

McQuellin v. McQuellin

41/1930

ISAACS C.J. I have stated what I regard as the principles governing the construction of wills in which there are apparent omissions, in Fell v. Fell 31 C.L.R. 268. I do not propose to restate them here. But I would cite a dictum of Turner L.J. in Peacock v. Stockford 3 de G. M. & G.⁷² at p 77, that "if a sensible construction can be put upon the words "as they stand, it is clear that we should not be justified in making "any interpolation". Now in the present case, a sensible construction cannot be placed upon portion of the will - the portion, namely, containing the intermediate declaration - unless an omission, which is evident upon the face of the document, is supplied. If the will is read literally and without any interpolation being made, it is impossible, with regard to the personal estate, to give any operative effect, during the intermediate period, to the trusts declared as to the ~~xxxx~~ "rents interest and yearly "produce thereof" referred to in that declaration. What words, then, are required to rectify the apparent mistake and give a sensible meaning to the will? I think that, by necessary implication, the words "and persona

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should be ~~supplied~~ supplied after the word "real" occurring in the clause
"And to stand possessed of the proceeds of the sale and conversion of
"my real estate".

The appeal should be allowed.

McQuellin v. McQuellin

DIXON J.: I think the case turns upon the question whether an intention is shewn on the part of the testatrix to subject the proceeds of her personal estate to the same trusts as those of her real estate. The words which ~~are~~ expressly dispose of the beneficial interest in the proceeds of personalty have been omitted, clearly, by mistake; but if, on the face of the will, there is enough to establish satisfactorily that personalty was to go upon the same limitations as realty, the intention should be carried into effect. The allusions in the will to the personal estate, in my opinion, do shew such an intention. The clause containing the declaration as to income pending conversion appears to me to indicate that there is one set of trusts in respect of both sets or classes of property. The use of the word "respectively" in that clause was relied upon as shewing or suggesting two sets of limitations. But where it first occurs, it is used because the power of sale enables the trustees to sell from time to time, so that different property might be sold at different times. The word "respectively" where used for the second time in that clause distinguishes between "the rents and interest and yearly produce" of the two classes of property. On the other

hand, the word does not occur in relation to the "trusts and provisions", or the word "such" in the phrase "such trusts and provisions" at the end of the clause seems incompatible² with an intention that the converted realty should be governed by a different trust from the personalty to which it is assimilated. The subsequent use of the expression "capital of my estate" reinforces this inference. When the testatrix provided that the bonus exacted on granting a lease shall be "considered as part of the capital" of her estate and be "disposed of as herein directed" as part of such capital, she uses language which assumes that the capital of her estate is subject to one set of limitations, which contain a discrimination between capital and income. Again, the use of the expression in the ultimate gift over "life interest...under this my will" points in the same direction, although by itself its weight would be small. But I think the intention to make one set of trusts and dispositions for both sets of property appears with reasonable certainty from the whole will. It is not necessary that we should be able to say pre-

cisely what words were omitted if we are satisfied from the context of *The*
effect intended.

The appeal should be allowed.

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McQuellin v. McQuellin

STARKE J. I agree that the appeal should be allowed.

McCusellin v. McCusellin

Gavan Duffy J. I agree that the words of the will lead inevitably to the conclusion that the testatrix intended that, after sale and conversion, the trusts which were declared to exist during and before such sale and conversion were to exist also in respect of the proceeds of the sale and conversion of both the real and the personal estate.

McQuellin v. McQuellin

RICH J: I agree that the appeal should be allowed. The words of the will shew that the testatrix treated the proceeds of the sale and conversion of her real and personal estate as one blended fund and intended that what she calls "the capital of my estate" should be disposed of by similar trusts.