IN THE MATTER OF THE ESTATE OF SHIRLEY GERTRUDE BERWICK, DECEASED

1948
*Feb. 27
*Mar. 23

ALEXANDER RAYMOND BERWICK (DEFENDANT) ..... APPELANT;

AND

THE CANADA TRUST COMPANY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Gift contingent on legatee's survival of testatrix by ten years—Legatee given power of appointment by will only—Gift over in event of death meanwhile without exercise of power—Whether absolute vested gift—Whether legatee entitled to demand immediate payment—Power of appointment by will only distinguished from power exercised by will, deed or otherwise.

*PRESENT:—Kerwin, Rand, Kellock, Estey and Locke JJ.

(1) [1945] S.C.R. 438.

1948

IN RE BERWICK ESTATE

BERWICK v. CANADA TRUST CO.

The testatrix devised and bequeathed all her estate to trustees upon the following trusts: (1) to pay to her son as soon as possible one-half of the residue; (2) to invest the other half and to pay the said son as long as he should survive the testatrix the income therefrom, and at the end of 10 years from her death to convey to the said son the remainder of her estate; (3) in the event of the son dying within 10 years of her death the share which he would have received had he survived the 10 years to be distributed as he should by his last will appoint, and in default of appointment to be distributed in the same manner as if the share had formed part of the son's estate whether he died testate or intestate.

The testatrix died in January 1946. The son, having received the first half, now demands the other half. The trial judge found that this was an absolute vested gift, but the Court of Appeal ruled that he was not entitled to receive now the entire residue of the estate.

Held: When a gift is contingent upon the legatee surviving the testator by ten years and the power of appointment can only be exercised through the medium of his will, which is a limited power as distinguished from a power which might be exercised by will, deed or otherwise, the legatee has not an absolute vested gift and cannot therefore demand the immediate payment of the gift.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the Court of King's Bench, Doiron J. (2), and ruling that the appellant was not entitled to receive now the residue of the estate in the hands of the trustees.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

David M. Tyerman for the appellant.

Gordon W. Forbes, K.C. for the respondent.

The judgment of the Court was delivered by

ESTEY J.:—The late Shirley Gertrude Berwick by her will appointed the respondent to be the executor and trustee and to hold all her property, real and personal, in trust to be disposed of as directed. The will provides for certain specific legacies and as to the residue her trustee is to convert it and immediately pay one-half to her son, Alexander Raymond Berwick. No question is raised in these proceedings as to any of the provisions except that which disposes of the second or remaining half of the residue.

(1) [1947] 2 W.W.R. 799. (2) [1947] 2 W.W.R. 566.

The testatrix died January 6, 1946; letters probate were granted February 12, 1946, and these proceedings by way of an originating notice are dated the 30th of May, 1947, well within the hereinafter mentioned ten year period.

The trustee asks the following question:

Is Alexander Raymond Berwick, beneficiary named in the said Will, entitled to receive now the entire residue of the estate in the hands of the Trustee?

The provisions of her will relative to the foregoing question are:

As to the remaining one half of the residue of my estate I direct my trustees to invest moneys realized therefrom in Dominion of Canada Bonds or securities and to pay to my said son so long as he continues to survive me the free annual income therefrom and at the expiration of ten years from the date of my death to pay, convey, assign and make over the remainder of my estate to my said son for his own use absolutely if he then be alive.

If my said son should predecease me or if he should survive me and die within ten years after my death the share or shares of my estate which my said son would have received had he survived me or the said period of ten years as the case may be shall be distributed by my trustees in such manner as my said son shall by his last will appoint and in default of such appointment the same shall be distributed by my trustees in the same manner as the same would have been distributed had such share or shares formed part of my son's estate at the time of his death whether testate or intestate and had he died without owing any debts.

The Court of Appeal for Saskatchewan (1) construed the provisions as providing a gift to the son contingent upon his surviving the testatrix by ten years; that if he did not do so and did not by his will exercise the power of appointment, then there was a gift over and that the son was not entitled to receive now the entire residue (the remaining half above referred to).

The appellant's contention is that the provisions of this will give to him an indefeasible interest in this remaining half and therefore he is now entitled to receive the entire residue or remaining half.

In the first of the above quoted paragraphs there are no words of a present gift but rather a gift only "at the expiration of ten years" and then only "if he then be alive".

In *Knight* v. *Knight* (2), the will provided:

I likewise give and devise to each of the daughters of Thomas Knight lawfully begotten, as soon as they attain the age of twenty-one years, the sum of £2,000 . . .

(1) [1947] 2 W.W.R. 799. (2) (1826) 2 Sim. & St. 491.

1948

IN RE BERWICK ESTATE

BERWICK v. CANADA TRUST CO.

Estey J.

It was held that the interests of the daughters were contingent. The Vice-Chancellor stated at p. 493:

> The expressed intention must prevail; and there is no gift, either of principal or interest, until the daughters attain twenty-one.

Halsbury, Vol. 34, p. 374, para. 418:

> A gift to a person, "at", "if", "as soon as", "when", or "provided" he attains a certain age, without further context to govern the meaning of the words, is contingent, and vests only on attainment of the required age, this being a quality or description which the donee must in general possess in order to claim under the gift.

The next of the above quoted paragraphs from the will gives to the son, with respect to this half of the residue, a power of appointment to be exercised by his will, and in the event of his not so appointing then the testatrix by her will directs that:

> . . . in default of such appointment the same shall be distributed by my trustees in the same manner as the same would have been distributed had such share or shares formed part of my son's estate at the time of his death whether testate or intestate and had he died without owing any debts.

The power of appointment here given to the son can be exercised only through the medium of his will. It is a limited power as distinguished from a power which might be exercised by will, deed or otherwise, and in default of the exercise of that power the property remains to be disposed of by the testatrix's own will. As stated by Sir W. Grant in *Bradly* v. *Westcott* (1):

> . . . if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment, in order to entitle that person to anything.

See also *Bull* v. *Vardy* (2); In *re McNeill Estate* (3).

In *In re Mewburn Estate* (4), the will directed that the power of appointment might be exercised "by deed or will", and therefore, notwithstanding the intention of the testator, the life interest together with the unqualified power of appointment was equivalent to an absolute interest and entitled the legatee to a transfer of the corpus.

The Will of Shirley Gertrude Berwick provides that her son can exercise his power of appointment only by a provision in his will. It is a qualified power and distinguishes this case from that of *In re Mewburn Estate* (4).

(1) (1807) 13 Ves. Jun. 445 at 453; 33 E.R. 361 at 364.
(2) 1 Ves. Jun. 270; 1 Ves. Jun. Supp. 115.
(3) [1920] 1 W.W.R. 523.
(4) [1939] S.C.R. 75.

Under both of the above paragraphs the son has but a right to the property if he lives the period of ten years and can exercise his power of appointment only through the medium of his will. The position is as Mr. Justice Macdonald, speaking on behalf of the Court of Appeal (1), stated:

> There is thus a gift over, for if the son does not outlive the testatrix by ten years and does not make an appointment by will those then entitled would take, not through devolution by law, but through the will of the testatrix.

Alexander Raymond Berwick has not under the will of his mother "an absolute vested gift" and therefore his request does not come within the rule of *Saunders* v. *Vautier* (2), as explained by Lord Davey in *Wharton* v. *Masterman* (3), where it is stated at p. 198:

> That principle is this: that where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit.

The appeal is dismissed with costs. The respondent is entitled to its solicitor and client costs out of the estate after giving credit for party and party costs.

Appeal dismissed, costs as per judgment.

Solicitors for the appellant: *MacPherson, Milliken, Leslie & Tyerman.*

Solicitors for the respondent: *Cross, Jonah, Hugg & Forbes.*