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*May 6

*June 22.

AGNES OLIVER *et al.* (Defendants).... APPELLANTS;

AND

ALEXANDER DAVIDSON (Plaintiff)..... RESPONDENT;

AND

DUNCAN McFARLANE AND WM. OLIVER ..... } DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will, construction of—Legacy—Condition Precedent.

W.O., by the third clause of his will, devised and bequeathed the residueof his estate to his wife, four sons and two daughters, the devise and bequest being subject to the condition that they should all unite in paying to the executors before the 1st January, 1877, the sum of $1,600, and the same sum before the 1st January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the fourth clause he gave the sum of $1,600, without condition, to each of his sons, Alexander and Duncan. By the 5th clause he devised to his sons Douglas and Robert Oliver two lots; and after giving several legacies to his daughters, he proceeded, "and further, that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871, and entered into mercantile pursuits.

Held, reversing the judgment of the court below, Ritchie, C.J., and Henry, J., dissenting, that the direction that Alexander should work on the farm was a condition precedent to his right to the legacy of $1,600.

APPEAL from a judgment of the Court of Appeal for Ontario (1), affirming the decree of Proudfoot, V. C. The question which arose on this appeal was whether, under the provision of the will of one William Oliver

*PRESENT.—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

(1) 6 Ont. App. R. 595.

(deceased) a legacy of $1,600, bequeathed to his son Alexander under certain conditions, was payable to the assignee in insolvency of the said Alexander Oliver.

The clauses of the will relating to the matter in question are fully set out in the judgments hereinafter given.

James Bethune, Q. C., for appellants, and *Bruce* for respondent.

The cases cited and relied on by the counsel are reviewed in the judgments hereinafter given.

RITCHIE, C. J.:—

In the introductory clause of the will the testator thus expresses himself:—

As it is the wishes of my family, all except my son Daniel Oliver who seems dissatisfied, and it is also my will, that the remainder of my family remain united one and all, as at present, until the mortgage is paid upon my farm in the township of Brantford, and other just debts paid, after said debts and mortgage are paid, the rest and residue of my property I give, devise, and dispose of as follows, that is to say:—

No intention is here indicated that should any of the family change their minds and not remain united, any forfeiture was to accrue in consequence. Then we have the bequeathing clauses: —

I give and bequeath to my son, Daniel Oliver, the sum of $1,200, along with the stock and money he has already received; and to my daughter, Flora Oliver, the sum of $400; also, to my daughter Mary, the sum of $400; and I direct and order the said legacies to be paid to the said legatees in the following manner, viz., to my son Daniel, $600 on or before the 1st January, 1873, and the sum of $600 on or before the 1st January, 1874; to my daughter Flora, $400 on or before the 1st January, 1875; to my daughter Mary, $400 on or before the 1st January, 1876.

Then by the clause second the testator says:—

2nd. I give and bequeath unto my two sons, Thomas and William Oliver, my farm in the township of Brantford and county of Brant, Ontario, being composed of Lots 2, 3, 4 and 5, in the Ox Bow Bend

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of the Grand River, containing by admeasurement 144 61-100 acres, together with all the heriditaments and appurtenances thereunto belonging, to be equally divided between them, share and share alike, and under the following conditions, viz., that they do pay to my executors thereinafter named, the following sums of money herein described, viz., the sum of $300 each on or before the 1st January, 1873; and the sum of $300 each on or before the 1st January, 1874; also, the sums of $200 each on or before 1st January, 1875; and the sum of $200 each on or before the 1st January, 1876.

Here we have a bequest on a condition clearly expressed, as we have in the next clause 3 :—

3rd. I give, devise and bequeath all the rest and residue of my estate, real and personal, and mixed, of which I shall be seized, possessed, and entitled to at the time of my decease, to my wife Agnes Oliver, and four sons and two daughters namely, Alexander, Duncan, Douglas, Robert, Helen, Agnes Oliver, my property in the township of Onondaga, and county of Brant, consisting of lots 8 and 9 in the third concession, east of Fairchild's Creek, county of Brant, Ontario, together with all other property above named (except so much of the stock on both farms as shall form one-third of the whole, which I hereby give and bequeath to my sons Thomas and William Oliver, to be equally divided between them), and this bequest shall be made when the mortgage on my farm, on Ox Bow Bend, shall be fully paid, to have and to hold the same for their use from the year 1872, until the youngest child becomes 21 years of age, subject to the following conditions, viz.:—that they unite in paying over to my executors on or before the 1st January, 1877, the sum of $1,600, and also the sum of $1,600 on or before the 1st January, 1882, said sums to pay Alexander and Duncan Oliver's shares as herein provided for.

It may well be contended that the testator intended that the effect of the breach of this condition should exclude any of those who did not so unite from participating in this bequest or devise, but there is nothing whatever, by expression or implication, to indicate any intention that should some or all refuse to unite, the bequests referred to, and subsequently provided for, to Alexander and Duncan, were to lapse or become forfeited. Then comes clause 4, as follows :—

4th. I give and bequeath to my son Alexander Oliver, the sum of

$1,600; to my son Duncan Oliver, the sum of $1,600; to my daughters Helen and Agnes Oliver, the sum of $400 each as herein provided, and I order the said sums to be paid to the respective legatees as follows:—Alexander, on or before 1st January, 1877; to Duncan Oliver, on or before 1st January, 1882; and to my daughters Helen and Agnes Oliver, on or before 1st January, 1886.

Here we have a clear, separate, absolute bequest, without qualification, limitation or condition. Seeing that in clauses 2 and 3, where the bequests are intended to be conditional, the conditions are clearly, unequivocally and absolutely expressed, is it not a fair and legitimate inference that in the clauses 1 and 4, where the bequest is in clear and decisive terms without any conditions or qualifications, the testator intended the bequest should stand and be acted on as it is unequivocally and absolutely written. Up to this point in the will, no question can, it appears to me, arise as to these bequests to Alexander and Duncan being without condition.

The wish expressed in the preamble, or opening clause of the will, that the family should remain united, had no connection with, or control over, the bequests in either the 1st or the 4th clauses.

Then comes sec. 5:

5th. I give and bequeath unto my sons Douglas and Robert Oliver, their heirs and assigns, my two lots of land in the township of Onondaga and county of Brant, composed of lots Nos. 8 and 9, township aforesaid, to be divided as follows: Douglas Oliver to have lot No. 9 and Robert Oliver lot No. 8; Douglas Oliver to pay sister Helen $400 as above provided, and to his sister Agnes the sum of $400 as above provided; and further, that Alexander and Duncan Oliver work on the farm until their legacies become due, and when the youngest child becomes the age of 21 years, Douglas and Robert Oliver each to get possession of his lot specified, and of one-half of the stock and implements which shall be at that time on the said lots, and the other half shall be equally divided between my sons Alexander and Duncan Oliver, yet be it fully understood that I reserve for my wife, Agnes Oliver, the sole use of so much of the dwelling house and furniture situated on lot No. 8, where I now

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reside, as she may desire so long as she shall remain my widow, and she shall receive the sum of $180 per annum from my son Robert Oliver.

It is contended that the provision or stipulation that Alexander and Duncan shall work on the farm until their legacies become due, control and over-ride the preceding section, and on they or either of them neglecting to do so, their legacies respectively became void.

Had the testator so intended, I think the frame and phraseology of the whole will indicate that he would have so expressed it in clause 4 in which the bequest is made, or failing, that he could have done it in this clause 5, and not have left the matter in uncertainty or to inference. It may well be that if Alexander and Duncan neglect or refuse to work on the farm, they will lose all benefit of the bequest in clause 5, which contains the injunction for them to do so, and still the legacy in clause 4 be payable to them. I can discover no language from which it can be clearly and certainly concluded that a non-compliance with a stipulation in clause 5, was intended to work a forfeiture of a bequest in clause 4; the only reference to the bequest in clause 5 being that the times of the payments of the legacies, the dates of which are found in clause 4, are named as the periods until which they should work on the farm. No provision is made in case of a forfeiture for the disposition of these legacies, nor any intention exhibited that the testator intended them to form part of his residuary estate, which he disposes of by clause 3. On the contrary, the bequest of the residuary estate is on the express condition, without limitation or qualification, that they the devisees unite in paying over to the executors, on or before 1st January, 1877, the sum of $1,600, and also the sum of $1,600 on or before the 1st January, 1882, said sums to pay Alexander and Duncan's shares as herein provided for. Here is a positive and

absolute condition which, according to the present contention, is again made conditional on the performance of an alleged condition on the part of Alexander and Duncan. But where do we get any language of the testator's to indicate that he had any such intention; and we have nothing whatever to show that the testator contemplated dying intestate as to these two sums of $1,600. There is a well established principle of law that, I think, should govern this case.

It is a rule of the courts, in construing written instruments, that where an interest is given, or an estate conveyed, in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away, or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate. See *Biddulph* v. *Lees* (1); *Young* v. *Turner* (2); *Wright* v. *Wilkins* (3); *East* v. *Twyford* (4); *Grey* v. *Fryer* (5); *Key* v. *Key* (6).

In *Doe Luscombe* v. *Gates* (7) the court says:—

We are to consider that this is a proviso introduced to defeat an estate already vested for the breach of a condition subsequent, and is in the nature of a forfeiture, and consequently that the words of it must, according to general rules and principles, be construed strictly, and effect must not be given to it unless the supposed intention of the testator be expressed in plain and unambiguous language.

In *River* v. *Oldfield* (8), Per Lord Justice Knight-Bruce:—

This will, although singularly penned, clearly gives a fourth part of the property in question to the plaintiffs, or one of them, and this share cannot be taken from them except by language equally clear.

In *Thornhill* v. *Hall* (9) the Lord Chancellor says (10):—

(1) 9 E. B. & E. 312.
(2) 1 B. & S. 550.
(3) 2 B. & S. 244.
(4) 4 H. L. C. 517.
(5) 4 H. L. C. 565.
(6) 4 DeG. M. & G. 72.
(7) 5 B. & Ald. 544-554.
(8) 4 DeG. & J., p. 267.
(9) 2 C. & F. 22, 36.
(10) At p. 35.

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I hold it to be a rule that admits of no exception in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument by terms, clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt,—in order to reverse that opinion, to which the terms would, of themselves and standing alone, have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by *tacitum* or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*.

If there ever was a case in which the principles here enumerated should be acted on, I think this is the case. Can it be said that these clear bequests to Alexander and Duncan have been limited by language, or even inferences, equally clear? The court of first instance, presided over by Vice-Chancellor Proudfoot, decided that the legacy was not subject to the condition precedent of his working on the farm; three judges out of the four in the Appeal Court of Ontario held the same and even the dissenting judge in the Court of Appeal says: "This will is so inartificially drawn that it can be no matter of surprise to find different views taken of its meaning." Under all these circumstances, in view of well established principles, I am unable to bring my mind to the conclusion that the judgment should be reversed. It is scarcely necessary to say I agree with all the judges in the courts below, that the evidence fails to establish the agreement referred to in the second of the reasons of appeal in the court below.

STRONG, J.:—

In the view which I take of the proper construction

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of this will, the direction that the testator's sons, Alexander Oliver and Duncan Oliver, should work on the Onondaga farm until their legacies became due, constituted a condition precedent to the payment of those legacies. After 1872, when the mortgage on the Brantford farm would be paid off, and until which date the family were directed to remain together, the use of the Onondaga farm is devised to the testator's widow, and the six children named as residuary legatees, until the youngest child came of age, subject to what the testator calls a condition that all the legatees should unite in providing a fund for the payment of the legacies to Alexander and Duncan. The effect of the words "subject to the following conditions," and those which follow them at the end of the third clause of the will was, to make the legacies given to Alexander and Duncan charges upon the beneficial interest—an interest in the nature of a term commencing in 1872 and ending upon the youngest child coming of age—given to the widow and six children in the Onondaga farm. That this is the proper construction a moment's reflection will show, for if land is devised to A upon condition that he pay a sum of money to B, the money so to be paid constitutes a charge, though expressed in the form of a condition. And there is nothing by which we can make any distinction in principle, between the case presented to us by the provision in the 3rd clause of this will, and the more simple form of bequest just put. If there had been nothing more in the will restricting this charge to the actual profits of the land, to be raised by its actual occupation and cultivation as a farm, it would have been one which might have been raised either by the sale or mortgage of the term, or beneficial interest in the nature of a term, which had been devised, or out of the annual rents and profits, either those accruing from a lease or those derived from actual occupation, at

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the election of the devisees. The subsequent clause of the will, which directs that "Alexander and Duncan work on the farm until their legacies become due," shows, however, clearly that the enjoyment is to be a personal one, and not an enjoyment of the rents and profits derived from a lease or otherwise; in other words the expression "use" in the 3rd clause is to be taken in its popular, and not in its technical signification. The effect is the same as if the testator had directed, in terms, that the legacies to Alexander and Duncan should be payable out of profits to be derived from the working and cultivation of the farm; to raise which Alexander and Duncan were to contribute, not only their shares of the use and enjoyment of the farm, but also their labor; whilst the other residuary legatees, i. e., the widow and four other children, were only to contribute their shares in the profits of the farm to be thus raised by the personal services of Alexander and Duncan. This seems to me to make it clear, that it was a condition precedent to the payment of legacies to Alexander and Duncan that they should comply with the direction of the will. If a testator bequeaths a pecuniary legacy, and then directs for its payment the provision of a fund to be formed by the contribution of the legatees to whom the legacy is given as well as others, as, for instance, if a man bequeaths $1,000 each to his widow and six children, and gives a further sum of $1,000 to his widow, and then directs that for the payment of this last legacy a fund should be provided to which all, including the widow herself, should contribute in money payments of equal amount; in such a case it would be out of the question to say that the widow could insist upon the payment of the full amount of the second legacy, and resist any reduction from it in respect of the sum she was directed to contribute to the fund to be provided for its payment.

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The rights of the parties in this simple case would be administered by merely deducting the amount of the widow's contribution from the legacy given to her. The principle of construction is the same in the present case, but as the services of the sons were of uncertain value, and inasmuch as by the devotion of their time and labor to the farm the whole amount of the legacies given to them might have been raised without any contribution from the other legatees beyond the relinquishment *pro tanto* of their use and enjoyment of the profits of the farm, the obligation imposed on Alexander and Duncan could not be dealt with as a charge as in the case of a money payment. The only mode in which effect could be given to the testator's direction that they should work on the farm, is by treating it as a condition precedent. That they should take the legacy *cum onere*, was, I am satisfied, by the considerations I have already pointed out, the clear intention of the testator, and I am equally clear that no other mode can be suggested by which the performance of the obligations of personal service so imposed can be ensured, but by treating them as conditions precedent to the payment of the legacy. This being so, all difficulty in thus construing the will is at an end, for, if we do not adopt the construction indicated, we must treat the direction in question as wholly nugatory and ineffectual, and every principle, applicable to the interpretation of wills, forbids us to do this.

The appeal must be allowed with costs, and the decree of the Court of Chancery, and the judgment of the Court of Appeal affirming it, must be reversed with costs to the appellants in both of those courts.

FOURNIER, J.:—

In this case I agree with the view taken by Mr. Jus-

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tice Patterson in the court below, and am of opinion that the appeal should be allowed.

HENRY, J.:—

Under the pleadings in this case the decision of the issue depends upon the construction of the will of William Oliver, late of the township of Onondaga in the county of Brant and province of Ontario, farmer, deceased.

The respondent is the assignee of the estate and effects of Alexander Oliver and Douglas Oliver, sons of the testator, to whom bequests are made in the will. The question before us is as to the bequest to Alexander Davidson of $1,600, as made in the fourth clause of the will, which provides that the legacy should be paid to him on or before the 1st January, 1877.

The words of the bequest are "I give and bequeath to my son Alexander Oliver the sum of $1,600." It is, therefore, wholly unconditional so far as contained in that clause. There are, however, other provisions and directions in the will, by which it is claimed that the bequest was intended to be, and is, conditional. In the first part of his will the testator says:—

As it is the wishes of my family, all except my son Daniel, who seems dissatisfied, and it is also my will, that the remainder of my family remain united one and all, as at present, until the mortgage is paid upon my farm in the township of Brantford, and other just debts paid; after said debts and mortgage are paid, the rest and residue of my property I give, devise and dispose of as follows:—1st. I give devise and bequeath to my son, Daniel Oliver, the sum of $1,200 along with the stock and money he has already received.

He then gives and bequeaths to two of his daughters $100 each, and directed when the legacies were to be paid.

In the second clause of his will the testator bequeaths to his two sons, Thomas and William Oliver, a farm in the township of Brantford, but on condition of their

paying to his executors two thousand dollars by certain instalments therein mentioned.

He then in the third clause gives, devises and bequeaths:—

All the rest and residue of my estate, real and personal and mixed, of which I shall be seized and entitled to at the time of my decease, to my wife Agnes Oliver and four sons and two daughters, namely, Alexander, Duncan, Douglas, Robert, Helen and Agnes Oliver, my property in the township of Onondaga and county of Brant, consisting of lots 8 and 9 in the Third Concession, east of Fairchild's Creek, county of Brant, Ontario, together with all other property above named, (except so much of the stock on both farms as shall form one-third of the whole, which I hereby give and bequeath to my sons Thomas and William Oliver, to be equally divided between them). And this bequest shall be made when the Mortagage on my farm on Ox Bow Bend shall be fully paid; to have and to hold the same for their own use from the year 1872 until the youngest child becomes 21 years of age, subject to the following conditions, viz., that they unite in paying to my executors on or before the 1st January, 1877, the sum of $1,600, and, also, the sum of $1,600 on or before the 1st January, 1882, said sums to pay Alexander and Duncan Oliver's shares as herein provided for.

In the 5th clause of his will he bequeaths to his two sons, Douglas and Robert Oliver, the two lots 8 and 9 previously bequeathed in the 3rd clause—Douglas to pay his sister Helen $400 and his sister Agnes $400 "as above provided." "And further, that Alexander and Duncan Oliver work on the farm until their legacies become due." The clause then provides that "when the youngest child (Robert) becomes the age of 21 years, Douglas and Robert each to get possession of his lot specified, &c."

The question then is: Do the words which direct that Alexander and Duncan should work on the farm until their respective legacies should fall due, avoid the bequest to Alexander, he having failed to work on the farm as that part of the clause provides? No part of the will so provides in express terms, and we are, there-

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fore, to ascertain from the whole will whether or not that was the testator's intention. That intention must be found from strong language that should have no reasonable doubt.

The bequest to Alexander in the 4th clause of the will is absolute, and subject to no condition whatever. We must therefore, from some other part of it find, that although so made, a condition was annexed. We are not allowed to speculate as to it where the words relied upon are in themselves doubtful. The testator has spoken plainly in the 4th clause. His intention is clear and unmistakeable, and unless we find it equally clear that he intended to annex a condition, we are, I think, bound to sustain the bequest as unconditional.

In *Clavering* v. *Ellison* (1) the Vice-Chancellor says:

> Now, with regard to contingent limitations or conditions, which are to have the effect of defeating a vested estate, it is a plain rule that such limitations must be construed strictly. That rule is of very old standing.

And again:—

> If such be a clear rule, it appears to me to be an equally clear principle that the contingency on which such a limitation is to take effect should be something definite and certain; that the contingency should be so expressed as not to leave it in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate.

In *River* v. *Oldfield* (2) Lord Justice Knight-Bruce, in giving judgment, says:—

> This will, although singularly penned, gives a fourth part of the property in question to the plaintiffs, or one of them, and this share cannot be taken from them except by language equally clear.

In *Thornhill and others* v. *Hall* (3), Lord Chancellor Brougham, when giving judgment in the House of Lords, said: [His Lordship read the extract] (4).

I think this clearly applies to the case before us.

(1) 3 Drew. 470.
(2) 4 De G. & J. 36.
(3) 2 Cl. & F. 36.
(4) See *ante*, p. 172.

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I hold that the moment a doubt is raised, the previous absolute bequest should be adjudged as uncontrolled by any thing subsequent. In a subsequent part of the same judgment his lordship said:

> Here is that which may apply to either; here is that which is doubtful; here is that which is not of necessity, or by necessary implication to be held to cover Robert's interest, and you are called upon, in the face of a devise clearly giving to Robert an absolute interest, to elect between two possibilities to convert what is doubtful into a certainty, and to convert that which is absolutely certain into absolute *dubium* or something the very reverse of certainty.

In view of the principles of construction adopted in the several judgments I have quoted from, and many others I might have referred to, I am of opinion that there is nothing in the will in this case to show that the testator would have declined to make the bequest to Alexander unless on the condition contended for. In the first part of his will he states the fact of his son Daniel being dissatisfied and declining to remain united with the rest of the family, but he nevertheless bequeaths him $1,200 in addition to stock and money he had previously received as advancement, in all probability a bequest much larger than that to Alexander. The latter, at his father's death, was but seventeen years old, and while thus dealing liberally with Daniel, his elder brother, are we necessarily to conclude that he would have cut Alexander entirely off from any participation in his estate had he, like Daniel, been dissatisfied and declined to remain. On the contrary I think we should conclude, in the absence of anything shown to the contrary, that he would have made no distinction between the two brothers. The testator, however, shows by the particular words used, that the idea of the family remaining united did not originate with him. "As it is the wishes of my family, all except my son Daniel," &c., "and as it is my will," &c. These expressions would lead to the conclusion

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that as it was their wish to do so, he would make the necessary provision for their doing so, independently of any particular desire on his own part. If that be the proper construction of the language referred to, it would go very far to negative the proposition that the subsequent provision that Alexander and Duncan should work on the farm until their legacies became due, was intended as a condition upon which they were entitled to the legacies made to them. As I, however, consider the rule of construction to be as I before stated it, there is no occasion, in my opinion, to resort to the view I have just given. According to the construction contended for by the appellants, if Alexander had worked on the farm for the whole period up to a week or a few days before his legacy fell due, and then left, such leaving would be the means of forfeiting the whole of it. To adjudge such a result, we should have such an intention on the part of testator stated in the most unequivocal terms, and we would not be justified while a doubt remained, but must be satisfied that the language of the will necessarily called for such a decision. It will be observed that the testator in the fifth clause makes use of no words such as "I direct," "I order," or "It is my will," preceding and referring to "that Alexander and Duncan work on the farm," &c. These words immediately follow gifts and bequests to his sons Douglas and Robert, upon condition to pay two of their sisters sums of money therein stated, and then proceeds "and further that Alexander and Duncan Oliver work on the farm," &c. As I view the rule of construction, it would not be sufficient if the testator had in the most positive terms ordered and directed his sons Alexander and Duncan to work on the farm, unless he added something to avoid the bequests to them if they failed to do so. Besides, he made no disposition over of the sums bequeathed to them, which, it must

be concluded, he would have done had he intended to limit their right to the legacies by a condition that they should work on the farm. The absence of such a provision is evidence, I think, sufficient to raise the presumption that he intended the bequests to them to be unconditional. Apart from the rule of construction before stated, were we permitted to speculate as to the intention of the testator, I would be inclined, even in that case, to doubt that intention to have been the annexing of the condition. The onus, even in the latter case, of shewing such an intention beyond any reasonable doubt, was on the appellants, and I think that they have failed to do so. The bequest in the first instance is clear and certain, and cannot be avoided by words of doubtful meaning that are capable of two interpretations and which may be construed differently, as it appears has been done in this case before it came to this court. For the reasons given, I am of the opinion the appeal herein should be dismissed with costs.

TASCHEREAU J.—I am in favor of allowing the appeal.

GWYNNE J.—We must consider the testator's will as a whole, and collect therefrom his intention irrespective of the fact that his will is divided into paragraphs, and so doing we cannot fail to see that the legacies of $1,600 to each of the testator's sons, Alexander and Duncan, mentioned in the fourth paragraph, are the same legacies as those of like amount which are mentioned in the third paragraph, in which the testator indicates how he contemplated that the fund to pay these legacies should be raised. The right of Alexander and Duncan to those legacies would be complete under the third paragraph without the addition of the fourth, which, in truth, adds no force to the gift as contained in the third, but defines the time when these legacies shall become payable.

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By the third paragraph it is apparent that the testator contemplated that the term which he granted to his widow, and Alexander, Duncan, Douglas, Robert, Helen and Agnes, should be instrumental in creating the fund out of which the legacies to Alexander and Duncan should be paid, for it is granted on condition that they all shall unite in paying those legacies. Now, the testator never could have contemplated that the grantees of this term should contribute to this fund simply by a money payment, and that so contributing they should have power to alien and dispose of them as they should think fit, for in such case, as Alexander and Duncan were themselves to contribute to the fund out of which their legacies were to come, if the contribution contemplated was such a money payment, they would not receive their $1,600 each. When, then, we find in the 5th paragraph the testator, in connection with these same legacies, declaring his intention and will to be that Alexander and Duncan respectively shall work on the farm, which is mentioned in the third paragraph and in respect of which the term is granted, until the respective periods, in that paragraph also mentioned, at which their respective legacies shall become payable, this declaration of the testator's will, plainly enough, I think, indicates his intention and will to be that they shall not enjoy the benefit of the bequest unless they shall respectively conform to this direction, and shall so contribute to the creation of the fund out of which the testator contemplated that payment of their legacies should be made. By conforming to this direction, they become, as it appears to me, relieved from any further obligation to continue working on the farm after their respective legacies became payable, but it is, I think, sufficiently apparent upon the face of this inartistically made will, that the testator's intention was that Alexander and

Duncan respectively should continue to work on the farm, at least until the period named for their respective legacies becoming due, and that this intention was conceived, partly in the interest of the testator's widow and younger children, who, at the time of his death, were incapable of taking part in the management of the farm, and partly that Alexander and Duncan should, by their labour, contribute to the creation of the fund out of which the testator contemplated that their legacies should be paid.

I think the appeal should be allowed, and that the plaintiff's bill in the Court of Chancery, as affects the legacy in question here, should be dismissed with costs to the appellants in all the courts.

Appeal allowed with costs.

Solicitors for appellants : *Fitch & Lees.*

Solicitors for respondents: *Bruce, Walker & Burton.*