Privy Council Appeal No. 107 *of* 1925.

Olive Christian and others - - - - - - *Appellants*

v.

Charles F. Taylor and another - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEWFOUNDLAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1926.

Present at the Hearing:

VISCOUNT HALDANE.
LORD SHAW.
LORD WRENBURY.
LORD DARLING.
LORD SALVESEN.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Supreme Court of Newfoundland on an application by the respondent Taylor as the administrator, with the will annexed, of the estate of one William Brazel for directions as to the construction of his will. The will was dated the 17th February, 1896, and the testator died on the 21st April, 1897. He left a considerable estate, consisting mainly of land, some of it with houses on it, in Newfoundland. Part of this land is said to have been freehold and the rest leasehold.

After bequeathing to his wife Margaret his chattels and money and securities absolutely, the testator made a disposition of his remaining property in the terms which were as follows:—

> "All the rest residue and remainder of my estate I will devise and bequeath unto my said beloved wife Margaret for her sole use and benefit during her lifetime, and after her death all that part of my estate situate

on Barron Street, formerly Casey's Lane, and upon which the houses and tenements held or occupied respectively by the following tenants, C. Sloan, James Power, Michael Power, Miss McDonald, Mrs. Ryan, Mrs. H. Dwyer, C. Cook's Cooperage, Jeans and McGrath's Cooperage, Edward Martin, J. Donnelly, Anthony H. Bowley now stand together with all the land appurtenant thereto or connected with the said tenancies I give devise and bequeath to my three sons Patrick, William and David for their absolute use and benefit, share and share alike. And that part of my estate situate on the West side of Brazil's Square and upon which the houses and tenements held or occupied by the following tenants, Edward O'Neil, formerly occupied by Hannigan, Mrs. Capt. Power, Mrs. James Phelan, Robert Cowan, Edward Waugh, John Connors, Patrick Connors, Mrs. Ellen O'Neill now occupied by W. Pope now stand together with the land appurtenant thereto or connected therewith and also that part of my estate on the east side of Brazil's Square upon which the houses and tenements held or occupied by J. Collins, Edward O'Neill, Thomas Fitzgibbon, in which latter one Pippy now resides, J. J. Collins in which one White lives, Charles Cook, William Burt, John McGrath, Cook Engineer, Allan Knight and the land under lease to James Brien now stand together with the land appurtenant to the said tenancies or connected therewith. And also that part of my estate situate on Waldegrave Street upon which the houses and tenements occupied or held by the following tenants Vale, MacKay, and J. Kennedy, Mrs. Foley, Sloan, Mrs. C. Brine, and John Waddleton now stand together with the land appurtenant thereto or connected therewith I give devise and bequeath to my four sons Patrick, William, David and Thomas for their absolute use and benefit share and share alike. After my wife's death also that part of my estate situate on New Gower Street and upon which the houses and tenements held or occupied by the following tenants, Mrs. Daley, Miss Quirk, James Brine, Michael Connors, William Ellis, William Smale and on Pleasant Street that part of my estate upon which the houses and tenements held or occupied by Thomas Murphy and on Barron Street aforesaid that part of my estate upon which the houses and tenements held or occupied by J. Walsh and Mrs. Martin now stand together with the land appurtenant thereto or connected therewith I give devise and bequeath to my daughter Alice Wife of Charles Taylor for her sole separate and absolute use and benefit and free from the control of her present or any future husband. After my wife's death also that part of my estate situate on New Gower Street upon which stand the houses and tenements held or occupied by Costigan and T. Baker and that part of my estate situate on Barron Street aforesaid upon which stand the houses and tenements held or occupied by Mrs. Cooper, and Moores and the stable occupied by Thomas O'Mara and the house occupied by G. Buckingham together with the land appurtenant thereto or connected therewith I give devise and bequeath to my daughters Catherine and Margaret for their absolute use and benefit and free from the control of any husband or husbands they or either of them may marry, share and share alike. After my wife's death also that part of my estate situate on New Gower Street upon which stand the houses held or occupied by James Raftus, James Power and C. Mahony and that part of my estate on Springdale Street upon which the Cooper Shop of Patrick McGrath stands and also that part of my estate on the east side of Springdale Street aforesaid upon which the house occupied or held by Patrick Mahony stands I give devise and bequeath to my daughter Catherine for her sole separate and absolute use and benefit and free from the control of any husband she may marry. After my wife's death also that part of my estate situate on New Gower Street upon which stand the houses and tenements held or occupied by Mrs. Shea, William McCarthy's Estate, T. Bailey, and that part of my estate situate on Springdale Street upon which stand the

houses and tenements held or occupied by Robert Pierce, P. Walsh, and the stable lately occupied by John Hynes, now vacant, and the land appurtenant thereto or connected therewith I give devise and bequeath to my daughter Margaret for her sole separate and absolute use and free from the control of any husband she may marry. After my wife's death also that part of my estate situate on Pleasant Street upon which stand the houses and tenements held or occupied by James O'Neill the estate of Maurice Goff, Mrs. Connell, and the house together with the stable in the rear thereof and the piece of land adjoining Pleasant Street occupied by Healy with the land appurtenant to the said houses or connected therewith I give devise and bequeath to my son Thomas for his sole separate and absolute use and benefit. After my wife's death also my farm known as the 'Old Farm' situate on the Mundy's Pond Road and the field known as 'Bentlans Field,' and the farm known as the 'New Farm' with the barn thereon situate on the said Mundy's Pond Road I give devise and bequeath to my seven children share and share alike. The dwelling houses and land situate on Pleasant Street in the occupancy of J. Tracey and one Brennan I give devise and bequeath to my son Thomas for his sole separate and absolute use and benefit. I give devise and bequeath also to my said son Thomas the dwelling house now occupied by me in Brazil's Square and the outhouse and land in connection therewith but upon the express condition that it is to be a home for any of my said children whilst unmarried, and any of my said children whilst unmarried shall have the right to occupy the said house and premises jointly with my said son Thomas. My farm situate on the Topsail Road near Brazil's Pond I give devise and bequeath to my four sons Patrick, William, David and Thomas share and share alike. I give devise and bequeath that part of my estate situate at the head of Brazil's Square and on the east side thereof upon which the house occupied by Susannah McDonald now stands and the land appurtenant thereto or connected therewith to my grandchild Olive Mary Taylor absolutely. The bequests in this my last will to my children and my grandchild shall take effect only after the death of my beloved wife. In the event of any or either of my said children dying without lawful issue his her or their share or shares shall be divided equally among the survivors or survivor. I appoint my said beloved wife Margaret executrix of this my last will.

Dated at St. John's, Newfoundland, this seventeenth day of February Anno Domini, One thousand eight hundred and ninety-six. W. Brazel, Signed published and declared by the said testator as and for his last will and testament in presence of us who in his presence at his request and in presence of each other have subscribed our names as witnesses thereto. The words 'In the event of any or either of my said children dying without lawful issue his her or their share or shares shall be divided equally among the survivors or survivor' having been interlined betweeen the second and third and fourth lines from the top of this sheet. Allan Knight, Edward Shea."

The main question to be decided is, whether the gift over towards the end of the will on the death of any of the testator's children dying without lawful issue is to be read as referring to death at any time or to death before any period of distribution, if there be one.

The testator left seven children; four sons, Patrick, William, David and Thomas; and three daughters, Alice, Catherine and the respondent Margaret. He also left a granddaughter, Olive Mary Taylor, as to whose share no question arises.

The widow died on the 17th June, 1897. All the seven children survived her. One, namely, the respondent, Margaret Brazel, is now the sole survivor. Five died leaving no issue. One, Alice, died leaving her surviving two daughters, the appellants, Olive Christian and Gladys O'Leary.

The summons for directions came before the Supreme Court, and judgment was delivered on the 2nd March, 1925. The majority of the judges (Horwood, C. J., and Johnson, J.) held (Kent, J., dissenting) that the respondent, Margaret Brazel, was entitled to all the landed property of the testator excepting the portions given by the will to his daughter Alice and his granddaughter Olive Christian.

Whether the conclusion so arrived at was right depends on the expressions used in the will read as a whole. The question is one entirely of intention. In ascertaining that intention, their Lordships have to bear in mind that the words "dying without lawful issue" are, *prima facie*, to be construed in their literal significance as referring to death at any time, and not merely in the lifetime of the tenant for life. This rule of interpretation will yield to any sufficient indication to a contrary effect, to be found in the language of the will taken as a whole, but apart from any such indication death at any time is what the words taken by themselves must be assumed to mean. At one period a different view was supposed to have been established by the fourth of the rules of construction laid down by the then Master of the Rolls, Lord Romilly, in *Edwards* v. *Edwards* (15 Beavan 357). That fourth rule was treated as laying down that words indicating death without leaving issue must be construed as referring to the occurring of such death only in the lifetime of the tenant for life, where there was one, that being treated as equivalent to a period of distribution. But it was pointed out by two decisions of great authority, given in the House of Lords—*O'Mahoney* v. *Burdett* (L.R. 7, H.L. 388), and *Ingram* v. *Soutten* (*ibid.*, 408), that the expression "period of distribution" as popularly used is an ambiguous and equivocal expression. It may import either a mere apportionment of interests under the will, as, for instance, by the mere provision of a life interest followed by the gift to the person whose subsequent interest is to govern in the case of death without leaving issue. Alternatively, it may assume the form of a direction to divide and hand over the estate on the termination of an antecedent life interest. Unless there was such a direction, the House of Lords held that the rule as laid down by Lord Romilly could not be maintained if meant to be a rule of construction to be applied without regard to expressions in the will requiring it. If the language used showed that the one person to whom the gift was made was intended in some event to take and enjoy an absolute possessory interest, and if that intention could not receive effect unless the operation of the divesting clause was limited to a time earlier than his death, then the time within which the divesting clause is to operate must be restricted. But unless there is in

the context of the will something that independently requires it, the law must be taken to be that words indicating a gift over on death without issue are not to be construed as restricted to death in the lifetime of the tenant for life.

The principle thus established by the decisions in the House of Lords is a valuable guide in all questions of construction to which it can be applied, and it gets rid of Lord Romilly's supposed fourth rule. But, as was stated in the House of Lords, it has to yield to distinct indications of a contrary intention in the particular will under construction. These indications may be of different kinds. In *Re Roberts* (1916, 2 Ch. 42) and also in *Re Brailsford* (*ibid.*, 536), Sargant, J., reviewed the authorities and held that where, although the expression divide " or distribute " was not used, there could be found an expression of intention to apportion finally the estate on the determination of the life interest, the gift over was limited to death before that determination. In reviewing the authorities in *O'Mahoney* v. *Burdett*, Lord Cairns points to *Da Costa* v. *Keir* (3 Russell 360) and *Home* v. *Pillans* (2 My. and K. 15) as illustrations of cases in which the wills there under consideration contained particular expressions requiring the exclusion of the principle that death meant death at any time. Obviously there can be no exhaustive enumeration of cases of this class.

The question which their Lordships have to decide is whether the language of the will before them is inconsistent with the application of the *primâ facie* general principle in interpretation. Their Lordships are of opinion that it is inconsistent.

The initial bequest is one of personalty, and it is made to the wife for her " sole separate and absolute use." All the residue of the testator's estate he gives to her " for her sole use and benefit during her lifetime." He appoints no trustees, but makes her his executrix. She was, therefore, a trustee during her lifetime. After her death, as to a certain block of his land, he devises and bequeaths it to three named sons " for their absolute use and benefit, share and share alike." They thus took as from his death vested interests in remainder expectant on the determination of the wife's life estate. He makes exactly the same disposition of other blocks of his land in favour of his other sons and children respectively and a granddaughter. In each case the disposition is to take effect only after the death of his wife, and this he reiterates in a clause expressly so providing, after these dispositions have been enumerated. This is immediately followed by the words which have given rise to the controversy : " In the event of any or either of my said children dying without lawful issue, his her or their share or shares shall be divided equally among the survivors or survivor."

Their Lordships think that, although there is no express introduction of trustees, with a direction to distribute, there is what is equivalent to it for the purpose of the question before them. After the death of the tenant for life, the gifts are in each case,

to be of the full legal and equitable estates for the absolute use and benefit of the beneficiaries, without any qualification in terms. This appears to indicate an intention that the dispositions are to be treated as exhaustive at the death of the tenant for life. Moreover, unless they are so treated and the gifts over are to be operative only on death within her lifetime, it is not apparent that any significance can be found for the introduction of the word "their" share or shares in addition to "his" or "her" in the gift over at the end of the will. For to satisfy the word "their" there must be a plurality of shares as to which the gift over is to take effect at the same moment of time. This may well be the case if several children have died in the lifetime of the widow, but cannot subsequently happen unless two or more children die at the same moment. It is at this moment of time that the survivors are to be ascertained. If the word so introduced is not confined in its operation to the lifetime of the widow when the gifts in fee take effect, but is to be operative at any time, there is no moment of time at which the survivors are to be ascertained. The expression fits only, as pointed out by Kent, J., if it be confined to death without lawful issue prior to the period which is that of the gift becoming gifts in absolute property. In that case the words indicate that the clause is to operate distributively. This is the conclusion to which their Lordships have come on reading the will as a whole, a conclusion which in their opinion is in no way inconsistent with the view taken by the House of Lords in the two cases referred to. It follows that the clause of accruer, being so limited, and all the children having survived the tenant for life, no question arises as to whether the accruer can extend to further interests which only in a different view might have been acquired under it.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that, in accordance with the conclusion arrived at by Kent, J., it should be declared that the children took indefeasible interests on the death of the testator's wife. The costs of all parties as between party and party, excepting in the case of the trustee, who should have his solicitor and client costs, ought, they think, to be paid out of the estate.

In the Privy Council.

OLIVE CHRISTIAN AND OTHERS

v.

CHARLES F. TAYLOR AND ANOTHER.

DELIVERED BY VISCOUNT HALDANE.

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