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*June 15
Oct. 6

EMMA JANE KILBY, SAMUEL T. GRAHAM, FREDERICK NOBEL GRAHAM, ADRIAN DOBBIE and HYATT DOBBIE .....APPELLANTS;

AND

LOREEN MYERS, RONALD HARMER, DALE DVORACHEK, DONALD ALEXANDER CAMPBELL and CROWN TRUST COMPANY, Executors and Trustees under the Last Will and Testament of Lenna May Harmer, deceased .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Construction—Gift to testatrix's husband if he survives—Provision for alternative disposition and will to take effect as if husband had predeceased testatrix in event of their deaths being simultaneous—Whether expression of intention that in either of the two situations, contemporaneous death or death of testatrix following that of husband, disposition of property to be the same.

The testatrix was a spinster until 1947 when at the age of 64 she married a widower who was then 75. Her husband had living at that time one child and four grandchildren. On September 10, 1959, the testatrix and her husband made wills which were in the same terms *mutatis mutandis*. The testatrix's husband died on May 4, 1962, and the testatrix died on July 3, 1962. Paragraph III of the testatrix's will read in part: "If my husband and I should both die under circumstances rendering it uncertain which of us survived the other, I declare that my will shall take effect as if my husband had predeceased me and I GIVE, DEVISE AND BEQUEATH all my said property to my Trustees upon the following trusts, namely: x x x (3) To divide the residue of my estate into as many equal parts as there are grandchildren of mine then alive, and to pay to each grandchild one of such equal parts."

The legatees in accordance with para. III (3) claimed the whole balance of the estate and their claim was opposed by the heirs-at-law of the testatrix. A motion was made for construction of the will; the trial judge was of the opinion that there was an obvious omission in para. III and that the testatrix intended to provide not only for the contingency of simultaneous death but also for the contingency of her husband predeceasing her. He held that in the circumstances it was the right and the duty of the Court to supply the omission and proceeded to do so by giving an affirmative answer to the question: Having regard for the provisions of the will as a whole and the language of para. III, does para. III apply when the testatrix's husband clearly predeceases her? An appeal to the Court of Appeal was dismissed; the majority held that in the testatrix's will there was a clear and unequivocal expression of her intention that in either of the two situations, *i.e.*, contemporaneous death or by her death following that of her husband, the disposition of her property was

*PRESENT: Cartwright, Abbott, Judson, Ritchie and Spence JJ.

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to be the same. A further appeal by the heirs-at-law was brought to this Court.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright, Abbott, Judson and Ritchie JJ.: This was not a case in which the Court was justified in supplying words in the will; it could not be said with certainty that anything had been omitted. In para. III the testatrix made a complete disposition of her property to take effect if her husband and she should die at the same time. By using the words "I declare that my will shall take effect as if my husband had predeceased me and . . ." she had expressed the intention that if her husband predeceased her her estate was to be disposed of as if he had died contemporaneously with her and what was to be done if the latter event should happen was fully set out in clauses (1), (2) and (3) of para. III.

Per Ritchie J.: The construction urged by the heirs-at-law was based on the assumption that the testatrix intended to die intestate in the event of her husband having predeceased her. The suggestion that she had such an intention failed. When an individual has purported to make final disposition of all his "property both real and personal of every nature and kind and wheresoever situate", he is not to be taken to have intended to leave all his property undisposed of on the happening of certain events, unless there are some very exceptional and compelling reasons for so holding. A construction resulting in an intestacy "is a dernier ressort in the construction of wills."

Per Spence J., *dissenting*: The declaration and dispositions made by para. III were in terms wholly conditioned upon an event which did not happen. Therefore, in order to attain the result which was reached in the Courts below, this Court must insert additional words in the testatrix's will. To read into this will the words necessary to provide for the unmentioned event the Court must be compelled to the conclusion that the will revealed so strong a probability of such an intention that a contrary intention could not be supposed. No compelling necessity to insert the words allegedly omitted could be found; neither the actual words of the will nor the circumstances of the testatrix and her late husband's death resulted in any compelling conviction that there was an accidental omission in the will as executed.

The words "I declare that my will shall take effect as if my husband had predeceased me . . ." could not be considered as mere surplusage but even if that were so, the existence of surplusage in a will was no ground for giving the rest of the clause a new and different meaning. These words did not indicate that the testatrix had made a clear and unequivocal expression that in either of the two situations, the disposition of her property was to be the same.

[*Maclean et al. v. Henning* (1903), 33 S.C.R. 305, distinguished]

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Fraser J. Appeal dismissed, Spence J. dissenting.

S. C. Biggs, Q.C., for the appellants.

[1] [1964] 1 O.R. 367, 42 D.L.R. (2d) 321, *sub nom. Re Harmer.*

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G. H. Davies, for the respondents: L. Myers, R. Harmer, D. Dvorachek and D. A. Campbell.

M. J. Tarrison, for the respondent: Crown Trust Company.

The judgment of Cartwright, Abbott and Judson JJ. was delivered by

CARTWRIGHT J.:—The relevant facts and the manner in which the case has been dealt with in the Courts below are set out in the reasons of my brother Spence.

In my opinion, this is not a case in which the Court is justified in supplying words in the will; I agree with my brother Spence that it cannot be said with certainty that anything has been omitted.

The decision of the appeal appears to me to turn on the construction of the opening words of para. III of the will reading as follows:

> III. If my husband and I should both die under circumstances rendering it uncertain which of us survived the other, I declare that my will shall take effect as if my husband had predeceased me and I GIVE, DEVISE AND BEQUEATH all my said property to my Trustees upon the following trusts, namely:

If this clause did not contain the words:

> I declare that my will shall take effect as if my husband had predeceased me, and

this case would be indistinguishable from that of *Maclean et al. v. Henning*[1]; but, in my opinion, the presence of the last-quoted words is of decisive importance.

As a matter of syntax all the words of para. III which follow the opening conditional clause:

> If my husband and I should both die under circumstances rendering it uncertain which of us survived the other

are dependent upon the prescribed condition and come into operation only if it be fulfilled, in the events that have happened it has not been fulfilled, and consequently, on a literal construction, para. III would be without effect and the estate of the testatrix would pass to those entitled on an

[1] (1903), 33 S.C.R. 305.

intestacy, as was held by Aylesworth J.A. The objection to this view is that it gives no effect to the words:

> I declare that my will shall take effect as if my husband had predeceased me and

It is argued that even if this literal construction be adopted the words last quoted are not pure surplusage as in the event of uncertainty whether he survived, they would cancel the gift to the husband and revoke his appointment as executor; but if the husband and wife had died in a common disaster the same result would have been reached although the words last quoted had been omitted. In my view, these words serve no purpose if the literal construction is adhered to, although they may have been inserted *ex abundanti cautela.*

Not without hesitation, I have reached the conclusion that the last-quoted words shew that it was the intention of the testatrix that if her husband should predecease her the disposition of her estate contained in clauses (I), (2) and (3) of para. III of her will should take effect.

In para. III the testatrix has made a complete disposition of her property to take effect if her husband and she should die at the same time. By using the last-quoted words she has said that the disposition made on that condition shall be the same as if her husband had predeceased her. If the disposition of her property to be made if her husband and she die contemporaneously is represented by the symbol "X", she has said that this shall be the same as the effect of her will if her husband predeceases her; if the last-mentioned effect is represented by the symbol "Y" the meaning of the opening words of para. III now under consideration may be represented by the equation "X equals Y"; from which it follows that "Y equals X".

If this reasoning be sound, as I think it is, it follows that the meaning of the words used by the testatrix is that if her husband predeceases her her estate shall be disposed of as if he had died contemporaneously with her and what is to be done if the latter event should happen is fully set out in clauses (I), (2) and (3) of para. III. In my opinion this is the intention which the testatrix has expressed by the words which she has used.

I agree with the reasons of Kelly J.A., who gave the judgment of the majority in the Court of Appeal, subject only

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to the reservation that, while I have reached a definite conclusion, I do not find the matter as clear as did the learned Justice of Appeal. In my opinion this case falls within the observations as to the disposition of costs made by Lord Birkenhead in *Boyce v. Wasbrough*[1], at p. 435, which were applied by the majority of this Court in *Niles v. Lake*[2]. The issue to be decided in the case at bar was difficult and debatable and there has been a difference of judicial opinion in the Court of Appeal and in this Court.

I would dismiss the appeal but would direct that the costs of all parties, other than Crown Trust Company, be paid as between party and party out of the estate of the testatrix. I would make no order as to the costs of Crown Trust Company.

RITCHIE J.:—The facts giving rise to this appeal are fully set forth in the reasons for judgment which have been filed by Mr. Justice Spence and it will accordingly be unnecessary for me to restate them.

I agree with Mr. Justice Cartwright, whose decision I have also had the benefit of reading, that, for the reasons stated by him, the words ". . . I declare that my will shall take effect as if my husband had predeceased me and . . ." as they occur in clause III of the will of the late Lenna May Harmer, are sufficient to distinguish this case from that of *Maclean et al. v. Henning*[3], and that it is not necessary to delete or supply any words in order to give effect to that clause as a valid disposition of the whole estate of the testatrix in the event of her husband having predeceased her.

I only wish to add that in my view this conclusion is strengthened by the fact that the alternative construction urged upon us on behalf of her heirs-at-law is based on the assumption that the testatrix intended to die intestate in the event of her husband having predeceased her.

The inclination of courts to lean against a construction which will result in intestacy is far from being a rule of universal application and is not to be followed if the circumstances of the case and the language of the will are such as to clearly indicate the testator's intention to leave his property or some part of it undisposed of upon the happening of certain events.

[1] [1922] 1 A.C. 425. [2] [1947] S.C.R. 291, 2 D.L.R. 248.
[3] (1903), 33 S.C.R. 305.

It appears to me, however, that when an individual has purported to make final disposition of all his "property both real and personal of every nature and kind and wheresoever situate", he is not to be taken to have intended to leave all that property undisposed of on the happening of certain events, unless there are some very exceptional and compelling reasons for so holding. As was said by Lord Shaw in *Lightfoot v. Maybery*[1], at p. 802, a construction resulting in an intestacy "is a dernier ressort in the construction of wills".

In the present case the husband and wife made mutual wills and the suggestion is that it was the intention of each of them that in the event of one having predeceased the other, the whole property of the survivor should remain undisposed of. One reason which is relied on in support of the existence of such an intention in the case of the testatrix is that it would be quite rational for her to leave the final disposition of her estate in the event of her surviving her husband to be decided after she had learned who was going to assist her during the balance of her life. It appears to me that the opening words of the will—"THIS IS THE *LAST* WILL AND TESTAMENT of me, Lenna May Harmer . . ." must of themselves be taken as mitigating strongly against any interpretation which is predicated on the assumption that the testatrix signed that document intending that in the event of her surviving her husband, she might make another will.

For the above reasons, as well as for those stated by Mr. Justice Cartwright, I would dismiss this appeal and direct that the costs should be paid in the manner proposed by him.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal of Ontario[2] made on January 3, 1964, in which that Court by a majority dismissed an appeal from the judgment of the Honourable Mr. Justice Fraser made on August 9, 1963.

The testatrix married Stephen Harmer, a widower, in 1947. She was a spinster and had no children and at the time of her marriage she was 64 years of age. Her husband, a widower, had living at that time one child and four grandchildren. On September 10, 1959, the testatrix and her hus-

[1] [1914] A.C. 782.
[2] [1964] 1 O.R. 367, 42 D.L.R. (2d) 321, *sub nom. Re Harmer.*

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band made wills which were in the same terms *mutatis mutandis*. The testatrix was at that time 76 years of age. On June 13, 1961, the testatrix's husband by a codicil revoked the provisions of para. III(3) of his last will which had been made on September 10, 1959, and provided that the whole of the remainder of his estate should go to his granddaughter Mrs. Loreen Myers. The testatrix's husband then died on May 4, 1962, and the testatrix died on July 3, 1962, without making any alteration of her will dated September 10, 1959. That will provided in part:

> II. I GIVE, DEVISE AND BEQUEATH all my property, both real and personal, of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my husband, STEPHEN HARMER, for his own use absolutely, if he survives me, and I NOMINATE, CONSTITUTE AND APPOINT my husband and CROWN TRUST COMPANY to be the Executors of this my Will.
>
> III. If my husband and I should both die under circumstances rendering it uncertain which of us survived the other, I declare that my will shall take effect as if my husband had predeceased me and I GIVE, DEVISE and BEQUEATH all my said property to my Trustee upon the following trusts, namely:
>
> (1) To pay all my just debts, funeral and testamentary expenses as soon as possible after my decease.
>
> (2) To pay out of the capital of my general estate all estate taxes, inheritance and death taxes and any taxes that may be payable in this or in any other jurisdiction by reason of my decease in connection with any insurance or any gift or benefit given by me to any person hereinafter mentioned, either in my lifetime or by survivorship or by this my will or any codicil thereto, with full power to my Trustees in their sole discretion to settle, compromise, commute or postpone payment of the duty or any part thereof.
>
> (3) To divide the residue of my estate into as many equal parts as there are grandchildren of mine then alive, and to pay to each grandchild one of such equal parts.

The legatees in accordance with para. III(3) claimed the whole balance of the estate and their claim was opposed by the heirs-at-law of the testatrix.

The Crown Trust Company, as surviving executor, applied to the Supreme Court of Ontario for advice and directions on the following questions:

> 1. Having regard for the provisions of the Will as a whole and the language of paragraph numbered III, does paragraph numbered III apply when the Testatrix's husband clearly predeceases her?
>
> 2. If the answer to question 1 is affirmative, to whom do the benefits pass under subparagraph numbered (3) of paragraph numbered III if the testatrix had no children of the marriage and consequently no grandchildren

or in the alternative

To whom the words 'grandchildren of mine' and 'grandchild' refer in subparagraph numbered (3) of paragraph numbered III?

Fraser J. answered the first question in the affirmative and answered the second question by finding that the words "grandchildren of mine" and "grandchild" in para. III(3) referred to the grandchildren of the testatrix's deceased husband.

In the Court of Appeal and here, the appeal was argued solely with respect to the answer to the first question. Fraser J., in written reasons, was of the opinion that there was in the will of the testatrix an obvious omission, although he was unable to find the exact words which were, in his opinion, omitted or to say whether those words would have been, by an additional clause inserted before III or by additional words inserted into clause III. Fraser J. held that it was the right and the duty of the Court under the circumstances which existed to supply the omission and proceeded to do so by his answer to question 1. .

Kelly J.A., giving judgment for the Court of Appeal, said:

> I am in agreement with the conclusions reached by Fraser J. for the reasons so ably set out by him, and would adopt his reasons save in one particular.

He continued:

> I take it as a governing principle that the very words used by the testatrix in framing her will should be interpreted so as to give effect in its ordinary meaning to every word and phrase employed by the testatrix, unless there are such inconsistencies as to make it impossible to accomplish this end.

and found that the testatrix had considered the possibility of three different sets of circumstances prevailing at the time of her death. First, that her death might occur prior to that of her husband, second, that her death might occur after her husband's death, and third, that due to some common disaster both deaths might occur under circumstances which would make it difficult or impossible to determine which death had occurred first. And then continued:

> Having made effective provision for the one to whom she felt the most responsibility should he continue to live and enjoy the benefit of her bequest, she then directed her attention to situations (b) and (c).
>
> There is a clear and unequivocal expression of her intention that in either of these two situations the disposition of her property was to be

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the same. Whether the death of her husband occurred before her death or at the same time, only one set of provisions for the disposition of her property was to be made.

Having made clear her intention that in either situation (b) or situation (c) the disposition of her property was to be the same, she proceeded to set out adequate provisions dealing with her property. Whether the distributive provisions, paragraph III, are grammatically related to situation (b) or to situation (c), if the words of distribution are applicable to either situation they must perforce be deemed equally applicable to the other.

I am unable to adopt the view of Kelly J.A. that in the testatrix's will there is a clear and unequivocal expression of her intention that in either of the two situations, *i.e.*, contemporaneous death or by her death following that of her husband, the disposition of her property was to be the same. I am, on the other hand, of the view that Aylesworth J.A., in his dissenting reasons, was exactly accurate when he said:

> The declaration and dispositions made by paragraph III of the Will (supra) are in terms wholly conditioned upon an event which did not happen, namely, "if my husband and I should both die under circumstances rendering it uncertain which of us survived the other".

I am, therefore, of the view that in order to attain the result which was reached in both Courts below, this Court must insert in the last will of the testatrix additional words. Aylesworth J.A. suggested those words, if they should be inserted, might be inserted at the beginning of clause III(3) of the will and those words might be "in the event my husband predeceases me" or words to like effect.

The difficulty of such an insertion by order of the Court is that the Court must be able to say as a matter of necessary implication that there was an omission and what the omission was: *Crook v. Hill*[1], *per* Sir William James, L.J., at p. 315. The Court must not speculate but be able to say as a matter of compelling conviction the nature of the error which has occurred: *Re Smith, Veasey v. Smith et al.*[2]

Davis J. said in the Supreme Court of Canada in *Maclean et al. v. Henning*[3], at p. 307:

> Much has been said as to the "intention" of the testator. It is our duty, however, to gather that intention from the language he has used. Speculation as to what he must have intended has been indulged in based upon the alleged vagueness of the language of the will and the relations of the testator toward his wife who predeceased him, the character of

[1] (1871), L.R. 6 Ch. App. 311. [2] [1947] 2 All E.R. 708 at 710.
[3] (1903), 33 S.C.R. 305.

the contingent dispositions he has made, and the circumstances surrounding his death. Able and ingenious as many of them are, however, they must not be permitted to alter the plain meaning of the language used.

I adopt the view cited by Aylesworth J.A. in the Court of Appeal:

> To read into this will the words necessary to provide for the unmentioned event the Court must be compelled to the conclusion that the will reveals so strong a probability of such an intention that a contrary intention cannot be supposed.

Now do either the actual words of the will or the circumstances of the testatrix and her late husband's death result in any compelling conviction that there was an accidental omission in this will as executed. Since the counsel for the respondent submits that the Court to determine the intention of the testatrix may not only look at the will but at surrounding circumstances, it is my intention to consider these two matters together. One would surely believe that neither the testatrix nor her husband at the date they both executed wills would have believed that they would ever have any children. The first interest of them both was that whichever one survived would have available for his or her support the whole of their joint estates. Both the testatrix and her husband saw to that by clause II of their respective wills. To reverse the order of the consideration by Kelly J.A., I turn next to the contemplated situation that both might die as a result of a common disaster under circumstances which would make it difficult or impossible to determine which death had occurred first. Again, both the testatrix and her late husband took care of that situation in the words of clause III and particularly the opening lines thereof, and did so, in my view, in a perfectly rational fashion, *i.e.*, that the whole of the estate would go to the grandchildren of the testatrix' husband, who he had determined would be the recipients of his bounty. When both died, to all intents and purposes contemporaneously, then neither one was in need of any fund to maintain them after such catastrophe and the testatrix might be perfectly ready under those circumstances to have her husband's grandchildren take the fund.

Lastly, one might survive the other, considering the situation from the point of view of the survivor. It is the position of counsel for the said grandchildren of the husband that

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it would be ridiculous that the two testators should contemplate intestacy. I am of the opinion that rather than it being ridiculous it was quite rational. There is nothing to conclude that either the testatrix or her husband believed that either of them would, when such one survived his or her spouse, be deprived of an opportunity to make further testamentary disposition. In fact, if the deaths did not occur as a result of a common disaster, each one would think that the survivor could then contemplate the future in the light of the situation which then maintained and make such testamentary disposition as was commensurate with the view. Either of them, due to their age on the death of the spouse might well contemplate that he or she would have to have some assistance and care in living out the balance of his or her life. It might be that that care would be provided, at any rate in the case of the testatrix, by either her late husband's grandchildren or by her own nieces or nephews. Therefore, it would be quite rational for the testatrix to leave the disposition of her estate, in the event she survived her husband, which is the event that occurred, to be decided after she had learned who was going to assist her in living out the balance of her life and therefore who would be entitled to her bounty. This is the view expressed by Aylesworth J.A. in the Court of Appeal when he said:

> she may have considered the contingency but have come to no conclusion upon it, reflecting that if she survived her husband her future was uncertain as to whom she would live with or where she would live and as to many circumstances which might arise creating claims upon her bounty . . .

The fact that the testatrix died only 88 days after her husband without having made such further testamentary disposition, in my view does not operate as any denial of the view which I have expressed, especially when it appears that she had been in hospital suffering from a broken hip from January 1962, some months before the death of her husband, until the date of her death. I, therefore, can find no compelling necessity to insert the words allegedly omitted.

Both at trial and in the majority judgment of the Court of Appeal, the view was expressed that to interpret the will of the testatrix in the manner suggested by her heirs-at-law was to find the words "I declare that my will shall take effect as if my husband had predeceased me and . . ." mere

surplusage. If those words are omitted the clause would read

> If my husband and I should both die under circumstances rendering it uncertain which of us survived the other, I give, devise and bequeath all my said property to my trustee upon the following terms:

There would still remain the whole of clause II so that it would have still resulted in the appointment of her late husband as an executor and it might have caused difficulties in administration despite the provisions of *The Survivorship Act*, R.S.O. 1960, c. 391. I am of the opinion such words cannot be considered as mere surplusage and even if that were so, the existence of surplusage in a will is no ground for giving the rest of the clause a new and different meaning: *In re Boden, Boden v. Boden*[1], *per* Fletcher Moulton L.J., at pp. 143 and 145.

Therefore, with every respect to the views of Kelly J.A., I have come to the conclusion that these words do not indicate that the testatrix had made a clear and unequivocal expression that in either of the two situations, the disposition of her property was to be the same.

I would allow the appeal and would answer the first question in the negative. The costs of the parties appearing on the appeal with the exception of the executor, should be paid out of the estate. There should be no costs to the executor.

Appeal dismissed, SPENCE J. *dissenting.*

Solicitors for the appellants: Payton, Biggs & Graham, Toronto.

Solicitors for the respondents, L. Myers, R. Harmer, D. Dvorachek and D. A. Campbell: Pearson, Flynn, Sturdy & Davies, Preston, Ont.

Solicitors for the respondent, Crown Trust Company: Littlejohn, Sutherland & Tarrison, Paris, Ont.

[1] [1907] 1 Ch. 132.