

Ross's Judicial Factor Vs. Martin

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Court : House of Lords

Decided On : Mar-04-1955

Judge : Lord Chancellor, Lord Earl Jowitt, Lord Morton of Henryton, Lord Keith of Avonholm

Appeal No. : No.

Appellant : Ross's Judicial Factor

Respondent : Martin

Judgement :

LORD CHANCELLOR(Kilmuir).-This is an appeal against an interlocutor dated 20th November 1953, pronounced by the Second Division of the Court of Session, recalling, except so far as it dealt with expenses, an interlocutor pronounced by the then Lord President, dated 2nd July 1953. The effect of the interlocutor of the Lord President was to give to the appellants certain legacies under the wills of each of two sisters, and the effect of its recall was to allow the estates of the two sisters to fall into intestacy.

The appellants are the sole surviving legatees under the trust-dispositions and settlements of two sisters, Miss Margery Newton Ross and Miss Hannah Ross, who, at the respective ages of 79 and 74, met their deaths from gas poisoning in a common calamity on 1st February 1950. Each of the two sisters left a trust-disposition and settlement dated 9th June 1938. The two trust-dispositions and

settlements were not only dated on the same day but were witnessed by the same witnesses, and *mutatis mutandis* they were in identical terms. They were, however, two separate and revocable testamentary deeds and were not a mutual will containing provisions of a contractual nature. By her will each sister bequeathed her whole estate to her other sister and her only brother equally and the survivor of them. Each provided that, in the event of both her sister and brother predeceasing her, John Melville Clark, W.S., was to be appointed her trustee and executor for the purposes enumerated in her will. These purposes included the payment of certain bequests to the appellants. The appellants are the surviving legatees under the wills of each of the said sisters, each of whom bequeathed the same pecuniary legacies to the same legatees, and each of whom named the same residuary legatees for the same share of residue.

The sisters' only brother, Edward Burns Ross, died on 11th January 1947, unmarried. Subsequent to that date, therefore, the surviving sister was to take the whole estate of the sister who died first, assuming, as was the fact, that neither sister altered her will. Following upon the death of the two sisters in the common calamity, a Mr Bishop was appointed judicial factor on the estates of both sisters. The judicial factor was advised that in the circumstances he would not be in safety in distributing the estates of the two sisters without judicial authority. He accordingly raised an action of multiplepounding, in which the estates of the two sisters formed the fund in medio. The appellants lodged claim in the said action, as did the Lord Advocate, representing the Crown as *ultimus hres.* At the time the said action was raised no next-of-kin of the two sisters had been traced. Certain persons eventually came forward and lodged claims as the deceased's next-of-kin. They are the respondents in this appeal and were the successful appellants in the Court below. The Lord Advocate petitioned to be allowed to withdraw from the case and was not present before your Lordships' House.

There is only one portion of each will which is relevant, and I quote that portion from the will of Miss Margery as follows:-

"I, Miss Margery Newton Ross,... do hereby assign, dispone, devise, legate and bequeath to my brother, Edward Burns Ross, and my sister, Hannah Ross,...

equally between them and the survivor of them, the whole means and estate, heritable and moveable, real and personal, wherever situated, which shall belong to me, or over which I shall have the power of disposal, at the time of my death; and I nominate the said Edward Burns Ross and Hannah Ross and the survivor of them to be my executors or executor; but these presents are granted subject to the payment by my said executors of my lawful debts, deathbed and funeral charges, and any legacies I may leave by any writing under my hand, however informal the same may be: and in the event of both the said Edward Burns Ross and Hannah Ross predeceasing me I nominate John Melville Clark, Writer to the Signet, Edinburgh, to be my trustee and executor, and I assign, dispo, devise, legate and bequeath to the said John Melville Clark as trustee under these presents the whole means and estate... which shall belong to me... in trust for the following purposes, videlicet..."

Mr M'Donald, who urged all possible arguments for the appellants, made three broad points:-(1) The judgment of the Lord President should be restored on the ground that on a proper construction and on the evidence each sister validly bequeathed to his clients, because the words "in the event of both the said Edward Burns Ross and Hannah Ross predeceasing me" were equivalent to "in the event of survivor of my sister and my brother failing to take an interest." The intention of both wills was that the appellants should take in the event of the failure of the prior gift. (2) The appeals should succeed because, having regard to the identical terms of the two wills, it is immaterial whether Miss Margery survived Miss Hannah or vice versa. In either case, whoever may have survived, there was a series of valid legacies and bequest of residue. These interests emerge when both sisters are dead and the order of their dying did not matter. (3) This is one of the cases in which in dubio the fact that a double intestacy would result if the appellants' claims were repelled should tilt the balance in favour of the appellants.

Mr M'Donald's first point before your Lordships was the point which appealed to the Lord President, who concludes his reasoning with the following words:

"Gathering the intention of the testatrices from the wills as a whole, I read the gift over to the charities and others, not as dependent upon the possibility of

demonstrating which sister died first, but as conditional only upon there not being a surviving sister to take on the death of a predeceasing sister, and I am not prepared to allow 'the mere letter of a particular clause' to prevail over that meaning."

The Lord President found assistance in *Elrick's Trustees; Crawford's Trustees v. Fleck*; and *Beveridge's Trustees*, per Lord Clyde at p. 586. Mr M'Donald asked your Lordships to consider these cases and also *Ramsay's Trustees; In re Harrison*; *In re Bright-Smith*, per Chitty, J., at p. 319; and *In re Stevens*. The English cases were added to advance his third point, that when in doubt the Court will lean against intestacy.

With all respect to the view of Lord Cooper, I find two difficulties in accepting his construction. The first is that the will, read as a whole, adds nothing to the particular clause. The second is that the authorities cited do not seem to me to go further than this. If one can find in the remainder of the document words which could give a secondary meaning to the critical clause, then it is possible to adopt that secondary meaning. If there is no such guidance, then one must give effect to clear words. In my view, "predecease" means "die in the lifetime of," which were words considered by this House in *Wing v. Angrave*. On this part of the case the reasoning of the House, at the time when it was the law of England (as it still is in Scotland-see *Drummond's Judicial Factor v. Lord Advocate* 1944 SC 298) that there is no presumption as to survivorship in a common calamity, seems conclusive. I take the words of Lord Chelmsford at pp. 221 and 222, which also appealed to Lord Mackintosh:-

"Had it occurred to her mind that a highly improbable state of facts might arise, either of their both perishing together or of its being impossible to ascertain which was the survivor, no doubt she would have used apt words to embrace such an extraordinary contingency. Can the language which she has employed be made to include such an intention? If it cannot, then we are not at liberty to go out of the will to bring into it something which is not to be found there. The testatrix says, I give to my husband certain property, and in case he should die in my lifetime, then to the appellant [W. W.]. She clearly intended that the appellant should not have her

property if her husband survived her, for on that event it was to go to him. The appellant can only be entitled in case the husband fails to take by survivorship. If the husband survived, the appellant's bequest never came into existence. But he cannot show that the husband did not survive, and therefore he fails altogether in establishing the foundation upon which alone his right can be built."

On principle and on authority I cannot accept the reasoning of Lord Cooper or Mr M'Donald's first point.

I now turn to Mr M'Donald's second point. I think there is weight in the warning given by Lord Mackintosh that, although the judicial factor seeks in this action to get a judicial determination upon the two estates now falling to be distributed, and although that may be a convenient way of dealing with the matter, it must be kept in view throughout that the estates and the settlements are quite separate and distinct, and must be dealt with in the same way as if a separate judicial factor had been appointed on each estate and a separate action of multiplepoinding had been raised dealing with one estate alone. In my view, it is not permissible to take the two settlements together, and say that it does not matter whether Margery was predeceased by Hannah, or Hannah by Margery, because there must have been one survivor and one predeceasing. I do not find it necessary to go into the difficult question of simultaneous death. It is enough for me that this approach, in my opinion, leaves a gap in the argument, and, by treating the two settlements in this matter together, fails to construe either of them. It leaves as entirely unknown which of the two settlements is the operative document in the disposition of the massed estates. I quote the same opinion of Lord Chelmsford again, this time from p. 223:

"But it is difficult to understand upon what principle the wills of Mr and Mrs Underwood can be taken together for the purpose of interpretation. If different persons had been entitled under the two wills, each must have established his claim solely by the will in his favour, independently of the other, and no difference can be made in the rules of evidence, because the appellant accidentally happens to be the ultimate legatee in both wills."

Mr M'Donald, however, pressed your Lordships very hard with a passage from the speech of Lord Cranworth in *Wing v. Angrave*, at p. 211. It should be remembered that in that case a husband had made a will and a wife had made an appointment under her father's will. Mr Wing was, therefore, claiming as an executor under the husband's will and appointee from the wife under her father's will. On these facts, similar arguments were advanced-unsuccessfully-to those advanced in the present case. It is true that Lord Cranworth emphasises that Mr Wing was in a different capacity as appointee from that as executor, although where he was executor he was also sole beneficiary subject to the payment of debts. Mr M'Donald, however, relied on the following words:

"The union of the two rights in *Wing* does not enable him to do this; if, indeed, the same person was entitled for his own benefit, whichever of the events had happened, this argument of the appellant would have been good. If, for instance, the appointment had been in one event to Wing, in the other to the person who at the death of the person appointing filled a particular office, say that of Lord Mayor of London, then if Wing was at that time Lord Mayor of London he would be entitled, *quacunque via*, and his title would be good. But then it would be certain that in every possible event Wing must be entitled for his own use and benefit."

I have considered these words carefully and have come to two conclusions. In the first place, they are spoken *obiter*. Secondly, I think that Lord Cranworth had in mind two events appearing in one appointment of one fund. He was not then considering two instruments. On that basis the passage on which Mr M'Donald relies does not appear to me to lessen the cogency of the reasoning which has impelled me to reject Mr M'Donald's second point.

As to his third point, I have tried to give full weight to the authoritative statements against allowing an intestacy. I come back, however, to the words of Fry, L.J., in the case of *In re Harrison*, at p. 395:

"Where there is a reasonable construction which results in a testacy, that construction must prevail rather than one which leads to an intestacy."

I regret, however, that I cannot find such a reasonable construction or anything equivocal in the words before us in this case.

For these reasons I think that the interlocutor appealed against is well founded in law, that the declaratory finding in the Second Division is right, and that this appeal should be dismissed. I am of opinion that the expenses of this appeal to your Lordships' House should be dealt with in the same way as, I understand, expenses have been dealt with in the Court of Session-in other words, that they should come out of the fund.

EARL JOWITT.-Miss Margery Newton Ross, who lived at Edinburgh, made a will on 9th June 1938 by which she left all her estate to be divided equally between her brother Edward Burns Ross and her sister Hannah Ross, or the survivor of them in case one should die before the other. She provided further, in the event of both her brother Edward and her sister Hannah predeceasing her, for the payment of a considerable number of pecuniary legacies, and provided for the residue of her estate to be left to certain charities.

It will be observed that these legacies were conditional upon her brother and sister predeceasing her; the words of the will being, "in the event of both the said Edward Burns Ross and Hannah Ross predeceasing me."

By a will of the same date Miss Hannah Ross left her estate on precisely the same terms as her sister Margery. In this will also the payment of the legacies, whether pecuniary or residual, was expressed to be "in the event of both the said Edward Burns Ross and Margery Newton Ross predeceasing me."

The brother, Edward Burns Ross, predeceased his sisters by some years.

On 1st February 1950 Miss Margery Newton Ross, who was then 79 years of age, and Miss Hannah Ross, who was then 74 years of age, lost their lives in an accident caused by the escape of gas. There was no means of knowing whether Miss Hannah Ross died before Miss Margery Newton Ross, or whether Miss Margery Newton Ross died before Miss Hannah Ross.

The provisions of section 184 of the Law of Property Act, 1925, under which, if such a case were to occur in England, there is the presumption that the elder of the two persons dies before the younger, do not apply to Scotland.

This case certainly seems to me to show the value of such an enactment. There can be no doubt, I should suppose, that the wills were made in collaboration, for they are dated the same day and the provisions of the two wills are identical. Yet it seems to me clear on the consideration of the wills that anyone seeking to claim under the will of Miss Margery Newton Ross must establish that Miss Hannah Ross predeceased her; and equally anyone claiming under the will of Miss Hannah Ross must show that Miss Margery Newton Ross predeceased her.

The word "predecease" is quite unambiguous, and there is nothing in the context of the wills to justify us in giving it a construction other than the one it would normally bear.

I think, therefore, that the legatees cannot claim under the will of Miss Hannah Ross, for they cannot establish the predecease of her sister Margery Newton Ross; and equally they cannot claim under the will of Miss Margery Newton Ross because they cannot establish the predecease of her sister Hannah Ross.

Although, therefore, the legatees cannot establish their claim under either of the wills, yet they base a claim to benefit under one or other of the wills, relying on the fact that the provisions of both wills are identical. This claim succeeded before the Lord President, and as a result of his decision each of the pecuniary legatees got a double legacy. There was an appeal against this decision, and the Second Division of the Inner House reversed the decision of the Lord President.

With some regret I have come to the conclusion that this decision is correct, for I find the reasoning of Lord Mackintosh quite irresistible. I cannot think that we are entitled to give an extended or unusual meaning to the word "predecease" in the absence of any context entitling us to do so. *Wing v. Angrave* is an authority which supports this result, though I confess I have not found the speech of Lord Cranworth at all easy to follow.

In the circumstances I regretfully concur that this appeal should be dismissed.

LORD MORTON OF HENRYTON.-The appellants put forward two separate and distinct claims under two separate and distinct wills. First, they claim to be entitled to the estate of Miss Margery Newton Ross under and by virtue of her will dated 9th June 1938, some of them claiming as pecuniary legatees and others as residuary legatees. Secondly, they claim to be entitled to the estate of Miss Margery's sister, Miss Hannah Ross, under and by virtue of her will of the same date; again some of the appellants claim as pecuniary legatees and some as residuary legatees.

The two sisters, Margery and Hannah, died by gas poisoning in the same room on 1st February 1950, and there is no evidence to show which of them predeceased the other or whether they died simultaneously, if such an event is practically possible. They had a brother, Edward Burns Ross, who died on 11th January 1947.

The gift to the appellants under Miss Margery's will takes effect only (to quote the words of the will) "in the event of both the said Edward Burns Ross and Hannah Ross predeceasing me." There is no doubt that Edward predeceased Margery, but the question whether Hannah did or did not predecease Margery is a question of fact. There is no presumption in the law of Scotland as to who survived in a common calamity, and, as the appellants' rights under the will only arise in the event of Hannah predeceasing Margery, it is clear law that the burden of proving that this event happened falls upon them-see Drummond's Judicial Factor. As there is no evidence that this event happened, the appellants' first claim must fail.

For a similar reason, the appellants' second claim, that they are entitled to the estate of Miss Hannah, must fail. They can only take this estate if they prove that Miss Margery predeceased Miss Hannah, and this they cannot do.

I should have arrived at the conclusions just stated without the aid of any authority; but the decision of this House in *Wing v. Angrave* is, in my opinion, irreconcilable with the contentions of counsel for the appellants in the present case. That was a decision based upon principles of English law, but I am not aware of any

difference between the principles of English law applied by this House in *Wing v. Angrave* and the principles of Scots law which are applicable in the present case; nor was any such difference suggested in the judgments of the Second Division or in the arguments presented in this House.

Mr M'Donald for the appellants sought to gain comfort from a dictum in the speech of Lord Cranworth, just quoted by the Lord Chancellor, which appears at the foot of page 211 in the report of *Wing v. Angrave*. The implications of that dictum may have to be considered on some future occasion, but it affords no assistance to the appellants in the present case. Lord Cranworth was there addressing his mind to the question of a person making a claim, in either one of two different events, to one and the same estate bequeathed by one and the same will. In the present case the appellants' claim to take Margery's estate can succeed in one event only, i.e., if Hannah predeceased her, and the same observation applies, *mutatis mutandis*, to their wholly separate claim to take Hannah's estate.

I should have been content simply to express the view that this appeal should be dismissed for the reasons which I have stated, but, as there was a difference of opinion in the Courts in Scotland, I shall deal seriatim with the three arguments put before this House by Mr M'Donald. They are as follows:-(1) In each will the words "predeceasing me" should be read as meaning "failing to take an interest." (2) If the wills must be read literally, then, having regard to the identical terms of the bequests to the appellants in each will, it is immaterial whether Miss Margery survived Miss Hannah or vice versa. In either case there is a series of valid legacies and bequests of residue to the appellants. They claim only one set of legacies. Their interest merged when both sisters were dead. One of the sisters must have survived and taken the whole estate, and that one has validly bequeathed the whole estate to the appellants. (3) This is a case in which, in *dubio*, the fact that a double intestacy will result if the claims of the appellants are repelled should "tilt the balance in their favour."

I reject argument (1) because the words "in the event of both A and B predeceasing me" are words in common use, having a clear and definite meaning, and there is no context in either will which should lead a Court to put a meaning

upon them other than that which they ordinarily bear. This argument is really an echo of the reasoning contained in the dissenting opinion of the Lord Chancellor, Lord Campbell, in *Wing v. Angrave*, at pp. 199 fin. to 203 init.; and that reasoning did not commend itself to any of the Lord Chancellor's colleagues. I would add that I am in some doubt as to the meaning which we are invited to place upon the substituted words "failing to take an interest"; but, if this gloss upon the will were accepted, and Mr M'Donald's contention that each of the ladies "failed to take an interest" under her sister's will were also accepted, the result achieved would be plainly contrary to the intention of both ladies, since it would give to each of the pecuniary legatees a legacy under each of the two wills.

Argument (2) has the advantage of giving only one legacy to each of the pecuniary legatees, but it is, in my opinion, wholly fallacious, since it disregards the fact that, as I have already pointed out, the appellants are putting forward two separate and distinct claims under two separate and distinct wills. It matters not that the wills are in identical terms, *mutatis mutandis*.

I think the words of Lord Chelmsford in *Wing v. Angrave* at p. 223 med. may usefully be quoted in dealing with the argument now under consideration:

"If different persons had been entitled under the two wills, each must have established his claim solely by the will in his favour, independently of the other, and no difference can be made in the rules of evidence, because the appellant accidentally happens to be the ultimate legatee in both wills."

I readily accept the suggestion of Mr M'Donald that the identical dispositions in the two wills now under consideration were not accidental but must have been the result of consultation between the two sisters and their advisers; but that can make no difference to the result. To take under Miss Margery's will the appellants must prove that Miss Hannah predeceased her; to take under Miss Hannah's will they must prove that Miss Margery predeceased her.

As to argument (3), the words of each will are, in my view, free from any ambiguity.

The case is a most unfortunate one, and I join with Lord Mackintosh in thinking that the words of Lord Chelmsford in *Wing v. Angrave* at p. 221 are applicable to each of the testatrices in the present case:

"Had it occurred to her mind that a highly improbable state of facts might arise, either of their both perishing together, or of its being impossible to ascertain which was the survivor, no doubt she would have used apt words to embrace such an extraordinary contingency. Can the language which she has employed be made to include such an intention? If it cannot, then we are not at liberty to go out of the will to bring into it something which is not to be found there."

I would dismiss the appeal.

LORD REID.-Two sisters, Misses Margery and Hannah Ross, who were both over 70 years of age and who lived together in Edinburgh, were found dead at their home on 1st February 1950, having been poisoned by gas. It is admitted that there is no evidence to show which of the two sisters died first.

Both sisters left a will, and their wills are *mutatis mutandis* in identical terms. By her will Margery bequeathed to her brother Edward and her sister Hannah and the survivor of them her whole means and estate, "and in the event of both the said Edward Burns Ross and Hannah Ross predeceasing me" she bequeathed a number of legacies, and then directed the division of the residue of her estate among certain institutions. Edward died in 1947, unmarried.

Questions having arisen as to what effect, if any, was to be given to these wills, a judicial factor was appointed on the estates of both sisters and he raised the present action of multiplepoinding. The fund in medio amounts to approximately 30,000. Claims were lodged for the present appellants, who are legatees under both wills, and for the Lord Advocate, as representing the Crown as *ultimus hres.* Later, claims were lodged for the respondents, who claim as heirs in *mobilibus* of the deceased sisters, and the Lord Advocate withdrew his claim.

The Lord President, sitting in the Outer House, on 2nd July 1953 ranked and preferred the appellants to the fund in medio. On 20th November 1953 the Second

Division recalled this interlocutor and found and declared that the estates of the sisters had fallen into intestacy. The present appeal is taken against that interlocutor.

In Drummond's Judicial Factor v. Lord Advocate a husband and wife and their children had all been killed in an air raid. The wife died intestate and possessed some money, and this money was claimed by the personal representatives of the husband and children. There was no claim by any surviving relative of the wife, and the Lord Advocate claimed, as representing the Crown as *ultimus hres*. The Lord Advocate's claim succeeded. It was held that when two or more persons die in a common calamity there is no presumption in the law of Scotland that one died before another, and there was no evidence to show in what order the deaths had occurred. It was therefore held that the claims of the personal representatives of the husband and children failed because it could not be shown that the husband or children survived the wife to become her heirs in intestacy. In my opinion, this case was rightly decided, and it was not questioned by either party to this appeal.

It follows from this decision that the first bequests in both wills, those to the brother and sister and the survivor of them, are ineffective. The brother predeceased both sisters, Margery's bequest to Hannah fails because it cannot be shown that Hannah survived Margery, and Hannah's bequest to Margery fails because it cannot be shown that Margery survived Hannah. The next bequests are the legacies to the present appellants, but they are only given in the event of both the brother and the other sister predeceasing the testatrix, and if the word "predeceasing" here has its ordinary meaning these bequests must fail for the same reason. In the case of the legacies under Margery's will it cannot be shown that Hannah predeceased Margery and in the case of Hannah's will it cannot be shown that Margery predeceased Hannah, and therefore the event on which alone the legacies would be payable cannot in either case be shown to have occurred.

The appellants' legacies could only be payable if either the word "predeceasing" is capable as a matter of construction of having some other meaning than "dying at a point of time before" or it is permissible to substitute some other word or words for the word "predeceasing" used by each testatrix or to supplement it by adding other

words which are not in the wills. In my judgment, the word "predeceasing" has a definite meaning in the English language and it is not capable of having any other meaning, no matter what the context may be. Of course, a testator may "make his own dictionary" and, if there were anything in these wills to show that the testatrices were using this word with some peculiar meaning, that meaning would be given to it, but otherwise I am unable to see how it can have any other than its ordinary meaning. I can find nothing in the wills to indicate that the testatrices were intending to use the word in an unusual sense; on the contrary, it appears to me that the only reasonable inference to draw from the phraseology of the wills, taken as a whole, is that the testatrices (or their advisers) never thought of the event which happened and assumed that it would always be possible to establish that the one sister either survived or predeceased the other.

The Lord President interpreted the crucial phrase as meaning "in the event of neither the brother nor the sister being there to take the initial bequest." But with all respect that is a very imprecise phrase. If it meant in the event of neither taking a vested interest under the initial bequest, then that would create exactly the same difficulty as the use of the word "predeceasing"; it could not be established either that the other sister had or that she had not taken a vested interest, because that would depend on whether or not she had survived her sister. But, if it meant in the event of neither the brother nor the sister surviving long enough to receive payment of the initial bequest, that would conflict with the terms of the initial bequest. Under the initial bequest the sister, if she survived at all, would take a vested interest immediately on the death of the testatrix and, if she then died before receiving payment, her personal representatives would become entitled, but on this interpretation of "predeceasing" the legatees would also be entitled in that event, and so, if this interpretation of "predeceasing" were to prevail, the terms of the initial bequest would also have to be varied. Even if it were permissible to do so, I do not see how the problem could be solved merely by giving some peculiar meaning to the word "predeceasing."

The testatrices chose words which would cover all ordinary cases. There was perhaps one chance in a million of an event which they would not cover. That event was not foreseen or provided for, but it has happened, and the wills could

not be made to apply to it without reading in some provisions to deal with it. The wills provide for payment of the legacies in the event of both the brother and sister predeceasing the testatrix, and it would be necessary to read in something to the effect that the legacies should also be payable in the event of it not being possible to prove that either survived the testatrix.

It may sometimes be permissible to read words into a will if the will as a whole discloses an intention which would be frustrated if these words were not added, but such cases are rare. The appellants founded first on *Elrick's Trustees v. Robinson*, where the Second Division were able to neglect the words "predeceased by me." It is not useful to argue from the words in one will to the words in another; what is important is the principle which was applied. Lord Justice-Clerk Alness said (at p. 452):

"Now, this is a holograph settlement; and whether there is direct authority on the subject or not, I should be disposed to accord more elasticity to the construction of a deed which is prepared by a person who is not a qualified lawyer, in order to give effect to the intention of the writer, even if imperfectly expressed, than I should accord to the construction of a deed prepared by a firm of solicitors."

I am not concerned with the question whether it is proper to adopt a different method of construction in the case of a holograph will, but even in that case the Lord Justice-Clerk recognises that the intention which justifies regarding words in the will as surplusage must be found in the will itself "even if imperfectly expressed." I think that the rule is accurately expressed by Lord M'Laren (*Wills and Succession*, (3rd ed.) p. 359):

"Where it is apparent from the language of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also apparent what are the words that have been omitted, the necessary words may be supplied by construction in order to effectuate the intention as collected from the context."

In the next sentence Lord M'Laren adds this caution:

"The supplying words to complete the sense of a testamentary provision is a task of great delicacy, and one which Courts are generally unwilling to undertake from an apprehension of the danger of overstepping the just limits of judicial construction."

In the present case the appellants have to contend with the additional difficulty that it is by no means clear what the testatrices would have done if they had foreseen the event which happened. In the event for which they provided—one of them surviving and becoming entitled to the estate of the other—the appellants would have taken nothing under the will of the predeceasing sister but would have taken their legacies under the will of the survivor. But if there is read into each will a provision making the appellants' legacies also payable in the event of it not being possible to prove that the other sister survived the testatrix, or, as the Lord President puts it, in the event of the other sister not taking the bequest to her, then the appellants' legacies will be paid twice. This is admittedly the result if the Lord President's ground of judgment is correct: the appellants would get more and the residuary legatees would get less than the sisters intended them to have. Even if it were possible to spell some general intention out of the terms of the wills taken as a whole, it would not be an intention to produce this result.

The appellants then founded on the presumption against intestacy. Of course, a testator does not intend to die intestate and, if there is any reasonable construction of the will which will avoid intestacy, then, in the absence of strong reasons to the contrary, that construction will be adopted. But the presumption against intestacy can never justify going beyond the proper limits of construction. The appellants relied on *Beveridge's Trustees v. Beveridge*, but I need only quote one sentence from the opinion of Lord President Clyde in that case (at p. 587):

"It seems clear that the legal abhorrence of intestacy can be allowed to justify the construction of plain words in other than their natural meaning only within narrow limits; and no Court can be entitled to amend the provisions of a will unless to give effect to the testator's manifest intention."

"Manifest" must there mean manifest in the will. I find nothing in any of the other cases cited to throw doubt on this principle, and therefore I am unable to agree

with the opinion of the Lord President.

But then the appellants submitted quite a different argument as an alternative. They say one or other of the sisters must have survived, the two wills are identical and it therefore does not matter which survived, because in any event that can possibly have happened their legacies are due to them. In *Mitchell's Executrix v. Gordon's Factor* the circumstances were somewhat similar to the present case. A father, who died intestate, and one of his daughters died in a common calamity, and that daughter left a son, Alan. If the daughter had survived the father, a share of his estate would have vested in her and passed on her death to her son Alan. But, if the daughter had predeceased the father, then by virtue of section 1 of the Intestate Moveable Succession (Scotland) Act, 1855, Alan would have taken in his own right the share which would have vested in his mother had she survived. It was held that Alan took nothing, but the appellants' present argument was not submitted. It was not argued that in either of the only two events which could possibly have happened, the daughter predeceasing or surviving her father, Alan would have been entitled to receive the same sum out of his grandfather's estate- in the first case under the Act and in the second case as heir of his mother- and that therefore his claim to that sum should succeed. Accordingly, in my view, the case is not, strictly speaking, an authority against the present appellants. But I need not consider whether, if this argument had been presented, it ought to have succeeded, because there is this essential difference.

I do not wish to express any opinion, but it may be that if the same person would be beneficially entitled to the same property, or to the same sum out of the same estate, in either of the only two possible events, although it would have come to him by different routes in the two cases, then his claim ought to succeed. But that would not help the present appellants, because they cannot claim that their legacies would in either event have been payable to them out of the same estate. If Margery survived, the legacies would be payable under her will and out of her estate, whereas, if Hannah survived, the legacies would be payable under her will and out of her estate. In whatever order they died, each died possessed of her own property. The property which Margery undoubtedly had when she died cannot be taken out of her estate except by someone who can show a title to it under her

will, and similarly with Hannah's property. And, for the reasons which I have given, no one can now establish any claim under Margery's will to any part of her property or under Hannah's will to any part of her property. The appellants' claim is to aggregate the property of both sisters and to be paid out of that aggregate, but, in my view, it breaks down, because there is no legal basis for aggregating two estates leaving it uncertain to whose estate the aggregate belongs. It is true that, if it could have been proved which sister survived, the estates would in fact have been aggregated, but that would have been because the executor of the surviving sister could have claimed the estate of the other sister from her executor, and the aggregate would then have belonged to the estate of the surviving sister and have been dealt with under her will. It so happens that the same judicial factor has been appointed on both sisters' estates, but that cannot affect the legal position. If there had been different judicial factors on the two estates, the aggregation on which the appellants' argument depends would have been impossible, and the argument unmaintainable.

The case of *Wing v. Angrave* was founded on by both sides. The respondents relied on the actual decision and the appellants supported their alternative argument by citing from the speech of Lord Cranworth. The facts in that case were complicated and I do not find it necessary to set them out. I think that it is sufficient to say that the reasoning in that case is destructive of the first argument for the appellants and that their second argument gains no real support from anything said by Lord Cranworth.

I am therefore of opinion that this appeal should be dismissed.

LORD KEITH OF AVONHOLM.- For the reasons stated by your Lordships I agree that this appeal must fail. In the condescendence annexed to the summons the judicial factor, as pursuer and real raiser, states that, so far as is known to him, there is no evidence to show whether either of the deceased survived the other or whether they died simultaneously. This statement has been adopted by all the parties to this case. On strict pleading, therefore, the possibility of simultaneity of death cannot be excluded, though expressions of judicial opinion can be found to indicate that such an eventuality is an impossibility, or at least that proof of it is

impossible-see *Hickman v. Peacey* .

These three accepted possibilities do not in any way affect the first argument that was advanced for the appellants, namely, that the words "in the event of... Hannah Ross predeceasing me" in the one will and the words "in the event of... Margery Newton Ross predeceasing me" in the other will should be read as meaning in the event of Hannah, or Margery, as the case may be, failing to take under one or other of the wills. This is the view that commended itself to the Lord President, sitting in the Outer House, and is also the view that in very similar circumstances was taken by Lord Campbell, L.C., in his dissenting opinion in *Wing v. Angrave* .If this argument has not been anticipated and rejected by this House in that case, as I think it was, I agree that, for the reasons given by your Lordships, it should be rejected now. Its acceptance would produce the strange result that each of the general legatees would take a double legacy and that the residue available for the residuary legatees would be pro tanto diminished, which would not have been the result if it could be shown that one of the sisters had survived the other for however short a space of time. On no view can it be said that this was the intention of the testatrices.

The second argument for the appellants does not suffer from this patent defect. It involves, however, jettisoning the admission on record that the deaths may have been simultaneous. What is said is that the appellants must take under one or other of the wills and it does not matter which, because one or other of the sisters must have died first. It is not necessary to show which. Assuming that the appellants are not tied to their admission of a third possibility, namely, simultaneity of the deaths, this argument is only made plausible by the fact that the judicial factor, by treating the two estates as if they were one fund in medio, has obscured the realities of the situation. To satisfy the argument put forward, the two estates must be brought together into one executry and distributed as the estate of Hannah, or as the estate of Margery. But that is just what an executor of Hannah or Margery respectively would not be able to do. He could not show that as executor of Hannah's estate he was entitled to Margery's estate or vice versa. Nor could the legatees claim for half a legacy from each estate.

I do not find it necessary to say whether a similar argument could have been put forward with more success in circumstances such as arose in *Mitchell's Executrix v. Gordon's Factor* and *Mitchell's Trustees v. Gordon's Factor*.

In conclusion, I would say that this case suggests the desirability of introducing some statutory rules of presumption into the law of Scotland for cases of common calamity, corresponding to what was done for the law of England by section 184 of the Law of Property Act, 1925.

I agree that the appeal fails.

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