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* March 9
* May 26

IN THE MATTER OF THE ESTATE OF CECILIA ROACH, DECEASED

GEORGE ROACH..... APPELLANT;

AND

THOMAS ROACH, SURVIVING EXECUTOR OF THE WILL OF CECILIA ROACH, DECEASED, ARTHUR JOSEPH HOLMES, EXECUTOR OF THE WILL OF MARY ROSELLA KORMANN, DECEASED,..... FANNY KING ROACH AND FREDERICK S. KING, EXECUTORS OF THE WILL OF MARTIN ROACH, DECEASED.... } RESPONDENTS.

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

Will—Construction—Vesting—Power to divide and apportion—Capacity of survivor of donees of power to execute it—Equal division among beneficiaries.

The testatrix' will gave all her estate "in the manner following," and then directed that the estate be held in trust by her executors, that her son John be maintained from it so long as he lived, and whatever portion was not used for him was, at his death, "to be divided among my remaining sons and daughter as follows," and then directed that, after her sons Thomas and William each received $1,000, the entire balance of the estate was to be divided among the remaining two sons Martin and George and her daughter Mary "as in the judgment of my son Thomas and my daughter Mary deem wise, fit and proper to divide and apportion the estate". One H., Thomas and Mary were appointed executors. The testatrix died in 1923, Martin in 1926, Mary in 1928, and John in 1929.

Held: (1) Upon the testatrix' death, Martin, George and Mary took vested interests (subject to the prior gifts and to the power of apportionment) in whatever portion of the estate was not used for John. The gift to them in remainder vested at once on the testatrix' death, although the division was postponed until John's death.

(2) The power to Thomas and Mary to divide and apportion was a discretion only, which might or might not be exercised; the children took under the will, even if the power was not executed; they took through the executors who, under the will, held as trustees for them, and not through the named donees of the power; the gift was not subordinate to the exercise of the power; the power was not in the nature of a trust; it was a bare power given to two persons by name (and not annexed to the office of executorship), a "joint confidence," and so could not be executed by the survivor (Farwell on Powers, 3rd

* PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

ed., p. 514, referred to); therefore Thomas, the surviving donee of the power, could not exercise it. S. 25 of *The Trustee Act*, R.S.O., 1927, c. 150, did not apply.

(3) The result was that, on John's death, and after payment of the legacies to Thomas and William, the residue of the estate belonged to George, the estate of Martin, and the estate of Mary, in equal shares.

APPEAL by George Roach from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing his appeal from the judgment of Logie J. (2), declaring (upon motion brought by way of originating notice on behalf of the surviving executor of the will of Cecilia Roach, deceased, for interpretation of the said will) that the estate of Martin Roach, deceased, the estate of Mary Rosella Kormann, deceased, and the said George Roach, are each entitled to one-third of the residue of the estate of Cecilia Roach, deceased, after payment of certain bequests under the said will.

The appellant contended that Martin Roach and Mary Rosella Kormann did not acquire any vested interest in the estate of the testatrix, Cecilia Roach, at the time of the latter's death, and, having predeceased John Roach, never acquired any interest in the estate; that until the power to divide had accrued there could be no vesting in the objects of the power; that the appellant, who survived John Roach, was alone entitled to the residue of the estate after payment of the legacies to Thomas Roach and William J. Roach. Alternatively, the appellant contended that, if the court should hold that the time of vesting was on the death of the testatrix, Cecilia Roach, then Thomas Roach (the survivor of the two who were given the power to divide and apportion) had power to divide and apportion the said residue among the estate of Martin Roach, deceased, the estate of Mary Rosella Kormann, deceased, and the appellant, as he (Thomas Roach) deemed wise, fit and proper.

The provisions of the will in question and the material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

(1) (1930) 39 Ont. W.N. 109. (2) (1930) 38 Ont. W.N. 189.

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In re ROACH.

ROACH *v.* ROACH

J. C. McRuer, K.C., and *F. A. Browin* for the appellant.

A. J. Holmes for the respondent, the executor of the will of Mary Rosella Kormann, deceased.

F. D. Hogg, K.C., for the respondent, Thomas Roach, surviving executor of the will of Cecilia Roach, deceased.

(No one appeared for the respondents, the executors of the will of Martin Roach, deceased.)

DUFF J.—This appeal should be dismissed with costs.

The judgment of Newcombe, Rinfret, Lamont and Cannon JJ. was delivered by

RINFRET J.—This is a motion brought by way of originating notice in the Supreme Court of Ontario for interpretation of the last will and testament of the late Cecilia Roach. The will reads as follows:

I Revoke all former Wills and other Testamentary Dispositions by me at any time heretofore made, and declare this to be my last Will and Testament.

I Direct all my just debts and funeral and testamentary expenses to be paid and satisfied by my executor and trustees hereinafter named.

I Give, Devise, and Bequeath all my Real and Personal Estate which I may die possessed of or interested in, in the manner following, that is to say:

I direct that my entire Estate both Real and Personal shall be held in trust by my Executors and trustees hereinafter named and my son John Roach M.D. will be maintained from my estate after the maintenance given him from his Father's Estate is exhausted and that the entire Estate be held in trust for him and for him only so long as he lives.

Whatever portion of my Estate is not used in behalf of my son John Roach M.D. as herebefore directed at the time of his demise such portion is then to be divided among my remaining sons and daughter as follows:

After my son Thomas Roach, Priest and William J. Roach Priest each receive One Thousand Dollars legacy then the entire balance of the Estate is to be divided among the remaining two sons Martin Roach and George Roach and my daughter Mary Rosella Kormann as in the judgment of my son Thomas and my daughter Mary Rosella deem wise, fit and proper to divide and apportion the Estate.

My Executors and trustees are to dispose of my Real Estate only when and as same can be done advantageously.

I direct that my Executors and trustees shall apply One Hundred Dollars of my Estate for Masses for the Repose of my soul after death and Two Hundred Dollars for Monument to be erected for my deceased husband and myself.

And I nominate and appoint Thos. P. Hart, Estate Agent of the Town of Orillia, Ont., and my son Thomas Roach, Priest and my

Daughter Mary Rosella Korman to be executors and trustees of this my last Will and Testament.

In Witness Whereof I have hereunto set my Hand the day and year first above written.

The testatrix died on the 9th of June, 1923.

John Roach, M.D., for whom the entire estate was to be held in trust so long as he lived, died on the 5th of February, 1929. During his lifetime, he received the maintenance directed in the will.

Martin Roach died on the 1st of March, 1926, and, by his will duly probated, named as executors his widow and Frederick S. King.

Mary Rosella Kormann, the daughter and one of the executors, is also dead (22nd of October, 1928). By her will, she appointed Arthur J. Holmes as her executor. The executors of Martin Roach and Mary Rosella Kormann are the respondents in this appeal.

George Roach is the only surviving child and, as will be noticed, was also the only child still living at the death of John Roach. He is the appellant in this court.

Thomas P. Hart, one of the three executors, died on the 5th of December, 1929.

Thomas Roach is the only surviving executor. He sought the interpretation of the will with reference to the following matters, namely:

"(*a*) To determine what interest, if any, the estate of Martin Roach and the estate of Mary Rosella Kormann take with George Roach under the said Will.

"(*b*) If the estates of Martin Roach and Mary Rosella Kormann share in the Estate of the said Cecilia Roach to determine the discretion that may be exercised by the surviving executor in dividing the balance of the estate among the estates of Martin Roach and Mary Rosella Kormann and George Roach."

Logie, J., in the Supreme Court of Ontario, considered that

the two sons Martin and George and the daughter Mary Rosella took upon the death of the testatrix vested interests (subject to the apportionment of Thomas and Mary Rosella) in whatever portion of the estate of Cecelia was not used on behalf of John, but the enjoyment thereof was postponed until after the death of John.

He further considered that the power of apportionment was

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a bare power and not a trust and * * * the power (was) not exercisable by the survivor of the two persons in whom it was vested.

Accordingly, upon the principle that "equality is equity" he directed that the balance of the estate should be divided equally among George Roach and the representatives of Martin Roach and Mary Rosella Kormann (1).

That judgment was unanimously confirmed by the Appellate Division (2).

On this appeal, the surviving executor is maintaining merely his application for advice and directions.

Our first duty is to determine what interest, if any, the estates of the deceased children take with George Roach, the surviving child.

We agree with the courts below that Martin Roach and Mary Rosella Kormann took vested interests immediately upon the death of the testatrix.

The controlling words, in the will, are found in the third sentence:

> I Give, Devise, and Bequeath all my Real and Personal Estate which I may die possessed of or interested in, in the manner following, that is to say:

Those are the only words of gift. All the other clauses are directions subordinated to these introductory words. They are words of present gift, under which Martin Roach, George Roach and Mary Rosella Kormann immediately became entitled to a share in "the entire balance of the estate". There is a prior gift, but it is only for the maintenance of John Roach, "so long as he lives". The "remaining" or other children took the beneficial ownership in the contingent *corpus*, that is: in "whatever portion of (the) estate is not used in behalf of * * * John Roach, M.D., as herebefore directed" (i.e., for his maintenance). On account of the position of the property, because of the prior gift for life, the division was postponed, but the gift in remainder vested at once (Theobald on Wills, 8th ed., p. 656). What was "not used in behalf of John Roach" is precisely what the executors now have on hand. The beneficial interest in that contingent *corpus* vested, upon the death of the testatrix, in the named chil-

(1) (1930) 38 Ont. W.N. 189. (2) (1930) 39 Ont. W.N. 109.

dren and not only in such of them as would survive their brother John. The personal representatives of those who died in the lifetime of John are entitled to the property (Williams on Executors, 11th ed., p. 800), subject to the power of apportionment now remaining to be discussed.

The scheme devised by the testatrix is that the entire estate is to be held in trust by the three executors, first to provide maintenance for John Roach, and "then to be divided among (the) remaining sons and daughter", and the division is to be "as follows": $1,000 to Thomas Roach, $1,000 to William J. Roach, and

then the entire balance of the Estate is to be divided among the remaining two sons Martin Roach and George Roach and my daughter Mary Rosella Kormann as in the judgment of my son Thomas and my daughter Mary Rosella deem wise, fit and proper to divide and apportion the Estate.

The first point to be noticed in the disposition thus made by the testatrix is that the power to divide is not given to the executors and trustees. There are three executors and trustees. The power is given *nominatim* to Thomas Roach and Mary Rosella Kormann. They are, in fact, two of the trustees, but the power is not conferred on them as such; and the elimination of the third executor, from among those who are to exercise the power, indicates the intention of the testatrix that the power should not be considered annexed to the office.

Then, the fair construction of the will is that the testatrix intended to make provision for all her children, each of whom is clearly indicated by name. They take through the trustees who hold for them and not through the named persons who are given the power. It is not a power to select or to appoint; it is a power to divide and apportion. A discretion is left to Thomas Roach and to Mary Rosella to use their "judgment", but it is a discretion only—which they may or may not exercise—and, under the terms of the will, the children take even if the named persons do not execute the power. It follows that the gift is not subordinate to the exercise of the power and, therefore, that there was not, on the part of the testatrix, an intention of making the exercise of the power a duty. The power is not a trust nor in the nature of a trust; and nobody could complain of a breach of trust if it were not exercised. See *In re Mills. Mills* v. *Lawrence* (1).

(1) [1930] 1 Ch. 654, at 670.

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It being so, this is not a case where s. 25 of *The Trustee Act* (c. 150 of R.S.O. 1927) applies. It is a case of a bare power given to two persons by name, it is "a joint confidence", and it cannot be executed by the survivor. (Farwell on Powers, 3rd ed., p. 514). The result is that, Mary Rosella Kormann having died, the surviving donee of the power (Thos. Roach) can no longer exercise the discretion.

Our opinion on the matters submitted is therefore in accord with that of the Supreme Court of Ontario and of the Appellate Division. It is not necessary to say anything further to dispose of the appeal, which should be dismissed with costs. Both courts, however, expressed the view that, as a consequence of the failure of the power, the residue of the estate must be divided equally between the appellant and the estates respectively represented by the respondents Holmes, Fanny King Roach and F. S. King. We have no doubt that, the power being now impossible of execution, a trust results in favour of all the persons in whose favour the power would have been exercisable and they take the property in equal shares.

Appeal dismissed with costs.

Solicitors for the appellant: *Foy, Knox, Monahan & Keogh.*

Solicitor for the respondent Thomas Roach: *Fred. C. MacDonald.*

Solicitor for the respondent, Estate of Mary Rosella Kormann, deceased: *A. J. Holmes.*

(The executors of the will of Martin Roach, deceased, respondents, did not appear).

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* PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.