Privy Council Appeal No. 28 *of* 1950

Re **Louisa Jane Hollis** *deceased*

Louise Gwendolyn Outerbridge and another - - - *Appellants*

v.

Ethel Mackay Hollis and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF BERMUDA

JUDGEMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH MAY, 1951

Present at the Hearing:

LORD SIMONDS
LORD MORTON OF HENRYTON
LORD REID
LORD TUCKER

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal from a judgment of the Supreme Court of Bermuda, delivered by the Chief Justice (Sir Cyril Gerard Brooke Francis) on an Originating Summons issued for the determination of certain questions arising under the will of Louisa Jane Hollis (hereafter called "the testatrix").

The testatrix made her will on the 13th November, 1919. At that date she had six living children. A daughter, Erminnie, had died on the 27th May, 1919.

The will is divided into clauses, which were conveniently numbered by the Chief Justice in his judgment.

By clauses 3, 4 and 5 the testatrix gave to her eldest daughter, Kathleen Louisa Hollis, for the term of her life, the following properties:—

(1) A piece of freehold land known as "The Cat Cave" with all the structures thereon, save as in the will expressly excepted.

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

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

After expressing a desire that the husband of her late beloved 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:—

"(7) 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.

"(8) 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."

By clause 9 the testatrix then gave a piece of freehold land to her eldest son Harry, and by clause 10, after referring to the lamented demise of her youngest daughter Erminnie, wife of George W. Bartelmez, on 27th May, 1919, the testatrix bequeathed £400 each to the three children of her said daughter.

By clause 11 the testatrix gave certain directions in regard to the last-mentioned legacies and the will ended as follows:—

"(12) I desire to give a legacy of £20 (twenty pounds) to each of my granddaughters whom I now name, Marjory Eleanor Haycock, Edith Constance Hollis, Kathleen Belinda Caffee, Amy Louise Outerbridge, Caroline Jane Bartelmez, as a token of love and remembrance.

"(13) 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 contained no residuary devise or bequest. The testatrix appointed Harry Stuart Hollis, Austin Wilkinson Hollis, and Kathleen Louisa Hollis executors and executrix of her will.

The six persons named in clauses 7 and 13 of the will were the six children of the testatrix who were living at the date of the will. Austin Hollis died on the 6th November, 1921. The testatrix died on the 3rd April, 1923, without having revoked or altered her will, probate of which was granted to Harry Hollis and Kathleen Hollis.

Kathleen did not during her lifetime sell any of the properties of which she was life tenant under the will.

Mary Haycock died on the 4th June, 1941, Harry Hollis died on the 22nd August, 1942, and the tenant for life Kathleen Hollis died on the 22nd March, 1949. Thus the only children of the testatrix who survived Kathleen were the appellants Louise Gwendolyn Outerbridge and Matilda Evelyn Caffee.

The respondents represent the estates of the four other children of the testatrix who were living at the date of her will.

The first question arising for decision is as to the true construction and effect of the words in clause 8—"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", but this clause must, of course, be read and construed having due regard to the terms of the will as a whole. The appellants contend that the words "my surviving children" refer to children surviving Kathleen, and consequently that they are entitled to the whole of the property whereof Kathleen was tenant for life. The learned Chief Justice rejected this contention and held that clause 8 created a tenancy in common in fee simple and that the real property in question was divisible as follows:—

(1) The heirs or devisees of the late Kathleen Louisa Hollis one undivided sixth part;

(2) The heirs or devisees of the late Harry Stuart Hollis one undivided sixth part:

(3) The heirs or devisees of the late Austin Wilkinson Hollis (through the operation of section 31 of the Wills Act, 1840) one undivided sixth part:

(4) The heirs or devisees of the late Mary Logier Haycock one undivided sixth part:

(5) Matilda Evelyn Caffee one undivided sixth part:

(6) Louise Gwendolyn Outerbridge one undivided sixth part.

Their Lordships think that the heirs or devisees of the testatrix' son Austin must have been included *per incuriam*. It is well settled that section 33 of the Wills Act, 1837, which is identical in wording with section 31 of the Bermuda Wills Act, 1840, does not apply to a class gift; and a gift to "my surviving children" is a gift to a class, whether the class is to be ascertained at the death of the testatrix or at the death of the tenant for life.

The Chief Justice further held that the personalty at Hilgrove mentioned in clause 8 of the will was to be divided in the same manner, with the substitution throughout of the expression "the next-of-kin or legatees" for the expression "the heirs or devisees".

Their Lordships are of opinion that the appellants' contention is well founded, and that on the death of Kathleen they became entitled to the whole of the property, real or personal, whereof Kathleen was the tenant for life.

The testatrix' direction is that at the death of her daughter Kathleen the property in question "shall be inherited by my surviving children", and in their Lordships' view the word "surviving", in such a context, naturally and grammatically refers to surviving Kathleen. If the reader pauses at the end of clause 8 and asks himself "what is the event which the testatrix' children must survive, in order to be 'surviving children' within the meaning of this clause" the natural reply would be "the death of Kathleen, which is the only event mentioned in this short clause, and is the event whereon the 'surviving children' are to inherit". Expressions used in a will ought to be given the meaning which they would most naturally bear, unless sufficient reason is found in the will, read as a whole, for giving them some other meaning. Their Lordships can find no such reason in the will now under consideration. Moreover, there is a well-established rule of construction, which was stated as follows by Leach V.C. in *Cripps* v. *Wolcott* 4 Maddox 11 at p. 15:—"I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. . . . But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy." The Vice-Chancellor referred only to a legacy, but it is now well settled that the rule applies equally to real estate.

The learned Chief Justice approached the question of construction from a different angle. He first considered the case of *In re Poultney* [1912] 2 Ch. 541, and rejected the suggestion that the rule in *Cripps* v. *Wolcott* applied to the present case, because in the will of the testatrix there were "no such definite words as were present in the wills considered in *these two cases*". *Examining the will as a whole, he found 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". The Chief Justice continued: "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."

Their Lordships would of course agree that it is necessary to consider the testatrix' will as a whole, but they are unable to accept the reasoning of the learned Chief Justice. Had he adopted as his starting point the view that the natural meaning of clause 8 is that for which the appellants contend, their Lordships think that he must have failed to find, in the rest of the will, any sufficient reason for rejecting that meaning.

Their Lordships feel bound to add that even if they had accepted the Chief Justice's view that "survivorship here is to be related to the death of the testatrix" they could not have accepted his view as to the division of the property. There are no words of severance in clause 8, and accordingly the gift to "my surviving children" creates a joint tenancy. Thus, even if the original gift was to the five children of the testatrix who survived her, the appellants would to-day be the only persons entitled to the property in question, unless some events have taken place, since the death of the testatrix, which have severed the joint tenancy. The Chief Justice gave no reason for his view that the gift creates a tenancy in common, and counsel for the respondents could offer no argument in support of that view.

Their Lordships understand that the whole of the testatrix' estate, other than the properties now in question, has long since been distributed. In these circumstances, it seems not inappropriate that these properties should bear the costs of ascertaining the testatrix' meaning.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and it should be declared that the appellants are entitled as joint tenants in fee simple and absolutely to the real and personal property dealt with by the third, fourth and fifth clauses of the testatrix' will.

The costs of all parties of this appeal, and of the proceedings in the Supreme Court, will be paid out of the said real and personal property.

(12169) Wt. 8137—69 100 6/51 D.L./P1.3

In the Privy Council

Re **LOUISA JANE HOLLIS,** *Deceased*

LOUISE GWENDOLYN OUTERBRIDGE AND ANOTHER

v.

ETHEL MACKAY HOLLIS AND OTHERS

DELIVERED BY
LORD MORTON OF HENRYTON

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