IN THE MATTER OF THE ESTATE OF HERBERT CARLYLE HAMMOND, DECEASED

1933
*Nov. 28.
1934
*March 6.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO

Will—Construction—Vesting—Time of payment.

A testator's will, after some specific bequests, gave the residue of his estate to his executors in trust for purposes defined in the will. Then, after certain directions and gifts of annuities, the will provided, par. 14, that "on the death of my said wife or when my youngest son shall or would have attained the age of 25 years whichever event shall first happen" the trustees should divide the net residue into two equal parts, and one part (subject to a charge) "shall be equally divided between my said two sons" (with provisions for gifts over in events which did not happen); then, par. 15, that the "other half" of the said residuary estate (subject to charges) "upon the death of my said wife * * * shall subject as hereinafter be distributed in equal shares amongst" certain named beneficiaries, including B., with provisions that should any of them "predecease my said wife or die before the period of distribution with reference to this half of my residuary estate leaving a child or children surviving, such child or children living at the date of such distribution * * * shall take

*PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Hughes JJ.

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the share which the parent * * * would have received if living at the time of such distribution" and that the share of any of said named beneficiaries "who shall die before the period of distribution aforesaid without leaving any child or children who shall be living at the date of distribution shall belong to my said two sons in equal shares"; and that, in the event (which did not happen) of the wife dying before the youngest son "shall or would have attained the age of 25 years", then the period of distribution with regard to this half of the residuary estate should be delayed until the latter event.

The testator died in 1909, leaving his widow and two sons. The widow is still living. The younger son attained the age of 25 years in 1912, and conformably to (and subject to) par. 14 of the will, the trustee then divided the net residue of the estate into two equal parts and divided one part between the two sons. The older son died in 1915 and the younger son in 1930. In 1922, B., one of the said named beneficiaries in par. 15 of the will, died without issue. The present question was concerned with her share.

Held: Upon the words in par. 15 (a construction supported by comparison of language in other parts of the will) both sons took, on the testator's death, a vested interest in equal shares in the "other half" (of the residuary estate) disposed of in par. 15 (subject to charges there mentioned), subject to partial defeasance in favour of any of the said named beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution; and therefore the sons' estates took the benefit of the aliquot part of the residuary estate which B. would have received under par. 15 had she lived until the time therein fixed for distribution; but that aliquot part was not payable until the testator's wife's death.

Busch v. *Eastern Trust Co.*, [1928] Can. S.C.R. 479, distinguished.

APPEAL by The Royal Trust Company, executor and trustee of the last will and testament of Herbert R. Hammond, deceased, one of the sons of Herbert Carlyle Hammond, deceased (the construction of whose will was in question), from the judgment of Kingstone J., delivered on an originating motion made in the Supreme Court of Ontario for the determination of certain questions affecting the rights of certain persons under the will of the said Herbert Carlyle Hammond, deceased.

An appeal was taken by the present appellant to the Court of Appeal for Ontario, but such appeal never came on for argument before that court. Upon the consent of the solicitors for all interested parties who had taken any part in the proceedings, an order was made by the Court of Appeal granting leave to appeal direct from the judgment of Kingstone J. to the Supreme Court of Canada.

The said Herbert Carlyle Hammond died on January 26, 1909, and by his will he appointed the National Trust

Company Ltd. executor of his estate. He left him surviving his widow, Fannie Hammond, and two sons, Frederick S. Hammond and Herbert R. Hammond. The widow is still living.

The older son, Frederick S. Hammond, died on May 7, 1915, having made a will, whereof he appointed the National Trust Company Ltd. the executor. By it he bequeathed the whole of his estate to his wife, Kathleen Saunders Hammond. The latter died on September 22, 1919, having made a will. Letters of administration with the will annexed of her estate was granted to the National Trust Company Ltd. Subsequently, by *The Soldiers' Aid Commission Amendment Act, 1922,* Ontario, 12-13 Geo. V, c. 40, it was enacted that the Soldiers' Aid Commission of Ontario should be the beneficiary as to one-half of the residue of her estate.

The younger son, Herbert R. Hammond, died on August 12, 1930, and by his will appointed The Royal Trust Company executor.

The terms of the will of the said Herbert Carlyle Hammond, deceased, material on the present case, and the questions for determination, are sufficiently set out in the judgment now reported, and are indicated in the above headnote.

G. M. Huycke for the appellant.

McGregor Young K.C., Official Guardian.

W. B. Milliken K.C. for Mrs. Fannie Hammond.

C. M. Garvey K.C. for Soldiers' Aid Commission.

C. A. Thompson for National Trust Company Ltd. (Executor and Trustee of the Herbert Carlyle Hammond Estate).

The judgment of the court was delivered by

RINFRET J.—We are to construe the will of the late Herbert Carlyle Hammond, broker, of the city of Toronto, for the determination of certain questions submitted, by way of originating motion, to the Supreme Court of Ontario.

The will is elaborate and there are many codicils. They provide for several specific bequests, with which we are not concerned. The clauses material to the present submission are those which deal with the residue of the estate.

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Paragraph 8 begins in this way:—

8. I give devise and bequeath all the rest residue and remainder of my estate to my executors and trustees in trust to realize such portions thereof from time to time as it may be necessary to realize * * *.

Then follow directions as to the realization of the estate and the administration by the trustees.

Paragraph 9, amongst other bequests, directs the trustees, "out of the income and profits of my estate," to pay to the widow the sum of $12,000 per annum during her life and to pay certain other annuities to named beneficiaries during their lives, subject to a provision for final distribution referred to in paragraph 15 presently to be set out. One of the beneficiaries so named is "Jessie Butler of Toronto."

The main provisions are to be found in paragraphs 14, 15 and 16, and, in order to grasp this case, it is necessary that they should be read in full:

14. On the death of my said wife or when my youngest son shall or would have attained the age of twenty-five years whichever event shall first happen my trustees shall divide the net residue and remainder of my estate into two equal parts and one of such equal parts subject and charged as hereinafter shall be equally divided between my said two sons and In Arriving at the net residue and remainder of my estate for the purposes of division there shall be taken into account such sums as may have been given to my sons in my lifetime by way of advancement and such advances as may have been made after my death not exceeding twenty thousand dollars each to my said two sons or either of them out of the Principal of my estate and the shares of each of my said two sons in the said one-half of my Estate shall be charged with such sums by way of advancement and such advances after my death out of the principal as shall have been made to them respectively.

One-half the annuity of twelve thousand dollars to my said wife shall be charged upon and be payable out of the half of my residuary estate to be divided between my said two sons as aforesaid and on the period of distribution arriving and my said wife being then living my trustees shall retain from such one-half of my residuary estate in equal proportions from each son's share if both then be living a Capital sum sufficient to provide for the payment to my said wife of six thousand dollars per annum during her life. If either of my said sons shall die before the period of distribution and without having disposed of his share by his last will and testament and leaving lawful issue him surviving the share of such son so dying charged as aforesaid shall go to his said issue and if more than one in equal shares and in the event of either of my said sons dying before the period of distribution without leaving lawful issue him surviving and not having disposed of the same by his last will and testament the whole of the said half share reduced and charged as aforesaid shall go to the survivor of my said sons.

15. The other half of my said residuary estate shall be charged with the payment to my said wife of one half of the annuity of twelve thou-

sand dollars given to her as aforesaid and with all the other annuities and annual charges above mentioned and I will and direct that upon the death of my said wife the said other half of my residuary estate subject to all the existing annuities or annual charges above mentioned and after making provision for the said annuities continuing thereafter shall subject as hereinafter be distributed in equal shares amongst the following persons namely: Fannie Parker, Georgina Bogert, Edward R. Crombie, Ethel Butler, Jessie Butler, Charlotte Scougall, Belle Marks, Mona Wily and Thomas W. Butler.

Should any of them the said Fannie Parker, Georgina Bogert, Edward R. Crombie, Ethel Butler, Jessie Butler, Charlotte Scougall, Belle Marks, Mona Wily and Thomas W. Butler predecease my said wife or die before the period of distribution with reference to this half of my residuary estate leaving a child or children surviving such child or children living at the date of such distribution (and in equal shares if there be more than one) shall take the share which the parent respectively of such child or children would have received if living at the time of such distribution.

The share of any of them the said Fannie Parker, Georgina Bogert, Edward R. Crombie, Ethel Butler, Jessie Butler, Charlotte Scougall, Belle Marks, Mona Wily and Thomas W. Butler who shall die before the period of distribution aforesaid without leaving any child or children who shall be living at the date of distribution shall belong to my said two sons in equal shares.

In the event of my said wife dying before my youngest son shall or would have attained the age of twenty-five years then the period of distribution with regard to this half of my residuary estate shall be delayed and such distribution shall not take place until my youngest son shall or would have attained the age of twenty-five years.

From the time the said Fannie Parker, Georgina Bogert, Edward R. Crombie, Ethel Butler, Jessie Butler, Charlotte Scougall, Belle Marks, Mona Wily or Thomas W. Butler receive their share of the principal under this my will the said annuities in their favour respectively shall no longer be paid to them.

16. If both my said sons shall die before the period of distribution to them as aforesaid and without lawful issue him or them surviving and not having disposed by will of the share of my estate to which they or the survivor of them are entitled the same shall be divided in the same way as is directed in reference to the other half.

There are other passages of the will which may be helpful in determining the matters involved, but it will be sufficient to refer to them as we proceed.

The pertinent facts are:

Herbert Carlyle Hammond, the testator, died on the 26th January, 1909. In his will, National Trust Company, Limited, was appointed executor and trustee.

He left him surviving his widow, Fannie Hammond, and his two sons, Frederick S. Hammond and Herbert R. Hammond.

The widow is still living.

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The youngest son, Herbert, attained the age of twenty-five on the 19th December, 1912.

As a consequence, and conformably to paragraph 14 of the will, the trustee then divided the net residue and remainder of the estate into two equal parts and one of these parts, subject to the other conditions and charges therein provided, was divided between the two sons.

The older son, Frederick, died on the 7th May, 1915. He left a will appointing National Trust Company, Limited, executor and bequeathing the whole of his estate to his wife, Kathleen Saunders. She has also died leaving a will. Her estate is now represented by National Trust Company Limited and by The Soldiers' Aid Commission of Ontario (under c. 40 of Statutes of Ontario, 12-13 Geo. V).

Herbert Hammond, the younger son, died on the 12th August, 1930. He left a will appointing The Royal Trust Company executor.

But, at a prior date, to wit, on the 30th April, 1922, and, therefore, while Herbert Hammond was still living, one of the beneficiaries named in paragraph 15 of the will, Jessie Butler, died without issue.

And the present submission is really concerned with the question: In the events that have happened, what becomes of the share of Jessie Butler?

The questions were submitted to the court in the following form:

1. Is the interest of the said Herbert R. Hammond, deceased, one of the residuary legatees of the said deceased, in the share of Jessie Butler deceased, also one of the residuary legatees of the said testator, now payable to the estate of the said Herbert R. Hammond, deceased, the period of distribution mentioned in said paragraph 15 of the Will of the Testator not yet having arrived?

2. Did Frederick S. Hammond, deceased, one the residuary legatees of the said testator, have a vested interest in the share of the said Jessie Butler now deceased, and if so is such interest now payable to the estate of the said Frederick S. Hammond, deceased?

3. If the interest of the said Herbert R. Hammond, deceased, and the interest of Frederick S. Hammond, deceased, if any, in the share of the said Jessie Butler, deceased, are now payable to their respective estates, on what basis should the assets constituting the one-half of the residuary estate of the said testator out of which such interests are payable be apportioned to effect such payments?

Kingstone J., before whom the motion was returned, held that, Jessie Butler having died without issue prior to the death of the widow, Fannie Hammond, neither son of the

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testator had, at their respective deaths, a vested interest in the share directed to be distributed to her; that the share did not pass to any other person under the will and it should be distributed as upon an intestacy. He adjudged accordingly.

The appeal is from that judgment, *per saltum,* pursuant to an order of the Court of Appeal for Ontario.

The learned judge of first instance based his decision on the rule "laid down in Williams on Executors, 11th Ed., p. 981" (now: 12th Edition, p. 795) and referred to our judgment in *Busch* v. *Eastern Trust Company* (1), where, applying the rule to the peculiar circumstances of that case, we held that the vesting was postponed until the time of distribution. But while, for wills as well as for other documents, there are no doubt recognized canons of construction, the cardinal principle—to which any rule is always subservient—is that effect shall be given to the testator's intention ascertainable from the actual language of the will. Indeed, the rule itself relied on by the learned judge, as stated in Sir Edward Vaughan Williams' treatise, contains the qualifying words: "unless, from particular circumstances, a contrary intention is to be collected."

In this case, the expressed language of the testator indicates plainly the intention that no part of the residuary estate should remain undisposed of; and, in particular, does it negative intestacy with regard to the share of Jessie Butler. Provision having been made for special bequests, the "rest, residue and remainder" of the estate is given to the executors and trustees in trust for the purposes defined in the will. Until certain events happen, the trustees are to pay fixed annuities to a number of named beneficiaries. On the death of the testator's wife, or when the "youngest son shall or would have attained the age of twenty-five years whichever event shall first happen," the trustees must divide the net residue and remainder into two equal parts. And, as already seen, upon the youngest son attaining the specified age, this division was actually made.

The testator then proceeds to declare who shall be the beneficiaries of each of the two equal parts of the residuary estate. For one part, they are to be his two sons, charged however with half the annuity payable to the widow. With

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

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regard to that one part, we do not think, upon the language of paragraph 14, any doubt could be entertained as to its immediate vesting in the two sons, subject to being divested in the event of certain contingencies which have not happened. It is unnecessary further to follow the possible incidence under the will of that part of the estate, in respect of which there is no controversy.

The disposition of the other part of the residuary estate is made in paragraph 15. That particular part is charged with the payment of one-half the annuity due to the widow and with all the other annuities and annual charges mentioned in the will. Upon the death of the testator's wife or when the youngest son "shall or would" have attained the age of twenty-five years, whichever event happens last, the trustees, "after making provision for the annuities continuing thereafter," are directed to make a distribution in equal shares between the beneficiaries. The beneficiaries who may then receive a share are certain named persons (or, alternatively, their children) and the two sons of the testator.

There is, however, a material difference between the language used to express the bequests to the named beneficiaries or to their surviving children and that used to express the bequest to the two sons. The named beneficiaries do not constitute a class. They are, each of them, independent legatees. The direction is that the distribution to any of them is to be made only "subject as hereinafter" and that is to say: only to "any of them" who shall not "predecease my said wife or die before the period of distribution with reference to this half of [the] residuary estate." So as to be entitled to a share, they must be "living at the time of such distribution." That is a condition precedent to the very existence of their right, for, if they be not living at the period mentioned, the share goes to their children then living and, if no children are then living, it belongs to the two sons. It is therefore apparent that the testator, in this case, meant to annex the time to the gift of the legacy and not merely to the payment of it. And, for the same reasons, the rights of the surviving children of the named beneficiaries stand upon exactly the same footing. But when it comes to deal with the legacy to the "two sons" the language of paragraph

15 is essentially different. It says that "the share * * * shall belong to my said two sons in equal shares." The words "shall belong" are words of gift, by force of which the "two sons" take independently of the direction to divide. Nor is that gift made to depend upon the contingency of the "two sons" having survived the period of distribution. On the contrary, the language rather contemplates that the sons' estates will share in the distribution, notwithstanding the possibility of their death prior to the specified period, for such is the natural and logical meaning to be given to the subparagraph prescribing that

> in the event of my said wife dying before my youngest son shall or would have attained the age of twenty-five years then the period of distribution * * * shall be delayed and such distribution shall not take place until my youngest son *shall* or *would* have attained the age of twenty-five years.

There would seem to be no possible ground under paragraph 15, upon which it could be said that the gift to the sons was not intended at least to vest immediately upon the death without issue of one of the named beneficiaries. And it would follow that, when Jessie Butler died without leaving children, the share which she "would have received if living at the time of distribution" vested, at least from the date of her death, in one of the sons, Herbert Hammond, who survived her.

We are, however, led to the view that the intention of the testator, as it appears from the particular words he has used in paragraph 15, was that the two sons, and not only the survivor, should get the benefit of the legacy. Such is, it seems to us, the fair and literal meaning of the expression: "shall belong to my said two sons in equal shares." That becomes still more apparent when the expression is compared with the language in other parts of the will. When he desired to make a bequest primarily vesting in both his sons, but subject to being divested in favour of the survivor, the testator was not lacking in words explicitly to indicate his intention. The last part of paragraph 14 and the whole of paragraph 16, already set out, afford illustrations of the almost meticulous manner in which he expresses his wish in such cases. Other examples are furnished by paragraph 18, where the testator first disposes of a house and lot on the southwest corner of Beverly and Cecil streets. The use thereof is given to Ethel Butler

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and to Jessie Butler for the purpose of personal occupation by them so long as they remain unmarried. If one should marry, "the right of occupation shall continue to the other and after each shall have either married or died I give and devise the said house and lot to my sons and the survivor of them." The testator then bequeaths an insurance policy on his life "to my sons in equal shares to be divided between them by my trustees when the distribution to them above mentioned takes place or if only one son living the whole shall go to him."

On the contrary, in paragraph 5, the testator is dealing with his residence in Toronto. He gives the use thereof to his wife and devises that, after her death, the residence "shall go to my two sons equally." Then, in paragraph 23, he refers again to it and he directs that his

> Trustees may at any time sell the residence owned by [him] at the time of [his] death with the consent of [his] wife and with her consent purchase another house to be held on the same terms and if she does not require another house to be purchased then she shall be entitled to the income received from the proceeds of the house sold during her life and these proceeds at her death shall go to my two sons equally.

Both in paragraphs 5 and 23 the unmistakable intention appears that the beneficial interest in the residence or in the proceeds of the sale thereof shall, immediately upon the death of the testator, vest finally and definitely in the two sons. We will be following the course of authority in holding that a similar expression used in paragraph 15 ought to carry a similar meaning and to be given the same effect.

Our interpretation is therefore that both sons took at once a vested interest "in equal shares" in the "other half of the residuary estate" disposed of in paragraph 15, charged with one-half of the annuity provided for the widow and with all the other annuities and annual charges there mentioned, subject to partial defeasance in favour of any of the named beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution.

On the other hand, we are unable to find in paragraph 15 any language indicating that, upon the death without issue of any of the named beneficiaries, the aliquot part which he would have received if living at the time stated, shall immediately become payable to the two sons. For the purpose of this discussion, we may disregard the pro-

vision postponing the division, in any event, until the youngest son "shall or would have attained the age of twenty-five years," for this condition no longer stands in the way. But there is nothing in the whole clause to alter the explicit intention of the testator that the distribution of that part of the estate shall take place only "upon the death of [his] said wife"; and, on the contrary, there is every indication that the trustee is not empowered to distribute until that time has arrived, if, indeed, it were possible to do so before the exact number of shares into which the division is to be made has been definitely ascertained.

We must give full effect to the testator's intention.

The appeal will be allowed and the judgment of the Supreme Court of Ontario set aside, costs of all parties throughout to be paid out of the estate, and to the Executor and Trustee on a solicitor and client basis. The questions will be answered as follows:

To Question No. 1: No.

To Question No. 2: Frederick S. Hammond, deceased, took a vested interest in the aliquot part of the residuary estate which Jessie Butler might have received under paragraph 15 of the will, if she had lived till the time therein fixed for distribution; but such interest is not "now payable."

Question No. 3 does not arise.

Appeal allowed.

Solicitors for the appellant: *Osler, Hoskin & Harcourt.*

Solicitors of National Trust Company Ltd., Executors of Herbert Carlyle Hammond Estate: *Aylesworth, Garden, Stuart & Thompson.*

Solicitors for The Soldiers' Aid Commission of Ontario: *C. M. Garvey & Company.*

Official Guardian: *McGregor Young.*

Solicitors for Mrs. Fannie Hammond: *Mulock, Milliken, Clark & Redman.*