16/1951

No. 28 of 1950.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF BERMUDA.

IN THE MATTER of the WILL of LOUISA JANE HOLLIS, deceased.

BETWEEN

LOUISE GWENDOLYN OUTERBRIDGE, Widow and
MATILDA EVELYN CAFFEE, Widow (Plaintiffs) - *Appellants*

AND

ETHEL MACKAY HOLLIS, Widow
AMY HOLLIS GRAYSTON, the wife of George Grayston
EDITH HOLLIS BACH, the wife of Norman Bach
MARJORIE OUTERBRIDGE, the wife of George Outerbridge
PHYLLIS MARIANNE OUTERBRIDGE, the wife of Percy Clisdell Outerbridge and
CHARLES ELYSTAN HAYCOCK (Defendants) - - *Respondents.*

Case for the Appellants.

RECORD.

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 17th March 1950. pp. 10 *et seq.*

2. The said judgment was delivered on an originating Summons issued for the determination of certain questions arising under the Will of Louisa Jane Hollis (hereinafter referred to as " the Testatrix "). By the said judgment the learned Chief Justice decided that certain real and personal property comprised in the estate of the Testatrix was divisible in equal sixth shares between the following persons as tenants in common—

(1) the Appellants
(2) the Respondent Ethel MacKay Hollis
(3) the Respondents Amy Hollis Grayston and Edith Hollis Bach

(4) the Respondents Marjorie Outerbridge, Phyllis Marianne Outerbridge and Charles Elystan Haycock

(5) the Appellant Matilda Evelyn Caffee

(6) the Appellant Louise Gwendolyn Outerbridge.

If the construction contended for by the Appellants is correct, the Appellants are the only persons entitled to any interest in the said real and personal property and are entitled thereto as joint tenants.

pp. 4–6. 3. The Testatrix made her said Will (hereinafter referred to as " the Will ") on the 13th November 1919. By the Will, after expressing a desire that all her just debts should be paid, the Testatrix devised and bequeathed to her eldest daughter Kathleen Louisa Hollis for the term of her life the following properties— 10

(1) a portion of freehold land known as the " Cat Cave " with all the structures thereon (save as in the Will expressly excepted) ;

(2) the freehold property known as " Hilgrove " " together with the dwelling-house thereon and with all other furnishings of the said house " ;

(3) a portion of freehold land known as " Cave Hill " together with the cottage thereon.

After expressing a desire that the husband of her late daughter Erminnie might have the use of the cottage and premises of " Cave Hill " during his visits to Bermuda if he so desired, the Testatrix proceeded as follows :— 20

p. 5, ll. 26–36. " If Kathleen Louisa Hollis desires to sell any or all of the property left to her for her lifetime, and has a good opportunity of selling to a desirable person, I hereby empower her to do so, provided she has the consent and approbation of her Brothers and Sisters, and all emoluments of the sale shall be equally divided between the said Kathleen Louisa Hollis, Harry Stuart Hollis, Austin Wilkinson Hollis, Mary Logier Haycock, Matilda Evelyn Caffee, Louise Gwendolyn Outerbridge, or their heirs or assigns. 30

If Kathleen Louisa Hollis shall retain these properties, I desire and decree that at her death the said properties of ' Hilgrove,' ' Cat Cave,' and ' Cave Hill ' shall be inherited by my surviving children."

The Testatrix then (after devising a piece of freehold land to her eldest son and bequeathing a sum of £400 each to the three children of her said daughter Erminnie (as to the payment of which she gave certain express directions), concluded the Will by making the following provisions:—

p. 6, ll. 4–14. " I desire to give a legacy of £20 (twenty pounds) to each of my grand-daughters whom I now name, Marjory Eleanor Haycock, Edith Constance Hollis, Kathleen Belinda Caffee, Amy Louies Outerbridge, Caroline Jane Bartelmez, as a token of love and remembrance. 40

I Louisa Jane Hollis do furthermore ordain that all money (with the exception of my legacies to my Grandchildren) Bonds, Mortgages, Stocks, Loans, Bermuda Bank Shares, &c. belonging to the estate of my beloved Husband, the late Henry H. Hollis shall be equally divided between my well beloved children, Kathleen Louisa Hollis, Harry Stuart Hollis, Austin Wilkinson Hollis, Mary Logier Haycock, and Matilda Evelyn Caffee, Louise Gwendolyn Outerbridge or their heirs or assigns."

The Will contains no express residuary devise or bequest. The Testatrix appointed Harry Stuart Hollis Austin Wilkinson Hollis and Kathleen Louisa Hollis Executors and Executrix of the Will. p. 6, ll. 21–24.

The Will contained no provision relevant to the question arising on this Appeal other than those hereinbefore set out or summarised.

4. The Testatrix died on the 3rd April 1923 without having revoked or altered the Will, probate of which was on the 11th April 1923 granted to the said Harry Stuart Hollis and the said Kathleen Louisa Hollis (the said Austin Wilkinson Hollis having predeceased the Testatrix) and duly recorded in the Registry of the Supreme Court of Bermuda. p. 2, ll. 31–34.

5. The Testatrix had seven children only, of whom one (the said Erminnie) was dead at the date of the Will. Of the other children of the Testatrix named in the Will— p. 2, l. 37–p. 3, l. 7.

(A) the said Austin Wilkinson Hollis predeceased the Testatrix, dying on the 6th November 1921 ;

(B) the said Mary Logier Haycock survived the Testatrix but predeceased the life tenant Kathleen Louisa Hollis (who is hereinafter referred to as " Kathleen "), dying on the 4th June 1941 ;

(C) the said Harry Stuart Hollis survived the Testatrix but predeceased Kathleen, dying on the 22nd August 1942 ;

(D) Kathleen died on the 22nd March 1949 ;

(E) the Appellants alone are now surviving.

6. (A) The said Austin Wilkinson Hollis made and duly executed a will which was duly admitted to probate whereby he devised and bequeathed all his real and personal estate to his wife Amy Edith Hollis ; his said wife made and duly executed a will which was duly admitted to probate on the 9th August 1938 by which she devised and bequeathed her real and personal estate equally between her two daughters the Respondents Amy Hollis Grayston and Edith Hollis Bach. p. 3, ll. 13–21.

(B) The said Mary Logier Haycock made and duly executed a will which was duly admitted to probate whereby she devised and bequeathed all her real and personal estate equally between the Respondents Marjorie Outerbridge, Phyllis Marianne Outerbridge and Charles Elystan Haycock. p. 3, ll. 22–27.

(C) The said Harry Stuart Hollis made and duly executed a will which was duly admitted to probate whereby he devised and bequeathed all his real and personal estate to his widow the Respondent Ethel MacKay Hollis. p. 3, ll. 8–12.

p. 3, ll. 28–41. 7. Kathleen did not during her lifetime sell any of the properties of which she was life-tenant under the Will or any part of the same, and by her will which was duly admitted to probate she devised and bequeathed one-quarter of her real and personal estate to the Appellant Louise Gwendolyn Outerbridge and three-quarters thereof to the Appellant Matilda Evelyn Caffee.

p. 1, ll. 20–38, p. 2, ll. 1–24. 8. (A) On the 29th December 1949 the Appellants issued a Summons under Order 54 (A) of the Rules of the Supreme Court of Bermuda, to which the Respondents to this Appeal were Respondents, asking for the determination of the following questions :—

p. 2, ll. 14–24.

1. Who are the present owners as devisees under the said Will of the real estate therein described as " Hilgrove," " Cat Cave " and " Cave Hill " ?

2. What estate or interest in the said real estate is owned by the persons to be determined under the first question herein ?

3. Whether the personalty comprised in the real estate described as " Hilgrove " in the said Will follows the devise of the said real estate and is consequently owned by the persons and in the interests to be determined under the first two questions herein, or if not, to whom the said personalty belongs and the shares in which it is owned under the provisions of the said Will ?

p. 10, l. 21—p. 15, l. 18. (B) The said Summons was heard in Chambers by the learned Chief Justice on the 1st March 1950 and he delivered a reserved judgment thereon on the 17th March 1950. It is from this judgment that the Appellants now appeal.

p. 10, l. 30—p. 11, l. 24. p. 11, ll. 25–37. p. 11, l. 41—p. 12, l. 6. p. 12, ll. 22–40. 9. The learned Chief Justice opened his judgment by stating particulars as to the children of the Testatrix and the parties to the Summons ; summarising in his own words such provisions of the Will as he considered relevant ; and stating the questions asked by the Summons. He then stated his reason for feeling unable to hold that the rule in *Cripps* v. *Wolcott*, 4 Madd. 11, as expounded and confirmed in *In re Poultney* [1912] 2 Ch. 541 applied to the case before him, viz., that in the Will of the Testatrix there were " no such definite words as were present in the wills considered in those two cases and because . . . of the omission therefrom of some other equally positive phraseology."

p. 12, ll. 41–47. The learned Chief Justice then proceeded as follows :—

" In the absence therefore of some such cogently determining factor the period to which survivorship is to relate depends not upon any technical words, but upon the apparent intention of the testator to be collected from a just reasoning of the words of the whole will ; and the meaning of the will and of every part of it is to be determined according to that intention, taking into account not only the general scope of the will but the general purposes of the testator."

The learned Chief Justice then laid down as follows the principle which he held to be applicable in construing the Will :—

" Accordingly, if the language used in a will admits of two constructions, according to one of which the property disposed of will go in a rational, convenient and ordinary course of succession, and according to another in an irrational and inconvenient course, so that the Court is driven to the conclusion that the testator is acting capriciously, without any intelligible motive, and contrary to the ordinary mode in which men act in similar cases, the Court leans towards the former construction, as being that which was intended, although this may require a meaning to be given to the words different from their ordinary meaning." p. 13, ll. 15–24.

Asking himself " What was the intention of the late Louisa Jane Hollis, the head of a large family of children and grandchildren, when she used the expression ' inherited by my surviving children ' ? " the learned Chief Justice drew attention to the following considerations :— p. 13, ll. 25–27.

(A) that the application of the rule in *Cripps* v. *Wolcott* would be " to shut out all of the Defendants, who comprise in the first case, the widow of one of the sons, and in the other five, her grandchildren, some of whom in one part of her will, are referred to in an affectionate manner ; and all of whom are beneficiaries under the testamentary dispositions of their deceased husband or parents as the case may be " ; p. 13, ll. 30–36.

(B) that the principal purpose of the Will was (in the learned Chief Justice's view) to grant a tenancy for life to Kathleen, which (in his view) clearly signified " that the Testatrix chose this senior member of the family as the guardian of the family property " ; p. 13, ll. 41–44.

(C) that in the event of an exercise of the power of sale by Kathleen the proceeds were to be divided equally between the six children of the Testatrix named in the Will ; p. 13, ll. 44–48.

(D) that the Testatrix made provision for certain of her grandchildren by Clauses 10, 11 and 12 of her Will ; p. 14, ll. 1–6.

(E) that at the Testatrix's death " all her personalty was to be divided equally between her six children," as in the case of a division of the proceeds of sale under Clause 7 of the Will ; p. 14, ll. 7–11.

and the learned Chief Justice then continued as follows :—

" Does not all this point to the fact that the Testatrix was imbued with a sense of family protection and preservation, linked with a feeling of affectionate regard and interest towards the several members of this large family ? I think it does. p. 14, ll. 11–32.

Is there anything to indicate any whim, caprice or oddity by reason of the working of which she sought to determine that her son's widow, and her grandchildren were to be excluded from the benefits derivable through her children ? I do not see it.

Is there anything affirmatively to indicate her intention to restrict her bounty to the longest livers ? I do not see it.

Answering these questions as I have, and construing the Will then as a whole, I see in it a special intention of the Testatrix to dispose of her property in a rational, convenient and ordinary course of succession, so that each of her children who survived her (or their heirs and assigns, the words used by her in Clause 7) should benefit equally under her Will, and that it was not her intention that her beneficence should be restricted to the longest livers.

Since this special intent is found in the Will, I hold that this is not a case to which the rule in *Cripps* v. *Wolcott* can be applied. Survivorship here is to be related to the death of the testatrix, Louisa Jane Hollis, and not to the death of the life-tenant, Kathleen Louisa Hollis."

10. It is submitted on behalf of the Appellants that the reasoning of the learned Chief Justice was erroneous in the following respects :—

p. 13, ll. 15–24.

(A) there is no such ambiguity in the Will as warrants the application of the rule of construction, quoted above, which the learned Chief Justice applied to it ; and even if such rule were applicable, the construction of the Will contended for by the Appellants does not involve attributing to the Testatrix any irrational or capricious intention ;

(B) (i) the provisions of the Will in favour of certain grandchildren do not warrant any such conclusion as the learned Chief Justice drew concerning the Testatrix's desire to benefit other grandchildren, or her grandchildren generally ;

(ii) the Testatrix could not when making her Will or at the date of her death have known that the grandchildren named in the Will (whom he infers that she wished to benefit by the gift under consideration) would benefit under the wills of their respective parents ; but the reasoning of the learned Chief Justice involves the assumption of such knowledge on her part ;

(C) that there was no evidence before the learned Chief Justice, concerning either the value of the estate or of its component items or any other matters, to warrant the conclusion drawn by him as to " the principal purpose of the Will " ;

(D) that the provisions of the Will directing a division between the six named children of (i) the proceeds of sale (ii) the estate of the Testatrix's husband (erroneously referred to by the learned Chief Justice as " all her personalty ") afford no guide as to her intentions with regard to the property of which Kathleen was life-tenant ;

(E) that even on the footing that all the assumptions made and inferences drawn by the learned Chief Justice were warranted, the Will shows no such " special intention " on the part of the Testatrix as would justify displacing the rule in *Cripps* v. *Wolcott* in its application to the gift to " my surviving children."

11. Basing himself on the construction of the Will which he had thus arrived at, the learned Chief Justice concluded that " the estate

p. 14, ll. 33–34.

created by the will of Louisa Jane Hollis is a tenancy in common in fee simple " and declared that the questions asked in the Summons before him should be answered so as to effect a division of the real and personal estate in the manner indicated in paragraph 2 of this Case. p. 14, l. 34—p. 15, l. 13.

12. (A) It is submitted on behalf of the Appellants that if " survivorship " here is to be related to the death of the Testatrix, as the learned Chief Justice concluded, then, even if the gift created, as he held, a tenancy in common, his decision that one sixth of the property in question devolved upon the heirs or devisees of Austin Wilkinson Hollis through the operation of Section 31 of the Wills Act 1840 cannot be correct, since the qualification imposed by the construction which he adopted, viz., that the children taking under the gift must survive the Testatrix, would be an indication of a contrary intention sufficient to prevent that Section from applying. p. 14, ll. 30–31. p. 14, l. 43.

(B) It is further submitted on behalf of the Appellants that whether the qualification of survivorship is to be referred to the date of the execution of the Will or to the date of the death of the Testatrix or to any other date the estate created by the gift was a joint-tenancy, and that since there was no evidence before the learned Chief Justice that such joint-tenancy had been severed by any of the beneficiaries the persons now entitled to the property in question must be the Appellants.

13. Leave to Appeal to His Majesty in Council from the said judgment of the learned Chief Justice was granted by Order of the Supreme Court of Bermuda dated the 14th April 1950. p. 16, ll. 1–19.

14. It is submitted that the said judgment was wrong and ought to be reversed and that for the declaration thereby made there should be substituted a declaration that the Appellants are entitled as joint-tenants in fee simple and absolutely to the real and personal property respectively dealt with by the second, third and fourth paragraphs of the Will, for the following among other

REASONS

(1) BECAUSE the disposition in question is one to which the rule in *Cripps* v. *Wolcott* is prima facie applicable, and it is not possible to infer from any other passage in the Will, or from the Will as a whole, an intention on the part of the Testatrix that the rule should not apply ; and therefore survivorship must be referred to the death of the life-tenant Kathleen Louisa Hollis.

(2) BECAUSE, even if survivorship is to be referred to any other period, the estate created by the disposition is a joint-tenancy which has not been severed and the Appellants are the sole surviving joint-tenants.

(3) BECAUSE the judgment appealed from is wrong.

JOHN SPARROW.

No. 28 of 1950.

In the Privy Council.

ON APPEAL

from the Supreme Court of Bermuda.

IN THE MATTER of the WILL of LOUISA JANE HOLLIS, deceased.

BETWEEN

LOUISE GWENDOLYN OUTERBRIDGE and Another - - - - *Appellants*

AND

ETHEL MacKAY HOLLIS and Others - - - *Respondents.*

Case for the Appellants.

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