58, 1936

No. 52. of 1936

In the Privy Council

ON APPEAL FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF the Estate of KATHERINE HAMILTON BROWNE, Deceased;

AND IN THE MATTER OF the construction of the Will of the said Deceased;

BETWEEN ENID BROWNE - Appellant

— and —

FLORENCE YODA MOODY, CONSTANCE EMMA KINNEAR, HELEN SMITH, THE OFFICIAL GUARDIAN on behalf of the infant children of FLORENCE YODA MOODY and CONSTANCE EMMA KINNEAR, and any unborn children of the said FLORENCE YODA MOODY and CONSTANCE EMMA KINNEAR as well as of HELEN SMITH and of ENID BROWNE, and WILLIAM GEORGE HAMILTON BROWNE and THOMAS CAMERON URQUHART, Executors of the Estate of Katherine Hamilton Browne, Deceased, and NEDRA CAROLINE SMITH, daughter of the said HELEN SMITH,

Respondents.

Record

— Case For The Appellant — ENID BROWNE

1. This is an appeal from the judgment of the Supreme Court of Canada affirming a judgment of the Chief Justice of the High Court for Ontario declaring that the Appellant did not, upon the death of the Testatrix, take a vested interest in one half of the fund of $100,000 referred to in paragraph 5 of the Will of the said Katherine Hamilton Browne. pp. 20-22

2. By the Will of the said Katherine Hamilton Browne she disposed of the said fund of $100,000.00 as follows: pp. 5-7

"5. Whereas I have now the sum of $100,000.00 invested in "the name of E. H. Watt, of the said firm of Watt & Watt, in "trust in the form of a call loan, I HEREBY DIRECT that the said "fund is to be continued to be invested in call loans by the said E. "H. Watt during the lifetime of my said son, William George "Hamilton Browne, and the income arising therefrom is to be paid "to my said son during his lifetime. In the event of the death of "the said E. H. Watt during the lifetime of my said son, I DIRECT "that the fund now invested by him in the form of a call loan shall p. 6-4-47 "be invested by my executors in such securities as are authorized "by the laws of the Province of Ontario as trustee investments, and "the income therefrom is to be paid to my son during his lifetime. "On the death of my said son, William George Hamilton Browne, I "DIRECT that the said fund of $100,000.00 is to be divided as "follows:

"One-half of the said fund to my grand-daughter, Enid Browne, "daughter of my son, William George Hamilton Browne, and the "remainder of the said fund to be divided equally between my "daughters, Florence Yoda Moody, wife of Robert E. Moody, now "of Los Angeles, California; Constance Emma Kinnear, wife of "Harold Kinnear, of the City of Detroit, in the State of Michigan, "and Helen Smith, wife of Herbert P. Smith, of Jamaica, Long "Island, New York, share and share alike."

"6. All the rest and residue of my estate, both real and per- "sonal of whatsoever kind and wheresoever situate, I GIVE, DE- p. 7, l. 1-18 "VISE and BEQUEATH unto my grand-daughter, Enid Browne, "and my daughters, Florence Yoda Moody, Constance Emma Kin- "near and Helen Smith, to be divided amongst them equally, share "and share alike."

p. 6-7 "7. In the event of my grand-daughter, Enid Browne, or any "of my said daughters predeceasing me or predeceasing my said "son, leaving issue, I DIRECT that the child or children of the per- "son so dying shall take the interest to which their mother would "have been entitled had she survived."

p. 5, l. 46 **3.** THE SAID Katherine Hamilton Browne died on the 17th day of March, 1930, and probate of her Will was granted to the said Executors on the 22nd day of January, 1931, and thereupon all her property became, upon her death, under the "Devolution of Estates Act," Revised Statutes of Ontario, 1927, Chapter 148, Section 2, vested in the Executors as Trustees for the persons by law beneficially entitled thereto. 10

p. 8 l. 5, 6-10 **4.** The Testatrix was survived by all the four legatees named in Paragraphs 5 and 6 of her Will, viz., the Appellant and Florence Yoda Moody, Constance Emma Kinnear and Helen Smith and all are adults. She was also survived by her son. 20

p. 8, l. 18 **5.** SEVERAL important questions having arisen regarding the construction of the said Will, an originating motion was made on behalf of William George Hamilton Browne, one of the Executors and a Legatee under the said Will, to the High Court Division of the Supreme Court of Ontario to determine the question whether the said ENID BROWNE, p. 8, l. 25 FLORENCE YODA MOODY, CONSTANCE EMMA KINNEAR and HELEN SMITH took vested interests in the said fund of $100,000.00 under the said Will. 30

6. The Honourable the Chief Justice of the High Court for Ontario, after hearing Counsel for all parties, pronounced judgment on the 25th day of March, 1933, declaring that the said ENID BROWNE, FLORENCE YODA MOODY, CONSTANCE EMMA KINNEAR and HELEN SMITH did not take vested interests in the said fund on the death of the said pp. 10-11 Testatrix, on the ground that it was not open to him as a Judge in the first instance to depart from the law as laid down in the Court of Appeal for Ontario in the cases of Re Moore (1931) O.L.R. 454, Re Gaukel (1932) 41 O.W.N. 365, following a judgment of the Supreme Court of Canada, Busch vs. Eastern Trust Company (1929) S.C.R. 479, hereafter called the "Busch" case. 40

p. 8, l. 30 **7.** The Busch case having been previously followed in the Court of Appeal for Ontario in several cases involving the same question, the Appellant obtained leave from the said Court to appeal against the said judgment, per saltum, directly to the Supreme Court of Canada.

8. Subsequently a special case was submitted to the Supreme Court of Canada to determine the following questions:

(a) "Whether or not the legacies directed by the said Testa- p. 8, l. 40-44
"trix, KATHERINE HAMILTON BROWNE, deceased, under
"paragraph 5 of her said Will, to be paid to ENID BROWNE,
"FLORENCE YODA MOODY, CONSTANCE EMMA KINNEAR
"and HELEN SMITH (the Appellants herein) upon the death of
"the life tenant, WILLIAM GEORGE HAMILTON BROWNE, be-
"came vested upon the death of the said Testatrix."

(b) "and should this Honourable Court find that such lega- p. 8, l. 45
"cies did become vested upon the death of the Testatrix, then
"whether or not the legacy of any such Appellant is liable to be
"divested or otherwise affected by paragraph 7 of the said Will."

9. The Supreme Court of Canada, after hearing Counsel for all parties, reserved its judgment, and subsequently, on the 6th day of March, 1934, the Judgment for the Court was delivered by the Honourable Mr. Justice Rinfret, wherein he affirmed the judgment of the Honourable the Chief Justice of the High Court of Ontario and dismissed the appeal, holding: pp. 15-19

"that in paragraph 5 there are to be found no words of present gift. p. 17, l. 15-18
"The Testatrix states that she has now a sum of $100,000 invested
"in the name of E. H. Watt, in trust, in the form of a call loan. Her
"direction is that 'the said fund is to be continued to be invested in
"call loans.' A feature perhaps not to be overlooked is that this
"direction is not given to the Executors—at least it is not primarily p. 17, l. 18-20
"so given. The direction is that the investments are to be made by
"the said E. H. Watt, who is not appointed executor. So that the
"fund is really treated as separate and distinct from the estate dis-
"posed of in the Will. And it is to be looked after in this way
" 'during the lifetime of my said son, William George Hamilton p. 17, l. 20-40
"Browne,' that is to say, during the whole period extending up to
"the time fixed by the Testatrix for the distribution to the Appel-
"lants. Only indirectly, 'in the event of the death of the said E. H.
"Watt during the lifetime of my said son,' are the executors to be
"entrusted with the power of investing the fund. Moreover there
"is nothing in paragraph 5 necessarily indicating that, except in
"the event mentioned, the Executors are to have anything whatever
"to do with the fund. In terms, it is not given to them either in
"trust or otherwise. The Testatrix merely says that she has that
"sum of $100,000 invested in a certain form in the name of E. H.
"Watt. The income arising therefrom is to be paid to the son. The p. 17, l. 20-40

"principal itself is not given, but is to remain in the form in which "it is until the death of the 'said son.' Only then, when the Testa- "trix comes to refer to her son's death, and for the first time in the "clause, does she make use of expressions apt to dispose of the "capital or in any way connecting the Appellants with the fund it- "self. According to the words she uses, grammatically and literally, "the Testatrix gives when she divides, and there is no apparent "intention that the gift should take effect at any date prior to the "time she fixes for the division."

10. The Appellant submits that the Court below has erred in the construction of the directions given as to the investment of the fund by the Testatrix and contends

(a) That it is quite evident that the object and intention which the Testatrix had in view in giving these directions was to enable the Executors to continue the investment of the $100,000 fund in "call loans" through the agency of E. H. Watt, which the Executors could not have legally done without this provision; and furthermore this intent is clearly indicated thereafter in the same paragraph where she directs that on the death of E. H. Watt the fund is to be invested in securities authorized by the Laws of the Province of Ontario as Trustee Investments.

(b) There is no provision made in Paragraph 5 providing for the distribution of the fund in the event of the life tenant predeceasing E. H. Watt; nor is there any provision for the investment of the fund should E. H. Watt be unable to invest the same on "call loans," or decline to make such investments.

(c) Under the said Will and under the said "Devolution of Estates Act," all the property of the Testatrix became, upon her death, vested in the Executors, notwithstanding any testamentary disposition, as trustees for the persons by Law beneficially entitled thereto and subject to the payment of her debts and consequently all directions given by the Testatrix in her Will must necessarily be understood as given to her Executors, as the only persons vested with the title and authority to carry out the same; and the first direction in Paragraph 2 is expressly so given.

(d) During the lifetime of the son, the Appellant was not concerned with the investment of the fund so long as the Executors carried out the directions contained in Paragraph 5, and the management of the fund in no way affects the true construction of the Will with respect to the vesting of the legacies.

11. The Appellant further submits that, if the Will is read eliminating Paragraph 7, the direction in Paragraph 5 of the Will to divide the fund, upon the death of the son between four named persons in four specified shares, would clearly vest the fund absolutely in the Appellant and the three daughters of the Testatrix immediately upon her death, and the only question left for determination is: Does Paragraph 7 make the gifts in Paragraph 5 contingent?

12. The Appellant submits—

(a) That Paragraph 7 does not so operate to defeat the vested interests of the Appellant and the said daughters, because they all survived the Testatrix, and consequently, the legacies became vested in them and cannot be divested by subsequent inconsistent and repugnant dispositions made thereof by the Testatrix, and that the dominant object of the Testatrix's bounty and intention was to benefit her granddaughter and daughters solely. p. 16, 11 3-10

(b) That Paragraph 6 of the Will is a direct residuary gift to the same four remaindermen, nominatim, and it vests the residue absolutely at the Testatrix's death, indicating her intention that all her interests under her Will should be finally determined at her death, and that Paragraph 7 should then have no further application. p. 16 p. 16, l. 38

(c) That Paragraph 7 is a gift over on a double contingency, in the alternative, and is ambiguous in meaning and uncertain in application, as from its juxtaposition to Paragraph 6, it must refer to it, or else to both Paragraphs 6 and 5. Paragraph 6, however, is a direct gift, and vests at once at Testatrix's death, and Paragraph 5 should be similarly construed, as there cannot be two periods of vesting of a gift which might fall under either of these Paragraphs according to circumstances.

(d) That by reason of the prior absolute gift by the Testatrix to the original and natural objects of her bounty, and the doubts and inconsistency created by Paragraph 7 as well as the superfluous and unusual association by the Testatrix of her own death with that of her son's, as a composite event, the Court is enabled to endeavour to reconcile this final Paragraph with the preceding Paragraphs, and make all parts consistent, which may be done by construing Paragraph 7 conjunctively, and changing the disjunctive "or" into the conjunctive "and"—thus reading: "predeceasing me and predeceasing my said son;" and so giving an intelligible meaning to the first member of the double contingency; Bentley v. Meech (1858) 25 Beavan, 197; Green v. Harvey (1842) 1 Hare, 428; Law v. Thorpe (1856) 25 L. J. Chy., 75; Weddell v. Mundy (1801)

6 Vesey, 341; Re Crutchley (1912) 2 Chy., 335 &c.; Jarman, 7th Ed. 575-8; or by restricting the generality of death as a contingency to the Testatrix's lifetime, and reading the sentence elliptically, thus—"predeceasing me or predeceasing my said son (in my lifetime)."

(e) That the Court leans to a construction which will preserve—and not defeat—a prior absolute gift, and which will result in giving the greatest benefit to her five named children.

Re Duke &c (1880) 16 Ch. (C.A.) 112; Re Litchfield (1911) 104 L.T. 631; Hope v. Potter (1857) 3 Kay & Johnston, 206; Wright v. Stevens (1821) 4 Barnwall & Anderson 574.

13. The Appellant further also submits that the Testatrix, after making a complete disposition of her estate, including a residuary gift, added Paragraph 7, ex cautela majore, to provide a substitute donee in case of the prior gift failing through lapse in her lifetime; and the words "entitled" and "Surviving" in that Paragraph relate to the time of her death, when the original donees would be entitled in right or interest.

14. The Appellant submits that the judgment of the Supreme Court is wrong and this appeal should be allowed for the following, among other, reasons:

— REASONS —

Because the paramount intention of the Testatrix was to give the Appellant, and her three daughters, on her death, an absolute vested interest in the said legacies, free from contingencies.

A. J. RUSSELL SNOW

N. B. GASH