1923
*May 3, 4.
*June 15.

A. H. CHURCH AND OTHERS.....APPELLANTS;

AND

MARY A. V. HILL.....RESPONDENT.

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

Will—Construction—Specific devise of land—Effect of subsequent sale—Proceeds falling into residue—"Land Titles Act" (Alta.) [1906] c. 24, s. 41—"An Act respecting the transfer and descent of land," (Alta.) [1906] c. 19, s. 2.

Where a testator in his will makes a specific devise of land but subsequently sells same under agreement for sale, the devise is rendered inoperative; the devisee is not entitled to any part of the unpaid purchase money, which falls into residue.

Per Davies C.J. and Idington, Duff, Anglin and Mignault JJ.—This effect is not altered by the provisions of sect. 2 of c. 19 of "The Transfer and Descent of Land Act," (Alta.) [1906], which assimilate the course of descent of real estate to that of personality.

Idington, Anglin and Mignault JJ.—The settled jurisprudence in this matter applies notwithstanding the provisions of section 41 of "The Land Titles Act," (Alta.) [1906] c. 24.

Duff J.—The amendment to "The Land Titles Act" made by s. 7 of c. 39 [1921] in regard to executions does not affect the application of such jurisprudence.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Ives J. at the trial (2).

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

Parlee K.C. for the appellant.

Geo. F. Macdonnell for the respondent.

THE CHIEF JUSTICE.—While I feel myself compelled by the decided cases to allow this appeal and restore the judgment of Mr. Justice Ives, I may say that I do so with great regret.

Under the circumstances the costs throughout of all parties as between solicitor and client must be borne by the estate.

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

(1) [1922] 3 W.W.R. 1207.

(2) [1922] 2 W.W.R. 1268.

IDINGTON J.—The line of decisions begining with *Farrar* v. *Winterton* (1), and down to *Beddington et al* v. *Baumann et al* (2), holding that the subject matter of a specific devise or bequest made by a testator, having been sold by him, the devise or bequest was thereby adeemed so settled the English law of wills that it thereby became the law of the North West Territories before Alberta was set apart and hence when that happened it continued to be the law of Alberta until changed by legislation, which the legislature has not seen fit to enact.

Having received, from a consideration of the will and events relative thereto now in question, a very decided impression that the result of so holding as the learned trial judge felt he must would lead to thwarting the testator's probable intention, I have examined the line of decisions I have referred to and a great many more.

In the result I am driven by the weight of authorities to conclude that the judgment appealed from cannot be maintained.

I had hoped to find, inasmuch as Jarman had considered that the legal estate passed to the devisee in the case of a mere bargain and sale there might be a basis upon which to found something that would uphold the judgment appealed from. That, however, turned out, by a consideration of some of the cases, of which *Re Clowes* (3) was one, which showed that owing to the Imperial Conveyancing Act and Law of Property Act, 1881 (Imp.), c. 41, sec. 30, even the legal estate was taken away and would pass to the executor or administrator.

And that was the state of the English law and I suspect well fitted when introduced into the Northwest to receive the Torrens system of registration and other items upon which Mr. Justice Beck rests, in a way which, with great respect, I cannot.

In short it was the old common law doctrine that I had imagined might have saved the situation if in course of developing our judge made law, some court happened to discover a possible cause of injustice, and by its decision furnished a remedy we could adopt.

(1) [1842] 5 Beav. 1.
(2) [1903] A.C. 13.
(3) [1893] 1 Ch. 214.

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No such precedent existing, I see no help for it but to allow the appeal and restore the learned trial judge's judgment.

I think the costs of all parties in the courts below and here should be allowed out of the estate.

DUFF J.—I am constrained, I regret to say, to the conclusion that this appeal must be allowed and the judgment of Ives J., restored. The costs of all parties as between solicitor and client should be borne by the estate. I can add nothing of any value to the judgment of Mr. Justice Clarke.

ANGLIN J.—It is now too well settled to admit of controversy that the right of a vendor of land to the purchase money, though secured by lien upon the land sold, is not such an estate or interest as s. 23 of the English Wills Act, 1837 (Imp.), c. 26 (in force in Alberta entitles a devisee of the land under the will of such vendor, made prior to the sale, to claim. The decisions to that effect of Lord Langdale in *Farrar* v. *Winterton* (1), and of Lord Romilly in *Gale* v. *Gale* (2), have been followed ever since, the latter having been explicitly approved by the House of Lords in *Beddington* v. *Baumann* (3).

The assimilation in Alberta of the course of descent of real estate to that of personalty affords no ground for a departure from such a well settled rule. Section 23 of the Wills Act applies equally to real and to personal estate.

The result of decisions of this court in *Jellett* v. *Wilkie* (4), *Williams* v. *Box* (5), *Smith* v. *National Trust Co.* (6), *Yockney* v. *Thomson* (7), *Grace* v. *Kuebler* (8), and other cases, is that, notwithstanding such provisions as s. 41 of ch. 24 of the Alberta statutes of 1906, equitable doctrines and jurisdiction apply to lands under the Land Titles or Torrens system of registration and equitable interests in such lands may be created and will be recognized and protected. The presence of that provision in the Alberta statutes does not afford sufficient ground for holding that

(1) 5 Beav. 1.
(2) [1856] 21 Beav. 349.
(3) [1903] A.C. 13.
(4) [1896] 26 Can. S.C.R. 282.
(5) [1910] 44 Can. S.C.R. 1.
(6) [1912] 45 Can. S.C.R. 618.
(7) [1914] 50 Can. S.C.R. 1.
(8) [1917] 56 Can. S.C.R. 1.

where a testator has, after making his will, executed an agreement for the sale of his entire interest in a parcel of land in that province specifically devised in the will, the devisee is entitled to claim any part of the purchase money thereof remaining unpaid as an interest preserved to him by the operation of s. 23 of the Wills Act.

I would allow this appeal and restore the judgment of Mr. Justice Ives.

BRODEUR J.—I concur in the result.

MIGNAULT J.—The three appellants and the respondent are the children of the late Arthur W. Church, who died in Edmonton, Alberta, on February 5, 1921, leaving a will, executed at Edmonton on February 28, 1916, whereby he purported to divide his property real and personal among his four children. The principal clause of this will is as follows:—

> I give, devise and bequeath all my real and personal estate, of which I may die possessed, in the manner following, that is to say: To my youngest daughter, Mary Alice Viola Hill (wife of Stewart Hill) of Edmonton, Alberta, I bequeath Lot 15, Block 46 (the house number on this lot being 10649, 80th Avenue) in the city of Edmonton (South), province of Alberta. The balance of my property to be divided equally between my daughter, Amy Ethel Watson (wife of Harvey G. Watson), of Central Park, British Columbia, my son Arthur Harvey Church, of Edmonton, Alberta, and my daughter, Kate Adeline Joyce (wife of A. Joyce) of Edmonton, Alberta.

On April 1, 1920, the testator entered into an agreement of sale with one Lockerbie whereby he agreed to sell to Lockerbie and the latter agreed to purchase from him lot 15, block 46, in the City of Edmonton, to wit, the property he had devised to the respondent, for the sum of $4,500, whereof $500 was paid immediately, and the balance was made payable in monthly instalments of $30 with interest at eight per cent payable half yearly. Rigorous provisions secured the payment of this balance, as, for instance, a clause that on default of payment of any instalment of principal or interest, the whole amount outstanding would become due and payable, or the agreement forfeited and determined, at the option of the vendor; also a clause that until the completion of the purchase, the purchaser should hold the premises as tenant to the vendor at a rental equivalent to the instalments

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of principal and interest, the legal relation of landlord and tenant being constituted between the vendor and the purchaser. Lockerbie was given immediate possession by the agreement.

Notwithstanding these clauses intended to secure the payment of the purchase price, and although Lockerbie could demand a conveyance only when he had entirely completed the payment of the price and interest, it is unquestionable that he immediately acquired an equitable interest in the property.

In the Appellate Court Mr. Justice Stuart cited the well-known case of *Ross* v. *Watson* (1), as determining what are respectively the rights of the vendor and the purchaser under a sale agreement such as this. The question there was whether the purchaser, who had ceased his payments on account of non-fulfilment of representations (which were adjudged to be sufficient to absolve him from specific performance) had a lien on the property for the payments he had already made. The decision was that the purchaser had such a lien and it was clearly laid down by the Lord Chancellor, Lord Westbury, and by Lord Cranworth, who concurred with him, that where by an agreement of sale the ownership of an estate is transferred subject to the payment of the purchase price, every portion of the purchase money paid in pursuance of the agreement is a part performance and execution of the contract, and, to the extent of the money paid, does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate.

In *Ross* v. *Watson* (1) the purchaser, in the exercise of his right to do so, had refused to complete the purchase, and it was decided that he had a lien on the property for the money he had paid. But, with deference, I cannot think that, to quote the language of Mr. Justice Stuart, the decision casts

> some doubt upon the wide general proposition that in equity the property is the property of the purchaser.

It appears, on the contrary, that the ownership in equity of the purchaser in *Ross* v. *Watson* (1) was the foundation of the lien which he was held to possess.

(1) [1864] 10 H.L. Cas. 672.

Lockerbie therefore, at the death of the testator, had acquired in equity, and to the extent of the purchase money paid by him, the ownership of a corresponding portion of the estate of the testator.

It will be said, and such was the reasoning of Mr. Justice Stuart, that the testator, at his death, had still a substantial interest in the property, to the extent at least of the purchase money still unpaid. But he could assert no such interest against Lockerbie if the latter continued, as he has done, to pay the purchase money as it became due. So long as the conditions of the agreement of sale were carried out, the vendor was entitled only to this purchase money, and the purchaser, on completing its payment, had the right to demand a conveyance. Had the vendor refused to make this conveyance, the purchaser would have been entitled to compel him to do so by an action for specific performance; and therefore the interest which the purchaser acquired under the sale agreement was certainly an interest which equity would recognize and one commensurate with the relief which equity would give by way of specific performance. *Howard* v. *Miller* (1).

It is suggested that this recognition of an equitable interest belonging to the purchaser under a sale agreement cannot be relied on where there prevails a land titles system such as that in force in Alberta. And the respondent cites section 41 of the Land Titles Act, Alberta, under which, after a certificate of title has been granted for any land,

> no instrument until registered under this Act shall be effectual to pass any estate or interest in any land.

It would probably be sufficient to say that section 41 is mainly intended for the protection of third parties who have obtained registration and that the respondent claiming under her father's will is not in a better position than the latter would have been to contend that an equitable interest did not pass to Lockerbie under the sale agreement. While giving to section 41 and similar provisions full effect for the protection of third parties who have complied with the Act, it does not appear possible, and certainly not *inter partes*, to exclude from the Land Titles

(1) [1915] A.C. 318, at p. 326.

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Act equitable interests in property resulting from sale agreements. Equitable interests in property subject to the Act were expressly recognized by this court in *Jellett* v. *Wilkie* (1), and the provisions of the Act authorizing the filing of caveats show that such interests cannot be summarily excluded. I have found in the New Zealand reports a case decided by a single judge where, under section 38 of the New Zealand law corresponding with section 41 of the Alberta statute, it was said that in enforcing according to equitable doctrines contractual rights created by an unregistered instrument, the court cannot act inconsistently with section 38 by holding an interest to pass where the section says none shall pass *Orr* v. *Smith* (2). See also *Howie* v. *Barry* (3). In these cases there were rival claimants to rent, and the rights of the debtor who had paid the rent in good faith to the registered lessor were involved. I have however found, under the Torrens system, no authority excluding equitable interests as such, and certainly not as between the registered owner and a person to whom he has agreed to sell the property, and it does not seem possible to exclude them here. (See Hogg, Registration of Title to Land Throughout the Empire, pp. 111 et seq.).

I have referred to these matters because they were relied on by the learned judges who formed the majority of the Appellate Divisional Court. I cannot think, however, that they afford the respondent any answer to the contentions of the appellants. Moreover, the respondent, under the devise made to her, seeks to obtain the balance of the purchase money rather than an interest in the land itself, which interest the testator could not have asserted against Lockerbie so long as the latter fulfilled all the conditions of the promise of sale. The question now is whether this devise has become inoperative by reason of the sale of the devised property.

The legal position here can be stated as follows: By reason of the sale agreement, any interest in the property in question of the vendor as against the purchaser, and so long as the latter made the stipulated payments, was

(1) 26 Can. S.C.R. 282. (2) [1919] N.Z.L.R. 818 at p. 828.
(3) [1909] 28 N.Z.L.R. 681.

converted into a claim for the purchase moneys. What the testator devised to the respondent was the property itself. What he had at his death—and it is then that the will speaks—was the right to the price and not the property. The devise therefore fails because its subject matter no longer existed at the testator's death.

A different situation was dealt with by this court in the recent case of *Hicks* v. *McClure* (1). There the testator had himself sold a property which by his will he had directed his executors to sell and divide the proceeds between his two sons, and it was held that the bequest was really of the proceeds of the property. Here the devise is of the property itself.

It does not appear to me to matter that in Alberta real estate has been assimilated to personal property, both going to the personal representative of the deceased. So long as Lockerbie is not in default, the respondent could not claim either from him or from the personal representative of the deceased the property itself, and the answer to any demand by her of the purchase money is that it was not given to her under the devise of the property.

I cannot therefore avoid the conclusion that the devise to the respondent entirely fails. But can the appellants claim the purchase moneys under the bequest to them of the balance of the testator's property? The answer should be in the affirmative if the bequest is a residuary bequest.

The language used,

> the balance of my property to be divided equally between * * * *

taken in connection with the declaration of the testator,

> I give, devise and bequeath all my real and personal estate of which I may die possessed of in the manner following * * *

certainly indicates the intention that the appellants shall have everything except the property specifically devised to the respondent. They take therefore the residue of the estate, for the "balance" mentioned in the will is certainly what is known to the law as the "residue," both expressions having the same meaning. And the residue comprises this purchase price, so that it must go to the appellants.

That the testator ever contemplated that his youngest daughter, the respondent, would take nothing under his

(1) [1922] 64 Can. S.C.R. 361.

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will, and that the price of the property he had left to her would go to his other children, or that he intended any such result, seems very doubtful. But the court cannot make a will for him or provide the respondent with an equivalent for the loss of the property which the testator had devised to her. Nothing would be more dangerous than to refuse to apply the settled rules as to the ademption of legacies because it may be conjectured that the result would be contrary to the intention of the testator. *Dura lex,* it is true, *sed lex,* and the law must be applied.

Without therefore concealing my regret that this result cannot be avoided, I have come to the conclusion to allow the appeal with costs here and in the appellate court, payable out of the estate, and to restore the judgment of the learned trial judge.

Appeal allowed, costs to be paid by the estate.

Solicitors for the appellants: *Parlee, Freeman, McKay and Howson.*

Solicitors for the respondent: *Emery, Newell, Ford and Lindsay.*