THE MERCHANTS' BANK OF CANADA ..... } APPELLANTS; 1884

AND *Mar. 20.

THOMAS C. KEEFER, *et al* ..... RESPONDENTS. 1885

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *Jan. 12.

Will—Construction of—Contingent interest.

T. McK., a testator, having previously given all his estate, real and personal, to trustees in trust for his wife for life, or during her widowhood, made a devise, as follows:—"In trust, also, that at the death, or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot number 1, etc., which I hereby devise to him, his heirs, and assigns to and for his and their own use forever." The testator

*Present—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

1884

MERCHANTS' BANK OF CANADA v. KEEFER.

then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised," should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage all his personal property and estate remaining was to be equally divided among his children; providing always, that in the event of any child dying without issue before coming into possession "of his or her share of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue, if any, as shall have died leaving issue. The residuary clause was as follows:— "All other my lands, tenements, houses, hereditaments, and real estate," etc.

Held,—Sir W. J. Ritchie C.J. and Fournier J. dissenting, reversing the judgment of the court below, that the interest devised to Thomas was contingent upon his surviving his mother.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the decree of the Court of Chancery (2).

The clauses of the will bearing upon the points in issue as well as all the facts and circumstances giving rise to the action are fully stated in the judgments hereinafter given, and will be found also in the reports of the case in the courts below.

Robinson Q.C. and *Gormully* for appellants.

S. H. Blake Q.C. for respondents.

Black for respondent T. C. Keefer and *McIntyre* for the infants.

Sir W. J. RITCHIE C.J.—On the 8th of September, 1855, Thomas Mackay made his will whereby, after appointing his wife and his sons, Alexander, John, Charles and Thomas, executrix and executors thereof, with a provision in the event of his wife marrying again that she should cease to be executrix, he devised and bequeathed to his said executrix and executors in these words:—

All and singular the moneys, debts, stocks, bills, bonds, mortgages, debentures and other securities, goods, chattels and effects, lands,

(1) 9 Ont. App. R. 117. (2) 29 Gr. 162.

tenements and hereditaments whatsoever and wheresoever situate, and all interest in the same of which I shall die possessed, and to which I shall be in any way entitled at the time of my death, in trust, for the several uses and purposes hereinafter mentioned and declared, and to be held and applied and disposed of as hereinafter mentioned and appointed; that is to say:

First.—For payment of debts, &c.

Secondly.—For payment of £50 to Bytown Protestant Hospital, &c.

Thirdly.—In the event of his wife surviving him, in trust for her maintenance and support so long as she shall live, and of his children so long as they shall live with their mother, &c., and the testator directed that his wife, so long as she lived and continued his widow, should have the full right to possess and manage the property and the profits, &c., thereof, for such purposes, and in the event of her marrying again then for the payment out of the rents, &c., to her of £500 annually, which annuity he charged on his said property and estate in lieu of dower.

Fourthly.—In trust also that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1, in the front concession on the Ottawa, of the township of Gloucester, in the county of Carleton, and Province of Canada, containing two hundred acres, more or less (see deed from Francis Saragues), which I hereby devise to him, his heirs and assigns, to and for his and their own use forever. And that my sons, Alexander, John, Charles and Thomas aforesaid, shall have and take all my other real estate in the township of Gloucester aforesaid, namely, lots Nos. 2, 3, 4 and 5, in the said front concession of said township (see deeds from Henry Munro, Gideon Olmstead and Clements Bradley; also deed from Government of lot No. 2), with all mills, houses and buildings thereon erected. Also ten acres of land in the city of Ottawa, in said county, being a part of lot letter "O" in said city (except the part sold to John McKinnon, Esquire), with all mills, houses and buildings thereon erected. Also Green Island, near the mouth of the Rideau river, in said county, with all mills, houses and buildings thereon erected. All which I hereby devise to my said sons, Alexander, John, Charles and Thomas, and to their heirs and assigns, to and for their own use forever, as tenants in common, subject nevertheless, to the payment of the legacies and annuities in and by this my will, bequeathed and made chargeable thereon.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

And that my daughters, Ann, Christina, Jessie and Elizabeth, shall have and take all my houses, lands, tenements and real estate in the city of Montreal, which I hereby devise to my said daughters, their heirs and assigns, to and for their own use forever as tenants in common.

And I hereby will and direct that all the said devises in this section of my will mentioned and devised, shall take effect upon, from and after the said death or marriage of my said wife, and not sooner.

And all his other real estate of every nature and description in trust to be sold, and the rents, &c., to be at the disposal of his wife so long as she should live and remain unmarried for the support of herself and his children, and after her death or marriage to be equally divided among his children with power of conveyance to his widow unmarried, and after her death to his eldest surviving son.

In trust also that at the death or marriage of my said wife, as aforesaid, all my personal property and estate then remaining shall be equally divided among my said children, either in money or in kind as to my said executors shall seem best, allowing one year for the making of such distribution.

Provided always, and I hereby will and bequeath, that in the event of any of my said children dying without legal issue before coming into possession of his or her share or shares of the property or money hereby devised or bequeathed, then the share or shares of such child or children to go to and be equally divided among the survivors, and the legal issue of such, if any, as shall have died leaving issue.

And in the event of any of my said children dying before coming into possession as aforesaid, and leaving legal issue, such issue in every case to take the portion or share which would have belonged to his, her, or their father or mother if then living. And to the husband or wife of each of my said children, who shall after marriage, and before coming into possession as aforesaid, die without issue, leaving such husband or wife, I give and bequeath the sum of fifty pounds annually, as an annuity payable out of, and chargeable upon, the share which would have belonged to such child if living.

The question at issue in this case arises under that part of the fourth devise, viz:—

In trust, also, that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1, in the front concession, &c., which I hereby devise to him, his heirs and assigns, to and for his or their own use forever.

The appellants contending that this is a contingent

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

gift to Thomas, depending on his being alive at the death of his mother, the question then simply is: Did Thomas take a vested or contingent remainder?

The courts unquestionably favor a construction which gives a vested interest in property where there is ambiguity or doubt, and the intention that the interest shall be contingent is not clear, but not to defeat the clear intention of the testator.

Chief Justice Best puts this clearly in *Duffield* v. *Duffield* (1):

> The rights of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience and sometimes of injury to them. If the parents attaining a certain age be a condition precedent to the vesting estates, by the death of their parents before they are of that age children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to.
>
> In consideration of these circumstances the judges, from the earliest times, were always inclined to decide that estates devised were vested; and it has long been an established rule for the guidance of the courts at Westminster in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession.

In considering the whole scheme, or rather scope and object of this will, I think it very clear that the testator intended to dispose of the whole of his property, and did not contemplate any contingency whereby there should be an intestacy as to any part of it. I can discover nothing in this will to indicate that the testator intended or contemplated that any of his real estate, specifically devised, should in any event remain to be dealt with as undisposed of, as appellants contend. The testator after providing for his wife, then specifically devises certain portions of his real estate among his

(1) 1 Dow. & C. 309.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

children, male and female; these portions subject to the interest of the wife, I think he intended to dispose of absolutely to the objects of his bounty.

Much stress is laid by the appellants on the words in the devise to Thomas, "if he be then living," which are not to be found in the devises to the other sons and the daughters, but I think these words in substance amount to no more than the language of the paragraph which immediately follows the devises, viz.:—

> And I hereby will and direct that all the said devises in this section of my will mentioned and devised (which clearly includes the devise to Thomas) shall take effect upon, from and after the said death or marriage of my said wife and not sooner.

Which completes, in my opinion, the disposition of the will in reference to these specific devises.

I may here notice that it has been strongly urged, and the argument appears to have influenced the minds of the Chancellor and Mr. Justice Patterson, that the clause following the residuary bequest, which I have already quoted, providing that in the event of any one or more of the children dying without legal issue before coming into possession of her or their share, &c., "the share or shares of such child or children should go to and be equally divided among the survivors and the legal issue of such, if any, as should have died, leaving issue," and the other providing for the event of any of the children dying before coming into possession aforesaid and leaving legal issue, show an intent that the interest taken by Thomas in lot No. 1 was contigent, but I entirely agree with Chief Justice Hagarty and Justices Burton and Ferguson, that these paragraphs refer to the personal property and estate to be divided in money or kind, disposed of in the residuary clause and bequest, and have no reference whatever to the specific devises of the real estate to the sons and daughters which are to them respectively and their heirs and assigns, whereas disposition of the personalty refers only to the legal issue of such as shall have died leaving issue.

The last clause relating to these specific devises appears to me to show very conclusively that all these specific devises were intended by the testator to be placed on one and the same footing, though the words "if he be then living" are not used in connection with the other devises. Without these words then and without this paragraph what is the devise to Thomas? It is unquestionably a devise to Thomas, his heirs and assigns to and for his and their own use forever. Now *in re Duke Hannah* v. *Duke* (1) it is said by James L. J. :—

There is a strong, or I may say a stringent, rule, that if we have words clearly making a vested gift, clear words are required to convert it into a contingent one.

Mr. Jarman thus states this general rule (2) :—

Where a testator creates a particular estate, and then goes on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting.

Then have the words of futurity been inserted for the purpose of postponing the vesting or do they refer simply to the deferred possession or enjoyment ?

As to this Mr. Jarman again says (3) :—

The result of authorities is thus summed up by Sir W. P. Wood in *Maddison* v. *Chapman* (4): The true way of testing limitations of that nature is this: Can the words, which in form import contingency, be read as equivalent to "subject to the interests previously limited?"

Vice-Chancellor Wood's language is thus :—

The class of authorities of which *Pearsall* v. *Simpson* (5) may be taken as the leading case, merely establish that where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent upon a condition essential to the determination of the interests previously limited, the court is at liberty to hold, that, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests so previously limited.

(1) 16 Ch. D. 114.
(2) 1 vol. p. 800.
(3) Vol. 1 p. 809.
(4) 4 K. & J. 719.
(5) 15 Ves. 29.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

I apprehend the true way of testing limitations of that nature is this: Can the words which in form import contingency be read as equivalent to "subject to the interests previously limited?"

Take the simplest case: A limitation to A. for life, remainder to B. for life, and upon the decease of B., "if A. be dead," then to C. in fee. There the limitation to C. is apparently made contingent upon the event of A.'s dying in the life time of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, subject to A.'s life interest (if any) to C. in fee.

Theobald on Wills (1).

But in the case of successive limitations "where there is a limitation over which, though expressed in the form of a contingent limitation is, in fact, dependent on a condition essential to the determination of the interests previously limited, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests previously limited."

Maddison v. *Chapman* (2); *Webb* v. *Hearing* (3); *Pearsall* v. *Simpson* (4); *Franks* v. *Price* (5); *Chellew* v. *Martin* (6); *Edgeworth* v. *Edgeworth* (7).

I think the testator intended this to be an immediate absolute devise or gift to Thomas and his heirs, an absolute disposition of the property subject to the wife's interest, and that the words which accompany this gift, though apparently importing a contingency indicate no more than the determination of the prior estate, no more than certain circumstances on the happening of which the party entitled shall have and take the possession and enjoyment, that is to say, on the termination of the interest previously secured to the wife, and so was a vested estate in fee in Thomas and his heirs subject to the executory trust to be executed for the benefit of the wife during her widowhood or life, and not a condition that the devisee should survive the wife, but was intended only to mark the period at which the devise

(1) 2 Ed. p. 405.
(2) 4 K. & J. 709, 719; 3 DeG. & J. 536.
(3) Cro. Jac. 415.
(4) 15 Ves. 29.
(5) 5 Bing. N. C. 37.
(6) 21 W. R. 671.
(7) L. R. 4 H. L. 35.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

should take effect in possession and the devisee should have the full benefit of the devise and be put in complete possession, that possession being necessarily deferred on account of the antecedent benefit given to the wife. The devise to Thomas being in succession to the interest devised for the benefit of the wife, the gift to both were alike immediate, though Thomas and his heirs could not have the benefit until after the death or marriage of the wife, and therefore Thomas took a remainder in fee, which having vested immediately on the testator's death was not defeated by his own death in the life time of his wife.

In *Goodtitle* v. *Whitby* (1) Lord Mansfield :—

He said he would lay down a rule or two of construction, previously to giving his particular opinion on this case. 1st. Wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property. This rule is laid down in Matthew Manning's case (2).

2nd. Where an absolute property is given, and a particular interest is given, in the mean time, as "until the devisee shall come of age, &c., and when he shall come of age, &c., then to him, &c," the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainder—man is to take in possession.

* * * * *

Here, upon the reason of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it, in any event. Now suppose that this object of the testator's bounty marries and dies before his age of twenty-one, leaving children; could the testator intend in such an event to disinherit him? Certainly he could not. And as to the testator's heir-at-law, his heir-at-law is only to take what the testator has not devised away from him.

In the leading case of *Hanson* v. *Graham* (3), Sir Wm. Grant says :—

The only cases alluded to in *May* v. *Wood* (4) are cases of real estate, beginning with Boraston's case (5), and ending with *Doe Wheedon* v. *Lea* (6). The principle of them all is stated by Lord Mansfield in *Goodlittle* v. *Whitty* (1), &c.

(1) 1 Burr. 228.
(2) 8 Co. 951 b.
(3) 6 Ves. 246.
(4) 3 Bro. C. C. 471.
(5) 3 Co. 16.
(6) 3 T. R. 41.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

He then quotes the rules laid down—the first and second—as above, and after making observations on that case and Boraston's case, he says :—

So in *Manfield* v. *Dugard* (1) it was clear, the testator meant to postpone the enjoyment of the son for the sake of the antecedent benefit of the wife; but he clearly meant a vested remainder, not contingent, whether the son should take any benefit at all in the estate. But that makes a very different question from this, whether where there is no precedent estate, no purpose whatsoever, for which the enjoyment was to be postponed, you shall say the enjoyment only is to be postponed.

So in the case before us there was a reason for postponing the possession, and, in my opinion, it is very clear that nothing but the enjoyment was intended to be postponed.

Mr. Washburn (2) says :—

An estate is vested in interest when there is a present fixed right of future enjoyment.

And he quotes from Fearne (3) as follows :—

The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.

So that when the testator died leaving Thomas him surviving, Thomas had the then present absolute right and capacity to have and take the estate the instant the prior estate should determine, and though he should die and not have the enjoyment, as he did in fact, it would descend to his heirs who would take in his place.

I cannot bring my mind to the conclusion that when the testator used these words, "which I hereby devise to him, his heirs and assigns, to and for his and their own use forever" he ever intended or contemplated that if his son died before his mother, leaving children his heirs, that such children should not enjoy the property, because their father happened to die before the death or second marriage of his mother, and that under

(1) 1 Eq. Ca. Abr. 195. (2) Vol. 2 p. 548, Real Property.
(3) Contingent Remainders 216.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

such circumstances the testator as to his property would have died intestate.

Nor does the limitation in this case contain any incident but what is essential to the determination of the estate previously limited.

Ritchie C.J.

Lush J. in *Leadbeater* v. *Cross* (1) delivering the judgment of the court says:—

No doubt the life estate in question is limited in terms of contingency, terms which, literally construed, make the happening of the event, namely, the survivorship of the tenants for life, a condition precedent to the gift. But we are to look not at the form but the substance of the devise.

One of the rules of construction laid down in Powell on Devises (2) is:—

Where an estate in remainder is limited in terms of contingency on the happening of certain events, and the events described are precisely those on which (the preceding estates having determined) it will fall into possession, it is construed to be, not a contingent gift conditioned to take effect on these events, but a devise immediately vested, the possession of which is necessarily dependent on the events in question.

And I think we may apply to the case before us the words of the learned judge:—

This rule, which is deduced by the learned author from the cases which he quotes, could not have been more accurately framed to meet this case if it had been framed for the purpose, and it is one which commends itself to common sense.

Here then is an absolute gift to a person and his heirs "which I hereby devise to him and his heirs and assigns, to and for his and their own use forever," with words accompanying the gift apparently importing a contingency or contingencies, but in reality only indicating certain circumstances, viz: "the death or the marriage of the widow," on the happening of either of which the estate vested by the gift should take effect in possession and enjoyment by the devisee or his heirs or assigns, and though the death of the devisee before the happening of either of such events prevented his personal enjoyment of the property, that enjoyment and

(1) 2 Q. B. D. 21. (2) 3 Ed. by Jarman, vol. 2 p. 217.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

possession on the happening of the event passed to the heirs or assigns of the devisee, who were as much the object of the testator's bounty as the devisee himself—a result in accordance with the express intention of the testator—rather than to the heirs of the testator himself,—a result I can find no indication in the will that the testator contemplated.

Therefore I construe this devise as if the testator had said, "I hereby devise lot No. 1 to Thomas and his heirs and assigns, to and for his and their own use forever, which he shall have and take (that is the possession and occupation) at the death or second marriage of my wife, if he be then living," and is no more or less than is contained in the paragraph which says, "the devises shall take effect after and upon the death or marriage of my said wife, but not sooner." That is, in my opinion, shall take effect in possession, inasmuch as having devised for the benefit of the wife they could not take effect sooner. In other words, the intention of the testator was that the devise to Thomas and his heirs should confer a vested remainder, to take effect absolutely in possession on the marriage or decease of the widow—either of which events removing the prior estate out of the way—in effect, a devise of the whole estate *instanter* to Thomas and his heirs, with the exception of a partial interest carved out for the benefit of the widow. With respect to words of apparent contingency they are referable to the possession merely though the disposition of the ulterior interest should be, as Mr. Jarman expresses it, "in terms which literally "construed would seem to make such ulterior interest "depend on the fact of the prior interest taking effect; "in such cases it is considered that the testator merely "uses the expressions of apparent contingency as "descriptive of the state of events under which he "conceives the ulterior gift will fall into possession"; the object of the testator, apparently, being to make

it clear beyond all doubt that though devised absolutely the interest in the wife was not to be interfered with —that the devises shall be clearly understood to be subject to the life interest or until marriage of the wife.

Having given the estate to Thomas and his heirs, it never could have been the intention of the testator to die intestate as to such estate, if Thomas happened to die before the marriage or death of the wife. Had the testator intended in the event of Thomas so dying to take the estate away from his children or heirs, I think we should have found such intention clearly expressed to give it away from such children or heirs, or a devise or limitation over in case he so died. In this case there is, in my opinion, no residuary devise as to this property, and the reason seems to me obvious, because the testator intended to, and I think must have supposed he had, disposed of the fee simple. I cannot think the testator intended to create an intestacy, but on the contrary he intended that the property should go to his son Thomas and his heirs, and he or they should enter into the possession and enjoyment thereof on the decease or marriage of his wife.

And therefore I think it may be said in this case as Lord Westbury in *Edgeworth* v. *Edgeworth* (1) says :—

* * * * *

Upon the whole, therefore, we should unquestionably disturb that conclusion which is to be collected from the words of the will. We should depart from the settled canons of construction—that you are not to construe words as importing a condition if they are fairly capable of another interpretation—and we should entirely defeat the intention of this testator, which plainly was to make a complete disposition of the property, if we adopted a conclusion which would leave that intention baffled, and end in having it declared that there was an intestacy.

I am, therefore, of opinion that the appeal should be dismissed.

STRONG J.—The only question argued on this appeal was as to the construction of a particular devise

(1) L. R. 4 H. L. 41.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

contained in the will of the Hon. Thos. Mackay, whereby the testator gave a certain parcel of land to one of his sons, Thomas Mackay the younger. The devise in question is in the words following :—

In trust also that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1 on the first concession of the Ottawa, of the Township of Gloucester, in the County of Carleton, and Province of Canada, containing two hundred acres more or less, which I hereby devise to him, his heirs and assigns, to and for his and their own use forever.

The testator had previously given all his real and personal estate to trustees in trust for his wife for life or during her widowhood. The question of construction which has been raised as to this devise to the testator's son, Thomas Mackay the younger, is as to whether it was vested or contingent. I have arrived at a conclusion differing altogether from that of the Court of Chancery, and of two of the four judges who heard the cause in the Court of Appeal, and whose opinions were that Thomas Mackay, the devisee, took a vested estate in remainder subject to the life estate of his mother, for I am of opinion that the proper construction was that adopted by the late Chief Justice of Ontario and Mr. Justice Patterson, viz. : That this devise was contingent on Thomas Mackay, the son, surviving his mother. It appears to me to be perfectly plain that the words, "if he be then living shall have and take," have reference to the vesting of the estate and not merely to enjoyment or possession. If the words at the end of the paragraph, "which I hereby devise to him, his heirs and assigns to and for his and their own use forever" had been omitted, there would have been no doubt or question of this. In that case the only words of gift would have been, "shall have and take" and the vesting must necessarily have depended on them alone. The added words of limitation are, however, supposed to make a difference. The answer to this is, I think, that which Mr. Justice Patterson has pointed out

namely, that the proper office of these words is to describe the quantity of the estate to be taken by the devisee, and that they can have no influence whatever on the question of the time of vesting. Again, as was forcibly argued by Mr. Gormully, if the words "if he be then living" are not construed as making the devise contingent they are redundant and useless, for the possession was already deferred until the death or second marriage of the testator's widow by the preceding provisions of the will. The authorities which go to show that, when the devise in remainder is to take effect upon the contingent determination of a prior estate, the estate in remainder vests notwithstanding the words of contingency, are not applicable, since the contingency here has no connection whatever with the life estate of the widow, which is only subject to a contingent determination in the event of her second marriage. Thomas Mackay surviving his mother is an event wholly independent of and collateral to the duration of the estate given to her. I do not think any reference to authorities in a case like the present, not depending on any general rule of construction, but merely on the interpretation of the language in which the testator has expressed himself in this particular instance, is called for or would be useful. Then, it does not appear to me to be a legitimate mode of arriving at the testator's intention to contrast this devise with those in favor of his other sons in which no reference is made to that now in question, and to speculate upon the testator's omission to give any reasons for making any distinctions between his son Thomas and his three other sons as regards the vesting of the estates which he gave to them in the properties respectively devised to them. Therefore, construing the words as they stand, I have no hesitation in determining that the proper conclusion is to hold the devise to Thomas Mackay a contingent

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

remainder. If, however, in any subsequent part of his will the testator had so referred to this devise as to explain his intention to be to give a vested estate to Thomas, that of course would have the effect of changing the *primâ facie* construction already indicated. I have, however, searched the will in vain for any such explanation. Nothing can be found in the slightest degree to alter or affect the terms of this gift. The words contained in the same numbered section of the will "and I hereby will and direct that all the said devises in this section of my will mentioned and devised shall take effect from and after the death of my said wife, and not sooner" are no more than an emphatic reiteration of the previous provisions that all the estates previously devised to the testator's sons, including Thomas, were to be subject to the life estate of his wife. Whether they related only to the possession or had reference to the vesting itself, and so cut down vested estates previously given to the three sons, other than Thomas, to contingent remainders, is a question we have not now to determine. If I had to determine it, however, I should have very little hesitation in holding, that they had not any such effect, and that the estates conferred upon the three sons, Alexander, John and Charles, by a previous clause of the will, and which I think were vested, remained unaffected by this provision. I may say in passing, though it is of no importance as regards the present decision, that the apparent uselessness of a construction which would attribute vested estates in remainder to the sons other than Thomas, liable to be divested if these sons should pre-decease their mother, and the effect of which would therefore be that during their mother's life these three sons took estates which they could not enjoy and which were not marketable, is no objection to the construction I adopt. If the language of the testator calls for it, as I think it does, all we have to do is to

interpret his words according to settled rules, and we are not to permit ourselves to violate his directions because they appear to us to lead to a disposition of his property which would be wanting in practical utility. But it is sufficient for the present purpose to say, that whether the passage I have extracted relates to possession or vesting, it in neither case contains anything inconsistent with the construction which holds the devise of lot No. 1 to Thomas Mackay to be a contingent remainder.

Then, the devise to Thomas being held to have been contingent, the subsequent disposition of this lot No. 1 in the event which happened of his death before his mother must depend upon the residuary clause beginning with the words "all other my lands, tenements, houses and hereditaments and real estate." Nothing can be better established than that a devise of other lands includes undisposed of interests in lands in which partial interests in contingent estates which have failed have been previously given, as upon a like principle a gift of "unsettled lands" includes unsettled interests in lands in which particular estates have been by the same will previously settled. Then it seems a totally inadmissible construction to say that the provisions containing the gift over in case of the death of any of the testator's children without issue, and the clause substituting the issue of children, who may die before the testator's widow, for their parent, does not apply to every devise and bequest, as well specific as residuary, contained in the will. The words of this clause, "in the event of any of my children "dying without legal issue before coming into possession "of his or her share or shares of the property or money "hereby devised or bequeathed them, the share or shares "of such child or children to go to and be equally divi- "ded among the survivors, and the legal issue of such, if "any, as shall have died leaving issue," are surely

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

sufficiently comprehensive to include all previous gifts, as well residuary as specific, contained in the will, unless we are to attribute to the word "hereby," which primarily must mean "by this will," some secondary meaning, which would be purely arbitrary since no context calls for it. I cannot conceive how the testator, desiring to make this clause applicable to every one of his dispositions, could have expressed himself more aptly and generally, and I am unable to follow the argument which seeks to confine this provision to the personal property mentioned in the next preceding clause. I am unable to accede to the proposition that the description of the property and the limitations show it to have been the testator's intention so to restrict it; the word "property" is comprehensive of lands and real estate, and is even more appropriate to describe such subjects than personalty, and there is nothing in the gift over to survivors, or the substitution of issue by the clause following it, inconsistent with a disposition of realty. Then, holding that this clause of survivorship applies to all the preceeding devises contained in the will, it requires no demonstration to show that the following clause,—that substituting issue for parents—also applies to the same subjects of disposition. It follows from this, that, even if we were to construe the devise to Thomas as vested instead of contingent, our judgment in the event, which has happened, of his death before his mother must be the same. I should add that I do not see anything in the substitutional clause inconsistent with holding that Thomas did not take a vested estate, whilst the other sons did take such an estate but one liable to be divested in the event of their deaths before their mother. This substitution of issue is consistent with both constructions.

Then, if this lot No. 1 formed part of the residuary lands, and these residuary lands were included in these

provisions as to survivorship and substitution, as I hold they were, the consequence, in the events which have happened, will be, that on the death of Elizabeth Keefer, although that occurred in the life time of her mother, her children who survived her took an absolute vested estate in remainder, not liable to failure on the death of any of the children before the tenant for life, but subject only to Mrs. Mackay's life estate, in one-fourth of this lot No. 4. I say they took it absolutely and not subject to failure in the event of death in Mrs. Mackay's life time; for, according to the most modern authorities, a substitutional gift to children of a parent's share is not subject by implication to a contingency to which the vesting or determination of the original share of the parent may have been subject (1). I have already said, that I do not regard the passage in the will, by which the testator directs that all the devises in the fourth section of his will shall take effect from and after the death or marriage of his wife, as importing contingency, but merely postponement of enjoyment; but even if they were to be held as referring to the vesting, I should still be of opinion that they had no reference to the substitutional gifts to the children, although these, also, are comprised in the fourth section of the will though in a subsequent part of it.

The words used by the testator are that "issue" are to take the portion or share which would have belonged to his, her or their father or mother if then living. It is clear upon authority as indeed would almost necessarily be implied without it, that the word "issue," thus used correlatively with "father or mother," means children (2).

(1) *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Re Turner*, 34 L. J. Ch. 660; *Masters* v. *Scales*, 13 Beav. 60; *Merrick's Trusts*, L. R. 1 Eq. 551.

(2) *Sibley* v. *Perry*, 7 Ves. 522; *Pruen* v. *Osborne*, 11 Simons 132; *Smith* v. *Horsfall*, 25 Bea. 628; *Stevenson* v. *Abingdon*, 31 Bea. 305; *McGregor* v. *McGregor*, 1 DeG. F. & J. 63; *Martin* v. *Holgate*, L. R. I. H. L. 175; *Bryden* v. *Willett*, L. R. 7 Eq. 472; *Heasman* v. *Pearse*, 7 Ch. App. 275.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

The substitution is, however, to be restricted to those children who survived their mother; children who predeceased her, if any, are to be excluded. This also depends on a well settled rule applicable to substitutional gifts of a class of children for parents who die before the happening of a particular event, and appears to proceed upon the principle that the testator is to be presumed not to have intended to substitute for a dead person one previously deceased (1).

The children of Mrs. Keefer of course take as amongst themselves as tenants in common and not as joint tenants by force of the statute law of Ontario, R.S.O. ch. 105, sec. 11.

I have not considered that portion of the decree which relates to the lands devised by the testator other than lot No. 1, as I understood at the argument, and gathered from the way in which the appeal was presented by the appellant's factum, that the decree of the Court of Chancery in this respect was not objected to. For the same reason I say nothing about the partition or an account against the trustee. If any directions are required on these heads I suppose the parties will speak to the minutes.

The costs of all parties as well in this court as in both of the courts below, should, I think, be paid out of the estate of the Hon. Thos. Mackay, the testator.

The following minutes will sufficiently indicate the proper variations to be made in the decree:—

Vary the decree of the Court of Chancery as follows: For the first paragraph substitute the following declaration.

1. This court doth declare that lot No. 1 in the 1st Concession, on the Ottawa, in the Township of Gloucester, in the County of Carleton, in the

(1) *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Re Turner*, 34 L. J. Ch. 660; *Merrick's Trusts*, L. R. I. Eq. 551; *Thompson* v. *Clive*, 23 Beav. 282; *Crause* v. *Cooper*, 1 J. & H. 207; *Bennett's Trusts*, 3 K. & J. 280; *Hurry* v. *Hurry*, L. R. 10 Eq. 346; *Hobgen* v. *Neale*, L. R. 11 Eq. 48; *Heasman* v. *Pearse*, 7 Ch. App. 275; *Haskett Smith's Trusts*, 26 W. R. 418.

will of the Hon. Thos. Mackay mentioned, was by the said will devised to the plaintiff in trust for the testator's son, Thomas Mackay the younger, for an estate in fee simple in remainder, subject to the life estate of the testator's widow, but that such estate in remainder was subject to the contingency of the said Thomas Mackay the younger surviving the said testator's widow, and that upon the death of the said Thomas Mackay the younger before his mother the said remainder failed.

And that for the second paragraph of the said decree there be substituted the following declaration :—

2. And this court doth further declare that at and upon the death of Elizabeth Keefer in the pleadings mentioned, the plaintiff became and was seized of one undivided fourth part of the said lot No. 1 in trust for the surviving children of the said Elizabeth Keefer in remainder as hereinafter mentioned, and that the said children of the said Elizabeth Keefer, who survived her, thereupon became absolutely entitled to an equitable estate in fee simple in remainder expectant on the death or second marriage of the said testator's widow in one undivided fourth part of the said lot No. 1, as tenants in common. And that upon the death of the said Anne Crichton Mackay, the widow of the said testator, the said plaintiff became seized of the remaining undivided three-fourth parts of the said lot No. 1 in trust for Annie Keefer, Christine Mackay and Jessie Clark, in the pleadings named, and the said Annie Keefer, Christine Mackay and Jessie Clark became absolutely entitled to an equitable estate in the said remaining three undivided fourth parts of lot No. 1 as tenants in common in fee simple.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

3. And this court doth in all other respects affirm the said decree and the order of the Court of Appeal.

4. Order that the costs of all parties to this appeal be paid out of the estate of the Hon. Thos. Mackay.

FOURNIER J. concurred with RITCHIE C.J.

HENRY J.—Thomas Mackay, through whom both parties in this case claim on the 1st September, 1885, executed his last will and testament by which he appointed his wife and his sons, Alexander, John, Charles and Thomas, executrix and executors thereof, and by it devised and bequeathed to his executrix and executors all his estate, real and personal, as follows:—

All and singular, the moneys, debts, stocks, bills, bonds, mortgages, debentures and other securities; goods, chattels and effects, lands, tenements and hereditaments whatsoever and wheresoever situate, and all interest in the same, of which I shall die possessed and to which I shall be in any way entitled at the time of my death, in trust for the several uses and purposes hereinafter mentioned and declared, and to be held and applied and disposed of as hereinafter mentioned and appointed, that is to say: First, for the payment of debts; and secondly, for payment of £50 to the Bytown Protestant Hospital.

Thirdly.—In the event of his wife surviving him in trust for her maintenance and support during her life time and for the maintenance and support of his children so long as they should live with their mother, &c, with directions that his wife, so long as she lived and continued his widow, should have the full right to possess and manage the property devised and bequeathed and the profits, &c, thereof, for such purposes, but in the event of her marrying again then for the payment out of the rents and profits, &c., to her of £500 annually, which annuity he charged on his said property and estate in lieu of dower.

The controversy which has arisen between the parties to this action is as to the construction of that part of

the fourth devise, which is as follows :—

> In trust, also, that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1, in the front concession, &c., which I hereby devise to him, his heirs and assigns to and for his or their own use forever.

What then was the legal interest of Thomas at his father's death? Did he take a vested or contingent remainder? What did the testator intend? We must gather his intention from the words of the devise and from the whole of the will. He devised and bequeathed all his estate, real and personal, to his executrix and executors in trust for the support of his widow and children during her life and widowhood, and while the children lived with her; and in trust, also, that at the death or second marriage of his wife, should such happen, his son Thomas, if he should be then living, should have and take lot No. 1. He then directs that his four sons, including Thomas, should have and take all his other real estate in the township of Gloucester, namely, lots two, three, four and five, in the same concession as lot No. 1, with all mills, houses and buildings thereon erected. Also, ten acres of land in the city of Ottawa (except a part sold to John McKinnon, Esq.) Also, Green Island near the mouth of Rideau river, with all mills, houses and buildings thereon erected—all these properties he devised to his four sons (including Thomas), their heirs and assigns as tenants in common.

The testator devised his houses, lands, tenements and real estate, in the city of Montreal, to his four daughters Ann, Christina, Jessie and Elizabeth. All the devises and bequests in the will, except those to his wife, are appointed to take effect on the death of his wife or on her second marriage, if such should happen, and they included all his estate, real and personal, his wife in the meantime to have the use of all for her support and that of his children. And all his property then remaining undisposed of specially by his will to be divided equally

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Henry J.

amongst his then surviving children or their legal representatives.

It will thus be seen that the testator appointed for his son, Thomas, independently of the devise to him of lot No. 1, an equal share with his three other sons of all his estate, real and personal. Independently of lot No. 1 Thomas got the same share of his father's estate as his brothers, but the will provided for his getting lot No. 1 in addition, but, as the will provides, in case he should be alive at the death or second marriage of his mother. Lot No. 1, devised with all his other property to his executrix and executors, of whom Thomas was one, in trust for the benefit of his wife during her life or widowhood, was in trust, also, that at the death or second marriage of his wife, his son Thomas, if he should be then living, was to take it, which he thereby devised to him, his heirs and assigns. Taking the disposition of his estate by his will, why should the testator only in this one of the many devises contained in his will limit the devise of lot No. 1 by the use of the words "if he be then living," if he did not intend them to have the natural construction such words should bear? I can readily conceive why something special or extra should be provided and appointed for one of a number of sons, if alive, to take it personally on the happening of some future event, when the same reason would call for leaving the same property to become only the property of the son's heirs or assigns. I can readily understand that a father might fairly decide to devise to each of his sons an equal share of certain real estate to go to them, their heirs and assigns as vested remainders, which I take to be the result of the devise to the four sons, and in case one of them named by him should be alive on the happening of a certain event, and on that condition that he should also receive something further. I am of the opinion that such was the intention of the testa-

tor in regard to lot No. 1, and that he did not intend to devise that to the heirs or assigns of Thomas in case of his death before the death, or widowhood of his mother. The devise to Thomas, his heirs and assigns, was, therefore, in my opinion, contingent on Thomas being alive at the happening of the event named.

A construction which gives a vested interest is, no doubt, favored by the courts where there is ambiguity or doubt, but where the intention to create a contingent estate or interest is reasonably evident or clear that intention must be respected and carried out. In this case the condition precedent to the vesting, that is, that Thomas shall be then living, is, I think, clearly expressed, and we cannot treat it as a devise creating a vested interest without going in opposition to the terms of the will.

I think we must assume that the testator advisedly used the words "if he be then living," as a condition precedent; or, amongst other reasons, why were they inserted at all? The testator has used words sufficiently strong and explicit to create a condition precedent, and what right have we to say they were not intended to have any effect, and that without any evidence intrinsic or otherwise to sustain such a declaration? I gather from a study of the whole will that the testator had his own reasons for imposing the condition precedent in question.

I think the appeal should be allowed and judgment given for the appellants with costs to be paid out of the estate of the testator.

GWYNNE J.—The only question raised before us upon this appeal is: Was the estate devised to Thomas Mackay the younger, by the will of his father, in lot No. 1, in the front concession, on the Ottawa, in the township of Gloucester, an estate in fee vested in him upon the death of his father, subject to the estate of his mother

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Gwynne J.

therein during her life or widowhood, or was it an estate in fee contingent upon his being alive at the death or second marriage of his mother, which ever should first happen? The testator by his will devised and bequeathed all his real and personal estate of every description to his executrix and executors therein named, in trust for the several purposes particularly stated in sections numbered from one to five. In the third section he declared the trust to be as to the whole of his said property for his wife so long as she should live and continue his widow and unmarried, and by the fourth section, which is the one with which we have to deal, he declared the trust to be that at the death or second marriage of his said wife, should such happen, his son Thomas, if then living, should have and take the said lot No. 1 which he hereby devised to him, his heirs and assigns, to and for his and their own use forever, and that his sons, Alexander, John, Charles and Thomas, aforesaid, should have and take certain other real estate therein particularly mentioned, all which he thereby devised to his said sons, Alexander, John, Charles and Thomas, and to their heirs and assigns, to and for their own use forever, as tenants in common; subject, nevertheless, to the payment of the legacies and annuities by his said will bequeathed and made chargeable thereon; and that his daughters, Ann, Christine, Jessie and Elizabeth, should have and take all his houses, lands, tenements and real estate in the city of Montreal, which he thereby devised to his said daughters, their heirs and assigns, to and for their own use forever, as tenants in common. The section then proceeds:—

And I hereby will and direct that all the said devises in this section of my will mentioned and devised shall take effect upon from and after the said death or marriage of my said wife and not sooner.

And all other my lands, tenements, houses and real estate of what nature and kind soever, and wheresoever situate, and as well in Great

Britain as in Canada in trust to be sold, &c., &c., &c., and the rents, issues, profits, price, and proceeds thereof to be at the disposal of my said wife so long as she shall live and remain unmarried for the support of herself and my said children, and after her death or marriage to be equally divided among my said children. * * * * * * In trust, also, that at the death or marriage of my said wife as aforesaid all my personal property and estate then remaining shall be equally divided among my said children either in money or in kind as to my said executors shall seem best, allowing one year for the making of such distribution.

Provided always, and I hereby will and bequeath, that in the event of any of my said children dying without legal issue before coming into possession of his or her share or shares of the property or money hereby devised or bequeathed, then the share or shares of such child or children to go to and be equally divided among the survivors and the legal issue of such, if any, as shall have died leaving issue.

And in the event of any of my said children dying before coming into possession as aforesaid and leaving legal issue, such issue in every case to take the portion or share which would have belonged to his, her or their father or mother if then living, and to the husband or wife of each of my said children who shall after marriage and before coming into possession as aforesaid, die without issue, leaving such husband or wife, I give and bequeath the sum of fifty pounds annually as an annuity payable out of and chargeable upon the share which would have belonged to such child if living.

The testator then bequeathed a silver cup presented, to him by Col. By, to his said wife during her life or widowhood, and at her death or second marriage he gave and bequeathed the same to his youngest son then living, and all his books he gave and bequeathed to his sons, Alexander, John, Charles and Thomas, to be taken possession of and equally divided among them at the death or second marriage of his said wife.

In the fifth and last section the testator made provision for the event of his wife dying before him.

Now the testator by the third section of his will declared the trust purposes for which the devisees in trust should hold the whole of his property, real and personal, during the life or widowhood of his wife. In the fourth he declared the trust purposes as to the

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Gwynne J.

whole of his real estate and as to such of his personal estate as should remain at the death or second marriage of his wife, with a direction for the sale during the life of his wife and the conversion into personalty, subject to the control of his wife so long as she should live and remain unmarried for the support of herself and her said children, of the whole of his real estate not specifically devised to any one after the death or second marriage of his wife. In the first paragraph of this fourth section, which contains the declaration of trust as to the particular parcels of real estate devised to his sons, it is declared that at the death or second marriage of the testator's wife, his son Thomas, if then living, shall have and take the lot No. 1 now in question, which the testator thereby devised to him in fee simple, but these words "if then living" are not used in the sentence declaring the trust in respect of the lots devised to the testator's four sons, of whom Thomas is one as tenant in common. We cannot hold, as it appears to me, from the language used in this paragraph that the testator's intention was to give to his son Thomas an estate in fee in lot No. 1, contingent upon his being alive at the death or second marriage of his mother, and an estate in fee in the lands of which he was made devisee in common with his brothers, vested upon the testator's death, but subject to the estate during life or widowhood devised to the testator's wife. On the contrary, the estate of Thomas in the subject of both devises must, I think, be of the like nature—vested or contingent—and that it is the latter appears to me to be sufficiently clear from the context, for at the close of the next following paragraph of the same section which contains the declaration of trust as to the lands devised to the testator's daughters, in which paragraph the words "if then living" do not appear either, is added a sentence which applies to all

the previous declarations of trust as well in respect of the lands devised to sons as in respect of those devised to daughters, namely :—

I will and declare that all said devises in this section of my will mentioned shall take effect upon, from and after the said death or marriage of my said wife and not sooner.

This sentence, as it appears to me, was inserted for the express purpose of supplying the want of the repetition of the words "if then living" in the sentences containing the declaration of trust in respect of the lands devised to the testator's four sons as tenants in common, and to his daughters also as tenants in common, and to remove all doubts which the absence of those words from those sentences might raise ; and the effect of this sentence is, in my opinion, to put all the devises to the testator's sons and daughters alike upon the same footing ; that is to say, devises in fee contingent upon their respectively being alive at the death or second marriage of the testator's wife. To construe this sentence as merely postponing the enjoyment in possession of lands vested by the will in the devisees in fee subject to the estate therein of the testator's wife during her life or widowhood, would be to make it wholly nugatory and to hold it to have been introduced for a purpose quite unnecessary ; for the previous devise to the widow during her life or widowhood had already, without more, effectually postponed during her life and widowhood the enjoyment in possession by the sons and daughters respectively of the lands mentioned.

Treating then all of these specific devises to sons and daughters to be alike contingent upon their respectively being alive at the death or second marriage of the testor's wife, the proviso in the section becomes naturally applicable to all the estate, real and personal, devised in the section, and makes the will perfect in providing for the disposition of the testator's estate in the event of the contingency, upon which the devises to the sons and

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Gwynne J.

daughters should take effect, not happening. I cannot see anything in the proviso to justify us in construing it as applying to personalty alone. The words are sufficient to comprehend realty as well as personalty, and if the previous devises of realty to sons and daughters be contingent, the application of the proviso to those lands is essentially necessary to make the will complete and perfect in its structure. The proper way to construe the will, as it appears to me, is to ascertain, if possible, and I think it is, from that portion of the section which contains the devises to sons and daughters what is the nature and extent of the estate so devised, for the purpose of determining whether the proviso can affect the lands comprehended in such devises, instead of reading the proviso by itself and limiting it to personalty, when the language is comprehensive enough to include realty, and so limiting it to deduce therefrom what is the extent and nature of the estate in realty devised by a previous sentence in the section. Moreover the construction of the proviso as applying to personalty alone is, as it appears to me, open to the objection that it might, so construed, defeat a purpose sufficiently clearly appearing in the proviso itself, by which it is provided that the husband or wife of each of the testator's children who should, after marriage and before coming into possession, die without issue leaving such husband or wife, should receive an annuity of fifty pounds, payable out of and chargeable upon the share which would have belonged to such child, if living. Now, as the personalty is left to the disposal of the testator's wife for the support of herself and the testator's children during the life or widowhood of his wife, and as it is only so much of such personalty as shall be remaining at her death or second marriage that is bequeathed to the children, it might be that nothing should remain to meet that bequest or not sufficient to

secure out of it the payment of the annuities bequeathed to the husbands and wives of such of the testator's children as should die without issue during the life of testator's wife. These annuities in such case would fail unless they are made payable out of, and chargeable upon, the share in realty as well as in the personalty that would have belonged to such child if living. Consistent, too, with this, is the devise in the first paragraph of the section by which the devise to the four sons as tenants in common is expressly made "subject to the payment of the legacies and annuities in and by the will bequeathed and made chargeable thereon." Construing therefore the devises of realty to all of the testator's sons and daughters as contingent upon the event of their respectively being alive at the death or second marriage of the testator's wife, the whole will becomes consistent and complete in its structure, and for the above reasons I am of opinion that Thomas, the testator's son, did not take an estate in the lot No. 1 vested in him on the testator's death, but that the estate devised to him was contingent upon his being alive at the death of his mother, and as that contingency never happened the lot became subject to the limitations of the proviso.

Appeal allowed with costs to be paid out of estate of Hon T. McKay.

Solicitors for appellants: *Stewart, Chrysler & Gormully.*

Solicitors for respondents: *Delamere, Black, Riesor & English, John Hoskin.*