
THOMAS FOOT AND OTHERS (PLAIN- } APPELLANTS;
TIFFS)..... }

1888

* Oct. 9.

* Dec. 15.

AND

AGNES E. FOOT AND OTHERS } RESPONDENTS.
(DEFENDANTS)..... }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Devise under—Absolute—Subsequent restriction—Repugnancy

A testator directed his real estate to be sold and the proceeds, after payment of debts and certain legacies, to be divided into twelve equal parts, "five of which I give and devise to my beloved daughter C. M., four of which I give and devise to A. E. F. (daughter), and three of which subject to the conditions and provisions hereinafter set forth, I reserve for my son C. W. M. But in no case shall any creditor of either of my children, or any husband of either of my children, daughters have any claim or demand upon the said executrices, &c., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually * * * during their respective lives." In an action by the daughters to have their shares paid over to them untrammelled by any trust.—

Held, affirming the judgment of the court below, that it was clearly the intention of the testator that the daughters should only receive the income from the shares during their lives.

APPEAL from a decision of the Supreme Court of

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

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Nova Scotia (1) giving judgment for the defendants on a special case.

This action arose from the provisions of the will of the Hon Jonathan McCully, which contained the following clause, after directing that the real estate be sold and certain debts and legacies paid out of the proceeds:—

“I order and direct that the whole balance of proceeds of the estate be divided into twelve equal parts, five of which I give and devise to my beloved daughter Celeste Marie, four of which I give and devise to Agnes E. Foot, and three of which, subject to the conditions and provisions hereinafter set forth, I reserve for my son Clarencè W. McCully. But in no case shall any creditor of either of my children or any husband of either of my children, daughters, have any claim or demand upon the said executrices, executors or trustees, but their respective shares shall be kept and the interest, rents and profits thereof, shall be paid and allowed to them annually by their co-trustees and the survivors of them during their respective lives and their receipts only shall operate as discharges.”

The action was brought by the above devisees Celeste Marie and Agnes E. Foot and their respective husbands to have the several shares devised to them paid over at once untrammelled by any trust, they claiming that the gift of five-twelfths and four-twelfths so devised was absolute and could not be cut down by doubtful words or by implication, and that the restrictions as to claims of creditors and husbands were repugnant and illegal.

The Supreme Court of Nova Scotia held that the clear intention and direction of the testator was, that the shares of the daughters should be held and invested by the trustees during coverture and the income only paid to them, and gave judgment for the defen-

dants The plaintiffs then appealed to the Supreme Court of Canada.

Henry Q.C. for the appellants.

Protecting the property devised from claims of creditors is against public morality and protecting it from claims of a husband of the devisee is an infringement of his marital rights as given by law. Therefore, either of these limitations standing alone would be void.

The following authorities deal with the question of restrictions on alienation, *Brandon v. Robinson* (1); *Hulme v. Tenant* (2); *Tullett v. Armstrong* (3); *Percy v. Percy* (4); *Re Bown* (5); Gray's Restraints on Alienations (6).

Graham Q.C. for respondents referred to *Re Grey's Settlements*, *Acason v. Greenwood* (7); *D'Oechsner v. Scott* (8); *Doolan v. Blake* (9); *Freeman v. Flood* (10).

Sir W. J. RITCHIE C.J.—(His Lordship read the material clauses of the will and then proceeded as follows.)

To hold that the plaintiffs are entitled, under the said will and codicils, to have the relief claimed, and to have it declared that Celeste Marie James and Agnes E. Foot and their husbands are entitled to have their respective shares passed over to them absolutely, would be, in my opinion, to ignore and set at defiance the, to my mind, very clearly expressed intention of the testator which, I think, was to withhold the principal from his daughters and their husbands and to allow the daughters only the annual income thereof during their respective lives, and this intention the provision seems to me very clearly to express.

If these principal moneys are now to be handed over

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| (1) 18 Ves. 434. | (5) 27 Ch. D. 411. |
| (2) 1 Bro. C. C. 16; 1 White & Tudor's L. C. 536. | (6) Secs. 125, 131, 142, 269, 274-5. |
| (3) 1 Beav. 1; 4 Mylne & C. | (7) 34 Ch. D. 712. |
| (4) 24 Ch. D. 616. | (8) 24 Beav. 239. |
| | (9) 3 Ir. Ch. 340. |
| | (10) 16 Geor. 534. |

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to the daughters and their husbands, and they are to have the right to the absolute control of them free from all trusts and therefore free from the control of the trustees, how can it be said that their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually by their co-trustees and the survivors of them during their respective lives, and their receipts only shall operate as discharges? If the *corpus* is handed over how can the income be paid annually?

Then we have a provision for allowing Celeste Marie an amount suitable to her rank until she arrives at the age of twenty-one years, but not to exceed the interest on her five-twelfths, and this clause:—

In case of the death of Celeste before she becomes of legal age or before marriage, or in case of her death without issue, then her interest and share shall be inherited and become the property of Agnes E. Foot, her sister and her heirs as fully and completely as if devised herein and hereby. Subject only to the same provisions as in the hands of her deceased sister Celeste.

very clearly shows that the trusts were to be continued, and that the testator never intended that they were not to exist at all as to Agnes E. Foot who was married at the time of the making of the will, which would, practically, be the result of the plaintiffs' contention, or as to Celeste Marie to cease on her attaining twenty-one years of age.

Under these circumstances I think the decision of the Supreme Court of Nova Scotia quite right and that the appeal should be dismissed.

STRONG J.—The question presented for decision by this appeal is purely one of construction arising on the will of the late Hon. Jonathan McCully, and relates to the bequests of certain shares of the residue of the testator's estate, made respectively to his two daughters, Agnes E. Foot and Celeste Marie McCully.

The clause of the will which we are now called upon to construe is in the following words:—

I release and discharge each of my children from all debts due and owing to me, and for all advances made previous to my death, and in order that there may be as nearly as can be ascertained a fair division of what shall remain after payment or deduction of the legacies herein named, I order and direct that the whole balance of proceeds of the estate be divided into twelve equal parts, five of which I give and devise to my beloved daughter Celeste Marie, four of which I give and devise to Agnes E. Foot, and three of which subject to the conditions and provisions hereinafter set forth I reserve for my son Clarence W. McCully. But in no case shall any creditor of either of my children or any husband of either of my children, daughters, have any claim or demand upon the said executrices executors or trustees, but their respective shares shall be kept and the interest, rents and profits thereof shall be paid and allowed to them annually by the co-trustees and the survivors of them during their respective lives and their receipts only shall operate as discharges.

At the time of the testator's decease his daughter, Mrs. Foot, was married; his other daughter, Celeste Marie, was unmarried, but previous to the time of the institution of the present action she had married, and both daughters were under coverture when the action was brought.

The daughters and their husbands by this action seek to have it declared that they are entitled to the immediate payment over to them of the capital of the funds respectively bequeathed to them. The defendants, who are the trustees under the will, submit that they are not entitled to such payment, inasmuch as the legacies were for their separate use, and as regards the *corpus* at least, without power of anticipation.

The court below has determined both these questions against the plaintiffs, and I am of opinion that their decision is entirely right and ought to be affirmed.

As regards the question of separate use the exclusion of the husbands of the daughters from any right to call for payment of the legacies, and the direction that the legacies "shall be kept" (by which, of course, it is meant that the *corpus* of the respective funds shall be retained in the hands of the trustees) are conclusive to

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show that it was the testator's intention to limit the legacies to the separate use of his daughters. It would be idle and superfluous to cite cases in support of this construction, since it suffices to refer to the general principle that in order to create a limitation to the separate use of a married woman all that is required is the demonstration of an intention to exclude the husband. Then, there could not be a plainer indication of an intention to that effect than we have in the present instance.

As regards restraint upon anticipation that is divisible into two heads—first, in relation to the *corpus*, secondly, with reference to the income.

The words "shall be kept" which, as I have already said, are equivalent to an expression that the *corpus* of each legacy shall be retained by the trustees, and can have no other meaning than that, coupled with the direction to pay the income to the legatees, clearly exclude the inference that the legatees were entitled to call for payment of the funds to themselves. Whatever doubt there may have previously been as to the sufficiency of such a direction to constitute a restraint on anticipation, modern decisions of the highest authority and of very recent date (1) have conclusively established that where there is anything to show that the fund is to be retained by the trustees, and the income only paid to the married woman during coverture, the restraint takes effect. (2).

The will now before us undoubtedly complies with these conditions. It contains a distinct direction that the *corpus* shall be retained by the trustees and the income only paid to the married women, beneficiaries. Consequently, the gift to separate use with the restriction on all power of disposition during coverture as regards the *corpus* took effect, as regards the bequest to Mrs. Foot, immediately on the testator's death. And

(1) *Re Bown* 27 ch. D. 411.

(2) *Theobald on Wills*, 3 ed., p. 437.

in the case of Mrs. James, when she married without having, in the interval between the testator's death and her marriage, made any disposition of her legacy the same result followed.

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I find nothing in the will indicating any intention to restrain anticipation of the income. The direction that the receipts of the married woman alone shall operate as discharges, the only grounds in this will which can be referred to as affecting the right of disposition of income, have been held ineffectual for this purpose (1).

Gwynne J.

The appeal must be dismissed, but I think it reasonable that the costs should come out of the estate, inasmuch as the testator himself, by the loose and inaccurate language in which he expressed himself, has really been the cause of doubts which the parties were justified in asking the court to solve.

FOURNIER J.—I am in favor of dismissing this appeal for the reasons given by the Chief Justice of the Supreme Court of Nova Scotia.

TASCHEREAU J.—I would dismiss this appeal for the reasons given in the court below. Upon the reading of the will alone, without reference to authorities, I would determine that these plaintiffs are not entitled to the capital of the moneys in question.

GWYNNE J.—I agree with the opinion expressed by my brother Strong.

Appeal dismissed with costs.

Solicitors for appellants: *Henry, Ritchie & Weston.*

Solicitors for respondents: *Graham, Tupper, Borden & Parker; Sedgewick, Ross & Sedgewick.*

(1) *Ross's Trust*, 1 Sim. M. S., 524; *Acton v. White*, 1 Sim. & 196; *Wagtaff v. Smith*, 9 Ves. Stu. 429.