NATIONAL TRUST COMPANY LIMITED, executor of the last will and testament of Marguerite W. Fleury, deceased ..... APPELLANT;

1965
*Mar. 22, 23
June 24

AND

WILLIAM E. FLEURY AND ELINOR M. CAMERON AND NATIONAL TRUST COMPANY LIMITED, HAROLD LEAROYD STEELE AND WILLIAM ERIC FLEURY, trustees of the last will and testament and codicils of Herbert W. Fleury, deceased ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Construction—Bequest to testator's daughter for life with direction for distribution upon her decease to those persons entitled as if testator had died intestate—Whether next-of-kin to be determined at date of testator's death or at date of death of life tenant.

The testator, by para. 11(a) of his will, directed that the remainder of his estate was to be incorporated in a trust fund to be held by his trustees with direction to pay his daughter at least $5,000 a year from the income and if necessary from the capital and to the capital of which she could only otherwise have access if the trustees in their absolute discretion considered the sum of $5,000 annually to be insufficient for her proper support and maintenance. It was provided, by

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

1965

NATIONAL TRUST CO. LTD. v. FLEURY et al.

para. 11(c), that upon her decease a specified amount was to be divided among nephews and nieces of the testator and the remainder of the corpus was to be divided as follows: one-half to the testator's brother or his heirs, and the remaining one-half "to such persons as will be entitled thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto." The question raised was whether the statutory next-of-kin were to be determined at the date of death of the testator, in which event the executor of the estate of the daughter was solely entitled, or whether they were to be determined at the date of the death of the daughter, in which event four nephews and three nieces would take.

On a motion for construction the judge of first instance applied the general rule (established in *Bullock v. Downes* (1860), 9 H.L.C. 1) that the class is determined at the date of death of the testator unless a contrary intention appears from the will. He was unable to find a contrary intention. The Court of Appeal did find a contrary intention and held that the class was to be ascertained at the date of the death of the life tenant. The executor of the daughter's estate appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Cartwright and Martland JJ.: The authority of the rule of construction stated in *Bullock v. Downes*, applied by this Court in *Thompson v. Smith* (1897), 27 S.C.R. 628, was not impaired by subsequent decisions in Ontario. That rule, however, would yield to a sufficient indication in the words of the will that the next-of-kin were to be ascertained not at the death of the testator but at the time fixed by the will as the period of distribution. In the case at bar a sufficient indication that the testator intended that his next-of-kin should be ascertained at the death of his daughter was to be found in the clauses of para. 11 of the will.

Per Martland, Ritchie and Spence JJ.: In the construction of wills, the primary purpose was to determine the intention of the testator and it was only when such intention could not be arrived at with certainty by giving the natural and ordinary meaning to the words used by him that resort was to be had to the rules of construction developed by the Courts in the interpretation of other wills.

It was apparent that the testator intended the whole of the corpus of his estate to be preserved intact during the lifetime of his daughter subject to the payments which the trustees were authorized to make. The result of applying the rule in *Bullock v. Downes* to this will was to ignore the carefully drawn provisions setting up the trust and to attribute to the testator the contrary intention to provide for his daughter in such manner as to enable her to obtain a substantial part of the fund for her own use absolutely without the exercise of any authority or discretion by the trustees and whether or not the whole fund produced an income of $5,000 a year.

The inconsistency which resulted from the application of this rule to the language used in paras. 11(a) and 11(c) of the will was itself a sufficient indication that the testator did not intend the ultimate beneficiaries under para. 11(c) to be those entitled under *The Devolution of Estates Act* at the date of his death, but rather that he intended one-half of the remainder of the corpus of his estate to be divided amongst the persons so entitled at the date of the death of his daughter.

Hutchinson v. National Refuges for Homeless and Destitute Children, [1920] A.C. 794; *Lucas-Tooth v. Lucas-Tooth*, [1921] 1 A.C. 594, referred to.

Per Judson J., *dissenting:* The reasoning which led the judge of first instance to find that there was no contrary intention was sound and should be accepted. He thought that the testator meant what he said and that he intended to die intestate with respect to one-half of the residue; that he did not know whether or not his daughter would be living at his death, nor could he tell who his next-of-kin might be at that time. Whoever they were, they were the ones to take.

The mere fact that the life tenant and the person who would take if the class were ascertained as of the date of death of the testator were one and the same person was not an indication of a contrary intention.

Re Young (1928), 62 O.L.R. 275; *Jones v. Colbeck* (1802), 8 Ves. 38; *Thompson v. Smith, supra; Hutchinson v. National Refuges for Homeless and Destitute Children, supra,* discussed; *Re Allen,* [1939] O.W.N. 1; *Re Campbell* (1928), 63 O.L.R. 36; *Re Hughson,* [1955] O.W.N. 541; *Re Jones,* [1955] O.R. 837; *Re Colby,* [1957] O.W.N. 517, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Hughes J. on a motion for construction of a will. Appeal dismissed, Judson J. dissenting.

John D. Arnup, Q.C., for the appellant.

Terence Sheard, Q.C., and *R. Hull,* for the respondents: William E. Fleury and Elinor M. Cameron.

George W. Collins-Williams, Q.C., for the respondents: National Trust Co. Ltd., Harold Learoyd Steele and William E. Fleury.

Martland J. concurred with the judgment delivered by

CARTWRIGHT J.:—The question raised on this appeal and the relevant provisions of the will of the late Herbert W. Fleury are set out in the reasons of other members of the Court.

I have reached the conclusion that the appeal fails but, in view of some of the expressions used in the reasons of the Court of Appeal[1] as to the effect of the decisions there discussed, I propose to state shortly my opinion as to the present state of the law in Ontario on the point with which we are concerned.

[1] [1964] 2 O.R. 129, 44 D.L.R. (2d) 393.

1965

NATIONAL TRUST CO. LTD. v. FLEURY et al.

Cartwright J.

In my view the authority of the rule of construction stated by Lord Campbell in *Bullock v. Downes*[1], at p. 11, quoted by my brother Ritchie and applied by this Court in *Thompson v. Smith*[2], is not impaired by the subsequent decisions in Ontario. That rule, however, will yield to a sufficient indication in the words of the will that the next-of-kin are to be ascertained not at the death of the testator but at the time fixed by the will as the period of distribution.

For the reasons given by my brother Ritchie I agree with his conclusion that a sufficient indication that the testator intended that his next-of-kin should be ascertained at the death of his daughter is to be found in the clauses of para. 11 of the will. I am somewhat fortified in this view by the use of the plural number and the future tense in the words which I have italicized in the following extract from that paragraph:

> (c) Upon the decease of my daughter Marguerite W. Fleury to distribute the corpus of my estate as follows: . . . and the remaining one-half to such *persons* as *will be entitled* thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto.

I would dispose of the appeal as proposed by my brother Ritchie.

JUDSON J. (*dissenting*):—The testator directed by para. (11)(c) of his will that the remainder of his estate should be disposed of as follows:

> (c) Upon the decease of my daughter Marguerite W. Fleury to distribute the corpus of my estate as follows: The sum of Eighty Thousand Dollars ($80,000.00) shall be divided amongst, between or to the first cousins of my said daughter, being Nephews and Nieces of mine, or their children, per stirpes in being at the decease of my daughter.
>
> The remainder of the corpus of my estate to be divided as follows:—One-half to my brother William J. Fleury or his heirs; and the remaining one-half to such persons as will be entitled thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto.

It is common ground that the gift under consideration in this litigation is to the next-of-kin determined in accordance with *The Devolution of Estates Act*, and the whole question is whether the statutory next-of-kin are to be determined at the date of the death of the testator, in which event National Trust Company Limited, as executor of the estate

[1] (1860), 9 H.L.C. 1. [2] (1897), 27 S.C.R. 628.

of the daughter, is solely entitled, or whether they are to be determined at the date of death of the daughter, in which event four nephews and three nieces would take.

On a motion for construction the judge of first instance, Hughes J., applied the general rule that the class is determined at the date of the death of the testator unless a contrary intention appears from the will. He was unable to find any contrary intention. The Court of Appeal[1] did find a contrary intention and held that the class was to be ascertained at the date of the death of the life tenant. The executor of the daughter's estate now appeals to this Court.

To me, the scheme of the will is uncomplicated and I do not think that any help can be derived from any of its terms until the testator comes to the disposition of the residue. The daughter was to have the net income from the estate for life with the provision that if this did not produce $5,000 per year, the trustees were to encroach on the residue in order to produce this sum. There was a further direction that if the trustees did not think that $5,000 per year was enough for the proper support and maintenance of the daughter, they were again to encroach on capital as they deemed necessary or advisable. They were told that in exercising their discretion that the testator wished them to treat the daughter generously. Then he came to the disposition of the residue, which I have set out above. The $80,000, which was first to be taken out of the residue to be divided among nephews and nieces, was reduced by two subsequent codicils, first, to $60,000, and then to $40,000.

The Court of Appeal, in determining the class at the date of distribution, said that the testator must have assumed that his daughter, his only next-of-kin at the date of the will, would survive him and that the wording of the residuary clause was an inappropriate expression of an intention to benefit his only child or her estate. With respect, I cannot reach the same conclusion. The testator made provision for his daughter during her lifetime and for his nieces and nephews who at the date of the will were known to him as being his probable next-of-kin if his daughter were not, and he used language which would cover all eventualities. He chose to benefit as to one-half of the residue his next-of-kin, whoever they might be. A contrary intention does not

[1] [1964] 2 O.R. 129, 44 D.L.R. (2d) 393.

1965

NATIONAL TRUST CO. LTD. v. FLEURY et al.

Judson J.

sufficiently appear merely from the fact that by the will a prior particular estate is limited to a particular person who presumably would and, in fact, did turn out to be the person satisfying the definition.

The Court of Appeal also found a contrary intention in the fact that the daughter, being entitled to the life interest and one half of the residue, might have been in a position to demand immediate payment of this half of the residue. If this is the result of the dispositions in the will, it flows from the law and not from any expression used by the testator. In most cases where a beneficiary of income has been held entitled to demand immediate transfer of the corpus of the fund, the testator has not contemplated this result but principles of law have caused it to happen.

Nor do I think that a contrary intention is indicated by the use of words of futurity in the concluding clause of para. (11)(*c*) "and the remaining one-half to such persons as will be entitled thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto." The words of futurity, in my opinion, refer to the time when this one-half of the residue will come into possession and do not determine when the class is to be ascertained.

Nor can I see any significance in the fact that the persons who take under the will of the deceased daughter are strangers in blood to the testator. The claimant is the estate of the daughter as next-of-kin of the father and what she may have chosen to do with her own estate can have nothing to do with the interpretation of her father's will.

In my opinion, the reasoning which led Hughes J. to find that there was no contrary intention is sound and should be accepted. He thought that the testator meant what he said and that he intended to die intestate with respect to this half of the residue; that he did not know whether or not his daughter would be living at his death, nor could he tell who his next-of-kin might be at that time. Whoever they were, they were the ones to take.

Hughes J. also noted that the testator directed his attention to his nephews and nieces, who are the alternative claimants here. He divided $80,000 among them *per stirpes* and then reduced that sum by two separate codicils. It was a significant fact that he specifically ascertained this class of

nephews and nieces at the death of the daughter and that he refrained from making such an ascertainment with respect to the second half of the estate.

The course of litigation in Ontario on this type of problem has been full of meaning and should determine the construction of this will in the way in which Hughes J. construed it.

The Court of Appeal took as its starting point the decision of Middleton J. A., sitting in Weekly Court, in *Re Young*.[1] It is a convenient starting point because of its review of the litigation in the first half of the 19th century in England. The review of the English cases begins with *Jones v. Colbeck*[2], where there was a residuary bequest to a daughter for life, then to her children at the ages of 21, and after the death of the daughter and of her children under that age, the residue was to be distributed among the testator's relations in due course of administration. The daughter, who was a widow, died after the death of the testator without leaving issue. Great-nephews and nieces claimed in competition with the estate of the daughter and the result of the judgment was that the class of relations was ascertained at the date of the death of the daughter. I note that Theobald on Wills, 12th ed., has this comment on the case:

> The term relations, however, has not the same direct reference to the death of the *propositus* as heirs or next-of-kin. Therefore, where there is a gift either to A for life with remainder to her children, or to A absolutely followed by a gift over, if A dies without issue, to the testator's relations, and A is the sole next-of-kin at the date of the will and death, the class will be ascertained at A's death.

This case and those that purported to follow it cannot be cited for any general proposition that where the life tenant is also the same person as the next-of-kin if ascertained at the date of death of the testator, this is an indication that the next-of-kin are to be ascertained at the date of death of the life tenant because the testator could not mean by his next-of-kin the very person to whom he was giving the life interest.

In *Thompson v. Smith*[3], Chancellor Boyd applied *Jones v. Colbeck* literally where a testator gave a life interest to his daughter and her mother for their joint lives and to the survivor of them, and directed that at the death of both

[1] (1928), 62 O.L.R. 275, 2 D.L.R. 966.
[2] (1802), 8 Ves. 38, 32 E.R. 264. [3] (1894), 25 O.R. 652.

1965

NATIONAL TRUST CO. LTD. v. FLEURY et al.

Judson J.

"the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs". Both survived the testator, the daughter surviving the mother. At the date of death of the testator the daughter was his only heir.

Chancellor Boyd excluded the estate of the daughter and held that the class of heirs was to be ascertained at the date of death of the daughter. This was rejected both on appeal in Ontario[1], and on appeal to this Court[2], where Sedgewick J. said:

> I take it to be reasonably clear that this contention cannot prevail. The rule established in *Bullock v. Downes,* 9 H.L. Cas. 1, is that where in a case like the present the testator uses the word "heirs", he must be taken to mean heirs at the time of his death unless the contrary contention is apparent from the will. This rule was subsequently followed and applied in *Mortimore v. Mortimore,* 4 App. Cas. 448, and in *Re Ford; Patten v. Sparks,* 72 L.T.N.S., 5.

I take this to be an accurate and binding statement of what has been referred to as the rule established in *Bullock v. Downes*[3]. Nevertheless, Middleton J. A., p. 280, said that both the Court of Appeal and the Supreme Court of Canada proceeded

> entirely upon the theory that *Bullock v. Downes,* particularly as expounded in *Mortimore v. Mortimore* (1879), 4 App. Cas. 448, and *Re Ford, Patten v. Sparks* (1895), 72 L.T.R. 5, had established an inflexible rule that in all these cases the date of the testator's death could be alone regarded.

I do not think that any such inflexible rule was either established or applied in either Court.

There is no conflict between the rule stated in this Court and the way it was expressed in *Hood v. Murray*[4], and in *Hutchinson v. National Refuges for Homeless and Destitute Children*[5]. In the latter case, at p. 801, Lord Finlay said:

> *Bullock v. Downes,* 9 H.L.C. 12, 13, therefore decides that, prima facie, the next of kin are to be ascertained at the death of the testator, but, that if there is a sufficient indication to that effect in the words of the will, the time for ascertaining the class may be the time fixed by the will as the period of distribution. The question in this as in every other case of the kind must be whether there is in the will a sufficient indication that the period of distribution is the time at which the class is to be ascertained.

Under this will, who are the persons who will be entitled to the second half of the estate "according to the Statute of

[1] (1896), 23 O.A.R. 29.
[2] (1897), 27 S.C.R. 628 at 632.
[3] (1860), 9 H.L.C. 1, 11 E.R. 627.
[4] (1889), 14 App. Cas. 124.
[5] [1920] A.C. 794.

Distribution in force in the Province of Ontario as if I had died intestate in respect thereto"? There can only be one meaning to this, that is, the daughter, the sole next-of-kin and the one entitled under *The Devolution of Estates Act*. The question is whether the testator by the terms of this will was thinking of an artificial class of persons who would be entitled as next-of-kin if he, the testator, had survived to the date of distribution. I cannot see on the face of this will that he was thinking of any such artificial class and there are no other indications external to the residuary disposition that throw any light on this subject one way or the other. The mere fact that the life tenant and the person who would take if the class is ascertained as of the date of the death of the testator are one and the same person, is not an indication of a contrary intention.

This artificial class of persons was found to be indicated in the *Hutchinson* case and it is well, in considering the reasons for judgment, to look at the disposition that was under consideration. The testator gave his residuary personal estate upon trust after the death or remarriage of his wife for his three daughters and their respective children in equal shares with cross limitations among them. He also directed:

> that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the Statutes for the Distribution of Estate of Intestates, such persons if more than one to take distributively according to the said Statutes.

For myself, I think that there is a plain indication in this will that the next-of-kin would be ascertained only when it became apparent that the trusts had failed, and not on the date of the death of the testator. I cannot see this case as a new point of departure in the consideration of this problem. It is no more than a finding of a contrary intention on the wording of the will.

Rose C.J.H.C. considered this problem again ten years after *Re Young* in *Re Allan*[1]. I quote from his judgment at pp. 2 and 3:

> It is suggested that the testatrix cannot have intended that upon the death of Frederick Hugh Allan without issue any portion of the part of the estate set aside for him should descend to his representatives. Attention is directed to the fact that one one-fourth part of the estate of the testatrix is given outright to her son Thomas Martin Livingstone Allan

[1] [1939] O.W.N. 1.

1965

NATIONAL TRUST CO. LTD. v. FLEURY et al.

Judson J.

if he survives, whereas in the case of the parts set aside for other children (including Frederick Hugh Allan) the income only is given to the child; and it is suggested that a construction which vests in Frederick Hugh Allan an interest in remainder in the part given to him for life will place him to a certain extent upon an equal footing with his brother Thomas Martin Livingstone Allan. It is also to be noted that the testatrix makes no provision for the widow of a son, or the surviving husband of a daughter, for whom a part of her estate is set aside, and it is suggested that a construction which will cause a portion of the part set aside for Frederick Hugh Allan to descend to his widow is a construction which may defeat the wishes of the testatrix. The learned Chief Justice said that he could not find in any of this a sufficient indication that the testatrix intended that the ordinary rule should not be followed. Certainly the mere fact that the heirs, if the class is ascertained as at the date of the death of the testatrix, will include the life tenant is not sufficient. This is made plain by the text writers and the cases cited by them. Thus in Theobald on Wills, 7th ed., 340, it is said: "If the gift is to the heir of the testator, the heir must be ascertained at the death of the testator, though the gift to the heir is after a life interest to the person who is the heir." And in Jarman on Wills, 7th ed., 1551, it is said: "And since a departure from the rule leads to frequent inconveniences, slight circumstances or conjectural probability will not prevent an adherence to it. Thus it is not enough that the heir has an express estate in the same property limited to him in a previous part of the will."

Re Campbell[1], *Re Hughson*[2], *Re Jones*[3] and *Re Colby*[4] are all uniform and in line to the effect that identity of the life tenant with the person who would be the next-of-kin at the date of death of the testator is not in itself an indication of a contrary intention. *Re Pennock*[5] seems to be out of line with these decisions. It is important for the orderly administration of the law of property, where the problem is so clearly identifiable, that the mode of approach which was stated in this Court and in the Ontario Court of Appeal over seventy years ago should be adhered to.

I would allow the appeal and restore the judgment of Hughes J. The trustees of the will of Marguerite Fleury and the trustees of the will of William E. Fleury should have their costs out of this part of the residue on a solicitor and client basis both here and in the Court of Appeal. There should be no order for costs for the individual respondents in either Court.

Martland and Spence JJ. concurred with the judgment delivered by

[1] (1928), 63 O.L.R. 36. [2] [1955] O.W.N. 541. [3] [1955] O.R. 837.
[4] [1957] O.W.N. 517.
[5] [1936] O.R. 1, affirmed on appeal [1936] 2 D.L.R. 192.

1965

NATIONAL TRUST CO. LTD. v. FLEURY et al.

Ritchie J.

RITCHIE J.:—This appeal is concerned with the true construction to be placed on the provision made by the late Herbert W. Fleury in para. 11(c) of his will for the disposition of one-half of the remainder of the corpus of his estate on his daughter's death.

By the terms of para. 11 of his will, the late Mr. Fleury gave, devised and bequeathed all the rest, residue and remainder of his estate unto his trustees, upon and subject to the following trusts:

(a) To pay the net income to my daughter, MARGUERITE W. FLEURY, during the remainder of her life, such payments to be made in half-yearly payments or oftener as my Trustees may deem advisable. Should such income payable under this clause in any year amount to less than Five Thousand Dollars ($5,000.00) my Trustees shall pay out of the residue of my estate to my said Daughter the difference between the amount of the said income and Five Thousand Dollars ($5,000.00) it being my intention that my said Daughter shall receive not less than Five Thousand Dollars ($5,000.00) each year. Should the amount so to be paid to my Daughter be in the absolute discretion of my Trustees insufficient for the proper support and maintenance of my said Daughter, my Trustees are hereby authorized to pay to or for my said Daughter such part of the corpus of the said residue of my estate as they shall deem necessary or advisable. In exercising their discretion under this clause, it is my desire that my Trustees shall deal with my said Daughter generously.

(b) I GIVE AND BEQUEATH the following Charitable bequests:

(It is unnecessary to set out these bequests).

(c) Upon the decease of my daughter Marguerite W. Fleury to distribute the corpus of my estate as follows:

The sum of Eighty Thousand Dollars ($80,000.00) shall be divided amongst, between or to the first cousins of my said daughter, being Nephews and Nieces of mine, or their children, per stirpes in being at the decease of my daughter.

The remainder of the corpus of my estate to be divided as follows:— One-half to my brother William J. Fleury or his heirs; and the remaining one-half to such persons as will be entitled thereto according to the Statute of Distribution in force in the Province of Ontario as if I had died intestate in respect thereto.

The question to be determined on this appeal is whether "the remaining one-half" of the corpus of the estate, consisting of securities having a par value of $338,000 is to be paid to the person or persons who would have been entitled according to *The Devolution of Estates Act* at the time of the testator's death, or to those who were so entitled at the date of the death of his daughter Marguerite W. Fleury. The learned judge of first instance, Mr. Justice Hughes, decided that upon the true construction of the will, the testator intended that the fund should go to such persons as would

1965

NATIONAL TRUST CO. LTD. v. FLEURY et al.

RITCHIE J.

have been entitled at the date of his death if he had died intestate and in so doing he relied upon the rule of construction which was stated by Lord Campbell L.C. in *Bullock v. Downes*[1], at p. 12 where he said:

> Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class following a bequest of the same property for life vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death.

The late Marguerite Fleury was the only person entitled under the statute at the date of the testator's death and the result of applying the rule in *Bullock v. Downes, supra,* to the language of the present will is that her personal representative becomes entitled to the fund in question.

In the reasons for judgment delivered on behalf of the Court of Appeal[2] by Schroeder J.A. he has, however, found that the rule in *Bullock v. Downes, supra,* does not apply under the present circumstances and that the class of beneficiary is to be determined as at the date of the death of the life tenant so that the nephews and nieces of the testator are entitled to the fund.

Both of the judgments in the Courts below contain an extensive review of the authorities and I have now had the benefit of reading the reasons for judgment of my brother Judson who has also made an analysis of many of the cases. I do not think that any useful purpose will be served by my retracing the ground which has been covered so well.

I think that the true meaning of *Bullock v. Downes, supra,* is that described by Viscount Finlay in *Hutchinson v. National Refuges for Homeless and Destitute Children*[3], at p. 801 where he says:

> *Bullock v. Downes* therefore decides that, prima facie, the next of kin are to be ascertained at the death of the testator, but, that if there is a sufficient indication to that effect in the words of the will, the time for ascertaining the class may be the time fixed by the will as the period of distribution. The question in this as in every other case of the kind must be whether there is in the will a sufficient indication that the period of distribution is the time at which the class is to be ascertained.

[1] (1860), 9 H.L.C. 1.
[2] [1964] 2 O.R. 129, 44 D.L.R. (2d) 393.
[3] [1920] A.C. 794.

In the construction of wills, the primary purpose is to determine the intention of the testator and it is only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used that resort is to be had to the rules of construction which have been developed by the Courts in the interpretation of other wills. It is to be remembered that such rules of construction are not rules of law and that if their application results in attributing to the testator an intention which appears inconsistent with the scheme of the will as a whole, then they are not to prevail.

An interesting discussion of the scope and purpose of rules of construction in the interpretation of wills is to be found in a note in 4 Law Quarterly Review (which was then under the editorship of Frederick Pollock) where it is said at p. 488:

> A rigid rule of construction is a contradiction in terms. If it does not yield to an evident contrary intention, it is a rule of law not of construction, as Mr. Vaughan Hawkins pointed out many years ago. A rule of construction merely means that the Court has, in a series of cases, attached a particular meaning to a word or collocation of words, and will do so again if there is no reasonable ground for distinguishing the former cases. The Court does so because such meaning is probably the true one. . . . The difficulty is to give due weight to this probability consistently with a proper regard to the terms of the whole instrument, and to the other evidence (where there is other admissible evidence) of the intention of the settlor or testator.

As has been pointed out in the Courts below, Lord Birkenhead L.C. in *Lucas-Tooth v. Lucas-Tooth*[1], after commenting on *Hutchinson's* case, *supra,* had occasion to say at p. 601:

> Indeed, in approaching a problem of this kind it is important never to lose sight of the true principle of construction in such cases—that it is the duty of the Court to discover the meaning of the words used by the testator, and, from them and from such surrounding circumstances as it is permissible in the particular case to take into account to ascertain his intention. For this purpose, it is important to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause.
>
> Unless this is done, there is a grave danger that the canons of construction will be applied without due regard to the testator's intention, tending thereby to ascertain his wishes by rules which, in the particular case, may produce consequences contrary to that intention.

In this regard I would adopt the comment of the learned judge of first instance where he says of the cases subsequently decided in Ontario:

[1] [1921] 1 A.C. 594.

1965

NATIONAL TRUST CO. LTD. v. FLEURY et al.

RITCHIE J.

It seems to me that looking at all the authorities cited to me in the courts of this province since that time and including *Re Young* the principle of *Bullock v. Downes* has been applied in the sense stated by Lord Birkenhead, some cases having yielded indications from the wording of the will that the ascertainment of the class should be made with the time of the testator's death in mind and others with that of the time of distribution and that the former will result in the absence of indications of a contrary intention.

The whole scheme of the residuary clause in the present will appears to me to be predicated on the assumption that the testator's daughter would survive him and I agree with Schroeder J.A. that he must also be deemed to have known that in that event she would be his only next-of-kin at the date of his death. This being the case, to interpret the terms of para. 11(c) as being a gift of the income from "the remaining one-half" of the corpus to the daughter for life and after her death of the capital to the next-of-kin of the testator at the date of his death, is to attribute to the testator an intention to give his daughter a vested interest in this fund at his death. It appears to me, however, that such a construction runs contrary to the clear provisions of para. 11(a) of the will whereby the testator expressly directed that this part of his estate was to be incorporated in a trust fund to be held by his trustees with direction to pay his daughter at least $5,000 a year from the income and if necessary from the capital and to the capital of which she could only otherwise have access if the trustees in their absolute discretion considered the sum of $5,000 annually to be insufficient for her proper support and maintenance. In my view this makes it apparent that the testator intended the whole of the corpus of his estate to be preserved intact during the lifetime of his daughter subject to the payments which the trustees were authorized to make. It seems to me that the result of applying the rule in *Bullock v. Downes* to this will is to ignore the carefully drawn provisions setting up this trust and to attribute to the testator the contrary intention to provide for his daughter in such manner as to enable her to obtain a substantial part of the fund for her own use absolutely without the exercise of any authority or discretion by the trustees and whether or not the whole fund produced an income of $5,000 a year.

In my opinion the inconsistency which results from the application of this rule to the language used in paras. 11(a) and 11(c) of the will is of itself a sufficient indication that

the testator did not intend the ultimate beneficiaries under para. 11(c) to be those entitled under *The Devolution of Estates Act* at the date of his death, but rather that he intended one-half of the remainder of the corpus of his estate to be divided amongst the persons so entitled at the date of the death of his daughter. Such a construction does no violence to the language by which the trust fund was created under para. 11(a) and is not inconsistent with the natural and ordinary meaning attributable to the words used in para. 11(c).

For these reasons I am of opinion that the class entitled to the remaining one-half of the corpus of the estate is to be ascertained at the time of the death of Marguerite Fleury. I would therefore dismiss this appeal.

The costs of all parties throughout will be paid out of the estate. Those of the executors and trustees as between solicitor and client.

Appeal dismissed, JUDSON J. *dissenting.*

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