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*Dec. 3.
*Dec. 30.

IRENE PEARL MIDDLEBRO AND ANOTHER ..... } APPELLANTS;

AND

HAROLD G. RYAN AND NORMAN RYAN ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Will—Use of definite terms—Repetition—Presumption of uniformity.

When, in a deed or will, a word or phrase is used with a definite meaning and the same is repeated but the meaning is not so clear, *prima facie* the same meaning is intended to be conveyed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario varying the order made by Latchford J. on a motion for the advice of the court as to construction of the will of George Byron Ryan.

The material clauses of the will and the matters to be decided will be found in the opinions of the judges reported herewith.

Hellmuth K.C. for the appellants.

H. J. Scott K.C. for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was written by

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1911] 1 K.B. 243.

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ANGLIN C.J.C.—The question to be decided on this appeal is whether " the book value " of the testator's businesses, at which the respondents are given an option to acquire them, is that which appeared at the date of the testator's death in his books or is that shewn on the last statement of its affairs entered in the firm's books by the managers thereof in the usual course of business prior to the exercise of such option. Mr. Justice (now Chief Justice) Latchford, who heard the matter on an originating summons, took the former view; the Appellate Divisional Court the latter.

Clause "c" of the will reads as follows:

(c) I direct that my store property on Wyndham street, Guelph, shall be taken in and considered as one of the assets of my Guelph business and that my store property in Owen Sound shall be taken in and considered as one of the assets of my Owen Sound business. Both of the said properties shall be taken in at the book value thereof and the income therefrom shall be paid into and all taxes and outgoings in connection therewith shall be paid and borne by my said Guelph business and my said Owen Sound business respectively.

Clause " f," on which the question now before us arises, is in the following terms:

(f) I direct that after the expiration of five (5) years from my decease unless otherwise arranged with my executors, my sons, if they desire to purchase the said businesses shall commence to pay my estate for the same upon the basis of the book value thereof at the rate of not less than ten per cent (10%) thereof annually.

The Appellate Division also held that " the book value of the store properties " referred to in clause " c " of the will means the book value as it appears in the last annual or other statement entered in the firm's books by the managers thereof in the usual course of business, whereas, Latchford J. had held that " the book value " as shown by the books of the testator at his death is what is meant in that clause.

The present appeal is from the variation by the Appellate Divisional Court of the judgment of Mr. Justice Latchford on both these points.

The testator owned two businesses—one in Guelph, the other in Owen Sound. By his will he directed that these businesses should be carried on by his trustees (his widow, eldest daughter and two sons) under the management of the two sons who had been actively engaged with him in the businesses and had a sum of $30,000 " standing to their credit " in them.

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The trustees were given power to fix a " cash salary " for the managers; they were required to set aside annually a sum equal to 7 per cent on the testator's capital invested in the businesses which, with 7 per cent per annum on his residuary estate, would provide an " income fund " from which his widow should receive an annuity of $6,000 and the residue would be distributable amongst his four children equally. Any surplus profits of the businesses, after paying the managers' salaries, setting aside such 7 per cent and providing whatever further sums the trustees should deem proper " for depreciation, taxes, contingencies and reserve," were to belong to the two sons as additional salary, but were to remain with the $30,000 above mentioned in the businesses at their credit, but without bearing interest, until such time as they should purchase the same.

The testator also directed that the proceeds of the sale of certain lands owned by him in Saskatchewan should be paid into and form part of the assets of his businesses and that the properties in which his Guelph and Owen Sound businesses were carried on should also be assets of those businesses respectively and should " be taken in at the book value thereof." He empowered his trustees to invest further estate moneys in the Guelph and Owen Sound businesses and, if they thought fit, to establish other similar businesses. The businesses were to be carried on as long as the trustees should think it practicable or desirable; but, in the event of Mrs. Ryan's death before the sons had acquired them, a joint stock company was to be incorporated to take over the businesses on a basis which would ensure to his two daughters 7 per cent on their interest or share of the estate invested in them.

The adjudication of Latchford J. that

> the sons cannot make an election to buy any of the businesses of the testator till after the expiration of five years from the death of the testator,

affirmed by the Appellate Divisional Court, has been accepted by the parties and is, therefore, binding, as is also the determination of the Appellate Division, reversing the decision of Latchford J., that the 7 per cent payable into the " income fund " out of the profits of the businesses is to be computed upon

> the net capital as it appears in the last annual or other statement entered in the firm's books by the managers thereof, in the usual course of busi-

ness from year to year, and if supplemented by the trustees from the proceeds of the Testator's Saskatchewan lands referred to in the will, or by other advances, as it may appear from year to year in the books of the two establishments.

It is abundantly clear that the store properties were to be regarded as part of the assets of the businesses from the death of the testator. Clause " c " so directs. It was as of that date that they were to " be taken in." There would, therefore, with the utmost respect, seem to be no room for doubt that " the book value " of the store properties dealt with in clause " c," as was held by Latchford J., is " the book value " thereof as shewn in the books at the time of the testator's death.

The interpretation of clause " f " is perhaps not so free from difficulty. A careful study of all the provisions of the will does not disclose any ground which can be said to be entirely conclusive for supporting either of the two constructions of it which are preferred by the respective parties. Taking all the considerations which have been suggested into account, however, the weight of them seems to us to favour the conclusion reached by Mr. Justice Latchford.

What is given to the sons is an option to purchase. They are under no obligation to acquire the businesses. In our opinion the apparent intention of the testator was that if they wished to exercise that option they should pay to his estate the capital he had invested in the businesses represented by their value, including that of the real estate, as they stood on his books at his death; that, in addition, they should pay to the estate any capital subsequently invested in the businesses by his trustees, whether proceeds of sales of Saskatchewan lands or other advances of estate moneys; and that as to such additional investments the sums payable would be the amounts which would appear in the firm's books as the value of the assets in which they were invested when put into the businesses. The same observations would apply to any estate moneys invested by the trustees in establishing other similar businesses.

As to the existing businesses, the testator probably desired to fix a price at which his sons might acquire them. If their value should materially increase (as is said to be the case with the real estate) the sons might reap an ad-

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vantage from their industry, foresight and good management; should the values substantially decline under their management, the sons were not obliged to purchase on the terms of the option, but could bargain with their fellow-trustees, with whom the will expressly provides they may "otherwise arrange" for the acquisition of the businesses; and, failing an agreement, by taking proper steps they could secure the right to bid on the businesses if offered for sale by the trustees. But, if they should exercise the option given by the will, it must be at a price which would ensure the general estate payment of the entire capital invested by the testator in the businesses as he left them, and also any other estate capital subsequently put into them by the trustees. It is quite unlikely that the testator meant to place his sons in a position where their interests would conflict with their duty, as might be the case if the purchase price under the option were to be the book values placed by them as managers upon the businesses at whatever date they might elect to purchase.

Moreover, as above indicated, the words "the book value thereof" in clause "c" clearly means, in our opinion, the values at which the store properties were entered in the testator's books at the time of his death. While it cannot he said to be a canon of construction that identical words recurring in a will must be taken to have been used to express the same meaning (compare *Ridgeway* v. *Munkittrick* (1), per Sugden L.C., with *In re Brooke, Edyvean* v. *Archer* (2), and *In re Cozens, Miles* v. *Wilson* (3)), it is at least consistent with good sense that *prima facie* when a testator repeats an expression or formula of words, which he had already used to convey a particular idea, he may be presumed to intend again to express the same idea. Of course the context, the nature of the subject-matter or the whole tenor of the instrument may sufficiently indicate an intention to use such formula or expression in some different sense and the presumption will then be rebutted. But here there is no inconsistent context, the subject-matter is neutral in suggestion and any indication afforded by the will as a whole rather points to the words, "the book value,"

(1) [1841] 1 Dr. & War. 84, 93. (2) [1903] A.C. 379, 384.
(3) [1903] 1 Ch. 138, 143.

being intended to prescribe the same criterion of value in clause " f " as in clause " c." There appears, therefore, to be no ground for departing from the view, which has been termed " good sense " and " a principle of common sense," that where a word or phrase is used with a definite meaning in one clause of a deed or will it will be presumed to mean the same thing if used in another part of such deed or will where its meaning is not so clear. (*In re Birks, Kenyon* v. *Birks* (1); *Edwards* v. *Edwards* (2)).

Finally, it is common ground that from the purchase price payable on exercising their option the sons will be entitled to deduct the entire sum of $30,000, which stood to their credit in the businesses at the time of their father's death, on whatever basis that purchase price should be arrived at. It would seem strange indeed, if the value of the businesses according to the last statement entered by them as managers in the firm's books had greatly diminished, that the sons paying that reduced value should, nevertheless, be entitled to deduct from it the entire sum of $30,000 and also any further sums held in the businesses as surplus profits appropriated to them as additional salary under a provision above referred to. It is difficult to accept that as the testator's intention. It would be equally difficult to believe that, if the value of the businesses had greatly augmented through the prudence, foresight and industry of the sons, their father meant to exact from them, as a condition of exercising their option, a purchase price equal to such enhanced value. That such was not his intention is shewn by the very provision assigning to them as additional salary the net profits of the businesses remaining after making the deductions for their cash salaries as managers, the 7 per cent contribution to the "income fund" and the other charges for which the trustees are directed to provide.

Nor does the provision of clause " g " directing the payment into " the income fund " of 7 per cent annually

upon the book value of my capital invested in the said businesses from time to time

present any difficulty. The words " from time to time " were necessary because of the provision for additions to the

(1) [1900] 1 Ch. 417, 418. (2) 12 Beav. 97, 100.

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invested capital of the proceeds of the sales of Saskatchewan lands and the advances from the testator's general estate which the trustees were empowered to make. Their presence rather indicates that intending the words "the book value of any capital invested in the said businesses" in clause "g" to mean the amounts so invested as shown in the firm's books at some date other than that of his death, the testator thought it necessary to add a phrase apt to convey that idea.

Reading the will as a whole the dominant idea of the testator seems to have been, after providing for his widow, that there should be equality in the distribution amongst his four children of the amount of the value of his estate as he would leave it. Subject to that, he desired that the businesses, which he had established, and out of which he had made his fortune, and in the worth and earning capacity of which he probably had the fullest confidence, should not disappear or pass into the control of strangers, but should continue in the hands of his two sons who were already actively engaged therein and for whom, he no doubt thought, they would provide honourable and prosperous careers. There are two outstanding features of the scheme which the testator sought to formulate in regard to the taking over of the businesses by his two sons designed to secure to them every reasonable advantage therefrom and at the same time adequately to protect the interests of his daughters in that part of his estate which consisted of capital invested and to remain for some time invested in those businesses. While, on the one hand, the sons should have the full benefit of any net profits beyond the outlay and reserve necessary for the carrying on of the businesses on a safe basis, and a reasonable return to his estate for the use of his capital invested in them, on the other, in the event of his sons exercising the option to buy the businesses the capital so invested as he left it, and any additional capital the trustees might put in, would all be repaid to, and would form part of, his general estate in which his two daughters were to share equally with his two sons. Only by construing the words "upon the basis of the book value thereof" in clause "f" as meaning on the basis of the values of the businesses as they appeared in the testator's books at the

time of his death can effect be given to both of these apparent intentions of the late George Byron Ryan.

For the foregoing reasons this appeal should be allowed and the judgment of Mr. Justice Latchford restored in the two particulars which are the subject of the appeal. This seems to be a proper case for a direction that the costs of both appellants and respondents should be paid out of the testator's estate as between solicitor and client.

IDINGTON J.—This appeal arises out of an application to the Supreme Court of Ontario by the executors and trustees of the last will and testament of the late George Byron Ryan, for the advice and opinion of the said court in regard to the interpretation and construction of said will.

Some thirteen questions were asked. Mr. Justice (now Chief Justice) Latchford heard the application and gave judgment answering said questions.

Two of the executors (the sons of deceased and beneficiaries under said will) appealed therefrom to the Appellate Division of said Supreme Court, and the present appellants (the two daughters of deceased and beneficiaries under said will) cross-appealed, and judgment was given maintaining the said judgment except as to one point involved, and varied in that regard the said judgment.

Hence this appeal by said daughters.

Having carefully considered the several opinions given by the respective judges in the courts below, and the arguments addressed to us, I have come to the conclusion that this appeal should be allowed and the judgment of Mr. Justice Latchford restored, and that the costs of all parties here should be allowed and paid out of the estate.

Appeal allowed with costs.

Solicitors for the appellants: *Hellmuth, Cattanach & Meredith.*

Solicitors for the respondents: *Aylesworth, Wright, Thompson & Lawr.*