IN THE MATTER of the Estate of Frank Hamilton Mewburn, Deceased

1938

* Oct. 5.
* Dec. 12.

HELEN CHILTON MEWBURN ROBINSON ..... APPELLANT;

AND

THE ROYAL TRUST COMPANY (EXECUTOR AND TRUSTEE OF THE WILL OF SAID DECEASED)..... RESPONDENT.

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

Will—Construction—Gift of income for life with power to appoint by deed or will the inheritance of the principal—Right of beneficiary to exercise power by deed in own favour so as to acquire right to principal immediately.

A testator in his will, after certain specific gifts, directed that his trustee stand possessed of the residue of the estate upon trust for conversion and, after payment of debts, etc., to invest the residue and pay the income therefrom to the testator's wife during her life and upon her death (which occurred—subsequently to the testator's death) to pay a certain share thereof to a son (which was done), and to invest one-half of the residue in trust to pay the income therefrom to another son during his life (with power to pay him a limited sum from the principal) and upon his death his share (or so much thereof not received by him) was to "go and be disposed of as he may by deed or will appoint," with gift over in default of appointment. As to the remaining half of said residue the following provision (now in question) was made: to invest it in trust to pay the income therefrom to the testator's daughter during her lifetime "and upon her death said share to go and be disposed of as she may by deed or will appoint," and in default of such appointment (or so far as it should not apply), if she should die leaving issue then living, the share to go to her child or children then living, equally, to be paid to each on attaining 21 years of age, income in meantime to be applied for support, etc., during respective minorities; if she should die without leaving issue then living and without having made any such appointment as aforesaid, the share to go to the testator's two sons equally or to the survivor of them. The daughter demanded payment of the share covered by this provision, and the question of her rights thereunder came before the court.

Held: The daughter could exercise her said power of appointment by deed in her own favour so as to vest in her immediately her share of the residue of the estate and so as to entitle her to have the same transferred to her immediately.

Authorities referred to and discussed.

Judgment of the Appellate Division, Alberta, [1938] 2 W.W.R. 433, affirming judgment of Shepherd J., [1938] 2 W.W.R. 152, reversed.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Kerwin and Hudson JJ.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Shepherd J. (2) answering in the negative a certain question submitted to the court on an application (upon originating notice of motion) by the executor of the will of Dr. F. H. Mewburn, late of Edmonton, Alberta, deceased, for an order determining the rights or interests of the present appellant, a beneficiary under the said will, and more particularly for an order determining the said question, which is hereinafter set out.

The said deceased died on January 29, 1929. By his will, made December 24, 1924, he appointed the present respondent executor and trustee thereof, and, after certain specific gifts, he directed that the trustee should stand possessed of all the residue of his property real and personal upon trust for conversion and, after payment of the testator's debts, etc., and certain payments by way of legacy, then upon trust for investment of the residue and to pay all the income therefrom to his wife during her life, and upon her death, (and after sale of residence, lots and furniture, in which his wife had been given only a life interest), from the proceeds of the investments (and of said sale)

as to one-third thereof after deducting the sum of [$5,000] which I have already advanced to my son Frank Hastings Hamilton Mewburn to pay the remainder of said one-third to him if then living or as he may by deed or will appoint

with gift over in default of appointment. (The said son, after his mother's death, was paid his share). The will then provided:

I further direct that as to the residue of my estate and investments my trustee shall invest * * * one-half thereof * * * in trust to pay the income therefrom * * * to my said son Arthur Fenwick Mewburn during his life with power * * * to pay and advance to him from time to time part of the principal but not more in all than [$10,000]. Upon the death of my said last mentioned son I direct that as to his share or so much thereof as he shall not have received the same shall go and be disposed of as he may by deed or will appoint

with gift over in default of appointment, alternatively according to whether said son died leaving a widow only, a widow and child or children, or a child or children only, living at the time of his death, or leaving no issue or widow then living.

(1) [1938] 2 W.W.R. 433; [1938] 3 D.L.R. 459.
(2) [1938] 2 W.W.R. 152.

Then came the provision now in question, which read as follows:

As to the remaining half of said residue I authorize and direct my trustee to invest, reinvest and keep the same invested in such securities as aforesaid in trust to pay the income therefrom yearly or oftener if convenient to my said daughter Helen Chilton Mewburn during her lifetime and upon her death said share to go and be disposed of as she may by deed or will appoint and in default of such appointment or so far as such appointment shall not apply if she should die leaving issue then living I direct that her said share shall go to her child or children then living and if more than one then equally among them to be paid to each of said children on attaining the age of twenty-one years the income in the meantime to be paid and applied for the support, maintenance and education of such child or children during their respective minorities. If my said daughter should die without leaving issue then living and without having made any such appointment as aforesaid her said share shall be divided equally between and added to the shares hereby respectively given to my said two sons or to the survivor of them.

The testator's widow died on March 23, 1937. A division of the residuary estate as at that date was made with the approval of all interested parties. The share belonging to the son, Frank Hastings Hamilton Mewburn, was paid to him. Separate trusts were set up with respect to the shares of the estate belonging to Arthur Fenwick Mewburn and the present appellant, Helen Chilton Mewburn Robinson (described in the will as Helen Chilton Mewburn), the trusts being administered by the executor.

On October 12, 1937, the present appellant wrote the trustee as follows: "I have decided to ask you to turn over to me all the stocks and bonds which have been allocated to me from the estate of my father, the late Dr. F. J. Mewburn."

The trustee thereupon applied to the court for advice and direction as aforesaid. (The other sons did not oppose the present appellant's claim. No question was raised in the appeal as to the formalities which are necessary to exercise the power of appointment or as to the sufficiency of the demand which the present appellant made on the trustee).

The question submitted was:

Can Helen Chilton Mewburn Robinson exercise the power of appointment vested in her by the said will, by deed in her own favour so as to vest in her immediately her share of the residue of the said estate and so as to entitle her to have the same transferred to her immediately?

Shepherd J. answered the question in the negative (1), and this was affirmed by the Appellate Division (Ford J.A.

(1) [1938] 2 W.W.R. 152.

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dissenting) (1), and appeal was brought to this Court. By the judgment of this Court, now reported, the appeal was allowed and the question answered in the affirmative.

W. N. Tilley K.C. for the appellant.

H. G. Nolan K.C. for the respondent.

The judgment of the Chief Justice and Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—We are asked to determine the following question, which arises in the interpretation of the will of the late Doctor F. H. Mewburn and in the administration of his estate:

Can Helen Chilton Mewburn Robinson exercise the power of appointment vested in her by the said will, by deed in her own favour so as to vest in her immediately her share of the residue of the said estate and so as to entitle her to have the same transferred to her immediately?

By his will, after several specific devises and bequests, the testator directs his trustees to stand possessed of the residue of his estate in trust to pay debts and funeral and testamentary expenses and certain other sums, and to pay the income to his wife during her life. Upon the latter's death (which has occurred) the trustees are to hand over one-third of the ultimate residue to a son, less the sum of five thousand dollars advanced by the testator to him. As to one-half of the ultimate residue, provision is made for another son, and then comes the part in question:

As to the remaining half of said residue I authorize and direct my trustee to invest, reinvest and keep the same invested in such securities as aforesaid in trust to pay the income therefrom yearly or oftener if convenient to my said daughter Helen Chilton Mewburn during her lifetime and upon her death said share to go and be disposed of as she may by deed or will appoint and in default of such appointment or so far as such appointment shall not apply if she should die leaving issue then living I direct that her said share shall go to her child or children then living and if more than one then equally among them to be paid to each of said children on attaining the age of twenty-one years the income in the meantime to be paid and applied for the support, maintenance and education of such child or children during their respective minorities. If my said daughter should die without leaving issue then living and without having made any such appointment as aforesaid her said share shall be divided equally between and added to the shares hereby respectively given to my said two sons or to the survivor of them.

It may be taken that the testator intended (1) that his daughter should enjoy the income for her life and (2) that she might direct where the corpus should go but that such

(1) [1938] 2 W.W.R. 433; [1938] 3 D.L.R. 459.

direction should take effect only upon her death. However, it is argued that because of her general power to appoint by deed there is a rule of law whereby, notwithstanding this expressed intention, the daughter is entitled to appoint the share in question to herself by deed and to call upon the trustees to transfer the corpus to her. The provision made by the testator whereby his daughter would be assured of an income for her life would thus be set at naught and she would be able to use the fund as she thought fit.

In *Barford* v. *Street* (1), Sir William Grant had to consider a will by which the residue of the testator's personal estate and all his real estate were given and devised to a trustee to pay the rents, issues, interests, dividends, and produce, to Mary Barford during the term of her natural life, and from and immediately after her decease upon trust to convey, etc., the whole of the residue to and among such person or persons, and in such proportions, and at such time or times, and in such manner, as Mary Barford in her lifetime should from time to time by any deed or will appoint; and in default of such appointment to pay and divide the estate among the children of Richard Barford, her father. Mary Barford executed a deed poll directing the trustee to convey and assign all the estate to her. In giving judgment, the Master of the Rolls said:

> What do you contend to be the nature and extent of her interest? An estate for life with an unqualified power of appointing the inheritance comprehends everything. What induced me at first to doubt was the indication of an intention in the Codicil, that the estate should remain in the trustee for the life of the Plaintiff, with powers to her, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. But I do not think, I can by inference from thence control the clear and express words, by which the power is given to the devisee to dispose of this estate in her lifetime by any deed or deeds, writing or writings, or by her last Will and Testatment. How can the Court say, that it is only by Will that she can appoint? By her interest she can convey her life estate: By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition. The consequence is, that the trustee must convey the legal fee according to the prayer of the Bill.

In *Irwin* v. *Farrer* (2), there was a legacy in trust to be laid out in stock; the trustees were to pay the dividends as they came due to A. for life and after her decease they were to pay the principal according to her appointment

(1) (1809) 16 Ves. Jr. 135. (2) (1812) 19 Ves. Jr. 86.

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by will or otherwise. A., conceiving herself, by the power so given, to be entitled to an absolute interest in the legacy, applied to the executors for payment, and, upon their declining, filed a bill. Upon the argument *Barford* v. *Street* (1) was cited and in a short judgment the Court of Exchequer declared that under the will the legatee had an absolute power of disposition over the whole fund; that the demand, by the bill, was a sufficient indication of her intention to take the whole for her own benefit; and the execution of a formal appointment in writing was not necessary.

In *Reith* v. *Seymour* (2), it was decided that, on the construction of the will in question, the widow took only an estate for life with a power of appointment, and that the sale by her of a sum of three per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her own name, did not amount to an exercise of the power. The Master of the Rolls, Sir John Leach, distinguished the case of *Irwin* v. *Farrer* (3) but only on the ground that the sale and investment by the widow, in the case before him, was not equivalent to the demand by bill by the legatee in the earlier case.

In *Hughes* v. *Wells* (4), it was decided that a wife had no power to dispose of certain trust funds otherwise than by a perfect appointment. At page 767 the Vice-Chancellor, Sir George Turner, discussed the question as to whether the life estate, which he determined was the interest taken by the widow, coupled with such a power, was tantamount to absolute ownership, and determined that *Barford* v. *Street* (1) did not warrant a conclusion in the affirmative because, as he pointed out, in the *Barford* case the power had been exercised. He also referred to *Irwin* v. *Farrer* (3) and *Holloway* v. *Clarkson* (5), mentioning that in those cases no formalities were required in the execution of the powers and, as was observed by Sir John Leach in *Reith* v. *Seymour* (2) with reference to *Irwin* v. *Farrer* (3), it was required in the last mentioned case that the power should be exercised.

(1) (1809) 16 Ves. Jr. 135.
(2) (1828) 4 Russ. 263.
(3) (1812) 19 Ves. Jr. 86.
(4) (1852) 9 Hare 749.
(5) (1843) 2 Hare 521.

In *London Chartered Bank of Australia* v. *Lemprière* (1), their Lordships of the Judicial Committee had to consider whether, under the circumstances, by a general engagement (a letter to the Bank) a married woman had bound her separate estate for the repayment of the obligation. They had also to determine how far this obligation affected the corpus of a certain fund established under a settlement in which she had a limited interest only, with a power of appointment. The gift was to her for her separate use for life without any restraint on anticipation, with remainder as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors and administrators. No appointment was made by her except by a will subsequent to the general engagement. It was held that there was an absolute gift to the sole and separate use of the woman. However, it will be noticed that the remainder was to her executors and administrators and it would seem that that was the determining factor on that branch of the case.

In the case at bar, there is no such remainder and the *Lemprière* case (1), therefore, does not touch the precise point we have to determine. Nor does the decision in *Meagher* v. *Meagher* (2) bear upon the matter, as the only question argued and determined in this Court was as to whether an interest in certain real and personal estate was given to the daughters of a testator as trustees or as individuals. But the reasons for the judgment of the Court of Appeal for Ontario, delivered by Sir William Meredith (3), are of interest as indicating the view of the Chief Justice of Ontario that, notwithstanding the intention of the testator that beneficiaries should take a life estate, that estate, when coupled with a general power of appointment (construed to include an appointment by deed), enabled the beneficiaries to exercise the power in their own favour and so become entitled to the whole property. The trial judge had decided that the following clause in the will in question gave the absolute interest to the beneficiaries:—

> To hold all my property in lots eight and nine in the third concession from the bay in the township of York, together with all stock, crops, furniture and other goods and chattels and personal property

(1) (1873) L.R. 4 P.C. 572. (2) (1916) 53 Can. S.C.R. 393.
(3) (1915) 34 Ont. L.R. 33.

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thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom.

Sir William Meredith disagreed with this view because of the words "they my said daughters in the meantime to have all the rents and profits therefrom" and held that the daughters took a life interest with a general power of appointment. He observed, however, that this would make no practical difference since the daughters might exercise the power in their own favour and so become entitled to the whole property. He referred to the following quotation from the Second Edition of Farwell on Powers, page 8 (continued in the Third Edition at page 9):

> The donee of a general power may appoint to himself. (*Irwin* v. *Farrer*. (1)).

With reference to the case of *Irwin* v. *Farrer* (1), it is observed in Sugden on Powers, 8th edition, page 211:

> A power to appoint by will, *or otherwise*, of course authorizes an appointment by deed.

And in the same text book, at page 104, *Barford* v. *Street* (2) is referred to for the following proposition:

> A devise to A. for life, expressly, with remainder to such persons as he shall by deed or will, or otherwise, appoint, will of course not give him the absolute interest, although he may acquire it by the exercise of his power.

This extract is referred to in *Smith* v. *Smith* (3), by the Master of the Rolls who, dealing with the will there in question, concludes at page 525:

> It follows, therefore, that if John Graydon Smith had desired he might have acquired the absolute ownership in fee; but that, till he did so, he was merely tenant for life with power of appointment by will or deed.

In *Templeton* v. *Royal Trust Company* (4), the majority of the Manitoba Court of Appeal determined, notwithstanding the clear intention of the testator that only on the death of the life tenant should the corpus be distributed as he might direct, that, as the power of appointment was exercisable by deed, the life tenant could exercise it in that manner in his own favour so as to entitle him to have the corpus transferred by the trustee of the testator's will to him immediately.

Barford v. *Street* (2) is not mentioned in Jarman on Wills but in the Seventh Edition, at page 1160, after a

(1) (1812) 19 Ves. Jr. 86.
(2) (1809) 16 Ves. Jr. 135.
(3) (1887) 19 L.R. (Ireland) 514
(4) [1936] 2 W.W.R. 347.

consideration of a number of authorities, the result is stated to be as follows:

(1) A gift to A for life, with a power of appointment by deed or will, with a gift over away from A or his estate, or with no gift over, gives A entire dominion over the fund, and therefore if he applies to the Court for it the Court need not require a formal appointment of the fund, as his application to the Court is a sufficient intention to take the fund.

As authority for this proposition, the author cites *Irwin* v. *Farrer* (1).

In the present case, I conclude that the daughter's life interest, coupled with a power to appoint the corpus by deed, enables her so to appoint to anyone, including herself. The testator's manifest intention is contrary to the authority he conferred upon her. By giving his daughter a power to appoint by will only, he could have ensured that his wishes should be respected. If it be urged that in that event she would be unable to appoint by deed the corpus or part of it so as to assist a child, the same argument now advanced as to why she should not be authorized to deprive herself of the income, would apply. On principle as well as upon a consideration of the authorities referred to, she is able to exercise the power and disregard the testator's wishes.

The appeal should be allowed and the question answered in the affirmative. The costs of the appellant and the respondent Trust Company on the application to the judge of first instance were fixed by him and ordered to be paid out of the corpus, and this order as to costs should stand. The costs of all parties of the appeal to the Appellate Division of the Supreme Court of Alberta and of this appeal should be paid out of the same fund, those of the trustee as between solicitor and client.

CANNON J.—I would allow the appeal and answer the question in the affirmative. The order of the judge of first instance as to costs should stand and the costs of all parties of the appeal to the Appellate Division of the Supreme Court of Alberta and of this appeal should be paid out of the corpus, those of the trustee as between solicitor and client. *Appeal allowed.*

Solicitor for the appellant: *M. M. Porter.*

Solicitors for the respondent: *Bennett, Hannah, Nolan, Chambers & Might.*

(1) (1812) 19 Ves. Jr. 86.