1953

*Mar. 4, 5, 6
*May 8

IN RE FASKEN

DAVID FASKEN Jr. ..... APPELLANT;

AND

BELLE FASKEN and other collaterals, INEZ FASKEN, Administratix of the Estate of Alice Fasken, deceased, and Executrix of the Estate of Robert Fasken, deceased, THE OFFICIAL GUARDIAN, and the EXECUTORS and TRUSTEES of the last Will of David Fasken, deceased. ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Accumulations—Direction that accumulated income of Trust Fund be distributed in accordance with Ontario law relating to distribution of personalty upon an intestacy, among next-of-kin to be ascertained at date of distribution—Whether lineal descendant "next-of-kin"—The Devolution of Estates Act, R.S.O., 1950, c. 103, s. 29.

Testator by his will directed that the residue of his estate be set up as a trust fund from the income of which a specified sum was to be paid his son R. annually for life, all income not so required to be capitalized. Upon the son's death the fund was to be divided into as many shares as there should be children surviving him or issue of such children living at his death, one such share to be set aside "in respect of" each surviving child or deceased child leaving issue. No child or issue was to have any other or greater interest in any share than such as should be "expressly given" to him. Out of the net income each child to be of his share paid a certain sum per annum and each issue out of his share or equal part of a share the same sum. The excess income was to be added to the capital of the shares. On the death of any child of R. the son surviving him the share attributed to the child with any accumulated income was to go as he or she might by will direct and failing such direction, to the issue of such child in equal shares, and in default of issue the share with accumulated income to be added to the other shares, such additions to be treated as if they had at all times been a part of the original shares. Any part of the capital fund or accumulated income at any time undisposed of was to be distributed in accordance with the law of Ontario relating to the distribution of personal estate upon an intestacy among the next of kin to be ascertained at the date of such distribution. If any share or shares or any part of any share of the capital fund was not vested in some person or persons as the beneficial owner or owners at the expiration of 21 years less one day from the date of the death of the last survivor of the son and his child or children and the issue of such child or children born in the lifetime of the testator, such share or shares, part or parts, at the expiration of the said period,

*PRESENT: Kerwin, Rand, Kellock, Locke and Cartwright JJ.

was to vest in the person or persons who at that time was or were the person or persons for whose benefit the Trustees were authorized to make payments out of income derived from such share or shares or part or parts thereof. The Testator died in 1929 and upon the termination of the 21 year period from the date of his death s. 1 of *The Accumulations Act,* R.S.O. 1950, c. 4, applied to prevent further accumulation of income of the estate. The direction of the Court was sought as to whether the income so directed to be accumulated should go to a grandson David Fasken Jr., the sole surviving lineal descendant, or to the collateral next of kin of the testator.

Held: "Kin" or "kindred" is the equivalent of blood relationship; "next of kindred" defines its degree. Children are "next of kindred" in the ordinary sense of the words and in s. 29 of *The Devolution of Estates Act,* R.S.O. 1950, c. 103, children as kin, are dealt with first, and it is only if there are no children, meaning issue, that the word "next" is applied to the remaining kin. As held by the trial judge, the accumulated income should go to the grandson. *In re Natt; Walker* v. *Gammage* 37 Ch. D. 517, explained; *Withy v. Mangles* 8 E.R. 724; 10 C. & F. 215, followed.

Decision of the Court of Appeal [1952] O.R. 802, reversed.

APPEAL from the judgment of the Court of Appeal for Ontario (1), Roach J.A. dissenting, allowing an appeal from the judgment of Barlow J. (2) on a motion for the construction of the will of David Fasken, deceased.

J. D. Arnup, Q.C. and *R. A. Davies* for David Fasken Jr., appellant.

J. T. Weir for Inez Fasken as Administratrix of Estate of Alice Fasken, widow of the testator and as Executrix of the Estate of Robert Fasken, son of the testator, respondent.

H. P. Hill, Q.C. for the Official Guardian representing unborn issue of David Fasken Jr., respondent.

C. F. H. Carson, Q.C. and *Allan Findlay* for collaterals, respondents.

W. B. Williston and *J. W. Swackhamer* for executors and trustees, respondents.

The judgment of the Court was delivered by:—

RAND J.—This appeal raises a question of the interpretation of a will. The instrument was made in 1924 and the testator died in 1929. At the time of its making, the testator's only son, Robert, was alive and as well a grandchild, David Jr., the present appellant, then aged about eight years. The son died in 1934 and the testator's widow

(1) [1952] O.R. 802; 711. (2) [1952] O.W.N. 349.

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in 1935. The son had married twice. To his first wife was born David Jr., and to the second a daughter who died unmarried in 1945. David Jr. has not married. The testator was survived also by four brothers and four sisters. At the time these proceedings were commenced, two of the sisters and thirty-three nephews and nieces, the survivors of deceased brothers and sisters, were living. The widow of Robert is also alive and a party to the appeal, both as executrix of the will of her deceased husband and as administratrix of the estate of the testator's widow.

The estate of the testator was very substantial. The will directed the income from a capital sum to his wife during her lifetime, and from another sum to two children of a deceased cousin, with the capital to their issue and with cross-limitations over of both income and capital: power was given the trustees in their discretion to advance capital to either of the children upon entering business or marriage.

The remainder of the estate as a fund was dealt with as follows. From its income, trustees were to pay to the son, Robert, during his lifetime, annually, such a sum as with his income from other sources should make up $30,000; all income not so required was to be capitalized.

Upon the death of Robert, the trustees were to divide the fund with all accretions into as many equal shares as there should be children of Robert surviving him or issue of such children living at his death, and to set aside one such share "in respect of" each surviving child or deceased child so leaving issue. No child or issue was to have any other or greater interest in any share than such as should be "hereinafter expressly given" to him. Each share or portion in case there were more than one issue was to be subject to a spendthrift provision.

Each child was to be paid out of the net income from his share the sum of $10,000 per annum and each issue out of his share or equal part of a share the same sum. Income beyond such payments was to be added to the capital of the shares. Special provisions were made for discretionary payments to persons under the age of twenty-one. The trustees were empowered also to advance "to or for the benefit of any person then entitled to the benefit from the income of a share or part any sum or sums out of the capital of the share or part."

Clause 16 dealt with the capital in these terms:—

On the death of any child of my said son Robert who survives my said son, the share of the said child shall, with any accumulated income thereon, go in manner as he or she shall by will or by deed or other appointment in writing made in his or her lifetime direct, and failing any such direction, to the issue of such child, in equal shares if more than one such issue, and in default of issue the said share, with accumulated income, shall be added to the other shares into which the capital fund was divided as hereinbefore directed, and such additions to be treated for all purposes as if they had at all times been a part of the original share to which such addition is added.

Clause 17 made corresponding provision for the shares or parts attributed to the issue of deceased children of Robert.

Clauses 18 and 19 contemplated the possibilities of undisposed property:—

(18) In case the said capital fund or any part thereof, or any accumulated income thereon, is at any time undisposed of beneficially by the preceding provisions hereof, whatever is so undisposed of shall be distributed in accordance with the law of the Province of Ontario relating to the distribution of personal estate upon an intestacy, among my next-of-kin to be ascertained as of the date of such distribution.

(19) Notwithstanding anything hereinbefore contained, I expressly direct that if by the provisions hereinbefore contained in respect of the said capital fund, and the income derived therefrom, any share or shares or part or parts of any share or shares of the said capital fund, or any of the income thereof, is or are not vested in some person or persons as the beneficial owner or owners thereof at the expiration of twenty-one years less one day from the date of the death of the last survivor of my said son Robert, and his child and children, and the issue of such child and children born in my lifetime, any and every such share or shares, part or parts of any share or shares of the said capital fund, and any of the income thereof not so vested by the provisions hereinbefore contained, shall, at the expiration of the said period of twenty-one years less one day, immediately and absolutely vest in and be transferred by my Trustees to the person or persons who is or are respectively at that time the person or persons for whose benefit my Trustees are authorized to make payments out of income derived from such share or shares or part or parts of a share or shares (any income in my Trustees' hands to go with the share or part of a share from which it is derived), and I give and bequeath the same accordingly.

The income has greatly exceeded the amounts to be paid and as from December 2, 1950, being twenty-one years after the death of the testator, the Accumulations Act has intervened, and the immediate question is in whom the excess income is now vested. Barlow J. held in favour of the appellant as the "next-of-kin" of the testator as at the expiration of the twenty-one years; the Court of Appeal,

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with Roach J.A. dissenting, construed the expression "next-of-kin" in clause 18 to refer to collaterals and to exclude children, and in that situation the case comes before this Court.

It will be seen, at the outset, that the testator has endeavoured to confine both income and capital to descendants; clauses 16, 17 and 19 put this beyond doubt; and that fact becomes significant to the interpretation of clause 18.

The case for the respondents rests on the assumption that the connotation, as a compound word, of the verbal construct, "next-of-kin", which, as a word, is not recognized in any of the standard dictionaries, is to be identified with that of the expression "next of kindred" in s. 29 of the Devolution of Estates Act (R.S.O. 1950, C. 103) which, it is argued, does not include descendants. The language of the section is:—

> Except as otherwise provided in this Act the personal property of a person dying intestate shall be distributed as follows: one-third to the wife of the intestate and all the residue by equal portions among the children of the intestate and such persons as legally represent the children in case any of them have died in his lifetime and if there are no children or any legal representatives of them then two-thirds of the personal property shall be allotted to the wife, and the residue thereof shall be distributed equally to every of the next of kindred of the intestate who are of equal degree and those who legally represent them, and for the purpose of this section the father and the mother and the brothers and sisters of the intestate shall be deemed of equal degree;"

I find nothing whatever there which treats children as not being of kin or "next of kindred". "Kin" or "kindred" is the equivalent of blood relationship; "next of kindred" defines its degree. That children are not "next of kindred" in the ordinary sense of the words would be absurd and no one suggests it. That property left by a deceased person should pass to those of his blood is one of our deeply imbedded ideas; the question has been, to which of them? Naturally it would be to the nearest in blood, but not all in the same generation have always shared equally. In determining degrees we have followed the rule of the civil law, counting forward or back from the deceased. The limited meaning attributed to "next-of-kin" as derived from "next of kindred" results from the latter's position in the text of the section and its application to ascendants and

collaterals; but if, in construing the expression, the emphasis is placed, where it belongs, on the word "next", the appropriateness of its use in its plain meaning becomes apparent. As is seen, children, as kin, are dealt with first and it is only if there are no children, meaning issue, that the word "next" is applied to the remaining kin.

The Court of Appeal took *In re Natt; Walker* v. *Gammage,* (1) to establish the proposition that "next-of-kin" means next-of-kin other than lineal descendants. The point raised there before North J. was whether an undisposed share of the residue should be divided among four grandchildren *per stirpes* or *per capita.* The two children of the testator had died, and it was argued that the language of the section of the English statute,

> and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.

which has its counterpart in the latter part of s. 29 of the Ontario Act, was the applicable provision. The contention of counsel for three of the grandchildren, the descendants of one child, interpreted this language to read as if the words "including the descendants of deceased children", appeared after the word "intestate" and before the phrase "and their legal representatives". It was in relation to this contention that North J., at p. 521, says:—

> But I think the true construction is, that the words "next of kindred" mean next of kindred exclusive of issue of the intestate.

This, if I may say so, appears to be obvious from the fact that the language is introduced by the expression "if there is no child", that is, in the sense of issue. The decision went on the application of the earlier language that "if there is no wife, then all such personal property shall be distributed equally among the children", including descendants of children, and held the distribution to be *per stirpes.* That this was the only point decided is the view taken in the standard text books on the subject. The broader question seems to me to be concluded by *Withy* v. *Mangles,* (2) affirming the judgment of Lord Langdale, M.R., reported in 49 E.R. 377.

(1) [1888] 37 Ch. D. 517.

(2) [1843] 8 E.R. 724; 10 C. & F. 215.

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Clause 19, dealing with the possible application of the rule against perpetuities, is an overriding provision which must be read with clauses 16 and 17. It provides for the vesting of the capital while a beneficiary is in receipt of income. But it might be that all issue of the son should have died before the period mentioned without having appointed the capital.

The possible situations in which clause 18 would operate would include such a failure of issue and of appointment, and as well, the intervention of the Accumulations Act. In the former, the question raised would fall because of the absence of descendants. On the other hand, the limited period of accumulation must certainly have been present to the mind of the testator and, by the interpretation proposed, to exclude the children from this income when by clauses 16 and 17 the transfer to them of the capital by the trustees, either in their discretion or imperatively under clause 19, is provided for, involves a contradiction of the testator's clear intention.

Mr. Carson stresses the language of clause 13,

> But no child or issue of a deceased child or my said son shall have any other or greater interest in any share than such as is hereinafter *expressly given* to him or her.

Later in the same clause it is declared that,

> In every case, any right or interest *given in any share* shall be subject to the limitations of the clause hereinafter contained.

meaning the spendthrift provision.

The phrases "expressly given" and "given in any share" are intended primarily to rebut any implication that because, say, the income in whole or part of a share goes to a child or that the trustees have discretionary powers to advance any part of its capital, the share is intended thereby to be vested in the beneficiary although its immediate enjoyment is limited; the beneficiary is at any time to be entitled only to what the instrument clearly gives him and nothing more and the shares, in that sense, have so far a notional character. That purpose indicates the meaning to be attributed to "expressly given"; it means clearly given, and, as shown by the use of the word "given", makes the expression no stronger or weaker than if it had been

"really given". What the testator intended to make unmistakable was that there were to be no benefits by implication: except as to what was given, each share was to remain open.

There is nothing to show that "next-of-kin" has become a recognized locution signifying kin other than children, nor does the reference in clause 18 to the "law of the Province of Ontario" governing intestate estates supply it; and that clause, besides designating the beneficiaries, fixes the time for determining them: *Hutchison* v. *National Refuges for Homeless and Destitute Children* (1).

Since the language used, in its ordinary meaning, includes the testator's children, of whom the appellant is the sole representative, the onus is on those who seek to exclude him. Mr. Carson has left nothing unsaid in support of the view taken by the Appeal Court, but he has not raised a serious doubt in my mind of the soundness of Mr. Arnup's contention.

I would, therefore, allow the appeal and restore the order of Barlow J. All parties are entitled to costs in this Court and in the Court of Appeal out of the estate, those to the executors and trustees of the testator to be as between solicitor and client.

Appeal allowed.

Solicitors for the appellant: *Fraser, Beatty, Tucker, McIntosh & Stewart.*

Solicitors for the respondents: Belle Fasken et al: *Tilley, Carson, Morlock & McCrimmon.*

Solicitor for the Official Guardian: *P. D. Wilson.*

Solicitors for the respondents, the Executors and Trustees: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitor for Inez Fasken, respondent: *J. D. Arnup.*

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(1) [1920] A.C. 794.