DAME ELIZA CARTER AND OTHERS (MIS-EN-CAUSE) ..... APPELLANTS;

1921
Nov. 21.
Dec. 9.

AND

THE MONTREAL TRUST CO. AND OTHERS (DEFENDANTS) .....

AND

MAXWELL GOLDSTEIN ES-QUAL (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Will—Interpretation—Residuary bequest—Intestacy—Arts. 479, 596, 597, 838, 891, 902 C.C.

The two following clauses were contained in a will:

"5. I direct and desire that my executors whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law, and pay the interest or dividends from the said sum as the same are payable to my said wife during her lifetime so long as she remains my widow but in the event of her marrying then in such case the said interest or dividends shall cease and the said sums shall revert to my estate in the same manner as it will revert to my said estate upon the death of my said wife."

* * *

"15. Should there be any issue of my marriage the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years but the interest or revenue shall be employed in the education and support of such issue but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely."

PRESENT:—Sir Louis Davies, C. J. and Idington, Duff, Anglin and Brodeur JJ.

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Held that, upon the testator's death without issue and subject to the condition against re-marriage, the sum of $25,000 passed to the wife of the testator as part of the residue of the estate bequeathed to her and did not devolve upon the heirs at law as on an intestacy Judgment of the Court of King's Bench (Q.R. 31 K.B. 157) affirmed.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1) reversing the judgment of the Superior Court and maintaining the respondent's action.

The late C. B. Carter, K.C., of Montreal, made on the 28th of June, 1905, his will under the olograph form, which contained the clauses above recited. He had married on the 19th of April, 1905, dame Emma Blunden; and when he died on the 9th of August, 1906, there was no issue. Mrs. Carter died on the 21st of August, 1917, leaving a will under which the respondent was appointed executor. The latter brought action against the defendants, who were the executors of Mr. Carter's will, to recover the sum of $25,000 as being part of Mrs. Carter's estate. The lawful heirs of Mr. Carter were called in the case as *mis-en-cause* and they contested the action on the ground that that sum had been devolved upon them as on an intestacy.

Eug. Lafleur K.C. and *J. E. Labelle* for the appellants—The testator, by clause 5, has clearly stated his intention not to give the property of that sum of $25,000 to his wife, as he said in formal terms: "said sum shall revert to my estate * * * upon the death of my wife".

If Mrs. Carter had remarried that sum would have reverted to her husband's estate. Then, if his wife and his succession had been one and the same person, his wife if she had remarried would have received, by clause 15, what she was losing by clause 5, which conclusion brings to an absurdity.

(1) Q.R. 31 K.B. 157 sub nom. Goldstein *v.* Montreal Trust Co.

Aimé Geoffrion K.C. and *Pierre Beullac K.C.* for the respondent:—The sum of $25,000, in case of no issue, was bequeathed to the wife under clause 15, subject to the condition against re-marriage contained in clause 5.

The word "estate" in the phrase "shall revert to my estate" means "succession" or property.

THE CHIEF JUSTICE.—The question arising on this appeal was whether a sum of $25,000 passed to the widow of the testator as part of the residue of his estate bequeathed to her, or devolved upon the heirs-at-law of the testator as on an intestacy.

I have little difficulty in reaching the conclusion that the $25,000 in question did pass to the widow of the testator.

The two clauses of the will in question upon the construction of which the dispute in question must be determined read as follows:—

5. In addition to the sum given to my said wife, I direct and desire that my executors, whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law, and pay the interest or dividends from the said sum as the same are payable to my said wife during her lifetime so long as she remains a widow, but in the event of her marrying then in such case the said interest or dividends shall cease and the said sum revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife.

* * * *

15. Should there be any issue of my marriage the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years but the interest or revenue shall be employed in the education and support of such issue, but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely.

In clause 5 the testator directed the $25,000 to be set apart and the interest or annual proceeds to be paid to his widow during her lifetime and widowhood,

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but that in the event of her marrying the interest or dividends should cease and the "said sum revert to" his estate in the same manner as it would revert to his estate upon his wife's death.

I construe the word "revert" to mean "fall back into" his estate. In that paragraph, however, he made no further disposition of the corpus of the $25,000 beyond saying that under the specified contingencies it should revert to his estate.

When, therefore, in the fifteenth clause he provides that in default of issue from his marriage the residue of his estate should go absolutely to his wife, that residue necessarily included the corpus or principal of the $25,000 which was previously undisposed of. When the possiblity of issue from his marriage ceased, the absolute devise of the corpus of the $25,000 being part of the residue of his estate, would attach and become operative.

As the widow survived him and there was no issue of the marriage the bequest to her absolutely of the corpus of the $25,000 attached and became operative.

I would therefore dismiss the appeal with costs.

IDINGTON J.—The late Christopher Benfield Carter who married Emma Blunden on the 19th April, 1905 and made his last will and testament on the 28th of June, 1905, died on the 9th of August, 1906.

He had by a marriage contract on the day of his said marriage, but preceding same, bound and obliged

himself, his heirs and representatives to pay to the future wife within three months after his death, the sum of $10,000, with the right to secure the same during his lifetime and to make payments on account either by investments in the name of the future wife, by insurance on his life, by mortgage or hypothec upon immovable property or in any other way.

This transaction is of no consequence save as illustrating the provisions made in said will in respect thereof and also, I may be permitted to think, of the mentality of the testator whose said will we are now asked by this appeal to consider and reverse the construction put thereon by the Court of King's Bench which reversed that put upon it by the Superior Court.

The said wife survived the testator and died on the 21st of August, 1917, after having made her last will and testatment in the preceding February of the same year.

The respondent Goldstein was appointed thereby executor and trustee thereof.

The Montreal Trust Company and one Armstrong, a brother-in-law of the deceased testator, were the acting trustees of the said testator's estate under the said will.

The respondent Goldstein, as executor and trustee, brought before the said Superior Court the question of his right as executor of the will of the said testatrix to recover from said trustees the sum of $25,000 or the securities in which the said sum had been invested in course of their executing the trusts under the said testator's will.

The whole difficulty arises in regard to the proper interpretation and construction of the 5th and 15th clauses of said will of the testator.

The first clause revokes all former wills.

The second deals with his burial, and the third with the direction to pay all debts and funeral expenses.

The fourth refers to the said marriage contract, directs the sum of money due thereby to be handed over and paid his said wife absolutely to be disposed of by her as she thinks proper, and asks his executors to assist his wife in the investment of said sum so that she shall not suffer any loss, and that the investment should be in the best securities.

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Then follows the fifth clause which reads as follows:

5. In addition to the sum so given to my said wife, I direct and desire that my executors whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law, and pay the interest or dividends from the said sum as the same are payable to my said wife during her lifetime so long as she remains my widow but in the event of marrying then in such case the said interest or dividends shall cease and the said sums shall revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife.

Then there follow a great many bequests in which appellants and others are given personal bequests.

And amongst other bequests of that kind, he gives a total of eight thousand dollars to a number of institutions as objects of charity.

As his entire estate did not much exceed, if at all, ninety thousand dollars he clearly did not think of his own relatives, amongst whom he distributed the bulk of his estate, as needy objects of further generosity or charity, or we should have, I submit, expected something more presented in his will than what I am about to refer to which it is contended was an expression of such intention.

The fifteenth clause (which is the last in the will, save an injunction in way discharge of duty on the part of his executors was to be observed and power to discharge same), is as follows:—

15. Should there be any issue of my marriage the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years, but the interest or revenue shall be employed in the education and support of such issue, but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely.

I do not find the serious difficulty that the appellants do in the interpretation or construction of this will.

I think that these two clauses, 5 and 15 read together and in light of the whole will clearly gave the whole of that fund of $25,000 to his testators to hold as an investment solely for the benefit of his widow and possible children, but to be subject to the condition against re-marriage.

It was clearly to be for her and them subject only to a forfeiture on re-marriage.

So interpreted and construed there arises no such difficulty as suggested in argument of a bequest only to become operative on her death.

There seems to me neither such difficulty nor room for the rather curious suggestion of interpreting the words in the last part of clause 5, reading as follows

> the said sums shall revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife.

either as a bequest to his heirs or as a case of intestacy.

He certainly did not (being a member of our profession) in making such a will as before us intend that as a bequest to any one; nor did he expect to die intestate, unless his widow should remarry which as a reasonable man he would, in confronting her with forfeiture of such a bequest, consider highly improbable.

We must never forget, if we would interpret correctly the situation, that this will was made within a little more than two months after his marriage when the possibility of issue was quite conceivable.

I do not think the contention should have been continued beyond the decision of the Court of King's Bench and hence conclude that this appeal should be dismissed with costs.

DUFF J.—The intention of the testator is, I think, plainly enough evinced to dispose by testamentary disposition of the whole of his property both in extent

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and in interest. A certain interest in the investments representing the sum of $25,000 passes (under clause five) to his wife—it is not necessary, I think, to determine with precision the character of that interest. What of the interest left untouched by that clause? I see no good reason why it should be supposed that it is not captured by the residuary clause—clause fifteen—so as to pass in one event to the issue and in the other to the wife. There being no issue, the combined effect of the two pertinent clauses (five and fifteen) is to give to Mrs. Carter the entire property in the sum of $25,000 and the investments respecting it.

ANGLIN J.—The late C. B. Carter bequeathed $25,000 to trustees to pay the income derivable therefrom to his wife until her death or remarriage and directed that in the latter event

> the said sums (*sic*) shall revert to my estate in the same manner as it (*sic*) will revert upon the death of my said wife.

The residue of the estate was bequeathed to the testator's children if any (to be held in trust for them until they should attain 21 years, the income meantime to be applied for their education and support) and, if he should die without issue, to his wife absolutely. He died childless. The single question is whether the sum of $25,000 passed as part of the residue bequeathed to the wife or devolved on the heirs-at-law as on an intestacy.

I find nothing in the context to limit the universality of the word "residue". 6 Aubry & Rau, 4 ed. p. 466. There may be a question, of no practical importance since Mrs. Carter's death, whether, having regard to the trust for her of the income, she could have claimed payment of the corpus of the sum of $25,000

during her lifetime. But that the ownership of that sum became vested in her on her husband's death without any child born or *en ventre*, so as to form part of her estate, I entertain no doubt whatever.

Counsel for the appellant relied greatly on the testator's direction that in the event of his widow's remarriage the $25,000 should revert to his estate. In the first place it should be noted that the widow did not remarry and therefore this direction was inoperative. The corpus in fact does not pass under it but is undisposed of by any provision of the will other than that dealing with the residue. Moreover, the direction for reverter appears to signify nothing more than that in the event of the widow's remarriage the same disposition of the $25,000 shall ensue as would occur under the other terms of his will upon her death.

The word "revert" is obviously not applicable in the technical sense to the corpus of the $25,000. Since that sum was never taken out of the testator's estate, it could not revert to it. But in using this word the testator would seem to have had in mind as well the payments of income to his wife for the rest of her life, which had been in a sense taken out of his estate by the gift of them to her defeasible in the event of her contracting a second marriage. His use of the word "sums" would so indicate. This may explain his employing the word "revert", notwithstanding its inconsistency, if so used, with the succeeding phrase

> in the same manner as *it* will revert to my estate upon the death of my said wife.

Note that the singular pronoun "it" is used to signify the "sums" directed to "revert". Inaccuracy of diction is perhaps the most notable characteristic of this entire provision. I cannot find in the use of the word "revert" however, any indication of an inten-

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tion to divert the otherwise undisposed of corpus from the residuary legatees or legatee to the heirs-at-law. Still less can I discern in the word "estate" a designation of such heirs-at-law as its ultimate recipients to the exclusion both of the children and the widow of the testator as residuary legatees. For both would have been alike excluded if the appellant's contention is sound. I cannot conceive that that was the testator's intent. His future children, if any, were the first and direct objects of his residuary bequest.

The objection made against the wife claiming under the bequest that the benefit of it would enure only to her estate after her death does not apply to the bequests to the children. Yet if the children were to take under the residuary bequest the undisposed of corpus must have been included in the residue. Once there it is there for all the purposes of the bequest including the gift over to the wife Any other construction seems impossible unless the clearly outstanding purpose of the testator—to deal with the entire residue of his estate, including all property not otherwise effectively disposed of by his will (Fuzier-Herman, vbo. Legs. No. 8778), for the benefit in the first place of his children, if any, and failing issue, for that of his wife—should be disregarded. It is trite law, recently restated in the Privy Council (*Auger* v. *Beaudry* (1), that speculation or conjecture as to the motives that may have influenced the testator in giving to his bequests the form in which we find them cannot warrant a refusal to give effect to the fair and literal meaning of the actual language he has used. We may not reject the plain bequest to the wife because in the result it may benefit her heirs rather than the heirs of the testator.

(1) [1920] A.C. 1010.

If the right of the widow to payment of the $25,000 under the residuary bequest accrued immediately on the testator's death without children, the objection, strongly urged by Mr. Lafleur, that the bequest was to a person in whose favour it could not take effect until after her death and therefore in contravention of Art. 838 C.C. would obviously have no application. The same observation might be made if her right to payment of the corpus had arisen by reason of her remarriage. But assuming that the effect of the trust created by clause 5 of the will was, in the event which happened, to defer any right to actual payment of the corpus under the residuary bequest until her death, that suspension merely postponed the execution of the residuary disposition and did not prevent her having under it during her lifetime "an acquired right transmissible to her heirs," Art. 902 C.C." The event which gave effect to" the residuary legacy to the widow was the death of the testator without any children either born or *en ventre*. Thereupon she became "seized of the right to the thing bequeathed". Art. 891 C.C.

Whatever justification any obscurity in the late Mr. Carter's testamentary dispositions may have afforded for instituting this litigation and carrying it to the Court of King's Bench, the mis-en-cause might well have been content to abide by the judgment of that court. They should pay the respondents their costs of the unsuccessful appeal here.

BRODEUR J.—Le point en litige en cette cause est de savoir si une somme de $25,000 spécifiquement mentionnée au testament de M. l'avocat C. B. Carter de Montreal appartient aux héritiers légaux de ce dernier ou à sa femme.

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M. Carter s'est marié le 19 avril 1905, à Montréal, avec Mlle. Blunden; et par son contrat de mariage, il avait donné à sa femme une somme de $10,000 payable à sa mort, avec stipulation cependant que si elle prédécédait, la donation deviendrait de nul effet. Environ deux mois après son mariage, soit le 28 juin 1905, M. Carter faisait son testament par lequel il instituait comme ses légataires universels les enfants qui naîtraient de son mariage; et il ajoutait que s'il n'avait pas d'enfants alors l'universalité de ses biens irait à sa femme. Ce legs universel est stipulé dans la clause 15 du testament et se lit comme suit:

15. Should there be any issue of my marriage, the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years but the interest or revenue shall be employed in the education and support of such issue, but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely.

Il avait dans les clauses précédentes confirmé et ratifié la donation de $10,000 mentionnée au contrat de mariage; il avait nommé un de ses parents et un de ses amis comme exécuteurs testamentaires et fiduciaires et il avait aussi fait plusieurs legs particuliers à ses parents et à ses amis; il avait au paragraphe 5 disposé d'une somme de $25,000 dans les termes suivants:

5. In addition to the sum so given to my said wife I direct and desire that my executors, whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law and pay the interest or dividends from the said sum as the same are payable to my said wife during her life time so long as she remains my widow, but in the event of marrying then in such case the said interest or dividends shall cease and the said sums *shall revert to my estate* in the same manner as it will revert to my said estate upon the death of my said wife.

M. Carter est mort un peu plus d'un an après avoir fait son testament. Sa femme lui a survécu et aux termes du testament 'elle est devenue légataire uni-

verselle, vu qu'ils n'ont pas eu d'enfants. La somme de $25,000 a été administrée par les fiduciares, qui étaient en même temps exécuteurs testatmentaires, et le revenu en a été payé à Madame Carter, qui ne s'est pas remariée et qui est morte elle-même le 21 août 1917, laissant un testament par lequel elle nommait l'intimé, M. Goldstein, son exécuteur testamentaire, et son frère et sa soeur qui demeuraient en Angleterre, ses légataires universels.

Les héritiers de M. Carter, qui sont les appelants, prétendent que cette somme de $25,000 mentionnée au paragraphe 5 du testament de M. Carter leur appartient et que les mots "revert to my estate" veulent dire "retourne à mes héritiers légaux." M. Goldstein, l'intimé, prétend, au contraire, que cette somme devait revenir d'abord à ses enfants sous la clause 15 de ce testament et qu'à défaut d'enfants cette somme devenait la propriété de Madame Carter, et que les représentants de cette dernière ont le droit de la revendiquer.

M. Carter avait fait son testament dans l'espoir qu'il aurait des enfants; aussi il les avait institués ses légataires universels. En même tremps, il voulait assurer à sa femme les moyens de vivre et il y avait stipulé qu'elle aurait la jouissance d'une somme de $25,000 pendant sa viduité ou sa vie durante. Si M. Carter eût laissé des enfants à son décès, il ne peut pas y avoir de doute que la nue-propriété de cette somme de $25,000 aurait fait partie du patrimoine de ces enfants comme héritiers légitimes ou comme légataires universels de leur père Mais il n'a pas laissé d'enfants et alors le legs universel stipulé en leur faveur devenait caduc et sa femme recueillait la succession comme légataire universelle.

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Maintenant dans cette succession se trouvait cette somme de $25,000 (art. 596 C.C.) Malgré l'expression un peu étrange dont se servait M. Carter dans ces mots "revert to my estate," il ne pouvait pas empêcher la nue-propriété de cette somme d'appartenir à quelqu'un à son décès. Ce bénéficiaire ne pouvait pas être l'exécuteur testamentaire ou le fiduciaire qui n'est "qu'un légataire pour la forme", obligé de tenir en dépôt la somme léguée et de l'administrer jusqu'au jour de la remise au "légataire réel." Michaux, *Des Testaments*, p. 220, no. 1428; Merlin, Répertoire, vbo. fiduciaire, no. 3; Zachariae, Aubry & Rau, vol. 6, par. 694, texte et note 9.

Cette somme de $25,000, en supposant que M. Carter eût eu des enfants à son décès, aurait donc appartenu en jouissance à sa femme et en nue-propriété à ses enfants. Du moment qu'il n'avait pas d'enfants, la somme appartenait à sa femme en jouissance et en nue-propriété, vu qu'elle était instituée sa légataire universelle à défaut d'enfants. Elle aurait eu le droit de revendiquer cette somme des légataires universels à raison des dispositions de l'art. 479 du Code Civil qui déclare que l'usufruit qui était stipulé au testament en sa faveur était éteint

> par la consolidation ou la réunion sur la même tête des deux qualités d'usufruitier ou de propriétaire.

Ce qui caractérise le legs universel, c'est la vocation du légataire à l'universalité des biens qui composent le patrimoine du testateur. Dans le cas actuel, le testateur, en léguant le surplus de ses biens à sa femme, a montré son intention bien évidente d'exclure ses héritiers légitimes de sa succession.

Laurent, vol. 13, no. 516.

Aubry & Rau, vol. 7, p. 466, parag. 714.

Demolombe, vol. 4, Donations, p. 542.

Cette somme dès le décès de M. Carter est devenue la propriété absolue de Mme Carter; et alors il n'y a pas lieu d'invoquer au soutien de leur prétention, comme les appelants l'ont fait, l'article 838 du Code Civil. Le transmission de la nue-propriété de cette somme de $25,000 ne devait pas s'accomplir qu'après la mort de Madame Carter, comme le disent les appelants, mais cette transmission s'est produite dès le décès du testateur; autrement nous serions en présence d'une disposition testamentaire illégale parce qu'elle laisserait une partie des biens sans propriétaire au décès du testateur.

Le mot succession ou "estate" ne se rapporte pas simplement à l'idée de la succession légitime; il couvre aussi la succession testamentaire. De fait, la succession légitime n'a lieu que dans le cas où le *de cujus* n'a pas laissé de testament. S'il y a un testament, et s'il y a institution d'hérédité on un légataire universel de nommé, alors cette disposition testamentaire écarte la succession légitime. (Art. 597 C.C.)

M. Carter, en donnant le surplus de ses biens à ses enfants et à leur défaut, à sa femme, a donné à cette dernière la vocation, comme disent les auteurs, à l'universalité des biens qui composant son patrimoine. [Beaudry-Lacantinerie, Des Testaments, nos. 2288 & 2298]

Je suis donc d'opinion que les héritiers légitimes de M. Carter n'ont pas le droit de recueillir cette somme de $25,000 et qu'elle doit être remise à l'exécuteur testamentaire de Madame Carter.

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L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant H. J. Johnson:
Taillon, Bonin, Morin & Laramée.

Solicitors for the other appellants:
Beauregard & Labelle.

Solicitors for the respondent:
Goldstein, Beullac & Engel.

Solicitors for the defendants:
Brown, Montgomery & McMichael.