

C-114-620

5, 1952

31355

In the Privy Council.

No. 29 of 1950

ON APPEAL FROM THE SUPREME COURT
OF BERMUDA

UNIVERSITY OF LONDON
W.C.1.
20 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE MATTER of the Estate of JAMES NELMES LAMBE deceased
BETWEEN HERBERT LAMBE WILLIAMS (Defendant) - *Appellant*

— AND —

EDGAR RODERIC WILLIAMS (Plaintiff) - *Respondent*

Case for Respondent

- 10 1. This is an Appeal from a judgment of the Supreme Court of Bermuda delivered by Sir Cyril Gerard Brooke Francis, C.J. on the 30th January 1950. Record p. 13.
2. The said judgment was delivered on an originating summons issued for the determination of the proper construction of the Will of James Nelmes Lambe. The said Will is hereinafter referred to as "the Will" and the said James Nelmes Lambe as "the Testator." p. 1. pp. 4-7.
- 20 3. The question of construction raised by the said summons concerned the effect of the bequest contained in clause 3 of the Will. It was common ground between the parties that the effect of the said bequest was to give to the Respondent an interest in a business owned by the Testator at his death. The Respondent contended that the interest so bequeathed was the right to a share in the Testator's interest in the said business (i.e. that the bequest was a specific bequest); the Appellant contended that the said interest was a right to have primary recourse to the said business for the payment of a certain sum (i.e. that the bequest was a demonstrative bequest). The learned Chief Justice decided in favour of the contention of the Respondent.
- 30 4. (A) By the Will, which was dated the 30th September 1927, the Testator, after giving directions for the payment of his debts and funeral and testamentary expenses and appointing the Respondent and one John Emilio Lightbourn to be executors of the Will, provided by clause 3, as follows:—
"I give and bequeath to my nephew the said Edgar Roderic Williams the sum of Five thousand pounds of the capital I have p. 6, ll. 23-6.

invested in the partnership business carried on in the said Islands'' (i.e. the Islands of Bermuda) "under the firm name of J. E. Lightbourn and Company."

p. 6 ll. 27-36.

(B) By clause 4 of the Will the Testator bequeathed pecuniary legacies of the following amounts to the following legatees: £2,000 to each of his sisters Florence Isadora Lambe and Amanda Jane Dickinson Williams; £5,000 to his brother Thomas Youghlet Lambe; and £3,000 to his nephew Herbert Allan Williams and his niece Dora Ellaline Shanks.

p. 6, ll. 37-40.

(C) By clause 5 of the Will the Testator bequeathed the residue of his personal estate unto and equally between his said brother, the Respondent 10 and his great nephews the Appellant and Joseph Donald Shanks.

p. 6, l. 41.

p. 7, l. 3.

(D) By clause 6 of the Will the Testator devised all his real estate unto and equally between his said sisters as tenants in common and if only one of them should be living at his death then he devised all his real estate to such surviving sister.

p. 4, l. 37.

p. 5, l. 2.

5. The Testator died on the 25th March 1936 without having revoked the Will which was proved by the Respondent (the said John Emilio Lightbourn having died on the 2nd April 1929) in the Supreme Court of Bermuda on the 20th August 1936.

p. 8, ll. 12-23.

6. (A) Thomas Youghlet Lambe, in the Will referred to, died on the 20 23rd June 1944, and probate of his Will dated the 2nd May 1936 was on the 28th February 1945 granted by the Supreme Court of Bermuda to the Respondent and James White, the executors named therein.

p. 9, l. 35.

p. 10, l. 7.

p. 10, ll. 32-45.

(B) In his said Will the said Thomas Youghlet Lambe made no reference to any interest to which he was entitled in the estate of the Testator or in the said business of J. E. Lightbourn and Company, and after bequeathing certain pecuniary and specific legacies he bequeathed the residue of his personal estate to the Respondent and Herbert Allan Williams (who is the same person as the Testator's nephew Herbert Allan Williams in the Will referred to) in the proportions of three-fifths and two-fifths 30 respectively, with a proviso that if either of the said legatees should die in his lifetime leaving a child or children living at the death of the Testator (the said Thomas Youghlet Lambe) his share should go to such child or children.

p. 3, ll. 20-24.

(C) The said Herbert Allan Williams survived the said Thomas Youghlet Lambe and died intestate on the 14th August 1945 leaving him surviving his widow Dorothy Vivien Williams and two children only, viz the Appellant and Harold Allan Williams, the latter of whom is an infant.

7. The history of the firm of J. E. Lightbourn and Company, so far as is relevant to this Appeal, is as follows: — 40

(A) On the 21st July 1924 the Testator and the said John Emilio Lightbourn had for some time been carrying on the business of Wine and Spirit Merchants under the aforesaid firm name as partners at will on terms

which were not (so far as is known) reduced to writing and which are now unascertainable.

(B) On the 21st July 1924 the Testator and the said John Emilio Lightbourn executed a Deed of Partnership by which it was agreed (*inter alia*) that the partners should remain partners for 10 years from the date thereof if they should so long live subject to determination as therein provided; that the capital of the Partnership should consist of the amounts then standing to the credit of the Partners in the books of the Partnership and as might be adjusted from time to time; that the Partners should be
 10 entitled to the net profits of the business in equal shares; and that in the event of the Partnership being dissolved by the death of either Partner the other Partner should have power to purchase the share of the Partners so dying upon the terms therein contained. The original of the said Deed of Partnership has disappeared and the fact that such a deed had been executed was unknown to any of the parties to these proceedings until the discovery of a copy thereof (the accuracy of which is not disputed) after the date of the delivery of the judgment now appealed from.

p. 19, l. 30—
 p. 21, l. 38.

(C) The amount standing to the credit of the capital account of the Testator in the books of the Partnership at 31st July 1927 (the date of the
 20 last balance sheet of the Partnership drawn up before the execution of the Will on the 30th September 1927) was £20,191 6s. 5d.

p. 25.

(D) The said John Emilio Lightbourn died on the 2nd April 1929 and pursuant to the provisions of the said Deed of Partnership the Testator purchased from his widow and administratrix his share in the capital of the Partnership for the sum of £32,800, payment whereof was secured by a
 Mortgage dated 30th June 1930 whereof Heads of Mortgage were on 3rd
 July 1930 registered in the Book of Mortgages in the Registry of the Supreme Court of Bermuda. Such Mortgage is still subsisting.

p. 23.

p. 24, ll. 13-20.

(E) At the date of the Testator's death the capital of the business was
 30 totally owned by the Testator and amounted to £20,000.

p. 3, ll. 22-24.

(F) At the Testator's death it was considered impracticable to sell the
 business and it was continued by the Respondent, who in September 1939
 offered it for sale as a going concern. The outbreak of war rendered any such sale impossible and the business has ever since been operated with great success by the Respondent, who has been paid a salary for his services. A balance sheet was drawn up as at the 30th June 1949 which showed the net value of the assets of the business as approximately £161,765.

p. 2, l. 23

p. 3, l. 29.

8. At the date of the issue of the summons herein, it was agreed between all the parties affected

40 (A) That the Respondent was entitled to an interest in the business under clause 3 of the Will; and

(B) that subject to such interest of the Respondent, the business was, under the residuary gift of personalty contained in clause 5 of the Will,

divisible into four equal parts, to which the following persons were entitled respectively (i) the persons beneficially interested in the estate of Thomas Youghlet Lambe, in the following proportions, the Respondent three fifths and Dorothy Vivien Williams, the Appellant and Harold Allan Williams (as the persons entitled on an intestacy of the said Herbert Allan Williams) each two fifteenths; (ii) the Respondent; (iii) the Appellant; (iv) Joseph Donald Shanks.

(c) The persons other than the Respondent mentioned in sub-paragraph (B) above contended that the interest described in sub-paragraph (A) above was limited to the right to be paid £5,000 out of the capital of the business; the Respondent contended that it was the right to a $\frac{£5,000}{£20,000}$ (i.e. a one-
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quarter) share in the business.

p. 1. 9. (A) In order to decide the question at issue between the beneficiaries the Summons in this matter was issued by the Respondent on the 21st October 1949, the Defendants thereto being all the other persons beneficially interested in the residuary personal estate of the Testator, *viz.* the Appellant, the said Dorothy Vivien Williams (who was sued on her own behalf and as guardian of the estate of the said Harold Allan Williams) and the said Joseph Donald Shanks.

p. 12. (B) The said Summons was heard on the 14th day of December 1949 when the learned Chief Justice reserved judgment thereon. 20

p. 13. (C) The learned Chief Justice delivered a reserved judgment on the 30th January 1950, whereby he decided that "the intention of the Testator was that a participation in the capital of the firm of Messrs. J. E. Lightbourn in the proportion that £5,000 bore to the total capital of the partnership firm at the date of his death was to be given to Edgar Roderic Williams."

(D) It is from this judgment that the Appellant now appeals. None of the other Defendants to the said Summons has appealed against the said judgment.

10. (A) At the hearing of the said Summons the question at issue was argued on behalf of the Plaintiff and on behalf of the Defendants on the
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footing that the Testator was at all material times the owner of the whole of the capital of the business and on the footing that any change in the value of his share in the business occurring between the date of the Will and the date of his death was irrelevant, and judgment was given on that footing.

p. 16. (B) On the 31st May 1950 application was made to the Supreme Court of Bermuda on behalf of the Appellant for leave to admit as fresh evidence:

pp. 19-22. (i) the copy of the Deed of Partnership hereinbefore referred to together with an affidavit of one Rupert Carlyle Hollis-Hallett explaining how the said copy came to light and verifying it as a true copy of the lost original; 40

(ii) a certificate of the death of the said John Emilio Lightbourn; p. 23.

(iii) a certified copy of the Grant of Letters of Administration with the Will annexed of the said John Emilio Lightbourn;

(iv) a certified copy of the Heads of Mortgage dated 30th June 1930 hereinbefore referred to;

(v) a further affidavit sworn by Rupert Carlyle Hollis-Hallett; p. 24.

10 (vi) the balance sheet hereinbefore referred to of the said business as at 31st July 1927. p. 25.

(c) The said application having been dismissed the Appellant, applied on the 26th February 1951 by Petition to His Majesty in Council for leave to admit the additional evidence hereinbefore mentioned, which was granted him by Order of their Lordships of the Judicial Committee of that date, their Lordships ordering that the costs of the said Petition and of adducing the said additional evidence should be reserved. pp. 18-19.

20 11. (A) The Respondent submits that the fresh evidence thus admitted does not affect the true construction of clause 3 of the Will. In any event, the Will must (the Respondent contends) speak from the date of the death of the Testator with reference to the property comprised in the bequest. Even if (which the Respondent does not admit) it were right, in the light of such evidence, to take the date of the Will and not the date of the death as the date at which to fix the proportion comprised in the bequest (i.e. if the bequest ought to be construed as a bequest of a share of the Testator's capital invested in the business at the date of his death which bore the same ratio to the whole of such capital as £5,000 bore to the whole of his capital invested therein at the date of the Will), that construction would not, in the submission of the Respondent, affect the conclusion arrived at by the learned Chief Justice. The Testator was in fact (as the learned Chief Justice 30 assumed) owner at his death of the whole of the business and it is plain from the evidence now admitted that the value to be put upon the whole of the Testator's interest in the business was at either date approximately £20,000.

40 (B) Nor, in the Respondent's submission, can the date to which reference must be made to determine the quantum of the bequest affect the question whether the bequest is specific. In this connection the Respondent will contend that the dictum of Kindersley V.C. in *Mullins v. Smith* (1 Dr & Sm 204 at p. 210) is applicable: "A legacy of stock is equally specific whether the testator says, "I give £500 3 per cent consols out of the consols now standing in my name," or "I give £500 £3 per cent consols out of the consols which shall be standing in my name at the time of my decease."

12. It is plain from the judgment of the learned Chief Justice that he was of opinion that the bequest in clause 3 of the Will should be treated

as a bequest of a share in the Testator's interest in the said business and not as a pecuniary legacy. The Respondent contends that the language of clause 3 and the framework of the Will, and also the rule of construction applicable to specific and demonstrative legacies, support this conclusion, in that

- (A) the bequest is contained in a separate clause (clause 3), clause 4 being devoted to pecuniary legacies, a disposition which supports the contention that the bequest is a specific and not a pecuniary legacy;
- (B) the bequest is of a sum "of the capital" invested by the Testator and not of a sum "out of" or "payable out of" such capital and this phrasing is appropriate to a gift of a proportion of such capital and not to a gift of money charged on or payable out of such capital; 10
- (C) it is in accordance with the rule of construction accepted as being applicable in such cases to construe a bequest so phrased as a specific legacy of part of the fund referred to and not as a pecuniary legacy primarily payable out of such fund.

As illustrating the rule of construction referred to in sub-paragraph (c) of this paragraph the Respondent will refer to the cases of *Kirkly v. Potter* (4 Ves. 748 at p. 750) and *Davies v. Fowler* (16 Eq. 308 at pp. 312-3).

13. It is submitted that the judgment of the learned Chief Justice was right and ought to be affirmed for the following among other 20

REASONS

- 1. Because (for the reasons set out in paragraph 12 hereof) the bequest contained in clause 3 of the Will of the Testator should be construed as a specific bequest of a proportion of the Testator's interest in the business of J. E. Lightbourn and Company and not as a demonstrative pecuniary legacy payable primarily out of that interest.
- 2. Because the judgment appealed from was right.

JOHN SPARROW. 30

~~LINCOLN'S INN.~~

24th October, 1951.

In the Privy Council.

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COURT OF BERMUDA**

IN THE MATTER of JAMES NELMES
LAMBE, deceased

BETWEEN :

HERBERT LAMBE WILLIAMS (Defendant)
Appellant

— AND —

EDGAR RODERIC WILLIAMS (Plaintiff)
Respondent

Case for Respondent.

THEODORE GODDARD & CO., and
DEACONS & PRITCHARDS,
5, New Court,
Lincoln's Inn,
W.C.2.