1949

*Feb. 1, 2.
*May 9

IN THE MATTER OF
THE ESTATE OF GEORGE GILMOUR LENNOX, DECEASED.

WILLIAM SIDNEY RONALD and BEATRICE AVIS AINLEY CELS, Executor and Executrix of the last will of CORA BELL LENNOX, DECEASED ..... } APPELLANTS;

AND

LENNOX ARTHUR WILLIAMS and HELEN MARGUERITE FULLER.. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Wills—Construction—Life tenant—Residuary Personal estate—Power to executor to invest in securties he may deem advisable—Power to pay part of capital to tenant—What remains to be divided upon death of tenant—Whether executor has power to invest in unauthorized securities—Whether tenant entitled to income from unauthorized securities—Manitoba Trustee Act, R.S.M. 1940, c. 221.

Held: A will directing that the executor "shall invest in such securities as he may deem advisable", the income therefrom to be paid to the widow with power to pay her part of the capital, and directing that "such part of my estate as remained" shall be divided upon her death, does not give the executor power to retain or invest in unauthorized securities; and, therefore, the widow as life tenant of the residuary estate is not entitled to the income produced by unauthorized investments such as shares in a manufacturing company.

Howe v. *Dartmouth* (1802) 7 ves. 137 applies.

APPEAL and CROSS-APPEAL from the decision of the Court of Appeal for Manitoba (1) varying, Coyne J.A. dissenting, the judgment of Montague J., declaring certain moneys paid to the life tenant were capital in the hands of the executor.

Hugh Phillipps, K.C. for the appellants.

F. L. Bastedo, K.C. for the respondents.

The judgment of the Court was delivered by

KERWIN J.:—This appeal concerns the administration of the estate of a testator, George Gilmour Lennox, and the

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Estey and Locke JJ.

(1) [1948] 4 D.L.R. 753; 2 W.W.R. 640.

proceedings commenced with an application by his executor to the King's Bench in Manitoba for an answer to the following question:—

> Is the portion of the moneys received from the T. Herbert Lennox Estate which represent income or revenue in the hands of that estate, income or revenue in my hands and therefore the property of Cora Bell Lennox, widow, or is it capital and therefore to be held for the residuary legatees?

T. Herbert Lennox referred to in this question died in 1934. By his will, following a bequest of household goods and furnishings to his wife and a devise to her of the use or rent of a summer dwelling, he devised and bequeathed the balance of his estate to his trustees. After providing for an annuity for his wife, he directed that upon her death a number of legacies should be paid and the residue divided equally among his brothers and sisters who should survive his wife. Because of the point involved in this appeal, it is not without significance to notice clause 8 of the will of T. Herbert Lennox:—

> 8. I authorize my trustees to invest the moneys of my estate in any investments which they deem reasonably secure and likely to return a fair annual income, not being restricted to investments expressly authorized by law, and with power to retain the investments made by me in my lifetime as long as they think proper, and to reinvest the proceeds of the same, or any part thereof in similar securities.

The wife of T. Herbert Lennox died August 8, 1937, and the legacies payable on her death were paid June 8, 1938. The residue, which included 300 shares of the capital stock of T. Sisman Shoe Company Limited, was not divided among the four brothers and sisters of T. Herbert Lennox who survived the latter's widow. One of these brothers was the testator, George Gilmour Lennox, who died April 15, 1942. His will, after revoking previous ones and appointing an executor and directing him to pay debts, proceeds:—

> I DIRECT that the rest and residue of my estate shall be invested in such securities as my executor may deem advisable and the income from same paid to my beloved wife, Cora Bell Lennox, as long as she shall live.
>
> I HEREBY ACKNOWLEDGE that the house in which I am living at the time of my death and the furniture in the same are the property of my wife.
>
> I FURTHER DIRECT AND REQUEST that my Executor, if he deems it advisable, shall be at liberty to pay, in addition to the income

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from my estate, a further amount not exceeding five per cent of the capital of my estate in any one year to my wife as an additional allowance to her.

On the death of my beloved wife, I DIRECT AND REQUEST such part of my estate as shall remain be divided into three equal parts and one part I GIVE, DEVISE and BEQUEATH unto my niece Avis Beatrice Ainley Cels; one part to my nephew Lennox Arthur Williams, son of my sister; and one part to my niece Helen Marguerite Williams, now Helen Marguerite Fuller, daughter of my sister, respectively for their sole and only use forever.

Cora Bell Lennox, the testator's widow, died July 14, 1947, having received from her husband's estate the sum of $1,600. In the meantime, disputes had arisen between her, on the one hand, and Lennox Arthur Williams and Helen Marguerite Fuller, two of the residuary beneficiaries under the will of the testator, on the other. The testator's executor had received from time to time from the executors of T. Herbert Lennox cheques representing income or revenue earned by the latter's estate. While the executor's affidavit, filed on the application for advice, states that all of this was claimed by the two residuary beneficiaries to be capital, such claim is properly confined to the dividends declared and paid by the Shoe Company. The par value of each of the 300 shares held by the T. Herbert Lennox estate was $100 but, for succession duty purposes, each was valued at $240. Down to and including 1945, the annual dividend had been at a substantial rate but at the end of 1946, or early in 1947, while the application to the Court was pending, an extraordinarily large dividend was declared. In accordance with certain amendments to the *Income War Tax Act,* the Company paid the income tax of $73,178.81 out of its total accumulated undistributed income of $369,230.99 for the period 1917 to 1939. The directors objected to paying the balance in cash and decided that it should be distributed as a dividend in the following manner:—$46,052.18 in cash; the sum of $100,000 by the issuing of 1,000 shares of non-transferable preferred stock and the issuing of $150,000 debentures. The T. Herbert Lennox estate was entitled to 30 per cent of each of these items and the estate of George Gilmour Lennox would be entitled to one-fourth of the share of the T.

Herbert Lennox estate. The disposition of this one-fourth share has been treated as involved in the question submitted to the Court.

At the conclusion of the argument before him, the judge of first instance decided that the moneys referred to in the question and the cash and the preferred stock and debentures comprising the dividend declared by the company at the end of 1946 or early in 1947 were capital in the hands of the testator's executor. While no reasons were given, we were advised that the learned judge proceeded on the ground that the income which Cora Bell Lennox was entitled to receive was limited to the income from securities in which the testator's executor actually invested. While the appeal by Cora Bell Lennox to the Court of Appeal (1) was pending she died but the proceedings have been continued at the suit of her executor and executrix, William Sidney Ronald and Beatrice Avis Ainley Cels, the latter being also one of the residuary beneficiaries under the testator's will.

The Court of Appeal (1) dismissed the appeal with the following variations:—

1. That the entire residue of the George Gilmour Lennox estate (including the 75 shares of stock in the T. Sisman Shoe Co. Ltd., with all earnings and undistributed or undeclared accretions to the value thereof) be valuated as at the 15th day of April, 1942, being the date of the death of the said George Gilmour Lennox;

2. That the amount so ascertained by said valuation shall be, and shall be treated as, capital in the estate of the said George Gilmour Lennox;

3. That interest on the sum or amount of that valuation be paid or allowed to Cora Bell Lennox from the said 15th day of April, 1942, until the date of her death, namely, the 14th day of July, 1947;

4. That the interest be computed yearly at the rate of four per cent per annum;

5. That if in any year or years of that period, the said Cora Bell Lennox was actually paid by way of income, to which as life tenant she was entitled, any sum or sums in excess of four per cent of the said valuation but not in excess of five per cent of the residue so valuated, she shall be allowed to retain that excess sum or sums as being paid to her out of capital of the residue;

From that order the representatives of the estate of Cora Bell Lennox now appeal and the other two residuary beneficiaries cross-appeal. The cross-appeal is based on

(1) [1948] 4 D.L.R. 753; 2 W.W.R. 640.

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the reasons which found favour with the judge of first instance but in my opinion the testator's will is not capable of the construction adopted by him and the cross-appeal fails. However, subject to a variation, the main appeal also fails as it is clear that the majority of the Court of Appeal (1) were quite right in deciding that the rule in *Howe* v. *Lord Dartmouth* (2) applies.

The rule was well established even before the decision whose name it bears and has been followed consistently ever since (see *Wentworth* v. *Wentworth* (3)). Statements of the rule appear in all the textbooks and a convenient reference is to page 241 of the 4th edition of Hanbury's Modern Equity:—

> Where residuary personalty is settled on death for the benefit of persons who are to enjoy it in succession, the duty of the trustees is to convert all such parts of it as are of a wasting or future or reversionary nature, or consist of unauthorized securities, into property of a permanent and income-bearing character.

Necessarily it is there stated in wider terms than need be considered in this appeal since it takes account of cases as well where the rule operated to the benefit of life tenants, as where it assists residuary beneficiaries. As applied to this appeal, it may be put thus:—The life tenant of residuary personal estate is not entitled to the income produced by unauthorized investments. As pointed out in the third edition of Gober on Capital and Income, at page 171, on the authority of the cases there referred to, the rule does not proceed on any presumed intention of the testator that the property should be converted but is based on the presumption that he intended it to be enjoyed by different persons in succession; an intention which can only be carried out by means of conversion and investment in permanent securities.

In the present case there clearly was to be an enjoyment in succession. While the rule may be excluded if the will discloses an intention either by an express direction or by necessary implication that the property shall be enjoyed in its existing state, the onus of showing that the words in any particular will exclude the rule lies on those who

(1) [1948] 4 D.L.R. 753; 2 W.W.R. 640.

(2) (1802) 7 ves. 137.

(3) [1900] A.C. 163 at 171.

say that it ought not to be applied: per Thesiger L.J. in *Macdonald* v. *Irvine* (1) and James L.J. at 124, and other cases referred to in Gober at 179. Here, the circumstances that the testator's executor had power to pay the widow part of the capital not exceeding five per centum in any one year and that what was to be divided upon her death was "such part of my estate as remained" do not exhibit such an intention. Nor, in the direction to the executor to invest in such securities as he may deem advisable, is there found an authority to him to invest in unauthorized securities. The cases collected in 33 Halsbury, 2nd edition, paragraph 418, show that such a direction has uniformly been held to mean authorized securities only. It is in connection as well with the power to retain as with the power to invest that a comparison of the testator's will with clause 8 of the will of T. Herbert Lennox is enlightening.

In the absence of such authority in the will, the Sisman Company shares are unauthorized investments: *Manitoba Trustee Act,* R.S.M. 1940, c. 221. Mr. Justice Coyne (2) refers to the following provision in section 30 of the *Trustee Act,* R.S.M. 1913, c. 200:—

> Nothing in this Act shall . . . empower any administrator, executor or trustee to purchase any bank or other stock with moneys entrusted to him as such administrator, executor or trustee aforesaid.

and to the fact that it was omitted in S.M. 1931, chapter 52, and in subsequent legislation. However, this cannot alter the construction of the *Trustee Act* as no authority in Manitoba was ever given trustees to purchase bank or other stock except stock of the Government of the Dominion of Canada or of any province.

When once the position of affairs is appreciated and stated, there is, I think, no difficulty. On April 15, 1942, when the testator died, the time had already arrived for the executors of T. Herbert Lennox to distribute the residue of his estate. The testator's executor had no power to retain or invest in unauthorized securities. Even if it be a fact that there were obstacles in the way of the executors of T. Herbert Lennox selling or transferring the Company's

(1) (1878) 8 Ch. 101 at 121, 124.

(2) [1948] 4 D.L.R. 753; 2 W.W.R. 640.

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shares (and we have no information upon the subject), that does not alter the application of the rule since equity considers that as done which ought to have been done.

Counsel for the respondents stated that he did not seek to have repaid any moneys paid by the testator's executor to Cora Bell Lennox in excess of the amounts to which she was entitled under the formal order of the Court of Appeal but, in any event, clause (1) of that order should be amended so as to be restricted to the 75 shares of stock (including all earnings and undistributed or undeclared accretions) since there were other income-bearing assets in the estate of T. Herbert Lennox. In case it might be necessary to consider the point on some future occasion, it should be stated that the rate of 4 per centum per annum is accepted as one adopted by the Court of Appeal and as to which counsel for the respondents stated he raised no question.

With the variation mentioned above, the appeal should be dismissed with costs and the cross-appeal without costs.

Appeal dismissed with costs; cross-appeal dismissed without costs.

Solicitors for the appellants: *Phillipps and Tallin.*

Solicitors for the respondents: *Aikins, Loftus, Macaulay & Company.*