[HIGH COURT OF AUSTRALIA.]

PENNY AND ANOTHER . . . . APPELLANTS;

AND

MILLIGAN AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Nov. 21, 22, 25; *Dec.* 4.

Griffith C.J., Barton and Isaacs JJ.

Will—Construction—Provision for widow—"In lieu of dower and thirds"—Partial intestacy—Election—Absolute gift—Condition.

A testator by his will gave the residue of his personal estate to his wife for life, and after her death to his stepdaughter for life with remainder over to such of the stepdaughter's children as should survive her, and declared that the provision for his wife should be "in lieu of dower and thirds." The gift over in remainder having failed owing to the death of the children of the stepdaughter during the lifetime of the tenant for life, their interest fell into intestacy.

Held, that, inasmuch as it appeared from the terms of the will, that the events which happened and the consequent intestacy had never been contemplated by the testator, the declaration could not be construed as imposing a condition that the widow should only take the gift to her on the terms of renouncing any share on a possible partial intestacy, nor as a gift by implication of her share in the personalty to the next of kin, and that consequently she was entitled to both the provision and her share in the intestacy under the Statute of Distributions.

Lett v. *Randall*, 3 Sm. & G., 83; 24 L.J. Ch., 708, distinguished.

Naismith v. *Boyes*, (1899) A.C., 495, and *In re Williams*; *Williams* v. *Williams*, (1897) 2 Ch., 12, considered and applied.

Decision of *Street* J., *In re Eyers*; *McIntosh* v. *Milligan*, (1907) 7 S.R. (N.S.W.), 83, affirmed.

APPEAL from a decision of *Street* J. in Equity on an originating

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summons brought by executors for the determination of questions arising upon the construction of a will.

The testator, John Eyers, by his will, after providing for certain legacies, gave his real estate and the residue of his personal estate to his wife for life or so long as she should continue his widow and unmarried, and after her death or marriage to his stepdaughter for life, and after her death to such of her children as should be then surviving. The will contained this provision:— "I declare that the provision hereby made for my said wife is in lieu of dower and thirds." The testator died in June 1888, leaving a large amount of personal property. The widow died in December 1895, and the stepdaughter in January 1906, having had five children, all of whom had died during the lifetime of the testator. The gift in remainder to the surviving children of the stepdaughter, therefore, failed. The testator left no issue.

The executors of the will took out an originating summons for the determination of the following among other questions:— Whether or not on the true construction of the will the sequels in title of the widow of the testator are entitled to any and what share in his intestate personal estate? *Street* J., before whom the questions were argued, held that the widow was entitled both to her provision under the will and to her distributive share under the intestacy, and declared that the sequels in title were therefore entitled to share in the testator's personal estate undisposed of in respect of the intestacy: *In re Eyers*; *McIntosh* v. *Milligan* (1).

From this decision the present appeal was brought.

Cullen K.C. (*R. K. Manning* with him), for the appellants. The declaration has the effect of preventing the representatives of the widow from sharing in the personal estate under the intestacy. The testator must be taken to have contemplated a possible partial intestacy, because the only provision for remainder was in favour of the surviving children of the second life tenant, and there was a strong possibility of a failure. The words "dower and thirds" can refer to nothing but an intestacy. It is not necessary that a partial intestacy should be shown on the face of

(1) (1907) 7 S.R. (N.S.W.), 83.

the will in order to exclude the widow in such an event, but, if it were necessary, it appears just as clearly in the present case as it appeared in *Lett* v. *Randall* (1), which is a direct authority in favour of the appellants. The testator made for his widow such provision as he thought reasonable, and did not intend her to have any more even if there should turn out to be an intestacy. No other reasonable construction can be put upon the words used. The declaration could not have been intended to protect other beneficiaries, because they are all fully protected by the rest of the will, and the *Dower Act* rendered it unnecessary to protect devisees. Although a mere declaration that the widow is not to share in an intestacy will not deprive her of her share (*Re Holmes*; *Holmes* v. *Holmes* (2)), yet if something else is given, as is the case here, she must elect between the two. *Pickering* v. *Lord Stamford* (3) is distinguishable. There was an absolute disposition of the remainder there, if it had been valid, whereas in the present case, as in *Lett* v. *Randall* (1), the remainder is contingent. *Re Benson* (4) is against the statement of principle in *Pickering* v. *Lord Stamford* (3), that such a bar as this is for the benefit of the devisees, and shows that its effect is to restrict the widow to the provision. To hold otherwise would be to render the declaration inoperative in the only contingency in which it could possibly have taken effect. *Lett* v. *Randall* (1) was referred to in *Sykes* v. *Sykes* (5) and was not disapproved, and the statement in the headnote of *Tavernor* v. *Grindley* (6), that *Lett* v. *Randall* (1) was distinguished is not accurate. *Vachell* v. *Breton* (7), and *Bund* v. *Green* (8) also support the appellants. The widow, by accepting the provision, accepts with it the condition that she is to get no more. The position of the widow is analogous to that under a contract to submit to the conditions attached to the bounty: *Gurly* v. *Gurly* (9); *Northumberland* (*Earl of*) v. *Aylesford* (*Earl of*) (10); *Naismith* v. *Boyes* (11).

(1) 3 Sm. & G., 83; 24 L.J. Ch., 708.
(2) 62 L.T., 383.
(3) 3 Ves., 332, 492.
(4) 96 N.Y., 499; 48 Amer. Rep., 646.
(5) L.R. 4 Eq., 200; s.c. on appeal, L.R. 3 Ch., 301.
(6) 32 L.T., 424.
(7) 5 Bro. P.C., 51.
(8) 12 Ch. D., 819.
(9) 8 Cl. & F., 743.
(10) Amb., 540, at p. 545.
(11) (1899) A.C., 495.

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[ISAACS J.—But the question is, does the condition conflict with the will, and to decide that we must look at the will: *Naismith* v. *Boyes* (1); *Hall* v. *Hill* (2).]

The former case dealt with Scottish law, and is not wholly applicable to the rights of a widow under our law. The *tercc, jus relictæ*, and *legitim*, could be set up against any testamentary disposition. [He referred to *Rogers and Bell, Principles of Law of Scotland*, 1885 ed., p. 183.]

The exclusion of the widow is tantamount to a gift to the next of kin. The testator should be presumed to have made the will with knowledge of the legal consequences following upon a failure of any disposition in it: *Bickham* v. *Cruttwell* (3); *Collis* v. *Robins* (4); *In re March*; *Mander* v. *Harris* (5).

[ISAACS J. referred to *Garthshore* v. *Chalie* (6).]

The question whether this is a case of election and the question whether there is a gift to the next of kin are not mutually exclusive, but are to a certain extent bound up together. If the widow elects to accept the provisions on the terms imposed by the will, the result is, in effect, a gift to the next of kin to her exclusion. If she does not accept it, then there is no gift to the next of kin, but a partial intestacy in which she shares.

Owen K.C. (*Rich* with him), for the respondent Milligan. No doubt a widow may contract not to claim any share in intestacy, and a testator may so frame his will as to put her to her election, or may validly make a provision in such a way as to exclude the widow from a share in intestacy if he gives to someone else what the widow would otherwise have received. But there must be language implying that the next of kin are to get the widow's share. [He referred to *Williams on Executors*, 10th ed., p. 1234; *Naismith* v. *Boyes* (7); *Pickering* v. *Lord Stamford* (8); *Jarman on Wills*, 5th ed., p. 432; *Rogers on Legacies*, 4th ed., p. 1633.] There may be a contract to accept a condition imposed as in *Garthshore* v. *Chalie* (6). That is not the case here. There is no intestacy shown on the face of the will as there was in *Tavernor*

(1) (1899) A.C., 495.
(2) 1 Dr. & War., 94, at p. 105.
(3) 3 My. & Cr., 763, at p. 772.
(4) 1 De G. & Sm., 131, at p. 138.
(5) 27 Ch. D., 166, at p. 169.
(6) 10 Ves., 1.
(7) (1899) A.C., 495, at p. 505.
(8) 3 Ves., 332, 492.

v. *Grindley* (1) and *Lett* v. *Randall* (2). The testator plainly thought he was disposing of all his property. [He referred also to *Leake* v. *Robinson* (3); *Naismith* v. *Boyes* (4).] Mere words of exclusion will not make a gift to those not excluded: *Sympson* v. *Hornsby and Hutton* (5). Property not specifically disposed of will go to those who are by law entitled: *Re Holmes*; *Holmes* v. *Holmes* (6). To give something in lieu of dower does not exclude the widow from participation in such property.

[GRIFFITH C.J. referred to *Fitch* v. *Weber* (7).]

The testator may have meant to do what the appellants contend but he has not used words which have that effect: *Smidmore* v. *Smidmore* (8). He did not use the words in contemplation of the facts that resulted in failure of the gifts and gave rise to an intestacy; he used them with the intention of benefiting the persons named as legatees.

Pickering v. *Lord Stamford* (9) is conclusive in favour of the respondents as to the effect of the words used here. Even if the testator made a mistake as to the law, the interpretation of the will is not affected thereby. [He referred also to *Waring* v. *Ward* (10); *Ramsay* v. *Shelmerdine* (11); *Sykes* v. *Sykes* (12).]

[GRIFFITH C.J. referred to *In re Williams*; *Williams* v. *Williams* (13).

ISAACS J. referred to *Birmingham* v. *Kirwan* (14).]

Harriott, for the other respondents, on the question of costs only.

Cullen K.C. in reply.

Cur. adv. vult.

Dec. 4.

The following judgments were read:—

GRIFFITH C.J. [having referred briefly to the facts and having read the material portions of the will already reported, continued.] The question is whether the final declaration just

(1) 32 L.T., 424.
(2) 3 Sm. & G., 83; 24 L.J. Ch., 708.
(3) 2 Mer., 363, at p. 394.
(4) (1899) A.C., 495.
(5) 2 Eq. Ca. (Abr.), 439; 11 Viner's Abr., 185, Pre. Ch., 452.
(6) 62 L.T., 383.
(7) 6 Hare, 51, 145.
(8) 3 C.L.R., 344.
(9) 3 Ves., 332, 492.
(10) 5 Ves., 670, at p. 675.
(11) L.R. 1 Eq., 129.
(12) L.R. 4 Eq., 200.
(13) (1897) 2 Ch., 12.
(14) 2 Sch. & Lef., 444.

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read has the effect of excluding the widow and her representatives from a share under the Statute of Distributions in the property, which, in the events that happened, was undisposed of by the will. The widow was not entitled to "dower or thirds" except in the event of intestacy. The general rule is thus stated in *Williams' Executors*, 10th ed., p. 1235, in a passage which was expressly approved by Lord *Shand* in *Naismith* v. *Boyes* (1). The learned authors, after referring to the case of a settlement by which the wife's claim to a share in the case of an intestacy may be excluded, proceed:—"But it is otherwise when a husband by will makes a provision for his wife, stating it to be in lieu and in bar of all her claims on his personal estate, and then subjects his personalty to a disposition which lapses, or is void, so that the latter fund is subject to distribution; for then, notwithstanding the words of the will, the widow is entitled to a share under the Statute. The principle of this distinction is, that where a woman has before marriage agreed to accept a consideration for her widow's share, she is bound by her compact, whether her husband die testate or intestate; but where there is no such contract, but the provision in bar of the distributive share arises upon the husband's will, it is presumed that the motive for the widow's exclusion originated in a particular design or purpose of the testator, viz., for the benefit of the person in favour of whom the property was bequeathed by him; so that if the purpose be disappointed, there is no reason why the bar or exclusion should continue."

It is contended that the case of *Lett* v. *Randall* (2) established an exception to this rule. The foundation of the exception is said by the text writers to be the fact that there was in that case an intestacy on the face of the will. No doubt *Stuart* V.C. said so, but the actual intestacy arose, not from the testator leaving some of his property undisposed of, but from a failure of the objects of his bounty. In that respect the present case is not, I think, distinguishable. The learned Vice-Chancellor did not, however, I think, rely entirely on this ground. After pointing out that a mere exclusion of the heir or next of kin from a share in the

(1) (1899) A.C., 495, at p. 505.

(2) 3 Sm. & G., 83; 24 L.J. Ch., 708

estate is nugatory, he added (1):—"But the exclusion by declaration of one only of the next of kin, if it be valid, would enure to the benefit of the rest, and has the same effect as a gift by implication to them of the share of the person excluded. It has been said that, if such a clause had occurred in a settlement, it would have an effect which it cannot have in a will, because a settlement would operate as a contract. But, if by will certain terms or a certain condition be annexed to a gift, those terms as much bind the object of a gift, who accepts it, as if he contracted to abide by the terms or conditions. This is an essential element in the law of election. As there is found in the present case an intestacy on the face of the will, with language excluding the widow, in absolute and comprehensive terms, from any further share of the testator's property, in whatever way it might accrue, I can find no authority to justify the Court in holding that, having enjoyed the annuity, she or her representatives are entitled to any share in the property now to be distributed."

The words of exclusion in that case were very full. "I do expressly . . . declare that the said . . . provision . . . for my said . . . wife . . . . are by me meant and intended to be, and shall by my said wife be accepted and taken, in full and entire . . . satisfaction of . . . all manner of claims . . . . which she at any time might or could have . . . into, or out of any part or parts of my real and personal estate or under . . . any settlement or other writing . . . . or as or for or on account of any dower or thirds which she . . . could . . . in any manner have, claim . . . out of . . . any part of my estate . . . in any manner howsoever." The learned Vice-Chancellor therefore, appears to have thought (1) that there was an intestacy on the face of the will; (2) that the testator contemplated the case of an intestacy; (3) that the exclusion of the wife had the effect of a gift by implication of her share to the next of kin; and (4) that the gift to the widow was conditional, so that by accepting the gift she accepted the condition of exclusion. He also thought that it was a case of election, as no doubt it was. On these grounds he decided that the widow was excluded. I cannot regard this case

(1) 24 L.J. Ch., 708, at p. 711.

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as an authority governing the present case, even if the correctness of the learned Vice-Chancellor's conclusions as to the construction of that particular will be admitted.

In the present case there is no question of election, properly so called, since the testator did not purport to dispose of any thing which was not his own property. The clause relied upon cannot be read as a gift by implication to the other next of kin to the exclusion of the widow. The only way, therefore, in which the desired effect can be given to it is by treating it as imposing a condition upon the gift to the widow or an obligation upon her. The rule of construction applicable in such cases is thus stated by *Rigby* L.J. in the case of *In re Williams*; *Williams* v. *Williams* (1). (The learned Lord Justice in that case dissented from the opinion of the majority of the Court of Appeal on the construction of the particular will in question, but the accuracy of his statement of the rule was accepted by the Court of Appeal in *In re Oldfield*; *Oldfield* v. *Oldfield* (2).) "In the present case the question is one of condition, or election, not of trust, as the testator could not declare a trust of his wife's property; but the cases as to trusts are so closely analogous that they must be examined, and it will be seen that the same doctrines have been laid down as to conditions and trusts. . . . No authoritative case ever laid it down that there could be any other ground for deducing a trust or condition than the intention of the testator as shown by the will taken as a whole, though no doubt in older cases that intention was sometimes inferred on insufficient grounds. The general intention was always treated as the matter to be ascertained. . . .

"On these fundamental points there never has, in my opinion, been any real difference, though the application of them to particular instances has not always been satisfactory."

In the same case *Lindley* L.J. said (3):—"In each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases obligations were inferred from language which in

(1) (1897) 2 Ch., 12, at p. 28.
(2) (1904) 1 Ch., 549.
(3) (1897) 2 Ch., 12, at p. 18.

modern times would be thought insufficient to justify such an inference." And again (1):—"The whole equitable doctrine of election, when a testator disposes of property not his own, is based upon the principle that a Court of Equity will enforce performance of implied conditions on which property is given and accepted."

Can it then be inferred from the words of the will now before us that the testator intended to impose as a condition that the widow should not take anything under the will except on the terms of renouncing any share in property as to which the other dispositions of the will might fail? Looking at the matter apart from authority, I cannot think that any such idea entered the testator's mind. He dealt with the whole of his estate, and thought that he had dealt with it effectually. It happened, as often happens, that he had not provided for every event, but I do not think that he contemplated such a contingency as a failure of his intended bounty. If we have recourse to authority the appellants' case seems hopeless. In the case of *Sympson* v. *Hornsby and Hutton* (2), decided by Lord *Cowper* in 1716, a testator gave his daughter a legacy, and declared that it should be in discharge of her "child's share" and anything she could claim out of his estate. It was held that she was nevertheless entitled to a share in property as to which, in the events that happened, the testator died intestate. Without referring to the intermediate cases I will pass to *Naismith* v. *Boyes* (3), which was the case of a Scottish testamentary settlement. By the law of Scotland, a widow and her children are absolutely entitled to shares in the personality of the husband, which cannot be disposed of by his will to their prejudice. In that case the testator, who had been twice married, gave the income of the residue of his estate to his widow for life, with remainder to his children by her. He then declared as follows:—"And I declare the provision hereby made for my wife and the children of our present marriage and the provisions previously made for the said Minnie Arthur Hamilton (a child by the first marriage) to be in full of all that my said wife can claim in name of *terce*, *jus relictæ*, or otherwise, and

(1) (1897) 2 Ch., 12, at p. 19. (2) 2 Eq. Ca. (Abr.), 439; 11 Viner's Abr., 185.
(3) (1899) A.C., 495.

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of all that my said children can claim in name of *legitim*, portion natural, bairn's part of gear, or otherwise, in respect of my death." The gift over to the children failed. It was contended that it was a case of election (as no doubt it was), and that the widow having elected to take the life estate, her representatives could not claim a share as on intestacy. But the contrary was held. The *Earl of Halsbury* L.C. thought that the provisions in question were intended to apply only to such part of the estate as was disposed of by the testator, and could not be intended to apply to any rights arising from intestacy which were not contemplated by the terms of the settlement, and that the law of intestacy took effect upon his property not effectively disposed of. He added (1):—"This seems to me good sense, and I am satisfied that it gives effect to the intentions of the testator in the sense that he contemplated a state of things by the clause in question which as a fact did not arise, and that he never contemplated the clause as applying to intestacy at all." Lord *Watson* said (2):—"I do not think it can be reasonably assumed, in the absence of any provision to that effect either express or implied, that he intended to regulate the disposal of any part of his estate which might possibly lapse into intestacy." Lord *Shand* thought that this was the law of England applicable to such a case, as established by the case of *Pickering* v. *Lord Stamford* (3) in which *Sir R. P. Arden* M.R. and Lord *Loughborough* L.C. followed *Sympson* v. *Hornsby and Hutton* (4).

The learned counsel for the appellants sought to distinguish *Naismith* v. *Boyes* (5), on the ground that that was a true case of election, in which the testator had in form disposed of property not his own, namely, his wife's *jus relictæ*. But this difference appears, if it has any bearing at all upon the point, to have a contrary effect. If, in a case where a testator attempts to dispose of property which belongs to the donee, such a direction as that in question is insufficient to attach a condition to the gift of the testator's property, it seems to me that *a fortiori* it cannot have that effect when the testator disposes of nothing but his own

(1) (1899) A.C., 495, at p. 497.
(2) (1899) A.C., 495, at p. 501.
(3) 3 Ves., 332.
(4) 2 Eq. Ca. (Abr.), 439; 11 Viner's Abr., 185.
(5) (1899) A.C., 495.

property. In the present case I am of opinion that there is no condition clearly and unequivocally attached to the gift of the life estate. I am, therefore, of opinion that the decision appealed from is correct, and should be affirmed.

BARTON J. *Sir Richard Arden* M.R., afterwards Lord *Alvanley*, gives, in his judgment in the case of *Pickering* v. *Lord Stamford* (1), a statement of a case of *Sympson* v. *Hornsby and Hutton* from the Register's book, explaining that as there described, it seems to bear more upon the point he was there considering than the reports in *Viner* and in *Equity Cases Abridged*. The statement is shortly as follows:—Thomas Addison gave his daughter Jane out of his real and personal estate certain estates, leases, titles and money, and declared this provision to be in satisfaction of her child's part of whatsoever more she might have expected from him or out of his personal estate. He then devised to his wife, and gave her furniture and other things; all which devises and bequests he declared to be in full of her dower, thirds and other claims at law or in equity or by any local custom to any other part of his real and personal estate. He gave the residue to his other daughter, who died in his lifetime, leaving one child, who was the only person that could be entitled under the *Statute of Distributions* besides the wife and the excluded daughter. By a codicil he gave the residue to his wife for life, with power to dispose of the same after her decease, with the approbation of the trustees. Having this limited power, she made a disposition without the consent of the trustees. The decree of Lord *Cowper* declares, that Frances the widow, having disposed without the consent of the trustees, had not pursued her power, therefore the testator died intestate as to the residue, which ought to go according to the *Statute of Distributions*, viz., in thirds; one third to the plaintiff Sympson in right of his wife Jane; one third to the child of the deceased daughter; and one third to the devisee of the widow.

In the case of *Pickering* v. *Lord Stamford* (1) it was argued that the widow was excluded from any share of so much of the testator's personal estate as was invested in real securities, the

(1) 3 Ves., 332, 492.

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disposition of which to charitable purposes was void, and which was declared to be divisible among the next of kin. By the clause of the will drawn into question, the testator, after giving certain parts of his real and personal estate to his wife, declared the provision he had thereby made for her to be "in bar, full satisfaction, and recompense of all dower or thirds which his said wife can have or claim in, out of, or to all or any part of his real and personal estate, or either of them." The Master of the Rolls at first held in favour of the construction which excluded the widow from any share in the real securities in question, but after full consideration of the case of *Sympson* v. *Hornsby and Hutton*, as above described, he changed his mind, and said (1):—"I am now decided, by having found the very point determined by Lord *Cowper*; who was of opinion, in the case I have cited from the Register's book, that where a testator had given his wife that provision, which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person should set it up against the widow." After that, said *Sir Richard Arden*, "I cannot, upon such a point, set up my own judgment against Lord *Cowper's*. Therefore I think my former determination was wrong." This decision was affirmed on appeal by the Lord Chancellor, Lord *Loughborough* (2), who said:—"If the Master of the Rolls had not entertained different views of this case upon the two occasions, when it was before him, I should have thought there could be no doubt. If I look at the will, which I ought not, it is perfectly clear upon the will, the intention does not go in favour of the next of kin to prohibit the wife from taking any part of his personal estate; for the intention at the time was to guard, perhaps by unnecessary words, against any person setting up a claim to defeat the purpose of charity the testator had marked out: but neither an heir at law, nor by parity of reasoning next of kin, can be barred by anything but a disposition of the heritable subject or personal estate to some person capable of taking. . . . With regard to the two cases, the only two upon the subject, I perfectly approve Lord *Cowper's* decision. It is as

(1) 3 Ves., 332, at p. 337.

(2) 3 Ves., 492, at p. 493.

exactly in point to this case, as two cases can well bear upon each other." And I venture to say of the two decisions, one of which the then Lord Chancellor was approving and the other of which he was affirming, that there cannot be found two cases more in point to any other than are these two to that which we have now to decide. If indeed a partial intestacy arose, not from the lapse or voidance of a disposition in a will, but appearing on the face of the will so clearly as to give rise to the inference that the testator contemplated it, and such an intestacy co-existed with words emphatically and comprehensively excluding the widow, an intention in favour of the next of kin would be disclosed. But in the present case, as was rightly argued in *Pickering* v. *Lord Stamford* (1), there is a clear disposition of every part of the property, and if as to any part that fails, *pro tanto* the testator's intention is removed entirely out of the way. Perhaps, indeed, it is more correct to say that, the intention in favour of the original objects of the testator's bounty being frustrated, the protection of their interests against those of the widow is no longer needed, and it cannot be turned into an intention to protect against her the next of kin, who were never intended to have the subject matter at all. In *Lett* v. *Randall* (2), *Stuart* V.C. was able to find a partial intestacy on the face of the will, though with all respect I should have thought, but for this decision, that the voidance of the gift to the children of the daughters scarcely gave foundation to the inference of a contemplated intestacy as to their part. Be that as it may, the law of *Sympson* v. *Hornsby and Hutton* (3), and *Pickering* v. *Lord Stamford* (1) was not questioned by the Vice-Chancellor in *Lett* v. *Randall* (2). It has never been challenged; and I cannot but hold it to apply to the present case, so strikingly similar in its features. *Lett* v. *Randall* (2) itself has been somewhat questioned, and has not, I think, been found exactly in point for any subsequent decision.

It is not necessary to traverse the field of the numerous cases which were cited in argument. In his judgment in this case (4), *Street* J. cites a passage from the 10th edition of *Williams*

(1) 3 Ves., 332, 492.
(2) 3 Sm. & G., 83; 24 L.J. Ch., 708.
(3) 2 Eq. Ca. (Abr.), 439; 11 Viner's Abr., 185.
(4) (1907) 7 S.R. (N.S.W.), 83.

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on Executors, at p. 1235, in which it is stated that: "But it is otherwise when the husband by will makes a provision for his wife, stating it to be in lieu and in bar of all her claims on his personal estate, and then subjects his personalty to a disposition which lapses, or is void, so that the latter fund is subject to distribution; for then, notwithstanding the words of the will, the widow is entitled to a share under the Statute. The principle of this distinction is, that where a woman has before marriage agreed to accept a consideration for her widow's share, she is bound by her compact, whether her husband die intestate or testate; but where there is no such contract, but the provision in bar of the distributive share arises upon the husband's will, it is presumed that the motive for the widow's exclusion originated in a particular design or purpose of the testator, viz., for the benefit of the person in favour of whom the property was bequeathed by him; so that if the purpose be disappointed, there is no reason why the bar or exclusion should continue." Coming to the recent case of *Naismith* v. *Boyes* (1), it was pointed out to us that Lord *Shand* there said of that passage that it "states the rule with accuracy and great clearness." It unmistakably states the doctrine of *Sympson* v. *Hornsby and Hutton* (2), and *Pickering* v. *Lord Stamford* (3), the latter decided 110 years ago, the former many years earlier; and with so recent and so valuable an endorsement, it is clear that the doctrine remains unshaken to-day. In *Naismith* v. *Boyes* (4) a Scottish testator, by his will, called a *mortis causa* settlement, made provision for his wife and declared it to be in full of all claims by her of *terce* and *jus relictæ* or otherwise. Certain devisees died before vesting took place, so that the residue fell into intestacy. It was held that the testator's declaration was to be construed as excluding the widow's claim in so far only as it conflicted with the will, and that, as the testator had never contemplated the event that had happened, the widow was not only entitled to her provision under the will, but also to *terce* and *jus relictæ* out of such heritables and movables as had fallen into intestacy. Lord

(1) (1899) A.C., 495, at p. 505.
(2) 2 Eq. Ca. (Abr), 439; 11 Viner's Abr., 185; Pre Ch., 452.
(3) 3 Ves., 332, 492.
(4) (1899) A.C., 495.

Watson said (1):—"In a case like the present, where the testator settled upon the members of his family all the property, both heritable and movable, of which he was possessed, I do not think it can be reasonably assumed, in the absence of any provision to that effect either express or implied, that he intended to regulate the disposal of any part of his estate which might possibly lapse into intestacy. In my opinion the testator, when he inserted a clause in his settlement barring the legal rights of the appellant and respondent, had no object in view except to protect the settlement, by preventing the enforcement of these claims to the disturbance of his will and to the detriment of the beneficiaries whom he had selected. When accordingly, by the premature decease of his children of the second marriage, the residue provided to them by his settlement became intestate, I do not think it can be held that the testator contemplated, or intended, that the exclusion of the legal rights of his widow and surviving child should any longer remain operative." It is true that Lord *Watson* said he had not thought it necessary to refer to *Pickering* v. *Lord Stamford* (2) or to any of the other English cases cited for the successful respondent. He thought they did not directly bear upon the question raised in that appeal, which related to the sense in which certain expressions were used by a Scottish testator, having due regard to the nature of the rights with which he was dealing as they existed in the law of Scotland. But in the same case Lord *Shand*, after stating the principle of *Pickering* v. *Lord Stamford* (2) and *Sympson* v. *Hornsby and Hutton* (3) in the words of Lord *Cowper* in the latter case, said (4):—"That seems to be exactly the principle to which the House is now giving effect," and added, "the question is not one as to the nature of the claim. . . In either case the purpose which the testator has in view is to exclude the claims, whatever may be their nature or origin and foundation, in order to benefit others. If the benefit to those others is entirely to fail, it is clear that in conformity with the English decisions and, as I think, with sound principle, the exclusion of the right, whatever

(1) (1899) A.C., 495, at p. 501.
(2) 3 Ves., 332. 492.
(3) 2 Eq. Ca. (Abr.), 439; 11 Viner's Abr., 185; Pre. Ch., 452.
(4) (1899) A.C., 495, at p. 505.

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be its character, also fails." And Lord *Halsbury* L.C. says of the widow's claim (1):—"On the other hand, it is said that the provisions made were intended to apply only to such part of the estate as was disposed of by the settlor, and could not be intended to apply to any rights arising from intestacy which was not contemplated by the terms of the settlement at all, and I think that is a reasonable and sensible view of the matter. . . . As regards all that remains over when the provisions of the will are satisfied—in this case the whole residue—the law of intestacy takes effect upon it. That seems to me good sense, and I am satisfied that it gives effect to the intentions of the testator in the sense that he contemplated a state of things by the clause in question which as a fact did not arise, and that he never contemplated the clause as applying to intestacy at all."

That passage expresses to the letter my view of this will and of the intention of its maker. I think the matter is concluded alike by reason and by authority, that the decision of *Street* J. is clearly right, and that this appeal should be dismissed.

ISAACS J. The appellants claim that in the distribution of personal estate under the intestacy of John Eyers the widow should be excluded. The burden of establishing the exclusion rests upon them, and there are only two methods by which they can maintain their position; they must satisfy the Court, either that John Eyers by his will gave them the widow's share, or that he put the widow to her election whether she would retain her ordinary right to share in the event of his intestacy—a right which would then come into existence as her own against all the world—or would accept the specific provision he made for her in his will, and in consideration of that, surrender all claims to her possible ordinary distributive share.

Both positions, though separate and distinct in principle, appear to me in this case to depend on practically the same considerations. Words of exclusion only are sufficient, of course, to prevent participation in benefits conferred by will; but are not enough of themselves to deprive a person of rights given by law independently of the will; and here the rights claimed by the widow are

(1) (1899) A.C., 495, at p. 497.

asserted as being independent of and outside the provisions of the will. Are the words relied on, namely, "I declare that the provision hereby made for my said wife is in lieu of dower and thirds" words of mere deprivation, or do they, on this branch of the case, amount, when considered with the rest of the instrument, to a gift by implication of the widow's share of personality to the next of kin, as in *Bund* v. *Green* (1)?

That amounts to a question of construction of the whole will, in order to discover the intention of the testator.

Similarly on the second point, did the testator's intention to exclude the widow extend to the case of his intestacy? Did he in such case require her to abandon her share to others? I may, before passing to the second point, advert to the circumstance, probably the governing circumstance, that in *Bund* v. *Green* (1), the testator expressly excluded the brother and sisters from any share in case he happened to die intestate.

As to *election*, I shall assume, without in any way so deciding, that the widow should be treated as having been put to an election, and that, on the facts so far as they appear, she should further be regarded as having elected. On that assumption, she elected to take what the will offered her, in return for giving up that of which the testator intended to deprive her? But still the question remains, of what did the testator intend to deprive her? And so the question arises does the declaration I have read refer to surrender or deprivation of dower and thirds even in case of intestacy, or only so far as was necessary to satisfy, or in consequence of, the testator's own scheme of distribution. There is nothing which expressly provides that in the event of intestacy the widow is not to participate. The appellants, therefore, are compelled to rely on implication. But implication to exclude her must be necessary, that is, the probability to do so must be so strong that a contrary intention cannot reasonably be supposed: *Crook* v. *Hill* (2).

Dr. Cullen has argued that this necessary implication arises from the mere use of the expression *dower and thirds*, because he contends the testator had, and must be taken to have known that he had, power by testamentary disposition to deprive his

(1) 12 Ch. D., 819.

(2) L.R. 6 Ch., 311.

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widow of any share in his estate, and, therefore, and more especially with respect to the word "thirds," the only reasonable meaning to attach to the excluding declaration is that of its application to intestacy. The argument has considerable force, but a testator's implied intention has to be gathered, not solely from any part of his will, not from any isolated passages, but from reading and weighing the will as a whole. To put the view concretely with reference to the present case; the argument is that the use of the word "thirds" demonstrates that the testator had in view the possible event of his intestacy. But when the rest of the instrument is looked at, is it a proper deduction that he had any such conception? And it is not always presumed that the testator had an accurate knowledge of his legal power of testamentary disposition: See per Lord *Alvanley* in *Pickering* v. *Lord Stamford* (1), and in *Whistler* v. *Webster* (2).

If upon the whole it appears he had no conception of his scheme failing, then he cannot have had any intention to use those comprehensive words of substitution with reference to the case of intestacy. In my opinion, and judging from the words he has used, when that will was executed there was no such conception in his mind. He was not thinking of providing for the case of intestacy at all, but he was in his own opinion finally and absolutely distributing his property, by means of specific legacies, and general and residuary gifts, and with considerable elaboration. He recognized that in that distribution, when carried into effect, there would be no room for dower and thirds, and so he declared that, having regard to his purpose to so distribute his property, there should and could be no dower and thirds. The widow, therefore, while put to her election as to whether she would take the benefits and bear the burdens of the will whatever they might be, or would reject both, is only bound, having taken the benefits, to bear those burdens which, on a fair construction of the will, it was the intention of the testator she should bear. It happens that by a series of accidents there has after all been an intestacy as to portion of the personal estate.

On the construction I give to the will there is nothing inconsistent in her accepting the benefits of the instrument and in her

(1) 3 Ves., 332.

(2) 2 Ves. Jun., 367.

representatives claiming under the intestacy, because upon that construction the distribution in the intestacy is entirely outside the terms of the instrument.

Why, on a fair interpretation of the will, may not the two positions stand together, the deprivation of dower and thirds as part of the testamentary scheme of distribution, and the enjoyment of thirds so far as the scheme failed? Where is there any manifest intention to the contrary? *James* V.C., in *Wollaston* v. *King* (1) adopted *Sir Richard Arden's* definition of election in *Whistler* v. *Webster* (2), which is in these terms "that no man shall claim any benefit under a will, without conforming so far as he is able, and giving effect, to everything contained in it, whereby any disposition is made, showing an intention that such a thing shall take place," and he adds—"without reference to the circumstance, whether the testator had any knowledge of the extent of his power or not." And *Cairns* L.C., in *Codrington* v. *Codrington* (3) said:—"By the well-settled doctrine, which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate,' and in our Courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." But where is the inconsistency which is necessary to maintain this defence of election?

The appellants rely on *Lett* v. *Randall* (4), in which it was held that general words of substitution and satisfaction deprived the widow of participation in intestate personalty.

That case, though challenged by learned counsel for the respondents, seems to me to be perfectly sound in principle, notwithstanding the case of *Tavernor* v. *Grindley* (5), the headnote of which, so far as it refers to *Lett* v. *Randall* (4), appears to go beyond the judgment. The learned Vice-Chancellor *Stuart*, having to ascertain in *Lett* v. *Randall* (4) whether the testator intended to exclude the widow from sharing in the intestacy, set himself to

(1) L.R. 8 Eq., 165, at p. 174.
(2) 2 Ves. Jun., 367, at p. 370.
(3) L.R. 7 H.L., 854, at p. 861.
(4) 3 Sm. & G., 83; 24 L.J. Ch., 708.
(5) 32 L.T., 424.

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construe the general clause referred to by the light of the whole disposition, and the circumstances appearing on the face of the will. Foremost among those circumstances he found what he termed an intestacy on the face of the will. I presume he was referring to the fact that, if the daughters remained unmarried, there was necessarily an intestacy. The Vice-Chancellor considered that the testator must be taken to have had in mind the possible, or even probable, case of intestacy when using the wide words of the clause under consideration. Taking that fact in conjunction with the comprehensiveness of the clause, he applied the words of exclusion to the intestacy. He did not take either the comprehensiveness of the clause, or the *ex facie* intestacy as in itself sufficient to determine his judgment. He did not regard either as a canon of construction. But, looking at them both as circumstances of importance, they helped to guide him to his conclusion as to the meaning of the will. I see no reason for finding any fault with the method followed by the learned Vice-Chancellor in gathering the intention of the testator. But how far is *Lett* v. *Randall* (1) a controlling authority in the present instance? It is trite law that, laying aside accepted specific canons of construction, each will must be read and construed independently of any construction that has been placed on other wills. See *per* Lord *Halsbury* L.C. in *Scalé* v. *Rawlins* (2), and in *MacCulloch* v. *Anderson* (3). In the last cited case his words were:—"I speak simply of the construction of this will. I decline absolutely, as in many other cases, to enter into the question of what would be the construction of other wills under other circumstances even if the same words occurred in them." And if reference to any authority be desirable that it is the whole will that must be considered, it is again supplied by the words of Lord *Halsbury* L.C. in *Inderwick* v. *Tatchell* (4). Consequently even if *Lett* v. *Randall* (1), resembled the present case more closely that it does, still it would not necessarily have a controlling effect. To my mind, however, there is one important difference between the two, which materially distinguishes this case from *Lett* v. *Randall* (1). In that case,

(1) 3 Sm. & G., 83; 24 L.J. Ch., 708.
(2) (1892) A.C., 342, at p. 343.
(3) (1904) A.C., 55, at p. 60.
(4) (1903) A.C., 120, at p. 122.

unless a new event took place, namely, marriage of the daughters, or at least of one, and issue thereof, an intestacy was inevitable. The event was unforeseen, though doubtlessly much desired, but without it intestacy was obvious. In this case, however, unless an unforeseen event, certainly not desired, and apparently not expected, took place there was a complete testacy. This is, in my opinion, a weighty circumstance differentiating the two cases so far as relates to the question of whether the testator here was aiming at a future intestacy when inserting his declaration as to dower and thirds.

Tavernor v. *Grindley* (1), it was argued, was opposed to *Lett* v. *Randall* (2). But we have not the reasons of *Wood* V.C. for his construction of the will by which he held the widow not barred. It may have been that His Honor considered the omission of all mention of the consols from the will was a circumstance which, *inter alia*, enabled him to say that the words of exclusion were intended to apply only to such property as was covered by the will, so making it co-extensive with the scheme of distribution apparent on the face of the instrument, and thus leaving the consols entirely out of the whole will, including the clause of exclusion. The view is certainly borne out by the observations of *Bacon* V.C. And there is nothing reported as having fallen from either learned Vice-Chancellor which in anyway directly affects *Lett* v. *Randall* (2). *Stuart* V.C. distinguished that case from *Pickering* v. *Lord Stamford* (3), by pointing out that in the latter case all the property had been disposed of by the will, but had become distributable in intestacy through an unforeseen accident. "Unforeseen" must mean, unforeseen by the testator, because, although the law would not recognize the gift to the charity, yet he could not be supposed to have determined upon a scheme of distribution which he knew or intended to be futile, and it was his personal intention when using the words of exclusion that had to be ascertained.

Lord *Alvanley* M.R., in his ultimate opinion, rested, as I think, on election not to defeat the dispositions of the will, but interpreted the clause of substitution to go no further. He did so on

(1) 32 L.T., 424.

(2) 3 Sm. & G., 83; 24 L.T. Ch., 708.

(3) 3 Ves. 332, 492.

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the authority of *Sympson* v. *Hornsby and Hutton* from the Register's Book, and he says (1):—"I am now decided, by having the very point determined by Lord *Cowper*; who was of opinion, in the case I have cited from the Register's Book, that where a testator had given to his wife that provision, which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person should set it up against the widow. After that I cannot, upon such a point, set up my own judgment against Lord *Cowper's*." For myself I think that the case of the daughter Jane in *Sympson* v. *Hornsby and Hutton* (2) even more in support of the respondents' view here than was that of the widow. When the case of *Pickering* v. *Lord Stamford* (3) came before Lord *Loughborough* L.C., his Lordship (as appears *in arguendo*) refused to treat the case on the facts as one of actual election by the widow, and dealt with it as arising purely in the *Statute of Distributions*. It was said there in argument that it was an unusual thing to refuse to consider the words of the will, but the explanation is not far to seek. The Lord Chancellor had opened the will to ascertain how far it could be construed as a gift to the next of kin, and found it could not be so construed, and as there was in his view neither a gift nor an act of election proved, he closed the will, and declined to look at it to ascertain the testator's intentions. In those circumstances he could, as it appears to me, do nothing else. The case was then quite outside the will, and he says (4):—"Being a legal intestacy, I am to control the *Statute of Distributions*. How can the Court possibly do that? I must close the will; and cannot look at it."

He did approve of Lord *Cowper's* decision in *Sympson* v. *Hornsby and Hutton*(2), and did not approve of *Vachell* v. *Breton* (5). Possibly the latter case, if now to be looked upon as a guide at all, comes more properly within the class of cases of election.

But however *Pickering* v. *Lord Stamford* (6) is regarded, it is a powerful authority against the appellants. On the first branch

(1) 3 Ves., 322, at p. 337.
(2) 2 Eq. Ca. (Abr.) 439; 11 Viner's Abr., 185; Pre. Ch., 452.
(3) 3 Ves., 492.
(4) 3 Ves., 492, at p. 494.
(5) 5 Bro. P.C., 51.
(6) 3 Ves., 332, 492.

of the case, namely, as to whether the words excluding the widow amount to a gift to the next of kin, the Lord Chancellor's view is against them; and on the second branch, election, Lord *Alvanley's* opinion—untouched on appeal—is also opposed to them. In this latter aspect, too, the observations of Lord *Eldon* L.C. in *Garthshore* v. *Chalie* (1) are important, that learned Lord Chancellor regarding *Pickering* v. *Lord Stamford* (2) as being an authority that the widow is not barred in such a case, because the intention is to bar her from thirds for the sake of persons under that instrument to take the residue.

Naismith v. *Boyes* (3) is a case which, notwithstanding it related to Scottish law, appears to me to be really a strong authority for the respondents. It is true the widow's claims to *terce* and *jus relictæ* were inalienable without her consent, and therefore arose either on the testacy or intestacy of her husband. Dr. *Cullen* built an able argument up on this, and is certainly supported by the facts in what he said regarding the difference between a Scottish and an English widow's claims under the general law. But the answer is, I think, rightly given by Lord *Shand* (4) in these words:—"It is true that in this case the claims to *legitim* and *jus relictæ* are of a different character from a mere beneficiary right, as my noble and learned friend Lord *Watson* has pointed out; but the question is not one as to the nature of the claim, whether it is a right given by common law, a right such as *jus relictæ* or *legitim* where there is a *jus crediti*, or a right of succession under the *Statute of Distributions* or otherwise. In either case the purpose which the testator has in view is to exclude the claims, whatever may be their nature or origin and foundation, in order to benefit others. If the benefit to those others is entirely to fail, it is clear that in conformity with the English decisions and, as I think, with sound principle, the exclusion of the right, whatever be its character, also fails—for the exclusion of the right was provided only to protect and enlarge the purpose of the testator in making his testamentary provisions, whereas these provisions have failed, and he has died intestate."

(1) 10 Ves., 1.
(2) 3 Ves., 332, 492.
(3) (1899) A.C., 495.
(4) (1899) A.C., 495, at p. 505.

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It is to be borne in mind that the case was dealt with as a matter of principle, there being no decisions governing the question in the Courts of Scotland. Lord *Halsbury* L.C. considered that the clause of exclusion could not be intended to apply to any rights arising from intestacy which was not contemplated by the terms of settlement, and on this general ground, being what he called a reasonable and sensible view of the matter, he decided in the widow's favour. In the absence of authority to the contrary, Lord *Watson*, even in opposition to his earlier doubts, came to regard that view as being in accordance with sound principle. He also considered that, as the testator had settled all his property on the members of his family, it could not be reasonably assumed, in the absence of any provision, either express or implied, that he intended to regulate the disposal of any part of his estate which might lapse into intestacy. His Lordship proceeds to point out that a man might by his will, either in express words or by necessary implication, make it clear that he was framing or contemplating a scheme by which, whether intestacy supervened or not, the widow's exclusion should form a part of it, and he says (1) that "the exclusion would certainly operate in favour of all those beneficiaries who took *provisione* of the deceased, and it would also operate in favour of those taking *ab intestato* if it were reasonably apparent that denying effect to it would disturb the scheme which the deceased contemplated."

The case is consequently quite in line with those already referred to, and considerably supports the views I have based upon them.

I therefore am of the opinion that the decision of *Street* J. was correct, and that this appeal should be dismissed.

Appeal dismissed. Costs of both parties, by agreement, to come out of the estate.

Solicitor, for the appellants, *R. G. C. Roberts.*

Solicitors, for the respondents, *Read & Read; Curtiss & Barry.*

C. A. W.

(1) (1899) A.C., 495, at p. 502.