

V.-C. H.

1881

Dec. 19 20.

*In re* HENSLER, DECEASED.JONES *v.* HENSLER.

[1879 H. 123.]

*Will—Specific Devise by Father to Child—Death of Child in Lifetime of Father  
—Devise by Child to Father—Lapse—Wills Act (1 Vict. c. 26), s. 33.*

A father by his will devised a freehold house to a son, and his residuary real estate to trustees in trust for other persons. The son died in his father's lifetime leaving issue living at his father's death, and having by his will devised all his real estate to his father:—

*Held*, That as, under the 33rd section of the *Wills Act*, the son must be deemed to have survived the father, the property passed to the son absolutely under his father's will, and became subject to testamentary disposition by the son:

But that as by the will of the son the property was devised to his father, the devise by the son failed, and his heir-at-law was entitled to the property.

## PETITION.

*Frederick Anthony Hensler*, by his will, dated the 21st of February, 1866, devised a freehold house, 20 *St. Maryleport Street, Bristol*, to his son *John Hensler* in fee, and also gave to his said son and his (the said testator's) two brothers, their heirs, executors, and administrators, all his real estate except such parts thereof as should vest in the said *John Hensler* under the devise thereinbefore contained, upon trusts for the benefit of his (the testator's) wife and children other than the said *John Hensler*.

*John Hensler* died on the 6th of August, 1875, in the lifetime of his father leaving issue, and having by his will, dated in June, 1875, devised and bequeathed all his real and personal estate to his father, *F. A. Hensler*, absolutely.

*F. A. Hensler* died on the 16th of August, 1878, and several children of his son *John Hensler* were living at the time of his death. An action for the administration of his estate was instituted after his death, during the proceedings in which the freehold house devised by him to *John Hensler* was sold; and the net proceeds of the sale were paid into Court and were represented by a sum of £549 8s. 8d. Consolidated £3 per Cent. Annuities.

This petition was then presented by *John Gordon Hensler*, the eldest son and heir-at-law of *John Hensler*, who was also the heir-at-law of *F. A. Hensler*, for a declaration that he was beneficially entitled to the fund in Court. The question argued arose under the 33rd section of the *Wills Act*, which is in the following terms:—

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“And be it further enacted that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.”

*Millar*, Q.C., and *Bissell*, for the Petitioner:—

The Petitioner is entitled as the heir-at-law of *John Hensler*. By force and virtue of the 33rd section of the *Wills Act*, *John Hensler*, as a child of the testator *F. A. Hensler*, who had died in his lifetime leaving issue living at his death, must be deemed to have survived his father, and to have taken the real estate specifically devised to him by his father with all the incidents of absolute ownership, including the power of testamentary disposition: *Johnson v. Johnson* (1); *Pickersgill v. Rodger* (2); *Eager v. Furnivall* (3). But, as by his will he devised the property back to his father—a person who is to be taken to have predeceased him—that devise had lapsed, and, there being no residuary devise, there is an intestacy, and the property goes to the Petitioner as the heir-at-law of *John Hensler*: otherwise it would again become subject to the father's will, and so go round in a circle; and the two contradictory assertions would be involved, first, that the son survived the father; secondly, that the father survived the son.

(1) 3 Hare, 157.

(2) 5 Ch. D. 163.

(3) 17 Ch. D. 115.

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*Hastings, Q.C., and Douglas Round, for the widow and the other children of F. A. Hensley :—*

The freehold house in question passed under the residuary devise in the will of *F. A. Hensley*. The object of the 33rd section is to prevent a devise or bequest by a father to a child from lapsing in a case where the child has died leaving issue living at the death of the father; and when that object is accomplished by vesting the absolute ownership of the devised property in the child, the force and effect of the statute is expended. The fiction by which the child's life is prolonged is not to be continued for any other purpose: *Pearce v. Graham* (1); and as the son took under the specific devise in his father's will which is thus exhausted, and he himself devised to his father, who in fact survived him, his devise to his father did not lapse, and the house passed again from the son to the father, and then, under the residuary devise in the father's will, to the trustees for the benefit of the wife and the other children of the father: *Evans v. Jones* (2); *Thompson v. Whitelock* (3).

This is quite in accordance with the principles of *Pickersgill v. Rodger* (4) and *Eager v. Farnivall* (5).

Again, the 33rd section does not take effect if "a contrary intention shall appear by the will"; and here the contrary intention is manifested, for the testator *F. A. Hensley* excepts from his residuary devise such parts of his real estate "as shall vest in *John Hensley* under the devise hereinbefore contained;" and except under sect. 33, nothing did vest in him.

*Millar, in reply, referred to Executors of Perry v. The Queen* (6).

HALL, V.C. :—

By virtue of the 33rd section of the *Wills Act*, the property passed under the devise in the father's will as if the devisee had died immediately after the death of his father. The effect of that is that I must consider the son to have survived his father and to have taken as devisee. I must also consider that the property

(1) 9 Jur. (N.S.) 568.

(2) 2 Coll. 516.

(3) 4 De G. & J. 490.

(4) 5 Ch. D. 163.

(5) 17 Ch. D. 115.

(6) Law Rep. 4 Ex. 27.

became subject to the son's will, and included in the general gift therein contained. The son must be deemed to have had the property; and then the question arises whether he must by a legal fiction be taken to have survived his father for all purposes, or to have survived him only for the purpose of giving effect to the gift of the father. It seems to me that the object and the purpose of the 33rd section was to effectuate the will of the father, and that that object and purpose are satisfied by holding that the son took the estate. Effect would have been given to the will of the son in case he had left his property to some one other than his father and who in fact survived him, yet as he left it to his father the gift by the son fails, for I cannot hold that the section ought to be extended to any case beyond the one expressly provided for. It must therefore be declared that *John Hensler* the son took the property but died intestate as to it, and that the Petitioner is entitled as his heir-at-law. The costs of all parties will be allowed out of the fund.

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Solicitors : *Jones, Blaekland, & Son*, agents for *J. Miller, Bristol*.

W. W. K.

### FORBES v. JACKSON.

[1880 F. 1226.]

V.-C. H.  
1882  
Jan. 12, 16.  
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*Mortgage of Premises and Policy—Proviso for Redemption—Surety, Covenant by, to pay Interest and Premiums—Subsequent Advances by Mortgagee—Payment of Interest and Premiums by Surety—Right of Surety to a Transfer of the Securities.*

In December, 1854, *S.* assigned certain premises and a policy of assurance to secure the repayment of a sum of £200 advanced to him by *W.*, and interest. The proviso for redemption was that on payment of the money *W.* would reassign the premises and policy unto *S.*, his executors, administrators, or assigns, or as he or they should direct. *F.*, by the same indenture, as surety, covenanted, for himself only, with *W.* that while the £200 or any part should remain owing he would pay the interest and premiums, and he also assigned a policy on his own life, and covenanted to pay the premiums *W.* at four different periods between May, 1856, and May, 1866, advanced moneys amounting to £530 to *S.* on the security of the same premises. *S.* made default in the payment of interest. *W.* died in 1878, and his executors