

31351

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF BERMUDA.

IN THE MATTER of the WILL of LOUISA JANE

UNIVERSITY OF LONDON
W.C.1.
20 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

LOUISE GWENDOLYN OUTERBRIDGE, Widow
MATILDA EVELYN CAFFEE, Widow (Plaintiffs)

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.

RECORD OF PROCEEDINGS

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Notice of Motion for Conditional Leave to Appeal	4th April 1950
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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*

10

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.*

RECORD OF PROCEEDINGS

20

No. 1.

ORIGINATING SUMMONS.

IN 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

and

30

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.

*In the
Supreme
Court of
Bermuda.*

No. 1.
Originating
Summons,
29th
December
1949.

*In the
Supreme
Court of
Bermuda.*

No. 1.
Originating
Summons,
29th
December
1949,
continued.

LET Edith MacKay Hollis of Hamilton Parish in the Islands of Bermuda but presently residing at 56 Norfolk Road in the City of Arlington in the Commonwealth of Massachusetts in the United States of America, Amy Hollis Grayston, Edith Hollis Bach, Marjorie Outerbridge, Phyllis Marianne Outerbridge and Charles Elystan Haycock all of Hamilton Parish in the said Islands, within eight days after service of this Summons on them, exclusive of the day of such service, cause an Appearance to be entered for them to this Summons upon the application under Order 54 (A) of the Rules of the Supreme Court of the Plaintiffs herein who claim to be entitled to real estate specifically devised and bequeathed by the will of Louisa Jane Hollis, deceased, dated the 13th day of November, 1919, for the determination of the following questions arising under the above-mentioned will, namely :—

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.

No. 2.

No. 2.
Affidavit of
Plaintiff,
Louise
Gwendolyn
Outer-
bridge,
16th
December
1949,
with copy
of Will
annexed.

AFFIDAVIT of Plaintiff, Louise Gwendolyn Outerbridge, in support of Originating Summons.

I, LOUISE GWENDOLYN OUTERBRIDGE of Hamilton Parish in the Islands of Bermuda, make oath and say as follows :—

1. Louisa Jane Hollis made and duly executed her last will and testament dated the 13th day of November, 1919. 30

2. The said Testatrix died on the 3rd day of April, 1923, without having revoked or altered her said will, which was subsequent to her death duly admitted to probate and recorded in the registry of the Supreme Court on the 11th day of April, 1923.

3. A certified copy of the will of the said Testatrix is annexed to the file copy of this Affidavit as an exhibit and initialled by me.

4. The said Louisa Jane Hollis was my mother and had seven children, namely :—

Erminnie, who died before my mother and before the execution of the said will. 40

Kathleen Louisa Hollis, who died on the 22nd day of March, 1949.

Harry Stuart Hollis, who died on the 22nd day of August, 1942.

Austin Wilkinson Hollis, who died on the 6th day of November, 1921.

Mary Logier Haycock, who died on the 4th day of June, 1941.

Matilda Evelyn Caffee, one of the Plaintiffs in this action, who is still living.

and I, who am also one of the Plaintiffs in this action.

*In the
Supreme
Court of
Bermuda.*

No. 2.
Affidavit of
Plaintiff,
Louise
Gwendolyn
Outer-
bridge,
16th
December
1949,
with copy
of Will
annexed,
continued.

5. I am advised and verily believe that Harry Stuart Hollis made and
duly executed a will which was subsequent to his death admitted to
10 probate, under the provisions of which he devised and bequeathed all his
real and personal estate to Ethel MacKay Hollis, now his widow and one of
the Defendants in this action.

6. I am advised and verily believe that Austin Wilkinson Hollis
made and duly executed a will which was admitted to probate after his
death, under the provisions of which he devised and bequeathed all his
real and personal estate to his wife Amy Edith Hollis; that his said wife
Amy Edith Hollis likewise made and duly executed a will which was after
her death on the 8th day of August, 1938, duly admitted to probate and
20 under the provisions of which she devised and bequeathed her real and
personal estate equally between her two daughters, Amy Hollis Grayston
and Edith Hollis Bach, two of the Defendants in this action.

7. I am advised and verily believe that the said Mary Logier Haycock
made and duly executed a will which was after her death duly admitted to
probate under the provisions of which she devised and bequeathed all her
real and personal estate equally between Marjorie Outerbridge, Phyllis
Marianne Outerbridge and Arthur Elystan Haycock, three of the Defendants
in this action.

8. I am advised and verily believe that Kathleen Louisa Hollis made
and duly executed a will which was after her death duly admitted to probate
30 under the provisions of which she devised and bequeathed her real and
personal estate one-quarter thereof to me and three-quarters thereof to the
said Matilda Evelyn Caffee, the other Plaintiff in this action.

9. I am advised and verily believe that the Defendants in this action
are all of the persons who, together with myself and the said Matilda
Evelyn Caffee could under any possible construction of the will of the said
Louisa Jane Hollis be interested parties in the real or personal estate so
devised and bequeathed.

10. None of the properties described in the will of the said Louisa
Jane Hollis as "Hilgrove", "Cat Cave" and "Cave Hill", was sold by
40 the life tenant, Kathleen Louisa Hollis, under the power for this purpose
given under the terms of the said will.

11. I am advised and verily believe that the proper construction of
the devise of the three said properties to take effect on the death of the life
tenant, Kathleen Louisa Hollis, is that such of the children of the Testatrix
Louisa Jane Hollis, as should be living at the death of the said life tenant
should be the owners of the said parcels of real estate and fee simple.

*In the
Supreme
Court of
Bermuda.*

12. My sister, the said Matilda Evelyn Caffee, and I are the only two children of the said Testatrix, Louisa Jane Hollis, who survived the death of the life tenant, Kathleen Louisa Hollis.

No. 2.
Affidavit of
Plaintiff,
Louise
Gwendolyn
Outer-
bridge,
16th
December
1949,
with copy
of Will
annexed,
continued.

Sworn at the City of Hamilton in the
Islands of Bermuda this 16th day of } LOUISE G. OUTERBRIDGE
December, 1949.

Before me,

P. J. C. SMITH,

A Commissioner for taking affidavits in the Supreme Court
of Bermuda.

10

CERTIFIED COPY WILL OF LOUISA JANE HOLLIS.

L.G.O.

THE REGISTRY OF THE SUPREME COURT
BERMUDA.

BERMUDA,
Alias
SOMERS' ISLANDS }

By the Registrar of the Supreme Court of
Bermuda.

I DO HEREBY CERTIFY that the instrument in writing hereto
annexed marked "A" and initialled by me is an examined and correct
copy of the last Will and Testament of

20

LOUISA JANE HOLLIS

late of Hamilton Parish in the said Islands, deceased, which said will has
been duly admitted to probate in common form by the Supreme Court of
Bermuda and been duly deposited in the Registry of the said Court for
record pursuant to the laws of these Islands.

IN WITNESS WHEREOF I, the Registrar aforesaid, have hereto
set my hand this twenty-sixth day of November one thousand nine hundred
and forty-two.

(Signed) W. NORMAN PARKER,

Registrar. 30

"A."

Bermuda
Alias
Somers Islands.

I, LOUISA JANE HOLLIS of Hamilton Parish in the
Islands of Bermuda, widow of Henry Hilgrove
Hollis, being of sound mind, do make, ordain, and
constitute this my last Will and Testament.

I desire that all my just debts be paid.

I give and bequeath to my eldest daughter Kathleen Louisa Hollis, for her lifetime, all that portion of land in Hamilton Parish known as the "Cat Cave" and all structures thereon (save the workshop, machine hut and contents thereof owned by Arthur Robert Wilkinson) which said land is bounded on the North by land of the late Henry H. Hollis, on the East by land of George R. Outerbridge, and on the South and West by the public road.

*In the
Supreme
Court of
Bermuda.*

No. 2.
Affidavit of
Plaintiff,
Louise
Gwendolyn
Outer-
bridge,
16th
December
1949,
with copy
of Will
annexed,
continued.

I also bequeath to Kathleen Louisa Hollis the property known as "Hilgrove" together with the dwelling-house thereon and with all other
10 furnishings of the said house, for the term of her life. This property is situated in Hamilton Parish, bounded on the North by land owned by Harry Stuart Hollis and myself commonly called Northlands, on the East by land of the late Benjamin Outerbridge, on the South by the property called "Cat Cave" and on the West by the public road.

In consequence of the lamented demise of my daughter Erminnie, wife of George W. Barbelmez, to avoid complications, I bequeath to my eldest daughter Kathleen Louisa Hollis, for the term of her life, that portion of land in Hamilton Parish known as "Cave Hill" together with the cottage
20 thereon, bounded on the North by the sea, on the East by a road made by the late Julian I. Wilkinson to remove sea-weed from Hog Fish Point, on the South by the public road, and on the West by land of the late Robert T. Gibbons.

I desire that George W. Barbelmez husband of my late beloved daughter Erminnie, may have the use of the cottage and premises of "Cave Hill" during his visits to Bermuda if he so desires.

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
30 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.

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.

I give and bequeath to my eldest son, Harry Stuart Hollis, that portion of Northland in Hamilton Parish, bounded on the North by land of the late William W. N. North, on the East by land of the late Benjamin
40 Outerbridge, on the South by land of the late Henry Hilgrove Hollis, and on the West by land of my son Harry Stuart Hollis, recently purchased from William D. Wilkinson.

In consequence of the lamented demise of my youngest daughter Erminnie wife of George W. Bartelmez, on May 27th, 1919, I bequeath to her three children Caroline Jane Bartelmez, Erminnie Hollis Bartelmez, and Theodore Lawrence Bartelmez, the sum of £400 (four hundred pounds) each, which I believe to be the full amount of their mother's portion of the estate of her father Henry H. Hollis.

*In the
Supreme
Court of
Bermuda.*

No. 2.
Affidavit of
Plaintiff,
Louise
Gwendolyn
Outer-
bridge,
16th
December
1949,
with copy
of Will
annexed,
continued.

This legacy I desire that my executors will pay at their discretion, if needed for maintenance or education of the said children, or may be invested for the said children by my executors if they think it desirable.

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 Louise Outerbridge, Caroline Jane Bartelmez, as a token of love and remembrance.

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 10 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.

LOUISA JANE HOLLIS, L.S.

Signed sealed and delivered and acknowledged by the Testator Louisa Jane Hollis, as and for her last Will and Testament in the presence of us this Thirteenth day of November, one thousand nine hundred and nineteen.

Witnesses : { C. T. OUTERBRIDGE,
S. R. WILKINSON.

20

I Louisa Jane Hollis the testator hereinbefore named do hereby under my hand and seal appoint Harry Stuart Hollis, Austin Wilkinson Hollis and Kathleen Louisa Hollis Executors and Executrix to this my last Will and Testament.

LOUISA JANE HOLLIS, L.S.

Witnesses : { C. T. OUTERBRIDGE,
S. R. WILKINSON.

Recorded : April 11th, 1923.

(Sgd.) GERALD H. GRAY,

Registrar General. 30

No. 3.
Judge's
Notes
(Brooke
Francis,
C.J.),
1st March
1950.

No. 3.
JUDGE'S NOTES.

Originating Summons for determination of questions arising out of the will of Louisa Jane Hollis.

J. E. Pearman for Plaintiffs.

A. D. Spurling for Defendants.

Pearman represents both Plaintiffs, refers to O.54 A. Rules of the Supreme Court. Will of Louisa Jane Hollis. He requests in interpretation.

The personalty in question is the contents of one of the houses i.e. Hilgrove. Louise Gwendolyn Outerbridge is one of the children of the testatrix. Defendants comprise all those who may possibly "take."

*In the
Supreme
Court of
Bermuda.*

Spurling agrees to this.

The Will was executed on 13th November, 1919. Testatrix died on 3rd April, 1923. The Testatrix had seven children, two predeceased her, they are Erminnie and Austin Hollis. Five survived her, but three of these survivors have since died. These are Kathleen Louisa Hollis, Harry Stuart Hollis and Mary Logier Haycock, and the two survivors are the Plaintiffs. The Defendants are the children and successors of the testatrix's beneficiaries. Ethel Mackay Hollis, widow of Harry Stuart Hollis, takes under Harry Stuart Hollis' will.

No. 3.
Judge's
Notes
(Brooke
Francis,
C.J.),
1st March
1950,
continued.

Amy Grayston }
and } are the children of Austin Wilkinson Hollis.
Edith Bach }

Marjorie Outerbridge }
Phyllis Marianne Outerbridge } Children of Mary Logier Haycock.
Charles Haycock }

Refers to will. Clause 3 gives a life tenancy of "Cat Cave" to Kathleen Louisa Hollis the eldest daughter.

Clause 4.—Life tenancy to Kathleen Louisa Hollis of "Hilgrove." This clause is the bequest of the furnishings, contents in "Hilgrove."

Clause 5.—Life tenancy to Kathleen Louisa Hollis—"Cave Hill."

Clause 6.—Irrelevant.

Clause 7.—Empowers Kathleen to sell any or all of the three life tenancies—sale to be with consent of her brothers and sisters, and proceeds to be divided as set out in that clause. Six of them were alive in 1919, at the date of the will—13th November, 1919.

Clause 8.—This is the alternative ; if Kathleen retains the properties, then testatrix gives and bequeaths to "surviving" children. This is the crux—the "*surviving children.*"

Submission is that the word "surviving" has reference to the period of distribution that is to say the death of the life tenant Kathleen Louisa Hollis i.e. 23rd March, 1949. At which date the Plaintiffs were the only surviving children of the testatrix.

No more of the will is of interest.

Submit firstly :— In constructing a will words must be given their usual sense—On this point—on the meaning surviving, cites *Cripps v. Wolcott* 56 E.R. p. 631—Reads.

Refers to *In re Poultney* 1912/2 C.D. p. 541—Referring to *Cripps v. Wolcott*, Leach—V. Chancellor "It would be difficult . . . settled . . ." The present case is on all fours with this. The differing method of distinction i.e. as between clauses 7 and 8 does not show caprice.

*In the
Supreme
Court of
Bermuda.*

No. 3.
Judge's
Notes
(Brooke
Francis,
C.J.),
1st March,
1950,
continued.

Pearman continuing—Will is perfectly clear. Nothing to override.

Cripps v. Wolcott—emphasises.

Submits further with reference to paragraph two of summons: in that event Matilda and Louise—would take as “Joint tenants.”

There are no words of severance—words are—inherited by surviving children. Joint tenancy.

Paragraph 3 of Originating Summons. No gift of personalty in Clause 8 (of the will). The will is silent as to furniture and furnishings.

Refers Hailsham's Halsbury Volume 34 paragraph 240—*et sequitur*.

Spurling—Does not question facts—He confines himself to submissions 10 on the law.

With reference to concrete fact Austin W. Hollis predeceased. Refers to Section 31, Wills Act, Volume Two page 1157. The effect of this, is the presumption to have outlived the testator. By virtue of this section, and wording of will—Austin Wilkinson will be included.

Submission that the correct interpretation of the will would result in all children (6 of them) would in Clause 7 become entitled under will to vested equal shares as tenants in common, in the real estate of the testatrix, by reason of which each of them received a specified share in the real Estate which they could dispose of. 20

If the interpretation urged by Pearman which is based on *Cripps v. Wolcott* is adopted, he submits that an interpretation of clause (8) without reference to the will as a whole, would be contrary to the recognised canons of construction.

Weekly Reports, Clause 8 reads—By the use of the word “Children” a class gift was created and the testatrix intended that the time at which possession was to be ascertained was indicated by her by the use of the word “surviving” which means “Surviving at death of the life tenant” i.e. Kathleen - .

Which is in accordance with principle in *Cripps v. Wolcott*. 30

I do not dispute *Cripps v. Wolcott*. This applies to realty—Cites Jarmon on Wills, 7th Edition Volume 3 p. 2059, 2063.

Important words “And there be no special intent in Will”—and refers to Clause 13.

If you isolate clause 8, agree it would come within *Cripps v. Wolcott*. Consequence would be any child of testatrix who died before life tenant would receive no benefit; and the “longest liver” of the children would eventually become entitled. Reading will—That was not intention of testatrix. The facts in *Cripps v. Wolcott* are different from those here.

In Jarmon Page 2060—Cites *Shailer v. Groves*, Jarmon page 2066 40 (6 Hare page 162) 67 E.R. page 1124. The word “Surviving” has reference to the testatrix' death.

Rodgeur v. Cowther 9 J. p. 575.

Discussed Jarmon—Death of testatrix is the determining date, not the death of the life tenant as to meaning of technical words. *Newton v. Ayscough* 34 E.R. p. 614. Grant, J., M.R., 615 depends on apparent intention of testator.

*In the
Supreme
Court of
Bermuda.*

Russell v. Long 31 E.R. p. 283—Approval.

No. 3.
Judge's
Notes
(Brooke
Francis,
C.J.),
1st March,
1950,
continued.

Survivorship may be referred either to death of Testatrix or life tenant, according to intention of testatrix.

The will should be read as a whole and when so read the intention of the testatrix obviously is to benefit all children except only Erminnie, who predeceased her. She had benefited Erminnie's children. She died in May 1919.

Vide paragraph 10 is a pointer as to intention of testatrix. Submits relevant clauses of will as 3, 4 and 5. As to 7 the most important of will; Clause 7 gave a power of sale subject to approval. This sale would have given each of the 6 children surviving proceeds of the sale.

Clause 8.—

Clause 10.—

Clause 13.—Is an indication of intention of testatrix to benefit all her children. No difference of opinion or meaning of Clause 7.

20 Clause 8.—Is an alternative.

If any of these properties had been sold by Kathleen during her lifetime each of the six persons named and their representative would have taken an equal share, but if his (Pearman's) submission is correct obviously the result is that any one of the six children could prevent the other children obtaining any interest in the premises. At the whim of Kathleen and without the knowledge any one of the brothers and sisters could completely alter the terms of will.

Halsbury (Hailsham) Volume xxxiv page 209 and 210 *Vide* also S. 267 *et seq.*, para. 264, 265, also para. 267 canon of construction—Prefers construction which would benefit testatrix's family generally. Cites *Bretton v. Le Shulier* 23 E.R. page 1026. As to interpretation of will. *Bullock v. Bennett* 44 E.R. P. 111 words "Surviving children" being a description of the objects of the bounty of the testatrix. Must have reference to the date of her will—13th November, 1919. The expression "surviving children" is not limiting descent.

The fact that Erminnie had died was obviously in the mind of the testatrix—mentioned in will three times i.e. clauses 5, 6 and 10.

Therefore the testatrix obviously was considering her other children. She was using the words "surviving" to differentiate between Erminnie and the children who at the date of the will were alive and sufficiently named, and therefore the word "surviving" is descriptive of a group of testatrix's children, and not descriptive of time when distribution was to take place.

*In the
Supreme
Court of
Bermuda.*

No. 3.
Judge's
Notes
(Brooke
Francis,
C.J.),
1st March,
1950,
continued.

Jarman page 2048 and 2049 conclusion meaning of words " other to word ' Surviving '."

Should not be interpreted—" living at time of making of the will ".
Re Corbett's Trust 70 E.R. p. 555, with particular reference to page 558.
In this particular case if testatrix was rational—The word " surviving " must be construed as the children surviving at the date of the will.

If this testatrix does not intend to benefit the 6 children named in Clause 7, why did she make it a condition precedent to sale of property, that Kathleen had to obtain approval of her brothers and sisters.

Court presumed against intestacy. 10

With regard to personalty. Adds nothing to Pearman. Would seem that intention to let the furniture.

Pearman in reply—Perfectly clear testators do not always understand the full significance of everything they write in will.

Never intended life tenant should share with a remainder man. One more comment—all submission of Spurling are based on a request to alter the ordinary meaning of clause 8, drawn from what the intention of testatrix was. Emphasizes Halsbury Volume 34 page 191.

C. A. V.

C. B. F. 20

No. 4.
Judgment
(Brooke
Francis,
C.J.),
17th March
1950.

No. 4.
JUDGMENT.

This is an action on an originating summons heard in Chambers on the 1st March, 1950, for the determination of certain questions arising under the will of the late Louisa Jane Hollis.

Mr. J. E. Pearman of Counsel for the Plaintiffs and Mr. Dudley Spurling of Counsel for the Defendants.

At the conclusion of the hearing, the Court reserved Judgment.

The will in dispute was dated the 13th November, 1919, and the testatrix died on the 3rd April, 1923. She had seven children, comprising 30 five daughters and two sons, designated as follows :—

Kathleen Louisa Hollis	The life tenant mentioned in the action, who died on the 22nd March, 1949.
Harry Stuart Hollis	Who married, and thereafter died on the 22nd August, 1942.

	Austin Wilkinson Hollis	Who married, and thereafter predeceased the testatrix on the 6th November, 1921.	<i>In the Supreme Court of Bermuda.</i> <hr/> No. 4. Judgment (Brooke Francis, C.J.), 17th March 1950, <i>continued.</i>
	Mary Logier Haycock	Who married, and thereafter died on the 4th June, 1941.	
	Matilda Evelyn Caffee	Who married, and is one of the two Plaintiffs in this action.	
	Louise Gwendolyn Outerbridge ..	Who married, and is the second of the two Plaintiffs in this action.	
10	Erminnie Bartelmez	The youngest daughter who married, and thereafter died before the making of the will.	

The Defendants in this action are :—

	Ethel Hollis	Widow of the late Harry Stuart Hollis.
	Amy Grayston }	The children of the late Austin Wilkinson Hollis.
	and Edith Bach }	
20	Marjorie Outerbridge }	The children of the late Mary Logier Haycock.
	Phyllis Outerbridge and }	
	Arthur Elystan Haycock }	

The will comprises thirteen clauses, the first two and the sixth and ninth are irrelevant to this judgment.

The third, fourth and fifth clauses gave a life tenancy to the testatrix's eldest daughter, Kathleen Louisa, in three properties known as "Cat Cave", "Hilgrove" and "Cave Hill", all in Hamilton Parish.

30 The seventh clause gave the life tenant a power of sale over those properties, subject to the consent of her brothers and sisters, and defined a distribution of the proceeds of the sale equally between the six children mentioned by name and who were all living at the date of the making of the will.

The eighth clause provided that in the event of Kathleen Louisa retaining the properties and not selling, on her death they were to be inherited by her surviving children.

40 The life tenant, Kathleen Louisa, died on the 22nd March, 1949, not having sold the property, and the parties to this action are now before the Court seeking an interpretation of the words "my surviving children".

The questions put to the Court are as follows :—

1. Who are the present owners as devisees under the will of the late Louisa Jane Hollis, 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 ?

*In the
Supreme
Court of
Bermuda.*

No. 4.
Judgment
(Brooke
Francis,
C.J.),
17th March
1950,
continued.

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 what are the shares in which it is owned under the provisions of the said will.

It has been submitted by Counsel on behalf of the Plaintiffs that words must be given their usual sense, and it must be presumed, unless there be something very much to the contrary, that a testator intends that usual sense to be read into the phrasing which he uses. In this case, it is submitted, the wording is perfectly plain, and there is nothing to take the words sought to be interpreted out of the ordinary rule of law. Thus following the accepted canons of construction, Counsel argues that survivorship in this will must be referred to the period of distribution, that is to say the date of the death of the tenant for life, at which period the Plaintiffs (Louise Gwendolyn and Matilda Evelyn) were the only surviving children of the testatrix. He supports his submission on the old established rule in *Cripps v. Wolcott* as expounded and confirmed in *In re Poultney* (1912), 2 Ch. D. p. 541. Counsel urges that the case now under consideration is very similar to, and in fact is on "all fours" with that discussed in *re Poultney*. 10

Necessarily I have examined very carefully that case, the surrounding circumstances in which, I would agree, are similar with those presented in the case now before me; but the will contained some very precise wording which is absent from that in this case. I note that the *Poultney* case was determined on appeal before a Court presided over by the Master of the Rolls, who founded his judgment on the presence in the will (there under review) of certain specifically determining words in the final clause: e.g. "I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors." These words were held to be the determining factor, for they had the effect of directing a division amongst a different class of beneficiaries from that in existence at the date of the death of the testator, and in accordance with the rule in *Cripps v. Wolcott*, the division was precisely limited to those alive at the death of the tenant for life, that is to say, at the period of distribution. 30

There are no such definite words in the Louisa Jane Hollis' will now before me, and because of this, and of the omission therefrom of some other equally positive phraseology, I am unable to hold that the judgment in *Poultney's* case, or the rule in *Cripps v. Wolcott* apply here. 40

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.

Previous cases on the construction of other wills are considered by the Court, and weight may or may not be given them according as to whether or not they lay down some rule of construction applicable to the case before the Court, or are based on reasoning which commends itself to the Court; and although the Court may follow a previous decision on another will where the language was very similar to that in the will under consideration, yet the mere fact of similarity of language does not bind the Court to adopt a similar construction. The surrounding circumstances may be—usually are—different in every case.

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- 10 In the construing of wills the Court is sometimes confronted with suggestions of capriciousness on the part of a testator, and it is accepted that a testator has a right to be capricious if he chooses; but without some clear expression of such intention, the Court does not attribute to a testator a capricious intention, nor a harsh or whimsical result in his dispositions, where the words of his will can be read otherwise. 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
- 20 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.

Now 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"? Surviving when? Surviving at the date of her death, or surviving at the date of the death of her eldest daughter, Kathleen Louisa?

- 30 If the meaning is to be construed in the latter sense, then applying the rule in *Cripps v. Wolcott*, the result 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.

- 40 As I have said, there are no definite words in her testament comparable with those which appeared in the will in the *Poultney* case, and following the rules of construction which I have just enunciated, her intention must be collected from a consideration of the whole will.

The principal purpose of the will was, as I see it, to grant a tenancy for life to Kathleen Louisa, the eldest daughter. This signifies clearly that the testatrix chose this senior member of the family as the guardian of the family property. She was given a power of sale, but only with the consent of her brothers and sisters, and thereupon the proceeds were to be divided equally between the six brothers and sisters. This is an indication that in that event the bounty of the testatrix was to be enjoyed equally by each of them.

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The testatrix in three clauses 10, 11 and 12 then made provision for her grandchildren, whom again she specifically named : that is to say, major and seemingly liberal provision of four hundred pounds for each of the three children of her "beloved" youngest daughter, Erminnie, and minor legacies of twenty pounds each for four other granddaughters, and also for Caroline, one of the three daughters of Erminnie.

After this provision, she ordained (clause 13) that at her death all her personalty was to be divided equally between her six children whom again she named correspondingly to the manner in which they were named to enjoy the division of the proceeds of the sale of the property in the event mentioned in clause 7. 10.

Does not all of 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.

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 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. 20

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. 30

The estate created by the will of Louisa Jane Hollis is a tenancy in common in fee simple, and in answer to the questions proposed in the Originating Summons the Court declares :

Concerning the first and second questions, the present owners and their proportionate interests are 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 ; 40

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.

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As the wills of the deceased children of the late Louisa Jane Hollis have not been put in evidence, no judgment or opinion can be or is formed as to the estates and interests which are given thereby.

Concerning the third question :

- 10 The personalty at " Hilgrove " is to be divided between the same persons and in the same proportions as hereinbefore adjudged. Incidentally, the expression " the next-of-kin or legatees " should be substituted for the expression " the heirs or devisees " wherever the latter expression has been used.

And the Court so decrees with costs against the estate of Louisa Jane Hollis.

(Sgd.) C. BROOKE FRANCIS,
Chief Justice.

17th March 1950.

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No. 5.

ORDER for Conditional Leave to Appeal.

No. 5.
Order for
Condi-
tional
Leave to
Appeal,
14th April,
1950.

Application by Motion for leave to appeal to His Majesty-in-Council from the Judgment of the Court made in the above matter on the 17th day of March, 1950.

Before His Honour SIR BROOKE FRANCIS, Chief Justice.

On the 14th day of April, 1950.

Mr. J. E. Pearman for Plaintiffs.

Mr. A. D. Spurling for Defendants.

ORDER.

10

Upon hearing Counsel for the Plaintiffs and the Defendants, leave to appeal to His Majesty-in-Council is granted and IT IS ORDERED that security in the sum of £300 be entered into by one or both of the Plaintiffs, with two sureties, to be filed within thirty days, AND THAT the Record be prepared for despatch to England for printing within eight weeks.

Dated the 14th day of April, 1950.

W. NORMAN PARKER,
Registrar of the Supreme
Court of Bermuda.
