Privy Council Appeal No. 44 of 1914.

Elias Smith and others - - - - *Appellants,*

v.

Seth S. Smith and Dale M. King - - *Respondents.*

FROM

THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY 1914.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MOULTON.
LORD SUMNER.

[*Delivered by* LORD SUMNER.]

On 12th March 1913, John David Smith, as executor of the will and codicil of his deceased wife, Emma Josephine Smith, moved the High Court Division of the Supreme Court of Ontario for the determination of certain questions which had arisen in the administration of her estate. He joined as defendants to the motion his three sons, Elias, Vernon, and Carl, and Dale M. King, the husband of his deceased daughter Bertha, as executor of her estate. John David Smith has since died and his place has been taken by Seth S. Smith, as executor and trustee of his will, but the contesting parties are his three sons on the one hand and on the other the legal personal representative of his deceased daughter.

[69] J. 363. 90.—7.1914. E. & S.

Mr. Justice Middleton decided for the sons. On appeal the Appellate Division of the Supreme Court of Ontario reversed his decision but granted leave to appeal to His Majesty in Council.

The testatrix, Emma Josephine Smith, died on 9th August 1896, having made her will in 1889, with a codicil made in 1894. At the latter date Bertha, her only daughter and youngest child, was in her fifteenth year, and Vernon, her next older child and youngest son, was about twenty-one. Bertha did not marry till she was thirty-one. She survived her marriage only about a twelvemonth, and her husband Dale M. King survived her and proved her will.

It is evident that Mrs. Smith's will was the work of a lawyer and, so far as concerns the present appeal, it was perfectly clear. It began with a series of specific bequests by which Mrs. Smith divided some silver goblets and other articles among her four children, and gave to Bertha most of her trinkets and jewellery. Some property, which came to her on the death of one Robert Charles Smith, was left to her husband, in trust for himself for life and after his death for the benefit of her children equally, each child becoming entitled on attaining twenty-one.

She next disposed of her household furniture and effects, her books and pictures, piano and so forth equally among her children, the delivery of the several shares to take place on her death, with a power to her executor to postpone, but not beyond the times at which each child should attain twenty-one.

It was a common feature of both these dispositions that her grandchildren should stand in the place of their parents dying before the periods respectively fixed for the operation of the gift. Then came a gift of the residue of real

and personal estate to her husband as trustee, in trust to apply the income, first, for the education and maintenance till the age of twenty-one of such of her children as should be minors at her death; next, to making up her husband's income from Robert Charles Smith's property to $600 per annum; and then, subject to setting aside enough to secure this accretion to him for life, in trust to convert into money and divide the proceeds among her children equally (grandchildren again standing in the place of children deceased), as soon as her youngest child for the time being should attain twenty-one. As all Mrs. Smith's children survived her and came of age, Bertha thus became entitled to a vested share of this residue under the will in 1901. Their Lordships were informed that part of this residue consists of real property in Toronto, which has considerably increased in value of late years.

The short question is whether Bertha Smith's share in this residue, which vested by the terms of the will, was taken away by those of the codicil. Her brothers are of course concerned to say the latter, and her husband to maintain the former, and a substantial sum depends on the answer.

The codicil, by whomsoever drawn, is not the work of a lawyer but it affects a legal style and employs some terms of art, a fertile source of confusion. It must have been carefully considered, and was the fruit of much thought. No doubt the testatrix knew what she wanted, so far as she could anticipate events that might occur, but probably she failed to exhaust the different ways in which questions might arise. With her, as with other testators, knowing what she wanted and saying what she meant were probably very different things.

The codicil begins thus, "not feeling satisfied

" with the provision made in my will for Bertha " Hope Smith, my only daughter, I hereby add " this codicil." These words are only introductory and are far from being conclusive, but they establish at the outset two things, that the testatrix had her will in mind, and that her dissatisfaction was not with her will as a whole, but only with her daughter's share under it. She could only increase her daughter's share at the expense of the other beneficiaries, but that was no reason for wishing practically to make a new will. The codicil is intended to "add"; it does not start with an intention to take away.

She then gives her daughter, Bertha, a minimum income for life, diminishing if she marries before attaining twenty-five. The general sense is clear, though there are several difficulties, which need not now be discussed. They serve to contrast the lucidity of the will with the obscurity which naturally arises from altering such a will by means of a codicil without a lawyer's help. The crux of the case is that part of the codicil which deals with the dispositions of the testatrix on and after Bertha Smith's death. This runs as follows :—

" Whatever my estate realises over and above " the payment of this bequest to Bertha and the " provision made for my husband and executor " J. D. Smith—in my will—is to be equally " divided between my surviving sons or their " surviving child or children as provided in my " will.

" This bequest to Bertha is to supersede all " others made in my will, with the *one* exception " of the provision made for J. D. Smith, my " husband.

" Following the bequest to Bertha I solemnly " charge my executor or executors with a pro- " vision for Vernon's education or profession " until he attains the age of twenty-five years."

Mr. Justice Middleton held and declared that by these words, "the whole will is revoked except "in so far as it provides for the husband," and that the reference to "the surviving sons of the "testatrix or their surviving child or children as "provided in the said will," was only a compendious way of providing in the codicil that grandchildren should take in a certain event, and did not keep any provision of the will alive as such.

On this construction the testatrix swept away all the specific bequests, which carefully divided her personal valuables among her four children, and these things fell into residue. It swept away dispositions, the differences in which as to vesting and so forth showed that they had been the subject of anxious consideration, and this as regarded the sons and not the daughter Bertha only. As Bertha's $600 per annum is to be "paid her out of my estate," there could be no division of the corpus till her death, for the whole of it might some day be needed for her annuity, and then the division is to be among "my surviving sons," that is obviously the sons who survive their sister, not those who survive their mother. Yet there is a charge for Vernon's education during the next four years, which, failing a surplus of income, he could only enjoy, if his sister died before that time expired. If Bertha leaves children they get nothing, unlike their cousins who survive their parents. This is a drastic change indeed, and all because the testatrix was not "satisfied with the provisions made in my will for Bertha," and wished to "add" a codicil. There can be little doubt that this interpretation proves too much.

It is mainly, though not exclusively, rested on the word "supersede." If single words are to be examined narrowly, though "all other bequests in my will" are "superseded," the

devises contained in it are not, which would leave a good part of the will standing. On the other hand, if the testatrix used the word "bequests" without exactly knowing what it meant, why should it be held that she used the word "supersede" in the sense in which it is used ordinarily and correctly, and not in some loose sense of her own?

Again, if this construction prevails, what is the meaning of the words "unless the income "realised through or by my property on division "should yield more to each surviving child or "children," and "should such be the case, then I "authorise such division to be made, Bertha "having attained the age of twenty-five years as "aforesaid"? They would appear to make the corpus divisible in one clause on Bertha's twenty-fifth birthday and only on the day of her death in the other. Nor does this exhaust the difficulties. Reliance is placed on the words "whatever my "estate realises over and above the payment of "this bequest to Bertha and the provision made "for my husband . . . . is to be equally "divided between my surviving sons," as pointing to a division of corpus, taking place only on Bertha's death, from which any children of hers are excluded, and not to a mere division of surplus income, as if it ran "whatever income "my estate realises . . . ." and so forth. If so, the difficult clause "This bequest to Bertha "is to supersede all others . . . ." is mere surplusage: all that it can effect has been effected already. It is not, however, necessary to pursue the anomalies which arise on the appellants' construction.

Upon appeal the Appellate Division reversed the order of Mr. Justice Middleton, and rightly so, as their Lordships conceive. Some of the judgments contain passages and put interpretations upon particular words, with which their

Lordships are not prepared to agree, nor are they confident, as the learned Judges were, that an interpretation can be found which would reduce the whole of this codicil to consistency and clearness. It is not, however, necessary to solve all these questions for the purpose of this appeal.

It is a well established rule as stated by Tindal, C.J., in advising the House of Lords in *Hearle* v. *Hicks* (1 Cl. and F. at p. 24) that "if a devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include this particular devise, then such devise ought undoubtedly to stand." The present case falls, if not within the exact words, entirely within the spirit and substance of this rule.

Their Lordships are of opinion that the meaning of the material words in the codicil, if any (and some may be beyond reconciliation with the rest), is so far from being as clear as the language of the will, and is so far from establishing a revocation free from doubt of Bertha Hope King's interest in the corpus under her mother's will, that the disposition of the will in her favour undoubtedly ought to stand. They will accordingly humbly advise His Majesty that the order appealed from was right and that this appeal ought to be dismissed with the like order as to payment of costs out of the estate as was made by the order appealed against.

In the Privy Council.

ELIAS SMITH AND OTHERS

v.

SETH S. SMITH AND DALE M. KING.

[DELIVERED BY LORD SUMNER.]

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