1935

* June 17, 18.
* Oct. 1.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Accumulation of income—Postponed distribution of part of estate—Ownership of surplus income accumulated during period of postponement—Accumulations Act, R.S.O. 1927, c. 138, s. 1.

The testator died on January 26, 1909. Under directions in his will his executor, on an event which happened in 1912, divided the residue of his estate into two equal parts, one-half going (subject to charge) to the testator's two sons. As to the "other half" (the part now in question) the will directed that it be charged with certain annuities, etc., and that (subject to charges) upon the testator's wife's death (subject to delay in the event of her death before a certain time, which did not happen) it should be distributed in equal shares amongst nine named beneficiaries, with proviso that should any of them predecease her or die before the period of distribution (which will now, under the circumstances, be the testator's wife's death) the deceased beneficiary's child or children living at the date of such distribution should take the share which the parent would have received if then living; but if the deceased beneficiary left no child or children living at the date of distribution, the share should belong to the testator's two sons in equal shares. The testator's widow is still living. This Court has held ([1934] Can. S.C.R. 403) that, on construction of the will, the testator's two sons took, on the testator's death, a vested interest in equal shares in said "other half" (subject to charges), subject to partial defeasance in favour of any of said nine beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution. The present question was concerned with the disposal of the surplus income accumulated from the said "other half" of the residue of the estate.

Held: The accumulation of surplus income and of income thereon during the 21 years following the testator's death (the period limited for accumulation in such a case by the *Accumulations Act,* R.S.O. 1927, c. 138) is divisible as it existed on January 26, 1930 (the end of said

* PRESENT:—Duff C.J. and Lamont, Cannon and Crocket JJ. and Dysart J. *ad hoc.*

period of 21 years) in the same manner as the corpus, upon the death of the testator's widow; and the accumulation of surplus income and of income thereon after January 26, 1930, and until the testator's widow's death, is distributable as upon an intestacy. The clear implication from the will was that the testator meant to provide for the distribution, on his widow's death, of the fund as it should then stand, including all the accumulation of surplus income and of income thereon. This is also the implication which the law, failing any words indicating the testator's intention to exclude it, would itself annex to the gift, whether the gift be one which vests in the beneficiaries on the testator's death or an executory bequest vesting only on the testator's widow's death (*Wharton* v. *Masterman,* [1895] A.C. 186, at 198, 191-192; *Bective* v. *Hodgson,* 10 H. of L. Cas. 656, at 664-665). But as the accumulations have gone beyond the period allowed by the *Accumulations Act,* to that extent the direction for accumulation is void, so that that portion of the surplus income and the income thereon which has accumulated since January 26, 1930, is distributable as upon an intestacy (s. 1 of the Act).

Judgment of the Court of Appeal for Ontario, [1935] 1 D.L.R. 263, [1935] Ont. W.N. 1, affirmed.

APPEAL by the Soldiers' Aid Commission of Ontario from the judgment of the Court of Appeal for Ontario (1) affirming (subject to a variation in form) the judgment of Hope J. on an originating motion launched by the National Trust Co. Ltd., executor and trustee of the estate of Herbert Carlyle Hammond, deceased, for the determination of certain questions as to the disposal of the accumulation of surplus income arising under paragraph 15 of the will of the said deceased.

The 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 twenty-five 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" nine named beneficiaries, with provisions that should any of them

(1) [1935] 1 D.L.R. 263; [1935] Ont. W.N. 1.

1935

In re HAMMOND.

"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 the share which the parent * * * would have received if living at the time of such distribution" and that the share of any of said nine 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 twenty-five 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.

Certain questions arising under said par. 15 of the will were dealt with in a judgment of this Court delivered on March 6, 1934 (1), which held that, on construction of the will, the testator's two 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 nine beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution; and therefore, one of the said nine beneficiaries named in par. 15 having died without issue in 1922, the sons' estates took the benefit of the aliquot part of the residuary estate which that deceased beneficiary would have received under par. 15 had she lived until the time therein fixed for distribution; but that that aliquot part was not payable until the testator's widow's death.

By *The Soldiers' Aid Commission Amendment Act, 1922,* 12-13 Geo. V, c. 40, it was enacted that the Soldiers' Aid

(1) [1934] Can. S.C.R. 403.

Commission of Ontario, the present appellant, should be the beneficiary as to one-half of the residue of the estate of Kathleen Saunders Hammond, who was the widow of, and the sole beneficiary under the will of, Frederick S. Hammond, the older son of the said Herbert Carlyle Hammond, deceased.

The Soldiers' Aid Commission of Ontario, the present appellant, contended that the intermediate income of the "other half" (of the residuary estate) disposed of in par. 15 (subject to charges there mentioned) belongs to those in whom the fund is vested, up to and until the defeasance happens, and hence the accumulation of surplus income of this "other half" belongs to the estates of the testator's two deceased sons in equal shares. Alternatively it contended that the testator did not dispose by his will of the surplus income arising out of that part of the residue of his estate dealt with by said par. 15, and that he died intestate as to such surplus income; which would mean that the surplus income would be divided into three equal parts amongst the testator's widow and the estates of the two sons.

The Court of Appeal held that all the accumulation of surplus income and of income thereon in respect of the fund disposed of by par. 15 of the will during the period of 21 years following the testator's death, to wit, from January 26, 1909, until January 26, 1930, is divisible as it exists on January 26, 1930, in the same manner as the corpus of the said fund upon the arrival of the period of distribution, which, in the events that have happened, is upon the death of the testator's widow; and that all accumulations of surplus income and of income thereon in respect of the said fund, after January 26, 1930, and until the death of the testator's widow, is distributable as upon an intestacy.

C. M. Garvey K.C. for the appellant.

G. M. Huycke for respondent the Royal Trust Co., executor of H. R. Hammond estate.

W. Lawr K.C. for respondents, Fannie Parker and others.

McGregor Young K.C. (Official Guardian) for infant respondents.

1935

In re HAMMOND.

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

W. Judson for respondent National Trust Co. Ltd., executor of H. C. Hammond estate.

The judgment of the court was delivered by

CROCKET, J.—This appeal has to do entirely with the disposal of the surplus income which has accumulated from the second half of the residue of the estate of the above named testator since his death on January 26, 1909, and which it is stated now amounts to approximately $600,000.

The testator appointed The National Trust Co., Ltd., to be the executors and trustees of his will, and, after directing payment of his debts, funeral and testatmentary expenses, and making several specific devises and bequests, devised and bequeathed all the rest, residue and remainder of his estate to his executors and trustees in trust "to realize such portions thereof from time to time as it may be necessary to realize." He then directed his trustees out of the income and profits of his estate to pay annuities of $2,000 and $12,000 to his mother and to his wife in quarterly instalments during their respective lives, and annuities of $1,000 each to his two sons until the younger of them should attain the age of 25 years, and life annuities in quarterly instalments also to fifteen named friends, as well as $7,000 per annum to the National Trust Co. with a direction to pay that sum quarterly or so much thereof as may be required for the payment of sums mentioned in a written memorandum addressed to them relating to the latter bequest. Authority was given to his executors that, if his estate should not realize sufficient profits or income to pay the charges and annuities set forth in the will, to supplement the same out of the principal so that during each quarter the full bequests specified should be received by each party entitled thereto. He authorized his trustees to advance to each of his sons out of the principal of his estate, if they thought it wise to do so after they respectively should attain majority and before the time of distribution, in addition to the annual payments of $1,000, a sum to the amount of $20,000 each. Then by paragraph 14 he directed, "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," to "divide the net residue and remainder of my estate into two equal parts," and that one of these equal parts should be equally divided between his two sons subject to the payment of one-half of the $12,000 annuity to their mother during her life, and with a provision that should either die before the period of distribution and without having disposed of his share by his last will and leaving lawful issue such share should devolve on such issue, otherwise that it should go to the survivor. The other half of the residuary estate he directed, by paragraph 15, should be charged with the payment to his wife of one-half of the $12,000 annuity given to his wife, and with all the other annuities and annual charges previously mentioned, and that upon the death of his wife this other half of his residuary estate, subject to all the existing annuities or annual charges above mentioned and after making provision for the said annuities continuing thereafter, should "be distributed in equal shares" amongst nine named beneficiaries, all of whom had already been named in paragraph 9 among the beneficiaries to whom annuities were there bequeathed, with a proviso that if any of them should predecease the testator's wife or die before the period of distribution with reference to that half of his residuary estate leaving a child or children surviving, such child or children living at the date of such distribution should take the deceased parent's share, but that the share of any of the nine named persons who should die before the period of distribution "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."

The younger son attained the age of 25 in 1912, whereupon the residue of the estate was divided into two equal parts, one of which, subject to the charges mentioned, was divided between the sons. No question arises as to this moiety of the residue. Both sons predeceased their mother, the testator's widow. The elder son died in 1915 and the younger in 1930. The former appointed the National Trust Co., Ltd., his executor and trustee, and devised and bequeathed all his estate, both real and personal, to his

1935

In re HAMMOND.

Crocket J.

wife. She died in 1919 and a year later a grant of letters of administration of her estate with the will annexed was made to the National Trust Co., Ltd., also. One half of the residue of her estate subsequently became vested in the Soldiers' Aid Commission of Ontario, the present appellant, under the terms of *The Soldiers' Aid Commission Amendment Act, 1922,* 12-13 Geo. V, (Ont.), cap. 40. Probate of the last will of the younger son was granted by the Supreme Court of British Columbia (in Probate) in 1930 to the respondent The Royal Trust Co.

The widow of the testator still survives, so that no distribution has yet been made of the second half of the residue of the testator's estate under paragraph 15 of his will.

While the younger son was still living, one of the beneficiaries named in paragraph 15 of the will, Jessie Butler, died without issue, and after the younger son's death in 1930 the Supreme Court of Ontario was moved on an originating notice to determine whether the interest of the deceased younger son in Miss Butler's share of the second half of the testator's residuary estate was then payable to the deceased younger son's estate, and whether the other deceased son had a vested interest in the share of the said Jessie Butler which was then payable to his estate. These questions came before this Court in November, 1933, on a direct appeal by consent of all parties from the judgment of Kingstone, J., on the originating notice, wherein this Court unanimously held that both sons took upon the death of the testator a vested interest in equal shares in the second half of the residuary estate disposed of in paragraph 15, charged with one half of the annuity provided for the widow and with all other annuities and annual charges there mentioned, subject to partial defeasance in favour of any of the named beneficiaries (or, alternatively, their issue) at the time fixed for distribution, but that such interests were not then payable to their respective estates. See judgment of Rinfret, J., in *In Re Hammond* (1). While the latter case was still pending, the National Trust Co. launched a further motion to determine the ownership of the surplus income which had accumu-

(1) [1934] Can. S.C.R. 403, at 412 and 413.

lated on the fund dealt with by paragraph 15 of the will. The questions submitted to the court were as follows:—

1. Does the surplus income of the other half of the residuary estate of the testator mentioned in paragraph 15 of his will fall into and form part of such other half of such residuary estate, and if not, does it pass as on an intestacy?

2. If such surplus income falls into and forms part of such other half of such residuary estate then, in view of the provisions of the *Accumulations Act*, R.S.O. c. 138, what limitation, if any, is there as to the period during which such surplus income falls into and forms part of such other half of such residuary estate and if there be any such limitation, does the surplus income accumulating thereafter pass as on an intestacy?

3. If there be any surplus income which falls into and forms part of such other half of such residuary estate, then does the interest on such surplus income fall into and form part of such other half of such residuary estate, or does such interest pass as on an intestacy, and from what date does such interest accrue?

Hope, J., held upon these questions that the accumulation of income during the 21-year period following the testator's death—the period limited for accumulation of rents and profits in such a case, by the *Accumulations Act* (cap. 138, R.S. Ont.)—became part of the second half of the residue disposed of by paragraph 15 as construed by this Court, and that the accumulation of income after the expiration of the 21-year period should pass as on an intestacy.

On appeal by The Soldiers' Aid Commission, the Court of Appeal held that Mr. Justice Hope's judgment was right and affirmed the same subject to a variation in form. The formal judgment of the Appeal Court declared that all the accumulation of surplus income and of income thereon in respect of the fund disposed of by paragraph 15 of the said will during the period of twenty-one years following the death of the testator, viz., from January 26, 1909, until January 26, 1930, is divisible as it exists on the last mentioned date in the same manner as the corpus of the said fund upon the arrival of the period of distribution, which, in the events that have happened, is upon the death of the widow, and, further, that all accumulations of surplus income and of income thereon in respect of the said fund after January 26, 1930, and until the death of the said widow, is distributable as upon an intestacy, viz., one-third to the widow and one-third to each of the estates of the two deceased sons.

Another of the nine beneficiaries named in paragraph 15, Belle Marks, died in 1911, leaving surviving three children,

1935
In re
HAMMOND.
Crocket J.

who are represented by counsel on this appeal together with the remaining seven beneficiaries named in the said paragraph. These all submit that the judgment of the Court of Appeal is right. The respondent, Fannie Hammond, the testator's widow, takes the same position. The Royal Trust Co., as the executor and trustee of the estate of the younger son, Herbert R. Hammond, contends that the judgment of the Court of Appeal is correct with respect to the surplus income and income thereon which has accumulated from and after January 26, 1930, and with respect to the income which will hereafter accumulate thereon, and submits its rights to this Court as to the disposition of the surplus income which has accumulated in the 21-year period from the death of the testator, viz., January 26, 1909, to January 26, 1930.

As previously pointed out, this Court has already decided that the testator's two sons upon the death of the testator took a vested interest in the second half of the residuary estate disposed of in paragraph 15 of the will, subject to partial defeasance. Whether or not the gift to the nine beneficiaries named, or their issue, who should be living at the time of the death of the testator's widow, constituted an executory bequest which should not vest in any of them until the death of the widow, we have no doubt, from the language used, that the testator meant to provide for the distribution at that time of the entire second half of the residue of his estate as it should then stand, including all the accumulation of surplus income and of income thereon. In the absence of any specific direction to that effect, that is, we think, the clear implication to be gathered from the entire will. It is the implication as well which the law, failing any words indicating an intention on the part of the testator to exclude it, would itself annex to the gift, whether the gift be one which vests in the beneficiaries on the testator's death or an executory bequest vesting only on the death of the testator's widow. As pointed out by Mr. Justice Middleton in his reasons for judgment, Lord Davey in *Wharton* v. *Masterman* (1), stated the law as follows:—

> When there is no express trust declared of the income of a trust fund, it follows the destination of, and is an accretion to, the fund from which it is derived (unless there be words excluding that implication).

(1) [1895] A.C. 186, at 198.

And, applying it to the case then under consideration, added:—

But the source of the income in question is the investments of the surplus income; so that, even if it be not impliedly given by force of the term "accumulations," it would go in the same way as the investments of the surplus income, i.e., to the charities.

In the same case, Lord Chancellor Herschell used these words (1):—

It is true that there is no provision for the investment of the income derived from the accumulation of the surplus income, unless it be deduced from the use of the word "accumulation" in the clause which precedes the ultimate trust; but, whether this be so or not, I think the income arising from the investment of surplus income must, in the absence of any direction to the contrary, follow the destination of the investments from which it results.

Mr. Justice Middleton also quotes a dictum of Lord Chancellor Westbury in *Bective* v. *Hodgson* (2), treating of the distinction between executory devises of land and executory bequests of personal estate, in which he refers to "rules which have been very long established" as to each. The rule of law regarding executory devises of real estate, he says,

has no application to bequests of personal estate. Consequently, if by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period which the law allows for accumulation, be accumulated and added to the principal. Subject to the prohibition against accumulation, the ownership both of the principal and interest of the personal estate so bequeathed, may remain in suspense until the executory bequest takes effect, provided it be so given as that it must vest within the time allowed by the rule against perpetuities. In the case of personal estate, the policy of the law does not require that there should always be a representative of the beneficial ownership.

These pronouncements, in our view, settle the question as to the surplus income of the second half of the residuary estate falling into and forming part of that half of the residuary estate disposed of by paragraph 15 of the will, as propounded by interrogatory no. 1.

In the events which have happened and in the circumstances which now exist, however, the accumulations from the second half of the residuary estate have gone beyond the period allowed by the *Accumulations Act* of Ontario, i.e., beyond twenty-one years following the death of the

(1) [1895] A.C., at 191-192.

(2) (1864) 10 H. of L. cases, 656, at 664-665.

1935

In re HAMMOND.

Crocket J.

testator. To that extent, therefore, the direction for accumulation is void, so that that portion of the surplus income and the interest thereon, which has accumulated since January 26, 1930, is distributable as if the testator had died intestate in respect thereof. Such we think is the effect of that Act, which provides by s. 1 (1) that:—

> No person shall, by any deed, surrender, will, codicil, or otherwise howsoever, settle or *dispose* of any real or personal property so that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer than one of the following terms:—
>
> (One of these terms is, "(*b*) for twenty-one years from the death of the grantor or testator");

and by s. 1 (3) that:—

> Where an accumulation is directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, *so long as the same shall be directed to be accumulated contrary to the provisions of this Act,* go to and be received by such person as would have been entitled thereto, if such accumulation had not been directed.

The testator having, by virtue of these provisions of the *Accumulations Act,* died intestate in respect of all income accumulating after the lapse of twenty-one years following his death, it follows that such income is now divisible under the *Devolution of Estates Act* between his widow and the estates of his two deceased sons, who were at the time of his death the testator's next of kin and in whom as such, together with his widow, the inchoate right to such income, when it should accumulate, then vested—one-third thereof to the widow and one-third to each of the estates of the said two deceased sons. This, we take it, is the effect of the judgment of the Appeal Court as to all the accumulations of surplus income and the income thereon which have accrued since January 26, 1930.

The appeal should be dismissed and the costs of appeal of all parties, except the appellant, paid out of the estate of Herbert Carlyle Hammond, those of the executor and trustee of the said estate being taxed as between solicitor and client.

Appeal dismissed.

Solicitors for the appellant: *C. M. Garvey & Co.*

Solicitors for respondent, the Royal Trust Company, executor of estate of H. R. Hammond, deceased: *Osler, Hoskin & Harcourt.*

Solicitor for respondents Fannie Parker and others: *Waldon Lawr.*

Solicitor for infant respondents: *McGregor Young (Official Guardian).*

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

Solicitors for respondent, the National Trust Co., Ltd., executor of the estate of H. C. Hammond, deceased: *Aylesworth, Garden, Stuart & Thompson.*