PATRICK F. DUGGAN (PLAINTIFF).....APPELLANT. 1890

AND *Feby. 24. *June 13.

PATRICK M. DUGGAN, ASSIGNEE OF JOHANNA DUGGAN, AND OTHERS (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Interest—Contingent interest—Protection against waste.

D. was entitled to a legacy under a will provided he survived the testator's wife, and during her lifetime he brought suit to protect his legacy against dissipation of the estate by the widow.

Held, reversing the judgment of the court below, that D. had more than a possibility or expectation of a future interest; he had an existing contingent interest in the estate and was entitled to have the estate preserved that the legacy might be paid in case of the happening of the contingency on which it depended.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment in favor of the defendants at the trial.

The plaintiff brings his suit to protect his right to a legacy under the will of one John Duggan, of Halifax, claiming that the estate is being dissipated. The two clauses of the will material to the case are the following:

"I give, devise and bequeath unto my dear wife, Johanna, all and singular my real and personal estate, property, monies, goods, chattels and effects, whatsoever and wheresoever, of every kind and description, to have and to hold the same and every part and parcel thereof to my said wife, Johanna, her heirs, executors, administrators and assigns forever."

"And my will is further that, in case there should be

*PRESENT: Sir W. J. Ritchie C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

1890

DUGGAN v. DUGGAN.

any child or children of my deceased brother, Maurice, formerly of Dungarven, in Ireland, living at the time of the decease of my said wife, then that such child or children should receive out of the proceeds of my said property, at her decease, the sum of three thousand pounds, Halifax currency."

The plaintiff is the only child of Maurice Duggan named in the second of the above clauses. The wife, Johanna Duggan, who is the executrix of the will, is still alive, but she has mortgaged the real estate of the testator to the respondents (Millers), to secure her personal debts, in consequence of which this suit was brought. On the trial Mr. Justice Townshend decided that the plaintiff could not maintain the suit as he had no present, but only a future and contingent, interest in the estate. The full court, on appeal, affirmed the judgment at the trial.

E. L. Newcombe for the appellant. The cases relied upon to support the judgment in the court below did not deal with contingent interests but only with estates in expectancy depending on mere possibilities. See judgment in *Davis* v. *Angel* on appeal (1).

The learned counsel was stopped by the court.

Borden for the respondent. It is only in exceptional cases that the court will interfere to protect contingent interests. *Dowling* v. *Dowling* (2); *Kevan* v. *Crawford* (3); *Hampton* v. *Holman* (4); Annual Practice 1889-90 (5).

The legacy is only chargeable upon the personal estate. Theobald on Wills (6); *Bentley* v. *Oldfield* (7).

The whole property is given to the wife absolutely, and a later clause in a will does not take effect over

(1) 4 DeG. F. & J. 524.
(2) 1 Ch. App. 612.
(3) 6 Ch. D. 29.
(4) 5 Ch. D. 187.
(5) P. 456.
(6) 3 ed. p. 584.
(7) 19 Beav. 230.

1890

DUGGAN v. DUGGAN.

such a paramount devise. The devise to the plaintiff is, therefore, void for repugnancy; *Byng* v. *Lord Strafford* (1), affirmed on appeal to House of Lords *sub nomine*, *Hoare* v. *Byng* (2). In *Howard* v. *Carusi* (3) all the cases on this subject are collected. And see *Percy* v. *Percy* (4).

The learned counsel also referred to *Davidson* v. *Boomer* (5); Theobald on Wills (6).

Newcombe in reply cited *Allan* v. *Gott* (7); *Curtis* v. *Sheffield* (8); Cunningham & Mattinson's Pleadings (9).

Sir W. J. RITCHIE C.J.—I think the plaintiff had more than a possibility or expectation of a future interest, but that he had a present existing contingent interest in the testator's estate and has a right to maintain an action to have his legacies secured. This interest is vested by the testator's will; the enjoyment of it depends on a contingency, but the present interest does not the less exist. His right has come into existence; that right is to receive out of the testator's estate £3,000, in case he survives the defendant, Johanna Duggan; and what he now seeks is simply to have that right declared and his legacy secured, so that it may be paid to him in the event of his surviving the said Johanna Duggan which seems to me to come very clearly within the language of Lord Eldon in *Allan* v. *Allan* (10) where he says:—

> Some things are very clear. First, it is perfectly immaterial how minute the interest may be, how distant the possibility of the possession of that minute interest: if it is a present interest. A present interest the enjoyment of which may depend upon the most remote and improbable contingency is nevertheless a present estate; and as in the case upon Lord Berkeley's will, (*Lord Dursley* v. *Fitzhardinge Berke-*

(1) 5 Beav. 558.
(2) 10 C. & F. 508.
(3) 109 U. S. R. 730.
(4) 24 Ch. D. 616.
(5) 17 Gr. 509; 18 Gr. 475.
(6) 3 ed. p. 582.
(7) 7 Ch. App. 439.
(8) 21 Ch. D. 1.
(9) P. 487.
(10) 15 Ves. 130.

1890

DUGGAN v. DUGGAN.

Ritchie C.J.

ley, 6 Ves. 251,) though the interest may with reference to the chance be worth nothing, yet it is in contemplation of the law an estate and interest. On the other hand, though the contingency be ever so proximate and valuable, yet if the party has not by virtue of that an estate, the court does not deal with him.

And on the following page the Lord Chancellor says,

There is no case in which the tenant in tail has not been considered, as between him and his issue, as having the entire interest. The statute *de donis* certainly does say that the estate is to go according to the form of gift, and gives the forms of writs, which are of different sorts; but I cannot find that any Formedon was ever brought by the issue during the life of the tenant in tail. That demonstrates that the estate is in the tenant in tail for the time being himself; and then the reasoning that applies to the tenant in fee, must apply to the tenant in tail.

In the case of Lord Berkeley's will referred to the Lord Chancellor says: (1)

A contingent interest is not the less a present interest.

It would seem very clear that if the appellant is refused the relief he seeks there is but a very small, if any, chance of his realising the legacy if the contingency on which its payment is to be made should happen. I cannot think the law so helpless as to allow an executrix and trustee to waste and dispose of the trust estate for her own purposes as was done in in this case, under, as it were, the very eyes of the court, and that the court should be unable to protect the estate so as to be available, on the happening of the event contemplated, for the purposes of distribution in accordance with the provision of the testator's will.

I therefore think this appeal should be allowed.

FOURNIER J.—I agree in the reasons given by the learned Chief Justice for allowing the appeal.

TASCHEREAU J.—I am of opinion that the appeal should be allowed with costs.

(1) 6 Ves. 260.

1890

DUGGAN v. DUGGAN.

Gwynne J.

GWYNNE J.—The question in this case turns upon the true construction of the last will and testament of John Duggan, deceased, in his life time the husband of the defendant Johanna Duggan. John Duggan died in the month of November, 1865, having first duly made and published his last will and testament upon and bearing date the 28th day of August, 1865, whereby, after providing for payment of his debts and funeral expenses, he devised as follows:—

2. I give, devise and bequeath unto my dear wife Johanna, all and singular my real and personal estate, property, monies, goods, chattels and effects whatsoever and wheresoever, of every kind and description, to have and to hold the same and every part and parcel thereof to my said wife Johanna, her heirs, executors, administrators and assigns forever.

And my will is further that in case there should be any child or children of my deceased brother Maurice, formerly of Dungarven, in Ireland, living at the time of the decease of my said wife, then such child or children should receive out of the proceeds of my said property at her decease the sum of three thousand pounds, Halifax currency.

Now upon the well established principle that a will must be construed so as to give effect, if possible, to every word a testator has used, I am of opinion that this devise operates as a devise to the testator's wife Johanna and to her heirs, executors, administrators and assigns forever, subject to a charge in favor of such of the children of the testator's deceased brother, Maurice, as should be living at the time of the decease of testator's wife Johanna. It appears that the testator's brother Maurice had died ten years before the testator made his will, as the testator well knew; it appears also that when the testator made his will the plaintiff was the only child of his deceased brother Maurice who was living; so that in effect the devise to Johanna was made subject to a charge of £3,000 in favor of the plaintiff, contingent upon his surviving the devisee

1890

DUGGAN v. DUGGAN.

Gwynne J.

Johanna his aunt. Now whether his charge be a present bequest vested in interest in the plaintiff subject to be divested in the event of his not surviving Johanna, or a bequest contingent upon his surviving her, there can, I think, be no doubt whatever that he has such an interest under the will as entitles him to the interference of the court to have the property subjected to the charge preserved in such a manner that it shall be forthcoming to be applied in payment of the bequest in his favor in the event of his surviving his aunt Johanna. The appeal therefore must be allowed with costs, and a decree be ordered to be made referring it to the master to enquire into particulars of the property devised, and as to the disposition thereof, and to report to the court in the ordinary manner.

PATTERSON J.—Concurred.

Appeal allowed with costs.

Solicitors for appellant: *Meagher, Drysdale & Newcombe.*

Solicitor for respondent Duggan: *A. G. Troop.*

Solicitor for other respondents: *H. W. C. Boak.*