1934
*Nov. 20
*Dec. 21

IN THE MATTER OF THE ESTATE OF JAMES CARMEN MACINNES, DECEASED.

ANNIE MacINNES .....APPELLANT;

AND

MARGARET MacINNES, MAMIE CAMPBELL, AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance (Life)—Will—Insurance Act, R.S.O. 1927, c. 222, ss. 140 (2), 142 (1), 145 (1), 146, 163 (1)—Preferred beneficiaries—Designation of beneficiary by policy—Alteration by will—Effectiveness of alteration—Document accepting participation in Employees' Savings and Profit Sharing Fund—Designation therein of beneficiary in case of death—Whether testamentary in character.

M. (now deceased) took out policies of insurance on his life, designating therein his wife as beneficiary. Later by his will he declared that "all insurance policies on my life, now payable to my wife" should be paid to his executor in trust for the use and benefit of his wife and mother

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

upon the same trusts, terms and conditions as if they had formed part of the residue of his estate; and he left the residue of his estate to his executor in trust to divide it into two equal shares to be held as separate trust funds, one for his wife, the other for his mother, during life time, each to receive the net income from her share, with power of encroachment on corpus according to need, in the executor's discretion; the survivor to have the benefit, in the same manner, of the balance of the other's share added to her own, and on the survivor's death, the trust to terminate and the whole balance to be paid to M.'s sister C., if living, otherwise to her then surviving issue. By the Ontario *Insurance Act*, where the insured designates as beneficiary or beneficiaries a member or members of the class of "preferred beneficiaries" (which class includes a wife and mother, but not a sister or her issue), a trust is created, and, so long as any member of the class remains, the insurance money apportioned to a preferred beneficiary shall not (except as otherwise provided in the Act) be subject to the control of the insured, or of his creditors, or form part of his estate. Sec. 146 provides that, notwithstanding the designation of a preferred beneficiary or beneficiaries, the insured may subsequently restrict, limit, extend or transfer the benefits to any one or more of the class to the exclusion of any or all others of the class, "or wholly or partly to one or more for life or any other term or subject to any limitation or contingency, with remainder to any other or others of the class." Sec. 163 (1) provides for power to appoint trustees.

Held (affirming judgment of the Court of Appeal for Ontario, [1934] O.R. 371): While the gift of remainder over to C. or her issue was not competent (as going outside the preferred class), yet the alteration of beneficiaries by the will was not wholly void. The phrase in s. 146 "with remainder to any other or others of the class" is severable and not conditional. Sec. 146 means that it is competent for the insured to transfer absolutely the rights of one preferred beneficiary to another preferred beneficiary, or, within the class, to transfer or leave, as the case may be, a limited estate such as a life estate, an estate for a term, an estate subject to a limitation, or an estate in remainder. The insurance moneys in question should be dealt with as directed in the will, except that, should the mother predecease the widow, the whole balance of the insurance moneys should then belong to the widow absolutely, and should the mother survive the widow, then on the mother's death the whole balance of the insurance moneys should revert to the widow's estate.

M. had joined his employer's "Employees' Savings and Profit Sharing Fund." The plan was intended to furnish to each participating employee (*a*) who served until retirement on account of age, a help to future maintenance, (*b*) who served for an extended period but not until retirement on account of age, a substantial accumulated sum, (*c*) who died while an employee, help towards an income for family or dependents. An employee might withdraw at any time, receiving thereupon an amount, or a share of the fund, determined according to length of service. If a participating employee died, a share of the fund was payable to his designated beneficiary or beneficiaries. He might designate the beneficiary by his "Employee's Acceptance" (signed on joining the plan) or by an instrument signed and lodged with the trustees of the fund, or by will, and might from time to time revoke the benefits or change the

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beneficiaries or divert the money to his own estate. In his "Employee's Acceptance" M. directed the trustees (*a*) upon his withdrawal to pay to him the amount to which he was entitled under the plan, (*b*) upon his death to pay the amount to which he was entitled to his wife, or otherwise as he might have last designated by writing lodged with the trustees or by will. There was only one witness to his signature.

Held (affirming judgment of the Court of Appeal, *supra*): The "Employee's Acceptance" designating M.'s wife as beneficiary was testamentary in character and, as it had only one witness, was ineffective to make her a beneficiary, and his share in the fund formed part of his estate. *Cock* v. *Cooke*, L.R. 1 Pro. & Div. 241, at 243 *in the Goods of Baxter*, [1903] P. 12, and other cases, cited).

APPEAL by the widow of J. C. MacInnes, deceased, from the judgment of the Court of Appeal for Ontario (1) which (varying the judgment of Garrow J. (2) on a motion for the opinion and direction of the Court upon certain questions arising in the administration of the estate of said deceased) held that the benefit to appellant as designated beneficiary in each of two policies of life insurance had been altered by the will of said deceased (to the extent as described in the judgment now reported which affirmed the said judgment of the Court of Appeal) and that the appellant, as the beneficiary in case of deceased's death designated by deceased in a certain document, did not take the amount payable on deceased's death out of a certain "Employees' Savings and Profit Sharing Fund" in which the deceased had participated, but that the amount formed part of deceased's estate. The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported and are indicated in the above headnote. The appeal to this Court was dismissed with costs.

W. E. P. DeRoche for the appellant.

McGregor Young K.C. (as Official Guardian) for infant children of respondent Mamie Campbell, and (by appointment of the Court) for her unborn issue.

H. A. O'Donnell K.C. for the respondents Margaret MacInnes, Mamie Campbell, and certain of the latter's children.

K. G. Morden for respondent Executor.

DUFF C.J.—I concur in the dismissal of the appeal.

(1) [1934] O.R. 371; [1934] 3 D.L.R. 302.

(2) [1934] O.R. 120; [1934] 1 D.L.R. 733.

The judgment of Rinfret, Cannon, Crocket and Hughes JJ. was delivered by

HUGHES J.—On May 19th, 1924, the late J. C. MacInnes took out a policy of insurance on his life in the sum of $1,000 in the National Life Assurance Company of Canada. He designated the beneficiary as follows "Annie MacInnes—Wife."

On November 29th, 1927, he took out a policy of insurance on his life in The Travellers Insurance Company and again designated as beneficiary his wife, Annie MacInnes.

The testator was, in his lifetime, an employee of The Robert Simpson Company, Limited. This company had what was known as an Employees' Savings and Profit Sharing Fund managed by a board of trustees. The company contributed to the Fund and each participating employee contributed five per cent of his wages, not exceeding $100 per year, and certain bonuses. The employee was entitled to withdraw from the plan at any time. If he withdrew before ten years, he received what he personally had put in together with five per centum interest. If he withdrew after ten years, he received a share of the full Fund. If an employee died, his interest was a share in the full Fund regardless of whether he had or had not served the company ten years. The late J. C. MacInnes accepted membership in the plan in September, 1926, and designated the appellant his beneficiary. There was only one witness to the execution of this document.

On July 31st, 1931, he duly made his last will and testament. The fourth to sixth clauses are important and it may be well to give them textually:—

Fourth: I will and declare that all insurance policies on my life, now payable to my wife, shall be payable and paid to Chartered Trust and Executor Company in trust for the use and benefit of my said wife and my mother upon the same trusts, terms and conditions as if the said proceeds had formed part of the residue of my estate.

Fifth: All the rest, residue and remainder of my estate both real and personal of whatsoever nature and wheresoever situate, I give, devise and bequeath to Chartered Trust and Executor Company in trust to divide the same into two equal shares which shall be held in trust as *Separate Trust Funds,* one for the use and benefit of each of my wife, Annie MacInnes, and my mother Margaret MacInnes, during her lifetimes as follows: During her lifetime each of my said wife and mother shall receive the net income from her share of the trust estate in convenient instalments, together with such portions of the principal thereof as may with the said income be necessary from time to time in

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the discretion of my trustee for her proper support and maintenance. In the event of sickness, accident or other emergency arising affecting the life, welfare or happiness of my said wife or mother my trustee is authorized to pay to her such further portions of the principal of her share necessary in its discretion under the circumstances.

Upon the death of either my wife or mother the balance of her share shall be continued in trust and added to the share of the other of them, and shall be used and held for her benefit in the same manner as her original share in the trust estate hereby created.

Upon the death of the survivor of my said wife and mother the trust shall terminate, and the whole undistributed balance of the trust estate shall be forthwith paid over to my sister Mamie Campbell, if living, otherwise to her then surviving issue per stirpes.

Sixth: Upon my death it is my sincere wish that my wife and mother or the survivor of them release to my estate any interest that they or she may have or has as preferred beneficiaries or preferred beneficiary, in the proceeds of my insurance policies now in force, in order that the distribution herein set forth may be consummated.

The request of the testator in the sixth clause of the will was of no avail, and the executor and trustee moved by originating notice for the opinion and direction of the Supreme Court of Ontario on two questions:—

(*a*) Is the declaration attached to each policy of insurance, declaring the moneys payable thereunder to the widow, a preferred beneficiary, altered or varied in any way by the said Will?

(*b*) Does the document dealing with the Robert Simpson Co. Ltd. Profit Sharing Fund create a trust of the said fund in favour of the widow, or is said fund a part of the estate?

On January 9th, 1934, the Honourable Mr. Justice Garrow gave judgment on the motion, declaring that question (*a*) should be answered in the affirmative and directing that the insurance moneys should be paid to the executor and trustee and divided into two equal trust funds, free from payment of debts, the income from one to be paid to the widow with power to encroach on corpus, and the income from the other to be paid to the mother with power to encroach on corpus, and that, on the death of either the widow or the mother, the survivor should have absolutely what remained of both funds. The learned judge in effect held that the gift over to the sister Mamie Campbell, if living, otherwise to her then surviving issue per stirpes, was severable and alone was void. As to question (*b*) the learned judge held that the document was testamentary, and that, as it had only one witness, the funds formed part of the estate.

The widow appealed to the Court of Appeal for Ontario, which affirmed the answer to (*b*), and varied the answer to (*a*) by providing that, if the widow should predecease the mother, the income from the whole insurance fund should be paid to the mother, with power to encroach on corpus, during her lifetime, and, on the subsequent death of the mother, the remainder of the fund should revert to the estate of the widow; and, in the event of the mother predeceasing the widow, the balance of the fund should thereupon belong to the widow absolutely.

From this judgment, the widow now appeals to this Court.

As to question (*a*), some provisions of the Ontario *Insurance Act* are more or less relevant. Section 140 (2) provides that preferred beneficiaries are the husband, wife, children, grandchildren, father and mother of the person whose life is insured. Section 142 (1) provides that, subject to the rights of beneficiaries for value and assignees for value and to the provisions of the Act relating to preferred beneficiaries, the insured may designate the beneficiary by the contract or by a declaration, and may from time to time by any declaration appoint, appropriate or apportion the insurance money, or alter or revoke any prior designation, appointment, appropriation or apportionment, or substitute new beneficiaries . . . Section 145 (1) provides that where the insured, in pursuance of the provisions of section 142, designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and, so long as any of the class of preferred beneficiaries remains, the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in the Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured. Section 146 provides that, notwithstanding the designation of a preferred beneficiary or beneficiaries, the insured may subsequently exercise the powers conferred by section 142 so as to restrict, limit, extend or transfer the benefits of the contract to any one or more of the class of preferred beneficiaries to the exclusion of any or all others of the class, or wholly or partly to one or more for life or any other term or subject to any limi-

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tation or contingency, with remainder to any other or others of the class. Section 163 (1) provides that the powers conferred upon the assured by that Part of the Act (which contains section 146 also) shall include power from time to time to appoint trustees for any beneficiary or beneficiaries.

The appellant contends that by virtue of section 145 (1) any attempt on the part of an assured to control the insurance money where a preferred beneficiary has been designated is void unless expressly permitted by some other provision of the Act; and that section 146 does not permit the alteration attempted by the will which purports to change the full ownership of the wife in the insurance moneys into a life estate for her in one-half and into a life estate for the mother in the other half, each with power to encroach on corpus, with remainder over to a sister of the assured, if living, otherwise to her issue per stirpes. It is conceded that the remainder over is not competent, as the latter parties are not within the class of preferred beneficiaries. The appellant contends, in other words, that on this account the attempted alteration is wholly void because section 146 permits an alteration to a life estate in one or more of the preferred class only where the remainder is to "any other or others of the class." The contention of the appellant necessarily implies that the phrase "with remainder to any other or others of the class" is a condition to the validity of such an alteration of the rights of a preferred beneficiary or beneficiaries so long as any of the class of preferred beneficiaries remains. An examination of the history of the statutory provisions in question does not throw much light on the question. It is, however, mainifest that section 146 is intended to be an enlarging enactment. This seems clear from the use of the words "notwithstanding," "extend" and "transfer" in section 146 and from the opening words of section 163, "The powers conferred upon the insured by this Part with regard to the * * * alteration or revocation of such designation or appointment * * *". Section 146 clearly purports to enlarge the power of the assured over the insurance money in extending or transferring the benefits of the contract among members of the preferred class. It is true that it is a restraining enactment at the same time, but it is re-

straining only in regard to the rights of the preferred beneficiaries which may, by the assured, be restricted, limited, extended or transferred to any one or more of the class of preferred beneficiaries to the exclusion of any or all others of the class. In my opinion, the phrase "with remainder to any other or others of the class" is severable and not conditional. In other words, the section means that it is competent for the assured to transfer absolutely the rights of one preferred beneficiary to another preferred beneficiary, or, within the class, to transfer or leave, as the case may be, a limited estate such as a life estate, an estate for a term, an estate subject to a limitation or an estate in remainder.

(*b*) The Revised Plan of The Robert Simpson Company Limited Employees' Savings and Profit Sharing Fund states that the intention of the Plan is to furnish to each participating employee:

(*a*) Who remains an employee until retirement on account of age, an important contribution to future maintenance;

(*b*) Who serves for an extended period of years, but not until retirement on account of age, a substantial accumulated sum;

(*c*) Who dies while an employee, assistance in providing an income for family or dependents.

The Plan further states that participation in it will be entirely voluntary. Any employee is eligible to participate after one year of service and as long thereafter as he is employed. In order to join, the employee must sign an "Employee's Acceptance" and deposit the same with the Board of Trustees. Each participating employee deposits 5 per centum of his wages, not exceeding $100 yearly, and certain bonuses to the credit of the Fund. The company contributes 5 per centum of its net profits and The Robert Simpson Eastern Limited 5 per centum of the net profits of its mail order branch at Toronto. Provision is made for a Board of five Trustees selected by the company and for the vesting of the Fund in and the management of the Fund by the Board of Trustees, who stand possessed of the Fund and the investments, and of the interest of each participating employee upon the trusts and conditions and for the purposes of the Plan. An em-

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ployee who has not completed ten years of service may withdraw from the Plan at any time and shall thereupon be entitled to the amount deposited by him with interest at 5 per centum per annum with minor adjustments. If there is a balance at the credit of the employee's account, it will revert to the Fund. A participating employee may, according to the Plan, after ten years of service withdraw and shall thereupon be entitled to the full balance at his credit with minor adjustments. Upon the death of a participating employee, the full balance at his credit less minor adjustments shall be paid to such beneficiary or beneficiaries as the employee may have designated in writing lodged with the trustees, or by will. A participating employee may designate the beneficiary by the "Employee's Acceptance" or by an instrument in writing signed and lodged with the Trustees or by will, and the employee may from time to time revoke the benefits or change the beneficiaries or divert the money to his own estate.

On September 9th, 1926, the late J. C. MacInnes executed an "Employee's Acceptance" and joined the Plan. In it he authorized the company to pay to the Board of Trustees of the Fund the bonus to which he might yearly be entitled and also 5 per centum of his wages and he directed the Board of Trustees provided by the Plan, (*a*) upon his withdrawal to pay to him the amount to which he was entitled in accordance with the Plan, (*b*) upon his death to pay the amount to which he was entitled to his wife, Annie MacInnes, or otherwise as he might have last designated by writing lodged with the Board of Trustees or by will. There was only one witness to his signature.

On July 31st, 1931, as above stated, the late J. C. MacInnes made his last will and testament. On June 17th, 1932, he assigned and transferred to the Bank of Montreal his interest in the Fund as collateral security for a loan. He covenanted that he had full power to assign the same and that he would execute such further assignments as might be required. After his death, the debt was paid off by the executor and trustee.

The precise question is whether the "Employee's Acceptance" with the designation of Annie MacInnes as beneficiary is a trust in her favour or a testamentary instrument. If the latter, it is void, having only one wit-

ness. On this question the words of Sir J. P. Wilde in *Cock* v. *Cooke* (1) are frequently quoted:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

Shortly afterwards, Lord Penzance in *Robertson* v. *Smith and Lawrence* (2), said that the guiding principle in determining whether a paper was or was not testamentary was this—that it would be held testamentary if it was the intention of the maker that the gifts made by it should be dependent on his death. In *In the Goods of Joseph Baxter* (3) referred to by the Honourable Mr. Justice Middleton in the Court of Appeal, consideration was given to a nomination paper executed by the nominator under section 25 of the *Industrial and Provident Societies Act* (1893). The paper was signed in the presence of two witnesses. It was invalid as a nomination paper because the amount it purported to dispose of was in fact over £100, but it was held testamentary and admitted as a will. Section 25 (1) provided that a member of a registered society might in writing nominate any person to or among whom his property in the society in whole or part should be transferred at his decease provided the amount credited to him in the books of the society did not then exceed £100. Section 25 (2) provided that a nomination so made might be revoked or varied by a similar writing but not by the will of the nominator. Joseph Baxter on January 6th, 1899, signed a nomination paper whereby he purported to give the whole amount at his credit at the time of his death to his nephew John Baxter. The nominator died on September 21st, 1901. After the death John Baxter applied for payment but was refused. A lawful sister and next of kin of the deceased then applied for and obtained a grant of letters of administration, she having sworn that Joseph Baxter died intestate. John Baxter then moved the court to revoke the letters of administration and to pronounce the nomination paper a will duly executed. Gorell Barnes J. held that, as the document was not operative as a nomination, subsection 2 had no effect, and granted administration with the will annexed to the

(1) (1866) L.R. 1 Pro. & Div. 241 at 243.
(2) (1870) L.R. 2 Pro. & Div. 43.
(3) [1903] P. 12.

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applicant as the sole beneficiary. This case was referred to in *Griffiths* v. *Eccles Provident, etc., Society, Limited* (1). The question in the latter case was simply whether the word "then," in section 25, subsection 1, referred to the date of the nomination paper or the date of death. It was held by Vaughan Williams, L.J., and Kennedy, L.J., that the word "then" referred to the date of the nomination, Farwell, L.J., dissenting. The point decided in that case is not important in the case at bar, but certain statements in the judgments as to the testamentary character of a nomination under section 25 are helpful. Vaughan Williams, L.J., said, at page 282:—

> The view which I am taking is not a novel view, because in *In the Goods of Baxter* (2), this very question was raised and decided. Gorrell Barnes J. said in that case: "In my judgment this document is testamentary. It fails, under the provisions of the Industrial Societies Act, 1893, to operate as a nomination paper. Under that Act, a member of the society may, by writing under his hand, nominate a person or persons to whom his interest in the society is to go after his death, * * *"

Kennedy, L.J., agreed with the judgment of Vaughan Williams, L.J. In his dissenting judgment, Farwell, L.J., said, at page 284:

> The nomination in pursuance of such a power is, like any other testamentary disposition, revocable, as, under the Wills Act, a will is revocable, and, like a will, does not, prior to the nominator's death, affect his property, but leaves him free to deal with it as he pleases, either by withdrawing it in accordance with the rules of the society, or receiving payment of his loans to the society, without any power of interference by the nominee. The nominator is in the position of a testator, and the nominee of a legatee.

The decision of the Court of Appeal was affirmed by the House of Lords (3). Earl Loreburn, L.C., was of opinion that the judgment of the Court of Appeal should be affirmed. Lord Mersey said, page 490, that, once made, the nomination took effect, not by creating any charge or trust in favour of the nominee as against the nominator, but by giving to the nominee a right as against the society, in the event of the death of the member without having revoked the nomination, to require the society to transfer the property in accordance with the nomination. Until death the property was the property of the member, and all benefits accruing in respect of it during his lifetime were his also. Lord Atkinson concurred in the judgment

(1) [1911] 2 K.B. 275. (2) [1903] P. 12, 14.
(3) [1912] A.C. 483.

of Lord Mersey. Lord Shaw of Dunfermline dissented on the point involved in the case, but nowhere was it suggested in the Court of Appeal or in the House of Lords that the nomination was not testamentary in character.

It has already been pointed out that the intention of the Plan in the case at bar was to furnish to each participating employee who remained until retirement on account of age, a contribution to future maintenance; to each employee who served an extended term of years, but not until retirement on account of age, a substantial accumulated sum; and to each employee who died, assistance in providing for his family or dependents. An employee with less than ten years of service could withdraw for himself approximately the amount deposited with interest. An employee after ten years of service could withdraw for himself approximately the balance at his credit. Any participating employee could revoke the benefits or change the beneficiaries or divert the money to his estate by instrument in writing or by will. The "Employee's Acceptance" did not, in the words of Lord Mersey, *supra*, create any charge or trust in favour of the nominee against the nominator. Until death the beneficial interest in the amount which the participating employee could withdraw was in the employee. If he died while a participating employee, his beneficiary had a right to his share of the Fund. The right of the beneficiary was dependent upon the death of the participating employee for its vigour and effect.

I am, therefore, of opinion that the appeal should be dismissed with costs payable by the appellant.

Appeal dismissed with costs.

Solicitors for the appellant: *Johnston, Grant, Dods & MacDonald.*

Solicitors for the respondents Margaret MacInnes, Mamie Campbell, and certain children of the latter: *Stewart & O'Donnell.*

Official Guardian, representing infants and unborn issue of Mamie Campbell: *McGregor Young.*

Solicitors for the Executor of the Estate of Deceased: *Armstrong & Sinclair.*