[HIGH COURT OF AUSTRALIA.]

JOHN DYNELEY FELL AND ANOTHER . APPELLANTS; DEFENDANTS,

AND

DAVID FELL AND ANOTHER . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *Dec.* 4, 15.

Knox C.J., Isaacs and Higgins JJ.

Will—Construction—Uncertainty—No subject of disposition mentioned—Appointment of executors—Intention—Presumption against intestacy—Gift of whole estate.

Practice—Originating summons—No next-of-kin—Service on Attorney-General.

The will of a testator was substantially as follows:—"This is the last will and testament of me" W.J. "I give devise and bequeath unto" eleven named persons "and hereby appoint" two named persons "executors of this my will."

Held, by *Isaacs* and *Higgins* JJ. (*Knox* C.J. dissenting), that the will was a valid gift of the whole of the testator's estate to the eleven named beneficiaries in equal shares.

In re Bassett's Estate; *Perkins* v. *Fladgate*, (1872) L.R. 14 Eq., 54; *In re Byrne*; *Byrne* v. *Byrne*, (1898) 24 V.L.R., 832; 20 A.L.T., 172; *McLaughlan* v. *McLaughlan*, (1902) S.R. (Qd.), 11, and *Batson* v. *Morgan*, (1894) 13 N.Z.L.R., 525, followed.

Hall v. *Warren*, (1861) 9 H.L.C., 420; *Enohin* v. *Wylie*, (1862) 10 H.L.C., 1, and *Mohun* v. *Mohun*, (1818) 1 Swans., 201, distinguished.

Per Higgins J.: As one of the affidavits used on the originating summons made it probable that the testator had no relatives at his death, the summons ought to have been served on the Attorney-General.

Decision of the Supreme Court of New South Wales (*Street* C.J. in Eq.): *Fell* v. *Fell*, (1922) 22 S.R. (N.S.W.), 383, reversed.

APPEAL from the Supreme Court of New South Wales.

The will of William Jamieson, who died on 4th August 1920, was, so far as is material, in the following terms :—" This is the last will and testament of me William Jamieson at present residing at 'Ormiston' Kirribilli North Sydney New South Wales I give devise and bequeath unto John H. F. Jeffrey Marguerite Jeffrey John D. Fell Hugh Mackinley Fell Robert A. Fell Masie Fell Helen Fell Jessie Donald Smith Struan Smith M. M. Lovegrove Joseph M. Berry and hereby appoint David Fell Equitable Buildings George Street Sydney Donald Smith dentist 159 Macquarie Street Sydney executors of this my will In witness whereof" &c. Probate of the will was on 25th October 1920 granted to the executors thereby appointed.

The executors applied by originating summons to the Supreme Court for the determination of the following questions :—(1) Whether upon the true construction of the will the defendants and the other persons mentioned as beneficiaries in the will are entitled to participate in the estate of the testator. (2) Whether upon the true construction of the will there is an intestacy in the estate of the testator.

The defendants to the summons were John Dyneley Fell and Jessie Donald Smith, two of the beneficiaries named in the will. In an affidavit filed in support of the summons Jessie Donald Smith deposed that the testator had frequently told her that so far as he knew he had not a single relation living. The Supreme Court made a decretal order declaring that upon the true construction of the will the persons mentioned as beneficiaries in the will were not entitled to participate in the estate of the testator, but that such estate devolved as upon the intestacy of the testator. The Court also ordered that for the purposes of the suit the plaintiffs should be appointed to represent the next-of-kin of the testator and the defendants to represent all persons mentioned as beneficiaries in the will other than the parties, and that it be referred to the Master in Equity to inquire as to the next-of-kin of the testator : *Fell* v. *Fell* (1).

From that decision the defendants appealed to the High Court.

(1) (1922) 22 S.R. (N.S.W.), 383.

H. C. OF A. 1922. FELL v. FELL.

Wickham, for the appellants. The will sufficiently indicates an intention on the part of the testator to give the whole of his estate to the eleven named beneficiaries in equal shares. The facts that the testator declares that the document is his last will and testament, that he uses the words "give devise and bequeath" and that he appoints executors, coupled with the presumption against intestacy, take the case out of conjecture and raise an implication that the testator intended to dispose of the whole of his property to the named beneficiaries. [Counsel referred to *McLaughlan* v. *McLaughlan* (1); *Batson* v. *Morgan* (2); *In re Byrne*; *Byrne* v. *Byrne* (3); *In re Bassett's Estate*; *Perkins* v. *Fladgate* (4); *Stanley* v. *Bond* (5); *In re Harrison*; *Turner* v. *Hellard* (6).]

[ISAACS J. referred to *Towns* v. *Wentworth* (7); *In re Hagen's Trusts* (8); *Kirby-Smith* v. *Parnell* (9).]

Bethune, for the respondents. The next-of-kin will not be deprived of their statutory right of succession except by express words or necessary implication showing an intention of the testator to give his property to someone else. In order to support the appellants' view the words "all my property" must be inserted after the words of gift, and it is mere conjecture to say that the testator intended those words to be supplied rather than any other words. [Counsel referred to *Hall* v. *Warren* (10); *Hall* v. *Hall* (11); *Mohun* v. *Mohun* (12); *Halsbury's Laws of England*, vol. XXVIII., p. 667.]

Wickham, in reply, referred to *Jarman on Wills*, 6th ed., p. 454.

Cur. adv. vult.

Dec. 15. The following written judgments were delivered:—

KNOX C.J. I agree with the Chief Judge in Equity in the conclusion at which he arrived, and in the reasons given by him for coming

(1) (1902) S.R. (Qd.), 11.
(2) (1894) 13 N.Z.L.R., 525.
(3) (1898) 24 V.L.R., 832; 20 A.L.T., 172.
(4) (1872) L.R. 14 Eq., 54.
(5) (1913) 1 I.R., 170.
(6) (1885) 30 Ch. D., 390.
(7) (1858) 11 Moo. P.C.C., 526, at p. 543.
(8) (1877) 46 L.J. Ch., 665.
(9) (1903) 1 Ch., 483.
(10) (1861) 9 H.L.C., 420, at p. 428.
(11) (1892) 1 Ch., 361, at p. 365.
(12) (1818) 1 Swans., 201.

to that conclusion. I can find no justification in any rule of construction, or in any authoritative decision, or in any presumption, for inserting in this will after the word "bequeath" the words "my property." There is, in my opinion, nothing on the face of the will from which it can be seen clearly and precisely that those are the words which the testator intended to insert. I cannot accept as sufficient the argument pressed by Mr. *Wickham*, that when a man makes a will there is a presumption that he intends to dispose of all his property. I think the true rule is that when a man makes a will he intends to die testate only in so far as he has expressed himself in his will (per *Romer* L.J. in *In re Edwards*; *Jones* v. *Jones* (1)). Where the will contains a residuary gift or otherwise shows an intention on the part of the testator to dispose of the whole of his real and personal estate, but, as regards the interests created, admits of two constructions, the Court inclines to take the words in the sense which will enable them to operate as a complete disposition; but this so-called presumption against intestacy is not enough to satisfy the Court that intestacy was not intended: in order to oust the title of the persons claiming on intestacy it must be shown distinctly that there are words in the will sufficient to constitute a gift of the property in question expressly or by implication to some donee, and the burden of proof is on the alleged donee to that extent (see *Halsbury's Laws of England*, vol. XXVIII., pp. 666-667, pars. 1277-1278).

Another argument addressed to the Court was that, as the testator by his will appointed executors and as by force of law the whole of his real and personal estate became vested in such executors, the gift now in question must be read as extending to the whole of his real and personal estate—in other words, that from the fact that he appointed executors, in whom by law his whole estate became vested, it was a necessary implication that he intended by the defective words of gift to dispose by his will of the beneficial interest in the whole of his estate in favour of the persons named as donees. Somewhat similar arguments were rejected by the House of Lords in *Hall* v. *Warren* (2) and *Enohin* v. *Wylie* (3). In the former case

(1) (1906) 1 Ch., 570, at p. 574. (2) (1861) 9 H.L.C., 420.
(3) (1862) 10 H.L.C., 1.

H. C. OF A. 1922.

FELL v. FELL.

KNOX C.J.

the Lord Chancellor said (1): "If there are words in a will which raise a doubt as to the amount of interest given to a devisee or legatee, the Court must put a construction upon them and give effect to them, unless they are wholly insensible; but where there is uncertainty whether the property has been devised or bequeathed away from the heir-at-law or next-of-kin, the wise course has been, to let the property go as the law directs in cases of intestacy." And in the latter case Lord *Cranworth* says (2): "Executors take the property put under their control merely for the purpose of executing the testator's directions concerning it, and so that, if there are no such directions, it must be distributed as an intestacy." Possibly these words were not used with regard to the position of an executor under English law, but they aptly describe that position. I do not think the mere appointment of executors of itself warrants any implication as to intended dispositions of beneficial interests in the estate. At the most it shows that the testator intended that the persons named as executors should dispose of his real and personal estate in due course in the manner prescribed by the *Wills, Probate and Administration Act* 1898. In the case now before us the words of gift are, in my opinion, insensible, and therefore ineffectual to dispose of any property.

I think the appeal should be dismissed.

ISAACS J. The question is whether, on the construction of this particular will, the testator can be held in law to have died testate as to all his property. If he can, then, since the intended objects of his bounty are clearly designated, no further difficulty exists. I have come to the conclusion, after much consideration, that the question should be answered in the affirmative.

As I am differing on a matter of considerable importance from my brother the Chief Justice and also from *Street* J., the learned primary Judge, I propose to state very explicitly the line of reasoning that has led me to the opinion I have formed.

I think I should preface what I have to say directly on the subject by a preliminary observation. In the judicial construction of instruments, whether wills or deeds or statutes, Courts

(1) (1861) 9 H.L.C., at p. 428. (2) (1862) 10 H.L.C., at p. 22.

are not to approach the matter from the standpoint of the hypothetical personage sometimes alluded to as "the man in the street." In earlier times Courts certainly sometimes laid greater stress on rigid rules of construction, and in the dominancy of interpretative tests, than they do to-day. Actual intention has freer scope in recent years than in many of the early cases. Influences that formerly were thought imperative have in many instances passed away, and the modern tendency of Courts is to give fuller play to the words themselves than was once thought proper. But, on the other hand, we have to guard ourselves from the opposite extreme. A Court, in my opinion, is not to place itself in the position of a person unaccustomed to the functions of a legal tribunal, and then make the double error of first assuming how he would construe the document, and next adopting as a curial interpretation the construction so assumed. I do not for a moment think that has been done in the present case, but it is part of the mental discipline I have thought necessary to exercise. With specific reference to wills, *Cotton* L.J. very pointedly called attention to this in *Ralph* v. *Carrick* (1). One sentence I quote: "We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do." Lord *Wrenbury* (while *Buckley* L.J.) said very much the same, though more categorically, in *Kirby-Smith* v. *Parnell* (2).

On this basis I proceed to consider this particular will. Certain principles are incontestable. To prevent misapprehension as to the groundwork of my opinion I state them:—

(1) "Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence, as is necessary in order to enable us to understand the words which the testator has used" (Lord *Cranworth* in *Abbott* v. *Middleton* (3); Lord *Wensleydale* in the same case (4)).

(2) "The instrument . . . must receive a construction according to the plain meaning of the words and sentences therein contained. But . . . you must look *at the whole instrument*, and,

(1) (1879) 11 Ch. D., 873, at p. 878.
(2) (1903) 1 Ch., at p. 489.
(3) (1858) 7 H.L.C., 68, at p. 88.
(4) (1858) 7 H.L.C., at p. 114.

H. C. OF A. 1922.

FELL v. FELL.

Isaacs J.

inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole *in order to give effect, if it be possible to do so, to the intention of the framer of it*" (Lord *Halsbury* L.C. in *Leader* v. *Duffey* (1); *Ward* v. *Brown* (2); *Buckley* L.J. in *Kirby-Smith* v. *Parnell* (3)).

(3) "If the will shows that the testator must necessarily have intended an interest to be given *which there are no words in the will* expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has *on the whole will*, sufficiently declared" (*Towns* v. *Wentworth* (4); *Hawkins on Wills*, 2nd ed., at p. 6).

(4) An inference cannot be made "that did not necessarily result from all the will taken together" (Sir *R. P. Arden* M.R. in *Upton* v. *Ferrers* (5)). A necessary inference is one the probability of which is so strong that a contrary intention cannot reasonably be supposed (*James* L.J. in *Crook* v. *Hill* (6)).

(5) "We cannot give effect to any intention which is not expressed or plainly implied in the language of" the "will" (Lord *Watson* in *Scalé* v. *Rawlins* (7)). "You have no right to fancy or to imply, unless there be something within the four corners of the will which is not only consistent with the implication you make, but *which could hardly stand, if at all*, in the will, without that implication being made. That is what is called necessary implication, and legitimate implication, in contradistinction to gratuitous, groundless, fanciful implication" (Lord *Brougham* L.C. in *Langston* v. *Langston* (8)).

(6) "If the contents of a will show that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfil the intention with which the document was written, the addition or rejection will by construction be made" (*Knight Bruce* L.J. in *Pride* v. *Fooks* (9)).

(1) (1888) 13 App. Cas., 294, at p. 301.
(2) (1916) 2 A.C., 121; 31 T.L.R., 545.
(3) (1903) 1 Ch., at p. 489.
(4) (1858) 11 Moo. P.C.C., at p. 543.
(5) (1801) 5 Ves., 801, at p. 804.
(6) (1871) L.R. 6 Ch., 311, at p. 315.
(7) (1892) A.C., 342, at pp. 344-345.
(8) (1834) 2 Cl. & F., 194, at pp. 236-237.
(9) (1858) 3 DeG. & J., 252, at p. 266.

(7) " When the will is in itself incapable of bearing any meaning unless *some words* are supplied, so that *the only choice is between an intestacy and supplying some words*; but even there, as in every case, the Court can only supply words if it sees on *the face of the will itself clearly and precisely what are the omitted words*, which may then be supplied upon what is called a necessary implication from the terms of the will, and in order to prevent an intestacy " (*Page Wood* V.C. in *Hope* v. *Potter* (1)).

(8) " There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense . . .), that you should rather lean towards that construction which preserves, than towards that which destroys. *Ut res magis valeat quam pereat* is a rule of common law and common sense; and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally and literally, as it is, or with a somewhat larger and more liberal construction, and by *so supplying* words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand; and thus again, according to the rule *ut res magis valeat quam pereat*, to supply, if you can safely and easily do it, that which he *per incuriam* omitted, and that which instead of destroying preserves the instrument; which, *instead of putting an end to the instrument and defeating the intention* of the maker of it, tends rather to *keep alive and continue and give effect to that intention* " (Lord *Brougham* L.C. in *Langston* v. *Langston* (2)).

(9) If on reading the will you can see *some mistake* must have happened, " that is a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself " (*Langston* v. *Langston* (3)).

(10) " The mind never inclines towards intestacy; it is a *dernier ressort* in the construction of wills " (Lord *Shaw* in *Lightfoot* v.

(1) (1857) 3 K. & J., 206, at p. 209. (2) (1834) 2 Cl. & F., at p. 243.
(3) (1834) 2 Cl. & F., at pp. 240-241.

H. C. OF A. 1922.

FELL v. FELL.

Isaacs J.

Maybery (1)). " In ascertaining the intention, I ought to a certain extent—we all know what the expression means—to lean against an intestacy, and not to presume that the testator meant to die intestate if, on a fair construction, *there is reason for saying the contrary* " (*Buckley* L.J. in *Kirby-Smith* v. *Parnell* (2)).

With these principles in mind, I examine the will itself, remembering, as Chief Justice *Wilmot* quaintly said in *Dodson* v. *Grew* (3), " Words are only pictures of ideas upon paper." So long as we find the ideas delineated on the paper, it matters nothing how crude the craftsmanship may be.

The instrument begins with the usual formula "This is the last will and testament " and ends with the words " and hereby appoint David Fell . . . Donald Smith . . . executors of this my will." It is trite law that " the bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved " (see *In the Goods of Jordan* (4)). That is so because the executor is the representative of the testator. The nomination of an executor is at common law a request by the testator to represent him for certain purposes, including the payment of debts, and to do in relation to all his personal property what he can no longer do for himself. *Wentworth on the Office of Executors*, 14th ed., p. 10, says of the office of executor :—" So as the naming of A and B executors, is *by implication a gift or donation* unto them of *all the goods and chattels, credits and personal estate* of the testator, and the laying upon them an obligation to pay all his debts, and making them subject to every man's action for the same." The jurisdiction of the Ecclesiastical Court to grant probate of a testamentary paper was founded on the fact that it affected personal property (*In the Goods of Morton* (5)). The rule irrespective of statute was clear, " The appointment of executors," says *Kindersley* V.C. in *Dacre* v. *Patrickson* (6), " is a gift to them of the personal estate ; and a Court of equity will not deprive them of the beneficial interest, unless it sees that a strong

(1) (1914) A.C., 782, at p. 802.
(2) (1903) 1 Ch., at p. 489.
(3) (1767) Wilm., 272, at p. 278.
(4) (1868) L.R. 1 P. & M., 555, at p. 556.
(5) (1864) 33 L.J. P., 87.
(6) (1860) 1 Dr. & Sm., 182, at pp. 184-185.

and violent presumption arises from the will, that the intention of the testator was that the executors should not *virtute officii* take the personalty; and if there is that violent presumption, then a Court of equity holds the executors trustees for the next-of-kin." This passage was quoted and acted on in *In re Glukman*; *Attorney-General* v. *Jefferys* (1), by *Cozens-Hardy* M.R.; *Fletcher Moulton* L.J. concurred. *Buckley* L.J. was of the same opinion, and said (2): —"I start with the presumption that the executors are intended to take the residue beneficially. 'The fundamental presumption which the law makes, is, that the appointment of executors is a gift to them of what is undisposed of' (per Lord *Thurlow*, *Bowker* v. *Hunter* (3))." Now, let it be clearly understood that I am not quoting these passages as representing the law here as to the *beneficial interest* of executors. That depends on the terms of the *Wills, Probate and Administration Act* 1898, and particularly sec. 49, and I am not now construing that section. What I am at present concerned with is that the general appointment of an executor is at common law a gift of what I might term the "legal" right, and sometimes the beneficial right, to *all the personalty of the testator*. That is the first step, and establishes that, inasmuch as sec. 44 brings in real property on the same basis as personal property for this purpose, the general appointment of executors in this will must be regarded as a gift to them *virtute officii* of the legal interest of the testator in all his real and personal estate, and that became legally vested in them on probate by force of sec. 44. Then sec. 46 makes the whole estate, real and personal, assets in the same hands of the executors obtaining probate for the payment of duties and fees and debts. I apprehend that whether or not a testator inserts an express direction to pay duties, fees and debts is immaterial as to the construction of the will. The testator omitting it does so because he is taken to know that it is a necessary implication. And he knows that the executors will hold the property subject to any disposition he makes of it, and, failing that, subject to any disposition the law makes of it. In this case the testator, who presumably said that all his property real and personal should be given for all his estate

(1) (1908) 1 Ch., 552, at p. 555. (2) (1908) 1 Ch., at p. 557.
(3) (1783) 1 Bro. C.C., 328, at p. 329.

H. C. OF A. 1922.

FELL v. FELL.

Isaacs J.

and interest to his executors as such, also said this : "*I give devise and bequeath unto*" the named objects. Now, having regard to the fact that he was solemnly executing his "last will and testament" and was thereby by necessary implication saying that the whole of his property should after his death be vested in his executors, then, unless we look upon his words as a jest or intentionally meaningless, we must, as an irresistible inference, conclude that he intended to give *some* interest in his property to the named objects. What property was he dealing with ? Presumably all his property. What interest ? Presumably, since nothing appears to the contrary, the same interest as he dealt with further on when making a general appointment of executors.

The principles I have enumerated above seem to me to apply in this way :—I read the words of the will and regard nothing extrinsic except the *Wills, Probate and Administration Act* 1898 (*Abbott* v. *Middleton* (1)). I read it as a whole, and find an undoubted intention to give *some* interest in the testator's property. A complete intestacy would, therefore, be in direct conflict with the clear intention apparent on the face of the will. But if *some* interest is clearly intended, and if clear intention is not to be destroyed, then a meaning must be found *to give effect* to the clear intention so far as it appears (*Leader* v. *Duffey* (2) ; *Kirby-Smith* v. *Parnell* (3) ; *Towns* v. *Wentworth* (4) ; *Langston* v. *Langston* (5) ; *Lightfoot* v. *Maybery* (6)). The only way to give effect to the will is to imply, from the words "give devise and bequeath unto" the named objects, a gift of the beneficial interest in the whole property. That is both by affirmatively regarding the same subject as (1) the subject of the gift to the objects and (2) the subject of the nomination of the executors, and by negatively refusing to destroy entirely the actual intention to benefit the objects, and refusing to introduce any subject of limitation different from that in the rest of the will. It is clear that, on any other basis, a mistake has occurred, and that is a legitimate consideration. The omission was not intentional (*Langston* v. *Langston*). No alternative expressions present themselves

(1) (1858) 7 H.L.C., 68.
(2) (1888) 13 App. Cas., 294.
(3) (1903) 1 Ch., 483.
(4) (1858) 11 Moo. P.C.C., 526.
(5) (1834) 2 Cl. & F., 194.
(6) (1914) A.C., 782.

on the words of the will. One only is possible on its words to give any efficacy to the instrument, or any effect that will not lead to intestacy, and, therefore, the only reasonable implication is, I think, "plain" (*Scalé* v. *Rawlins* (1)), for without it the words "give devise and bequeath unto" the objects could not stand at all (*Langston* v. *Langston* (2)) without certainly defeating the testator's intention of creating an intestacy. To create a complete intestacy would be openly opposed to the intention of the testator, and I think that should not be done by the Court if at all avoidable. All reasonable inference points, as I think, in the direction of avoiding the intestacy, and adhering to the same implication with regard to the legal estate vested in executors as to the intended beneficial estate vested in the named objects.

I have arrived at this result on principle alone, and without the help of any decisions of actual construction. But I regard, as strongly supporting the conclusion I have formed, the four cases: *In re Bassett's Estate*; *Perkins* v. *Fladgate* (3); *In re Byrne*; *Byrne* v. *Byrne* (4); *McLaughlan* v. *McLaughlan* (5), and *Batson* v. *Morgan* (6). *In re Byrne* is, in my opinion, particularly strong. The reference in the will there to prior payment of debts and testamentary expenses is only a statement of the statute law, and would in any case be implied. The opinion of *àBeckett* J. on such a subject is entitled to great weight. *Mohun* v. *Mohun* (7) is not, in my opinion, an authority to the contrary, even if at this day the "heir" would be a paramount consideration. But the important feature is that it is not the case of a will appointing executors. Counsel for the plaintiffs stressed the contention that the mere appointment of executors passes a testator's property, and he urged that trustees were analogous. But counsel for the heir pointed out that the Ecclesiastical Court had decided that the trustees were not executors. There was, therefore, no such starting-point as we have here.

In my opinion the appeal should be allowed, and the questions

(1) (1892) A.C., at p. 345.
(2) (1834) 2 Cl. & F., 194.
(3) (1872) L.R. 14 Eq., 54.
(4) (1898) 24 V.L.R., 832; 20 A.L.T., 172.
(5) (1902) S.R. (Qd.), 11.
(6) (1894) 13 N.Z.L.R., 525.
(7) (1818) 1 Swans., 201.

H. C. OF A. 1922.

FELL v. FELL.

Isaacs J.

should be answered thus: (1) The persons mentioned as beneficiaries are entitled to participate in the testator's estate in equal shares; (2) there was no intestacy.

I have examined with care the two cases in the House of Lords referred to by the Chief Justice. As to the first, I think the Lord Chancellor's words, including the sentence immediately preceding the passage quoted, help the construction I have arrived at, because here there are no "words . . . which raise a doubt as to the amount of interest given" (1). There the words specifically used to designate the property given to William Hall Warren were not capable of the suggested extension. In the second case the point is contained in the final sentence in Lord *Chelmsford's* judgment (2).

HIGGINS J. The will has been set out. We have seen the original. It is on a printed form, on one face of a sheet. The names of the eleven intended beneficiaries fill the space *after* the printed words "I give devise and bequeath unto" and *before* the printed words "And hereby appoint." There is no blank left, or any indication that the testator meant to insert anything else. The attestation clause appears on the same face. There are other words on the opposite face, but they are not included in the grant of probate, being after the attestation clause; and it is our duty to construe the will as admitted to probate, paying no regard to the other words. Unless on the true interpretation of the will as proved we can find the subject of the gift as well as the objects, there is an intestacy.

But it is a "will"; and a will means a gift of property to take effect on death. Property is implied in a will. Property is also implied in the words "give devise and bequeath." The only question under this will is, what property? We are not entitled to construe by conjecture; but we are entitled to make use of the usual implications and presumptions arising from the words used. *Some* property being implied by the gift, there is a presumption that when a man makes a will at all he intends to dispose of all his property. Of course, the presumption may be rebutted by the context; but there is nothing in the context here that suggests any exception from his property. Here, the testator appoints executors of his

(1) (1861) 9 H.L.C., at p. 428. (2) (1862) 10 H.L.C., at p. 26.

will—that is to say, executors to administer *all* his property, real and personal; for, by the law of New South Wales, executors take the real property as well as the personal; and as to the beneficial interest in all that property there are eleven beneficiaries named, in one group and without distinction. As there is nothing to suggest any differentiation between them, there is a presumption of equality in sharing the benefit of the gift of the property. I accept to the full Mr. *Jarman's* statement: "To the validity of every disposition, as well of personal as of real estate" (the property is all personal), "it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal" (*Jarman on Wills*, 6th ed., p. 454). Here, the objects are certain, by virtue of express words; and, in my opinion, the subject of the gift is certain, by necessary implication.

This would be my conclusion even if there were no reported decisions as to similar wills. It is a matter of construction of the words of this particular will, and the construction depends on the actual words here used. We have no right to fill in any gap in the will by conjecture; but it is quite a different thing to fill it in by fair inference from the words actually used. We have also to remember the rule of construction, well stated in *Jarman*, 6th ed., p. 2210: "Words . . . are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative." Here, if we treat the testator as not giving anything by his words, we infringe this rule, as we give no effect to the words "This is the last will and testament of me William Jamieson," or to the words "I give devise and bequeath." It is more than a fair inference (it is necessarily involved in these expressions) that the testator is giving property—some property; and then the strong presumption applies that, in making a will at all and giving, devising and bequeathing any property, he is giving all his property. As *Talbot* L.C. said: "If the will be general, and . . . taking his words in one sense will make the will to be a complete disposition of the whole, whereas the taking them in another will create a chasm; they shall be taken in that sense which is most likely to be agreeable to his intent of

H. C. OF A. 1922.

FELL v. FELL.

Higgins J.

disposing of his whole estate" (*Ibbetson* v. *Beckwith* (1)). It is, of course, only a presumption that the testator means to dispose of his whole estate; and the presumption will yield to express words. This is the explanation of *Enohin* v. *Wylie* (2). There the testator, living in Russia, gave "the whole of my capital which shall remain with me . . . in *ready money*"; and in his will he stated that he intended to make a further will by way of supplement. The House of Lords held that the gift did not apply to British consols, which were not ready money. But in the present case there is nothing to rebut the presumption, and nothing to interfere with the common-sense inference, that the beneficiaries named are to get all the property which the executors take, but subject to payment of debts, costs, &c. There is no indication here of any discrimination between one piece of property and another, or between one beneficiary and another; the names of eleven beneficiaries are mentioned in one group as for one gift; and we must apply the presumptions (1) that *all* the property is given to the eleven, and (2) that the eleven are to share equally. The whole difficulty would vanish if after the word "bequeath" the testator had said "my property"; and, in one aspect, the question is, are we justified in supplying these words? According to *Jarman* (p. 2211, rule of construction XIX.), "words . . . may be . . . supplied . . . where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis." The power to supply words is put by *Page Wood* V.C. (afterwards Lord *Hatherley* L.C.J.) in *Hope* v. *Potter* (3), under two heads; and "the first is, when the will is in itself incapable of bearing any meaning unless some words are supplied, so that the only choice is between an intestacy and supplying some words: but even there, as in every case, the Court can only supply words if it sees on the face of the will itself clearly and precisely what are the omitted words, which may then be supplied upon what is called a *necessary implication* from the terms of the will, and in order to prevent an intestacy."

But what is the meaning, in this and other cases, of *necessary* implication? Fortunately, we have the guidance of Lord *Eldon*,

(1) (1735) Cas. *t.* T., 157, at p. 161. (2) (1862) 10 H.L.C., 1.
(3) (1857) 3 K. & J., at p. 209.

in *Wilkinson* v. *Adam* (1). There it is said that "in construing a will conjecture must not be taken for implication: but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed." This exposition was adopted by *James* L.J. in *Crook* v. *Hill* (2); and in the same case *Mellish* L.J. expounded "necessary implication" as "a plain and clear inference, leaving no reasonable doubt" (3). "It is called 'necessary,' because the Court finds it so to answer the intention of the devisor" (*Coryton* v. *Helyar* (4)). In *Parker* v. *Tootal* (5) there is a good concrete instance showing how far the Courts go in supplying words. The will gave an estate for life to T., with remainder to the first son of the body of T. lawfully begotten "severally and successively in tail male." The House of Lords held that the words "severally and successively" &c., had no meaning unless the words "and other sons" were implied before "severally"; and it treated these words as implied.

What we have to find then is, what is the meaning of the words of the testator, when closely studied, and it does not matter that he has forgotten to put the appropriate noun after the transitive verbs "give devise and bequeath," if it is clear, on the ordinary rules of construction, what the noun that he intended was. *Jarman* puts it (6th ed., p. 2205): "The intention of testators, when ascertained, is implicitly obeyed, however informal the language in which it may have been conveyed; yet the Courts, in construing that language, resort to certain established rules by which particular words and expressions, standing unexplained, have obtained a definite meaning." Further, the Courts elicit "from the contents of the instrument the intention of the author, the faintest traces of which will be sought from every part of the will." "A Court never construes a devise void, unless it is so absolutely dark, that they cannot find out the testator's meaning" (*Minshull* v. *Minshull* (6)). As *Jessel* M.R. said in *In re Roberts*; *Repington* v. *Roberts-Gawen* (7):— "When we talk of the intention of a testator . . . what we really

(1) (1813) 1 V. & B., 422, at p. 466.
(2) (1871) L.R. 6 Ch., 311.
(3) (1871) L.R. 6 Ch., at p. 318.
(4) (1745) 2 Cox, 340, at p. 348.
(5) (1865) 11 H.L.C., 143.
(6) (1737) 1 Atk., 411, at p. 412.
(7) (1881) 19 Ch. D., 520, at p. 529.

H. C. OF A. 1922. FELL v. FELL. Higgins J.

mean is the fair interpretation to be given to the words used. . . . The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty." The absence of an appropriate noun or verb is not fatal to a gift; and there is no doubt that, in modern times, a document duly executed and attested as a will, containing nothing but "all for my mother"—without any verb—would carry the whole of the testator's estate, real and personal. Lord *Esher* M.R. said (in *In re Harrison*; *Turner* v. *Hellard* (1)):—"There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."

Much stress has been laid by the respondent here on a case of *Mohun* v. *Mohun* (2). There the testator said: "I J.M. do make this my last will . . . I leave and bequeath to all my grandchildren, and share and share alike." By a codicil he said: "And farther I appoint T.H. and T.E. my trustees for all my grandchildren and *nieces*." The Master of the Rolls said there was uncertainty both in subject and in objects, who are to take and what is taken, and declared an intestacy. It was not clear there whether the nieces were not to share with the grandchildren; and there was no mention of land at all. At that time (1818) there still existed a sort of superstitious sentiment against disinheriting the heir-at-law; and, as the Ecclesiastical Court had refused to give probate to the will to the trustees, there is good reason for believing that the Master of the Rolls was influenced by older cases which treated land as not included under a will unless expressly mentioned. According to the report, the argument in favour of intestacy came from the counsel for the heir-at-law, not from the next-of-kin. Moreover, Mr. *Jarman* warns students against yielding implicit confidence to any early cases in

(1) (1885) 30 Ch. D., at p. 392. (2) (1818) 1 Swans., 201.

which a gift has been held void for uncertainty, as the true principles of construction have in recent years been better settled (*Jarman on Wills*, 5th ed., p. 327 ; see 6th ed., p. 992, note (*k*)). This warning has been adopted by *Malins* V.C. in *Smyth* v. *Smyth* (1). All the cases in recent years where the testator has not expressly stated the property given are against intestacy (*In re Bassett's Estate* ; *Perkins* v. *Fladgate* (2) ; *In re Byrne* ; *Byrne* v. *Byrne* (3) ; *McLaughan* v. *McLaughlan* (4) ; *Batson* v. *Morgan* (5)). As *Richmond* J. said, in the case last mentioned (6), the " testator must have meant that his words as they stand should have some effect ; and if *some* effect is to be allowed to them, it can be nothing less than that of a general devise and bequest of everything."

In my opinion, therefore, there is no intestacy here, and the appeal should be allowed. I have set out my reasons at what may seem to be undue length ; but I regard the principle involved as of great and general importance, although the estate is small, and the same exact mistake is not likely to be repeated. But I think it is my duty to say that, in the face of the affidavit of Jessie Donald Smith, referred to in the decretal order, the Attorney-General ought to have been served with the originating summons. If the decision of this Court be in favour of the beneficiaries named in the will, the Crown's claims to intestate property when there are no next-of-kin will not be bound ; and the Attorney-General may possibly claim the property for the Crown hereafter, in new proceedings against the executors. It would appear probable from the affidavit that the testator had no relatives living. Sec. 26 of the New South Wales *Equity Act* 1901 does not meet the case ; for that section (taken from sec. 51 of the English Act 15 & 16 Vict. c. 86) only applies where every point of view is represented by *some* person before the Court (*Swallow* v. *Binns* (7)). There is no such provision, I understand, in New South Wales as that contained in rule 40 of Order XVI. of the *Judicature Rules*, enabling the Court to direct that the Attorney-General be served with the judgment (decretal order).

(1) (1878) 8 Ch. D., 561.
(2) (1872) L.R. 14 Eq., 54.
(3) (1898) 24 V.L.R., 832 ; 20 A.L.T., 172.
(4) (1902) S.R. (Qd.), 11.
(5) (1894) 13 N.Z.L.R., 525.
(6) (1894) 13 N.Z.L.R., at p. 527.
(7) (1852) 9 Ha., App. xlvii.

H. C. OF A. 1922. FELL v. FELL.

Appeal allowed. Order appealed from discharged. Declare that the persons mentioned in the will as beneficiaries are entitled to participate in the estate of the testator in equal shares. Costs of all parties of the proceedings in the Supreme Court and of this appeal as between solicitor and client to be paid out of the estate.

Solicitors, *A. J. McLachlan & Co.*

B. L.

[HIGH COURT OF AUSTRALIA.]

W. R. CARPENTER AND COMPANY LIMITED . APPELLANT; DEFENDANT,

AND

ATKINS AND OTHERS . . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *Dec.* 5, 6, 12.

Isaacs, Gavan Duffy and Starke JJ.

Practice—High Court—Appeal from Supreme Court of State—Facts insufficient for determination of questions raised—New trial—Form of order—Evidence already given to stand—Liberty to parties to supplement evidence.

On an appeal from the Supreme Court of a State to the High Court, the evidence being insufficient to enable the Court to decide the question involved,

Held, that a new trial should be ordered, that the evidence given at the previous hearing should stand, and that both parties should be at liberty to supplement that evidence.

Mudie v. *Strick & Co.*, (1909) 14 Com. Cas., 227, followed.

Decision of the Supreme Court of New South Wales, reversed.