1941
* Oct. 10, 14.
1942
* Feb. 3.

IN THE MATTER OF THE WILL AND ESTATE OF SARAH MARGARET WEST, DECEASED

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Will — Interpretation of — Priority of legacies — Abatement — Residuary legatees — Disposition of corpus of trust fund.

Upon a consideration of the terms of a particular will, it was *held*, reversing the judgment of the Court of Appeal for Manitoba ([1941] 3 W.W.R. 49) and restoring the judgment of the judge of first instance, that the rule in *Farmer* v. *Mills* ((1827) 4 Russ. 86), and *Dudman* v. *Shirreff* ((1870) 18 W.R. 596) did not apply.

Robertson v. *Broadbent* ((1883) 8 A.C. 812), *Arnold* v. *Arnold* ((1834) 2 M & K 365) and *Hichens* v. *Hichens* ((1876) 25 W.R. 249) discussed.

APPEAL by two beneficiaries under the will of Sarah Margaret West, deceased, from the judgment of the Court

* PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

of Appeal for Manitoba (1) reversing the judgment of the judge of first instance, Donovan J. (2) on an application by the executor of the will, by way of originating motion for an order construing and interpreting the will and for the opinion, advice and direction of the Court upon certain questions arising out of some clauses of the will.

The material facts of the case and the questions at issue are stated in the judgments now reported.

John Jennings K.C. for the appellants.

Sir Charles Tupper K.C. for the respondent.

R. N. Starr for the executors.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—This appeal is concerned with a question that arises in the administration of the estate of Mrs. Sarah Margaret West. By her last will and testament Mrs. West devised and bequeathed all her property to her trustees in trust and, after disposing of her jewelry, furniture, clothing, household and personal effects, provided by paragraph 8:—

> The distribution of my estate under the devises and bequests hereinafter stated is to be made in the order of priority indicated in the succeeding paragraphs of this my will.

The first provision in order of priority was made by paragraph 9 whereby certain bonds to the par value of $45,000 were to be held in trust in a special fund, the income from which was to be paid to Emma Melissa Carr, a sister of the testatrix, with power to advance to Miss Carr out of the corpus of the fund, such amounts as the executors and trustees should consider necessary or advisable for her proper maintenance and support. Then follows this sentence:—

> Upon her death any unexpended portion of the corpus of said special fund, including any accretion of interest thereto, shall become part of my residuary estate.

Paragraph 10 provides for the bequests that are to be paid second in priority, and paragraph 11 for those to be

(1) [1941] 3 W.W.R. 49; [1941] 2 D.L.R. 437.
(2) [1941] 3 W.W.R. 50; [1941] 1 D.L.R. 795.

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paid third in priority. Paragraph 12, dealing with the fourth priority, opens as follows:—

Paragraph 12. Fourthly: I make the following bequests, and should my estate be insufficient to pay same in full after the creation of the fund mentioned in paragraph "9" hereof, I direct that the beneficiaries named in this paragraph shall abate proportionately:

By paragraph 13 the sum of $15,000 less succession duty was to be paid as the fifth priority to the governing authorities of Victoria University of Toronto, Ontario.

The opening part of paragraph 14 is as follows:—

Paragraph 14. Sixthly: Subject to the completion of the devises and bequests in paragraph 9, 10, 11, 12 and 13 hereof, I make the following bequests, and should my estate be insufficient to pay same in full, I direct that the beneficiaries named in this paragraph shall abate proportionately:

Then follow bequests to the Superannuation Fund of the United Church in Canada, to Wesley College in Winnipeg, and to the Fort Rouge United Church in Winnipeg.

Paragraph 15 reads in part:—

Paragraph 15. Seventhly: All the rest and remainder of my estate is to be divided into five equal residuary portions

and contains directions as to the payment of each portion. By paragraph 17 the executors were directed "before providing for any of the bequests mentioned in this my will" to set aside $500 in a trust fund in order to care for a cemetery plot. By a codicil to the will, Mrs. West bequeathed Miss Carr $5,000, which was to "take priority over all other bequests and funds created in my will", and a bequest in paragraph 10 of the will was increased.

After the death of Mrs. West, the executors paid Miss Carr the legacy of $5,000, established a fund for the care of the cemetery plot, and set up the trust fund for Miss Carr. The executors were able to pay the legacies mentioned as second in priority in paragraph 10 and also the ones mentioned as third in priority in paragraph 11, except that as to the latter, one of the legatees mentioned therein having predeceased the testatrix and his legacy having lapsed, the amount of it was used, together with the remaining assets of the estate, to make payments on account of the legacies mentioned as fourth in priority in paragraph 12. The estate was not sufficient to pay these in full or to pay anything on those mentioned in the subsequent paragraphs of the will.

Miss Carr has since died and as to her fund the question that arises is as to the manner in which the

> unexpended portion of the corpus of said special fund, including any accretion of interest thereto

(paragraph 9), is to be applied. On behalf of those among whom, by paragraph 15, "all the rest and remainder of my estate is to be divided into five equal residuary portions", it is contended that the Carr Fund should fall into the ultimate remainder of the estate and be divided among those mentioned therein, while the beneficiaries mentioned in paragraphs 12, 13 and 14, contend that the Fund should be used to complete the payments to those mentioned in paragraph 12 and pay the legacies mentioned in paragraphs 13 and 14, leaving a small balance for the five residuary portions referred to in paragraph 15.

There is no doubt as to the general rule that residuary legatees have no right to call upon particular general legatees to abate.

> It does not need authority (as Lord Blackburn points out in *Robertson* v. *Broadbent* (1)) to show that * * * the residuary legatee can take nothing until all the other legacies are paid in full for till then there is no residue.

In the present case I did not understand counsel for the respondents to contend that because of that part of paragraph 9 quoted above the Carr Fund was subtracted from the estate and placed in the ultimate residue so as to make it unavailable for the general legatees. Such a proposition could not, of course, be supported even without the distinction that the testatrix drew between her "residuary estate", which expression she uses in numerous places throughout the will, and "the rest and remainder of my estate", mentioned in paragraph 15. What is argued is that since the opening part of paragraph 12 directs that if the estate be insufficient to pay in full the bequests mentioned in that paragraph, after the creation of the Carr Fund ,"the beneficiaries named in this paragraph shall abate proportionately", the abatement that was found necessary upon the setting up of the Carr Fund was permanent, within the meaning of the decision in *Farmer* v. *Mills* (2).

(1) (1883) 8 App. Cas. 812, at 818, 819. (2) (1827) 4 Russ. 86.

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In that case a testator, by his will, gave certain annuities, directing that, as the annuitants should die, the sums by which the annuities were secured should sink into and become a part of the residue of his estate, and named several persons as residuary legatees. To quote from the report:—

> By a codicil to his will he stated, that, upon reflection, he considered it to be probable, that, after full payment of his funeral expenses, debts, and legacies there might not be property left, which would be adequate to produce interest sufficient to pay the annuities given by his will; and in such case he directed that an equal deduction should be made from each annuity rateably according to its amount, after the expiration of six months from his death; in which time he considered that his affairs might be closed, so as to ascertain the amount of his property.
>
> His estate did prove insufficient for the full payment of the several annuities given by his will: and the question in the cause was, whether, upon the death of any annuitant, the sum set apart to secure his reduced annuity should be applied to increase the other annuities, until they were made to amount to the sums given by the will? or, whether the sum so set apart should belong to the residuary legatees?

Sir John Leach, Master of the Rolls, decided that:—

> The annuitant, who receives his reduced annuity, received all that the testator intended he should receive, in case of the deficiency of his property: and the sum set apart to secure the reduced annuity will sink into the residue, in the same manner as it would have done, if the property had been adequate to provide for the sum given by the will.

In *Arnold* v. *Arnold* (1), Sir Charles Pepys, Master of the Rolls, pointed out that in the *Farmer* case (2) the testator's codicil expressly provided that the annuities should be rateably reduced. In *Dudman* v. *Shirreff* (3), the testator directed the trustees to set apart four sums upon certain trusts, disposed of the residue of his personal estate and provided that if the whole of his estate should not be sufficient to answer and satisfy all the trusts of his will, then each trust should abate in proportion. His estate was not enough to satisfy the four funds and the executors accordingly divided the available assets rateably among them. The testator's widow was entitled to the income for life from one fund with power of appointment as to one moiety thereof and in default of appointment such moiety was to fall into and be considered as part of the residue of the testator's personal estate. The widow made an appointment of this first moiety but part of it lapsed.

(1) (1834) 2 M. & K. 365, at 379. (2) (1827) 4 Russ. 86.
(3) (1870) 18 W.R. 596.

In proceedings in the original estate taken after the widow's death, it was held by Vice-Chancellor James that the case was governed by *Farmer* v. *Mills* (1). He held that the direction for abatement was the same as if the testator had directed his executors to pay the income of each fund, after abatement, to the tenant for life and gave over the capital of such abated fund afterwards.

I do not understand *Farmer* v. *Mills* (1) and *Dudman* v. *Shirreff* (2) to lay down any general rule of law applicable to all wills which contain an abatement clause in whatever form it may be expressed. In *Robertson* v. *Broadbent* (3), Lord Blackburn states:—

> Sometimes a testator foresees this possibility of a deficiency and provides for it. This was done by a codicil in *Farmer* v. *Mills* (1). When a testator does so there can be no doubt about it his express intention governs.

If Mrs. West had expressed in her will an intention such as was found in the *Farmer* (1) and *Dudman* (2) cases, those decisions should be followed but in my opinion her will is entirely different. As I have already indicated, the words "residuary estate", in paragraph 12, do not bear the same meaning as "the rest and remainder of my estate", in paragraph 15, but what is more important, the direction to abate, in paragraph 12, applies only to the beneficiaries named in that paragraph. A similar direction to abate is found in paragraph 14, confined to the beneficiaries named therein. In neither case is the abatement for the benefit of those entitled to the five portions of "the rest and remainder of my estate" in paragraph 15. In my view the whole tenor of the will makes it clear the testatrix intended to provide, and did provide, that upon the falling in of the Carr Fund the assets comprised therein should become assets in the hands of the executors and trustees to carry out the priorities in the order named.

I would allow the appeal and restore the judgment of the judge of first instance. The costs of all parties to the appeals to the Court of Appeal and to this Court should be paid by the executors in priority to any further payments to the legatees named in the will, those of the executors as between solicitor and client.

(1) (1827) 4 Russ. 86. (2) (1870) 18 W.R. 596.
(3) (1883) 8 App. Cas. 812, at 818.

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The judgment of Rinfret, Hudson and Taschereau JJ. was delivered by

HUDSON J.—The question for decision here is whether a fund in the hands of the executors after the termination of a life interest falls to the persons named in the will as residuary legatees, or whether it is available to make good deficiencies of pecuniary legacies of specific amounts.

The provisions of the will which directly give rise to the controversy are the following:

Paragraph 8. The distribution of my estate under the devises and bequests hereinafter stated is to be made in the order of priority indicated in the succeeding paragraphs of this my will.

Paragraph 9. (*a*) Should my said sister Emma Melissa Carr be living as at the date of my death, I direct that Dominion of Canada Bonds maturing in 1959 and yielding four and one-half per centum per annum on the par value thereof, to the par value of forty-five thousand ($45,000) dollars shall be selected or if necessary purchased and held by my executors and trustees in trust in a special fund, the income from which shall be paid as from time to time received to my said sister Emma Melissa Carr, with power to my said executors and trustees to advance from time to time to my said sister Emma Melissa Carr, out of the corpus of said special fund, such amounts as in their judgment may be necessary or advisable for her proper maintenance and support. Upon her death any unexpended portion of the corpus of said special fund, including any accretion of interest thereto, shall become part of my residuary estate.

Paragraph 12. I make the following bequests, and should my estate be insufficient to pay same in full after the creation of the fund mentioned in paragraph 9 hereof, I direct that the beneficiaries named in this paragraph shall abate proportionately

(Then follows a number of specific bequests).

Paragraph 13. I direct that my executors and trustees shall pay to the governing authorities of Victoria University, in Toronto, Ontario, the sum of fifteen thousand ($15,000) dollars to form * * *

Paragraph 14. Subject to the completion of the devises and bequests in paragraphs 9, 10, 11, 12 and 13 hereof, I make the following bequests, and should my estate be insufficient to pay same in full, I direct that the beneficiaries named in this paragraph shall abate proportionately.

(Then follow bequests to certain charitable organizations).

Paragraph 15. All the rest and remainder of my estate is to be divided into five equal residuary portions, one residuary portion to be paid into the said "Anna Margaret West Trust Fund" to be held on the trusts hereinbefore established in connection with said fund.

Of the remaining four equal residuary portions, one residuary portion is to be paid to my sister Emma Melissa Carr; one residuary portion to be paid to Annie West, widow of Edward Charles West of Campbellford, Ontario; one residuary portion to be paid to Martha Emily West, widow of Samuel John West, late of Campbellford aforesaid; and one residuary portion to be paid to William Newton Redner, son of my

deceased sister, Mary Jane Redner. Should any of the four last mentioned legatees of residuary portions predecease me leaving children him or her surviving, his or her residuary portion is to be paid share and share alike to his or her children now living, and if only one then to that one; and should any of the children of such deceased legatee of a residuary portion (being one of the four last mentioned residuary legatees) predecease me leaving child or children they shall take their parent's share of the residuary portion equally among them, and if only one then to that one. If any of the four last mentioned legatees of the residuary portions above named, predecease me leaving no surviving child or issue of children, the residuary portion which would otherwise go to such legatees shall be divided equally per capita and not per stirpes among the children of the remaining four legatees of residuary portions living as at the date of my death.

Miss Carr, the sister of the testatrix, survived and the trust fund provided for in paragraph 9 was set up by the executors. The assets of the estate were to the extent of about 95% liquid and all of the legatees ranking prior to the legacies specified in paragraph 12 were paid in full, except one which had lapsed. Those mentioned in paragraph 12 were paid to the extent of 75%, but nothing has been paid on account of those provided for in paragraphs 13 and 14.

Miss Carr has died and the assets in the special fund created pursuant to paragraph 9 had, at the time the present proceedings were commenced, a market value of approximately $48,000. Apart from this fund, the value of the assets still in the hands of the executors was stated to be $7,555.91, an amount quite insufficient to pay in full the beneficiaries under paragraph 12, and leaving nothing for those mentioned in paragraphs 13 and 14. On the other hand, if the $48,000, with accretions, were available to make good deficiencies of specific legacies, they all would be paid in full and still leave a residue of over $9,000.

Mr. Justice Donovan, before whom the matter came in the first instance (1), held that the fund was available to make up deficiencies in the specific legacies.

The Court of Appeal (2) reversed this decision, holding that the fund passed to the persons named in the residuary clause. Mr. Justice Trueman, in giving the judgment of the Court, after pointing out that paragraph 12 directs that should the estate be insufficient to pay the bequests named therein in full

(1) [1941] 3 W.W.R. 50; [1941] 1 D.L.R. 795.
(2) [1941] 3 W.W.R. 49; [1941] 2 D.L.R. 437.

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after the creation of the fund mentioned in paragraph 9 hereof, the beneficiaries named in this paragraph shall abate proportionately, proceeds:

This fund was thus not to be looked to to make up any deficiency in the legacies in paragraphs twelve, thirteen and fourteen. The fund was a trust in the hands of the trustee during Miss Carr's life, subject to the terms of paragraph nine, and upon her death to become part of the testatrix' "residuary estate", and then to be disposed of as directed in paragraph fifteen. By reason of the estate being in liquid form the legacies provided for in the will were to be paid forthwith after the creation of said trust fund in the order of their priority, those in paragraph twelve being subject to proportionate abatement if need be, and those in thirteen and fourteen having in their order to depend on what remained, if anything. It is thus clear that the will called for immediate distribution after said fund was created, and that the legatees, in event of deficiency or non-payment, had nothing to hope for on the trust for Miss Carr coming to an end on her death.

This statement embodies the chief argument urged before this Court on behalf of the respondent.

On the other hand, the appellant here contended that on reading the will as a whole it is manifest that the abatement referred to in paragraph 12 was a temporary and not a permanent abatement; that it is perfectly clear that the testatrix intended that ultimately all of the beneficiaries should be paid in full; that paragraph 8 providing for priorities is re-enforced by the concluding paragraph of the will, namely, 19, which reads as follows:

Except as otherwise provided herein I direct that all succession duties with which my estate may be charged, shall be paid first out of my estate, my intention being that each beneficiary of this my will shall in the order named receive the full amount of each respective bequest free of succession duty except as hereinbefore directed.

that the real purpose of the provision in paragraph 12 as to abatement was to make it perfectly clear that each one of the many beneficiaries enumerated therein should abate proportionately, notwithstanding the provision in paragraph 8 as to general priorities; that Mr. Justice Trueman correctly interpreted the provision in another portion of his judgment dealing with a matter not now in issue, where he said:

The legatees in paragraph twelve are relatives of her deceased husband and of herself. The sole object of the provision for proportionate abatement in paragraph twelve was to ensure that the legatees therein should have no priority *inter sese* in event of deficiency of assets.

That as by paragraph 15 providing for the disposition of the remainder of the estate, one portion was directly to go to Miss Carr, a portion of the trust set aside which was to remain undivided until her death could not in fact be paid to Miss Carr, it is not to be supposed that the testatrix, in order to allow Miss Carr's personal representative to dispose of a portion of the Carr fund, would defeat her own will entirely as to the provisions in paragraphs 13 and 14 and deprive the numerous beneficiaries in paragraph 12 of a part of what had been intended for them. The prescribed benefits for Miss Carr in her lifetime were to take priority over these other things, but Miss Carr could not benefit by an addition to the residuary estate after her own death.

Another circumstance not discussed by either counsel is that paragraph 9 was conditional on Miss Carr surviving the testatrix. If she had not survived, the fund would not have come into existence and the money represented by the fund would have continued as part of the general estate for distribution according to the priorities provided for in the will.

Consideration of the terms of the whole will in the light of these arguments has satisfied me that the intention of the testatrix was that the abatement mentioned in paragraph 12 should be only temporary.

The respondent relied upon the principle laid down in the cases of *Farmer* v. *Mills* (1); *Dudman* v. *Shirreff* (2); and *Hichens* v. *Hichens* (3), also referred to in the judgment of Mr. Justice Trueman. If we were confined to a consideration of paragraphs 9 and 10 of the will, I would agree with the Court of Appeal that the principle upon which these cases were decided is applicable and should prevail. But, as already pointed out, the will does contain other provisions and the consideration of these provisions has led me to the conclusion that it was the intention of the testatrix that the abatement should be temporary only. For that reason, I do not think that the decisions in these cases are applicable.

(1) (1827) 4 Russ. 86. (2) (1870) 18 W.R. 596.
(3) (1876) 25 W.R. 249.

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I agree that the appeal should be allowed and that the judgment of the judge of first instance be restored, with costs of all parties to be paid by the executors out of the estate, and that the costs of the executors should be as between solicitor and client.

Appeal allowed, costs as per judgment.

Solicitors for the appellants: *Pitblado, Hoskin, Grundy, Bennest & Drummond-Hay,* and *Hull, Sparling & Sparling.*

Solicitors for the respondent: *Tupper, Tupper & Adams.*

Solicitors for the executors: *Fillmore, Riley & Watson.*