Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James H. Kennedy v. *David Kennedy and others from the Court of Appeal for Ontario (Privy Council Appeal No. 37 of 1913); delivered the 1st August 1913.*

PRESENT AT THE HEARING:

LORD ATKINSON.
LORD SHAW.
LORD MOULTON.
LORD PARKER OF WADDINGTON.

[DELIVERED BY LORD PARKER OF WADDINGTON.]

The testator David Kennedy by his will dated the 4th June 1903 appointed his son, the present Appellant, Annie Maud Hamilton, and his grand-daughter, Gertrude Maud Foxwell (thereinafter called his trustees), to be his executor and executrixes and he devised to the Appellant his dwelling-house and premises therein mentioned, subject nevertheless to the provision thereinafter contained for the benefit of Annie Maud Hamilton and Gertrude Maud Foxwell. By this provision each of these ladies was to be entitled to live in the dwelling-house as her home and to occupy a room therein for her life, and was also to be entitled to all necessary maintenance and board which the testator made a charge on the premises. The testator also gave an annuity and various pecuniary legacies and devised and bequeathed

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his residuary estate both real and personal to his executor, executrixes, and trustees aforesaid, to be used and employed by them in their discretion or in the discretion of the majority of them so far as it might go in the maintenance and keeping up of his said dwelling-house and premises therein-before-given to the Appellant, with full power to sell the real estate and devote the proceeds to keeping up and maintaining his said residence in the manner in which it had been theretofore kept up and maintained, and if for any reason it should be necessary that the said residence should be sold, the testator directed that upon such sale being completed the residuary estate then remaining should be divided in equal proportions among the pecuniary legatees under his will.

The chief question now arising for decision is whether any definite limit can be assigned to the duration of the discretionary trust affecting the testator's residue. If no such limit can be assigned the trust is void as offending against the perpetuity rule. Their Lordships are of opinion that no such limit can be assigned. It was suggested in the Court below that according to the true construction of the will the discretionary trust is exercisable only by the three persons, or a majority of the three persons by the will appointed to be the testator's executor, executrixes, and trustees, and could therefore not be exercised beyond lives in being. This suggestion was not pressed before their Lordships' Board, and indeed it is, in their Lordships' opinion, fairly obvious that the discretionary trust is not vested in different persons, but in the holders for the time being of a definite office. (*See Re* Smith 1904, 1 Ch. 139). The argument relied on before their Lordships was to the effect that, according to the true construction of the will, the trust was for the benefit

only of the Appellant and the two ladies who were entitled to use the dwelling-house as their home, and therefore could only be exercised during the lives of those persons or the lives or life of the survivors or survivor of them. It is to be observed, however, that the trust is not to keep up a home for these three persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death. It is a trust which, if valid, would enure for the benefit of all persons for the time being interested in the dwelling-house, and is by the testator himself contemplated as coming to an end only if the dwelling-house be sold, an event which may not take place within the period allowed by the rule against perpetuities. The trustees, or a majority of them, are to determine as occasion arises, the amount to be expended, and there can be no person entitled to determine the trust as long as there is any part of the trust fund remaining unexpended, provided the dwelling-house is still unsold. Under these circumstances, their Lordships are of opinion that the trust offends against the perpetuity rule and is void. (*See Clarke* v. *Clarke*, 1901, 2 Ch. 110. *Re* Blew, 1906, 1 Ch. 624, and *Re* De Sommery, 1912, 2 Ch. at p. 630).

The Appellant also contended that the Respondents were all of them estopped from setting up the invalidity of the discretionary trust by reason of the judgment in the action of *Kennedy* and *Kennedy* referred to in the Appellant's case. In that action there was some suggestion that the discretionary trust was void for uncertainty, but the point, obvious though it was, as to the effect of the perpetuity rule, appears for some reason to have passed unnoticed. Moreover, the Plaintiff in that action based his claim upon interest which he claimed under the will, and not upon his title as next-of-kin or otherwise

against the will. Under these circumstances their Lordships are of opinion that there is no such estoppel as alleged.

The Appeal therefore fails, and their Lordships will humbly advise His Majesty to dismiss the same with costs, but their Lordships consider that there should be one set of costs only as between the several Respondents.

With regard to the Petition of Madeline Kennedy, no useful purpose could, in the view taken by their Lordships of the true construction of the will, be served by granting the prayer of such Petition. Their Lordships will, accordingly, humbly advise His Majesty to make no Order thereon.

In the Privy Council.

JAMES H. KENNEDY

v.

DAVID KENNEDY AND OTHERS.

DELIVERED BY LORD PARKER OF WADDINGTON.

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