[HIGH COURT OF AUSTRALIA.]

CLERK . . . . . APPELLANT;
DEFENDANT,

AND

THE EQUITY TRUSTEES EXECUTORS AND AGENCY CO. LTD. AND OTHERS } RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 24, 25.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Will—Interpretation—Ambiguity—Omission of redundant words

A testator by his will, which was written by another person, in making a gift over to his six brothers and one sister, directed that his property should be divided into eight shares, and that each of five of his brothers should receive one share, but as to the distribution of the other three shares between his sixth brother and his sister left it doubtful which of the two should receive one share, and which two shares.

Held, on an inspection of the original will and a consideration of its other provisions, that the intention of the testator was to give his sister two shares and his brother one share.

Decision of the Supreme Court of Victoria (*Hodges* J.) reversed.

APPEAL from the Supreme Court of Victoria.

Alexander Brunton by his last will, dated 14th July 1840, gave, devised and bequeathed all his property to trustees for his daughter Elizabeth Brunton for life with remainder to her

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children. The will then proceeded:—"And in case there shall be no child or issue of my said Daughter who under the trusts hereinbefore Contained shall become entitled to the said trust moneys and securities then and in such case my said Trustees or Trustee shall stand possessed thereof In Trust and pay the same to my Brother and sister now living, and residing in the City of Edinburgh to divide the same into eight equal Parts or Shares and in manner following, that is to say, to my Brother James Brunton One Share One Share to my Brother John Brunton One Share to my Brother George Brunton One Share to my Sister Elizabeth Farquaher Two Shares to my Brother Adam Brunton one Share to my Brother Andrew Brunton one Share and to my Brother Ephraim Brunton One Share."

The testator's daughter Elizabeth Brunton died without leaving issue, and the gift over to the testator's brothers and sister took effect.

An originating summons was taken out by the Equity Trustees Executors and Agency Co. Ltd., as trustees of the will of Alexander Brunton, to determine the question (*inter alia*) in the events which had happened, what person or persons were entitled and in what shares or interests to the property of the testator from and after the death of Elizabeth Davies (Elizabeth Brunton mentioned in the will). The defendants to the summons were Barnett Hyman Altson, as representing himself and all others beneficially interested under the will of Elizabeth Davies, deceased, George Brownlow Clerk, as administrator of the estate of Elizabeth Clerk (Elizabeth Farquaher mentioned in the will), deceased, and the Curator of the Estates of Deceased Persons, as representing the estates of the testator's brothers, who were all dead. Barnett Hyman Altson was also the assignee of all the beneficiaries in the estate of Adam Brunton.

The summons was heard before *Hodges* J., who held that of the eight shares two were given to Adam Brunton, one to Elizabeth Farquaher, and one to each of the other brothers of the testator, and he answered the question accordingly.

From this decision George Brownlow Clerk now appealed to the High Court.

McArthur K.C. (with him *Macindoe*), for the appellant, referred to *Gordon* v. *Gordon* (1); *Sanford* v. *Raikes* (2).

Weigall K.C. and *Latham*, for the respondent B. H. Altson.

Hayes, for the respondents the Equity Trustees Executors and Agency Co. Ltd.

McArthur K.C., in reply, referred to *In re Harrison*; *Turner* v. *Hellard* (3).

[ISAACS J. referred to *In re Edwards*; *Jones* v. *Jones* (4).]

GRIFFITH C.J. The question for determination in this case depends upon the meaning of words, which are no doubt obscure, in a will made in 1840 by a testator who died almost immediately afterwards, leaving one child, a daughter, then three or four years of age. We have had the original will before us, and it appears to be in the handwriting of a person who had some pretensions, quite unjustified, to literary style. It was evidently either dictated to him or copied from a draft, but the writing, whether from defect in the dictation or from miscopying the draft, is often confused. I will read the sentence which gives rise to the difficulty. The testator first directed that all his property should go, as we held in a previous case, to his child for life, with remainder to her children. The will then proceeded to direct that in default of children his property should be held upon trust "to divide the same into eight equal parts or shares and in manner following that is to say to my brother James Brunton one share one share to my brother John Brunton one share to my brother George Brunton one share to my sister Elizabeth Farquaher two shares to my brother Adam Brunton one share to my brother Andrew Brunton one share and to my brother Ephraim Brunton one share." The testator's daughter had no children and this trust took effect. It is clear that there is some mistake in the language. It is to be observed that the sentence begins by first naming the beneficiary and then stating the share to be taken—"to my

(1) L.R. 5 H.L., 254, at p. 276.
(2) 1 Mer., 646, at p. 651.
(3) 30 Ch. D., 390.
(4) (1906) 1 Ch., 570, at p. 574.

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brother James Brunton one share." At the end of it are the words: "and to my brother Ephraim Brunton one share." So that it begins and ends with the same order of thought, viz., first the name of the beneficiary and then the share to be given to him. But it is suggested that in the interval he changed the order. Near the beginning of the sentence the words "one share" are repeated. The words "to my brother James Brunton one share one share to my brother John Brunton one share" may be read in two ways. It is suggested for the appellant that the words "one share" are a reduplication by error of the scribe. If that view is accepted, the whole sentence becomes homogeneous from end to end. On looking at the will, it appears that the words "one share" where they secondly occur reduplicated, are at the end of the line and in rather smaller writing. As against that, it is said that after the words "Elizabeth Farquaher" and before the words "two shares" there are a full stop and an appreciable space, and that the word "two" begins with a capital letter. But this is not a holograph will, and I think it is an extreme presumption to make a testator responsible for the manner in which the scribe who writes his will writes, and to hold that he must be taken to have carefully scrutinized the manner of writing and to have appreciated the supposed leaving of spaces between words, and the punctuation and use of capital letters. I do not think any such knowledge ought to be attributed to a testator. I do not mean to say that in many cases the division of a will into paragraphs, or such matters, may not be important elements in interpreting the will. But in a will of this sort it appears to me that such considerations have little weight. On inspection of the will I find that the scribe used capital letters whenever he felt inclined, and, apparently, whenever he thought a particular word important. Thus, he uses them sometimes for the word "trustee," sometimes for the word "money," sometimes for numbers, and sometimes for the word "will," and so on. It also appears that he had an erratic notion of punctuation. Occasionally he put in stops where they should not be put, and he put in the wrong stops in several places. Under these circumstances I do not think that the ignorance of the scribe should be attributed as knowledge to the testator. Moreover, when we come to examine the material

part of the will I really cannot bring myself to appreciate the alleged larger space between the words "Elizabeth Farquaher" and "two shares"; and as to the alleged full stop I have the very greatest doubt as to its existence. What is said to be a full stop is very minute, and is quite different from the full stops which are put in somewhat lavishly in other places. Under these circumstances I am unable to give weight to the capital letter, the space, or the full stop.

I feel, therefore, confined to the language itself. I have already pointed out that, on the construction contended for by the appellant, the sequence is consecutive from beginning to end, the words "one share" when they secondly occur being merely repeated. On the other construction the sequence is not consecutive. The first idea was to name the recipient and then the share. On the respondents' contention this idea is changed to naming first the share and then the recipient, and keeping this order in the case of four recipients, and then reverting to the original order. That seems to me not very likely. As I suggested in argument, the scribe or draftsman must have had before him instructions from the testator as to the gifts. He must have had the names of the testator's six brothers and one sister, and he must have had opposite their names the number of shares they were each to take. Apparently, the name came first and the number of shares, thus, "James—one share." Probably the next would be, "John—one share," then "George—one share," "Elizabeth Farquaher —two shares," "Adam—one share," "Andrew—one share," "Ephraim—one share." It seems to me much more likely that the mistake which was made was in inserting the second "one share," than that it was in inserting them in the last place in the gift, which would read in this absurd manner:—"One share to my brother, Andrew Brunton, one share and to my brother Ephraim Brunton one share." If there were no more in the case, this is the conclusion to which I should come. But this is not all. What I have said shows that there is an ambiguity, and where there is an ambiguity in a will it is sometimes justifiable to look to external facts. On the face of this will we find some facts which indicate that the testator might reasonably have intended to give a double share to his sister rather than to his

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brother Adam. I find that by the will he appoints his sister to be the guardian of his child, that he directs that, as soon as possible after his death—which occurred almost immediately after making his will, and was very likely contemplated by him as likely to occur soon,—his daughter should be sent from Australia to be under the care of his sister, Mrs. Farquaher, in Edinburgh, and that the marriage of his daughter was to be with her consent. Under those circumstances it is at least extremely likely that, having imposed this task upon Mrs. Farquaher, he would give to her a larger share in his estate than to his brothers.

It is suggested that the testator did not know whether his request to Mrs. Farquaher to take charge of the child would be fulfilled. Of course he did not. But testators, when they make wills and give benefits to persons to whom they make certain requests, may be assumed to think that these requests will be granted. Therefore, merely as a matter of construction, I think that the construction contended for by the appellant is probably the right one, and when extrinsic circumstances are looked at I think the probability is greatly increased. Therefore I do not think I am justified in saying that I am unable to form any conclusion as to the meaning of the clause. In my opinion, the will sufficiently expresses the intention of the testator that Mrs. Farquaher should have two shares. I think, therefore, that the appeal should be allowed.

BARTON J. I am of the same opinion. The contention of the respondent Altson appears to be founded mainly upon the occurrence, in the clause allotting the several shares in the property to the testator's brothers and sister, of a full stop—if it is a full stop —a space, and a capital letter to the word "to" between the words relating to Elizabeth Farquaher and those relating to Adam Brunton. No reason arising from the particular passage of the will or from the context is assigned in favour of the construction which would give two shares to Adam Brunton, and only one share to the testator's only sister Elizabeth Farquaher, and it does seem to me that the respondent's contention is really confined to the questions of punctuation and the distribution of capital letters. That is a method of construction which, I think,

is never of any great weight, although it may in some cases turn the scale in the last resort. As Lord *Westbury* said in the passage cited by Mr. *McArthur* from *Gordon* v. *Gordon* (1), quoting from a judgment of Sir *William Grant* in *Sanford* v. *Raikes* (2), "'it is from the words, and from the context, and not from the punctuation,' that the meaning of the testator is to be collected." What, then, is there, on the other hand, in support of the contention for the appellant? He points out that, after the words "that is to say," in assigning the first share in the estate, the words "to my brother James Brunton one share" are used, and that that order is followed in the allocation of the last share, thus: "to my brother Ephraim Brunton one share." There is also the not unimportant fact that in assigning the share to Ephraim Brunton the word "and" is used—the word, of course, appropriate before making the final allocation. That word is useful as placing apart that portion of the gift, and as tending to show that the testator had in mind that form of allocation. As the learned Chief Justice has observed, it is not improbable that the person who wrote the will had before him some list of the persons and the number of shares to be allotted to them, and that he had before him the name "James Brunton," and opposite to it the share which he was to take, and so on with each of the beneficiaries. There is one departure, if the amanuensis had before him a list of that kind, namely, that there is a repetition after the allocation of the first share, of the words "one share," thus: "to my brother James Brunton one share one share." It is not an improbable thing that the amanuensis made a mistake, and we know that a common mistake is to write a thing twice. If that second "one share" is treated as a redundancy, the whole clause conforms to the same form of allocation, that is to say, the name first and then the number of shares. The contrary contention is to the effect that, after saying "to my brother James Brunton one share," the testator changed the method of allocation and went on "one share to my brother John Brunton," and so on. If that latter method were followed, it would have the effect of giving one share to Elizabeth Farquaher and two shares to Adam Brunton. It is only on that supposition that it

(1) L.R. 5 H.L., 254, at p. 276. (2) 1 Mer., 646, at p. 651.

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can be argued that two shares are given to Adam Brunton. Then the difficulty arises that, after the gift of two shares to Adam Brunton, the will proceeds thus: "one share to my brother Andrew Brunton one share." So that we come again to the difficulty of redundant words. There is also the difficulty that, if the words "one share" after the gift to Andrew Brunton are to be treated as redundant, the consequence is involved that the testator, having in the earlier part changed his method of allocation, has again changed it at the end and reverted to the original method. That is to say, we are to suppose that the testator changed his method of allocation twice. I fail to see any reason for such a conclusion. It seems to me, therefore, to be more probable that there was an accidental repetition of the words "one share" in the allocation of the share to James Brunton.

On the words as they stand it is obvious that there is an ambiguity; and an ambiguity may be solved by reference to the context, and, where it is not solvable by other means, it is proper to resort to the more reasonable construction. The only context referable to this clause of the will, are the provisions with respect to the guardianship and maintenance of the testator's daughter. She was a niece of his sister Elizabeth Farquaher, who was to have either one or two shares. The testator made Mrs. Farquaher guardian of his daughter, and made it necessary that her consent should be obtained to the marriage of his daughter. He also directed that his daughter, who was then about four years old, should be sent with all convenient speed to Edinburgh, and placed under the care and direction of Elizabeth Farquaher, who was a married woman—"the wife of William Farquaher." That is the one circumstance, outside the terms of the clause itself, which seems to throw any light upon what may have been the intention of the testator with regard to the share of Mrs. Farquaher. She was his only sister. She was the person in whom he evidently placed the highest confidence, and whom he selected in preference to any of his brothers as the person in whom to place the guardianship of his only child, a guardianship which involved the daughter being sent from Australia to Edinburgh, and being maintained and educated there. It is not unreasonable, in the absence of any reason for a double benefit to Adam

Brunton, to suppose that the person the testator most trusted, and the only person upon whom he was placing a burden, was the person to whom he intended to give the largest share of his estate. That is a view which certainly does no violence to the words used, and which is conformable to the reasonable treatment of the clause, because, whatever is done, some words have to be disregarded. There seems to be no canon of construction which prevents the Court from looking at the facts which I have mentioned, stated as they are in the document itself, in aid of the interpretation of the clause.

The difficulty about placing reliance upon the use of capital letters and the punctuation is that, in going through the will, we find that the person who wrote it was indiscriminate in the use of capitals, placing them in front of words which did not require them and placing small letters before words which appear to require capitals. He also distributed punctuation marks in an extraordinary fashion, sometimes placing full stops in the middle of sentences which obviously run on. As I suggested during argument, the value of the punctuation and capital letters in ascertaining the meaning of the clause is imponderable. If they are discarded altogether, as they ought to be, I think the construction which the learned Chief Justice has expounded is at once the most reasonable and the most probable.

I therefore think that the appeal should be allowed.

ISAACS J. I may say that I am not altogether clear on this question; but, on the whole, I agree with what has been said by my brethren about the meaning of this clause.

One of the chief arguments, if not the chief argument, on behalf of the respondents is this, that you can read the clause quite easily and regularly until you pass the reference to the shares in question here. Then it is said: "As you do not find any difficulty in construction until after you pass that point, deal with the difficulty when you find it later on and do not go back." I think that is a fallacious argument, because the rule of construction is that you must look at the whole of the document in order to get the true meaning of any part of it. Lord *Ellenborough* C.J. stated the rule, in

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Barton v. *Fitzgerald* (1), in these words:—"It is a rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done." Therefore, I am unable to admit the method of construction which was suggested by learned counsel for the respondents.

Then, looking at the document, I take this position, that every will must be in writing, and I do not think I am here at liberty to look at any circumstance beyond the will, but that I am bound to look at the whole of the written words, their arrangement, the punctuation, everything that I can see upon the document which was adopted by the testator as the declaration of his will. The comparative force to be given to any special feature of it depends upon the proper consideration of all that the document presents.

Starting with these two propositions, I agree with what has been said, viz., that, if you eliminate the words "one share" after the gift to James Brunton, the rest flows on naturally and without any further difficulty. I do not neglect the two circumstances of the dot after the words "Elizabeth Farquaher" and the space, as it is called, between the word "Farquaher" and the word "two." But I am unable to give to those circumstances the force which would be necessary for the success of the respondents. In the first place, it would make it necessary to change the style of the early part of the clause, and also would make it necessary afterwards to revert to the original style, and no sufficient reason is given for that. It is quite clear that when you come to the last gift, "and to my brother Ephraim Brunton one share," that is the method of expression that is finally adopted. So that the immediately preceding gift, "to my brother Andrew Brunton one share," follows the same course.

The learned primary Judge has struck out the words "one share" after the words "Andrew Brunton." There is, however, a difficulty in regard to that because the next word "and" would bring vividly to the mind of the testator the fact that the style was being changed.

(1) 15 East, 530, at p. 541.

Then it is suggested that we may leave in those words "one share" and strike out the same words where they occur after the words "Adam Brunton." That, it is said, would suit the respondents, and be free from the objection to the use of the word "and." But there is a serious objection to that. Not only would you have another change in the style of the gift, but it would be an obvious mistake, because, admitting that Adam Brunton is given two shares, it would be wrong to say "two shares to my brother Adam Brunton one share."

I do not think I can usefully add anything further. I feel in regard to this curiously worded clause a good deal of doubt, and I can quite understand the other conclusion being reached. On the whole, however, as I have said, I agree with the conclusion at which my learned brethren have arrived.

GAVAN DUFFY J. I agree with the other members of the Court in thinking that under this will Elizabeth Farquaher took two shares.

Appeal allowed. Order appealed from varied by declaring that the legal representatives of Adam Brunton are entitled to one share, and those of Elizabeth Farquaher to two shares. Costs of all parties to be paid out of the estate.

Solicitors, for the appellant, *Farmer & Turner.*

Solicitors, for the respondents, *Martin & Martin*; *P. D. Phillips*; *Fox & Overend.*

B. L.