*507 In Re Bowes

Positive/Neutral Judicial Consideration

Court
Chancery Division

Judgment Date
25 January 1896

Report Citation
[1895 B. 5880.]
[1896] 1 Ch. 507

ICLR

Earl Strathmore v. Vane

Chancery Division

North J.

1896 Jan. 25

Will—Construction—Legacy to Plant Trees.

A bequest of money to be laid out in planting trees on an estate of which the testator was tenant for life:—

Held, primarily for the benefit of the owners for the time being, and to belong to persons entitled to the estate absolutely.

JOHN BOWES, the testator in this action, died in October, 1885, having by his will made the following bequest:—

> "I bequeath to my trustees the sum of 5000*l.* sterling upon trust to expend the same in planting trees for shelter on the Wemmergill estate being part of my settled estates. If I shall have designated in my lifetime the places where such trees should be planted then I desire my trustees and trustee to plant the same in the places which I shall have designated; but if I shall not have designated the places then I desire my trustees and trustee in the place and manner of planting such trees to have regard to the wishes of the person for the time being entitled to the possession of the said Wemmergill estate. I have long had the intention of planting trees on the Wemmergill estate for the improvement thereof and I consider that Scotch fir is the best tree to be used."

The action was commenced shortly after the death of the testator for the administration of the testator's real and personal

estate.

This was a petition to obtain the direction of the Court as to the application of a sum of 5069*l.* 17s. 11d. New Consols, and a small sum of cash standing in court to the credit of the action to a separate account entitled, "The legacy to the trustees of testator's will upon trust for planting on the said Wemmergill Estate." The sum in court represented the legacy of 5000l. and some income in respect of the same; nearly all the duty had been paid on the sum in court.

At the date of his will and at the date of his death the ***508** testator was tenant for life of the Wemmergill estate. On the death of the testator, Earl Strathmore, the plaintiff in the action, in default of issue of John Bowes, became tenant for life of the Wemmergill estate, with remainder to his eldest son, Lord Glamis, in tail, subject to certain incumbrances. The estate had been disentailed and resettled; it was still limited to Earl Strathmore for life with remainder to Lord Glamis in tail, subject to certain incumbrances on the inheritance, and also to a mortgage on the Earl's life interest in favour of the Royal Bank of Scotland.

There was evidence of foresters before the Court to the effect that only seventy-five acres of the estate could be planted to advantage, and that the expense of such beneficial planting would be about 800*l.*

Earl Strathmore was the sole petitioner; the respondents were Lord Glamis, the surviving trustee and executor of the testator's will, and the Royal Bank of Scotland.

The petition asked for application of the sum in court in payment of the small amount of duty not paid, in payment of the costs of the petition, in payment of the sum in court representing income to the petitioner, and the balance representing capital to Earl Strathmore and Lord Glamis.

Crackanthorpe, Q.C. , and *S. Dickinson* , for Earl Strathmore. Where there is a bequest to lay out money on the estate, and it can be gathered from the will that the governing object of the bequest is to benefit the persons entitled, the money bequeathed need not be laid out on the estate if there are persons absolutely entitled, but may be paid over to them. We submit that on the construction of this will the object of the testator was to benefit the persons successively entitled: *Palmer v. Flower*[1] ; *Re Skinner's Trusts*[2] ; *Lockhart v. Hardy*[3] ; *Earl of Lonsdale v. Berchtoldt* . [4] We ask that, on the execution of a disentailing assurance and the production of the consent of all incumbrancers which can be obtained, the legacy may be paid to the petitioner and Lord Glamis.

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G. A. Watson , for Lord Glamis.

Foster Cooke , for the mortgagees of the life interest.

W. B. Heath , for the surviving executor. There is no expression in the will of an intention to benefit the successive owners. The primary object of the testator was to beautify the estate. It was not intended necessarily to lay out the whole of the money in planting trees. A discretion was given to the trustees, and what is not applied for planting trees falls into residue: *Cowper v. Mantell*[5] ; *In re Ward's Trusts* . [6] The bequest is in the nature of a bequest for a public purpose, such as to plant trees in Hyde Park.

NORTH J.

The case is shortly this. Mr. Bowes, being tenant for life, but nothing more, speaks of this estate as part of his settled estates, which in a sense it was. His interest ceased at his death, and then the estate went to the Earl of Strathmore for life, with remainder to his issue in tail; and that course of limitation is still subsisting, though under a resettlement.

That being so, the will of Mr. Bowes contains this gift: "I bequeath to my trustees the sum of 5000*l.* sterling upon trust to expend the same in planting trees for shelter on the Wemmergill estate being part of my settled estates." Pausing there, I think there is as clear a trust as well can be. The will does not give them an option or choice about the matter; it directs that that sum is to be spent by them in planting trees upon the estate. I can entertain no doubt about the intention. It is common ground that the estate would hold far more trees than could possibly be put upon it for that sum, though, on the other hand, it is said it would be a very disadvantageous mode of spending that sum to apply it in planting trees even upon any part of the

estate; for some reasons applicable to one part, and some to another, it is not the interest of any one that trees should be planted to so great an extent upon that estate. Still, there is a direct trust to plant. Then the testator says: "If I shall have designated in my lifetime the places where such trees should be planted then I desire my trustees and ***510** trustee to plant the same in the places which I have designated; but if I shall not have designated the places then I desire my trustees and trustee"—not for all purposes, but—"in the place and manner of planting such trees to have regard to the wishes of the person for the time being entitled to the possession of the said Wemmergill estate"; so that he considered that, though the estate was not his after his death, yet he still would have some power of control over it in giving a direction as to the places where trees should be planted by his trustees after his death; but, if he had not done so, regard should be had to the wishes of the person for the time being entitled in possession. Of course, it was not the testator's own estate; nothing could be done at all without consulting the person who was in possession of the estate, and who would have the opportunity of saying that unless the trees were planted where he liked they should not be planted at all. The 5069l. New Consols is the amount representing the fund. The question is to whom is it to belong. Lord Strathmore being the present tenant for life, and his eldest son being tenant in tail and having attained twenty-one, they are together now capable, if Lord Glamis executes a disentailing deed, of dealing with the whole estate exactly as they like. I do not forget that there are prior charges upon it; but the consents of all persons with prior charges upon it have been obtained, or will be proved to be obtained, before the order is drawn up.

Then, the sole question is where this money is to go to. Of course, it is a perfectly good legacy. There is nothing illegal in the matter, and the direction to plant might easily be carried out; but it is not necessarily capable of being performed, because the owner of the estate might say he would not have any trees planted upon it at all. If that were the line he took, and he did not contend for anything more than that, the legacy would fail; but he says he does not refuse to have trees planted upon it; he is content that trees should be planted upon some part of it; but the legacy has not failed. If it were necessary to uphold it, the trees can be planted upon the whole of it until the fund is exhausted. Therefore, there is nothing illegal in the gift itself; but the owners of the estate now say: ***511** "It is a very disadvantageous way of spending this money; the money is to be spent for our benefit, and that of no one else; it was not intended for any purpose other than our benefit and that of the estate. That is no reason why it should be thrown away by doing what is not for our benefit, instead of being given to us, who want to have the enjoyment of it." I think their contention is right. I think the fund is devoted to improving the estate, and improving the estate for the benefit of the persons who are absolutely entitled to it. If it had been for the benefit of or improving the estate by way of making it part of a public park or something of that sort, the case might possibly have been different. I do not think that a gift to plant Hyde Park is really a case in point. Here it is to be planted, not as part of a public trust, but for the benefit of the. owners of the estate, the owner in possession being the person whose wishes are to be considered, not merely saying whether he will give leave for the planting or not, but in considering where the trees shall be planted. I consider it was for the benefit of the estate, and the persons who, for the time being, are entitled to the estate, that that direction was given.

Then, is there a mere power to the trustees to lay out a sum, or is there a trust to lay it out? I think there clearly is a valid trust to lay out money for the benefit of the persons entitled to the estate. If that be so, the case comes within the class where there is not a mere power to lay out the money—in which case the money may go or not according to whether the power is exercised or not. In the present case there is a trust to lay it out; and, in my opinion, the persons entitled to it are entitled to have the money, whether it actually is laid out or not. The case seems to me to come exactly within the cases of *Earl of Lonsdale v. Berchtoldt*[7] and *Re Skinner's Trusts* .[8] I think that the remarks of Lord Langdale in *Lockhart v. Hardy*[9] are also exactly in point; and the observations in the case of *In re Ward's Trusts*[10] also, which are strongly the same way.

I think, therefore, that upon proving that all the proper ***512** consents have been got, and that the disentailing deed has been executed by Lord Glamis, I can make the declaration that they are entitled.

Representation

Solicitors for Earl Strathmore and Lord Glamis: Young, Jones & Co.
Solicitors for mortgagees: Minet, Harvie, Smith & May .
Solicitors for executors: Western & Sons .

(D. P.)

Footnotes

1 *L. R. 13 Eq. 250* .

2 *1 J. & H. 102* .

3 *9 Beav. 379* .

4 *3 K. & J. 185* .

5 *22 Beav. 231* .

6 *L. R. 7 Ch. 727* .

7 *3 K. & J. 185* .

8 *1 J. & H. 102* .

9 *9 Beav. 379* .

10 *L. R. 7 Ch. 727* .