Privy Council Appeal No. 72 *of* 1934.

William Barton and others - - - - - - *Appellants*

v.

Edward Rhodes Moorhouse and others - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1935.

Present at the Hearing :

LORD TOMLIN.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

LORD ALNESS.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD TOMLIN.]

This is an appeal against part of a judgment and order dated the 18th October, 1933, of the Court of Appeal of New Zealand.

The questions raised by the appeal are questions of construction upon a private estate Act passed in the year 1901 in connection with the estate settled by the will of the late William Barnard Rhodes, who died in the year 1878.

By the will, certain properties known as Heaton Park and Highland Park, in the Provincial District of Wellington, in New Zealand, were devised to trustees upon trusts under which, subject to certain rights of occupancy given to his wife during widowhood, in Highland Park, and in the events which happened, his natural daughter, Mary Ann, who married Edward Moorhouse, became tenant for life with remainders over in tail male in favour of her sons, under which William Barnard Rhodes Rhodes-Moorhouse, son of Mary Ann Moorhouse, was first tenant in tail male, and the infant appellant, the son of William Barnard Rhodes Rhodes-Moorhouse, became and is second tenant in tail male.

The will contained divers trusts over in favour of the sons of the testator's daughter in tail general, and the daughters of his daughter in tail male and in tail general, with an ultimate trust providing for the settled lands becoming part of his general residue.

The trusts of residue were for the testator's daughter for life, and after her death for all her children who, being sons, should attain the age of 21 years, or being daughters should attain that age or marry as tenants in common.

William Barnard Rhodes Rhodes-Moorhouse, the first tenant in tail male, attained the age of 21 years, and was killed in action in France on the 27th April, 1915, in the lifetime of his mother, Mary Ann Moorhouse. Mary Ann Moorhouse died on the 2nd April, 1930, and upon her death the infant became tenant in tail male in possession of the settled lands, or such of them as then remained unsold under the statutory power of sale hereinafter mentioned.

Under the will, the testator's wife, in addition to her rights of occupation in respect of Highland Park, was given during her occupancy, and while she continued the testator's widow, and in case of her absence from the mansion house for a period not exceeding two years, an annual sum of £2,000.

Now the will contained no power of sale, and in the year 1901 the trustees of the will, who with the infant tenant in tail are the present appellants, promoted a Bill in the New Zealand Parliament by which certain powers of sale and leasing over the settled lands were sought to be conferred on the trustees. That Bill passed into an Act called the Rhodes Trust Act, 1901, and it is with the construction of that Act that this appeal is concerned.

The Act by its preamble recited the death and seisin of the testator of lands in the Provincial District of Wellington, and that since his death other lands in the same district had been acquired by the trustees of the will under the powers of investment contained in the will, and that the widow of the testator was still living, and that Mary Ann Moorhouse was entitled to a life interest in the residuary real and personal estate, and that she had married and had issue; and the preamble also contained a statement of the clauses of the will by which rights of occupancy and the annuity were granted to the wife of the testator, and recitals that the Highland Park Estate was situated near the City of Wellington, and was specially suitable for residential building purposes and that the granting to the trustees of adequate powers of leasing and sale over the said lands would be of great benefit to all the beneficiaries of the will and would enable land which could not then be used for close settlement, though well adapted therefor, to be so used.

By section 3 of the Act, it was enacted that the trustees might, with the consent of the testator's widow and daughter

during their respective lives, and after the deaths of them both, at the discretion of the trustees, exercise over all or any part or parts of the lands in the Provincial District of Wellington vested in the trustees, such powers of sale and leasing under the Leasing and Sales of Settled Estates Act, 1865, as they could have been authorised by the Supreme Court to exercise under the said Act and its amendments if the consents of all beneficiaries had been obtained and no prohibition against sale or leasing had been contained or implied in the said will; and also such powers under section 14 of the said Act as they could have been authorised by the Supreme Court to exercise if the consents of all beneficiaries had been obtained and no prohibition against the exercise of such powers had been contained or implied in the said will.

Section 4 contained a provision saving the rights of the widow of the testator.

By section 5 (which is the critical section in this case), there was a provision to the following effect :—

> "All moneys to be received on any sale or sales shall be paid to the trustees to be invested by them in accordance with the trusts of the said will, and all dividends, interest, and income produced by such investments, and all rents derived from any lease or leases of all or any of the said lands shall be paid to the person or persons (if any) who, but for such sale or lease, would have been for the time being beneficially entitled to the occupation of the land in respect of which such moneys shall have been received; and if there shall be no person so entitled, such dividends, income, interests and rents shall be part of the general income of the said estate and dealt with accordingly."

In exercise of the powers conferred by the Act, large parts of the settled estates have been sold. The greater part of the sales took place before the 27th April, 1915, the date of the death of Captain William Barnard Rhodes Rhodes-Moorhouse.

The questions submitted to the Court were contained in an originating summons issued on the 16th August, 1932. The first question asked by the summons was whether the estate tail in the unsold lands forming part of the Highland Park Estate was vested in the infant appellant, and the Court in New Zealand has answered that question in the affirmative, and against that decision there is no appeal.

The originating summons however raised three other questions: First, Does the Rhodes Trust Act, 1901, create in respect of the purchase moneys and investments representing the same an estate tail vested in the person in whom the estate tail in the unsold lands is for the time being vested? Second, whether the devolution of any of the property comprised in the estate tail had been altered by its having been converted into money and investments under the power of sale conferred by the Rhodes Trust Act of 1901, and if so how it had been altered? and Thirdly, Does the right of the person for the time being entitled as tenant in tail in possession of the said land to bar the rights of his issue

and of the persons entitled in remainder on failure of the estate tail in the lands by a disentailing assurance duly executed and filed in the Office of the Supreme Court at Wellington pursuant to section 114 of "The Property Law Act, 1908," enable him by including in the same or any other deed the purchase moneys arising from the sale of part of the lands and the investments representing the same to bar the rights of those persons therein ?

By a majority the Court gave the following answers to these three questions. To the first question the answer was :—

> "No. The Rhodes Trust Act, 1901, makes no provision for the disposition of the purchase moneys and the investments representing the same among persons occupying the position of tenants in tail under the will if the land had not been converted, except that the proceeds of the sales are to be invested by the trustees pursuant to the powers of investment conferred by the will and that the purchase moneys and the investments representing the same are to be held upon the trusts of the will subject to the operation of 'The Rhodes Trust Act, 1901'."

The answer to the second question was as follows :—

> "The right to the income of the proceeds of the converted land will vest in the person, for the time being, beneficially entitled to the occupation of the land, as if unsold, but the person so entitled to the income is not entitled to acquire the corpus by executing a disentailing assurance."

The answer to the third question was "No."

Now the effect of these answers seems to be that the income of the investments representing the sales of lands under the powers of the Act is to be applied as though there were created a series of life interests in such income continuing until the several lines of issue entitled under the entail have come to an end, and that then the fund will go to the persons who are entitled to the general residue, being the persons in whom is the ultimate remainder in the settled lands. It is an essential part of the conclusion at which the Court in New Zealand has arrived that there is no power in the person who for the time being is tenant in tail of the settled lands by means of a disentailing assurance to break the trust in the fund consisting of the investments representing the proceeds of sale of the lands which have been sold. It follows therefore that this is a trust which may continue for hundreds of years, but the validity of which being created by statute cannot be impeached upon the ground of perpetuity.

The views of the majority of the Court, which consisted of seven judges, five of whom took the view which prevailed, were expressed at length by Mr. Justice Smith and Mr. Justice Kennedy. They were of opinion that the effect of section 5 of the Act was to create a series of life interests in the persons who were beneficiaries under the entail created by the will, and that inasmuch as an estate tail in personalty is unknown to New Zealand law, and section 71 of the Fines and Recoveries Act, 1833, which was at all material times in force in New Zealand, did not admit of a disentailing deed of money not subject to be laid out in the purchase of lands, it was not possible for the person who for the

time being was the tenant in tail of the settled lands to determine the trust of the money fund.

The language of section 5 of the Act is somewhat inartificial, but in their Lordships' opinion the meaning of the section is reasonably clear. In the first place it is to be observed that this is a private Act of Parliament passed with a strictly limited purpose, as indicated in the preamble, and accordingly it would be contrary to accepted canons of construction to give to the Act, unless compelled by unambiguous language, an effect which would alter unnecessarily the rights of the parties if the langauge employed is capable of any other construction. The meaning which has been put upon section 5 by the Court of Appeal of New Zealand certainly alters the rights of the parties to an extent which is beyond anything required for conferring on the trustees powers of sale and leasing, and does not seem to their Lordships to be clearly demanded by the language used.

In the next place it is to be noted that the rents of lands leased and the income from proceeds of sale of lands sold are dealt with in section 5, together and in the same way, and if the language relating to the rents be read apart from the language relating to the income of the proceeds of sale it would read thus :—" And all rents derived from any lease or leases of all or any of the said lands shall be paid to the person or persons if any, who but for such lease would have been for the time being beneficially entitled to the occupation of the land in respect of which such money shall have been received."

Read apart from the reference to the income of the investments, those words can, in their Lordships' opinion, only have the effect of carrying the rents to the persons entitled under the trusts of the will to the lands leased in the capacity in which they are so entitled, that is as tenant for life or tenant in tail as the case may be.

There is therefore in their Lordships' opinion a *prima facie* presumption of an intention that the income from the proceeds of sale, which is dealt with in one clause with the rents, should go as nearly as the law will permit in the same way ; in other words, that the income should be paid to the persons entitled under the will, either as tenant for life or tenant in tail for the time being, in the capacity of tenant for life or tenant in tail as the case may be. There appears to be nothing to rebut the *prima facie* presumption, and in their Lordships' view the words " who but for such sale would have been for the time being beneficially entitled " are apt to give effect to an intention in the sense indicated. Those words must necessarily imply a reference to the will, and the implied reference to the will fixes the nature of the interest of the recipient.

If this be the true effect of the language, the result must be that the corpus becomes vested in a tenant in tail, following the ordinary rule that where personalty is given upon trust to follow

as nearly as the rules of law will admit, the trusts of realty which is entailed, *prima facie* the first tenant in tail takes the fund absolutely.

There is, however, a further question to be considered. Although under the general rule it is the first tenant in tail, whether he comes into possession or not, in whom the personalty vests absolutely, that vesting may be postponed by the employment of suitable directions made with sufficient certainty to justify the conclusion that the vesting is intended to take effect at a later point. In the present case, the words " entitled to occupation of the land in respect of which such money shall have been received " are relied upon by the appellants as indicating that the vesting is intended to be postponed, and that no absolute vesting is to take place, except in the first tenant in tail, who is entitled to actual possession or receipt of the rents and profits of the settled land.

Their Lordships are of opinion that this is the true view of the clause. If the words " the occupation of " were omitted, the result would be the same as that contended for on behalf of the respondent, Linda Beatrice Rhodes-Moorhouse, the legal personal representative of Captain William Barnard Rhodes Rhodes-Moorhouse, namely, that the vesting takes place in the first tenant in tail at the time of sale, whether he is in actual possession or not. This is to give no meaning at all to the words " the occupation of." These words are, in their Lordships' judgment, intended to postpone the absolute vesting until there is a tenant in tail in actual possession, and bring the case within the category of those cases of which *Re Angerstein* [1895], 2 Ch. 883, is an example.

The result is that the fund representing the proceeds of sale of the lands that have been sold under the power, whether during the life of Captain William Barnard Rhodes Rhodes-Moorhouse or after his death, now belongs absolutely to the infant appellant. It will be observed that on the view which their Lordships take, no question arises as to the existence of an estate tail in personalty, or as to the power to bar such an entail if it existed. The title of the infant appellant is a present absolute interest, which requires nothing further to be done to make it complete.

Their Lordships think that the appeal should be allowed, that the order of the Court of Appeal of New Zealand should be set aside, and that it should be declared in answer to the questions forming the subject of the appeal that upon the true construction of the Act, and in the events which have happened, the investments representing the proceeds of sale of the settled lands are now vested absolutely in the infant appellant, and their Lordships will humbly advise His Majesty accordingly. The costs of all parties to this appeal as between solicitor and client are to be provided for out of the investments representing the proceeds of sale.

In the Privy Council.

WILLIAM BARTON AND OTHERS

v.

EDWARD RHODES MOORHOUSE
AND OTHERS.

DELIVERED BY LORD TOMLIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1935.