

58, 1936

In the Privy Council

No. of 1936

---

ON APPEAL FROM THE SUPREME COURT OF CANADA  
FOR ONTARIO

(By special leave granted)

---

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.

---

RECORD OF PROCEEDINGS

---

LAWRENCE JONES & CO., *Solicitor for the Appellants.*

BLAKE & REDDEN, *Solicitors for the Respondents.*

— I N D E X —  
— OF REFERENCE —

NO.	DESCRIPTION OF DOCUMENT	DATE	PAGE
1	Reasons for Judgment of Chief Justice of High Court for Ontario .....	22nd December, 1932	10 & 11
2	Formal Judgment of Chief Justice of High Court for Ontario .....	31st March, 1933	12 & 13
3	Order granting leave to appeal	7th April, 1933	14
4	Special Case .....	28th July, 1933	3 to 9
5	Reasons for Judgment Supreme Court of Canada .....	6th March, 1934	15 to 19
6	Formal Judgment .....	6th March, 1934	21 & 22
7	Order of Judicial Committee granting leave to appeal ....	20th December, 1934	23 to 25

## IN THE SUPREME COURT OF CANADA

IN THE MATTER OF the Estate of Katherine Hamilton Browne,  
Deceased;

10 AND IN THE MATTER OF the construction of the Will of the said  
Katherine Hamilton Browne, Deceased, dated the 16th day of  
December, 1929.

---

SPECIAL CASE

(Submitted to the Supreme Court of Canada)

This is an Appeal from the Judgment of the Honourable the Chief  
Justice of the High Court for Ontario in so far as it declared and ad-  
judged that the legacies directed by the Testatrix Katherine Hamilton  
Browne, deceased, under paragraph 5 of her Will (hereinafter set out)  
20 to be paid to Enid Browne, Florence Yoda Moody, Constance Emma  
Kinnear and Helen Smith, named therein, upon the death of William  
George Hamilton Browne, did not, nor did any of such legacies, become  
vested upon the death of the said Testatrix.

The said Judgment was rendered pursuant to an originating Notice  
of Motion submitting for the adjudication of the Court (amongst other  
questions not relevant to the present issue) the questions set out in the  
second, third and fourth paragraphs of the said Notice of Motion, which  
read as follows:

30 “(2) When do the respective shares of the four beneficiaries  
“entitled to the corpus of the said fund in remainder, under Para-  
“graph 5 of the said Will, become vested?

“(3) Do their shares vest absolutely, immediately upon the  
“death of the Testatrix, payable on the death of the said William  
“George Hamilton Browne, through their having survived the Testa-  
“trix, under the first contingency of Clause 7 of the said Will? or,

“(4) Are such respective shares liable to be divested through  
“the beneficiaries predeceasing the said William George Hamilton  
“Browne leaving issue, under the second contingency of Clause 7?”

40

---

For the disposition of this case Counsel representing the parties in-  
terested, have agreed upon the following facts:

1. That KATHERINE HAMILTON BROWNE died at Toronto, on the  
17th March, 1930.
2. That KATHERINE HAMILTON BROWNE made her last Will and  
Testament, dated the 16th December, 1929.
3. That Probate of the said Will was granted to WILLIAM GEORGE

HAMILTON BROWNE and THOMAS CAMERON URQUHART, the Executors named therein.

Will of  
deceased  
dated 16th  
Dec., 1929

4. That the said Will is in the words and figures following:

“THIS IS the Last Will and Testament of me, KATHERINE  
“HAMILTON BROWNE, wife of John Charles Browne, of the City  
“of Toronto.

“1. I REVOKE all former Wills and testamentary dispositions  
“at any time heretofore made by me. 10

“2. I DIRECT my executors hereinafter named to pay all my  
“just debts and funeral and testamentary expenses as soon after my  
“decease as may be convenient.

“3. I GIVE, DEVISE AND BEQUEATH unto my son, William  
“George Hamilton Browne, of Toronto, my house and premises at  
“21 Warren Road, Toronto, together with all household furniture,  
“pictures, paintings, books, plate, cutlery and linen, and other house-  
“hold effects; and also all automobiles which I may own at the time  
“of my death, for his own use absolutely.

“4. I GIVE and BEQUEATH unto my son, William George 20  
“Hamilton Browne all moneys, profits, stocks, bonds and securities  
“in my account in the firm of Watt & Watt, Stock Brokers, 6 Jordan  
“Street, Toronto, or any other firm; together with all my equity in  
“any stocks or bonds or shares in any Company or undertaking, pur-  
“chased for me or sold for me or on my behalf, and the benefit of  
“and interest in all contracts for the sale or purchase of stocks, or  
“shares, bonds or debentures or other securities which I have entered  
“into through the said firm, or any other firm.

“5. Whereas I have now the sum of \$100,000.00 invested in the 30  
“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 Hamil-  
“ton 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 be invest-  
“ed 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 said son during his lifetime. On the 40  
“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.

10 “6. All the rest and residue of my estate, both real and personal,  
“of whatsoever kind and wheresoever situate, I GIVE, DEVISE and  
“BEQUEATH unto my grand-daughter, Enid Browne, and my  
“daughters, Florence Yoda Moody, Constance Emma Kinnear and  
“Helen Smith, to be divided amongst them equally, share and share  
“alike.

“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 person so  
“dying shall take the interest to which their mother would have been  
“entitled had she survived.

20 “8. I HEREBY authorize and empower my executors if and  
“whenever in settlement of my estate, they deem it advisable in their  
“discretion to sell the whole or any part of my real estate at public  
“or private sale, and to execute and deliver all deeds and other in-  
“struments to make a sufficient title thereto.

“9. I NOMINATE AND APPOINT my son, William George  
“Hamilton Browne and Thomas Cameron Urquhart, Barrister-at-  
“law, both of Toronto, to be the executors of this my will.

Will of  
deceased

“WITNESS my hand at Toronto, this sixteenth day of Decem-  
“ber, A.D. 1929.

30 “SIGNED, PUBLISHED AND DECLARED  
“by the above-named Testatrix as and for  
“her last will and testament in the presence  
“of us, both present at the same time, who  
“at her request, in her presence and in the  
“presence of each other, have hereunto sub-  
“scribed our names as witnesses.

“Katherine Hamilton  
Browne”

40 “W. G. Wellington  
“Bank Clerk  
“400 Avenue Road  
“Toronto

“J. C. Browne  
“Retired  
“21 Warren Road.”

5. That the Testatrix was possessed at the time of her death of the said fund of \$100,000.00 referred to in paragraph 5 of the said Will, and the said fund is still intact, excepting as to the sum of \$2,294.00 applied to pay Succession Duty.
6. That all the beneficiaries indicated by name in the said Will survived the Testatrix and are still living, and all of them are now adults.
7. That Florence Yoda Moody is the Mother of three infant children, and Constance Emma Kinnear is the Mother of one infant child, and these children are represented by the Official Guardian who also represents any unborn children of the said Florence Yoda Moody and Constance Emma Kinnear, and of the other two named beneficiaries, Enid Browne and Helen Smith. 10
8. That Helen Smith is the mother of one child, Nedra Caroline Smith, an adult, whose interest under the said Will is the same as that of the said infants.
9. That upon originating Motion to the Supreme Court of Ontario to determine the question whether the said Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith took vested interests in the said fund of \$100,000.00 under the said Will, the Honourable the Chief Justice of the High Court for Ontario 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 Testatrix, following judgments in the Supreme Court of Ontario. 20
10. That in consequence of the said Judgment, and upon the application of the said Florence Yoda Moody, Constance Emma Kinnear and Helen Smith, an order was made by the Court of Appeal for Ontario, dated the 7th day of April, 1933, granting leave to appeal against the said Judgment directly to this Honourable Court. 30
11. That Enid Browne at the date of the application referred to in paragraph 9 hereof, was an infant and represented by the Official Guardian, but that she has since then, on the 9th day of June, 1933, attained the full age of twenty-one years, and is now represented by Counsel for the Appellants.
12. That the questions to be determined are:
  - (a) Whether or not the legacies directed by the said testatrix, 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, became vested upon the death of the said testatrix; 40
  - (b) And should this Honourable Court find that such legacies

Admission  
of facts  
28th July,  
1933

did become vested upon the death of the testatrix, then, whether or not the legacy of any of such Appellants is liable to be divested under or otherwise affected by paragraph 7 of the said Will.

DATED this 28th day of July, A.D. 1933.

A. J. RUSSELL SNOW,

- 10** Solicitor for the Appellants, Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith.

J. E. HARE,

Solicitor for Nedra Caroline Smith, adult daughter of Helen Smith.

- 20** MCGREGOR YOUNG,

Official Guardian for the infant children of Florence Yoda Moody and Constance Emma Kinnear, and of any unborn children of the said Florence Yoda Moody and Constance Emma Kinnear, as well as of Helen Smith and of Enid Browne.

URQUHART, URQUHART,

- 30** SMITH & PARROTT,  
Solicitors for the Executors of the Estate of Katherine Hamilton Browne.

## RE KATHERINE H. BROWNE ESTATE

REASONS FOR JUDGMENT OF THE CHIEF JUSTICE OF  
THE HIGH COURT OF ONTARIO

This originating motion launched by one of the executors raises again the question as to the time of vesting of a legacy where the only expression of the gift is a direction to pay and divide at a future time.

10

The testatrix directed that a certain fund which had been invested for her should continue to be invested in the same class of securities during the lifetime of her son and that the income arising from the investment should be paid to him during his lifetime and that on the death of the son the fund should be divided as follows:

One-half to her granddaughter (for whom the Official Guardian appears) and the remainder equally among her three daughters (for whom Mr. Gash appears). She gave the residue of the estate to her granddaughter and daughters only and she directed (clause 7) that if her granddaughter or any of her daughters should predecease her or her son leaving issue the child or children of the person so dying should "take the interest to which their mother would have been entitled had she survived." The principal question raised by the motion is whether the interests of the granddaughter and the daughters are vested.

20

Reasons for  
Judgment  
of Chief  
Justice of  
the High  
Court, 22nd  
Dec., 1932

Upon consideration I am unable to find anything in the Will to distinguish the gift to the granddaughter and the daughters from the gifts in RE GILMOUR 41 O.W.N. 34 and RE GAUKEL 41 O.W.N. 214 and 365, which were held to be covered by the rule stated in BUSCH vs. THE EASTERN TRUST COMPANY, (1928) S.C.R. 479, and while the force of the reasoning of the dissenting judgment of Magee, J. A. in the Gaukel case at Page 360, is obvious, my opinion is that it is not open to a judge of the first instance in Ontario to depart from the rule as stated in the cases above mentioned.

30

It is contended that the case is distinguishable from the Busch, Gilmour and Gaukel cases, first by the fact that what is being dealt with is a specific existing fund which the testatrix directs to be kept intact during the lifetime of the son and then distributed, and secondly, by the fact that the provision in Clause 7 of the will for the death of the granddaughter or daughter leaving issue indicates that the granddaughter and the daughters were to take vested interests upon the death of the testatrix. It is true in this case the subject matter of the gift is a definite sum, whereas in the Gaukel case the sum was quite indefinite, but the fact seems to me to make no difference in principle. The point in all cases was that the gift was to be found only in the direction to distribute, and

40



the question whether distribution is to be of some fund which at the time of the death of the testatrix is definite, or of a fund which when the time for distribution arrives may be small or great, is unimportant. As to clause 7 of the will I think that in so far as it has any bearing it tells rather against an intention that the gift to granddaughter and daughters shall vest on the death of the testatrix. The words are that the issue of the legatee deceased shall take the interest to which their mother would have been entitled—i.e. the interest to which their mother would have taken title, if she had lived till the time of distribution.

10 What has been said answers the second, third and fourth questions in the motion.

The fifth question is whether the residuary clause of the will governs the disposition of the share of a granddaughter or a daughter upon her predeceasing the son and leaving no issue surviving. It seems to me that no useful purpose will be served by answering this question at present. It is a question that in ordinary course of events is unlikely to arise and if it does arise it ought to be settled upon a motion to which the persons

20 who at the time happen to be directly interested are parties.

The first question is one which can be answered if the parties desire a formal answer. The answer which should be made was indicated during the course of the argument but in a memo which Mr. Gash furnished me on other matters it is stated that an arrangement had been come to with reference to the handling of the trust fund, which arrangement seems to be a satisfactory one, and to make any disposition of the first question undesirable. However, if the parties think that there ought to be a formal answer to the first question, the matter may be mentioned to me before the order is issued.

30 In a supplementary notice of motion two questions were asked at the instance of Mr. Urquhart. These were answered during the course of the argument and the answers may be incorporated in this order.

The cost of all parties to the motion ought to come out of the fund.

22/12/32.

IN THE SUPREME COURT OF ONTARIO

The Honourable, the Chief ) Saturday, the 25th day  
Justice of the High Court ) of March, 1933

IN THE MATTER OF the Estate of  
Katherine Hamilton Browne, late of  
the City of Toronto, in the County of  
York, Married Woman, Deceased.

10

UPON MOTION made unto this Court on the 15th day of September, 1932, and continued on the 20th day of October, 1932, by Counsel for William George Hamilton Browne, one of the Executors and Legatees named in the last Will and Testament of the said Katherine Hamilton Browne, deceased, in the presence of Counsel for Florence Yoda Moody, Constance Emma Kinnear, Helen Smith and Nedra Caroline Smith, and of Counsel for Thomas Cameron Urpuhart, an Executor named in the said Will, and of Counsel for E. H. Watt named in paragraph 5 of the said Will, and of the Official Guardian, representing unborn children, and Enid Browne and the infant children of Florence Yoda Moody and Constance Emma Kinnear, for an Order construing the said Will of the said Deceased and determining the several questions arising under the said Will, set out in the Notice of Motion herein; upon reading the said Will and the affidavits of William George Hamilton Browne, and the affidavits of Ernest Halliday Watt and of Thomas Cameron Urquhart, and the Exhibits referred to in the said several affidavits; and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that this Motion stand over for Judgment, and the same coming on this day for Judgment—

20

Formal  
Judgment,  
25th March,  
1933

30

1. THIS COURT DOTH DECLARE that the legacies directed by the said Testatrix, Katherine Hamilton Browne, deceased, under paragraph 5 of the said Will, to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith, named therein, upon the death of the life tenant, William George Hamilton Browne, did not, nor did any of such legacies become vested upon the death of the said Testatrix, AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

40

.....  
.....

AND THIS COURT DOTH FURTHER ORDER that the costs of all parties to this Motion be taxed as between Solicitor and Client and be paid by National Trust Company out of the capital of the said fund.

JUDGMENT SIGNED this 31st day of March, 1933.

10

(Sgd.) "D'Arcy Hinds."  
Registrar S.C.O.

March 31st, 1933.  
Entered J.B. 54, page 78-9-80.

"H.F."

20

30

40

IN THE SUPREME COURT OF ONTARIO

The Honourable the Chief Justice	)	
of Ontario,	)	
The Honourable W. E. Middleton,	)	Friday, the 7th day
	)	of April, 1933.
The Honourable H. H. Davis.	)	

10

(SEAL)  
E.S.  
10.4.33

IN THE MATTER OF the Estate of Katherine Hamilton  
Browne, late of the City of Toronto, in the County of York,  
Married Woman, deceased.

---

UPON MOTION made unto this Court this day of  
Counsel for the applicants Florence Yoda Moody, Constance Emma Kin-  
near and Helen Smith, upon hearing Counsel for the said applicants and  
Counsel for the Executors of the Estate of Katherine Hamilton Browne,  
deceased, and the Official Guardian representing the infant children of  
Florence Yoda Moody and Constance Emma Kinnear, and Enid Browne,  
upon reading the Judgment of the Honourable the Chief Justice of the  
High Court of Ontario, dated the 25th day of March, 1933, and upon  
hearing what was alleged by Counsel aforesaid—

20

Order  
granting  
leave to  
appeal per  
saltum  
dated 7th  
April, 1933

1. THIS COURT DOTHT GRANT LEAVE to the said applicants  
to appeal directly to the Supreme Court, from the said Judgment, against  
that part only of the said Judgment which reads as follows:

30

“1. This Court doth declare that the legacies directed by the  
“said Testatrix Katherine Hamilton Browne, deceased, under para-  
“graph 5 of the said Will, to be paid to Enid Browne, Florence Yoda  
“Moody, Constance Emma Kinnear and Helen Smith, named there-  
“in, upon the death of the life tenant, William George Hamilton  
“Browne, did not, nor did any of such legacies become vested upon  
“the death of the said Testatrix.”

AND DOTHT ORDER ACCORDINGLY.

2. AND THIS COURT DOTHT FURTHER ORDER that the costs of  
this application, to be taxed or fixed by the Taxing Officer, shall be costs  
in the appeal to the Supreme Court, unless the Supreme Court shall  
otherwise direct.

40

Entered O.B. 133, page 32,  
April 10, 1933.  
“H.F.”

(Sgd.) “D’Arcy Hinds”  
Registrar

REASONS FOR JUDGMENT OF RINFRET, J. OF THE  
SUPREME COURT OF CANADA

(Concurred in by Sir Lyman Duff, C.J.C., and Smith, Cannon  
and Hughes, JJ.)

Rinfret, J.—

10 This is an appeal per saltum from part of the judgment rendered in Weekly Court, at Toronto, on an originating notice of motion submitting for determination certain questions (among others not relevant to the present appeal) arising out of the interpretation of the will of Katherine Hamilton Browne bearing date the 16th day of December, 1929.

The will begins, as usual, by revoking all former testamentary dispositions and by directing the executors to pay all debts, funeral and testamentary expenses.

20 Specific bequests are made unto the son, William George Hamilton Browne; and then follow the main provisions which form the subject of the submission:

“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  
30 “now invested by him in the form of a call loan shall 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 said 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:

40 “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 personal,  
“of whatsoever kind and wheresoever situate, I GIVE, DEVISE and  
“BEQUEATH unto my grand-daughter, Enid Browne, and my

Reasons for  
Judgment  
Supreme  
Court of  
Canada

“daughters, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith, to be divided amongst them equally, share and share alike.

“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 person so dying shall take the interest to which their mother would have been entitled had she survived.”

The final provisions of the will deal with the powers of the executors and appoint as such the son, William George Hamilton Browne, and Thomas Cameron Urquhart, Barrister-at-law, of Toronto.

For the purpose of the appeal, a Special Case was settled by a judge of the Court appealed from, and the questions to be determined are stated thus:

“(a) Whether or not the legacies directed by the said Testatrix, 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, became vested upon the death of the said testatrix;

“(b) And should this Honourable Court find that such legacies did become vested upon the death of the testatrix, then, whether or not the legacy of any of such Appellants is liable to be divested under or otherwise affected by paragraph 7 of the said Will.”

The relevant facts are set out in the Special Case:

The testatrix died at Toronto on the 17th March, 1930.

Probate of her will was granted to the executors appointed therein.

All the beneficiaries indicated by name in the will survived the testatrix and are still living.

All of them are now adults. Enid Browne, who was an infant represented by the Official Guardian at the date of the application, has since attained the full age of twenty-one years and is now represented by Counsel for the Appellants.

Florence Yoda Moody is the mother of three infant children, and Constance Emma Kinnear is the mother of one infant child, and these children are represented by the Official Guardian, who also represents any unborn children of the said Florence Yoda Moody and Constance Emma Kinnear, and of the other two named beneficiaries, Enid Browne and Helen Smith.

Helen Smith is the mother of one child, Nedra Caroline Smith, an adult, whose interest under the will is the same as that of the said infants.

The judgment appealed from, and which was pronounced by the Honourable the Chief Justice of the High Court for Ontario, declared

10

20

30

40

that the legacies directed under paragraph 5 of the will to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith "did not, nor did any of such legacies become vested upon the death of the said testatrix."

The beneficiaries just named appeal from that judgment.

In answering the questions submitted our endeavour must be to give effect to the testator's intention. And the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will (*Auger v. Beaudry*—1920 A.C. 1010, at 1014). If we approach from that viewpoint the will now under consideration, the first thing to be noted is that, throughout paragraph 5, there are to be found no words of present gift. The testatrix states that she has now a sum of \$100,000.00 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 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 disposed of in the will. And it is to be looked after in this way "during the lifetime of my said son, William George Hamilton Browne," that is to say: during the whole period extending up to the time fixed by the testatrix for the distribution to the appellants. 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 \$100,000.00 invested in a certain form in the name of E. H. Watt. The income arising therefrom is to be paid to the son. The 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 testatrix 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 itself. 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.

In contradistinction to the language of clause 5, must we point to the wording of every other clause of the will where the testatrix makes a bequest with the evident intention that it should become vested at once. Invariably and in each case without exception, the testatrix says: "I Give, Devise and Bequeath." That is the expression used in clause 6 (above

set out) where she disposes of the rest and residue of her estate. Such is also the expression in clauses 3 and 4, which it is not necessary to quote in full, and which are the other clauses of the will containing the specific bequests.

The contrast between clause 5 and these other clauses is so striking as to lead to the logical—if not the almost inevitable—conclusion that, while all the other bequests were intended to vest immediately upon the death of the testatrix, the language in clause 5 was purposely chosen to indicate a contrary intention. It evidences a desire to postpone the operation of the gift to the appellants until the period of distribution.

10

That view is further confirmed by clause 7. The direction there is that in the event of the grand-daughter, Enid Browne, or any of the daughters predeceasing the testatrix or predeceasing her son, leaving issue, “the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived.” The interest there referred to, and “to which the mother would have been entitled had she survived,” is the interest conferred in clause 5. In the premises, the fair and literal meaning of those words is that the mother (i.e. any of the appellants) takes no title to that interest unless she survives both the testatrix and her son, and that is to say: till the time of distribution.

20

It follows that our view accords with the judgment pronounced by the learned Chief Justice of the High Court of Ontario.

We feel, however, that we should not part with this case without adding yet one more observation.

In support of his argument before this Court—and apparently also before the learned judge of the first instance—counsel for the respondents as well as the Official Guardian strongly relied upon our judgment in *Busch v. Eastern Trust Co.* (1928 S.C.R. 479).

30

The *Busch* case ought not to be “cited as deciding more than was actually decided” (*In re Gilmour*, 41 O.W.N. 34). There was no intention in that case of laying down a rule of general application, far less of “effecting a radical change in the law and creating some new principle governing the question of vesting.” (*Re: Moore*, 1931 O.R. 454). It is unnecessary to repeat that the golden rule, the fundamental principle whereby the courts must be guided in the interpretation of testamentary documents is that effect must be given to the testator’s intention ascertainable from the expressed language of the instrument. So far as possible, the will itself must speak. If, after careful consideration of the language used, in the particular passage immediately under examination and consistently with the context of the document, the intention remains doubtful, then resort may be had to certain rules which have been generally adopted. Upon the strength of those rules, the courts are enabled to draw a certain conclusion “on the ground that this must more nearly

40



correspond with (the) intention” of the testator. It was one of those rules which this Court thought applicable to the particular language of the will under consideration in the Busch case. But Mr. Justice Newcombe, in delivering the reasons of the Court, was careful in recalling at the outset the cardinal principle that “one must decide according to the intent appearing upon the will” (p. 483); and, in *Singer v. Singer* (1932 S.C.R. 44 at p. 49), speaking for the majority of the Court, he had

**10** further occasion of pointing out the limited application of the rule acted upon in the Busch case. The rule itself, as stated in *Williams* (12th Ed. p. 795), is made subject to many qualifications. Each will must be construed according to the apparent intention of the testator (*Williams on Executors* 12th ed. p. 726). While the well known rules or the decided cases are no doubt helpful in ambiguous matters or in affording illustrations, “in every case it is the testator’s intention, if it can be gathered from the will, which must govern.” (*Singer v. Singer*—1932 S.C.R. at p. 49). The appeal will be dismissed with costs. XX

**20** The new questions submitted in the Special Case will be answered as follows:

Question (a): The legacies referred to did not become vested upon the death of the testatrix.

Question (b): In view of the answer to the first question, the point submitted here does not arise.

**XX—** Reporter’s note: On a subsequent motion, the parties interested consenting, an Order was made for payment of the costs of all parties in this

**30** Court out of the fund.

IN THE SUPREME COURT OF CANADA

Tuesday the 6th day of March, A.D., 1934.

PRESENT:

The Right Honourable Sir Lyman Poore Duff, P.C., G.C.M.G., Chief Justice,

The Honourable Mr. Justice Rinfret,

The Honourable Mr. Justice Smith,

The Honourable Mr. Justice Cannon,

The Honourable Mr. Justice Hughes.

The Honourable Mr. Justice Smith being absent, his judgment was announced by the Right Honourable the Chief Justice, pursuant to the Statute in that behalf.

10

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

20

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

SEAL

S. C. C.

BETWEEN:

FLORENCE YODA MOODY, CONSTANCE EMMA KINNEAR, HELEN SMITH and ENID BROWNE,

APPELLANTS,

and

THE OFFICIAL GUARDIAN on behalf of the infant children of Florence Yoda Moody and Constance Emma Kinneer, and of any unborn children of the said Florence Yoda Moody and Constance Emma Kinneer as well as of Helen Smith and of Enid Browne

30

and

William George Hamilton Browne and Thomas Cameron Urquhart executors of the Estate of Katherine Hamilton Browne, Deceased

and

Nedra Caroline Smith

RESPONDENTS.

LAW  
STAMPS

\$10.00

Formal  
Judgment  
Supreme  
Court of  
Canada

The appeal of the above named appellants pursuant to leave to appeal per saltum granted by the Court of Appeal for Ontario, on 7th April, A.D. 1933, from that part of the judgment of The Honourable The Chief Justice of the High Court for Ontario, pronounced in the above cause on the 25th day of March in the year of our Lord 1933, which declared that the legacies directed by the said testatrix Katherine Hamilton Browne, deceased, under paragraph 5 of her said Will, to

40

be paid to the said appellants, upon the death of the life-tenant William George Hamilton Browne, did not, nor did any of such legacies, become vested upon the death of the said Testatrix, having come on to be heard before this Court on the 28th and 29th days of November, in the year of our Lord 1933, on a special case, in which the following questions were to be determined:

- 10 (a) Whether or not the legacies directed by the said Testatrix, 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, became vested upon the death of the said Testatrix:
- 20 (b) and should this Honourable Court find that such legacies did become vested upon the death of the Testatrix, then, whether or not the legacy of any such Appellants is liable to be divested under or otherwise affected by paragraph 7 of the said Will,

in the presence of Counsel as well for the appellants as the respondents, and upon motion made unto this Court on the 26th day of March in the year of our Lord, 1934, in the presence of Counsel aforesaid, to vary the disposition of costs of the said appeal, whereupon, and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming up on the 6th day of March, 1934, and on the 26th day of  
30 March, 1934, for judgment on the said motion,

THIS COURT DID ORDER AND ADJUDGE that the said judgment of the Honourable the Chief Justice of the High Court for Ontario should be and the same was affirmed, and that the said appeal should be and the same was dismissed.

40 AND THIS COURT DID FURTHER ORDER, ADJUDGE AND DECLARE that the questions submitted in the Special Case should be and the same were answered as follows:

Question (a): The legacies referred to did not become vested upon the death of the Testatrix;

Question (b): In view of the answer to question (a) the point submitted here does not arise.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the costs of all parties in this Court, including the costs of the said motion heard on the 26th day of March, A.D. 1934, and also the costs of all parties of and incidental to the application to the Court of Appeal for Ontario, for leave to appeal per saltum as taxed or fixed by the Taxing Officer of the Supreme Court of Ontario, be paid by the National Trust Company, Limited, out of the capital of the fund referred to in clause number five (5) of the Last Will and Testament of the said Katherine Hamilton Browne, Deceased.

“J. F. SMELLIE,”  
Registrar.

10

20

30

40

## AT THE COURT AT BUCKINGHAM PALACE

The 20th day of December, 1934

## PRESENT

THE KING'S MOST EXCELLENT MAJESTY  
 LORD PRESIDENT                      SECRETARY SIR JOHN SIMON  
 10 LORD CHAMBERLAIN                 SIR PHILIP SASSOON

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 6th day of December, 1934, in the words following, viz. :—

20 “WHEREAS by virtue of His Late Majesty King Edward the Seventh’s Order in Council of the 18th day of October, 1909, there was referred unto this Committee a humble Petition of Enid Browne in the matter of an 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 of 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 Respondents setting forth (amongst other matters) that the question at issue relates to the vesting of certain legacies under the Will of the above mentioned Katherine Hamilton Browne deceased (hereinafter called ‘the testatrix’): that several questions having arisen regarding the construction of the Will an Originating Motion was made on behalf of William George Hamilton Browne in the High Court Division of the Supreme Court of Ontario for the opinion and direction of the Court on the following question amongst others viz.: (2) When do the respective shares of the four beneficiaries entitled to the corpus of the . . . . fund in remainder under paragraph 5 of the . . . . Will become vested?: that the parties to the Originating Motion other than the Appellant and the Respondent daughters were the Official Guardian on behalf of the existing infant children of Florence Yoda Moody and Constance Emma Kinnear and the unborn children of them Helen Smith and the Appellant respectively the executors and Nedra Caroline Smith an adult daughter of Helen Smith: that the Motion was heard by Rose C.J. of the High Court: that on the 25th

Order of  
 Judicial  
 Committee  
 of the  
 Privy  
 Council  
 granting  
 leave to  
 appeal  
 dated 20th  
 Dec., 1934

day of March 1933 the learned Judge delivered judgment declaring that the legacies directed by the testatrix under paragraph 5 of her Will to be paid on the death of William George Hamilton Browne did not nor did any of such legacies become vested in the legatees on the death of the testatrix: that the learned Judge held that in construing the Will he was bound by a rule which he understood to have been laid down by the Supreme Court of Canada in *Busch v. The Eastern Trust Company* 1928 S.C.R. 479: that as the *Busch* case had been previously followed in the Court of Appeal for Ontario in several cases involving the same question the Petitioner obtained leave from the Court of Appeal for Ontario to appeal per saltum direct to the Supreme Court of Canada: that the form of the questions actually submitted to the Supreme Court was as follows: '(a) Whether or not the legacies directed by the said testatrix, 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, became vested upon the death of the said testatrix (b) and should this Honourable Court find that such legacies did become vested upon the death of the testatrix, then whether or not the legacy of any such Appellant is liable to be divested under or otherwise affected by Paragraph 7 of the said Will': that on the 6th March, 1934, the Judgment of the Supreme Court was delivered dismissing the Appeal: that the Order of the Supreme Court declared in answer to Question (a) that the legacies referred to did not become vested upon the death of the testatrix and that in view of the answer to Question (a) the point submitted in Question (b) did not arise: that pending the Appeal to the Supreme Court and the delivery of judgment in the Petitioner's case judgments in several cases pending in the Courts of Appeal in Ontario and Manitoba in which similar questions were involved were withheld; that upon the delivery of judgment by the Supreme Court in this case, the Judges of the Court of Appeal in Ontario gave judgment in *Re McFarlane* (1934) Ontario Reports, 383, holding that they were compelled to follow the judgment in the *Busch* case: that the *Busch* case has been commented on by the Judges of the Courts in Ontario and Manitoba more particularly in the case of *Re Gaukel* (1932) Ontario Weekly Notes 365 and in the case of *Re McFarlane* (1933) Ontario Weekly Notes 3: that Petitioner submits that the legacies given by paragraph 5 of the Will in remainder after the life estate of the testatrix's son were vested on the death of the testatrix and that payment thereof is postponed for no purpose but to let in the previous life estate: that the amounts of money involved are large: that the legal point in dispute is one of general

10

20

30

40

importance in the administration of Wills in the Dominion of Canada and raises a matter of public interest: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court of the 6th March 1934 or for such further or other Order as to Your Majesty in Council may appear just:

10 "THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and Counsel for the Official Guardian of the infant Respondents Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Judgment of the Supreme Court of Canada dated the 6th day of March 1934 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs: and that both questions submitted to the Supreme Court of Canada ought to be open for consideration on the Appeal.

20 "And their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of his Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

30 Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

"E. LEADBITTEN."

CONSENT OF THE PARTIES AS TO DOCUMENTS COMPRISING  
THE RECORD OF THE PROCEEDINGS

The parties by their Solicitors agree that the transcript from the record to be submitted on the present appeal to HIS MAJESTY IN HIS PRIVY COUNCIL shall consist of the following documents:— **10**

1. Special case ..... 28th July, 1933.
2. Reasons for Judgment of the Chief Justice of the High Court for Ontario ..... 22nd December, 1932.
3. Formal Judgment of the Chief Justice of the High Court for Ontario ..... 31st March, 1933.
4. Order granting leave to appeal..... 7th April, 1933. **20**
5. Reasons for judgment, Supreme Court of Canada ..... 6th March, 1934.
6. Formal Judgment ..... 6th March, 1934.
7. Order of Judicial Committee granting leave to appeal ..... 20th December, 1934.

A. J. RUSSELL SNOW, **30**  
Solicitor for Plaintiff-Appellant.

G. A. URQUHART,  
Solicitor for the Executors.

McGREGOR YOUNG, **40**  
Official Guardian.