ELLA MAUD HICKS AND MARY ETTA ELEY ..... APPELLANTS;

1922

*May 30.
*June 17.

AND

WILLIAM McCLURE AND GEORGE McCLURE ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

*Will—Devise to executors for sale—Disposal of proceeds—Sale by testator—Effect on devise.*

A clause in a will directed the executors to sell a certain farm and divide the proceeds between the testator's two sons. The testator himself sold the farm and took a mortgage for part of the purchase money. This mortgage he held unimpaired at his death and it formed part of his estate. The executors applied by originating summons to the Supreme Court of Ontario for construction of this clause in the will.

*Held,* affirming the judgment of the Appellate Division (51 Ont. L.R. 278) that the trust declared by the will in respect to the proceeds of sale of the farm applied to the mortgage which passed to the testator's sons in the proportions he indicated.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the hearing on an originating summons for construction of a will.

The question raised on the appeal was whether the devise in the will of William McClure of the proceeds of sale of a farm by the executors to the

*PRESENT:—Sir Louis Davies CJ. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 51 Ont. L.R. 278 sub nom. *In re McClure.*

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respondents applied to the mortgage taken by the testator when he himself sold the farm or such mortgage fell into the residue of the estate. The courts below held that it passed to the respondents.

*Proudfoot K.C.* for the appellants. By the Ontario Wills Act a will speaks as if executed immediately before death. Applying that rule here there was nothing when the testator died for the devise of respondents to operate on. See *In re Dods* (1); In *re Clowes* (2).

The executors were directed to sell "my farm" which the testator made impossible. No "contary intention" to this direction can be found and the will must speak from the death. The "contrary intention" in sec. 26 of the Wills Act can only be looked for in cases of error by the testator where the intention is clear. See *In re Clifford* (3).

*Nesbitt K.C.* and *J. H. G. Wallace* for the respondents. The devise was of the proceeds from the sale of the farm and these proceeds have not lost their identity. The intention of the testator is clear and must govern. See *In re Carter* (4); *In re Bick* (5).

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin J. with which I fully concur, I would dismiss this appeal with costs.

IDINGTON J.—Having considered the cases cited by appellant, as well as those by the learned judges below, I agree with the reasons assigned by the latter in

(1) 1 Ont. L.R. 7.
(2) [1893] 1 Ch. 214.
(3) [1912] 1 Ch. 29.
(4) [1900] 1 Ch. 801.
(5) [1920] 1 Ch. 488.

support of the judgment appealed from. It seems to me that the cases of clear ademption relied upon in appellant's factum are beside the real question in issue.

That question is whether or not the testator, having bequeathed to the respondents the proceeds of the sale of his farm, directed by him to be effected by his executors, can be carried out by them, when he anticipated their selling by acting himself as seller, and took the mortgage now left in their hands as part of the purchase money so clearly designed by the terms of the will to become theirs.

I may add to those cited below and herein the decision in *Morrice* v. *Aylmer* (1), as in line with a mode of thought more liberal than some earlier decisions and worth looking at in such a case as this.

This appeal should be dismissed with costs and in any event the executors to have their costs out of the estate.

DUFF J.—This appeal presents a question of will construction which is one of not a little difficulty. The testator William McClure, by his will directed that the executors should sell his farm and that the proceeds should be divided in a certain way. By another clause he disposed of cash on hand or securities for money and "all other property and estate". Before his death he sold the farm which was the subject of the above mentioned trust and at his death part of the purchase money remained unpaid secured by a mortgage on the farm.

The question is whether the trust declared in respect of the farm applies to the mortgage. My conclusion is that the judgment of the Appellate Division should

(1) 10 Ch. App. 148; L.R. 7 H.L. 717.

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be maintained. The question may fairly, I think, be stated by an adaptation of the language of Farwell J. cited by Mr. Justice Hodgins from *In re Dowsett* (1). Has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such? I think such an intention is manifest by the terms of the will.

ANGLIN J.—The circumstance that the devise to the respondent is not of the farm in specie but of the proceeds of the sale of it directed to be made by the executor distinguishes this case from *In re Clowes* (2) where the devise was of land in specie, subsequently sold by the testator (who had, as in the case at bar, taken a mortgage on it to secure payment of part of the purchase money), sufficiently to afford opportunity for the application of s. 26 of the Wills Act and to bring this case within the principles of such decisions as *In re Clifford* (3); *In re Leeming* (4); *In re Carter* (5); and *In re Johnstone's Settlement* (6).

There seems to be enough in the devise here in question to indicate an intention that the funds representing the property dealt with should go to the beneficiary in whatever form they might be found at the testator's death. The "contrary intention" of s. 27 of the Wills Act therefore appears. *Morgan* v. *Thomas* (7) shews that in a case such as this a broad and even a lax construction of the terms of the will should prevail if thereby effect will more probably

(1) [1901] 1 Ch. 398.
(2) [1893] 1 Ch. 214.
(3) [1912] 1 Ch. 29, 35.
(4) [1912] 1 Ch. 828.
(5) [1900] 1 Ch. 801.
(6) 14 Ch. D. 162.
(7) 6 Ch. D. 176.

be given to the testator's intention. That case and *Manton* v. *Tabois* (1) establish that partial ademption owing to a portion of the property which is the subject of the devise being unavailable or to its identity having been lost will not prevent the devise taking effect as to so much of it as still forms part of the testator's available estate and can be fully identified.

Looking at the substance of the devise in question and giving effect to what appears to have been the probable intention of the testator, I am of the opinion that the mortgage in question passed to the respondents in the proportions indicated by the testator. Passages from the judgment delivered in the House of Lords in *Beddington* v. *Baumann* (2), quoted by Mr. Justice Hodgins, confirm this view. Adapting the language of Lord Davey the testator's will is

> expressed in such language and in such large terms as to carry not only the property as it then existed, but also this property which has arisen from the particular dealings with it.

BRODEUR J.—This is an appeal concerning the construction of a will. William McClure had by his will directed his executor to sell his farm and to divide the proceeds between his two sons. Before his death he sold the farm himself and part of the purchase price was secured by a mortgage thereon.

The question is whether the devise fails because the farm had already been sold.

If the farm itself had been devised to the legatees, the solution might be different; *Gale* v. *Gale* (3); *Farrar* v. *Winterton* (4); *Blake* v. *Blake* (5); *In re Clowes* (6); *In re Dods* (7).

(1) 30 Ch. D. 92.
(2) [1903] A.C. 13
(3) 21 Beav. 349.
(4) 5 Beav. 1.
(5) [1880] 15 Ch. D. 481.
(6) [1893] 1 Ch. 214.
(7) 1 Ont. L.R. 7.

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But the testator's executor was called upon to distribute the proceeds of the farm. There is nothing to shew that the testator did intend in selling his farm himself to prevent his beneficiaries under the will from having the proceeds of the mortgage handed over by the executor to his legatees. *In re Graham* (1).

The appeal should be dismissed. As there is some diversity of opinion as to the construction of such a will the costs of all parties should be paid out of the estate.

MIGNAULT J.—The question here is whether a bequest, whereby the testator directed his executors to sell his farm and divide the net proceeds among the respondents in the proportions therein stated, took effect the testator having himself sold the farm and taken a mortgage for the balance of the purchase price. The mortgage was still unpaid at the testator's death.

In my opinion, the bequest was of the proceeds of the farm and not of the farm itself, and it is not defeated because the testator anticipated the sale which he had ordered his executors to make.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *William A. Skeans.*

Solicitor for the respondents: *J. H. G. Wallace.*

(1) 8 Ont. W. N. 497.