ALEXANDER C. McISAAC (PLAINTIFF) ..... } APPELLANT;

AND

JOHN E. BEATON AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1905

*Dec. 13.
*Dec. 22.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Trust—Conditional devise.

The property was devised by will as follows:—

"I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all my just and lawful debts be paid out of the same. And I do hereby appoint my brother, Donald McIsaac, and my brother-in-law, Donald McIsaac, tailor, my executors to carry out this my last will and testament."

Held, affirming the judgment appealed from (38 N.S. Rep. 60), that the widow took the real estate in fee with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children, to do so.

APPEAL from a decision of the Supreme Court of Nova Scotia(1) reversing the judgment at the trial in favour of the plaintiff.

The only question to be decided by this appeal was as to the construction of the will set out in the head note. The plaintiff was a son of the testator who claimed that the widow only took a life estate in the realty and defendant's title derived from her was

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 38 N.S. Rep. 60.

1905

MCISAAC v. BEATON.

defective. The Statute of Limitations was pleaded as to which plaintiff claimed that it began to run only from the date of his mother's death, at which time he was residing out of the province and only returned shortly before his action was commenced.

A. A. MacKay for the appellant. We contend that Margaret McIsaac took only an estate for life in the property, with a power of appointment among the children, and that all she conveyed to Donald Beaton was this estate for life. The words "to be by her disposed of amongst my beloved children as she may judge most beneficial to herself and them" create what is known as a power in the nature of a trust. It is a power of appointment among the children. Though testator is providing that his estate shall go to his children, there is no gift to them, except in or by means of the power; there is no gift to the children in express terms, and no estate vests in them until the power is exercised. In default of the exercise of the power the estate vests in all the children equally, on the death of the donee of the power. Smith's Principles of Equity, pp. 42, 43 and 44; Jarman on Wills, p. 372; *Crockett* v. *Crockett* (1); *Godfrey* v. *Godfrey* (2); *Bibby* v. *Thompson* (3); *Hart* v. *Tribe* (4); *Newill* v. *Newill* (5); *Booth* v. *Booth* (6); Theobald on Wills (4 ed.), pp. 475-6, 384-387. The words are apt and imperative; she has no discretion except that allowed her by the will. "To be paid" in an agreement creates a covenant to pay. *Bower* v. *Hodges* (7). "To be settled," creates an executory trust. *Ballance* v. *Lanphier* (8).

(1) 2 Phillips 553.
(2) 11 W.R. 554.
(3) 32 Beav. 646.
(4) 32 Beav. 279.
(5) 7 Ch. App. 253.
(6) [1894] 2 Ch. 282.
(7) 13 C.B. 765.
(8) 42 Ch. D. 62.

The objects of the disposition are limited and not within her control; "amongst my children." She has a discretion as to the time and manner of the disposition, and takes an interest herself, and it follows that as she may postpone that disposition until it is impossible to make it, that is at her death, she takes an estate for life. *Lambe* v. *Eames* (1), and cases of that class are clearly distinguishable as there the words were "to be at her disposal in any way she may think it best for the benefit of herself and family." Her discretion was unlimited in every direction, and she, therefore, took the fee simple. *Curnick* v. *Tucker* (2); *LeMarchant* v. *LeMarchant* (3).

This case is not that of an executor exercising an implied power of sale, nor is it the case of a devisee exercising an implied power of sale for the payment of debts. *Robinson* v. *Lowater* (4); Theobald on Wills (6 ed.), p. 433; Dart on Vendors and Purchasers (7 ed.), p. 635.

Under the direction to pay debts the personalty should have been exhausted before recourse could be had to the real estate. Williams on Executors (10 ed.) 1315 *et seq.* The direction, if a charge, only charges the real estate when the personal property is insufficient to pay the debts. At the time of this sale the statute in relation to such sales, R.S.N.S. (2 ser.), ch. 139, secs. 13-18, provided that undevised real estate should be sold first under license from the Court of Probate, unless it appeared that a different arrangement was intended by the testator, in which case the provisions of the will were to be complied with. There is no evidence that there were any debts rendering a sale necessary. The testator left personal property,

(1) 6 Ch. App. 597.
(2 2 L.R. 17 Eq. 320.
(3) L.R. 18 Eq. 414.
(4) 5 DeG. M. & G. 272.

1905

McISAAC v. BEATON.

and seems to have been a well-to-do farmer, in those days.

Section 19, ch. 167, R.S.N.S., 1900, does not bar the plaintiff's right to recover. The right of entry accrued in 1882, the plaintiff was then out of the province and only returned about 1902, and he had ten years from the time of his return in which to bring the action. Darby & Bosanquet, Statutes of Limitations (2 ed.) 322. We also rely upon *Evans* v. *Evans* (1); *Talbot* v. *O'Sullivan* (2); *Combe* v. *Hughes* (3); *Ramsden* v. *Hassard* (4); and Elphinstone on Deeds, p. 40, Rule IX. and notes.

Mellish K.C. and *Jamieson* for the respondents. The plaintiff's claim is barred by the Statute of Limitations, R.S.N.S. 1900, secs. 10, 18, 19 and 27. The respondent contends that the appellant's right of action first accrued either under section 10 (*b*), on the death of the testator when his children were entitled to have the property divided, or under section 27, when the widow sold the lands in 1860. In either case the plaintiff cannot recover under section 19.

The property is charged with the testator's debts and devised to the widow *so charged* "to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them." This devise conferred upon the widow a power of sale to pay the debts. Theobald on Wills (6 ed.), p. 432, and cases there cited; *Marshall* v. *Gingell* (5); *Brooke* v. *Brooke* (6). The widow presumably sold the lands in exercise of that power and there is some evidence that the proceeds were used to pay testator's debts. It is,

(1) 12 W.R. 508.
(2) 6 L.R. Ir. 302.
(3) L.R. 14 Eq. 415.
(4) 3 Bro. C.C. 236.
(5) 21 Ch. D. 790.
(6) [1894] 1 Ch. 43.

however, for the plaintiff to shew that the sale by the widow was wrongful to the knowledge of the purchaser. *Colyer* v. *Finch* (1).

The words of the will by which the lands are devised "to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them" taken alone either create the widow merely a trustee for the children; *Blakeney* v. *Blakeney* (2); Theobald on Wills (6 ed.), p. 476; in which case the plaintiff's right of action would have first accrued when the widow conveyed the land to Donald Beaton (section 27), or the words merely mean that the lands are to be disposed of by the widow as she may judge most beneficial for herself and children—in which case she would have a clear power of sale. There is no authority for the proposition that the widow took a life interest under the will.

The plaintiff is neither in possession nor in constructive possession of the lands sought to be partitioned herein and cannot maintain this action. An action by partition is not a substitute for an action in ejectment. *Bennetto* v. *Bennetto* (3).

THE CHIEF JUSTICE and GIROUARD J. were of opinion that the appeal should be dismissed with costs.

DAVIES J.—The question in this appeal is as to the construction of a will made by Archibald McIsaac who died in 1858, which will was in the following words:

I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am possessed, whether real or personal, or wheresoever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial to her and

(1) 5 H.L. Cas. 905. (2) 6 Sim. 52.
(3) 6 Ont. P.R. 145.

1905

McISAAC v. BEATON.

Davies J.

them, and also order that all my just and lawful debts shall be paid out of the same.

McIsaac was a poor farmer living in Cape Breton and at the time of his death owned a farm of 100 acres worth about $600 and a very small stock of cattle together with a few other chattels. He left a widow and nine children in very poor circumstances, and owed some debts, the amount of which was unproved.

The contention on the part of the appellant was that under this will the widow only took a life estate with a trust in favour of the children, and his counsel admitted that unless that construction prevailed the appeal must fail.

The trial judge held in favour of appellant's contention, and gave judgment in his favour. The Supreme Court of Nova Scotia, on appeal, reversed this judgment, Townshend and Meagher JJ. holding that the widow took an estate in fee simple under the will and in any case had power to sell the land in consequence of the charge upon it of the testator's debts, while Russell J. agreed in the result, but based his judgment upon the implied power to sell arising out of the charge of the debts.

The case is one by no means free from difficulty and I have entertained a good deal of doubt as to the true meaning of the will. As was said by Chief Justice May in *Talbot* v. *O'Sullivan*(1), at p. 308:

> The authorities upon the construction of wills of this class are extremely numerous and not probably capable of being reconciled, and the decisions properly depend in each case upon the particular language used in the will to be interpreted.

I have, after an examination of the authorities and much reflection upon the language of this will, reached the conclusion that the reasoning of Town-

(1) 6 L.R. Ir. 302.

shend J. concurred in by Meagher J. as to its true meaning, should prevail.

The two leading authorities, *Lambe* v. *Eames,* in appeal(1), and *Howorth* v. *Dewell*(2), relied on by the learned judge in support of his position are, I think, very applicable, and difficult, if not impossible, to distinguish. I only desire to add a few words as to the intention which ought to be drawn from the somewhat enigmatical language of the will in question. It must be admitted that where the will begins with an absolute gift in order to cut it down, the latter part of the will must shew as clear an intention to cut down the absolute gift as the first part does to make it. Now here, the words of the will in the first part are absolute and unqualified, and if the will had stopped at the words "wherever situated," it would not be open to any argument that the widow took an estate in fee simple of the lands and the personal property absolutely. Now what are the words which can satisfy us that this estate was cut down? They are attempted to be discovered in the words

> to be disposed of amongst my children as she may judge most beneficial to her and them.

But the courts would not and could not undertake to execute any trust arising out of words such as these. They were the expression of his personal and absolute confidence in his wife. How could the court declare any disposition amongst the children which they might think proper to be such a disposition as the testator had in mind when he said "as she might judge most beneficial to her and them." She alone and not the court was to make the determination.

(1) 6 Ch. App. 597. (2) 29 Beav. 18.

1905

McISAAC v. BEATON.

Davies J.

Whether circumstances might arise in which she could be called to account for a breach of trust we have not now to decide. But I cannot find in the words quoted any justifying a conclusion that the estate devised in the first part of the will was cut down in the latter part, much less that a specific and limited estate for life was created.

Perhaps a good way to test the question is to apply it to the personalty. The same language is used in the will with respect to the personal property as with respect to the real estate. If that language creates an estate for life in the widow in the land it also limits her rights in the personal property to its user for life and prevents any sale of it. The widow could not sell, but must divide the property in specie amongst the children. Would such an argument applied to the personal property be reasonable? Would it not be destructive of the very object the testator had in mind? Not a horse or a cart or farm implement could be sold. They might be used by the widow, but must at her death be divided amongst the children in specie. She could not sell and apply the proceeds for their maintenance and support if she deemed that method "most beneficial to her and them," as specified in the will.

The application of the rule contended for to the personalty seems to me to illustrate its weakness more forcibly than when applied to the realty. But I quite concur that it was the full intention of the testator, and that he has sufficiently expressed it, to give his widow the absolute right to sell all or any part of the property devised and to apply the proceeds

amongst the children as she thought most beneficial to herself and them.

In the view I take of this will, that the absolute estate granted to the widow in the first part of the devise is not cut down by the subsequent words, and that these words do not, under the authorities above referred to, constitute a trust which a court of equity either should or would administer, in this view I say it is not necessary for me to consider either the Statute of Limitations or the point on which Russell J. relied in his judgment. That point was, and it was also adopted and relied on by Townshend and Meagher JJ., that the direction or order of the testator for the payment of his debts out of the real and personal property devised constituted a charge upon the lands and gave the devisee a power of sale over them. If it was necessary for me to consider this point I should require further time, because the two leading cases in the House of Lords relied on as authority for the proposition are cases in which the devisee of the lands charged was also executor of the will. In the latest case in the House of Lords of *Corser* v. *Cartwright* (1). Lord Cairns said at page 737:

> My Lords, for the sake of caution I ought to observe that in *Coyler* v. *Finch* (2), as in the case before your Lordships, the devisee of the real estate charged with the payment of debts was also an executor; and I desire not to apply any observation which I am now addressing to your Lordships to the case of a stranger, that is to say a person who is not an executor, being devisee of estates charged with the payment of debts.

In the case at bar the widow was such stranger, being devisee of the lands, but not executor of the will.

The late case of *Re Bailey* (3) shews that the power of sale is not necessarily implied even when lands are devised to executors and his testator directs that his debts shall be paid by them, but that it is a

(1) L.R. 7 H.L. 731. (2) 5 H.L. Cas. 905.
(3) 12 Ch. D. 268.

1905

McISAAC v. BEATON.

Davies J.

question of intention to be collected from the whole will.

The appeal should be dismissed.

IDINGTON J.—It is, I admit, possible to distinguish the words, or literal meaning of the phrase, used in the devise in the will in question here from that in the case of *Lambe* v. *Eames*(1).

If one does not feel bound, as he might, in regard to what was known to be a carefully drawn document, to adhere to the literal meaning, of every word, but rather seeks to ascertain the intention of the testator by observing the general scope and purpose of the will, in light of the surrounding facts and circumstances, I think this case is not distinguishable from that just cited.

It is quite possible, by the same method of interpretation, to accept the alternative adopted by Mr. Justice Russell, and there may possibly be open, though I am not inclined to think so, the other alterntive, to read it as a devise so charged that the person accepting it became bound to satisfy the charge and incidentally thereto be empowered to sell. In any of these alternatives the result here would be the same.

Every effort made, during the ingenious argument presented to us, to extract some meaning from the words in question other than one of these alternatives, when tested by the supreme test of the intention of the testator sought out in the way I indicate above, seems to me to fail to produce anything that one could seriously think was like unto what it was possible the testator could have intended.

Every case relied upon to support each of these

(1) 6 Ch. App. 597.

other interpretations, so proposed by counsel, is easily and clearly distinguishable from this case.

The appeal should be dismissed with costs.

MACLENNAN J.—I am of opinion that the appeal should be dismissed with costs.

The question is whether the gift by the testator's will to his wife of his real and personal estate enabled her to sell and make a good title to his farm; or whether, if that be doubtful, the plaintiff, one of the children of the testator, can recover the farm after forty-four years' uninterrupted possession by the purchaser and his assigns.

The gift is as follows:

> I give and bequeath to my beloved wife Margaret McIsaac, all and singular the property of which I am possessed whether real or personal or wheresoever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial to her and them, and also order that all my just and lawful debts shall be paid out of the same.

In and by the same will he appointed his brother and brother-in-law his executors, "to carry out this my last will and testament," but he assigned to them no other duty.

The testator was a farmer, owner of a farm of 100 acres, and was possessed of some farm stock and implements. He had a family of nine young children. The land was of no great value, and only brought $600 when sold sixteen months after his death. He owed some debts, and there is some evidence that while the family remained on the farm they were to some extent dependent on neighours for assistance.

The testator died in 1858, and in 1860 the widow sold and conveyed the land to a person under whom the defendant derives his title.

1905

McISAAC v. BEATON.

Maclennan J

The plaintiff is one of the children of the testator, and claims that under the will his mother was tenant for life, and her children tenants in remainder in fee, and that upon his mother's death on the 3rd of April, 1882, he became seized of an estate in possession in fee simple.

He avoids the defence of the Statute of Limitations by saying that when his right of action first accrued, at the death of his mother in 1882, he was resident without the province, and so continued until within a short time before he commenced his action.

Now the first thing to be observed is that beyond any question the legal title of the testator's farm vested in the widow under the will. She took the legal fee simple in the land, and whatever beneficial interest in the land was intended to be given, or was given, to the children was in the nature of a trust. The personal estate is given in the same terms, but other persons being named executors the property in the personal estate would not vest in the widow absolutely until the debts were paid. Subject to that, the legal property in the personal estate would be in her absolutely, upon the same trust as that resting upon the land. Now the trust of both kinds of property being the same, the court must put such a construction upon that trust as will best accord with its terms and with the nature of both kinds of property, and with the reasonable and probable intention of the testator having regard to the circumstances of his property and his family. The widow is given the title of both kinds of property in the most unqualified manner, and she is to dispose of it as she may judge most beneficial to her and them. But it is said she must dispose of it *amongst the children.* I attach importance to the word "dispose," which is a large word, larger than

divide. Applying it to the personal estate, it is easy to say it means to sell and apply the proceeds as she might judge most beneficial to herself and her children. In short, she was to *dispose* of everything both real and personal, to see that all just debts were paid, and to apply what was left for the benefit of herself and her children according to her best judgment.

I think the reasoning of the court in *Lambe* v. *Eames*(1) entirely applicable to this case, and that the proper construction of the will is that it gave the widow not only the legal title in fee simple in this land, but also an absolute power to dispose of it, as well as of the personal estate, if and when, in her judgment, it was for the benefit of herself and her numerous helpless children to do so.

In the foregoing view of the case it is unnecessary to consider the defence of the Statute of Limitations. But it being, as I think it is, quite impossible to hold that the will gave the widow the beneficial interest for life and the children an interest only at her death; and on the contrary, it being plain that the children as well as the mother were intended to have an *immediate* beneficial interest in both lands and goods, it follaws that if the widow had no power to sell the wrong done to the children was done by the sale and conveyance.

It is impossible to contend upon the language of the will that the children were not to have any immediate benefit, or that their mother could turn them all adrift, and take all the use and benefit of the property both real and personal for her own exclusive use for life.

If that be so the plaintiff's cause of action arose when the sale and conveyance was made on the 5th

(1) 6 Ch. App. 597.

1905

McISAAC
v.
BEATON.

Maclennan J

of April, 1860, and is barred by section 19 of the Statute of Limitations.

Appeal dismissed with costs.

Solicitor for the appellant: *Jos. D. Matheson.*

Solicitor for the respondents: *J. H. Jamieson.*