MARY V. BUSCH AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE EASTERN TRUST COMPANY (PLAINTIFF)

AND

HOWARD WHISTON AND MARION B. BUSCH, EXECUTORS OF THE LAST WILL AND TESTAMENT OF WALTER J. BUSCH, DECEASED (DEFENDANTS)..... } RESPONDENTS.

1928
*May 3.
*June 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Will—Construction—Vesting—Direction to divide at future time

A testator's will, after providing for collection and payment of debts and for certain specific legacies, provided for sale of certain property, comprising the residue of his estate, and investment of the proceeds and payment of the interest for the maintenance of his wife and daughter A until A (who, however, predeceased the testator) attained 21 years of age, and, on A attaining 21 years of age or dying, for payment of $400 of interest to his wife annually during her life, and then provided that "any money remaining after the payment of said $400 shall be equally divided among my children * * * the issue of any deceased child to take parent's share. On the death of my wife the whole of my property shall be divided between my children (the issue of any deceased child shall be entitled to parent's share) said division to be in equal shares."

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

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Held, that the estate of any deceased child of the testator who died in the lifetime of the testator's widow and left no issue him surviving was not entitled to share in the income from the said residue or in the corpus when divided on the widow's death.

The following passage from Williams on Executors, 11th ed., p. 981, quoted with approval: "Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected."

Judgment of the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 486) reversed.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) affirming the judgment of Graham J. (2) on the construction of a will. The provisions of the will, the questions to be determined, and all material facts are sufficiently stated in the judgment now reported. The appeal was allowed.

Carl P. Bethune for the appellants.

E. Hart Nichols K.C. for the respondents Howard Whiston and Marion B. Busch, executors of the last will and testament of Walter J. Busch, deceased.

The judgment of the court was delivered by

NEWCOMBE J.—In order to grasp this case, it is necessary to read the following clauses of the testator's will:

I direct that so soon after my decease as practicable my book debts and choses in action to be collected and my debts paid;

I give, devise and bequeath:

(1) To my wife all my household furniture;

(2) To my son, WALTER JOHANNES, my business, office furniture, books, plans, papers, and instruments connected therewith or belonging thereto;

(3) To my son, ERNEST and his Heirs, a lot of land owned by me on Clifton Street in the said City, 40 x 120 feet and purchased by me from representatives of Lahey;

(4) I give, devise and bequeath my properties on Gottingen, North and Creighton Streets to my said Trustees or the survivor of them upon trust to sell said properties or either of them if they shall see fit, either at Public Auction or Private Sale. And in the event of such sale I direct them to invest the proceeds arising therefrom in Mortgages of real estate

(1) (1927) 59 N.S. Rep. 486; [1928] 1 D.L.R. 554. (2) (1927) 59 N.S. Rep. 486.

or other security approved by them and pay the interest of such investments to my wife for the proper maintenance of herself and the support and education of my youngest daughter until she shall reach the age of twenty-one years;

It is my will that my Uncle, CHARLES WALTHER, shall have a home with my wife for his life but should any disagreement take place to prevent, then I direct my Trustees to deduct from the interest of said investments the sum of $100, One Hundred Dollars, annually and pay the sum in quarterly instalments during his life-time to my said Uncle. Should my said Trustees not sell said properties I hereby authorize them to let the same and apply the rentals towards the maintenance of my said wife, the support and education of my said daughter and to provide a home for my said Uncle, for the payment to him of said One Hundred Dollars as aforesaid;

On my daughter, AMELIA, reaching the age of twenty-one years, or dying before said property shall be sold, I direct that out of the proceeds to be realized therefrom, a sufficient sum shall be invested as aforesaid so as to produce Four Hundred Dollars ($400) annually, which shall be paid to my wife in quarterly instalments for the support of herself and a home of my said Uncle which sum shall include the One Hundred Dollars hereinbefore provided to be paid to him on disagreement. On his decease, the whole of the said sum shall be paid to my wife during her life for her sole use. Any money remaining after the payment of said Four Hundred Dollars shall be equally divided among my children free from the interference or control of any other person; the issue of any deceased child to take parent's share. On the death of my wife the whole of my property shall be divided between my children (the issue of any deceased child shall be entitled to parent's share) said division to be in equal shares and free from the interference or control of my daughters' husbands;

The above bequests are made to my wife upon the condition that she releases all other interests she may have in my property by right of dower or otherwise; On the marriage of my wife all payments to her as hereinbefore provided shall immediately cease and all my real estate then held shall be sold and the proceeds divided; One-third to my wife (in lieu of dower) and the balance together with the residue of my estate in equal shares among my children, and the share of my daughters to be free from the control of their respective husbands, the issue of a deceased child to take parent's share;

The testator, Henry F. Busch, who resided at Halifax, Nova Scotia, died on 28th January, 1902, leaving a will, without date, which was proved on 3rd February following. The probate was granted to executors named in the will, but subsequently, by order of the court of 7th August, 1925, the Eastern Trust Company (plaintiff) was appointed executor and trustee, to act jointly with the testator's widow and son, Henry C. Busch.

The proceeding was by originating summons, dated 22nd March, 1927, at the instance of the Trust Company, to de-

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termine certain questions which are thus set out in the summons:

(a) Whether under the true construction of the Last Will and Testament of Henry F. Busch, late of Halifax in the County of Halifax, Architect, deceased, the Trustees under said will were required to invest the whole of the residue of the said Estate (after payment of debts, liabilities, expenses and specific legacies) or only so much thereof as would be reasonably necessary to produce the annuity of $400 per annum by the said Will directed to be paid to the widow of the Testator during her widowhood?

(b) Whether under the true construction of the said Will any portion of the corpus of the said residue should be paid to the Testator's children or their issue prior to the death of the Testator's widow?

(c) Whether under the true construction of the said Will the estates of any deceased children of the Testator who died in the lifetime of the Testator's widow, and left no issue them surviving respectively are entitled to share in the income from the said residue or to any share of the said residue when same is divided?

(d) Whether under the true construction of the said Will when the said residue is divided the issue of any deceased child or children will share equally with the children of the Testator living at the date of the death of Testator's widow or whether on such division such issue of any deceased child or children shall respectively divide the share or shares their parent or parents would, if living, have respectively taken?

(e) How the costs of this application are to be borne?

The only evidence introduced came by way of the admissions, which are stated as follows:

For the purpose of determining the questions raised by the Originating Summons issued herein, the following facts are agreed upon by Counsel representing all the parties herein, namely:

1. Henry F. Busch, the Testator died on the 28th of January, A.D. 1902, leaving a Will, copy of which is hereto attached and marked "A."

2. Probate of the said Will was granted in the year 1902 to the Executors therein named.

3. By an Order of the Supreme Court of Nova Scotia dated August 7, 1925, and made in a certain proceeding to be identified as 1924 C. No. 6329, The Eastern Trust Company, the above named Plaintiff, was appointed Trustee under the said Will and has since been carrying on the trusts imposed by the Will.

4. The Testator's Uncle, Charles Walther, and the Testator's youngest daughter, Amelia, referred to in the said Will, both predeceased the Testator.

5. At the time of his death the Testator left surviving him his widow, Mary Victoria Busch, who is a Defendant herein and three sons, namely, Henry C. Busch of Boston, Mass., Ernest A. Busch of Halifax, N.S., and Walter J. Busch of Halifax, N.S., now deceased, and two daughters, Marea R. C. Whiston of Halifax, N.S., and Wilhelmina Boutilier, now deceased. The said Henry C. Busch, Marea R. C. Whiston and Ernest A. Busch are Defendants herein.

6. The Testator's son, Walter J. Busch died on or about the 14th day of July, 1924, leaving no issue him surviving but having first made

a Will, the Executors of which are Howard Whiston and Marion B. Busch, who are Defendants herein.

7. The Testator's daughter, Wilhelmina Boutilier died after the death of the Testator leaving her surviving the following children, namely, Marion V. M. Bray, Marea T. C. Boutilier and Herbert R. Boutilier of Soda Lake, in the Province of Alberta and Ruth Boutilier of Halifax, N.S., Lily M. Boutilier, Robert J. Boutilier and Arthur B. Boutilier. The said Marion V. M. Bray, Marea T. C. Boutilier, Herbert R. Boutilier and Ruth Boutilier are Defendants herein as is also Arthur M. Boutilier, the Guardian of the minor children of the said Wilhelmina Boutilier, deceased, namely Lily M. Boutilier, Robert J. Boutilier and Arthur B. Boutilier.

The case was tried by Graham J., who gave the following answers, as settled by the order of 21st October, 1927:

(*a*) The Trustees were empowered to sell the whole or any part of the residue of the said Estate (after payment of debts, liabilities, expenses and specific legacies) and were required to invest the proceeds of all the residue so sold.

(*b*) No portion of the corpus of the said estate was to be paid to the Testator's children or their issue prior to the death of the Testator's widow.

(*c*) The estates of any deceased children of the Testator who died in the lifetime of the Testator's widow, and left no issue them surviving respectively are entitled to share both in the income from the said residue and in the said residue itself when same is divided.

(*d*) On the division of the residue of the said estate the issue of any deceased child or children of the Testator shall respectively divide the share or shares their parent or parents would, if living, have respectively taken.

The parties accepted these answers, except the third, marked (*c*), as to which the testator's widow, and the other parties who had been summoned, except the executors of Walter J. Busch, appealed to the Supreme Court of Nova Scotia *en banc,* and the respondents were the Eastern Trust Company, and the last mentioned executors. Chisholm J., with whom the Chief Justice, Carroll and Jenks JJ. concurred, pronounced the judgment of the Court *en banc,* whereby the trial judge was upheld, and the appeal was dismissed. Mellish J. dissented. There is an appeal to this Court by the same appellants, and limited to the same question.

One must decide according to the intent appearing upon the will. I see nothing to suggest that this testator was *inops consilii,* and there is no defect of words for the law to supply; when a bequest is given, it is framed in apt terms, whether the gift is to take effect in future, or to continue for a limited time, or where the payment is to be post-

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poned; when specific properties are given with the intent that the gift shall take immediate effect, the testator says: "I give, devise and bequeath"; and he repeats these words with respect to the Gottingen, North and Creighton St. properties, which are put in trust; and, the testator's directions to his trustees with respect to these properties are expressed in language which regard for simplicity makes sufficiently intelligible.

The trustees were empowered to sell the whole or any part of the lands so devised, which, in the findings, are apparently regarded as the whole of the residue of the estate, and they were required to invest the proceeds of the residue so sold, and to pay the interest of the investments to the testator's widow for the maintenance of herself and daughter Amelia, until the latter should reach the age of twenty-one years. If the trustees did not sell they were authorized to lease, and to apply the rents to the maintenance of the widow and her daughter, and to provide a home for the testator's uncle, but, in the events which happened, both the daughter and uncle having died before the testator, the direction was that, out of the proceeds to be realized, a sufficient sum should be invested to produce $400 annually, to be paid to the widow, in quarterly instalments, during her life, for her sole use. Then follows this sentence: "Any money remaining after the payment of said $400 shall be equally divided among my children, free from the interference or control of any other person; the issue of any deceased child to take parent's share." It is here that the testator's children, and their issue, are first introduced. We have no copy of the inventory or accounts, but there is an affidavit of Marea R. C. Whiston, one of the testator's daughters, sworn on 27th February, 1928, which forms part of the case, with which is produced a statement of the Eastern Trust Company showing that the value of the investments held by it on behalf of the testator's estate amounts to $13,462.78, also that there is a balance to the credit of Income Account, amounting to $689.37, and she says therefore that she believes the present value of the estate to be $14,152.15. There was thus probably some income in excess of that required for the widow.

It is not suggested that, in the clause last quoted, "any money remaining after the payment of said $400," includes

capital of the estate, or that this clause refers to a distribution of capital antecedent to the death of the testator's widow; and, however reasonable it may be that the residue should be reserved for the testator's children and their issue upon the death of his widow, I cannot discover that he has revealed any intention to make it the subject of gift previous to that event.

The learned trial judge finds, and it is not questioned, that, as to the surplus income, the testator had in view a periodic division, so that annually, after the death of Amelia, the excess income, if any, of the fund which had been invested by the trustees to produce $400 annually for the widow, should be equally divided among the testator's children, " the issue of any deceased child to take parent's share." I am willing to acquiesce in that interpretation; it has become conclusive by the findings; but I deny that any implication or inference arises from it, either upon reason or authority, that, on the death of the widow, when the purpose of the investment is satisfied, the testator intended that the children, or their issue, should take the whole, and especially so, seeing that the testator expressed his intention in the next succeeding sentence, which provides for the disposition of the residue, and upon which the controversy turns.

It must be remembered that the residue had been given in trust, and that no provision whatever had been made for the children, except the gift of some interest already mentioned. The testator's words then are " On the death of my wife, the whole of my property shall be divided between my children (the issue of any deceased child shall be entitled to parent's share), said division to be in equal shares and free from the interference or control of my daughters' husbands." Upon the assumption that the widow satisfied the condition upon which the testamentary provisions for her benefit were expressly made, the clause which directs the division of the residue upon her death is the only expression of the will which gives the testator's children an interest in the residue, and it does not, according to my interpretation, in the grammatical and ordinary sense of the language used, operate before the time so specified. This interpretation produces no absurdity, repugnance or inconsistency with the rest of the instru-

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ment; and, so far from coming into conflict with any recognized rule of construction, it is in conformity with the rules declared in the books. It is "On the death of my wife" that "the whole of my property shall be divided," etc. It is then that "the issue of any deceased child shall be entitled."

It is said in Williams on Executors, 11th ed., p. 981,

> Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected.

And this rule is established by numerous authorities cited in the note. To the like effect is the text of Mr. Jarman's original edition, as incorporated in the sixth edition at p. 1399. And see *Smell* v. *Dee* (1), and the judgment of Kekewich J., in *Re Eve* (2). It is unnecessary, however, to go beyond the golden rule, to which I have already referred. There are, for the children and their issue, no words of present gift to be found in the will, and no language to interpret which can, consistently with the will, be made effective to vest the residue at the testator's death.

The learned trial judge finds such a provision by implication, because the children, he says, immediately became beneficiaries. They may have done so with respect to uncertain amounts of surplus income, if any, by reason of the death of Amelia in the testator's life time, but I do not feel justified to infer or to imply from this accident a gift of the residue, or one which the testator has failed to express.

Referring to the clause which provides for the residue, the Court *en banc* paraphrases the words in brackets thus:

> "In the case of the death of any of my children leaving issue, then to such issue."

And it is said that a reasonable construction would be that the testator intended to make a vested gift to each of his children, subject to be divested in favour of the issue, in case of the death of a child leaving issue. I have already said that I see no evidence of beneficial vesting of the corpus before the death of the widow, and it is, I am sure, not permissible to introduce it by way of a paraphrase. It

(1) 2 Salk. 415. (2) (1905) 93 L.T. 235.

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has been said not infrequently, and with great force, that it is mischievous to regard the testator as saying anything which he has not said, and especially must this be so when the paraphrase serves to eliminate a pregnant expression.

I would allow the appeal and answer the question in the negative.

Appeal allowed.

Solicitor for the appellants: *E. C. Phinney.*

Solicitor for the respondents Howard Whiston and Marion B. Busch, executors of the last will and testament of Walter J. Busch, deceased: *E. Hart Nicholls.*

Solicitor for the respondent The Eastern Trust Company: *C. B. Smith.*