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April 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

WILLIAM TRAIL AND MARGARET TRAIL ..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Expropriation—Will—Construction—Gift over in the event of death—Life estate—Interest on compensation money.

A testatrix made the following disposition of a certain portion of her estate:—"I give, devise, and bequeath unto my niece M. W. of H., spinster, daughter of my eldest sister M., all that dwelling-house and lot of land now occupied by me (describing it) together with all and singular the appurtenances thereunto belonging, and all fixtures, furniture, bedding and clothing, and all sum and sums of money and other things that may be remaining and found in my said dwelling-house at the time of my decease, and all debts due me, save except as hereinafter mentioned, to have and to hold the said dwelling-house, lot of land and premises aforesaid unto her my said niece M. W., her heirs, executors, administrators and assigns, forever. But in case she should die without leaving lawful issue, then to my nieces hereinafter mentioned, and their children being females." Following this there was a residuary gift or bequest to "the daughters of my sisters M. and H., and to the daughters or daughter of my late brother J., and to their children if any being daughters."

Held, that there was nothing in the will to indicate any intention on the part of the testatrix that the gift over should not take effect unless in her lifetime her niece M. W. died without leaving lawful issue; but on the contrary it was to be inferred from the terms of the will that it was the intention of the testatrix that in the case of the death at any time of the said M. W. without leaving lawful issue, the other nieces to whom she left the residue of her estate should take the property. *Cowen* v. *Allen* (25 S.C.R. 292); *Fraser* v. *Fraser* (26 S. C. R. 316); *Olivant* v. *Wright* (1 Chan. Div. 348) referred to.

2. The property in question had been expropriated by the Crown for the purposes of a public work.

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Held that the suppliant M. T., the devisee under the will, *sub nomine* M. W., was in any event entitled to a life interest in the compensation money, and that she might be paid the interest thereon during the pendency of proceedings to determine the respective rights of all parties interested therein.

Argument of Counsel.

PETITION OF RIGHT for a declaration of title to certain compensation money tendered by the Crown in respect of lands taken at Halifax, N.S., for the purposes of a public work.

The facts of the case are stated in the reasons for judgment.

June 19th, 1900.

The case was now heard at Halifax, N.S.

C. H. Cahan, for the suppliants, contended that Margaret Trail was entitled to the compensation in respect of the lands taken as the owner thereof in fee simple under the will of Margaret Brown. The devise was to the suppliant Margaret Trail, née Wilson, in fee upon the condition that "in case she should die without leaving lawful issue" the property should vest in certain other persons in tail. Now the words "in case she should die," &c., must, we submit, be taken to refer to death in the lifetime of the testatrix; and the devise was by way of substitute. Now the will was dated the 13th January, 1858, and by *The Revised Statutes of Nova Scotia*, first series (1851), we find that all estates tail are abolished, and every estate which would have therefore been adjudged a fee-tail should thereafter be adjuged a fee-simple. (And see R. S. N. S., second series, (1859) c. 112; R. S. N. S., third series, c. 111; 28 Vict. c. 2 (1865) R. S. N. S., fourth series, c. 78; R S. N. S., fifth series, c. 88.) The will in this case was proved in the year 1867. He cites *Clayton* v. *Lowe* (1); *Gee* v. *Mayor of Manchester*

(1) 5 B. & Ald. 636.

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Argument of Counsel.

(1); *Woodburne* v. *Woodburne* (2); *Cooper* v. *Cooper* (3); *Apsey* v. *Apsey* (4); *Theobald on Wills* (5); *Jarman on Wills* (6); *Hawkins on Wills* (7); 29 *Am & Eng. Ency. of Law* (8).

If the suppliant Margaret Trail took anything under the will she took a fee-simple. The subsequent words provide for the contingency of her not taking. This condition is void for repugnancy. He cites *In re Parry* v. *Daggs* (9); *Corbett* v. *Corbett* (10); *Jarman on Wills* (11).

But if the words used by testatrix do not refer to the death of the devisee in the lifetime of the testatrix then the devisee took an estate tail. He cites *Roberts on Wills* (12); *Theobald on Wills*(13); *Woodhouse* v. *Herrick* (14); *Slater* v. *Dangerfield* (15); *Ernst* v. *Zwicker* (16); *Re Anstice* (17).

H. Mellish for the plaintiff;

The words used by the testatrix imply a gift to the nieces in fee subject to a limitation in the event of Margaret Wilson (Trail) dying with issue. A gift to A, and in case of A's death to B means the death of A in the lifetime of the testatrix. The expression "my nieces" must be interpreted to mean nieces other than Margaret Trail. He cites *Cowan* v. *Allan* (18); *Fraser* v. *Fraser* (19); *Duggan* v. *Duggan* (20); *Dugdale* v. *Dugdale* (21); *Wright* v. *Wright* (22).

(1) 17 Q. B. 737.
(2) 23 L. J. Ch. 336.
(3) 1 K. & J. at p. 662.
(4) 36 L. T. N. S. 941.
(5) 4th ed. 534.
(6) 5th ed. Vol. 1, p. 442; Vol. 2, p. 1600.
(7) P. 257.
(8) P. 370.
(9) 31 Chan. D. 130.
(10) 13 P. D. 136; 14 P. D. 7.
(11) 5th ed. vol. 2, p. 855.
(12) Vol. I., p. 481.
(13) P. 337.
(14) 1 K. & J. at p. 361.
(15) 15 M. & W. 263.
(16) 27 S. C. R. 594.
(17) 23 Beav. 135.
(18) 26 S. C. R. 292.
(19) 26 S. C. R. 316.
(20) 17 S. C. R. 343.
(21) 38 Ch. D. at p. 181.
(22) 1 Ves. Snr. 408.

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C. H. Cahan replied, citing *Olivant* v. *Wright* (1); *Besant* v. *Cox* (2).

THE JUDGE OF THE EXCHEQUER COURT now (April 2nd, 1901) delivered judgment.

The petition is brought for a declaration that the suppliant Margaret Trail, whose maiden name was Margaret Wilson, is entitled to the sum of three thousand dollars as compensation for certain lands in the City and County of Halifax, taken by the Crown for the use of the Intercolonial Railway. The claim, made in the petition as filed, is based upon the allegation that at the time of the taking of the lands Margaret Trail was the owner thereof in fee-simple, as devisee under the will of one Margaret Brown. By an amendment to the petition the sum is, in the alternative, claimed by her as surviving executrix of the last will and testament of Margaret Brown. It is very clear, I think, that Margaret Trail is not entitled to the compensation money as executrix. Margaret Brown having died in 1867, and the lands not being expropriated until 1898.

Whether or not she is entitled as owner in fee-simple of the lands at the time they were taken by the Crown depends upon the construction of Margaret Brown's will, in which occur the following gifts and devises:

"I give, devise and bequeath unto my niece Margaret Wilson, of Halifax, spinster, daughter of my eldest sister, Margery, all that dwelling-house and lot of land now occupied by me, situate, lying and being in the north suburbs of Halifax, commonly called Dutch Town, abutted and bounded as follows: On the east by Water Street, on the south by the late Jacob Hurd's lot, now or lately the property of Samuel Marshall, and on the north and west by the property now

(1) 1 Ch. D. 346. (2) 6 Ch. D. 604.

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or lately of Michael Leonard, measuring on Water Street forty-two feet, and backwards towards Lockman Street, one hundred and fifty feet, being lot number seven, letter C, in said north suburbs, together with all and singular the appurtenances thereunto belonging, and all fixtures, furniture, bedding and clothing, and all sum and sums of money and other things that may be remaining and found in my said dwelling-house at the time of my decease, and all debts due to me, save except as hereinafter mentioned, to have and to hold the said dwelling-house, lot of land and premises aforesaid unto her my said niece, Margaret Wilson, her heirs, executors, administrators and assigns forever: But in case she should die without leaving lawful issue, then to my nieces hereinafter mentioned and their children being females."

* * * * * * * *

"I give and bequeath unto the daughters of my sisters Margery and Helen, and to the daughters or daughter of my late brother John, or their children, if any, being daughters, all the rest, residue and remainder of my estate, property and moneys, particularly my shares in the Bank of British North America, to hold the same to the said daughters of my said two sisters, and the daughters or daughter of my said brother John and their children, being females, share and share alike, but free from the debts, control or engagements of any husband or husbands they or any or either of them now or may hereafter have. And I do hereby declare that the separate receipts of my said several nieces or their daughters—provided said nieces or daughters be duly identified as such—signed by them, respectively, in presence of two credible witnesses shall be sufficient discharges to my said executrix and executor for such sum or sums of money as shall be expressed in such receipts."

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And the question is whether the words "in case she should die without leaving lawful issue" have reference to her death during the lifetime of the testatrix, or to her death at any time. Unless a contrary intention appears by the will, a gift over in the event of death without issue is held to mean death without issue at any time. *Cowan* v. *Allen* (1); *Fraser* v. *Fraser* (2), and cases cited in the reasons for judgment therein. See also *Olivant* v. *Wright* (3).

There is nothing, in my opinion, in the will in question to indicate an intention on the part of the testatrix that the gift over should not take effect unless in her lifetime her niece, Margaret Wilson, died without leaving lawful issue. On the contrary, I infer from its terms that it was her intention that in the case of the death at any time of the latter without leaving lawful issue, the other nieces, to whom she left the residue of her estate, should take the property.

If I had come to a contrary conclusion I should not have stated it without having made the other persons mentioned parties to the action, and affording them an opportunity of being heard. Whether that could be more conveniently done in an information by the Crown than on the present proceeding need not be now considered. It is clear, however, that the suppliant, Margaret Trail, is entitled to a life interest in the fund or sum of money mentioned; and there can be no objection to the interest thereon being paid to her during the pendency of proceedings to determine the respective rights of the parties. But I give no direction at present as to that. It is a matter that may possibly be arranged by counsel. For the present I give leave to either party to speak to the form of the

(1) 26 S. C. R. 292. (2) 26 S. C. R. 316.
(3) 1 Chan. D. at p. 348.

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judgment that should be entered up, or to obtain further directions.

Judgment accordingly.

Solicitor for suppliants: *W. A. Henry.*

Solicitor for respondent: *W. B. Ross.*