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In re FERGUSON.

*June 3,4,5.
*Nov. 10.

ANNIE TURNER, MARGARET ANN GOODMAN AND MARY JANE WALSH (DEFENDANTS)... APPELLANTS;

AND

MARY ANN BENNETT (PLAINTIFF)...RESPONDENT;

AND

WILLIAM PURDY, CARRIE W. EGGLESTON, JANE H. EGGLESTON, FRANK PURDY EGGLESTON, EMILY BARNES, WILLIAM CHARLES BALL, EMERSON COATSWORTH, AND EMERSON COATSWORTH, JUNIOR, TRUSTEES OF THE LAST WILL AND TESTAMENT OF EDWARD FERGUSON, DECEASED (DEFENDANTS)..... RESPONDENTS.

ANNIE TURNER (DEFENDANT).....APPELLANT;

AND

MARGARET JANE CARSON, MARY ANN BENNETT, EDWARD GALLEY, EMILY BARNES, AND WILLIAM JOHN BALL (DEFENDANTS)..... RESPONDENTS;

AND

EMERSON COATSWORTH AND EMERSON COATSWORTH THE YOUNGER (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will, construction of—"Own right heirs"—Limited testamentary power of devisee—Conditional limitations—Vesting of estate.

Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of an intestacy

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

unless a contrary intention appears, and where there was a devise to the only daughter of the testator conditionally upon events which did not occur and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention and the daughter inherited as the right heir of the testator.

APPEAL from a judgment of the Court of Appeal for Ontario (1) which reversed the judgments of the Chancellor upon the construction of the will in question in two actions entitled respectively *Coatsworth et al.* v. *Carson et al.* (2), and *Re Ferguson, Bennett* v. *Coatsworth* (3), for the construction of the will and administration of the estate of the late Edward Ferguson, deceased, which forms the subject of the controversy in this case.

The proceedings in this matter commenced by an order of the master in chambers on 3rd May, 1893, for the administration of the estate of the late Edward Ferguson, who died on the 9th January, 1874, having made his last will on 30th July, 1870, and leaving him surviving, his only child Jane" who died a spinster on the 1st January, 1892, and his widow who died on 1st February, 1893, without having re-married.

The testator had two sisters, Eliza Purdy, who predeceased him, and Jane Ball, who died in 1878. At the time of the death of his daughter there were nephews and nieces of the deceased testator alive, namely, three of the children of the late Jane Ball and a son and three grandchildren of his other sister, the late Eliza Purdy, besides a number of grandnephews and grandnieces on the side of the Ball family.

The testator by his will, after sundry special bequests, devised all his other real and personal property to executors to be held for the use of his wife and daughter jointly, so long as they both survived and

(1) 24 Ont. App. R. 61. (2) 24 O. R. 185.
(3) 25 O. R. 591.

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his widow remained unmarried; and in the event of the widow remaining unmarried and surviving the daughter, for her use for life, and in case the daughter survived her mother then for the use of the daughter as her separate estate with power to dispose of the same by will in case she should marry; and he then directed that in case his daughter died without leaving issue "and without having made a will as aforesaid," that his trustees should (after the death of his widow, should she survive the daughter) sell all his estate real and personal and divide the same "equally" amongst his "own right heirs" who might prove relationship within a stated period.

An action, entitled *Coatsworth et al.* v. *Carson et al.* (1), was commenced in May, 1893, for the construction of the words "my own right heirs," in the will, and by the judgment therein the Chancellor held that these words signified such persons as would take real estate upon an intestacy and that the children of the heirs at law of the deceased were entitled to share *per stirpes*, and holding further that the testator's daughter was not empowered, by the clause in the will limiting her testamentary power, to devise the property in question, as she had predeceased the widow without issue. This judgment was amended on a petition presented by the appellants and thereupon the master-in-ordinary made his report. On an appeal therefrom, entitled *Re Ferguson, Bennett* v. *Coatsworth* (2), by some of the present respondents, the Chancellor held, having regard to his former judgment in *Coatsworth et al.* v. *Carson et al.*, that the "right heirs" were to be ascertained at the death of the testator's daughter, and that the whole estate was to be divided amongst them equally, share and share alike, and also that the expression *per stirpes* in the former judgment was im-

(1) 24 O. R. 185. (2) 25 O. R. 591.

providently used, due weight not having been given to the word "equally."

On appeal from this judgment the Court of Appeal for Ontario reversed both judgments of the Chancellor (1) and held that the testator's daughter was entitled to take as the "right heir" of the testator. From this latter judgment the present appeal is asserted.

The judgment appealed from, while reversing the Chancellor's decision, gave the appellants herein, who were respondents in the Court of Appeal, certain costs which were taxed and paid to the appellants out of moneys in court to the credit of the action.

Macklem on behalf of the respondents, moved to quash the appeal on the ground that the appellants by accepting payment of these costs had acted upon the judgment now under appeal and taken a benefit thereunder, and cited *Hayward* v. *Duff* (2); *Pearce* v. *Chaplin* (3); *Ball* v. *McCaffrey* (4); *International Wrecking Co.* v. *Lobb* (5); *Re Smart Infants* (6). After hearing counsel on both sides, the court reserved judgment until after the hearing upon the merits of the appeal.

McCarthy Q.C., *McCullough* Q.C. and *Lobb* for the appellants. If it is possible the court should give effect to the will as a whole; *Jodrell* v. *Seale* (7); *Leader* v. *Duffy* (8); and it is submitted that the scheme of the testator's will was to give certain lands to his daughter absolutely; to give his other property to his trustees to be held for the joint lives of his wife and daughter; if his wife married, one-third for his wife for life, and subject thereto for his daughter absolutely for life; if his wife did not

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(1) 24 Ont. App. R. 61.
(2) 12 C. B. N. S. 364.
(3) 9 Q. B. 802.
(4) 20 Can. S. C. R. 319.
(5) 12 Ont. P. R. 207.
(6) 12 Ont. P. R. 635.
(7) 44 Ch. D. 590; [1891] A. C. 304.
(8) 13 App. Cas. 294.

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marry and survived the daughter, for his wife for life; after the death of his daughter without issue, for his wife for life; if his wife survived his daughter, and his daughter should leave issue, one-third for his wife for life, and at his wife's death all for his daughter's issue equally; if his daughter should survive his wife, all for his daughter absolutely; then (clause four) if his daughter should survive his wife, all for his daughter, and if she should marry a special power to her to make her will; and (clause five) if his wife survived his daughter and his daughter died without issue, (this event happened) or if his daughter survived his wife and died without issue, and without having made the will, his trustees should, (at the death of his wife, if she survived his daughter) sell and divide all equally among his "own right heirs" who proved relationship within six months from the death of his wife or daughter, whichever last took place.

The words "after the death of my wife if she survive my said daughter" can only apply to one event, the death of his daughter without issue before his wife, for his daughter might survive his wife and die without issue and, by clause four expressly, his daughter must survive his wife to be able to make a will. The ownership of the wife cannot apply if his daughter survives his wife. The first event may arise before his wife's death, but two events may arise after. The survivorship of the wife can only apply to the one event before his wife's death. If the daughter have issue and die before his wife, such issue take by his will; if she survive his wife, his daughter takes absolutely, and may then make her will. Nothing remained to be considered but the events:—What would happen if his wife survived his daughter and his daughter had died without issue; or if his daughter survived his wife and died without issue; and with-

out having made the will spoken of? The testator directs that in these events his trustees shall sell all his estate. But his wife's life estate must be protected, therefore, the trustees can only sell after his wife's death if it should happen that she survived his daughter. *In re Wroe, Frith* v. *Wilson* (1); *Pond* v. *Bergh* (2).

Full effect must be given, too, to the words "as aforesaid," in the phrase "without having made a will as aforesaid." By clause three, the daughter takes if she survives his wife; clause four re-declares this and gives his daughter power then to make a will. Until clause five came to be drawn, the testator had not provided for the death of his daughter without issue before his wife. If his wife survived his daughter and his daughter died without issue she could not have made a will, for by clause five he provides for that event. The words "as aforesaid" point to the survivorship of the daughter, then her will, and if her will could only be made "as aforesaid" she had not a general power to dispose of the property by will unless she survived her mother. As far as they go, the trusts in *Lees* v. *Massey* (3) are identical with those in this will, but that will had no such context to control the last trust.

The testator could not mean to describe an only daughter as "my relations," and direct also the residue to be distributed among those relations; the words "my own right heirs who may prove their relationship" are equivalent to "my relations." *Jones* v. *Colbeck* (4).

Where the gift over is contained in the direction to pay and divide, the class is to be ascertained at the

(1) 74 L. T. 302.
(2) 10 Paige, N. Y. 140.
(3) 7 Jur. N. S. 534; 3 DeG. F. & J. 113.
(4) 8 Ves. 38.

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period of distribution. *In re Mervin, Mervin* v. *Crossman* (1); *In re Stevens, Clerk* v. *Stevens* (2).

The testator did not mean to die intestate; intestacy is not to be presumed, and his words "in case my daughter shall have died without issue," show that when his daughter and her issue can no longer take, his trustees are to find his own right heirs by proof of their relationship within six months *after the death* of his wife or daughter, whichever may last take place. *Wharton* v. *Barker* (3); *In re Rees, Williams* v. *Davies* (4); *Doe d. King* v. *Frost* (5); *In re Taylor, Taylor* v. *Ley* (6); *Pinder* v. *Pinder* (7); *Clark* v. *Hayne* (8).

As to right to give devisee power to make a will without husband's consent, see *Powell* v. *Boggis* (9).

As to the daughter inheriting under the last clause of the will, see *Bullock* v. *Downes* (10); *Thompson* v. *Smith* (11); *Wharton* v. *Baker* (3). It would go to the daughter without this clause and it was not intended for her benefit. *Long* v. *Blackall* (12).

Mortimer Clark Q.C. and *Macklem* for the respondents Carson, Bennett, Ball and Purdy, and the trustees and executors. The property goes to the daughter's representatives; it passed to her as property not specially disposed of by the will, or at least it passed to her as the right heir, and the clause in question contains an implied power to the daughter to dispose of the property by will, as she did. As to implication from use of words "right heirs" see *Humphreys* v. *Humphreys* (13). The devise to the daughter and on her death

(1) [1891] 3 Ch. 197.
(2) [1896] W. N. 24.
(3) 4 K. & J. 483.
(4) 44 Ch. D. 484.
(5) 3 B. & Ald. 546.
(6) 52 L. T. 210, 839.
(7) 28 Beav. 44.
(8) 42 Ch. D. 529.
(9) 35 Beav. 535.
(10) 9 H. L. Cas. 1.
(11) 23 Ont. App. R. 29; 27 Can. S. C. R. 628.
(12) 3 Ves. 486.
(13) L. R. 4 Eq. 475.

without issue then over implies that if she left issue they would take. *Houghton* v. *Bell* (1).

The fact of the daughter having devised the property by her will absolutely prevented the possibility of the occurrence of the events upon which the devise to the right heirs depended. Between the years 1859 to 1873, there was doubt as to a married woman's right to will property unless empowered by the instrument under which she acquired it. See Armour on Titles (2 ed.) pp. 314–315; *Re Weekes's Settlement* (2). This provision can only have the purpose of removing any disability by reason of marriage to dispose of the property by will, and the words "as aforesaid" in the last clause are there used to continue in that clause the removal of any such disability. This final clause therefore means "in case my daughter shall have died without having made a will, which I empower her to make notwithstanding her coverture, etc., etc." The only other words the testator could have intended the words "as aforesaid" to stand for would be the words "of all or any part of the said property," immediately following the word "will" in the fourth clause of the will. In this case the clause would read "in case my daughter shall have died without leaving issue her surviving and without having made a will of all or any part of the said property."

As to construction of devise see *Doe* v. *Lawson* (3); *Mortimore* v. *Mortimore* (4).

The law favours early vesting and since 1860 the rule in similar cases is that the property goes to those who were the testator's heirs or his heir at his death, and that immediately upon his death the estate vests in the heir notwithstanding any particular intervening limited estates, whether the same were in favour

(1) 23 Can. S. C. R. 498.
(2) [1897] 1 Ch. 289.
(3) 3 East 278.
(4) 4 App. Cas. 448.

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of the heir or of any other person; *Bullock* v. *Downes* (1); and the rule applies although the tenant for life be the sole next of kin or one of the next of kin at the death of the testator and at the date of the will (2). The rule can only be overcome by a clear declaration that the heirs are to be ascertained at some future time to that of his death, which has not been done in this case. The fact of the testator having left a life estate or other limited estate to his heir on the determination of which the estate is to go to his heirs is not sufficient to take the case out of the general rule. The fact that, at the time his will is made and at his death, his heir is only one individual to whom he has given a life estate and on whose death the estate shall go to "his heirs" is not sufficient to deprive his sole heir under the ultimate devise of the fee. *Re Ford, Patten* v. *Sparks* (3); *Re Nash, Prall* v. *Beaven* (4); *Brabante* v. *Lalonde* (5); *Re Barber's Will* (6); *Wrightson* v. *McCauley* (7); Jarman on Wills, 8th ed., pp. 86 and 136; *Thompson* v. *Smith* (8); R. S. O. cap. 109, sec. 31; *Grundy* v. *Pinniger* (9); *Holloway* v. *Holloway* (10); *Tylee* v. *Deal* (11).

On a perusal of the whole will, it seems clear that the daughter takes everything subject to a life estate and it is only if his daughter dies childless and without having disposed of the property by will, that the property goes to the "right heirs." There is no benefit to any particular persons or intention to exclude any one by this last devise, but if all the limitations fail,

(1) 9 H. L. Cas. 1.
(2) Hawkins on Wills (2 ed.) pp. 99-100.
(3) 72 L. T. 5.
(4) 71 L. T. 5.
(5) 26 O. R. 379.
(6) 1 Sm. & Gif. 118.
(7) 14 M. & W. 214.
(8) 23 Ont. App. R. 29; 27 Can. S. C. R. 628.
(9) 14 Beav. 94.
(10) 5 Ves. 399.
(11) 19 Gr. 601.

he allows the law to give the property to those who would be entitled if he had died intestate.

The property vested in the daughter at the time of his death; *Mays* v. *Carroll* (1); there is no other definite period indicated in the will, and there is no excuse for speculating as to any fictitious class of heirs to be ascertained at any other time. *Re Bradley*, *Brown* v. *Cottrell* (2); *Druitt* v. *Seaward* (3); *Clark* v. *Hayne* (4).

The ordinary legal meaning must be given to the words used in a will, and the court cannot speculate as to the testator's intention, but should construe the will according to the meaning of the words which the testator has actually used. *Houghton* v. *Bell* (5); *King* v. *Evans* (6); *Grey* v. *Pearson* (7).

Hodgins for the respondents, the trustees under the will of E. Ferguson and the executor of the will of Jane Ferguson submitted their rights to the court, and asked that provision should be made for their costs out of the estate in any event. Lewin on Trusts (9 ed.) pp. 381, 384, 390, 1121; *Bennet* v. *Going* (8); *Westcombe's Case* (9); *Eparte Stapleton* (10); *Westcott* v. *Culliford* (11) at page 274; *Reade* v. *Sparks* (12); *Rashleigh* v. *Master* at page 205 (13); *Moore* v. *Frowd* at page 49 (14); *Re Love*, *Hill* v. *Spurgeon* (15); *Re Medland* at page 492 (16); *Banque Franco-Egyptienne* v. *Grant* (17); *Nicholson* v. *Falkiner* a page 559 (8).

(1) 14 O. R. 699.
(2) 58 L. T. 631.
(3) 31 Ch. D. 234.
(4) 42 Ch. D. 529.
(5) 23 Can. S. C. R. 498.
(6) 24 Can. S. C. R. 356; 21 Ont. App. R. 519.
(7) 6 H. L. Cas. 61.
(8) 1 Moll. 525.
(9) 9 Ch. App. 553.
(10) 10 Ch. D. 586.
(11) 3 Hare 265.
(12) 1 Moll. 8, 11.
(13) 1 Ves. 201.
(14) 3 Mylne & Cr. 45.
(15) 29 Ch. D. 348.
(16) 41 Ch. D. 476.
(17) [1879] W. N. 165.

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Taschereau J.

TASCHEREAU J.—The motion made at the hearing to quash this appeal must be dismissed with costs as stated in the written judgment to be delivered by my brother Gwynne, and also for the reasons stated therein the appeal must be dismissed with costs.

GWYNNE J.—This appeal must be dismissed with costs. The case appears to be free from doubt. A testator devised his residuary, real and personal property, to his executors upon trust after payment of his debts, &c., to hold the same to the use of his wife and daughter Jane, jointly, as long as they should both live, and his wife remain unmarried, but if his wife should marry again during the daughter's life, then upon trust to pay the wife during her natural life one-third of the net income arising from the property so devised in trust and, subject to such provision for the wife, to the use of the daughter for her life as her separate estate. But in case the wife should not marry again during the lifetime of the daughter and should survive the daughter, then upon the death of the daughter without leaving issue her surviving, upon trust to hold the property to the use of the wife for life, but if the daughter should have died leaving issue her surviving then upon trust to hold one-half of the property to the use of the wife for life, and subject thereto to hold all the property so devised to the use of such issue in equal shares. And in case the daughter should survive the wife then upon trust to hold all the said property to the use of the daughter, her heirs and assigns forever as her separate estate. The will then contained a clause the precise object of a part of which it is difficult to perceive, seeing that it relates expressly to the case only of the daughter surviving her mother when the whole estate becomes vested in the daughter who would then have

no need for the power of making a will professed to be granted to her by the clause.

The clause is as follows :—

And I declare that the provision herein made for my said wife is in lieu of dower and all other claims upon my estate, real or personal, and that if she elects to take her dower in place of such provision she shall take nothing of my estate, real or personal, *and further that in the event of my daughter surviving my said wife,* in which case my property becomes hers, as aforesaid, *I empower her notwithstanding her coverture in case she shall marry* to dispose by will of the whole or any part of the said property.

Now by the above will it appears that the testator had provided for every possible contingency except one, namely, what disposition should be made of the capital of the residuary real and personal property, so devised in trust in the event of the daughter dying *without issue* in the lifetime of the wife; and a clause was inserted for no other apparent purpose than for providing for such a contingency, and it must, in my opinion, be construed as having been introduced for that purpose for without it the capital in the event which has happened must have passed to testator's daughter as his sole heiress and next of kin. It is as follows :—

I direct that in case my daughter shall have died *without leaving issue her surviving and without having made a will as aforesaid, my trustees shall after the death of my wife, if she survive my said daughter,* sell all my estate, real and personal, and divide the same equally *amongst my own right heirs* who may prove to the satisfaction of my said trustees their relationship within six months from the death of my wife or daughter, whichever may last take place.

Now, the contention of the appellants upon this clause is that, the words "without having made a will *as aforesaid*" must by force of the words *as aforesaid* be construed as relating to the clause professing to empower the daughter to make a will *in the event of her surviving her mother*, and to a will made in that event; but so construing the clause it is sufficient to

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say, that as that event has not happened the devise in the event of its happening can never take place. The only possible way to enable the devise over to take effect in the event of the daughter dying without issue in the lifetime of the mother, which is the event which has happened, is to construe the clause as providing for that event; that is to say, in case the daughter should die in the lifetime of the mother without leaving issue her surviving and without having made a will *as aforesaid*, that is as already provided in the case of her dying after the death of the mother, then over—but as this event has not happened either the devise over can never take effect, and it is quite unnecessary to inquire who would be the persons competent to take the testator's bounty under the clause if the event upon the happening of which the devise to them was to take effect had happened. In the events which have happened there can, I think, be no doubt that the devisees under the daughter's will take the whole.

It only remains to dispose of the costs of the motion to quash which was heard at the same time as the appeal, for having given judgment on the merits in the appeal, it is scarcely necessary to say that we think the reception by the appellants of the costs mentioned in the affidavits in support of the motion was in no way inconsistent with the appeal against the judgment upon the construction of the will. We give no counsel fee on opposing the motion, but simply order that the solicitor's costs in opposing the motion be set off against the respondents' costs on dismissal of the appeal.

SEDGEWICK J. concurred.

KING J.—The testator provides that in certain events which the appellants claim to have happened (but

which, upon their construction of the will, respondents do not admit to have happened) the property in question is to go to his "own right heirs." The question is, who are meant? The rule of law is that the expression "right heirs" or a similar term, means the heirs in the ordinary sense, namely, the person or persons who would be entitled to take at the testator's death in case of his dying intestate, unless the contrary sufficiently appears from the will, and the contrary does not sufficiently appear merely from the fact that by the will a prior particular estate is limited to a particular person, who presumably would, and in fact did, turn out to be the person filling the character of right heir. The law was so settled in *Bullock* v. *Downes* (1), and acted on in *Mortimore* v. *Mortimore* (2) and *Re Ford* (3), and recently in this court in *Thompson* v. *Smith* (4), the observations in which latter case are applicable to this case as well. The clause in question here is not indeed free from doubt, but upon the whole there does not appear in the will to be any sufficient indication that the words are used in a non-natural sense. It is consistent with what is expressed that the testator meant that, in certain contingencies, he would leave his property to those whom the law should deem his right heirs, be they whom they might. The observations of Bowen L. J. in *Re Rawlins's Trust* (5) are not inapplicable on the question of particular intent.

In the result I agree with Hagarty C.J.O., and also concur in his reasons.

GIROUARD J. agreed that the motion should be dismissed with costs as stated in the judgment of His

(1) 9 H. L. Cas. 1.
(2) 4 App. Cas. 448.
(3) 72 L. T. 5.
(4) 27 Can. S. C. R. 628.
(5) 45 Ch. D. 299.

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Lordship Mr. Justice Gwynne, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCullough & Burns.*

Solicitor for the respondent, Wm. John Ball: *John Hoskin.*

Solicitors for the respondents, Bennett and Carson: *Mortimer, Clark & Gray.*

Solicitors for the respondents, Purdy and Eggleston: *Denison & Macklem.*

Solicitors for the respondents, Coatsworth and Galley: *McMurrich, Coatsworth & Hodgins.*

Solicitor for the respondents, Barnes and W. C. Ball: *J. R. L. Starr.*