JOSIAH H. MACQUARRIE, JAMES M. MILNE, AND MCKENZIE FORBES (DEFENDANTS) ..... APPELLANTS;

AND

THE EASTERN TRUST COMPANY (PLAINTIFF), MARIA F. PERLEY (DEFENDANT), AND ISABEL F. RUDDICK (DEFENDANT) ..... RESPONDENTS.

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*Oct. 18.
*Dec. 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Will—Construction of bequest—Ascertainment of class benefited—Time as at which class to be ascertained.

J. W. Forbes by his will left property upon trust, after the death of a brother, "to pay the one-half of the interest arising from said investments yearly to my brothers and sisters then living * * * and to the survivors or survivor of them so long as any one of my said brothers and sisters shall live and upon the death of the survivor of my said brothers and sisters to pay the whole of the principal * * * and the interest remaining to my next of kin, of the name 'Forbes' then living." The testator died a bachelor leaving as next of kin brothers and sisters, who all died leaving no descendants except one brother who left two daughters who survived the last surviving brother or sister of the testator. These daughters were living at the tes-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Smith JJ.

(1) [1893] 1 Q.B. 256.

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tator's death, but subsequently, and before the death of the testator's last surviving brother or sister, had married and become Mrs. P. and Mrs. R. respectively.

Held (reversing judgment of the Supreme Court of Nova Scotia *en banc*, [1927] 3 D.L.R. 70, and restoring judgment of Mellish J.) that the persons who took the principal and remaining interest under said bequest were the testator's nearest of kin in equal degree who bore the name "Forbes" at the time of the death of the testator's last surviving brother or sister; the class was to be ascertained as at the period of distribution, and not as at the time of the testator's death; Mrs. P. and Mrs. R., not bearing the name "Forbes" at the period of distribution, could not take. The principles of construction approved in *Hutchinson* v. *National Refuges for Homeless and Destitute Children*, [1920] A.C. 794, and *Lucas-Tooth* v. *Lucas-Tooth*, [1921] 1 A.C. 594, applied. *Pyot* v. *Pyot*, 1 Ves. Sr. 335, and *Carpenter* v. *Bott*, 15 Sim. 606, discussed and distinguished.

APPEAL by certain of the defendants from the judgment of the Supreme Court of Nova Scotia *en banc* (1), which reversed the judgment of Mellish J. The question in dispute was with regard to the construction of a clause in a will. The clause in question and the material facts of the case are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal was allowed.

E. M. Macdonald K.C. for the appellant McKenzie Forbes (representing relatives of the testator, of the name "Forbes," living at the death of the testator's last surviving brother or sister).

J. H. MacQuarrie for the appellants MacQuarrie and Milne (representing, respectively, the estates of two deceased brothers of the testator who survived the testator).

E. C. Phinney for the respondents Mrs. Perley and Mrs. Ruddick.

J. Ross K.C. for the respondent The Eastern Trust Company (trustee of testator's estate).

The judgment of the court was delivered by

NEWCOMBE J.—John W. Forbes, the testator, died on 22nd March, 1893. We were informed at the hearing that he never was married. When he died, his next of kin were his surviving brothers (including his brother Hugh) and

(1) [1927] 3 D.L.R. 70.

sisters, the last of whom, his sister Christine, died on 10th October, 1925. None of them left any descendants, except Hugh; he left two daughters, who are respondents; the one, Maria, who married Mr. Perley on 22nd November, 1898; the other, Isabel, who married Mr. Ruddick on 28th December, 1896. There is evidence of more remote collateral kindred of the name "Forbes" residing in Scotland, and they are represented upon this appeal by McKenzie Forbes, one of their number.

The will, dated 30th December, 1892, has the following clause, which seems to be the only provision material to the case:

> And upon further trust after the death of my said brother, Roderick Alexander Forbes, to pay the one-half of the interest arising from said investments yearly to my brothers and sisters then living in equal proportions share and share alike, and to the survivors or survivor of them so long as any one of my said brothers and sisters shall live and upon the death of the survivor of my said brothers and sisters to pay the whole of the principal of said investments and the interest remaining to my next of kin, of the name "Forbes" then living.

The object of these proceedings is to ascertain who is entitled to receive the principal and interest bequeathed by this clause to the testator's next of kin of the name "Forbes" living at the time thus indicated, and the immediate question is concerned with the interpretation. The case is put upon the assumption that the testator's nieces, upon their marriages, parted with their surname, and that each of them has since been known by the surname of her husband. *Doe* v. *Plumptre* (1).

Mellish J., the trial judge, was of the opinion that the testator meant his nearest of kin in equal degree who bore the name "Forbes" at the time of the death of the last survivor of his brothers and sisters, share and share alike, and that the class was to be ascertained as at the period of distribution, and not as at the time of the testator's death; and, in the absence of sufficient evidence to identify these relatives, he directed an enquiry for the purpose of ascertaining who they were. He held, moreover, that the testator's nieces, Mrs. Perley and Mrs. Ruddick, not bearing the name "Forbes," did not qualify.

Upon appeal this judgment was reversed. There was, however, a difference of opinion. The Chief Justice with

(1) (1820) 3 B. & Ald. 474, at p. 482.

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whom Graham J. concurred, considered that the testator's next of kin should be determined as at the time of his death, excluding his brothers and sisters, and that therefore Mrs. Perley and Mrs. Ruddick, being then unmarried and bearing the name "Forbes," were entitled. He also intimated a doubt, arising out of the application of the case of *Carpenter* v. *Bott* (1), as to whether these ladies did not take, even if the class were to be ascertained as at the period of distribution.

Chisholm J. found evidence of still another intention. He thought that there were two conditions of qualification which must concur, next of kinship and possession of the name "Forbes," and he agreed with Mellish J. that the qualified class was to be ascertained as at the time of the death of the testator's last surviving brother or sister. Therefore he held that the testator's nieces, although they constituted at that time his next of kin, must fail, because not of the name "Forbes," and that the more remote relatives were likewise disentitled, because not true next of kin, and so he concluded for intestacy.

How is the class described by the testator in his will as "my next of kin of the name 'Forbes' then living" to be ascertained? There are many authorities, but the principles of interpretation have recently been considered by the House of Lords in *Hutchinson* v. *National Refuges for Homeless and Destitute Children* (2), and in *Lucas-Tooth* v. *Lucas-Tooth and others* (3), and applying these principles, I have reached the conclusion that the judgment at the trial must be restored. I think the testator has, by the words of his will, sufficiently indicated that the class should be determined at the death of the survivor of his brothers and sisters. He could not have meant next of kin at the time of his death, because they were, as he anticipated, his brothers and sisters, and the bequest was to go only to persons who survived them. It is said that the will shows an intention to establish the class subject to an exception of the brothers and sisters, but there are no express words of exception or exclusion, and one would be surprised to find them, because such an exception would be as comprehen-

(1) (1847) 15 Sim. 606. (2) [1920] A.C. 794.
(3) [1921] 1 A.C. 594.

sive as the class, and a gift to next of kin, excluding next of kin, is nonsense. Then I can see no justification for introducing into the gift of the residue, as would be necessary to maintain the respondent's contention, an implication that the next of kin mentioned should be those who would be the testator's next of kin at the time of his death if he should survive his brothers and sisters. Moreover, if you read the words "next of kin" in the sense of the rule that *prima facie* the next of kin are to be ascertained at the death of the testator, you are apt to get a result which is contrary to the testator's manifest intention, for the qualification, "of the name 'Forbes' then living", would upon that reading naturally have reference to the date of the testator's death and therefore mean the testator's brothers and sisters who were living at his death. This would seem to follow if the meaning alleged to be implied were expressed in the will; but an implied intention cannot well exist if it will not stand expression consistently with the context.

As was pointed out by the Lord Chancellor in the *Lucas-Tooth Case* (1), one must take care to regard the testator's intention, and not so to apply a canon of construction as to produce consequences contrary to that intention. The name "Forbes" dominates the purpose of the gift, and evidently a claimant for this bequest must, if he is to succeed, "be of the name Forbes," whatever that expression means, upon the death of the survivor of the testator's brothers and sisters. The claimant must then be living, and, if he is not required to be of the testator's next of kin at the time of his death, the clause must refer to next of kin at the time of distribution, which, moreover, is most natural, if that be the time for determining the other characteristics of the class. It is true that the words "then living" in one aspect seem to point to a class of persons some of whom may not be living at the time fixed for the payment, but the inference to be drawn from that is, I think, overborne by the other considerations which I have mentioned. The case is within the application of the lan-

(1) [1921] 1 A.C. 594.

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guage of Lord Dunedin who, in his speech in the *Lucas-Tooth Case* (1), at p. 608, said:

> Prima facie the heir of A. is the person who holds that character when A. dies. If, however, the period of distribution is owing to the interposition of a life interest or by explicit direction postponed, and it is clear that the favoured person is only to be sought at the time of distribution, then it is legitimate to hold that the *prima facie* meaning is displaced and that the person indicated is he who would have the character of heir of A. if A. had really died at the date of the period of distribution. Everything, therefore, turns as Thesiger L.J. put it in *Mortimer* v. *Slater* (2), (for I do not read his judgment as a monograph on the word "then"), on its being clear from the words used that the person is to be found, or the class selected, only when the succession opens.

If, as I hold, the testator has shown that he does not mean his next of kin living at his death, the words "then living" serve to indicate in contradistinction the time when his next of kin, for the purposes of the gift, are to be ascertained.

In any event, since, referring to the death of the survivor of the testator's brothers and sisters, the bequest is to his then living next of kin of the name "Forbes," his nieces are not within the description, for they had parted with that name before the time set for ascertaining the class. If female next of kin can be admitted, they must be of the name "Forbes" at the time directed for payment. There is no authority by which we are bound to substitute any such word as "stock," "blood" or "family" for "name," and to do so would, I think, be to fail in due regard to the testator's intention. *Pyot* v. *Pyot* (3), depends upon its own special considerations. Lord Hardwicke held the description in that case to refer, not to the actual bearing of the name "Pyot," but to the stock "of the Pyots." There seems to have been some confusion as to what precisely was the language to be interpreted. The words "of the Pyots" are put in quotation in the Lord Chancellor's judgment, and, in a note to the report, it is stated that these were the words used and not "of the name of the Pyots." The case is considered in the text of Mr. Jarman's first edition, which has been reproduced by the learned authors of the 6th edition at pp. 1650 et seq. In

(1) [1921] 1 A.C. 594. (2) (1877) 7 Ch. D. 322.
(3) (1749) 1 Ves. Sr. 335.

Leigh v. *Leigh* (1), Lawrence J. says that, according to a manuscript note of the case which he had, the bequest was "to my nearest relation of the name, not 'of Pyot,' but 'of the Pyots,'" and that that circumstance appears to weigh with Lord Hardwicke. Moreover, Thompson B., at p. 111 of the same case, says that the disposition was in favour of the testatrix's nearest relation of the name "of the Pyots," adding "so it appears in the Register's book; which I have examined; and not 'of Pyot'". Therefore I think the *Pyot Case* (2) is distinguishable, and this apparently was the view of the Vice-Chancellor in *Carpenter* v. *Bott* (3), which was the case of a fund bequeathed in trust for the testator's next of kin "of the surname of Crump," although it was held that these words were the equivalent in meaning of the expression interpreted in *Pyot's Case* (2). But I may be permitted to doubt that the learned Vice-Chancellor would have gone the step further which would be necessary to substitute "stock" for "name" in the present case. Indeed if it were the testator's intention that the fund should go to a person named "Forbes," it is not easy to perceive by what other words he could more plainly have expressed that intention.

As to the reasoning of Chisholm J., I think he fails to recognize the effect of the description "of the name 'Forbes' then living" which, in my judgment, is intended to constitute a special class of next of kin, and his conclusion is moreover in conflict with the golden rule enunciated by Lord Esher that "you ought, if possible, to read the will so as to lead to a testacy, not to an intestacy." *In re Harrison* (4).

I am therefore of the opinion that the appeal should be allowed, and that the judgment of Mellish J. should be restored. As to costs, they should be governed throughout by the same direction as in the court below—to be paid out of the fund; and, for the Trust Company, as between solicitor and client.

Appeal allowed.

(1) (1808) 15 Ves. 92, at p. 99.
(2) (1749) 1 Ves. Sr. 335.
(3) (1847) 15 Sim. 606, at p. 607.
(4) (1885) 30 Ch. D. 390, at pp. 393, 394.

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Solicitor for the appellant Josiah H. MacQuarrie: *Josiah H. MacQuarrie.*

Solicitor for the appellant James M. Milne: *R. Douglas Graham.*

Solicitor for the appellant McKenzie Forbes: *J. Welsford Macdonald.*

Solicitor for the respondent The Eastern Trust Company: *J. U. Ross.*

Solicitor for the respondents Maria F. Perley and Isabel F. Ruddick: *E. C. Phinney.*