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* Feb. 11, 12.
* March 19.

IN THE MATTER OF THE ESTATE OF EDWARD ROBERSON, DECEASED

STANLEY CAMERON AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

FRANCIS LONGWORTH HASZARD TRUSTEE, ETC., (COMPLAINANT) AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND

Will—Interpretation—Persons entitled—Vested interest.

The testator died in 1883, leaving his widow and three daughters, G., H. and L. By his will he devised and bequeathed all his property to his executors and trustees upon trusts. The will set aside three specific funds, one for each of the daughters for life, and, subject thereto, gave to the widow a life interest in the estate. She was also given a power of appointment, which she exercised, as to one-half of the residue of the estate, and this was not now in question.

The daughter G. died in 1885, ten days after the birth of her only child, who died within two months later, leaving his father as next of kin. The daughter H. died without issue in 1907. The widow died in 1909. The daughter L. died, unmarried, in 1934.

Questions then arose, under provisions in the will, and in the above circumstances, as to who were now entitled to (1) that half of the residue of the estate over which the widow was not given a power of appointment, (2) the fund set aside for the daughter L. during her life, and (3) the fund set aside for the daughter H. during her life.

As to said half (in question) of the residue, the will directed the trustees to pay the income thereof to the testator's wife during her life and, on her death, then to pay the income to G. during her life, and upon her death to pay the principal "to the lawful issue of my said daughters L. and G. or should only one of them have children, then to the lawful issue of such daughter, share and share alike."

Held: G.'s child took at birth a vested interest in the principal of said half of the residue. Though vesting in possession was postponed until the expiration of the life interest of the widow and of the subsequent life interest of G. had she survived her mother, the vesting of an interest in G.'s child was not dependent or expectant upon the prior

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

life interest or interests; it did not depend on his being alive at the time of distribution. (*Brown* v. *Moody,* [1936] A.C. 635; *Hickling* v. *Fair,* [1899] A.C. 15, at 35; and *Duffield* v. *Duffield,* 3 Bligh's New Reports, 260, at 330-331, cited).

As to the fund set aside for L. during her life, the will directed the trustees, upon the death of L. having issue, to pay it to such issue, and in default of issue then to pay it "to my daughter G., should she survive my daughter L., or should my said daughter G. not be living at the death of my said daughter L., then to pay [the fund] to the lawful issue then living of my said daughter G., share and share alike."

Held: The words "then living" clearly related to the last antecedent, the date of L.'s death, and, there being no issue of G. living at that date, the fund fell into the residue of the estate, half of which passed under the widow's appointment and the other half to those entitled through G.'s child's vested interest.

As to the fund set aside for H. during her life, the will directed the trustees upon her death to pay it to her issue and in default of issue to pay it to G. if living "and should she not be then living to pay the same to the lawful issue of my daughters L. and G. share and share alike or should there be but one child of either of my said daughters then to such child absolutely."

Held: The fund became (for the same reasons as those for the above conclusion as to the residuary clause) vested in G.'s child at birth, and there was no intestacy. The court could not insert such words as "then living" after the words "to pay the same to the lawful issue." (*Re Litchfield; Horton* v. *Jones,* 104 L.T. 631).

Judgment of the Court of Appeal in Equity of Prince Edward Island, [1936] 4 D.L.R. 443, reversed.

APPEAL from the judgment of the Court of Appeal in Equity of Prince Edward Island (1) affirming (except in a matter of costs, the variation made in this respect not being appealed against) the judgment of Saunders M.R. (2) in a suit brought by the surviving executor and trustee of the last will and testament of Edward Roberson, deceased, by bill of complaint in the Court of Chancery of Prince Edward Island, asking for a declaration as to who are the persons now entitled to the assets of the estate of the said deceased which still remain in the hands of said executor and trustee and for an order for payment over or distribution and for an order and direction regarding further administration.

The determination of what persons are now entitled to the assets of said estate involved the interpretation of certain clauses in the will of said deceased and their effect in the events which have occurred.

(1) [1936] 4 D.L.R. 443.

(2) [1935] 4 D.L.R. 44 (*sub. nom. Haszard* v. *Winchester et al.*)

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The material facts and circumstances, the relevant clauses of the will, and the questions for consideration, are sufficiently stated in the judgment of this Court now reported, and are indicated in the above headnote. The appeal to this Court was allowed, the judgments of the Courts below set aside, and judgment directed to be entered declaring the rights of the parties in accordance with the reasons for judgment of this Court now reported; the costs, as between solicitor and client, to all the parties throughout to be paid out of the residue of the estate.

A. A. McLean K.C. and *Donald McKinnon K.C.* for the appellants.

E. K. Williams K.C. and *W. E. Bentley K.C.* for the respondents.

The judgment of the court was delivered by

DAVIS J.—This litigation is to determine the proper interpretation and effect of the will of Edward Roberson, late of the province of Prince Edward Island, who died in 1883, in respect of the final distribution of certain substantial portions of the estate. The principal difficulty arises out of the fact that the only grandchild of Edward Roberson was not born until 1885 and lived less than two months. The real contest is between those persons who claim through the grandchild on the basis that the grandchild acquired at birth a vested interest in those portions of the testator's estate now involved in this litigation and those persons who claim through those who were the next of kin of Edward Roberson at the date of the latter's death on the basis that in the events which have occurred since the death of the testator there is an intestacy in respect of the said portions of the estate.

The grandchild's mother was a daughter of Edward Roberson. She died ten days after the birth of the child and on the child's death a few weeks later his father became the only next of kin. In later years the father remarried and had three sons by his second marriage. He died in 1921, his second wife having predeceased him, and the three sons survived him and are still alive. In reality, the three sons by the second marriage, who are, of course, strangers to Edward Roberson, are claiming through their father against those persons who claim through those who

were the next of kin of Edward Roberson at the date of his death.

Three separate portions of the estate of Edward Roberson are involved in this litigation and they have been described throughout, for convenience, as funds A, B and D. The main point is whether or not the corpus of all, or of any, of these funds became vested in the grandchild. No real difficulty will be met in the ascertainment of the persons now beneficially entitled to the corpus of the funds, or of the shares in which they will take, once it is determined, upon the proper interpretation and effect of certain provisions of the testator's will, whether or not the grandchild acquired at birth a vested interest.

Before turning to the language of the will it is convenient to set out certain facts and dates. The testator was survived by his widow and three daughters. All his property, real and personal, was by his will expressly devised and bequeathed to his named executors and trustees upon certain trusts and, broadly speaking, the will set aside three specific funds, one for each of the daughters for life, and subject thereto the widow was given a life interest in the estate. The widow and the three daughters are now dead. The questions raised in these proceedings concern the disposition of the corpus of two of the specific funds and of one half of the residue of the estate, and the alleged improper payment by the trustees of some of the income from these funds over a period of years. The daughter Georgianna died February 10, 1885. Her child was born on February 1, 1885, and died on March 26 of the same year. The daughter Hannah Louisa married and died without issue on April 9, 1907. The widow of the testator died on November 28, 1909. The daughter Lucy Jane never married and lived until January 13, 1934. Alexander Cameron, who married Georgianna and who was the father of the grandchild, died on July 16, 1921, leaving all his property by will to his three sons, share and share alike.

What is described as fund A is the specific fund set apart by the will for the daughter Lucy Jane during her lifetime; what is described as fund B is the specific fund that was set aside for the daughter Hannah Louisa during her lifetime, and what is described as fund D is that half of the residue of the estate over which the widow was not given a power

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of appointment. The other half of the residue was duly appointed by the widow, by virtue of a power vested in her by the will, to her daughter Lucy Jane who survived her. The same problem is raised in respect of the corpus of each of these funds, A, B and D, that is, whether it became vested in the grandchild or is there an intestacy? The executors of the father of the grandchild are the appellants in this Court and the respondents represent next of kin of Edward Roberson. Counsel for the respondents contended that there was an intestacy in respect of funds A and B and admitted that if that contention was sound those funds had fallen into the residue. They further contended that there was an intestacy in respect of half the residue, i.e., fund D.

We may conveniently turn at once to the provisions of the will relating to the residue. Omitting those parts that gave a power of appointment to the widow with respect to the disposition after her death of one half of the residue, the residuary clause reads as follows:

> And the said trust premises shall be held by my said trustees upon the further trust to pay the net annual interest and income of all the residue of my said estate * * * to my said dear wife during the term of her natural life, and on the death of my said wife * * * then to pay the annual income * * * of the remaining moiety of the residue of my said estate to my daughter Georgianna during the term of her natural life, and upon the death of my said daughter Georgianna to pay the principal money to the lawful issue of my said daughters Lucy and Georgianna or should only one of them have children, then to the lawful issue of such daughter, share and share alike.

The widow died, as we have stated, in 1909. Her daughter Georgianna had predeceased her. The only issue of the daughters Lucy and Georgianna was the child of Georgianna. Much stress is laid by counsel for the respondents upon the fact that the grandchild was not alive at the date of the death of the testator and was not alive at the date of the death of the widow.

The contention on behalf of the respondents is that there was a mere direction to pay and that by force of the repetition of the word "then" in the language of the residuary clause the gift to the issue was contingent upon being alive at the date of distribution. In other words, the contention of the respondents in effect is that we should read into the language of the clause the words "then living" after the words "lawful issue" so that the provision shall require that the issue be "then living," i.e., at the date of distribution.

The respondents treat the provision as disclosing an intention on the part of the testator to create a contingent gift to a class to be ascertained at the date of distribution, and contend that, there having been no one of the class then alive, there is an intestacy. Further, the respondents point to the power of appointment given to the widow in respect of one half of the residue of the estate and contend that, as that half of the residue was plainly not to become vested in any one until the death of the widow provided she exercised the power, it may fairly be implied that the testator did not intend any part of the residue to vest before the date of his widow's death. But the two halves of the residue are subject to separate and different trusts and are quite independent one from the other and it is a forced construction to import the contingency with respect to the disposition of one half of the residue into the provisions governing the disposition of the other half.

The questions of interpretation were raised by a bill of complaint in the Court of Chancery of the province of Prince Edward Island. Saunders J., the Master of the Rolls of that Court, came to the conclusion in a carefully considered judgment that the gift of half the residue to the issue of Lucy and Georgianna was contingent upon such issue being alive at the date of distribution. The learned Judge relied mainly upon decisions in this Court of which *In re Browne* (1) was then the latest. An appeal was taken to the Court of Appeal in Equity of the province of Prince Edward Island and the judgment was affirmed by the members of that Court (Mathieson C.J. and Arsenault J.) who also put the ground of their decision principally upon the authority of the decision of this Court in the *Browne* case (1). But subsequently the Judicial Committee delivered judgment in an appeal that had been taken from the judgment of this Court in the *Browne* case (1). Their Lordships reversed the judgment (*Browne* v. *Moody* (2)). We have no doubt that if the Judges in the Courts below had had the advantage of the judgment of the Judicial Committee in the *Browne* case (2) they would have reached a different conclusion in this case. It will be sufficient if we quote two passages from the judgment delivered by Lord Macmillan in the Privy Council:

(1) [1934] S.C.R. 324. (2) [1936] A.C. 635.

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Their Lordships observe, in the first place, that the date of division of the capital of the fund is a *dies certus*, the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place, the direction to divide the capital among the named beneficiaries on the arrival of that *dies certus* is not accompanied by any condition personal to the beneficiaries, such as their attainment of majority or the like. The object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital.

The law, their Lordships said, had been correctly stated by Sir William Page Wood, V.C., in *In re Bennett's Trust* (1) as follows:

It is clear that the use of the words "pay and transfer," as the only words of gift, does not make such a bequest contingent. The true criterion is that which is mentioned in *Leeming* v. *Sherratt* (2), namely, whether the postponement of the payment or division was on account of the position of the property, or of the person to whom the deferred interest is given. If the reason is simply, that a life interest is previously given to another person, so that the fund cannot be divided or paid over until his death, and is not a reason personal to the legatee of the absolute interest, such as his attaining twenty-one, it is treated as a gift to one for life, with a vested remainder to the legatees who are to take subject to the life interest.

Mr. E. K. Williams, in his very clear and direct argument on behalf of the respondents, naturally sought to escape from the force and effect of the *Browne* case (3) and he really rested his argument that there was no vesting in the grandchild in the present case upon the fact that there was no issue of the daughters Lucy and Georgianna alive at the date of the death of the testator, and he contended that there must be a vesting, if at all, *a morte testatoris*, and therefore the direction to pay to the issue of Lucy and Georgianna must be interpreted as creating only a contingent, as distinguished from a vested, interest. Mr. Williams did not refer us to any authority in support of this contention and it appears to us to be such an artificial construction of the settled rule as not to justify our acquiescence in it. No doubt the distinction is not without importance and in certain circumstances may well be an element in determining whether vesting has or has not taken place. There are, however, in this will no conditions or contingencies attached to the gift to the issue and no

(1) (1857) 3 K. & J. 280 at 283. (2) (1842) 2 Hare 14.
(3) [1936] A.C. 635.

clause of survivorship or gift over. Lord Davey in the course of his speech in the House of Lords in *Hickling* v. *Fair* (1), said:

It is an elementary principle in the construction of wills that a gift to a class after a life interest or life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used. I think it is equally clear that when the gift is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency.

In approaching the construction of a will and the question of vesting of legacies, the courts have often cited, with approval, the language in *Duffield* v. *Duffield* (2) (which case Lord Eldon expressed the hope would be a leading case (3)):

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 of 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 circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession.

The grandchild born in 1885 was the only issue of Lucy or Georgianna and as such, in our opinion, took at birth a vested interest in one half of the residuary estate which, though it was not to vest in possession until the expiration of the life interest of the widow and of the subsequent life interest of Georgianna had she survived her mother, was not dependent or expectant upon the prior life interest or interests. The vesting of the ultimate gift was independent of any prior life interest.

(1) (1899) A.C. 15, at 35.
(2) (1829) 3 Bligh's New Reports 260, at 330-331 (H.L.).
(3) *Ibid* at 339.

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Turning now to the language of the will with respect to the specific fund set apart for the benefit of the daughter Lucy during her life, fund A:

> And upon the death of my said daughter Lucy Jane having lawful issue to pay over the said sum of seven thousand dollars to such issue share and share alike and in default of issue then to pay over said sum of seven thousand dollars to my daughter Georgianna, should she survive my daughter Lucy, or should my said daughter Georgianna not be living at the death of my said daughter Lucy, then to pay over said principal sum of seven thousand dollars to the lawful issue then living of my said daughter Georgianna, share and share alike.

The daughter Lucy Jane, as already stated, did not die until 1934 and Georgianna died in 1885. The pertinent words therefore are

> should my said daughter Georgianna not be living at the death of my said daughter Lucy, then to pay over said principal sum of seven thousand dollars to the lawful issue then living of my said daughter Georgianna, share and share alike.

The words "then living" clearly relate to the last antecedent, i.e., the date of the death of Lucy. There was no issue of Georgianna living at that date and the fund fell into the residue of the estate, half of which passed under the widow's appointment and the other half passed to those entitled through the grandchild's vested interest.

Directing now our attention to the words employed by the testator respecting the specific fund set apart for the benefit of the daughter Hannah Louisa during her life, Fund B:

> And upon the death of my said daughter Hannah Louisa to hold the said sum of seven thousand dollars upon trust to pay the same to her lawful issue share and share alike, and in default of such issue then upon trust to pay the said principal sum of seven thousand dollars to my said daughter Georgianna if living, and should she be not then living to pay the same to the lawful issue of my daughters Lucy and Georgianna share and share alike or should there be but one child of either of my said daughters then to such child absolutely.

Hannah Louisa died in 1907 without issue and her sister Georgianna had predeceased her. The effect of this provision of the will is that if Georgianna should "be not then living," i.e., at the date of the death of Hannah Louisa, the fund is to be paid over to the lawful issue of Lucy and Georgianna, share and share alike, or should there be but one child of either of the said daughters, "then to such child absolutely." We are not entitled to insert such words as "then living" after the words "to pay the same to the lawful issue." See *Re Litchfield;*

Horton v. *Jones* (1). For the reasons given for our conclusion as to the residuary clause, this fund also became vested in the grandchild at birth, and there was no intestacy.

This disposes of the questions raised respecting the disposition of the corpus of each of the funds A, B and D, but a further question is raised in the proceedings as to the alleged improper disposition of some of the income from these funds. A proceeding of this kind is not, however, a convenient procedure for determining such a question and our judgment will be without prejudice to that question. If the parties cannot now agree upon an adjustment and settlement of their differences in respect of the impeached payments of income, that part of the bill of complaint should be remitted to the Court of Chancery. The facts in connection with the payments of income from these funds are not at all complete in the record before us but there is sufficient to indicate that there may well have been such an acquiescence on the part of the late Mr. Cameron, the father of the grandchild, who was himself one of the executors of the testator's will, as to preclude those now claiming through him from recovering against the surviving executor income which has been actually paid out by him, though, perhaps, to persons for the time being not strictly entitled to this income upon the construction which we have now put upon the provisions of the will respecting the funds in question. A great many years have elapsed since many of the payments were made, the surviving trustee obviously acted throughout in absolute good faith, and many matters of fact and questions of law may arise for consideration if the question of the actual payments of income is pressed. The evidence before us is quite insufficient to enable us to deal with the dispute.

The judgment below should be set aside and a declaration made in accordance with the foregoing conclusions. The costs, as between solicitor and client, of all parties throughout should be paid out of the residue of the estate.

Appeal allowed.

Solicitor for the appellants: *A. A. McLean.*

Solicitors for the respondents: *W. E. Bentley, D. L. Mathieson,* and *A. J. Haslam* (respectively).

(1) (1911) 104 L.T. 631.