IN THE HIGH COURT OF AUSTRALIA

ORIGINAL

JACKAMAN

v.

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on FRIDAY, 15TH. AUGUST, 1952.

H. E. Daw, Gov. Print., Melb.
C.12280/45

JACKAMAN

v.

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LTD. AND OTHERS

O R D E R

Appeal dismissed. Appellant to pay the costs of the respondents.

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JACKAMAN

v.

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED

JUDGMENT

DIXON C.J.
WILLIAMS J.
WEBB J.

JACKAMAN

V.

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED

JUDGMENT

DIXON C.J.
WILLIAMS J.
WEBB J.

This is an appeal from so much of a decretal order made by Hardie A.J. sitting as the Supreme Court of New South Wales in Eq. as declares that upon the true construction of the will and codicil of Arthur Henry Davies deceased and in the events which have happened the plaintiff (the trustee of the will and codicil) holds the property known as Craig-y-Mor mentioned and referred to in the will upon the trusts set out in clause 6 of the will and clause 3 of the codicil. The effect of this declaration is that the appellant, who is the daughter of the testator, has only an equitable life estate in this property, whereas she contends she has an absolute interest.

The testator made his last will and testament on 20th July 1934. He made a codicil thereto on 26th May 1937. He died on 28th January 1946. His widow died on the 26th February 1951. The full maiden name of the plaintiff was Muriel Norah Davies, but she was generally known as Cherry. She married Alfred Charles Morris Jackaman in 1938. There are issue of the marriage two children, both of whom are under the age of twenty-one years.

The will of the testator first appoints trustees and makes a specific bequest of a number of chattels. It is a specific bequest to his wife and in case of her death in his lifetime "to my said daughter Cherry". Clause 4 of the will devises all his real estate and bequeaths the residue of his personal estate upon trust (subject as thereinafter provided in the case of Craig-y-Mor and certain shares and other property which might belong to him at the date of his death) to sell, call in and

convert into money all such parts of his real and personal estate as should not consist of investments of the nature thereinafter authorised. Clause 5 provides that, subject to payment of debts etc., his trustees should invest the proceeds of sale as therein mentioned and stand possessed of such investments and of the rest of the estate both real and personal (thereinafter called his residuary trust fund) on the trusts that follow. These trusts are contained in three paragraphs (a), (b) and (c). Paragraph (a) is in the following terms: "As to my property at Point Piper known as 'Craig-y-Mor' (if it is still in my possession at the time of my death) to allow my wife to use and occupy the same during her life or so long as she may desire to do so and after her death or if she shall give my trustees notice that she does not desire to occupy the property then upon trust for my daughter Cherry Davies and I direct my trustees to keep the said residence in good and substantial repair and to pay all rates taxes insurance premiums and other outgoings payable in respect of the same during my wife's lifetime so long as she occupies such residence BUT I DECLARE that if my wife and my daughter or the survivor of them request my trustees so to do my trustees shall sell and dispose of the said property and stand possessed of the proceeds of sale upon trust to invest the same and pay the income arising therefrom to my wife during her life and after her death to stand possessed of the capital representing the said property upon the same trusts for the benefit of my said daughter and her children as are hereinafter declared with respect to her share of my residuary trust fund." Paragraph (b) directs that a fund shall be set aside to produce an income to provide for the maintenance and upkeep of Craig-y-Mor during its occupation by the widow and that this fund, when no longer required for this purpose, shall fall into and form part of the residuary trust fund. Paragraph (c) directs that, subject to paragraphs (a) and (b), the residuary trust fund shall be divided into

100 parts and that, inter alia, (i) 70 parts shall be held upon trust to pay the income to the testator's wife for life and after her death upon trust for the appellant and her children upon the same trusts and conditions as are thereinafter declared concerning the appellant's share of the residuary trust fund; (ii) as to 10 of such parts upon trust for the appellant and her children upon the same trusts and conditions as are thereinbefore declared with reference to the 70 parts. Then follow trusts of 17 parts, the contents of which are not material on the present issue. The trusts of 10 of these parts were revoked by the codicil and other trusts substituted. The remaining three parts are directed to be held upon trust for John Thurston Wright as to £500 and subject thereto upon trust for the testator's wife and in case of her death in the testator's lifetime then upon trust for his daughter Cherry.

Clause 6 of the will declares that the shares and interests of Cherry in the residuary trust fund shall be retained by the trustees and invested by them and held upon the trusts that follow. These trusts provide for the payment of the income to the appellant during her life and during coverture for her separate use without power of anticipation and from and after her decease upon the trusts therein mentioned, firstly in favour of her issue and secondly if she should have no issue upon the trusts declared by clause 3 of the codicil.

Hardie A.J. was of the opinion that the appellant acquired a life estate and not an absolute interest in Craig-y-Mor mainly because clause 6 of the will applied not only to the fractional shares or interests which she took in the residuary trust fund but also to the share or interest she took in that property. He thought that this construction of clause 6 received strong support from the other provisions of the will, particularly the final declaration in clause 5(a). He said it would be a most anomalous position if the interest of the appellant in Craig-y-Mor was liable to be changed from an absolute interest to a life

interest merely by reason of the fact that the trustees were requested by one or both the beneficiaries interested to sell and dispose of the property.

It was submitted for the appellant that the effect of the words "upon trust for my daughter Cherry Davies" is to devise Craig-y-Mor to the appellant absolutely in clear and unambiguous terms and that there is nothing in the rest of the will sufficiently explicit to cut down this clear absolute devise to an estate for life. It was submitted that the words "shares and interests in my residuary trust fund" in clause 6 of the will are not apt to include a devise of real estate and are only appropriate to refer to the fractional shares and interests taken by the appellant under the provisions of clause 5(c). We are unable to accept these submissions. Without a definition a devise of real estate might not be aptly included in such a description. But clause 5 expressly provides that the residuary trust fund is to include not only the investments of the proceeds of sale of those parts of residue which are converted but also the rest of the estate both real and personal, and the trusts of Craig-y-Mor which immediately follow are therefore defined by the will as trusts of part of the residuary trust fund. The words in clause 6 "shares and interests of my said daughter Cherry in my residuary trust fund", where the fund is expressly defined to include land, particularly the word "interests", are quite appropriate to include a specific devise. The clause also provides that the shares and interests shall be retained by the trustees and invested by them. A specific devise is not an asset which, strictly speaking, the trustees could retain and invest. They could retain it in the sense that they could retain the legal estate and only let the devisee as an equitable tenant for life into possession subject to her undertaking to keep the property in repair and pay the rates and taxes and perform any other

implied obligations but they could not invest it. But the will must be read as a whole, and in the case of Craig-y-Mor the direction to invest could only become operative when the property was sold either by request during the joint lives of the testator's widow and the appellant or during the life of the survivor or pursuant to the trust to convert after their decease.

We agree with His Honour that this construction receives strong support from the declaration contained in clause 5(a). The argument for the appellant requires that the words "or the survivor of them" in this declaration, as Mr. Mitchell admitted, should be treated as surplusage because the appellant, if she acquired an absolute interest in possession in Craig-y-Mor on her mother's death, could sell the property herself or not as she liked and the trustees would not be concerned with its disposition. We can find no justification whatever for treating the words "or the survivor of them" as surplusage. The declaration contemplates three forms of request , (1) a joint request during the joint lives of the widow and the appellant; (2) a request by the widow as the survivor; and (3) a request by the appellant as the survivor. The declaration contains the trusts of the proceeds of sale. If the property is sold pursuant to the first request the appellant takes a life interest in these proceeds in remainder and not an absolute interest. This strongly indicates an intention that the appellant should take a corresponding life estate in remainder in the unsold property. If the property is sold pursuant to the second request the appellant takes nothing. This also strongly indicates that the appellant is intended only to take a life estate in remainder in the unsold property which, in the circumstances, has never vested in possession. If the property is sold pursuant to the third request the daughter takes a life estate in possession. This also strongly indicates that the appellant is intended to take a life estate in remainder in the unsold property which, in these circumstances, has vested in possession.

Clause 5(a) contemplates successive life estates in realty which can only be converted into life estates in personalty during the joint lives of the widow and the appellant and the life of the survivor at the will of the life tenants. It contemplates trusts of property which will endure beyond their respective lives. It contemplates the legal estate remaining in the trustees throughout and the trustees having power to sell the property. It contemplates trusts of the capital in remainder which will fall into possession after the life tenants have died. It would be capricious and anomalous in the extreme to impute to the testator an intention that these trusts should be contingent upon the sale of the property during their lives. There are provisions in the will which throw some doubt on this construction. A good deal can be said for the submission that, when the testator intends to confine the shares and interests given to the appellant to life interests, he takes care to provide, as he does provide in clauses 5(a) and 5(c)(i) and (ii), that these benefits are to be benefits for her and her children and are to be held upon the trusts declared concerning her share in the residuary trust fund. The bequest of the chattels which the appellant would have taken if her mother had predeceased the testator is clearly an absolute bequest and the gift here is "to my said daughter Cherry". The gift in clause 5(a) is "upon trust for my daughter Cherry Davies". The contingent gift in clause 5(c)(vi) is "upon trust for my daughter Cherry". These three gifts are in different terms from the gifts contained in the declaration in clause 5(a) and those contained in clause 5(c)(i) and (ii). But Counsel did not, and could not, we think, contend that the gift contained in clause 5(c)(vi) was not a share and interest of the appellant in the residuary trust fund and therefore subject to the trusts of clause 6. The specific bequest, if it had vested, would have been absolute, but that is because the chattels in question are not part of the residuary trust fund. The gift contained in clause 5(c)(vi) is part of the residuary trust fund,

so that, if it had vested in the appellant it would have been impossible to contend that it was not a share and interest in the residuary trust fund. Yet this gift is in the same terms as the devise of Craig-y-Mor. There seems to be no reason, especially having regard to the trusts of the proceeds of sale of Craig-y-Mor, to hold that the testator intended to settle the appellant's share and interest under clause 5(c)(vi) but did not intend to settle her interest in Craig-y-Mor. When the will is read as a whole, the intention does sufficiently appear, we think, that Craig-y-Mor is to remain throughout part of residue and that the appellant's interest in the property is an interest which is subject to the limitations contained in clause 6.

Accordingly, we must dismiss the appeal and order the appellant to pay the costs of the respondents.