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GEORGIANA J. HOUGHTON, JOHN B. WRIGHT AND OTHERS..... APPELLANTS;

AND

JAMES J. BELL AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Will—Construction—Devise to children and their issue—Per stirpes or per capita—Statute of limitations—Possession.*

Under the following provision of a will "When my beloved wife shall have departed this life and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money * * * and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto:

*Held*, reversing the judgment of the Court of Appeal, Ritchie C.J. dissenting, that the distribution of the estate should be *per capita* and not *per stirpes*.

A son of the testator and one of the executors and trustees named in the will was a minor when his father died, and after coming of age he never applied for probate though he knew of the will and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate and remained in possession over twenty years, and until the period of distribution under the clause above set out arrived, and then claimed to have a title under the statute of limitations.

*Held*, affirming the decision of the Court of Appeal, that as he held under an express trust by the terms of the will the rights of the other devisees could not be barred by the statute.

APPEAL and cross-appeal from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Ferguson J. at the trial.

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

[NOTE.—This and the following cases decided in 1892-3 the reporters have not been in a position to publish until now.]

(1) 18 Ont. App. R. 25 sub nom. *Wright* v. *Bell*.

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The action in this case was brought for the purpose of having construed the will of the late Thomas Bell and for the administration of his estate.

The said Thomas Bell died in 1840 and his property was left to his widow for life for the support of herself and her unmarried daughters. The will contained the following provision, which is the only one material to the questions raised on this appeal :—

"When my beloved wife shall have departed this life, and my daughters shall all have married or departed this life, I direct and require my trustees and executors hereinafter named to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of those of my said sons and daughters who may have departed this life previous thereto."

On the death of the widow and the only one of the daughters who had not married there were several children and grandchildren of the testator entitled to the benefit of the above clause. The question for decision is : Did such beneficiaries take *per stirpes* or *per capita ?* The Court of Appeal held that they took *per stirpes* reversing the decision of Ferguson J. on this point.

The other question raised in the action which comes before the court on cross-appeal is, whether or not James J. Bell, one of the sons of the testator and one of the executors and trustees named in the will, is entitled to certain land which formed part of the estate by virtue of the statute of limitations. He was only fifteen years of age when his father died and never applied for probate of the will through leave was reserved for him to do so. He was aware of the will but took no part in the execution of the trusts thereunder. In 1861, with the consent of the acting

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trustee, he entered into possession of a farm which had belonged to the testator and remained in possession continuously from that time. He now claims title to the said farm by prescription.

The Court of Appeal held, affirming the decision of the trial judge, that the said James J. Bell must be considered as necessarily affected with notice of the provisions of the will and the express trusts thereby created as regards the land he claims, and as he admits that he thought he was devisee of the land when he entered the entry was not tortious and his possession was that of trustee under the will. He could not, therefore, set up the statute of limitations and claim the land as his own. The said James J. Bell took a cross-appeal to the Supreme Court from this decision, and is, also, a respondent to the main appeal on the question of the construction of the will.

*S. H. Blake* Q.C. for the appellants, the Wrights, and *Beck* for the other appellants in the main appeal, argued that the testator's devisees took *per capita*, citing *Tyndale* v. *Wilkinson* (1); *Payne* v. *Webb* (2); *Wood* v. *Armour* (3); *Bradley* v. *Wilson* (4); *Martin* v. *Holgate* (5); *In re Orton's Trust* (6); *In re Philps' Will* (7).

*McCarthy* Q.C. and *S. H. Osler* for the respondent, James J. Bell and *Hoyles* Q.C. for Charles J. Bell referred to *In re Campbell's Trusts* (8); *West* v. *Orr* (9); *In re Smith's Trusts* (10); *In re Goodhue* (11); *Board* v. *Board* (12).

In the cross-appeal *McCarthy* Q.C. and *Osler* for the appellant argued that James J. Bell was never an acting trustee and could claim the benefit of the statute

(1) 23 Beav. 74.
(2) L. R. 19 Eq. 26.
(3) 12 O. R. 146.
(4) 13 Gr. 642.
(5) L. R. 1 H. L. 175.
(6) L. R. 3 Eq. 375.
(7) L. R. 7 Eq. 151.
(8) 31 Ch. D. 685.
(9) 8 Ch. D. 60.
(10) 7 Ch. D. 665.
(11) 19 Gr. 366.
(12) L. R. 9 Q. B. 48.

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of limitations, citing *Dickenson* v. *Teasdale* (1); *Cunningham* v. *Foot* (2); *Sands* v. *Thompson* (3); and that never having accepted the trust the moment he disclaimed the deed as to him was void *ab initio*. *Doe d. Chidgey* v. *Harris* (4); *Paine* v. *Jones* (5).

*Blake* Q.C. and *Hoyles* Q.C. for the respondents cited *Ryan* v. *Ryan* (6); *Gray* v. *Bickford* (7); *In re Arbib & Class's Contract* (8).

Sir W. J. RITCHIE C.J.—After giving this case every consideration I am unable to arrive at the conclusion which my brother judges have reached, and therefore put forward my views with diffidence and doubt. My impression certainly is that the testator contemplated an equal distribution among his sons and daughters living at the time of distribution, and the children of the sons and daughters who may have departed this life previously thereto, meaning thereby that the children should represent their parents, not that the shares of the sons and daughters then living should be reduced by giving to the children of deceased sons and daughters more than the shares of the sons and daughters then living, thereby making an unequal distribution between the living sons and daughters, and the sons or daughters who may have departed this life; in other words I think the children of Mary Houghton took substitutionally in lieu of their mother; consequently I think that each child of Mary Houghton is not entitled to an equal share of the estate with each of the sons and daughters of the testator living at the death of Deborah Bell, and that they are not entitled to rank with such sons and daughters *per capita*.

(1) 1 DeG. J. & S. 52.
(2) 3 App. Cas. 974.
(3) 22 Ch. D. 614.
(4) 16 M. & W. 517.
(5) L. R. 18 Eq. 320.
(6) 5 Can. S. C. R. 387.
(7) 2 Can. S. C. R. 431.
(8) [1891] 1 Ch. 601.

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Ritchie C.J.

They do not take as claiming in their own right but as representing parents.

I think the object of the testator was to divide his property at the death of Deborah Bell, the last unmarried daughter of the testator, equally among his sons and daughters then living and the children representing his deceased sons and daughters; in other words that he neither desired to cut down the shares of his living sons and daughters, nor to increase the shares of the deceased sons and daughters, thereby destroying all equality, which it seems to me it was the testator's intention to secure, but that the sons and daughters should take their shares and the children of the deceased sons and daughters the shares of their respective parents, thereby preserving equality among his children; in other words, I think the children of the deceased parent took a contingent vested interest at the time of the parent's death, and the testator intended to have the division as it would have been if all the sons and daughters had survived, but substituting the children of each deceased son or daughter to the share their parent would have taken if living.

Therefore the appeal should be dismissed.

As to the cross-appeal, I do not think John Joseph Bell has established any title to the property under the statute of limitations. I think he entered on the property under the will of his father by which he was constituted a trustee, and cannot now claim the property in his own right. I entirely agree with the conclusion of the learned trial judge on this branch of the case, and think the cross-appeal should be dismissed.

STRONG J.—This appeal involves two questions, one relating to the construction of the will of Thomas Bell, which is the subject of the principal appeal, and the other as to the application of the statute of limitations

in favour of James Joseph Bell, who has raised this last point by a cross-appeal.

The clause of the will which we are required to construe is as follows:—

> When my beloved wife shall have departed this life I direct and require my trustees and executors hereinafter named to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of those of my said sons and daughters who may have departed this life previous thereto.

The gift then clearly was to such of the testator's sons and daughters who should survive the period of distribution, that period being the death of his widow if she should survive her daughters or the marriages of all of them, or, in the event of the widow dying leaving any unmarried daughters, then the marriage or death of the last unmarried survivor of these, an event which happened when Deborah Bell died in 1883.

Therefore, as regards the testator's sons and daughters, the gift to them having been contingent until that event—the death of the last survivor of the life tenants in 1883—thereupon became vested in such sons and daughters as then survived. As regards the testator's grandchildren who were to take under this devise the exact period of vesting is not quite so clear. According to *Marti* v. *Holgate* (1), if it applied, the interests of the children of sons and daughters of the testator who died before the period of distribution would not be contingent upon their surviving the last tenant for life but would become vested on the death of their parents, the reason for this being that, according to the construction which is authorized by *Martin* v. *Holgate* (1), the words "who may be then living" being confined by the testator to his sons and daughters, and not repeated as to the children of those sons and

(1) L. R. 1 H.L. 175.

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daughters, could not by implication be extended to the grandchildren, who would therefore take vested interests on the death of their fathers and mothers. In *Martin* v. *Holgate* (1) the devisee was to distribute and divide amongst such of certain nephews and nieces of the testator as should be living at the death of his widow, "but if either should then be dead leaving issue such issue should be entitled to their father and mother's share." The question upon this form of gift was whether a nephew having died in the lifetime of the tenant for life leaving a daughter that daughter took a vested interest upon her father's death, or whether she took only contingently upon her surviving the widow, the tenant for life, and it was held that she took a vested interest immediately upon the death of her father. It is to be observed that in that case there was no difficulty in ascertaining the share which thus vested since the children of nephews and nieces who died before the widow were to take their "father's or mother's share." Had the shares of the children of the first beneficiaries been dependent in that case, as they are in this, upon the fluctuations in a class which could not possibly be ascertained with certainty until the termination of the life estates the decision in *Martin* v. *Holgate* (1) might have been different. Otherwise, in the view which I take and which I have yet to mention as to the shares which the devisees, grandchildren as well as children, of the testator take under this will, this inconvenience would follow. The shares given to the children of sons and daughters who might die not being here given by way of substitution for those which their fathers and mothers would have taken if they had survived the life tenants, but original shares which could not be exactly ascertained until the period of distribution (the death of the last life tenant) arrived, the shares originally

(1) L. R. 1 H. L. 175.

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vested would be liable to be diminished and divested *pro tanto* by subsequent events. I think, therefore, that the case of *Martin* v. *Holgate* (1) does not apply in a case like this where it is apparent that the exact shares of none of the devisees can be ascertained until the arrival of the period of distribution. Therefore, even if the will had not contained the direction which it does contain as to personal enjoyment in specie, instead of a sale and conversion by the trustees at the election of the class who were to take, I should have considered *Martin* v. *Holgate* (1), so far as it is relied on as an authority showing who were the persons composing the class of devisees to take in the present case, though of course a decision of the highest authority and conclusive as to a devise in the same terms, yet of doubtful application to the particular will before us in the present case.

It appears, however, that this question as to who were the beneficiaries to take may be solved by a reference to the direction in this particular will to which I have just now incidentally adverted. The words of the testator are:—

> But if my said family should consider it more to their advantage to keep the yearly income and divide it among them in the same manner they are directed so to do.

We have here an indication of an intention entirely repugnant to the notion that some of the devisees might take vested interests even though they should pre-decease the last life tenant. The word "family" refers to the whole class of devisees, sons and daughters and the children of sons and daughters, taking under the will; these persons are, the testator says, to have the option of enjoying in specie, so that the sale by the trustees is not to be imperative. This clearly indicates that there was to be the possibility of actual personal enjoyment *in specie* by the objects of the testator's

(1) L. R. 1 H. L. 175.

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bounty at the death of the last tenant for life, and this could not be if the children of those who died before that event, and who in their turn might pre-decease the tenant for life, were to take vested interests which would be subjects of alienation, and might therefore become vested in strangers, a construction inconsistent with the testator's intention that there might be enjoyment in specie by the "family" if they should so elect, at the death of the tenant for life.

The question here is as to the ascertainment of a class, and recognizing the case of *Martin* v. *Holgate* (1) as an authority binding on me to the fullest extent I do not think it applies, as regards the point now under consideration, to the terms of this will. The construction, then, which I attribute to the testator's language is, that in the events which have happened he has given his property to a class composed of such of his children, sons and daughters, as survived Deborah Bell, and such of the children of sons and daughters who pre-deceased Deborah Bell as were living at her death, thus excluding altogether children of sons and daughters who survived their parents (children of the testator) but died before the last tenant for life. This construction, besides being, in my opinion, the natural meaning of the testator's language, has also the support of authority so far as authority is of consequence in questions of testamentary construction. I refer to the decision of Wood V. C. in *Re White's Trusts* (2) as a case which appears to me to be strongly in point.

As regards the question principally argued, that as to the shares taken by children and grandchildren of the testator respectively, I am compelled to differ from the learned judges of the court below. I can find nothing in this will which warrants the construc-

(1) L. R. 1 H. L. 175. (2) Johns. 656.

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tion contended for, namely, that the children of sons and daughters took their father's and mother's shares, in other words, took *per stirpes* and not *per capita*. It seems to me that the word "equally" used by the testator applied, as I am of opinion it must have, to a class all the members of which are to be ascertained at one and the same time; the period for distribution, the death of the last tenant for life, means exactly what, taken in its primary signification, it imports, namely, that each member of the class is to have the same share.

Further, the case of *Martin* v. *Holgate* (1) certainly applies here to show that the gift to the children of sons and daughters in this will is to be construed as a gift *per capita*. It has long been a settled rule of construction that under a gift by will to A, and the children of B, without more, all take equal shares—*per capita* and not *per stirpes*. In *Blackler* v. *Webb* (2), Lord King says that under such a devise "each should take *per capita* as if all the children had been named by their respective names." Then we have here the addition of the word "equally" to which effect could not be given save by holding that it applies as between the testator's sons and daughters on the one hand and his grandchildren on the other as well as between the latter as amongst themselves.

The class then being once ascertained all its members must take equally, and to hold otherwise, as would be done by saying that the grandchildren of the testator took *per stirpes*, *i.e.* took their parents' shares only, would be to make them take unequally with the other devisees in direct contradiction to the terms of the will.

That the will thus construed may seem harsh or capricious cannot of course have any influence in its

(1) L. R. 1 H. L. 175. (2) 2 P. Wm. 383.

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construction. The testator had a right to make any will he chose so long as he did not offend against the rules of law, and we can only derive his intention from the actual words he has used read in conjunction with the context. I am, therefore, compelled to differ from the full and able judgments delivered in the Court of Appeal on this part of the case, and to express my concurrence in the judgment of Mr. Justice Ferguson.

As regards the cross-appeal, by which James Joseph Bell seeks to have the benefit of the statute of limitations given to him, I am of the same opinion as the majority of the Court of Appeal who in this respect agreed with Mr. Justice Ferguson.

No doubt, according to *Butler and Baker's case* (1), which was determined in *Siggers* v. *Evans* (2) to be applicable to gifts and conveyances of estates burthened with onerous trusts, the legal estate vested in James Joseph Bell until disclaimer even though he had no knowledge of the will, although a court of equity would not have considered him liable as a trustee as regards the performance of active trusts until he had notice of the trusts and had accepted or at least acquiesced in them (3). The statute of limitations would not, however, have run in favour of James Joseph Bell by reason of a possession taken and held in ignorance of the will and the trusts contained in it for the statutory period of limitation. The case of *Lister* v. *Pickford* (4) is authority for this. Lord Romilly there says :

> Suppose that they (referring to certain trustees) had imagined *bonâ fide* that they themselves were personally entitled to the property, and that they were not trustees of it for any one, it would nevertheless have been certain that they would have been trustees for the *cestuis que trust* and no time would run while they were in such possession.

(1) 3 Rep. 26*a*.
(2) 5 E. & B. 380.
(3) See Lewin on Trusts 9 ed. p. 209.
(4) 34 Beav. 583.

The point, however, does not really arise here for either James Joseph Bell had notice of the will as Mr. Justice Ferguson held he had, in which case he would of course be incapable of setting up the statute of limitations against the beneficiaries taking under it, or being ignorant of the will and being let into possession in the manner he himself describes by his brother John Bell, who had full knowledge of the will and its trusts and was undoubtedly a trustee under it, he (James Joseph Bell) was a tenant at will claiming under an express trustee, and therefore a person in whose favour the statute would not run as is expressly provided by the 30th section, of R. S. O. c. 111. This is well pointed out in the judgment of Mr. Justice Maclennan with whom I agree as regards this part of the case.

John Bell did not of course acquire, under his purchase from the purchaser at the tax sale, any title paramount to that which he took under the will, but the estate he so acquired became in all respects subject to the trusts of the will. This does not appear to have been doubted by the learned judges in the court below, and is too plain to require further observation.

The appeal should be allowed with costs and the cross appeal be dismissed with costs, the effect of which will be to restore the judgment pronounced by Mr. Justice Ferguson in every respect. I do not think that the costs of the appeal should come out of the estate; it should be dismissed with costs to be paid by the appellants; James Joseph Bell must pay the costs of the cross appeal both here and in the Court of Appeal.

FOURNIER J.—I am of opinion that the appeal should be allowed and the cross-appeal dismissed.

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TASCHEREAU J.—I have come to the same conclusion for the reasons assigned by Mr. Justice Strong.

Patterson J.

PATTERSON J.—We have here a trust to convert the estate into money at the period of distribution and

> to divide the same equally among those of my said sons and daughters who may then be living and the children of those of my sons and daughters who may have departed this life previous thereto.

The general rule of construction was concisely stated by Vice-Chancellor Sir James L. Knight Bruce in *Leach* v. *Leach* (1) as being that:

> Words in a will are to be construed according to their ordinary sense and meaning, unless the testator has declared, or by the context shown, that he uses them otherwise.

There is nothing in this will, outside of the passage itself, to modify its meaning, and I cannot discover anything in the words used, or any justification in the authorities cited to us or in any of the numerous other cases at which I have looked, for holding otherwise than that the class of beneficiaries consists of the living sons and daughters and the children of those deceased, all taking *per capita*.

I was for some time disposed to look for an indication of a different intention in the circumstance, which I think had some influence in the court below, that the period of distribution, when the class was to be ascertained, was not at the death of the testator but at an indefinite time which, in the event, proved to be half a century later; but I cannot satisfy myself that that circumstance can, upon any grounds more substantial than mere conjecture, be taken to modify the literal meaning of the language. There are other circumstances peculiar to this will but not, so far as I can perceive, affording a safe basis for reasoning as to the intention of the testator. For example, the sons

(1) 2 Y. & C. C. 495, 499.

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who were to share in the distribution took no benefit in the meantime, nor did any daughter except while she remained unmarried. Any attempt to reason from these things is as likely to lead towards the *per capita* as towards the stirpetal distribution. The leading idea may be plausibly argued to be to provide for the widow and the unmarried daughters, no thought being given to the maintenance or advancement of the others, and then to divide among the whole of the indicated class.

I can hardly find reason for saying, as Vice Chancellor Malins said in *Payne* v. *Webb* (1) that :

> If I were at liberty to conjecture what the testator intended to do I should have no doubt that he meant to divide his residuary property into seven shares, giving one share to each of his surviving children, and one share *per stirpes* to the children of the deceased daughters.

I quote *mutatis mutandis*, but even if I entertained that opinion I should feel myself bound, as the Vice Chancellor did in that case, to construe the words according to their literal meaning.

Several of the most instructive of the recent decisions are those of Lord Justice Kay when a judge of the chancery division, such as *Lord* v. *Hayward* (2), and *In re Hutchinson's trusts* (3). They are not so directly upon the point in discussion as to call for citation at present, but I find in the report of the argument of that learned judge when at the bar, or of Lord Macnaughten who was with him, in *Swabey* v. *Goldie* (4), the following passage which I may adopt as apposite and as, in my opinion, borne out by the cases he cites :

> The principle of the cases is that where the fund is to be kept together and divided at one period there is no reason for inferring distribution *per stirpes;* but if it is divisible at different times then the distribution *per stirpes* is to be preferred : Hawkins on Construction

(1) L.R. 19 Eq. 26.
(2) 35 Ch. D. 558.
(3) 21 Ch. D. 811.
(4) 1 Ch. D. 380.

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of Wills (1); *Willes* v. *Douglas* (2); *Arrow* v. *Mellish* (3); *Waldron* v. *Boulter* (4); *Turner* v. *Whittaker* (5); *Wills* v. *Wills* (6); Jarman on Wills (7).

I am of opinion that on this branch of the case the appeal should be allowed and the judgment of the court of first instance restored.

Upon the cross-appeal of James Joseph Bell he had the judgment of the court of first instance and also that of the Court of Appeal against him, the decision of the latter court not being unanimous.

I have examined the evidence carefully and I am satisfied that the judgment is correct.

The account given by the appellant of the way he was put into possession of the lands by his brother John Bell, and the understanding on which he entered upon the occupation of the lands which has lasted for nearly thirty years, is to my mind simply incredible, and it does not gain in plausibility from the style of his answers as reported by the shorthand writer. Setting all that aside, however, and assuming that he had the idea when he entered upon the farm that the will of his father gave it to him, I do not see on what principle that alters the fact that he was a devisee in trust under the will, or deprives the *cestuis que trustent* of the protection of the statutory enactment (8) that:

> No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be barred by any statute of limitations.

It might, perhaps, have been more satisfactory if John Bell and Deborah had survived so that we might have had the benefit of their testimony, but if it were important that we should know John Bell's understanding of the position enough has been shown, even

(1) P. 114.
(2) 10 Beav. 47.
(3) 1 DeG. & S. 355.
(4) 22 Beav. 284.
(5) 23 Beav. 196.
(6) L. R. 20 Eq. 342.
(7) 3rd ed. vol. II, pp. 181-183.
(8) R.S.O. (1887) c. 111 s. 30 (2).

by the appellant himself, to make it apparent that John's understanding was very different from that on which the appellant relies. In fact all that we hear of John's doings, the action that he brought to eject Simon Peter Munger in the name of the appellant conjointly with his own, the repurchase of the lands that were sold for taxes, and other things, are consistent with the true position under the will. There is not a shadow of reason to doubt that John Bell fully understood the real situation, and there is no conceivable motive for his misrepresenting it as the appellant would have it believed that he did.

The fact of crucial importance is that the appellant held under an express trust by the terms of the will, and that the statute protects the interests given by the same will to the others.

The cross-appeal should, in my opinion, be dismissed.

*Appeal allowed with costs and cross-appeal dismissed with costs.*

Solicitors for the appellants, The Houghtons: *Beck & Code.*

Solicitors for the appellants, The Wrights: *Lefroy & Boulton.*

Solicitors for the respondent, James J. Bell: *Osler, Teetzel, Harrison & McBrayne.*

Solicitors for the respondent, W. H. Wright: *Bartlett & Bartlett.*

Solicitors for the respondents, The Millers: *Mulock, Miller, Crowther & Montgomery.*

Solicitors for the respondent, Susan Nagle: *Reeve & Woodworth.*

Solicitors for the respondent, Chas. J. Bell: *Moss, Barwick & Franks.*