Re Ellenborough; Towry Law v Burne

CHANCERY DIVISION

[1900-3] All ER Rep Ext 1171, Also reported: [1903] 1 Ch 697; 72 LJ Ch 218; 87 LT 714; 51 WR 315; 47 Sol Jo 255

HEARING-DATES: 22, 28 JANUARY 1903

28 JANUARY 1903

CATCHWORDS:

Voluntary settlement - Assignment of spes successionis - Operation as covenant - Act to amend Law of Real Property (8 & 9 Vict c 106), s 6.

HEADNOTE:

A mere spes successionis is not capable of valid assignment, and any purported assignment thereof operates only by way of covenant, which will not be enforced in favour of a volunteer.

L, having an expectation of succeeding by will of under intestacy to property belonging absolutely to her brother and sister respectively, executed a voluntary settlement, purporting to assign to trustees all the real and personal estate to which in the event of their respective deaths she might become entitled by will or under intestacy.

On the death of her brother intestate and a bachelor, L, as heiress-at-law and sole next of kin, obtained letters of administration to his estate.

Held: that the trustees of the settlement could not compel her to hand over the property to them.

Meek v Kettlewell (1843) 1 Hare, 464; 1 Ph 342, followed.

Kekewich v Manning (1851) 1 DGM & G 176, distinguished.

Originating summons raising the question whether an assignment of a spes successionis contained in a voluntary settlement could be enforced against the settlor.

In 1890 Charles Edmund, Lord Ellenborough, died, leaving him surviving his wife and three children by former marriages--namely, Charles Towry Hamilton Law, who succeeded to the title, and two daughters, Gertrude and Emily Law. All three became absolutely entitled to a considerable amount of property, but Charles and Gertrude were of unsound mind and in weak health.

Emily Law came of age in 1893, and under the circumstances she was advised to make a voluntary settlement of her property and expectancies.

Accordingly, on 22 December 1893, she executed a deed by which she declared trusts of a large sum of stock which she had previously transferred into the names of the trustees, and by the same deed she granted and assigned to them all the real and personal estate to which in the event of the death of her brother and sister respectively she might become entitled under his of her will of as heiress-at-law of next of kin.

The trusts of the settlement were to pay a small annuity to her stepmother, and subject thereto for herself for life with usual remainders over.

Gertrude Law died in 1895 intestate and a spinster, whereupon one half of her personal estate devolved upon her sister, and was in pursuance of the settlement handed over to the trustees.

In 1902 Charles Towry, Lord Ellenborough, died intestate and a bachelor, and letters of administration to his estate were granted to his sister, Emily Law, who was his heiress-at-law and sole next of kin.

Emily Law was not desirous of bringing any further property into the settlement, and she now applied by originating summons, in the matter of Lord Ellenborough's estate and in the matter of the settlement for the

determination of the question whether her interest as heiress-at-law and sole next of kin was effectually assigned to the trustees, and whether she was bound to assign or transfer such interest.

The funds already in settlement were amply sufficient to answer the annuity, and the trustees only were defendants to the summons.

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Distinguished: Caraher v Lloyd (Official Assignee) (1905) 2 CLR 480; 11 ALR 400 Referred: Liverpool & London & Globe lnsurance Co Ltd v Hartley & Ford, [1927] VLR 523; 49 ALT 70; 33 ALR 417.

Distinguished: Clegg v Bromley, [1912] 3 KB 474. Considered: Re Mudge, [1914] 1 Ch 115. Distinguished: Re Bowden; Hulbert v Bowden, [1936] Ch 71. Referred: Re Brookes' Settlement Trusts; Lloyds Bank Ltd v Tillard, [1939] 3 All ER 920. Considered: Re Adlard's Settlement Trust; Re Campbell's Settlement Trust; Re Fulton's Settlement Trust; Taylor v Adlard, [1953] 2 All ER 1437. Considered: Re Burton's Settlements; Scott v National Provincial Bank Ltd, [1954] 3 All ER 193. Referred: Re Ralli's Will Trusts; Calvocoressi v Rodocanachi, [1963] 3 All ER 940.

See Halsbury's Laws of England, 3rd ed, vol 18, p 376 (assignment of something not in existence).

CASES-REF-TO:

Cases referred to:

Kekewich v Manning (1851) 1 De GM & G 176.

Meek v Kettlewell (1843) 1 Hare, 464; 1 Ph 342; [1843-60] All ER. Rep 1109.

Parsons, Re; Stockley v Parsons (1890) 62 LT 929; 45 ChD 51.

Tailby v Official Receiver (1888) 60 LT 162; 13 App Cas 523; [1886-90] All ER Rep 486.

Tilt, Re (1896) 74 LT 163.

COUNSEL:

Astbury, KC, and A Cordery for the applicant.; Buckmaster, KC, and W G Wrangham for the trustees.

Solicitors for all parties, Burgess, Taylor, and Tryon.

A L MORRIS, BARRISTER-AT-LAW

JUDGMENT-READ:

28 January

PANEL: BUCKLEY, J

JUDGMENTBY-1: BUCKLEY J:

JUDGMENT-1:

BUCKLEY J:

On 22 December 1893 there were living Charles, Lord Ellenborough, and Gertrude Edith Towry Law, brother and sister of the applicant upon this summons. They were entitled respectively to certain property absolutely. In their property the applicant had no property of interest of any kind. She had an expectation, arising from the fact that, owing to the relationship between them and herself and to their state of health, she might be (as was subsequently the case) the survivor, and might under their respective wills or intestacies become entitled to their property. She had neither a future interest, nor a possibility coupled with an interest capable of being disposed of under s 6 of 8 & 9 Vict c 106. She had only a spes successionis, and that is not a title to property by English law (Re Parsons; Stockley v Parsons (1890), 62 LT 929; 45 Ch D 51). In that state of facts the applicant, on 22 December 1893, executed a voluntary settlement by

deed, by which she granted to the trustees, who are the respondents on this summons, the real estate, and assigned the personal estate to which the applicant in the event of the death of her brother and sister respectively in her lifetime might become entitled under their respective wills of intestacies. That deed could not operate by way of grant, but could in a court of equity operate as an agreement on the part of the applicant

to grant and assign that which in fact could not by the deed be granted or assigned. The brother and sister are now dead intestate, and the applicant has become entitled by devolution. The property coming to the applicant from her sister has been handed over to the trustees, and the applicant does not say that she can get it back. The property of the brother has not so been handed over, and the applicant does not desire to hand it over, unless she is compelled to do so. The question to be determined upon this summons is whether she can be called upon by the trustees to assign and hand over to them that which has come to her by devolution from the late Lord Ellenborough, or whether she can refuse to do anything further to perfect that which was a mere voluntary deed. In order to raise the question in proper form a writ has been or will be issued by the trustees against the applicant, seeking to recover the funds, and the order will be drawn on this summons and in that action. The deed was purely voluntary. The question is, whether a volunteer can enforce a contract made by deed to dispose of an expectancy. It cannot be, and is not, disputed that if the deed had been for value the trustees could have enforced it. If value be given, it is immaterial what is the form of assurance by which the disposition is made, or whether the subject of the disposition is capable of being thereby disposed of or not. An assignment for value binds the conscience of the assignor. A court of equity as against him will compel him to do that which ex hypothesi he has not yet effectually done. Future property, possibilities, and expectancies, are all assignable in equity for value: (Tailby v Official Receiver (1888), 13 App Cas 523, at p 543). But when the assurance is not for value a court of equity will not assist a volunteer. In Meek v Kettlewell (1843, 1 Hare, 464, affirmed by Lord Lyndhurst, 1 Ph 342) the exact point arose which I have here to decide, and it was held that a voluntary assignment of an expectancy, even though under seal, would not be enforced by a court of equity. "The assignment of an expectancy", says Lord Lyndhurst, "such as this is, cannot be supported unless made for a valuable consideration." It is, however, suggested that that decision was overruled or affected by the decision of the Court of Appeal in Kekewich v Manning (1851, 1 De GM & G 176), and a passage in White and Tudor's Equity Cases, 7th ed, vol 2, p 851, was referred to upon the point. In my opinion, Kekewich v Manning has no bearing upon that which was decided in Meek v Kettlewell. The assignment in Kekewich v Manning was not of an expectancy, but of property. "On legal and equitable principles", said Knight Bruce, LJ, "it is clear that a person sui juris acting freely, fairly, and with sufficient knowledge ought to have, and has it in his power to make in a binding and effectual manner a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced." The important words there are "of his property". The point of Meek v Kettlewell and of the case before me is that the assignment was not of property, but of a mere expectancy. On 22 December 1893 that with which the grantor was dealing was not her property in any sense. She had nothing more than an expectancy. In Re Tilt (1896, 74 LT 163) there was again a voluntary assignment of an expectancy, and the point was not regarded as arguable. "It was rightly admitted", said Mr Justice Chitty, "that as, when this plaintiff executed the deed of 1880, she had no interest whatever in the fund in question, which was a mere expectancy, the deed was wholly inoperative both at law and in equity being entirely voluntary." By "wholly inoperative" there the learned judge, of course, did not mean that if the voluntary settlor had handed over the funds the trustees would not have

held them upon the trusts, but that the grantees under the deed could not enforce it as against the settlor in a court of equity or elsewhere. In my judgment, the interest of the plaintiff as sole heiress-at-law and next of kin of the late Lord Ellenborough was not effectually assigned to the trustees by the deed, and the trustees cannot call upon her to grant, assign, transfer, of pay over to them his residuary real and personal estate.