1924.
Jan. 23.

[CIVIL JURISDICTION.]

[ACTION NO. 197, 1923.]

ELIZABETH MARY FADDY *v.* JOHN ROBERTSON, ELLEN VIKOCI SCHEMMELL, CAROLINE SARA SCHEMMEL, JESSIE CLARA SCHEMMEL, AND FRANK HICKES.

Originating Summons under Rule 6 (*e*) and (*g*) of the Rules of the Supreme Court 1906 for direction as to transfer under the Real Property Ordinance 1876 to be executed by the executor and trustee of the Will of Emil Carl Hermann Schemmel, contrary to the terms of the testator's will, the beneficiaries being *sui juris*, having divested themselves as alleged, of all their interest in the land in question.

Held, Court will not direct a trustee to execute a transfer in any case where he cannot give a good title——the Court has power only to approve a sale, not to direct a sale—trustee no present power of sale.—(Summons dismissed.)

In the matter of the trusts of the Will of Emil Carl Hermann Schemmel deceased.

And in the matter of the Rules of the Supreme Court (April) 1906.

Sir A. K. YOUNG, C.J. This is an orginating summons issued under Rules of the Supreme Court, 1906—Rule 6 (*e*) and (*g*)—asking in the first place whether the plaintiff is entitled to have a transfer to her under the Real Property Ordinance 1876 executed by the defendant John Robertson, of the land described in the summons. The defendant John Robertson is the executor and trustee of the Will of Emil Carl Hermann Schemmel, the other executor and trustee appointed under the Will having renounced probate and administration.

The testator, *inter alia*, expressly directed by his Will that the land (the subject matter of the summons) should not be sold or realised until after the death of his wife Vikoci and the attainment of their majority by his children. Vikoci, the wife, is still alive, and of the remaining defendants, two are children of the testator and the fifth, namely, Frank Hickes, is the husband of another, a daughter, who died without issue and intestate, all the beneficiaries under the Will are *sui juris*.

On the assumption that the before mentioned beneficiaries have divested themselves of all their interests in the land, in favour of the plaintiff Elizabeth Mary Faddy, an affidavit by the plaintiff with exhibits having been filed in support of this assumption, the Court is asked to decide the question above mentioned. When the summons came on for hearing I

requested counsel in the case to satisfy me in the first place, having regard to the decisions in the cases of *Johnstone* v. *Baber & Beavan*, and *Want* v. *Stallibrass*, L.R. Exch. cases, Vol. VIII, as to whether the Court had jurisdiction to direct an executor and trustee under a Will to act contrary to the express directions of the testator. The summons being adjourned to enable counsel to consider the point raised.

Mr. Grahame of Counsel for the plaintiff submits that the Court is not being asked to direct the trustee to act contrary to the directions in the Will, but is being asked as to whether in view of the fact that all the beneficiaries, being *sui juris*, have divested themselves of all their interests in the land in favour of the plaintiff, she is now entitled to have a transfer executed by the defendant John Robertson, the executor and trustee under the Will. In support of this proposition Mr. Grahame cites the case of *Anson* v. *Potter*, 13 L.R., C.D., p.141. The subject matter of that case was a fund consisting of a sum of money subject to certain trusts, one of which was a life interest; and it was held that when a fund is vested by a settlement in trustees for A for life and over and the reversion has been subsequently settled, the person entitled to the life interest and the trustees of the subsequent settlement are entitled to call for a transfer, and can give the original trustees an effectual discharge, although the settlement does not provide for a transfer or payment by anticipation.

Mr. Grahame submits that the facts in the present case admit of the trust being put an end to, for the reason, I gather, on the authority of *Anson* v. *Potter* that the trustee is discharged from his trust by executing a transfer to the plaintiff.

Mr. Grahame further cites the case of *Wharton* v. *Mastermann* (1895) A.C., 186, a case which decided that a legatee may put an end to an accumulation which is exclusively for his benefit, on the principle that the Court has always recognised the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by Will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless during the interval the property is given for the benefit of another.

Mr. Crompton of counsel on the other hand, in addition to the cases of *Johnstone* v. *Baber* and *Want* v. *Stallibrass*, has cited numerous cases in support of the proposition that a trustee cannot give a good title so long as he has no immediate power of sale.

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ELIZABETH MARY FADDY v. JOHN ROBERTSON AND OTHERS.

Although Mr. Grahame says I do not ask the Court to direct the trustee to execute a transfer in favour of the plaintiff, all I ask is that the Court decide whether, on the facts represented, the plaintiff is entitled to have a transfer executed by the trustee, yet he at the same time comes to the Court under Rule 6 (*e*) which reads " (*e*) directing the executors or administrators or trustees to do or abstain from doing any particular act in that character."

Should the Court find that in the circumstances represented the plaintiff is entitled to have a transfer executed by the trustee, I can only regard such a finding as being tantamount to an order or direction of the Court to the trustee to execute a transfer in favour of the plaintiff; and this the Court has always refused to do. See *Suffolk* v. *Lawrence*, 32 W.R., 899. (*g*), the other sub-head of the rule under which a determination of the question is sought, refers to questions arising in the administration of the estate or trust. Here I need only say that I have considerable doubt as to whether this mode of procedure is applicable to the case. Can the question, on the facts represented, be said to arise in the administration of the estate or trust ? I doubt it. It is not a question arising out of the trust contemplated by the Will (see re Bowes, 38 Sol. Jo. 81). As to the question whether the trustee has any present power to execute a transfer, Mr. Grahame says yes—the trust has been put an end to by all the beneficiaries having transferred their interests, which exhausts all the interests in the estate, to the plaintiff. In *Anson* v. *Potter* a trust fund only was being dealt with, and the life tenant and the trustees of the settlement were held entitled to call for a transfer and to give the original trustees an effectual discharge. In *Wharton* v. *Mastermann* the decision was directed against accumulations and permitted the legatee, the sole and exclusive beneficiary, to enter upon the enjoyment of the property on attaining the age of twenty-one, notwithstanding the fact that under the Will the testator had directed a later date.

In this case we are not dealing with the question as to whether in certain circumstances the trustee of a fund may be given an effectual discharge, nor are we dealing with the question as to whether in certain circumstances a legatee may put an end to accumulations; but the question for determination is whether the trustee is acting within the scope of his authority in executing a transfer of the trust property in favour of the plaintiff or, to put it another way, has the trustee at the present time a power of sale and can he give a good and valid title. The trust is subject to the life estate of Vikoci,

and although Vikoci may have transferred her life interest to the plaintiff, the trustee does not therefore become vested with such life interest. He clearly has no present power to give a good title to the property.

In re *Robinson Pichard* v. *Wheater*, 31 C.D., p. 249, it was held that Rule 3 (*f*), Order 55, does not give the Court power to direct a sale in a case in which it had no power to do so previously—Pearson, Justice pointing out that R. 3, O. 55, gives the Court power only to approve a sale, not to order a sale. Should I agree with Mr. Grahame's submission and should I decide the question in the affirmative, I should in effect be approving of the trustee transferring land with a defective title; from whatever point of view the subject is approached that seems to me quite clear.

In the case of In re *Bryant & Barningham's* contract, 44 C.D., p. 220, it was submitted by counsel in argument that the vendors of the land, the subject of a trust, could have made a good title, if they could have procured the concurrence of all the beneficiaries. Kay, J., without calling for a reply, held that the contract for the sale of the land could not be enforced, the trustees having no present power of sale whatever. I am of opinion that the Court has no power either to direct a sale; or to approve or agree to the execution by the trustee of a transfer, in any case in which the trustee cannot give a good title, and on some of the authorities cited by Mr. Crompton, to which I have referred, it is clear that the trustee has no present power to give a good title.

Mr. Grahame has requested me to consider question 3 in the summons, and refers me to the case of *Hope* v. *Hope* (1892), 2 Ch., p. 336. That case is cited in the Annual Practice, 1923, at page 1020 under the heading "And the following questions have been held not capable of being so determined." *i.e.*, under Order 55, r. 3. (*g*), of which our Rule 6 (*g*) is a reproduction. In this case the question at issue was raised upon an originating summons, but by direction of the Court a writ was issued and the case ordered to be set down for trial without pleadings. I regret therefore I am unable to appreciate how the case is an authority for proceeding under an originating summons with the issue raised in question 3 of the summons; nor does it seem to me to be a question arising in the administration of the estate or trust, and therefore capable of being determined under R. 6 (*g*) of the Rules of the Supreme Court.

The summons must therefore be dismissed.