CASE AND COMMENT

WILLS—VESTING—"PAY AND DIVIDE" RULE.—During the past six years, numerous estates of deceased testators in Ontario have been seriously depleted by legal costs incurred on motions for construction. Many of these cases involved the same point, namely, whether a gift of remainder interests, following life interests, made only in terms of a direction to trustees to divide and pay over to beneficiaries, created a vested interest or one contingent on the existence of the beneficiaries at the time of such postponed distribution. For example, if a testator devises and bequeaths all his property to T on trust, to pay the income to A for life, and on his death to divide the corpus equally between C and D, do C and D acquire vested or contingent interests? The problem usually arises when C or D has died before A. Is the estate of such deceased person entitled to participate on the ground that the remainder interest was already vested in him, or was his existence at the death of A a condition precedent to vesting?

As most modern wills involve the creation of a trust, and as the ultimate disposition of the trust property is commonly made by a direction to trustees to divide the trust *res* and then convey to various persons, the importance of these questions is apparent. It might confidently be expected that in a matter of this kind, the result would be free from doubt. The simple illustration given above must have operated as a precedent in countless wills, and while the result seems clear in England, the situation in Canada is not so fortunate.

Two recent decisions, one by the Manitoba Court of Appeal in *Re Hargraft*[1], the other by the Ontario Court of Appeal in *Re McFarlane*[2], dealing with gifts in remainder in terms identical with the C and D illustration given above, reached absolutely contrary results. The Ontario Court held the remainder contingent. The Manitoba Court held it vested. As both Courts purported to follow English and Canadian precedent, the incongruity of conclusion is unfortunate. As the Ontario decision was the culmination of a long and varied series of cases on the subject, one might hope that the problem had been definitely settled in favour of the view expressed in that case. So long as the right of appeal to the Privy Council exists, the writer believes that the question will not lie dormant. Further, it is

[1] [1934] 2 D.L.R. 593.
[2] [1934] O.R. 383.

the writer's opinion that the result reached in Ontario cannot be supported in view of the great weight of English authority to the contrary, and that the Manitoba decision not only states correctly the English law, but what, until quite recently, has been stated to be the law of Ontario.

Prior to 1928, the Ontario decisions can fairly be said to correspond with the result reached in *Re Hargraft*[3]. In that year the Supreme Court of Canada gave judgment in *Busch* v. *Eastern Trust Company*[4]. In *Re McFarlane* the Ontario Court states that its conclusion was dictated by that case; indeed, Middleton, J. A., says that "Had it not been for this decision [the *Busch* case] I am free to admit that I would have arrived at the opposite conclusion"[5]. If that be so, then the Manitoba Court, likewise bound, should have reached the same conclusion as the Ontario Court. Now the will in the *Busch* case did contain a remainder given in terms of a direction to divide, but, in addition, it had other provisions dealing with substitutionary gifts to the issue of the persons who would have taken the remainder had they been alive at the death of the life tenant. The Court, speaking through Newcombe J., disposed of the case, so far as the report shows, by adopting the rule stated in 2 Williams on Executors, 11th ed., p. 981 : " Where there is no gift but a direction to pay, or divide and pay, at a future time, or on a given event or to transfer 'from and after' a given event, the vesting will be postponed till after the time has arrived, or the event has happened, unless, from the particular circumstances, a contrary intention is to be collected." That canon of construction has never been doubted in any English authority. Its operation, however, has been so seriously curtailed by another rule of construction, which may be said to show the "contrary intention" mentioned above, that the first rule quoted is confined in the English cases to those situations where the court can be satisfied that the payment was postponed for some reason personal to the beneficiary[6]. If, on the other hand, the only reason for upholding payment to the ultimate beneficiaries until some future time, is because until that time the fund must be kept by the trustees to carry out other directions of the testator, e.g., the payment of income for life, there is no more reason to prevent

[3] See the early Ontario cases collected in 11 C.E.D. (Ont.) at p. 197. See also an article by Sheard, Vesting of Remainders (1932), 2 Fort. L.J. 118.

[4] [1928] S.C.R. 479.

[5] This is the first intimation by Middleton J. A. in a series of cases in which he participated since 1928, that there was any doubt of the correctness of the rule adopted by the Court of Appeal.

[6] See Theobald, Wills, 8th ed., 656; Jarman, Wills, 7th ed., pp. 1376-7.

a vesting of the remainder than in a common law legal remainder, such as "Blackacre to A for life, remainder to B", in which case it has never been suggested that B does not acquire an immediate vested interest[7]. Thus, to quote from the latest edition of Jarman on Wills[8]: "But even though there be other gift than in the direction to pay or distribute *in futuro;* yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question." As an illustration of this proposition, the example stated at the beginning of this note is given, and the result indicated to be that the ultimate beneficiaries take a vested interest. It is extremely unfortunate that the *Busch* case did not mention this well-established doctrine, or at least indicate in some way that the rule there quoted is not of universal application. The rule concerning gifts of remainders in terms of directions to pay giving a vested interest, has been fixed for so long in England, and followed so often[9], that the later cases assume it as a fundamental starting point from which to work in a complicated situation[10]. We think it correct to say that not only would such a disposition as was found in the will in *Re McFarlane,* be construed in England contrary to the conclusion of the Ontario Court, but that an English court would not even be troubled by an application for construction in such case. Much can still be said, apparently, in favour of specializing the work of court and counsel, as in England.

The Ontario courts appear to have taken the view (although not without protest)[11], that the *Busch* case completely changed the law and made *every* gift, whether of remainder or otherwise, in terms of a direction to "pay or divide", contingent. It seems strange to say that a judgment which does not make even a passing reference to a doctrine which is well established in England, approved by the House of Lords[12], and acted on for years in Ontario[13], should have the effect of overruling such doctrine, even if it were within the powers of the Court to do

[7] See the remarks in *Leeming* v. *Sherratt,* 2 Hare 14.

[8] 7th ed., p. 1377.

[9] See *Leeming* v. *Sherratt* (1842), 2 Hare 14; *Packham* v. *Gregory* (1845), 4 Hare 396. In 1858, Romilly M. R., in *Adams* v. *Robarts,* 25 B. 658, said that a gift in terms of future payment after a life interest had, with one exception, which he considered erroneous, never been doubted.

[10] See for example, *Hickling* v. *Fair,* [1899] A.C. 15; *Re Walker,* [1917] 1 Ch. 38; Re Stephens, [1927] 1 Ch. 1.

[11] See the remarks of Orde J. A. in *Re Moore,* [1931] O.R. 454; the vigorous dissenting judgment of Magee J. A. in *Re Gaukel* [1932], 41 O.W.N. 356, and the judgment of Raney J. in the lower court in *Re McFarlane, supra.*

[12] *Hickling* v. *Fair,* [1899] A.C. 15.

[13] See note 3, *supra.*

so. As a matter of fact, however, in four cases subsequent to the *Busch* case[14], the Supreme Court of Canada has insisted that no departure from principle was made in that case, nor was any new principle introduced by it. This can only mean that the original rule of the English cases is still effective. It is unfortunate that the Supreme Court of Canada did not take the opportunity presented it in *Re Browne*[15], which was an appeal *per saltum* from a single Ontario judge, to settle the dispute in Ontario. In that case, however, as in *Re Hammond*[16], RinfretJ., speaking for the Court, was able to evade the issue by finding, in other parts of the will, evidence of an actual intention regarding vesting. As he said, all canons of construction must give way to the testator's actual intention appearing in the will[17]. In most of these cases, we do not believe that the testator actually considered the vesting problem at all. If not, we should have a fixed rule for an oft-recurring situation.[18] On the other hand, the testator's solicitor may have considered the point and used precedents to effectuate his purpose. Are precedents in Ontario henceforth to be different in this matter than in England? This is a serious question. If any court can find an actual expressed intention in the will, *cadit quaestio*. In view of the most recent cases in the Supreme Court of Canada, we must accept their finding that such was the case in all the wills before them, including that in the *Busch* case as well. If so, such decision has no binding effect on any other application involving a different will. It therefore follows, that the Ontario Court in *Re McFarlane* was free to follow the ordinary canon of construction, there being nothing else in the will to throw light on the question.

The Manitoba Court of Appeal attempted, in *Re Hargraft*, to distinguish many of the Ontario decisions and all the Supreme Court of Canada decisions, on the ground that in the wills involved in these cases, there was a gift over to children or issue if the original beneficiary to whom the trustee was "to pay", died

[14] *Roach* v. *Roach*, [1931] S.C.R. 512; *Singer* v. *Singer*, [1932] S.C.R. 44; *Re Hammond*, [1934] 2 D.L.R. 580; *Re Browne*, [1934] 2 D.L.R. 588.

[15] [1934] S.C.R. 324.

[16] [1934] 2 D.L.R. 580.

[17] *Re Hammond, supra*, at p. 584; *Re Browne, supra*, at p. 592.

[18] See the comments in Gray, Nature and Sources of Law, secs. 700 et seq., where the suggestion is made that the modern attitude of disregarding precedent in the construction of wills may have unfavourable consequences. The author suggests that as a judge in ninety-nine cases out of a hundred has to decide what shall be done with the testator's property on a contingency not contemplated by the testator, he should follow fixed rules in the same manner that he follows fixed rules in cases of intestacy.

before the life tenant[19]. The argument is, that such a gift shows an intention that nothing passes until the death of the life tenant. While this is one method of distinguishing a case which the Court feels contrary to the weight of authority, the distinction seems doubtful. It can equally well be argued that as the rule giving a vested interest is based on a leaning of the courts in favour of an early vesting ,such a gift over operates as a divesting clause in favour of issue[20]. While the explanation attempted by the Manitoba Court enabled it to follow English authority in the case before it, it cannot justify *Re McFarlane* which can only be supported on the ground that the English cases no longer apply in Ontario.

The Ontario Court of Appeal having committed itself in *Re McFarlane* to excluding the rule regarding "convenience to the estate", was confronted with the problem raised by Magee J. A. in his dissenting judgment in *Re Gaukel*[21], and by Raney J. in the judgment under appeal in *Re McFarlane*, namely, conflict with the House of Lords in *Hickling* v. *Fair*[22]. Middleton J. A. attempted to distinguish that case, by saying that it dealt with a gift in remainder (by direction to divide) to a class, and that a class comprised those alive at the testator's death together with those born before the death of the life tenant. The answer to this is that such will be the result if it is a gift of a vested and not a contingent remainder. This depends on whether the rule which Middleton J. A. refuses to follow is adopted in Ontario. Where a person specifies another individually to take after the death of a life tenant, it would seem easier to construe the remainder as vested than where there is a likelihood of vesting in a person unknown to the testator, who might be born after the testator's death and die before the life tenant. It is interesting to find that Jarman on Wills places the case of individuals first, and says in effect that the rule extends as well to a class[23].

[19] Rose C.J.H.C. laid emphasis on this point in the case of *Re Browne*, [1933] O.W.N. 5, which subsequently went to the Supreme Court of Canada.

[20] See *Shrimpton* v. *Shrimpton* [1862], 31 B. 425, and see *Re Walker*, [1917] 1 Ch. 38; *Re Stephens*, [1927] 1 Ch. 1.

[21] (1932) 41 O.W.N. 365.

[22] [1899] A.C. 15. Assuming that the *Busch* case did change the English rule, a nice question of *stare decisis* arises in view of the Privy Council's statement that provincial courts are bound by decisions of the House of Lords. *Robins* v. *National Trust Co.*, [1927] A.C. 515.

[23] *Jarman*, Wills, 7th ed., 1378. See also *Gluck*, The "Divide and Pay Over" Rule in New York (1924) 24 Col. L.R. 8, where the author quotes many decisions as indicating that when the remainder is limited to named persons the courts will more readily find in favour of vesting than in the case of a class,—a result which we believe would be borne out by an examination of the English cases. The article by *Gluck* is instructive on the whole problem discussed here, and indicates that the State of New York is having its own difficulties concerning the same problem.

The class problem is more difficult than that of individuals, and if vesting is assumed in the former, one would have thought that it must of necessity be assumed in the latter.

It matters little, so far as the actual intentions of a testator are concerned, whether the English rule or the Ontario doctrine be followed. What is important is to have a rule on which the draftsman can depend, and which will reduce the expense of litigation to a minimum. If a trust is terminated simply by a direction to pay and divide after life interests have come to an end, are vested interests created in the ultimate beneficiaries? By Ontario authority, no; by other provincial authority[24], and by English authority, yes. *Finis* has not yet been written to this chapter of the law in Ontario.

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PROCEDURE — WITHIN THE JURISDICTION.— Order XLIII., Rule 1 of the Rules of Court of the Province of Nova Scotia, furnishes a method whereby the garnishment of debts payable by a third party to the judgment debtor may be attached by a judgment creditor. The wording of the Order and the accepted practice under it are substantially identical with the similar provisions contained in the Rules of Court of the other common law provinces. Until the present time there has been very little in the way of judicial pronouncement upon the interpretation of the word, "within the jurisdiction" found in The Nova Scotia Rule.

There are two Nova Scotia decisions of importance on the subject. In *Terrell* v. *Port Hood Railway & Coal Co.*[1] it was decided, *inter alia*, that garnishee proceedings cannot be taken against an agent within the jurisdiction. Five years later in *Taylor* v. *Tucker*[2] the Court followed the *Terrell* case and certain other English and Ontario decisions. In both the *Terrell* and *Taylor* cases the money due to the judgment debtor was owing by a garnishee resident outside of the jurisdiction. Beyond this point the decisions cannot be extended. In a New Brunswick case *Ranney* v. *Morrow*[3] the Court decided that a foreign corporation doing business in Canada with a Canadian head office

[24] See *Re Uniacke*, [1934] 2 D.L.R. 413 (Nova Scotia.)
[1] 45 N.S.R. 360.
[2] 49 N.S.R. 469.
[3] (1876), 3 Pugs. 270.

in Quebec and an agency in New Brunswick could not be garnisheed by serving the process upon a New Brunswick agent. This case, apparently carrying the law to the furthest extent, appears to be based upon the theory that law is territorial and the court of a legal unit cannot exercise jurisdiction over anything not within the confines of its own territory[4].

This situation where a company ordinarily resident outside of the jurisdiction but carries on business within the jurisdiction, is covered by special enactment in the Province of Prince Edward Island[5]. In the Province of Manitoba similar provision is to be found. As regards the Province of Nova Scotia there does not appear to be any decision more recent than that of *Taylor* v. *Tucker*,[6] and through what respectfully might be termed a certain amount of judicial reluctance, the rule relating to territorial jurisdiction has been perhaps followed too rigidly and invoked in cases where its use was not warranted and its applicability not clear.

Assume that a judgment debtor residing within a jurisdiction becomes the beneficiary under a policy of life insurance issued by a company having its head office in some province other than that where the judgment debtor resides, and that the judgment creditor takes garnishee proceedings on the policy and serves the provincial agent of the insurance company which is licensed to carry on business in the province under *The Domestic and Foreign Companies Act* mentioned in the *Insurance Companies Act*[7] which provides for the service of process upon the local office of the company. In the light of the cases of *Taylor* v. *Tucker and Ranney* v. *Morrow*[8] apparently these proceedings are not well founded.

Enlarging further upon the case of the insurance company there would scarcely seem to be any justification for the strict recognition of the legal precept limiting the scope of the words, "within the jurisdiction", to Dominion companies with their head offices "within the jurisdiction", as opposed to branch offices in another jurisdiction. A Dominion company which enters into a province and does business there and has property holdings, a local agent and in many cases a provincial manager certainly should be designated and recognized as being "within the juris-

[4] See also: *Martin* v. *Kelley*, (1871) 5 I.R.C.L.S. 404; *Canada Co.* v. *Parmalee*, 13 O.P.R. 308; *Parker* v. *Odette*, 16 O.P.R. 69; *Boswell* v. *Piper*, 17 O.P.R. 257.

[5] (1881) P.E.I. c. 4, ss. 4 and 30. In the Province of Manitoba, R.S.M 1913, c. 46, s. 228, a similar provision is to be found.

[6] *Supra.*

[7] R.S.N.S. 1923, c. 163 s. 25 (3).

[8] *Supra.*

diction". A strong argument, however, is made out to the contrary by reference to the authorities on the point which in the absence of express statutory declaration would seem to render the branch office of a Dominion company within the province immune from garnishee proceedings. The principle of *Taylor* v. *Tucker, Ranney* v. *Morrow,* and *Terrell* v. *Port Hood Richmond Railway & Coal Co.* probably had some merit when Dominion incorporation of companies was not used as much as is the case today. A court cannot and should not presume to interfere with "a person" not within the jurisdiction, but notwithstanding authority to the contrary it seems difficult to contend that many of the Dominion companies within a province even though they have branch offices are not "within the jurisdiction". It may be that considerable importance should be attached to the degree of permanence of a branch office and the attendant circumstances showing the intention of the company to maintain the branch. The authorities above referred to, however, do not appear to recognize that the basis of a decision of whether or not a corporation is "within the jurisdiction" may largely depend upon the scope of the company's business, its property holdings and all other kindred circumstances. The case that seems to be most in line with this view without actually following it, is: *McMulkin* v. *Traders Bank of Canada*[9] wherein the principle is laid down that where the garnishee is not within the jurisdiction, the test in deciding whether the debt due by it may be attached depends upon the right of the debtor to sue the garnishee within the jurisdiction for that debt.

The obstacles which surround the taking of garnishee proceedings can be overcome by another method, that is, by compelling an assignment under the provisions of the *Collection Act.* This procedure, however, might take and occupy sufficient time to enable a judgment debtor to dispose fraudulently of his interest to some unsubstantial third party with the possibility of eventually defeating the claim of the judgment creditor. Garnishee proceedings are not open to this objection for in such cases the judgment debtor is not aware of the steps that are being taken until served with a copy of the order nisi. It is obvious that if a "person" is amenable to garnishee proceedings, a much more effective weapon is placed in the hands of a judgment creditor than by compelling him to invoke the provisions of the *Collection Act* the use of which may or may not result in satisfaction being obtained.

[9] 6 D.L.R. 184.

With our increasing commercial activity and the gradual growth of Dominion companies doing business within the various provinces, a rigid adherence to the Rule as laid down in the Nova Scotia authorities would not seem to be in the best interests of civil rights of the individual. In the provinces of Prince Edward Island, Manitoba and Ontario there appears to be a statutory departure from the Nova Scotia precedent and it is submitted that a statutory enactment doing away with the Rule in the *Terrell* case and *Taylor* v. *Tucker*, and making the question of residence "within the jurisdiction" a question of fact would best serve the interests of the civil rights of all parties who find it necessary to engage in litigation.

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THE COURTS AND THE BUREAUCRATS.—The observations of the members of the House of Lords in the appeal of *Postmaster-General* v. *Liverpool Corporation*, [1923] A. C. 587, illustrate very forcibly the danger of clothing departmental heads and civil servants with administrative despotism. Lord Carson said : "My Lords, it seems to me that the Appellant desires to lay down that not only is the Postmaster-General, by which I mean of course his department, incapable of doing wrong, but that if he does commit a wrong, whereby damage occurs, he ought to ask somebody else to pay for it." Lord Shaw and Lord Birkenhead were equally censorious. The facts disclose that the Postmaster-General sued the Corporation for £40 damages in the County Court, and having lost there carried the trivial case through the whole judicial hierarchy to the House of Lords, not only to lose there but to be rebuked for his stubborn litigiousness.