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*March 11.
*May 11.

*Oct. 6.
*Nov. 16.

LORIE SINGER AND MADELINE SINGER BY THEIR NEXT FRIEND ELLA TARSHIS, AND THE SAID ELLA TARSHIS (APPLICANTS) ..... } APPELLANTS;

AND

ANNIE SINGER AND MOSES J. SINGER, EXECUTORS AND TRUSTEES OF THE LAST WILL OF JACOB SINGER, DECEASED, AND THE SAID ANNIE SINGER AND THE OFFICIAL GUARDIAN (RESPONDENTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Will—Construction—Vesting—Postponed distribution—Provision for advancement of portion of share in estate—Postponed payment—Death of beneficiary—Effect of gift over.

A testator gave all his property to his executors upon trusts, which included a direction to pay his wife during her life or widowhood the income of the estate for maintenance of herself and children, a direction for settlement upon his daughters on marriage, a direction "to pay to each of my sons who shall reach the age of 30 years, a sum equal to half that portion of my estate, to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his 30th year * * * Such payment to be considered as a loan from the estate." Upon the death or remarriage of the testator's wife the residue of the estate was given to his children share and share alike, deducting from each share "any sum or sums which shall already have been advanced" to the child; with provision for division among surviving children of the share of any child who predeceased the widow without leaving issue, and for the issue of any child who predeceased the widow to take the share of their parent. By a codicil the testator directed that his real property (of which his estate mostly consisted) should not be divided among the beneficiaries as directed by his will until after the lapse of 10 years from his death. The testator died in 1911. At the time of the present proceedings, begun in 1930, his widow (who had not remarried) and children still survived except a son S. who died in 1914, having attained the age of 30 years in the testator's life time. S. left a widow and children, one of whom, a posthumous child, died in infancy.

Held (1): The half portions which the sons were to receive at 30 years of age should be considered, not as loans, but as advances out of their shares of the residue (The holding to this effect in *Re Singer*, 33 Ont. L.R. 602, at 618; 52 Can. S.C.R. 447, adopted).

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(2): S's share in the residue of the estate became vested in interest at the testator's death (*Busch* v. *Eastern Trust Co.*, [1928] Can. S.C.R. 479, distinguished). S., who was over 30 years of age, had then, subject to the effect of the codicil, an immediate right to payment of his half portion; and, while the codicil may have practically operated, owing to the nature of the assets, to postpone payment, it did not affect the vesting; nor was the right to the advance personal only to S. so as to be defeated by his death during the 10 year period. But S's. vested interest was subject to defeasance by an executory gift over (to his issue) in the event which happened (issue of S. surviving him); therefore his share was not transmitted by his will, and, the right now to the advance did not belong to S's. widow as his personal representative or as beneficiary under his will, but to his children (S's. widow inheriting her distributive share in the estate of S's. said deceased child).

Duff J. dissented, holding that the direction for payment of half portions to the sons was strictly personal in relation to them in its incidence and effect, and that, with regard to S., no right now existed in any person to have the direction carried out.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of Logie J. (2).

Jacob Singer, late of Toronto, Ontario, deceased, by his last will and testament, dated May 16, 1904, gave all his property to his executrix and executors upon trusts, which included a direction to pay to his wife, Annie Singer, during her life or widowhood, the net annual income arising from his estate for the maintenance of herself and children, a direction for settlement upon his daughters on marriage, a direction " to pay to each of my sons who shall reach the age of thirty years, a sum equal to half that portion of my estate, to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year * * * Such payment to be considered as a loan from the estate." Upon the death or remarriage of his wife, the testator gave the residue of his estate to his children share and share alike, deducting from each share " any sum or sums which shall already have been advanced to such child;" with provision for division among surviving children of the share of any child who predeceased the widow without leaving issue, and for the issue of any child who predeceased the widow to take the share of their parent. By a codicil dated October 31, 1911, the testator directed that his real prop-

(1) (1930) 39 Ont. W.N. 278. (2) (1930) 38 Ont. W.N. 355.

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erty (of which his estate mostly consisted) should not be divided among the beneficiaries as directed by his will until after the lapse of ten years from his death.

The material provisions of the will and codicil are more fully set out in the judgment of Newcombe J. now reported.

The will has previously been before the courts on certain questions (1).

The testator, Jacob Singer, died on November 13, 1911, leaving him surviving his widow (who has not remarried), three daughters and nine sons, all of whom survived at the time of the present proceedings except one son, Solomon, who died on October 19, 1914, being then upwards of 30 years of age (he had reached the age of 30 years in his father's lifetime), and leaving surviving him his wife (the appellant, Ella Tarshis) and two children (born March 22, 1911, and April 21, 1912, respectively) who are still living, and another, a posthumous child, who died in infancy. Solomon Singer left a will in which he appointed his said wife sole executrix and sole beneficiary.

The present proceedings were begun by originating notice of motion, on behalf of the present appellants (the said surviving children of Solomon Singer, deceased, and the said Ella Tarshis) for determination as to what rights or interests the present appellants or any of them have under the provisions of the will of Jacob Singer, deceased, and in particular whether the trustees of the will should be directed to pay now to the children of Solomon Singer, deceased, along with the mother of his said deceased minor child as one of the heirs of such child, as they may be interested, or to the personal representative of Solomon Singer, deceased, before the death or remarriage of the testator's (Jacob Singer's) widow, a sum equal to half that portion of the estate to which Solomon Singer would have been entitled under the will upon the death of his mother had he not predeceased her.

Logie J. (2) held that, upon the true construction of the will and codicil, neither the children of Solomon Singer, deceased, nor his personal representative, were entitled to receive any of the moneys which might have been payable as advances or loans to Solomon Singer had he survived the

(1) *Re Singer*, (1915) 33 Ont. L.R. 602; 52 Can. S.C.R. 447.

(2) (1930) 38 Ont. W.N. 355.

testator ten years. An appeal to the Appellate Division was dismissed (1), and an appeal was brought to this Court.

W. F. O'Connor K.C. for the appellants.

R. S. Cassels K.C. and *D. Guthrie* for the respondent Annie Singer.

McGregor Young K.C., Official Guardian, who, at the hearing before Logie J., was appointed "to represent all persons contingently entitled to interests in the estate."

E. F. Singer K.C. for the executors of the will of Jacob Singer, deceased.

The judgment of the majority of the court (Newcombe, Rinfret, Lamont and Cannon JJ.) was delivered by

NEWCOMBE J.—It becomes necessary for the Court further to interpret the will and codicil of the late Jacob Singer, of Toronto, who died 13th November, 1911. Some questions have already been determined, both at Toronto and in this Court, upon the same testamentary documents, *In re Singer* (2).

The will was executed 16th May, 1904, and the codicil 31st October, 1911. The testator left considerable property, consisting mostly of real estate in small lots at Toronto; he left surviving him his widow, three daughters and nine sons. The daughters and eight of the nine sons still survive, but the other son, Solomon, died 19th October, 1914, leaving a will whereby he constituted his wife, the appellant, Ella Tarshis, sole executrix; and the question involved in this submission is as to whether his surviving children and their mother, in right of her kindship to a deceased child, are entitled to share in the present distribution of that portion of the residue of Jacob Singer's estate which Solomon would have received if he had lived.

Jacob Singer, by the first clause of his will, provided as follows:

> I give, devise and bequest unto my executrix and executors hereinafter named all my property, both real and personal and wheresoever situated upon the following trusts, that is to say:

In the next four clauses there are some charitable or benevolent dispositions; and then there are some provisions

(1) (1930) 39 Ont. W.N. 278.

(2) (1915) 33 Ont. L.R. 602; 52 Can. S.C.R. 447.

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with regard to the carrying on of the testator's business; and the clauses material to the present question follow. In the words of the will they are:

And I direct my said trustees to pay to my wife Annie Singer, during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children; should however my said wife remarry, then such annuity shall cease.

I hereby appoint my said wife Annie Singer to be the sole guardian of my children during their minority, but in case of my said wife shall remarry, then I appoint my Son in law Geo. I. Miller of New York to act with her as guardians of my children and I direct my said trustees to pay to such guardians for the suport, maintenance, and education of my said children, whatever summ shall in their opinion be necessary for their proper support, maintenance and education; such sum however, not to exceed thirty dollars per month for each child.

I direct my said trustees to secure and settle upon each of my daughters at the time any such daughter shall marry with their mother's consent, such consent to be signified to the said trustees in writing, the sum of six thousand dollars, as her separate estate free from the control of any husband, and to give to each such daughter so marrying as aforesaid the sum of one thousand dollars for the purpose of her wedding outfitt.

I direct my said trustees to pay to each of my sons who shall reach the age of thirty years, a sum equal to half that portion of my estate, to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees, and shall be final. Such payment to be considered as a loan from the estate.

Upon the death or re-marriage of my said wife I give, devise and bequeath all the rest and residue of my estate, not hereinbefore specifically disposed of to my said children share and share alike and I direct my said trustees to pay to each of my said children upon his or her attaining the age of twenty-one years his or her share of my estate, deducting however therefrom any sum or sums which shall allready have been advanced to such child; and in the event of any of my said children predeceasing my said wife without leaving lawfull issue him, her, or them surviving, then his, her or their share or shares shall be devided equaly between my surviving children, who shall attain their age of twenty-one years; but in the event of my said children, who shall so predecease my said wife, leaving him, her, or them surviving lawfull issue, then I direct, that such issue shall stand in the place of and be entitled to the share of the parent so deceased.

By the codicil there are some additional gifts; and by clauses 10 and 14 the testator provided thus:

10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors, in remuneration for their services.

14. I further direct that anything mentioned in the aforesaid will, which is at variance with the provisions mentioned in this codicil, shall be subservient and subject to this codicil.

The particular question upon which the appellants seek to be advised, as stated in the originating notice of motion, is

In particular whether the trustees of the said last will of the testator should be directed to pay now to (1) the children of Solomon Singer, deceased (son of the testator) along with the mother of a deceased minor child of said Solomon Singer, deceased, as one of the heirs of such child, as they may be interested, or (2) to the said personal representative of said Solomon Singer, deceased, before the death or remarriage of the testator's widow, a sum equal to half that portion of the estate of the testator to which the said Solomon Singer, deceased, would have been entitled under the said last will of the testator upon the death of his mother had he not predeceased her.

The case was heard by Logie J., of the Supreme Court of Ontario, who held that neither the personal representative of Solomon Singer nor his children were entitled to share in the payment directed by the clause of the will which provides for an advance to be paid to each of the testator's sons who should reach the age of thirty years.

There was an appeal to the Appellate Division and the appeal was dismissed, either upon the ground that the interest of Solomon Singer was not vested, or because the provision for an advance to him upon his attaining thirty years of age lapsed at his death. It may, however, conveniently be said here that Solomon Singer was, at his death, upwards of thirty years of age. There are thus two questions to be determined; first, as to whether Solomon, at the time of his death, had a vested interest; and, secondly, whether his interest, if vested, inured only to his personal use and benefit and was not transmissible.

Both the learned Judge of first instance and the Justices of Appeal refer to *Busch* v. *Eastern Trust Co.* (1), but it does not, in my opinion, rule this case. There was a question of vesting, it is true; but the facts were materially different. In every case it is the testator's intention, if it can be gathered from the will, which must govern; and, while there are some rules to which resort may be had for ambiguous or doubtful cases, there is none which is allowed to prevail in competition with lawful intention clearly ascertainable upon the face of the instrument. In the *Busch* case (1) there was a direction to divide and pay the

(1) [1928] Can. S.C.R. 479.

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residue at a future time; and that was the only evidence of the gift, except a reference to the legatees, as those who would then be entitled; and the court followed the course of authority in holding that the vesting was postponed until the time of distribution. Here, however, the interpretation leads plainly to the opposite result. The entire estate is given at the testator's death to his executors, upon the trusts defined by the will. The income of the residue is to be paid to the testator's widow during her life, or so long as she remains his widow, " for the maintenance of herself and our children." The question is concerned with a gift of a portion of the residue, and the residuary clause is immediately preceded and interpreted by what I shall call the " thirty years clause "; I have already quoted the words, and I think they unmistakably determine the testator's meaning. Solomon Singer lived for more than thirty years. We are told that he had reached the age of thirty years in his father's lifetime, and, consequently, when the testator died, Solomon had, subject to the effect of the codicil which I shall presently consider, an immediate right to receive payment from the trustees of a sum equal to one-half of his share or portion of the estate, at a valuation, and his share is identified by the testator as " that portion of my estate to which such son is entitled under my will upon the death of his mother "; half of that was, therefore, payable at the testator's death. And, as I understand the judgment of the learned judge who heard the motion, he does not question that interpretation. He holds the appellants disentitled by the codicil. The learned Judges of Appeal reach the same result, though for various reasons.

It is clearly expressed in the residuary clause that, in the event of any of the testator's children dying before his widow, without issue surviving, " then his or her share or shares shall be divided equally between my surviving children who shall attain the age of twenty-one years; but in the event of my said children who shall predecease my said wife leaving him, her or them surviving lawful issue, then I direct that such issue shall stand in the place of and be entitled to the share of the parent so deceased."

A doubt is suggested as to the meaning of the concluding words of the thirty years clause, " such payment to be considered as a loan from the estate." That question was

considered along with some others in the former litigation; and, in the judgment of Meredith C.J.O., in the Court of Appeal (1), in which the majority of the learned Justices of Appeal concurred, he held that

> The direction that what they receive is to be considered as a loan from the estate, coupled with the provision for the deduction, upon the ultimate distribution of the estate, from the share of any child to whom advances shall have been made, of the amount of the advances, was intended to make it clear that a son who received any money under the direction as to payments to sons who attain the age of thirty years, should not, in addition, receive a full share of the residue to be divided, when the division came to be made.

It appears that the majority of the learned Judges in this Court agreed with the view so expressed. *Singer* v. *Singer* (2). It is difficult to suppose that the testator meant to require his sons, at the age of thirty years, to borrow from his estate, or that repayment should be enforced, except by way of set off; and I am willing to adopt the view expressed by Meredith, C.J.O., if not bound by it by reason of its acceptance by the majority of this Court upon the former appeal. The half portions which the sons were to receive at thirty years of age are, therefore, to be considered as advances out of their shares of the residue.

The codicil remains to be considered; and, by the 14th clause, it is to control the provisions of the will where there is any variance; but, for the purposes of this case, there is no conflict between the will and the codicil apparent upon these documents themselves. It is suggested that, inasmuch as the testator's estate consisted mostly of realty, upon some of which it would be necessary to realize in order completely to satisfy the thirty years clause of the will, the 10th clause of the codicil, having regard to the nature of the assets at the testator's death, indirectly operated to defer advances to any of the sons for the period of ten years. But while that clause may have practically operated to postpone payments, both under the thirty years clause and under the residuary clause, it does not, I think, affect the vesting. And the question which now arises, more than ten years after the testator's death, as to the rights of Solomon's widow and children, should, I think, be determined by the interpretation of the will itself, as if there had been no codicil.

(1) (1915) 33 Ont. L.R. 602, at 618.

(2) (1916) 52 Can. S.C.R. 447.

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Masten and Orde, JJ.A., consider that the provision made for the testator's sons under the thirty years clause "was personal to the son and lapsed if at the time when such advance became payable the son was no longer living"; but, with all due respect, neither of the testamentary documents says so, nor can I discover any evidence of such an intention.

I would, therefore, allow the appeal, with costs throughout to all parties, to be paid out of the estate. If, in these circumstances, there be any question whether the declaration should be in favour of Mrs. Tarshis, as the personal representative of Solomon Singer, or as guardian of her surviving children, and as representing an interest in the estate of her deceased child, it may be spoken to.

DUFF J. (dissenting).—The conditions themselves of the direction shew, in my view, quite unmistakeably, that the direction is strictly personal in relation to the sons in its incidence and effect. This is of the essence of the testamentary provision; and it is entirely incompatible with the supposition that any right is created to have the direction carried out that is transmissible by operation of law to the legal personal representative.

These considerations are also sufficient to negative the devolution of any such right upon the children under the terms of the will.

The appeal should be dismissed; the costs of all parties to be paid out of the estate.

A further hearing was held upon the question left open in the last paragraph of the judgment of Newcombe J., and pursuant to leave reserved therein, and for settlement of the terms of the formal judgment.

D. Guthrie for the respondent Annie Singer.

McGregor Young K.C., Official Guardian, for infants.

W. F. O'Connor K.C. (*F. D. Hogg K.C.* with him) for the appellant Ella Tarshis.

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The judgment of the court on these questions was delivered by

NEWCOMBE J.—At the opening of the present session of Court, the parties were heard further, pursuant to the leave reserved by the judgment pronounced on 11th May last.

Upon the question as to whether Solomon's share was transmitted by his will, my answer is in the negative. It is provided in terms by the antepenultimate clause of the will of Jacob, his father, that

in the event of my said children, who shall so predecease my said wife, leaving him, her, or them surviving lawful issue, then I direct, that such issue shall stand in the place of and be entitled to the share of the parent so deceased.

Jacob's widow is living and has not remarried; and, therefore, the time for distribution of the residue of his estate has not arrived; and, in any event, it would conflict with the natural meaning of the clause which I have quoted to recognize the suggestion, submitted on behalf of Solomon's widow, that she is entitled to the exclusion of the issue. And so, notwithstanding that Solomon acquired a vested interest at the testator's death, it was, upon my interpretation of the will, subject to defeasance by an executory gift over in the event which happened. This follows from the decisions of the House of Lords, in *O'Mahoney* v. *Burdett* (1), and *Ingram and McQueen* v. *Soutten* (2); and the judgment of Lord Shaw of Dunfermline, in the Privy Council, in *Ward* v. *Brown* (3).

There was, however, a posthumous son of Solomon, Eric, who died in his first year; and it is not disputed that Eric's mother inherits, to the extent of her share in his estate, under the Ontario statute of distributions.

The appellants now wish to recover interest, although interest was not claimed by the originating notice; but in my view that claim is not open upon this appeal. It may, however, without prejudice from the present application, be raised upon the accounting, or other proper proceedings, disclosing the facts, if the parties be so advised. They will, of course, not overlook that Meredith, C.J.O., in the former case (4), referring to the paragraph of his judgment already quoted, added that

(1) (1874) L.R. 7 H.L. 388.
(2) (1874) L.R. 7 H.L. 408.
(3) [1916] 2 A.C. 121.
(4) (1915) 33 Ont. L.R. 602, at 618.

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This consideration, and the absence of anything being said as to the loan bearing interest, or of an addition of interest to the sum to be deducted from the share, lead me to the conclusion that interest is not payable on the sum which a son may receive, and that he cannot be required, as a condition of making a payment to him, to give security for it.

Appeal allowed.

Solicitor for the appellants: *Louis M. Singer.*

Solicitors for the respondent trustees: *A. & E. F. Singer.*

Solicitors for the respondent Annie Singer: *Cassels, Brock & Kelley.*

Official Guardian: *McGregor Young.*

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*PRESENT:—Rinfret J. in chambers.