1955
*Apr. 5
*May 24

IN THE MATTER OF the Estate of BENJAMIN REACH HOOPER, deceased;

ISABEL J. COLES ..... APPELLANT;

AND

SYLVIA GREENSHIELDS BLAKELY AND ROBERT GREENSHIELDS BLAKELY ..... } RESPONDENTS;

AND

THE ROYAL TRUST COMPANY, Administrator with Will annexed.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Vesting—Gift to a class—Ascertainment thereof.

A testator left the residue of his estate to his widow for life, with a discretionary power of appointment both of income and corpus in his personal representative for the maintenance of his wife and his son, the corpus to vest in the son upon his surviving the testator's wife

and attaining the age of thirty years. The son died in the testator's lifetime, intestate and unmarried. The will provided that in such event the corpus be divided among the heirs-at-law as though the corpus were part of the son's estate.

Held (Rand and Kellock JJ. dissenting): That there was no intestacy as to the corpus as the testator had specifically dealt with the contingency that had arisen. The general rule as to vesting is that where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or the capital, vesting of the capital takes place a *morte testatoris* in the remaindermen. *Brown* v. *Moody* [1936] A.C. 635 at 645. The rule also applies where the remaindermen are referred to as a class rather than named specifically. *Ross* v. *National Trust Co.* [1939] S.C.R. 276. The general rule as to vesting will be displaced only if the will contains a clear indication of a contrary intention. There was no evidence of such intention here.

APPEAL from a judgment of the Court of Appeal for Ontario (1) reversing a judgment of McRuer C.J.H.C. (2).

W. E. Spencer, Q.C. for the appellant.

T. Sheard, Q.C. and *S. Heighington* for the respondents.

E. S. Livermore, Q.C. for the Administrator.

THE CHIEF JUSTICE:—I agree with the reasons of Mr. Justice Cartwright and of Mr. Justice Abbott.

The judgment of Mr. Justice Rand and of Mr. Justice Kellock (dissenting) was delivered by:—

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for Ontario reversing the judgment of the Chief Justice of the High Court. The learned Chief Justice, in answer to certain questions propounded by the respondent, the administrator with the will annexed, held that the persons entitled to the residue of the estate of the testator, were the heirs-at-law of the testator's son living at the death of the testator's widow. The Court of Appeal, however, directed that the residue was to be dealt with as part of the widow's estate on the theory that the class entitled was determinable at the date of the death of the testator. The court did not give any written reasons.

After certain bequests of personal property, the testator gave, devised and bequeathed his residue on certain trusts. The widow was, in the first place, given the income for life

(1) [1954] O.W.N. 488. (2) [1954] O.W.N. 306.

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but the testator by a subsequent provision gave to his personal representative a discretionary power of appointment both of income and corpus for the maintenance of his wife and the maintenance and education of his son. Ultimate vesting of the corpus in the son was made dependent upon his surviving the widow of the testator and also upon his attaining the age of thirty years. In fact, although the widow survived the testator, the son died in the lifetime of his father, intestate and unmarried. In these circumstances, the relevant provisions of the will are contained in paragraph (*e*) as follows:

> (*e*) If my said son should die before reaching the age of thirty years or should predecease my wife leaving any issue him surviving, subject to the life estate of my wife, and subject to the powers of my executrix or executor and/or trustee to appoint the corpus of my estate from time to time as heretofore set out, I direct my executors or trustee to pay the income from my said estate for a period of twenty years after the death of the survivor of my said wife and son, with like powers as heretofore to appoint such part of the corpus of my estate as my executor and/or trustee, in his sole discretion, may deem necessary for the maintenance and education of such of my son's wife and/or children as shall survive my said wife and son, unto such of my son's wife and/or children as shall survive my said wife and son, but should my son predecease my said wife or die before reaching thirty years of age leaving no issue him surviving, I direct my executor and/or trustee to divide the corpus of my estate subject to the powers of my executors to appoint to my wife, and subject to the life estate of my wife, amongst the beneficiaries of my son's will, as my son in his will may appoint and in default of appointment or if my son should die intestate, amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate and I hereby give my said executor and/or trustee the power to so appoint my said estate.

It is the second branch of this paragraph which has to be considered in the event which happened, namely, the death of the son intestate and without issue.

It has been held that the fact that the donee of the power of appointment predeceases the testator does not affect the interest of those directed to take in default of appointment; *Edwards* v. *Saloway* (1); *Nichols* v. *Haviland* (2); *Jones* v. *Southall* (3); *Farwell*, 3rd Ed., 267.

In *Edwards* v. *Saloway*, a testator gave the residue of his real and personal estate to trustees in trust to pay the income to his wife for life and from and after her death, then as to one moiety upon trust for such person or persons and in such manner and form as his said wife should by

(1) (1848) 2 Ph. 624.
(2) (1855) 1 K. & J. 504.
(3) (1862) 32 Beav. 31 at 39, 40.

deed or will appoint, and in default of appointment, he directed that the same should go to her next of kin. The testator's wife died in 1839, the death of the testator not taking place until seven years later. In overruling earlier authority to the contrary and upholding the validity of the gift over in default of appointment, the Lord Chancellor, Lord Cottenham, said at p. 627:

> It is in vain to speculate on what a testator might or might not have done or intended in a different state of circumstances, from that which he in fact contemplated. That would be quite arbitrary and full of danger. The only safe way of determining what a testator intended, is to look at what he has said. It may be that in the present case the disposition in favor of the next of kin of the wife, was introduced only for the purpose which has been suggested, and that the testator would not have thought fit to provide for those individuals if he had foreseen that his wife would not live to take the benefit of his bequest to herself; but whatever may have been the motive for the gift, the gift and the motives for the gift are different things, and the gift itself is there.

It is not necessary in the present case to depend upon the rule thus enunciated as the testator has, in the will here in question, manifested his intention that the gift in default of appointment is to be operative notwithstanding the decease of his son in his lifetime.

In paragraphs of the will immediately following paragraph (*e*), the testator deals with moneys payable under certain policies of insurance upon his life. These provisions are predicated upon his wife predeceasing him for the reason that, presumably, she was otherwise the beneficiary under these policies. In these provisions the testator goes on to provide for the disposition of the insurance moneys should not only his wife but his son predecease him. It is sufficient to quote one of these paragraphs as follows:

> (3) If both my said wife and my said son shall predecease me, any moneys becoming payable under the said Policy Number 201375 may be commuted on the basis of an interest rate of three and one-half per cent per annum, compounded annually, and be made payable and included with the residue of my estate.

It therefore appears that the testator contemplated the death of his son in his lifetime, and further, in directing in that event payment of the insurance moneys as part of the residue, that he intended the gift contained in the latter part of paragraph (*e*) to be operative notwithstanding that the son might predecease him.

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The question remains as to the date at which the class is to be ascertained. For the respondent, it is contended that the rule applied in *Browne* v. *Moody* (1), governs and that the relevant date is the death of the testator, at which date the gift became vested. This was the view of the Court of Appeal. On the other hand, it is contended that, as the learned Chief Justice considered, there is in the will sufficient indication that the class intended by the testator were those living at the death of the widow.

The principle of the decision in *Browne* v. *Moody* does not apply when, to employ the language of Lord Macmillan at p. 1699, the object of the postponement of the division is not "obviously" in order only that the tenant for life may, during his lifetime, enjoy the income, or where the direction to divide the capital is accompanied by a condition personal to the beneficiaries.

In the case at bar, it is to be observed that not only is the division to be carried out by the executor and/or trustee of the testator (a phrase clearly applicable only to the executor in office after the death of the widow) but the testator gives to that executor "the power to so appoint my estate". This language must be given a meaning.

Apart from the language quoted, the division would clearly be among the class living at the death of the testator and would include the widow. But in my opinion, the additional words indicate that the appointment by his executor, which can take place only after the life estate and the power to encroach on corpus on the part of the wife have been terminated by her death, is a prerequisite to the vesting of the gift in remainder, although undoubtedly, the employment of the language "amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate" leaves no room for any discretion on the part of the executor in the making of the distribution amongst the class. In other words, in my view, the testator in the use of the words "I hereby give my said executor and/or trustee the power to so appoint my said estate" indicates that the class entitled is to be ascertained at the time when his executor will be in a position to make actual distribution by reason of the prior interests of the widow having terminated by her death.

(1) [1936] 2 All. E.R. 1695.

I would allow the appeal accordingly and restore the judgment of the learned Chief Justice. The costs of all parties in this court and in the court below should be taxed and paid out of the estate, those of the Administrator with the will annexed on a solicitor and client basis.

CARTWRIGHT J.:—The facts and the relevant portions of the testator's will are set out in the reasons of my brothers Kellock and Abbott.

It will be observed that the scheme of the provisions of the will which are applicable in the events that have happened is as follows. A life estate is given to the widow with a discretionary power to appoint parts of the corpus for her own benefit and on her death the corpus remaining is to be divided amongst the son's heirs-at-law.

The general rule, in such a case, as to when the class of those entitled to take as next-of-kin of the son, is well settled. It is stated as follows in Halsbury 2nd Edition Vol. 34, page 319:—

> Whatever may be the time of distribution, where there is a gift to a testator's next-of-kin, without more, the class prima facie has to be ascertained as at the testator's death, and where there is a gift to the next-of-kin of any other person, the class prima facie has to be ascertained at that person's death if he survived the testator, and if not, at the testator's death.

and in Hawkins on Wills 3rd Edition, page 134 as follows:—

> The rule in *Gundry* v. *Pinniger* (1) must be stated with a qualification, namely, where the gift is to the "next-of-kin", next-of-kin "according to the Statute" et cetera, of a person who dies in the testator's lifetime, or who is dead at the date of the Will:—in this case the objects to take are to be ascertained at the death of the testator, as if the person whose next-of-kin are spoken of had died at that time.

No doubt this general rule would yield to any clear indication in the language of the will of an intention that the class was to be ascertained at some time other than the date of the death of the testator, but I agree with my brother Abbott that no such indication is to be found in the will before us.

It is suggested that such an indication is to be found in the use by the testator at the end of clause (*e*) of the words "and I hereby give my said executor and/or trustee the power to so appoint my estate"; but the words quoted do not appear to me to modify in any way the duty of the

(1) (1852) 14 Beav. 94.

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executor or to enlarge the powers given to him under the preceding words of the clause. On the death of the testator's widow the executor is required "to divide the corpus . . . amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate." The persons (or person) who are to take and the proportions in which they are to take are fixed by the law as to the distribution of the estate of an intestate. The executor has no power to appoint otherwise and no discretion to exercise.

For the reasons given by my brother Abbott and those set out above I would dispose of the appeal as proposed by my brother Abbott.

ABBOTT J.:—This is an appeal from an Order of the Court of Appeal for Ontario varying an Order of the Honourable the Chief Justice of the High Court, made on an application for the construction of the will of the late Benjamin Reagh Hooper.

The testator died on March 20, 1953, leaving him surviving his wife, Isabel Helen Jane Greenshields Hooper, who died on May 8, 1953, having first published her last will and testament, letters probate of which were granted to the Royal Trust Company on July 29, 1953. Benjamin Reagh Hooper and his wife had one child only, David Benjamin Stewart Hooper, who predeceased his father on July 18, 1944, at the age of seventeen years, intestate and unmarried.

By his will dated January 30, 1942, Benjamin Reagh Hooper appointed his wife executrix and trustee of his will during her lifetime, and after her death appointed one Howard Riddle to be executor and trustee. The said Howard Riddle renounced his position as executor and trustee and on July 15, 1953, Letters of Administration with the Will Annexed were granted to The Royal Trust Company.

The testator, by his will, left to his wife his household furniture and personal effects outright, and a life interest in the residue of his estate with the following provision:—

> I give my executrix or executor or trustee a discretionary power to appoint such parts of my estate, whether real or personal, whether interest or corpus, that she or he shall, in their sole discretion, deem necessary for the proper maintenance, well being and comfort of my said wife and/or the comfort, education and maintenance of my son, David Benjamin Stewart Hooper.

On the death of the testator's wife the estate was to go to his only son on his attaining the age of thirty years with a gift over to the son's children in the event of his dying before attaining that age. The will then went on to provide in paragraph (*e*) as follows:—

> . . . but should my son predecease my said wife or die before reaching 30 years of age leaving no issue him surviving, I direct my executor and/or trustee to divide the corpus of my estate subject to the powers of my executors to appoint to my wife, and subject to the life estate of my wife, amongst the beneficiaries of my son's Will, as my son in his Will may appoint, and in default of appointment or if my son should die intestate, amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate and I hereby give my said executor and/or trustee the power to so appoint my said estate.

The will also provided for the disposition of the proceeds of certain life insurance policies on the testator's life, but these provisions do not appear to be particularly relevant to this appeal except that they do indicate that the testator clearly contemplated the contingency of his son predeceasing him.

The advice and direction of the Court was sought with respect to the following questions:—

1. Is there an intestacy as to the residue of the testator's estate?
2. If there is no intestacy as to the residue of the testator's estate, who are the persons entitled to receive the residue of the testator's estate under the words "amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate and I hereby give my said executor and/or trustee the power to so appoint my said estate" as contained in paragraph (*e*)?
3. In what proportions is the residue to be divided among the persons referred to in question (2)?

In his reasons the learned Chief Justice of the High Court set out the four contentions put forward namely:—

(*a*) The will does not deal with the contingency that the son might die before the testator and there is therefore an intestacy.

(*b*) The class of the heirs-at-law of the son is ascertained as of the date of the son's death.

(*c*) The class of the heirs-at-law of the son is ascertained as of the date of the testator's death.

(*d*) The class of the heirs-at-law of the son is ascertained as of the date of death of the life tenant.

As to the first of these contentions, the learned Chief Justice held that there was no intestacy as the testator had specifically dealt with the contingency that had arisen. With this view I am in complete agreement.

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As to the second contention, he held that the testator did not intend by his will to put himself or his estate in the position that he would be one of the heirs-at-law contemplated by the will in whose favour the trustee was to exercise the power of appointment after his death, and that in consequence the class of heirs-at-law is to be ascertained either at the death of the testator or at the death of the life tenant. With this view I am also in agreement.

By Order of the Court of Appeal for Ontario, dated May 3, 1954, the order of the Chief Justice of the High Court was varied and the Court of Appeal determined that the residue of the estate of Benjamin Reagh Hooper should be paid to the executors of the estate of Isabel Helen Jane Greenshields Hooper to be dealt with as part of her estate. No written reasons were given by the Court of Appeal for its decision that the heirs-at-law of the son should be ascertained as at the death of the testator.

The question at issue in this appeal is whether the class of the heirs-at-law of the son David Benjamin Stewart Hooper is to be ascertained as of the date of the testator's death or whether it is to be ascertained as of the date of the life tenant, the mother. In other words, whether the remainder interest of the son's heirs-at-law vested at the date of the testator's death or whether they had a contingent interest only, the class being ascertainable at the death of the life tenant, the testator's wife.

The determination of this question depends primarily upon the interpretation to be given to paragraph (*e*) which I have quoted.

The son having predeceased his mother it is clear that distribution of the residue of the estate is to take place on the death of the widow. The direction to make such distribution at that time is not accompanied by any condition personal to the beneficiaries, and the object of the postponement is clearly therefore for the sole purpose of protecting the life tenancy of the widow.

As Lord Macmillan said in *Browne* v. *Moody* (1) at p. 645:—

> The mere postponement of distribution to enable an interposed liferent to be enjoyed has never by itself been held to exclude vesting of the capital.

He then went on to state the general rule as to vesting in these terms:—

> But where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place a morte testatoris in the remaindermen.

Although the rule as just stated refers to "named and ascertained persons", it has been held to apply where the remaindermen are referred to as a class rather than named specifically: *Ross* v. *National Trust Company Ltd.* (2), which was followed in *re Simpson* (3).

This general rule as to the time of vesting will be displaced only if the will contains a clear indication of a contrary intention on the part of the testator. Reading paragraph (*e*) together with the will as a whole, and applying to the words used the primary rule of construction, namely, that they are to be given the natural ordinary meaning which they bear in relation to the context in which they stand, I can find no evidence of such intention.

The appeal should be dismissed but the costs of all parties should be paid out of the estate, those of the Administrator with the Will Annexed on a solicitor and client basis.

Appeal dismissed with costs.

Solicitors for the appellant: *Spencer & Braund.*

Solicitor for the respondents: *Jacob Markus.*

Solicitors for the Administrator: *Ivey, Livermore & Dowler.*

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(1) [1936] A.C. 635.
(2) [1939] S.C.R. 276; 4 D.L.R. 653.
(3) [1945] O.R. 169.