1955

*Feb. 28
*Mar. 1
*May 24

In re HUGHSON

THE DIOCESAN SYNOD OF FREDERICTON (*Defendant*) ..... } APPELLANT;

AND

C. WALLACE PERRETT and NELLIE PERRETT (Executors of the estate of George Miles Hughson) (*Plaintiffs*), NEW BRUNSWICK PROTESTANT ORPHANS HOME, THE MARITIME TRUST CO., ADA A. FITZGERALD and BESSIE CARLOSS (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, CHANCERY DIVISION, WITH LEAVE OF THE APPEAL DIVISION

Will—Ademption—Devise to executors for sale with direction to pay net proceeds into Trust Fund—Sale by testator—Proceeds deposited in bank—Subsequent withdrawals—Effect on legacy.

A testator by his will directed his executors to sell and convert into money all the assets of his estate and after the payment of debts and a legacy to the Flower Fund of a church "to pay the net proceeds from the sale of my automobile, furniture and Adelaide Street property in the said city of Saint John" to the appellant upon certain trusts, to pay certain other pecuniary legacies; and the residue to the respondents FitzGerald and Carloss. He finally directed that "Should the net proceeds of my estate at the time of my death be insufficient to pay the aforesaid legacies in full then I direct that they should be paid *pro rata* but that the gift for the Flower Fund and of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full." Prior to his death the testator sold the three last mentioned items and deposited the proceeds in his bank account. He later drew against the account but at his death the balance in the account was greater than the net proceeds arising from the sale.

Held (Cartwright J. dissenting): that the principle of ademption did not apply: the phrase "net proceeds of the sale" meant the means of determining the amount of a pecuniary bequest; there was no specific property. The testator by providing that in the event "the net proceeds of my estate at the time of my death" should be insufficient for the payment of "the aforesaid legacies in full" indicated that he intended his net estate, whatever it might be at the date of his death, should be employed in payment of all his legacies, priority to be given that of the appellant. *Hicks* v. *McClure* 64 Can. S.C.R. 361, referred to.

Per Cartwright J. (dissenting): The words of the clause in question are indistinguishable from those in *Hicks* v. *McClure* (*supra*) and must accordingly be construed as a gift not of the Adelaide Street property but of the proceeds of the sale thereof so long as those proceeds

*PRESENT: Rand, Kellock, Cartwright, Fauteux and Abbott JJ.

retained a form by which they could be identified as such. For the reasons given by the judge of first instance, such proceeds had lost their identity at the date of the testator's death and the legacy was adeemed. *Re Stevens* [1946] 4 D.L.R. 322 followed.

APPEAL *per saltum* by leave of the Supreme Court of New Brunswick, Appeal Division, from the judgment of Harrison J. (1) of the Chancery Division, by which he determined certain questions arising with respect to the administration of the estate of George Miles Hughson, deceased.

J. F. H. Teed, Q.C. for the appellant.

Norwood Carter for the respondents.

RAND J.:—This appeal concerns the interpretation of a will. The instrument was made in September, 1950. At that time, as well as at his death, the testator was a widower with no living issue. He then owned a home on Adelaide Street, Saint John, and had money on deposit in the Bank of Nova Scotia. In the late Fall of 1951, he went to live elsewhere. In February, 1952, he sold the property, together with his furniture and automobile, for $10,000 in cash which, on February 9th, was deposited in his savings account in the bank. At that time the account showed a credit of $8,469.72 to which was added the deposit. It appears also that on December 21, 1951, the testator issued a cheque to Ada A. Fitzgerald, one of the respondents and a legatee, for the sum of $5,000, the amount of a bequest in the will. Between the 9th of February and the 20th of May, 1952, when he died, he withdrew from the savings account the sum of $1,656.96 which did not relate to the house or other property sold.

By the will, he devised and bequeathed to his executors "all my property both real and personal for the following purposes". The debts were first to be paid and following a legacy of $100 to the Flower Fund of Saint Luke's Church in Saint John the executors were

to sell and convert into money all of the assets of my estate, and to pay the net proceeds from the sale of my automobile, furniture and real estate situate at No. 180 Adelaide Street in the said City of Saint John to the Diocesan Synod of Fredericton, to be invested in a Memorial Fund in my name, and with the income therefrom to be used and applied by the Bishop of Fredericton in such terms and conditions as he and his successor

(1) (1954) 35 M.P.R. 206.

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in office shall from time to time determine toward grants to a student or students selected by the Bishop for the purposes of assisting such student or students who undertake a course in Divinity Studies; preference at all times being given by the Bishop to students whose homes are in the area served by St. Luke's Church in the said City of Saint John, and if there be no such students in any given year, the Bishop shall be entitled to apply such income to the Divinity Scholarship Account of the Diocese of Fredericton.

Four legacies followed:—

To pay the sum of Five Thousand Dollars ($5,000) to the New Brunswick Protestant Orphans' Home;

To pay the sum of Five Thousand Dollars ($5,000) to the Maritime Trust Company for certain charitable purposes;

To pay the sum of Five Thousand Dollars ($5,000) to Ada A. Fitzgerald (who apparently had rendered services in caring for him);

To pay the sum of Three Thousand Dollars ($3,000) to Bessie Carloss.

The residue was given to Ada A. Fitzgerald and Bessie Carloss in equal shares. The last clause is in these words:—

Should the net proceeds of my estate at the time of my death after the payment of my said debts, funeral and testamentary expenses, be insufficient to pay the aforesaid legacies in full, then I direct that they should be paid *pro rata* but that the gift for the Flower Fund, and the gift of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full.

The question is whether the gift to the Diocesan Synod of Fredericton was adeemed by the sale of the property mentioned.

It will be seen that the gift is not of the property itself; the executors are to pay "the net proceeds". The word "proceeds" here means the net amount of money, not in specie, which the property should bring on its sale, i.e. it was the means of determining the amount of a legacy. The direction is to sell "all" the property belonging to him; the total proceeds so realized were to constitute one mass or fund, on which the legacy was made a first charge. It was, in short, a pecuniary bequest in the amount of the net sum realized from the sale. The property was sold by the testator most likely because he was no longer living in it and because of what he considered a good price: but whatever the reason, it clearly was not intended to affect the bequest. Ademption carries the sense of taking from another to one's self: but the circumstances exclude any such purpose or intention.

This construction is strikingly confirmed by the last paragraph, which puts beyond doubt the fact that he envisaged

the payment of all the legacies out of the total realized moneys, including those already in the bank. But the gifts to the Church and to the Synod were not to abate: they were to be paid in full first. The latter was, therefore, as the others, a general bequest of so much money.

It was argued that the gift was specific, not of the money realized in specie but, in some sense not very clear to me, specific as to some converted form of the property. Assuming it to be specific, which seems here to mean only that the property must be sold by the executors, there would have been no abatement at law and the precaution taken in the last clause is referable only to its having been intended to be of the general character.

That the courts lean strongly against specific legacies has long been settled. In Williams, vol. 2, p. 610, par. 932. it is said that

> Courts do not favour construing a bequest or devise in a will as being specific, and will not do so unless the intent of the testator to give a specific bequest or devise is clearly so expressed.

and at p. 611, par. 934:—

> The courts in general are averse to construing legacies to be specific; and the intention of the testator, with reference to the thing bequeathed, must be clear.

Jarman, 8th ed., vol. 2, p. 1041, puts it:—

> But in construing wills the court leans very strongly against specific legacies so that in a case of doubt the more probable view is that that legacy is not specific.

But here, without that general tendency, the circumstances leave no doubt of what the testator intended. It is indicated in the ademption by payment of the legacy to Miss Fitzgerald. The sale of the property was a mere incident in the administration of his estate by the executors. The predominant purpose was that out of that estate reduced to money these payments should be made, in the case of the Synod, with the preference expressly provided.

I would, therefore, allow the appeal and dispose of the costs as proposed by my brother Kellock.

The judgment of Kellock, Fauteux and Abbott JJ. was delivered by:—

KELLOCK J.:—The testator gave, devised and bequeathed all his property, real and personal, to his executors, in the first instance, to pay debts, funeral and testamentary

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expenses, and in the second place, to provide for a legacy of $100 to the Secretary-treasurer of the Flower Fund of Saint Luke's Church in the City of Saint John to be used for the purchase of flowers from time to time for use in the Church. He then directed his executors:

I To sell and convert into money all of the assets of my estate, and to pay the net proceeds from the sale of my automobile, furniture and real estate situate at No. 180 Adelaide Street in the said City of Saint John.

to the appellant upon certain trusts, the detail of which is not relevant.

After providing for other legacies and for the division of the residue of his estate between the respondents Ada A. Fitzgerald and Bessie Carloss, the testator further directed:

II Should the net proceeds of my estate at the time of my death after the payment of my said debts, funeral and testamentary expenses, be insufficient to pay the aforesaid legacies in full, then I direct that they should be paid *pro rata* but that the gift for the Flower Fund, and the gift of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full.

The appellant contends that the learned judge of first instance was in error in his conclusion that by reason of the realization of the property described in the paragraph I have numbered *I*, in the lifetime of the testator and the deposit of the proceeds to the testator's account in the bank and the subsequent dealings with that account, brought about an ademption of the gift.

In my opinion, it is not arguable but that the gift of the "net proceeds of the sale" in the above paragraph means exactly what it says and does not constitute merely a gift of the enumerated items of property as such. In *Hicks* v. *McClure* (1), a testator directed his executors to sell his farm and to divide the "proceeds" in a certain way. The testator had himself sold the farm and taken a mortgage for part of the purchase price and this mortgage formed part of his estate at his death. It was held that the trust declared by the will with respect to the proceeds of the sale of the farm applied to the mortgage. Sir Lyman Duff thus laid down the principle applicable at p. 364:

Has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such?

(1) (1922) 64 Can. S.C.R. 361.

Anglin J., as he then was, with whom Davies, C.J.C., agreed, in holding that there was enough in the language of the will to indicate an intention that "the funds representing the property dealt with should go to the beneficiary *in whatever form they might be found at the testator's death*", said at p. 364:

> *Morgan* v. *Thomas* (1), shews that in a case such as this a broad and even a lax construction of the terms of the will should prevail if thereby effect will more probably be given to the testator's intention.

Were there nothing else in the will it would be necessary to consider whether or not the proceeds of the assets here in question were still identifiable as such at the date of the death of the testator. In view of the later paragraph, which I have numbered *II* above, however, I do not find it necessary to embark on that inquiry.

If the gift in paragraph *I* is to be regarded for all purposes as purely a specific legacy and was so regarded by the testator, there would have been no need whatever for paragraph *II*. If at the date of his death there were no identifiable "proceeds" of the enumerated items, the gift would simply fail. If there were proceeds, there was equally no reason for paragraph *II*, as a specific legacy does not abate with general legacies for the purpose of rateable payment.

Paragraph *II* is not to be regarded as meaningless if a rational meaning can be given to it. In my opinion, the testator has indicated by this paragraph that in his mind the gift of proceeds was not specific in a technical sense but that he was giving a pecuniary legacy equal in amount to that which should be realized from the sale of the itemized property. Paragraph *II* is perfectly clear. It provides that in the event that *"the net proceeds of my estate at the time of my death"* are insufficient for the payment of debts, funeral and testamentary expenses and "the aforesaid legacies in full", the legacies other than the two mentioned are to abate rateably. Those two are to be *paid in full*. In my view, this is the clearest indication that the testator intended his net estate, whatever it might be at the date of his death, to be employed in payment of all his legacies, priority being given to the two mentioned.

I would accordingly allow the appeal. All parties should have their costs out of the estate, those of the executors as

(1) 6 Ch.D. 176.

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between solicitor and client. In the payment of costs regard shall be had to the priority given by the will to the gifts for the benefit of the appellant, and in the event of a resulting abatement of the other legacies, any costs to which the respondent Ada A. Fitzgerald would otherwise be entitled shall be reduced by such sum as her legacy of $5,000 would have abated had it not been paid to her in the lifetime of the testator and the assets of the testator at his death included such amount.

CARTWRIGHT J. (dissenting): This is an appeal, brought *per saltum* by leave of the Supreme Court of New Brunswick, Appeal Division, from a judgment of Harrison J. determining certain questions as to the interpretation of the will of the late George Miles Hughson, hereinafter referred to as the testator.

Several questions were raised before Harrison J. but this appeal relates to only one of these which is as follows:—

Whether the legacy and benefits given to The Diocesan Synod of Fredericton by and under Paragraph 3 of the said Will are adeemed by reason of the sale by the Testator George Miles Hughson in his lifetime of his automobile, furniture and real estate at No. 180 Adelaide Street, Saint John, New Brunswick, and the depositing of the proceeds from such sale in Savings Account No. 1843 in The Bank of Nova Scotia, Main Street, Saint John, New Brunswick, which account contains other deposits and withdrawals which are without relation to the subject matter of such bequest.

The relevant facts are undisputed. The testator died on May 20, 1952, leaving a will dated September 25, 1950 of which probate has been granted. The relevant provisions of the will are as follows:—

I, GEORGE MILES HUGHSON, of the City of Saint John in the County of the City and County of Saint John and Province of New Brunswick, retired Canadian National Railway employee, do hereby make, publish and declare this to be my Last Will and Testament.

I nominate, constitute and appoint C. WALLACE PERRETT of the said City of Saint John, Electrician and NELLIE PERRETT his wife, or the survivor, Executors of this my Last Will.

I give, devise and bequeath all my property both real and personal to my said Executors or to the survivor for the following purposes:—

1. To pay all my just debts, funeral and testamentary expenses.
2. To pay the sum of One Hundred Dollars ($100) to the Secretary-treasurer of the Flower Fund of Saint Luke's Church in the said City of Saint John to be used for the purchase of flowers from time to time for use in the said Church.
3. To sell and convert into money all of the assets of my estate, and to pay the net proceeds from the sale of my automobile, furniture and real estate situate at Number 180 Adelaide Street

in the said City of Saint John to the Diocesan Synod of Fredericton, to be invested in a Memorial Fund in my name, and with the income therefrom to be used and applied by the Bishop of Fredericton in such terms and conditions as he and his successor in office shall from time to time determine towards grants to a student or students selected by the Bishop for the purpose of assisting such student or students who undertake a course in Divinity Studies; preference at all times being given by the Bishop to students whose homes are in the area served by St. Luke's Church in the said City of Saint John, and if there be no such students in any given year, the Bishop shall be entitled to apply such income to the Divinity Scholarship Account of the Diocese of Fredericton.

4. To pay the sum of Five Thousand Dollars ($5,000) to the new Brunswick Protestant Orphans' Home.
5. To pay $5,000 to the Maritime Trust Company (on trusts for a Protestant Home for aged persons, the terms of which are not material).
6. To pay the sum of Five Thousand Dollars ($5,000) to Ada A. Fitzgerald, wife of Eaven Fitzgerald at present of 22 Kennedy Street, Saint John, New Brunswick, said sum to be inclusive of any amount to which she may be entitled for care, services and expenses which she has or may hereafter incur for me or on my behalf.
7. To pay the sum of Three Thousand Dollars ($3,000) to Bessie Carloss at present of 378 Haymarket Square in the said City of Saint John.

All the rest, residue and remainder of my estate I give and bequeath to the said Ada A. Fitzgerald and the said Bessie Carloss, share and share alike, or to the survivor, should either predecease me.

Should the net proceeds of my estate at the time of my death after the payment of my said debts, funeral and testamentary expenses, be insufficient to pay the aforesaid legacies in full, then I direct that they should be paid *pro rata* but that the gift for the Flower Fund, and the gift of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full.

IN WITNESS WHEREOF, I the said George Miles Hughson have hereunto set my hand and seal this 25th day of September, A.D. 1950.

At the date of this will the testator was living at 180 Adelaide Street. He owned this property and the furniture in it and an automobile. Nothing turns on the fact that two of these items of property are personalty and one realty and, as a matter of convenience, I will hereinafter refer to the three items collectively as "the Adelaide Street property". Late in the year 1951 the testator left 180 Adelaide Street and went to live in the home of the respondent Ada A. Fitzgerald. In February 1952 the testator sold 180 Adelaide Street together with the furniture and his automobile, and conveyed the same to the purchasers by deed and bill of sale dated February 9, 1952.

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The purchasers paid for the said real and personal property the sum of $10,000. This $10,000 was deposited to the credit of the testator in the Bank of Nova Scotia, Main Street, Saint John, N.B., on February 9, 1952. Only two withdrawals from this bank account were made after the deposit of the $10,000. These totalled $1,656.96, and the amount on deposit in this account at the date of the death of the testator was $16,811.76. The remainder of the estate consisted of a Dominion of Canada Bond $100, and two deposits in other banks totalling $3,230.82. The total value of the Estate according to the inventory amounted to $20,142.58.

The learned judge was of opinion that the legacy to the appellant was a specific legacy not of the Adelaide Street property but of the proceeds arising from the sale thereof, that the proceeds of the sale had lost their identity prior to the death of the testator and that, consequently, the legacy was adeemed.

For the appellant it is first argued that the legacy is not specific but is a general legacy of a sum of money equal in amount to the net proceeds of the sale of the three items of property. In support of this it is pointed out that there is no gift of the Adelaide Street property by designation and no specific direction to sell it by designation and that the testator deals with his assets, both in the gift to the executors and in the direction to convert, as a totality. It is argued that the words of the will shew the intention of the testator to be that his whole estate should be converted into one mass of money which he then proceeds to distribute among his beneficiaries.

I am unable to agree with this submission. The words of paragraph 3 of the will appear to me to indicate that the testator contemplated that among his other assets the Adelaide Street property would come into the hands of his executors, that they were to sell and convert such property and (having done so) to pay the net proceeds of the sale thereof to the appellant. The word "and" and the word "my" in the phrase "*and* to pay the net proceeds from the sale of *my* automobile, furniture and real estate situate at Number 180 Adelaide" are significant. Pausing here, I would have thought that there was a great deal to be said for the view that as at the date of his death the testator had

parted with the Adelaide Street property the legacy to the appellant was adeemed and further inquiry was unnecessary, but I agree with the learned judge of first instance that the case of *Hicks* v. *McClure* (1) is indistinguishable from the case at bar and requires us to construe the words of clause 3 as a gift not of the Adelaide Street property but of the proceeds of the sale thereof so long as those proceeds retain a form by which they can be identified as such.

Turning then to the question whether the proceeds of the sale of the Adelaide Street property were identifiable at the time of the testator's death, for the reasons given by the learned judge of first instance I agree with his conclusion that they were not. I do not find it necessary to review the numerous authorities dealing with the effect of the proceeds of the sale of a specific item of property being commingled with other moneys in the bank account of the vendor. A number of them are discussed in the judgments of the Supreme Court of Nova Scotia on appeal in *re Stevens* (2), which, in my opinion, was rightly decided. I would like to adopt the following statement from the judgment of Doull J. (at page 335) as correctly stating the law and as applicable to the facts of the case at bar:—

> The law seems to be that if at a testator's death, the thing answering the description is not in existence, there must be something else which can be identified as taking its place or there is ademption. In this case the something is "the proceeds" of the sale of the property, and the weight of authority is that the failure to keep such fund separate from other funds works such a change in the thing bequeathed that there is no longer anything upon which the gift can act. In the present case, a sum of money greater than "the proceeds" is in existence but its amount and form and substance have changed, and in my opinion there has been an ademption.

I have not overlooked the argument based on the direction in the concluding paragraph of the will that "the gift of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full". This paragraph does not appear to me to be of assistance in determining whether or not ademption has taken place. The testator is assuming that there will have been no ademption, and providing, *ex abundanti cautela,* that this legacy should not abate.

(2) [1946] 4 D.L.R. 322. (1) 64 Can. S.C.R. 361.

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For these reasons I would dismiss the appeal. As the majority of the Court are of the opinion that the appeal succeeds, nothing would be gained by my expressing my view as to the order which should have been made as to costs had the appeal failed.

Appeal allowed with costs.

Solicitors for the appellant: *Teed & Teed.*

Solicitor for the Executors: *H. O. McLellan.*

Solicitors for New Brunswick Protestant Orphans Home, respondent: *Inches & Hazen.*

Solicitor for Bessie Carloss, respondent: *R. G. Fairweather.*

Solicitors for The Maritime Trust Co., respondent: *Norwood Carter.*

Solicitor for Ada A. FitzGerald, respondent: *G. T. Clark.*