

Re Walker, (1925) 56 OLR 517

Middleton, J.A:

[1] An appeal from the judgment of Mr. Justice Riddell pronounced on the 27th September, 1924, declaring that the estate of the late Ellen Fitze Walker does not include any part of the estate of the late John Walker undisposed of by her at the time of her death.

[2] John Walker died on the 27th March, 1903, and first made his will, bearing date the 17th November, 1902, which was in due course admitted to probate, his widow being his sole executrix. At the time of his death his estate amounted to approximately \$16,000. By his will he provided as follows: > “I give and devise unto my said wife all my real and personal property saving and excepting thereout as follows namely my gold watch and chain I give to my nephew John Noble Walker son of my brother William Walker and all other jewellery I may have at the time of my decease I give to my nephews William Craig Walker and Percy Dugald Walker brothers of the said John Noble Walker share and share alike and also should any portion of my estate still remain in the hands of my said wife at the time of decease undisposed of by her such remainder shall be divided follows ...”

[3] The widow survived until 1922. Her will has been duly admitted to probate. Her estate, including all that remained of her husband’s estate, was valued at \$38,000.

[4] Those claiming under the husband’s will seek to have some portion of this estate earmarked as being an “undisposed of” portion of the husband’s estate. Those claiming under the wife’s will contend that under the provision of the husband’s will the widow took absolutely. Mr. Justice Riddell decided in favour of those claiming under the husband’s will. From this decision an appeal is now had.

[5] From the earliest times the attempt has been made to accomplish the impossible, to give and yet to withhold, to confer an absolute estate upon the donee, and yet in certain events to resume ownership and to control the destiny of the thing given. By conveyance this is impossible. Where there is absolute ownership, that ownership confers upon the owner the rights of an owner and restrains an alienation; and similar attempts to mould and control the law are void: *In re Rosher* (1884), 26 Ch. D. 801.

[6] As long ago as 1498 (13 Hen. VII. 22, 23, pi. 9), Bryan, C.J., interrupted counsel arguing before him that a condition on a fee simple not to alien was good, saying that the Court “would not hear him argue this conceit, because it is simply contrary to common learning and is now, so to speak, a principle ... because in this way we should transpose all our old precedents. Therefore speak no more of this point:” Gray’s Restraints on the Alienation of Property, 2nd ed., pp. 9, 10.

[7] By an executory devise testators succeed in many cases in attaining that which would have otherwise been impossible — creating a future right which would on the happening of certain events come into existence and terminate a pre-existing estate in fee simple, but limits have been placed upon this right constituting exceptions to the general rule that an estate given by will may be defeated on the happening of any event. > One of these exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution, and to alter its course . . . Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and who is to take effect on the exercise of any of the rights incident to the estate, is void; and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation, or an attempt at alienation, is void, because the right of alienation is incident to every estate in fee simple as to every other estate. Another illustration of the same principle is that which arises where the exercise of the executory devise over is made to take effect upon not alienating, because the right to enjoy without alienation is incident to the estate given.

[8] I quote Fry, J. *Shaw v. Ford*(1877), 7 Ch. D. 669, 673, 674), and as complementary to this quotation I would refer to the learned discussion of this case in the decision of O'Connor, M.E., in an Irish case, *In re O'Hare*, [1918] 1 I.E. 160.

[9] When a testator gives property to one, intending him to have all the rights incident to ownership, and adds to this a gift over of that which remains in specie at his death or at the death of that person, he is endeavouring to do that which is impossible. His intention is plain but it cannot be given effect to. The Court has then to endeavour to give such effect to the wishes of the testator as is legally possible, by ascertaining which part of the testamentary intention predominates and by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention.

[10] So the cases fall into two classes: the first, in which the gift to the person first named prevails and the gift over fails as repugnant; the second, in which the first named takes a life-estate only, and so the gift over prevails. Subject to an apparent exception to be mentioned, there is no middle course, and in each case the inquiry resolves itself into an endeavour to apply this rule to the words of the will in question. The sheep are separated from the goats; and, while in most instances there is not much doubt, in some instances the classification is by no means easy.

[11] Speaking generally, no aid can be derived from reported decisions which do

not establish a principle but simply seek to apply an established principle to a particular document. Nothing can well be added to the statements of Jessel, M.E., in *Aspden v. Seddon* (1874), L.E. 10 Ch. 397, note, and of Collins, M.R., in *Foulger v. Arding*, [1902] 1 K.B. 700. These being readily accessible, I refrain from quoting at length, only extracting a few words from the earlier decision (p. 397): > I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same.

[12] No better illustration of the danger of relying upon earlier decisions and disregarding the document under consideration can be found than in the cases dealing with this very subject. *Constable v. Bull*, 3 DeG. & Sm. 411, always cited, is a most unsatisfactory case, because the Court, while recognising the true rule, did great violence to the words of the will. *Re Sheldon and Kemble* (1885), 53 L.T.R. 537, followed, and instead of seeking to apply the rule to the will there in question the Court tried to distinguish between the words of the will in the case in hand and the words of the will in the earlier case. An Australian case, *Wright v. Wright*, [1913] Vict. L.R. 358, points out the unsatisfactory result.

[13] To quote again from Sir George Jessel's judgment (L.R. 10 Ch. at p. 398), already referred to, "And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner."

[14] A note in 40 L.Q.R., 3.93-395, discusses this principle and refers to other cases.

[15] I have referred to an apparent exception to the rule which might be regarded as constituting a third class of cases into which some fall. These are cases in which all that is given to the first taker is a life-estate, but the life-tenant is given a power of sale which may be exercised at any time during the currency of his estate. There is no doubt that this may be validly done. It is not uncommon in cases where property is held in trust. In such cases power of sale is frequently vested in trustees who are empowered to sell and pay the purchase-money to the life-tenant for his maintenance. *Re Johnson* (1912), 27 O.L.R. 472, is a good example. These cases constitute only an apparent exception to the rule because in them there is no conflict upon the face of the gift. Whether a case can be brought within this class is altogether a matter of construction, and the will here in hand plainly does not fall within it.

[16] The case of *Shearer v. Hogg* (1912), 46 Can. S.C.R. 492, affirming the judgment in *Shearer v. Forman* (1911), Q.R. 40 S.C. 139, is sometimes referred to as in conflict with these views. It is a case governed by the Civil Law, which recognises substitution "*de residuo*" or "*de eo quod supererit*" something quite unknown to the English law. The Court was endeavouring to ascertain the intention of the testator to determine if there was a valid substitution. The remarks as to the similarity of the law of the two Provinces must be taken as

directed to the duty of the Court to ascertain the intention of the testator and when it is possible so to do to give effect to it. The Supreme Court decision is more readily understood when the judgment in the Court below is read.

[17] Turning now to the will before the Court. I agree with the judgment in review that the words “undisposed of” do not refer to a testamentary disposition by the widow but refer to a disposal by her during her lifetime. I am, however, unable to agree with the construction placed upon the will otherwise. It appears to be plain that there is here an attempt to deal with that which remains undisposed of by the widow, in a manner repugnant to the gift to her. I think the gift to her must prevail and the attempted gift over must be declared to be repugnant and void.

[18] I would therefore allow the appeal and declare the construction of the will accordingly. Costs may well come out of the wife’s estate.

[19] Appeal allowed.