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*Mar. 23, 24
May 3

MARJORIE E. ABBOTT .....APPELLANT;

AND

MARY ANN GRANT .....RESPONDENT;

AND

MARJORIE E. ABBOTT and THE TORONTO GENERAL TRUSTS CORPORATION, Executors and Trustees of the last Will and Testament of James Duncan Grant, Deceased .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Trustees given implied power to lease—Stated income to widow—Balance of income and residue of estate to daughter—Whether widow put to election between gifts to her under will and her dower right.

The daughter of the testator appealed to this Court from a judgment of the Court of Appeal by which that Court, reversing the judgment of the trial judge, held that the testator's widow was not required to elect between her dower and the gifts to her under the will. The testator disposed of three parcels of real estate. He devised a cottage property absolutely to his daughter. No question of dower was raised in connection with this devise. The wife was given the right to continue to reside in the testator's house as long as she wished, and also $150 per month from the residue of the estate during her lifetime with the proviso that if she did not wish to continue in occupation of the

*PRESENT: Cartwright, Abbott, Judson, Hall and Spence JJ.

house, and so notified the trustees in writing, she was to have an additional $150 per month. It was held, and there was no appeal on the point, that the right to reside in the house was a devise of a life estate. Consequently no question of dower arose with respect to this disposition. The third parcel of real estate was an apartment building which contained eight suites.

The trustees were given powers to postpone conversion or sale and to retain the estate in the form in which it stood at the date of death. The balance of the income and the whole of the residue were to go to the daughter. The widow claimed dower in the apartment building in addition to the interest given to her by the will.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright, Abbott, Judson and Hall JJ.: In order to raise a case for election under a will, there must be on the face of the will a disposition by the testator of something belonging to a person who takes an interest under the will. This means that where dower is involved, unless the widow is expressly put to her election, it must be found from the will itself and not from parol evidence that the testator intended to dispose of his property in a manner inconsistent with the widow's right to dower.

An implied power to lease was given in the will. However, the cases where a widow must elect because of the power to lease all involved express powers. *Parker v. Sowerby* (1854), 4 De G. M. & G. 321; *Patrick v. Shaver* (1874), 21 Gr. 123; *Re Hunter, Hunter v. Hunter* (1904), 3 O.W.R. 141, referred to. But this principle did not extend to implied powers. *Laidlaw v. Jackes* (1878), 25 Gr. 293, referred to.

Also, the division of income did not raise a case for election. The widow was given nothing but income. She had no interest in the residue. Her interest in the income was a specified monthly sum subject to increase in a certain contingency. There was nothing on the face of the will when this disposition was made inconsistent with her right to dower.

Re Hill, [1951] O.R. 619, referred to.

Per Spence J., *dissenting:* The testator had carefully outlined a scheme of division which was compact and complete and left no room for the widow's claim for dower carving out of the estate such an amount as might well defeat the operation of the scheme.

Here it was not only the trustees' right but their duty to lease the suites, and the cases which held that an express power to lease puts the widow to her election applied equally to the situation in this estate. The realization that his trustees might have to hold the apartment house a few years before they could profitably realize upon it would cause the testator to give them the broad power to postpone conversion and to expect them to use it requiring them to lease and so in effect making a provision in his will inconsistent with his wife's taking dower from his estate.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Landreville J. Appeal dismissed, Spence J. dissenting.

M. J. Galligan, for the appellant.

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Adrian T. Hewitt, Q.C., for the respondent, Mary Ann Grant.

M. M. Kertzer, for the Executors.

S. M. McBride, Q.C., for the Official Guardian.

The judgment of Cartwright, Abbott, Judson and Hall JJ. was delivered by

JUDSON J.:—The question in this appeal is whether the testator has put his widow to an election between the gifts to her under the will and her dower right in certain real property in the city of Ottawa. In order to raise a case for election under a will, there must be on the face of the will a disposition by the testator of something belonging to a person who takes an interest under the will. This means that where dower is involved, unless the widow is expressly put to her election, it must be found from the will itself and not from parol evidence that the testator intended to dispose of his property in a manner inconsistent with the widow's right to dower. The Court of Appeal has held, contrary to the judgment of the judge of first instance, that the widow was not put to her election. In my opinion, the judgment of the Court of Appeal is correct.

The contest here is between the widow and a daughter of a prior marriage. The testator disposed of three parcels of real estate. He devised a cottage property in the province of Quebec absolutely to his daughter. No question of dower has been raised in connection with this devise. He gave his wife the right to reside in 189 Acacia Road, Rockcliffe Park, in the province of Ontario, as long as she wished, and also $150 per month from the residue of the estate during her lifetime with the proviso that if she did not wish to continue in occupation of the house, and so notified the trustees in writing, she was to have an additional $150 per month. It has been held, and there is no appeal on this point, that the right to reside in 189 Acacia Road is a devise of a life estate. Consequently no question of dower arises with respect to this disposition. The third parcel of real estate is a small apartment building in the city of Ottawa which contains eight apartments. The wife claims dower in this apartment building in addition to the interest given to her by the will.

The dispositions of chattel property have no relevancy in this case. The testator made an elaborate list of the contents

of 189 Acacia Road which the wife was permitted to use as long as she wished. The will contains a long list of chattels left absolutely to the daughter. The daughter is the residuary beneficiary.

The testator gave the whole of his estate to trustees on trusts of which the following are relevant to these reasons:

(*e*) To use their discretion in the realization of my estate, with power to my trustees to sell, call in and convert into money any part of my estate not consisting of money at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit as my said trustees may in their uncontrolled discretion decide upon, or to postpone such conversion of my estate or any part or parts thereof for such length of time as they may think best, or to reinvest any portion of the capital of my estate for such length of time as they may think best, and I hereby declare that my said trustees may retain any portion of my estate in the form in which it may be at my death (Notwithstanding that it may not be in the form of an investment in which trustees are authorized to invest trust funds, and whether or not there is a liability attached to any such portion of my estate) for such length of time as my said trustees may in their discretion deem advisable, and my trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

(*g*) To keep invested the residue of my estate and subject as hereinafter provided, to pay the sum of One Hundred and Fifty ($150.00) dollars per month to or for my said wife during her lifetime, provided that if during such time my said wife shall relinquish possession of the house referred to in sub-paragraph (*b*) of this paragraph, my said trustees shall pay to my said wife an additional sum of One Hundred and Fifty ($150.00) dollars in lieu of the benefit granted under the said sub-paragraph (b).

(*h*) To pay to my said daughter, Marjorie E. Abbott, for her own use absolutely the balance of the income from my estate.

(*i*) Upon the death of the survivor of me and my said wife to deliver the residue of my estate to my daughter, Marjorie E. Abbott, or in the event that she shall have pre-deceased the survivor of me and my said wife, to divide the residue of my said estate among her issue in equal shares per stirpes.

The appellant's first submission is that there is an implied power to lease and that this is enough to put the widow to her election. With the trustee's powers to postpone conversion or sale and to retain the estate in the form in which it stood at the date of death, I have no difficulty in finding an implied power to lease. However, the cases where a widow must elect because of the power to lease have all involved express powers. *Parker v. Sowerby*[1] was such a

[1] (1854), 4 De G. M. & G. 321.

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case. So also were *Patrick v. Shaver*[1] and *Re Hunter, Hunter v. Hunter*[2]. But it is clear that this principle does not extend to implied powers for the reasons given by Proudfoot V.C. in *Laidlaw v. Jackes*[3], at pp. 297-8.

> All the cases, where powers of leasing have been held to raise a case of election, have been cases of express powers, and proceeded upon the ground that they indicated an intention in the testator that his executors or trustees should exercise them, not only over his estate, but also over that of his wife. It is difficult to understand why any greater efficacy should be given to a power of this description than to a power of sale, which does not exclude dower: *Patrick v. Shaver* (21 Gr. 123); but at all events the reasoning does not apply to this implied power, which is only an incident to the implied estate, and that, I think, is subject to dower. It will not be presumed under these circumstances that the testator intended to confer a power over property which was not his, the wife's dower; but only intended that the executors should deal with his property, that is the land subject to the dower.

Problems arising from dower were comparatively few in England because of the *Dower Act,* (1833) 3 & 4 Will. 4., c. 105, according to which a widow was not entitled to dower out of any land which had been absolutely disposed by the husband in his lifetime or by his will (32 Hals., 3rd ed., p. 304). But in Ontario the old law continued that when dower had once attached to the land, the husband could not get rid of it by act *inter vivos* or by will. Litigation in Ontario on problems of election was frequent during the second half of the 19th century and there is no doubt that the Courts applied very technical rules. But they were needed by the technicalities of the law of property and we cannot modify them by judicial decision without adding to the confusion. It may well be that the whole problem of dower should be dealt with by the legislature in view of the present existence of legislation for the relief of dependants and the decreasing importance of real property in a modern estate as compared with earlier times.

I am also of the opinion that the division of income does not raise a case of election. The trustees are to keep invested the residue of the estate and to pay the widow $150 per month, to be increased by another $150 per month if she gives up the residence, and to pay the balance of the income to the daughter. If real and personal estate are blended, not for the purpose of its equal division but in order to obtain an income out of which payments of stated amounts are to be

[1] (1874), 21 Gr. 123.
[2] (1904), 3 O.W.R. 141.
[3] (1878), 25 Gr. 293.

made annually to the wife, the division of the corpus not being made until after the wife's death, this is not inconsistent with the right to dower. (*Re Biggar, Biggar v. Stinson*[1]; *Leys v. Toronto General Trust Co.*[2]; *Re Urquhart*[3]; *Re Williamson*[4]; *Re Taylor*[5].)

On the other hand, if the widow is given not a fixed annual sum out of the income of the blended fund but a percentage of the whole net income so that it is clear that the payments to her must depend upon actual net revenue received from the estate from time to time, the provision is inconsistent with dower.

The cases where there has been a direction to establish a blended fund from which periodical payments are to be made to the widow, are most recently reviewed in the judgment of McRuer C.J.H.C. in *Re Hill*[6]. I agree with these reasons in their preference for the judgment of Middleton J. in *Re Williamson*[7], as contrasted with the reasons in *Re Hendry* [8], and *Re Williamson*[9].

The present case is comparatively simple. The widow is given nothing but income. She has no interest in the residue. Her interest in the income is a specified monthly sum subject to increase in a certain contingency. There is nothing on the face of the will when this disposition is made inconsistent with her right to dower.

I would dismiss the appeal and direct that the costs of all parties be payable out of the residue of the estate, those of the executors as between solicitor and client.

SPENCE J. (*dissenting*):—This is an appeal by the daughter of the late James Duncan Grant from the judgment of the Court of Appeal for Ontario pronounced on April 16, 1964, by which that Court, reversing the judgment of Landreville J. pronounced on June 3, 1963, held that the testator's widow, the respondent Mary Ann Grant, was not required to elect between her dower and the gifts to her

[1] (1884), 8 O.R. 372.
[2] (1892), 22 O.R. 603.
[3] (1910), 17 O.W.R. 937.
[4] (1916), 11 O.W.N. 142.
[5] (1904), 3 O.W.R. 745, reversed 4 O.W.R. 211.
[6] [1951] O.R. 619.
[7] (1916), 11 O.W.N. 142.
[8] [1931] O.R. 448.
[9] [1943] O.W.N. 270, affirmed without written reasons, [1943] O.W.N. 411.

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under the will. Leave to appeal was granted by the order of this Court made on October 6, 1964.

The basic principle for the determination of the question whether the widow is required to make her election as to dower is that given by Lord Cranworth in *Parker v. Sowerby*[1]:

> It is not, I think, quite correct to state the general rule of law as being, that, to raise a case of election against the wife, the will must show that the Testator had in his mind her right to dower, and that he meant to exclude it; *the rule rather is that it must appear from the Will that the Testator intended to dispose of his property in a manner inconsistent with his wife's right to dower.* (The italicizing is my own.)

It is permissible to consider the circumstances in which the will was executed in so far as those circumstances appear in the record and I think I should outline those circumstances so that the words of the will may be considered in the light of the circumstances.

The testator was domiciled in Ottawa but executed his will in Regina, Saskatchewan, on November 17, 1959. He made a codicil on March 3, 1960.

The testator had been married previously and had one daughter, the appellant Marjorie E. Abbott. He married the defendant Mary Ann Grant who survived him and who is, therefore, his widow and it is a question of whether Mrs. Grant must elect her dower with which this appeal is concerned.

Schedule "A" to the affidavit of John Fraser shows household goods and furniture at the Rockcliffe Park property—$418, household goods and furniture at 125 Somerset St. West, Ottawa—$50, 8-unit apartment house at 125 Somerset St. West—$50,000, 189 Acacia Avenue, Rockcliffe Park—$25,300, cash—$325.

The estate consisted of those amounts plus a cottage property at Norway Bay, in the province of Quebec, and a very large number, some 44, of "items of household use and ornaments". It will be seen that the only income bearing property is the 8-unit apartment house on Somerset St. West. That apartment house is referred to in the affidavits of Monk, Beckett, Fraser and Hodginson, filed upon the application for interpretation of the will. Referring particularly to the last affidavit, the property is an 8-unit apartment house on a lot with 70′ frontage and 103′ depth

[1] (1854), 4 De G. M. & G. 321.

and was a 3-storey, detached residence which has been converted. There is a 2-storey garage and storage building to the rear. Mr. Hodginson swore that he understood the buildings were from 50 to 60 years old. The property, therefore, has reached the age which, according to Mr. Hodginson, has resulted in a need for very extensive repairs both outside and inside. Mr. Fraser swore that the stoves and refrigerators were quite old and it would be necessary to replace them in the near future.

The net rental in the year ending June 30, 1961, as adjusted, amounted to $4,918.90, and in the year ending June 30, 1962, amounted to $4,649.49.

Those net rentals make no allowance for depreciation on the buildings or the stoves or refrigerators.

It must be presumed that the testator realized that the sole income bearing property in his estate was this apartment house and that the apartment house was one which if it was to be retained for any lengthy period was going to require a great deal of expenditure which could not help but affect seriously the net rental income. Now, under those circumstances, let us look at what he did in his last will and testament.

It would seem that the testator determined first the objects of his bounty and then carefully divided his estate between his widow and his daughter. Considering the bequests in the order he would think of them, he first set aside from his estate his cottage property in the province of Quebec and a carefully chosen list of personalty and gave them to his daughter absolutely. He then looked at the balance of his estate and determined how it should be utilized to discharge the claims on his bounty, firstly, the support of his widow, and then the enrichment of his daughter. It was apparent his widow would need adequate housing. He could provide that as he owned the residence at 189 Acacia Road, Rockcliffe Park, where she then resided, and so he provided that she should have the right to continue to reside there during her lifetime or until she gave notice in writing of her intention to abandon it. Of course, his widow needed furnishings therein and so he provided that she could have the use of those furnishings, which he carefully listed, during the period of occupancy and that thereafter they should go to his daughter absolutely.

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I realize that the specific devise of a piece of real estate alone will not require a widow to make her election: *Re Hurst*[1]; *Leys v. Toronto General Trusts Co.*[2]

I cite the devise of the cottage only as an incident of his careful division of his whole estate and therefore as an indication of his intent that the scheme should not be fractured by his widow requiring dower to be carved out.

Realizing that his widow required more than a furnished home he then dealt with his remaining assets again with the purpose of first providing her with support and thereafter benefiting his daughter. The balance of his estate he put into a blended fund—I shall deal with the powers given his executors in reference thereto hereafter—and from that blended fund he directed payments as follows:

> (1) There should be paid all taxes, insurance, repairs, mortgage interest and any sums necessary for the upkeep of the residence which he permitted his widow to occupy. Although the premises would appear to be free of mortgage, the executors appear to have expended $831.05 for such purpose in the first year and $638.58 in the second year.
>
> (2) To his widow the sum of $150 per month for life and should she in writing relinquish her possession of the residence at 189 Acacia Road that sum was to be increased by a like amount.
>
> (3) To his daughter, the balance of the *income* of the estate.
>
> (4) Upon the death of his widow the need for her support having terminated the whole residue of his estate could be devoted to the enrichment of his daughter and the testator, therefore, so provided.

Upon this analysis, I am inclined to conclude that the testator carefully outlined a scheme of division which covered his whole estate and distributed the whole of it so that the first claim on his bounty, *i.e.*, the support of his widow, would be taken care of by providing her with a home, maintained at the cost of the estate, the necessary furnishings therefor so long as she chose to occupy it, and an allowance which he deemed sufficient to cover her other living expenses. Having accomplished such end, he was free to recognize the other claim to his bounty, his daugher. He

[1] (1905), 11 O.L.R. 6. [2] (1892), 22 O.R. 603.

did so by giving her those assets not required to assure the discharge of the first claim—the cottage and the items of personalty—outright, and any income not necessary to assure that first purpose and then accomplished his second purpose in full by giving all the residue to his daughter after his widow's death. It would appear to me that this scheme was compact and complete and left no room for the widow's claim for dower carving out of the estate such an amount as might well defeat the operation of the scheme.

It should be noted that the widow makes no claim for dower out of the cottage property in Quebec. Her estate in the property at 189 Acacia Road given by this will exceeds any dower right and therefore dower if taken would have to come from the Somerset St. West apartment. I have described that property, both its income and its condition. I do not think it can be said with certainty, and the testator could not have assumed, that if one-third of the income were taken out of that property to pay dower there would be enough left to maintain the expenses on the Acadia Road residence and pay the widow her monthly allowance. As I have pointed out, the apartment house would seem to be in imminent need of expensive and extensive repairs and the residence itself may require the expenditure of money—such an expenditure is charged on the estate by the will.

Counsel for the widow agrees that when a specific power to lease is given in a will, the widow is put to her election as to dower, but submits that such election has never been held to result from a mere implied power to lease. There are, as I have pointed out, specific powers to postpone, for as long as the trustees deem fit, conversion of assets in this will and certainly a power to lease is therefore implied. But when one considers that the sole income bearing real property was an apartment house, it is difficult to regard the power to lease as merely implied and permissive. If the trustees retain unconverted this asset then it is their duty to obtain an income from it and the only method whereby such income may be obtained is by leasing the suites. I am, therefore, of the opinion that it is not only the trustees' right but their duty to lease, and the cases which hold that an express power to lease puts the widow to her election apply equally to the situation in this estate.

The testator, evidently a careful and thoughtful man with sound business sense, would realize that Somerset St. West

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was close to the commercial centre of Ottawa but, at any rate, in November 1959 the commercial centre had not yet reached out to encompass it and that his trustees might have to hold the apartment house a few years before they could profitably realize upon it. Such realization would cause him to give his trustees the broad power to postpone conversion and to expect them to use it requiring them to lease and so in effect making a provision in his will inconsistent with his widow's taking dower from his estate.

For these reasons and upon considering the will as a whole, I have come to the conclusion that its provisions are inconsistent with the widow's right to dower and that she is put to her election. I would allow the appeal and restore the judgment of Landreville J. The costs of all parties should be paid out of the estate, those of the executors as between solicitor and client.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the appellant: McIlraith, McIlraith, McGregor and Johnston, Ottawa.

Solicitors for the respondent: Hewitt, Hewitt and Nesbitt, Ottawa.

Solicitors for the executors and trustees: Kennedy, Sweet, Lepofsky and O'Neil, Ottawa.

The Official Guardian, Toronto.