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Fehrsen Vs. Simpson

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Court : Kolkata

Decided On : Sep-11-1878

Reported in : (1879)ILR4Cal514

Judge : Broughton, J.

Appellant : Fehrsen

Respondent : Simpson

Judgement :

Broughton, J.

1. Mr. Piffard, for Mr. Abercrombie, contended that the deed of 1874 is, according to Scotch law, a will and a disposition of the fund in terms of the will of Dr. Simpson. But there is no evidence of a Scotch domicile of Mr. and Mrs. Fehrsen, and if there were, this deed is not a, disposition by bequest in terms of the will of Dr. Simpson, such bequest is there directed to be made 'to any one of the children they may select.'

2. It appears to me that the deed of 1874 could not operate upon the fund in consequence of the direction of the testator, Dr. Simpson, that it should not be transferred in the lifetime of his daughter.

3. I concur in the argument of Mr. Phillips, for the brother and sister of Mrs. Fehrsen, that she had nothing to settle under her father's will, and that the plaintiffs in this case consequently take nothing under the settlement. I also agree with his contention that the will cannot be said to be an execution of the power, for, even if it referred to the power or to the fund, it would have been an appointment embracing objects not designated by the power.

4. It is said by Lord St. Leonards in his work upon Powers, 8th edn., p. 505, 'that it is well settled that such a gift is wholly void, and the fund cannot be given to those to whom it might have been legally appointed.'

5. It appears to me that the power given by Dr. Simpson to his daughter Catherine was never exercised by her. The questions then remain, to whom does the fund go in default of appointment? What was the intention of Dr. Simpson? He gave the fund to any one of the children of his daughter to whom she might bequeath it, and in default of children of his daughter, it was to be divided between her brother and sister.

6. This is a disposition of the property very similar to that which was the subject of the case of Witts v. Coddington (3 Bro. C.C., 95) where the gift was to the wife for life, with power for her by will or otherwise to give and bequeath the same unto or amongst some or one of the child or children of his daughter in such manner and proportions as his wife should think proper; but in case no such children of his daughter should be alive at the time of his wife's decease, then over. The gift over was considered as indicating an intention to benefit his children, and in default of appointment they were held entitled equally. It has been always considered that the Court should favour a construction which will give the share of a child on his death to his children, and a slight indication of such an intention should be sufficient for the purpose of giving the fund to the issue of the deceased child who in his lifetime enjoyed it.

7. I think, therefore, that, on the proper construction of the will of Dr. Simpson, the settlement of Mr. and Mrs. Fehrsen and their will, the corpus of the fund, of which the interest was paid to Mrs. Fehrsen during her lifetime, devolved at her death upon her only child.

8. The costs of the parties must be paid out of the estate.

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