Privy Council Appeal No. 116 *of* 1919.

Eleanor Tarbutt and others - - - - - *Appellants*

v.

Alfred Nicholson and another - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH FEBRUARY, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
LORD ATKINSON.

[*Delivered by* VISCOUNT HALDANE.]

This appeal came before their Lordships from the Court of Appeal of New Zealand, whose judgment determined certain questions arising on the construction of the will of Miss Patty Maria Nuttall. These questions had been removed into the Court of Appeal for decision before trial of an action in the Supreme Court of the Dominion.

By her will the testatrix appointed the respondents to be trustees and executors. By a Clause numbered 3 she bequeathed her jewellery, furniture, and personal effects between Edith Seddon, Maud Nicholson, and Aimée Nicholson, daughters of a cousin. By Clause 4, she devised absolutely to her friend, George Tarbutt, warehouseman, certain pieces of land at Panmure in New Zealand. By Clause 5 she devised and bequeathed all her residuary estate, real and personal, to the respondents for sale and conversion. By Clause 6 she directed the respondents to pay thereout (*a*), £500 to the General Trust Board of the Diocese of Auckland, on trust to be applied for such uses as the vestry of a certain church should determine. Under subhead (*b*) of the same Clause 6, she directed £100 to be paid to the

churchwardens of the same church for keeping in order a grave. By subhead (*c*), she directed another and personal legacy to be paid, but this direction she afterwards struck out. By subhead (*d*) she directed payment of a legacy to George Tarbutt, already mentioned, of £100. By subhead (*e*) she directed payment of a legacy to Margaret Bell, her servant, of £600. By subhead (*f*) she directed payment to each of her executors, who should prove the will, of £100. Clause 6 then went on to declare that the residue was to be paid to her sister, Rachel Jane Bradshaw, and her cousin, Elizabeth Anne Nicholson, in equal shares, and, by the same Clause 6, the testatrix further declared that :—

> "Should any of the beneficiaries named in this clause of my will predecease me leaving issue living at my death, such issue shall take (and if more than one, equally between them) the benefits which his, her or their parent would have taken under this my will had such parent survived me."

The testatrix made two codicils increasing one of the personal legacies and adding others, and in all other respects confirmed her will. She died on the 17th January, 1916. George Tarbutt died ten days before her, leaving children. With the exception of a clause to be hereafter referred to, these are the material portions of the will.

The question is whether George Tarbutt's children, who include the appellants, take under the words in Clause 6 of the will, instituting to their shares the issue of the beneficiaries "named in this clause" of the will, conditionally on such beneficiaries predeceasing the testatrix, but leaving issue living at her death.

It is suggested that the reference in the concluding words of Clause 6 to "beneficiaries named in this clause," relates only to those named in the concluding portion of the clause, Rachel Jane Bradshaw and Elizabeth Anne Nicholson. In the Court o Appeal the learned Chief Justice took this view, but it was not adopted by the other learned Judges who formed the majority there, and their Lordships cannot accept it. They are of opinion that the testatrix must be taken to have used the word "clause" with the meaning which she had attached to it in the will. This meaning is shown by a final clause to which they have not hitherto referred, providing that the receipt of the Vicar of a church named, is to be an effectual discharge to her trustees for money directed to be paid to the churchwardens, and that the latter may expend the income of the sum of £100 "mentioned in sub-Clause (*b*) of Clause 6 of this my will" in the manner therein provided.

Their Lordships think that the reference made by the use of the word "clause," must therefore be to the entirety of Clause 6, and not merely to its concluding provisions. They agree with the opinion on this point of the majority of the learned Judges in the Court of Appeal, and they find nothing in the context which embarrasses them in arriving at this, the natural interpretation.

The question that remains is whether the language which concludes Clause 6 extends so as to institute the issue of George Tarbutt, in so far as he is to take under Clause 4, to his share under that clause. All the Judges in the Court of Appeal of New Zealand were of opinion that it could not be so read. Their Lordships regret that they do not find themselves in agreement with this opinion. It is based on the view that the persons referred to, as the first institutes, must be beneficiaries named somewhere in Clause 6, but beneficiaries in the sense that they must be more than mere devisees or, presumably, legatees, and must take, in order to satisfy the expression employed, through the medium of a trust, so that the devise to George Tarbutt under Clause 4 is to be excluded.

Their Lordships are unable to satisfy themselves that there is any valid reason for giving to the expression " beneficiaries named in this clause," as it occurs in the conclusion of Clause 6, such a restricted meaning. Words in a will ought to be read, unless the context or the document read as a whole renders it unnatural to do so, in their literal sense. Now George Tarbutt was a beneficiary named in Clause 6. All that was required by the words used, in order to introduce the conditional institution of his issue, should he predecease the testatrix, to the benefit taken by him under the will, was that he should predecease her. If he did it was the benefit which he would have taken, had he survived her, under, not Clause 6, but the will as a whole, that was conferred on his issue. Read according to the natural meaning of the words, the language used covers Clause 4, which is part of the will, taken as a whole, not less than Clause 6. Their Lordships are unable to find any reason in the wording of the clause for adopting the narrower construction put on it by the Court of Appeal. It is plain that, read literally, the words " would have taken under the will," apply to Clause 4, just as much as to Clause 6, and they cannot accept the view that in order to satisfy the description of " beneficiary " the introduction of a trust is required.

They are therefore of opinion that the questions raised ought to be answered by saying that, on the true construction of the will, the devise to George Tarbutt did not lapse by his death during the lifetime of the testatrix, having regard to the fact that he left issue living at her death, and that the so-called substitutionary gifts of benefits to issue did not apply only to benefits conferred by Clause 6 on the beneficiaries named therein, but applied to the devise to George Tarbutt under Clause 4 also.

They will humbly advise His Majesty that the judgment of the Court of Appeal of New Zealand should be reversed, and that a declaration should be made of the nature they have indicated. The appellants should have their costs of this appeal, but for the rest the decision of the Court of Appeal as to costs in the Courts below should remain as it stands. The respondents as executors and trustees are entitled to have their costs, charges and expenses out of the estate.

In the Privy Council.

ELEANOR TARBUTT AND OTHERS

v.

ALFRED NICHOLSON AND ANOTHER.

DELIVERED BY VISCOUNT HALDANE.

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