THE CANADA PERMANENT TRUST COMPANY, ALEXANDER MUTCHMOR SMITH, ALLAN FINDLAY SMITH, WILLIAM BOWMAN, JEAN HILLYARD, ALEXANDER C. SMITH, DUNCAN BOWMAN, PHYLLIS SMITH, MARJORIE SMITH, THE PUBLIC TRUSTEE for the Province of Alberta, Guardian *ad litem* of the estate of ROBERT A. SMITH, an infant (*Defendants*) .....APPELLANTS;

1962
*Feb. 15
Apr. 24

AND

LAURA FRAZER BOWMAN and BARBARA JEAN BOWMAN (*Plaintiffs*) .....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Wills—Document wholly in handwriting of deceased—Whether intended by deceased to be a testamentary instrument—Whether a valid holograph will—The Wills Act, R.S.A. 1955, c. 369, s. 5(b).

Following the death of the deceased and a search of her effects, no will had been found and letters of administration were granted to a trust company as attorney for the next-of-kin. Subsequently, a document, admittedly wholly in the handwriting of the deceased, was discovered. In this document, which contained some deletions and alterations, the deceased had stated her wishes respecting the disposal of her property. The trial judge, without giving written reasons, found that the document was not intended by the deceased to be a testamentary instrument. The Appellate Division of the Supreme Court of Alberta, by a majority, reversed that judgment and an appeal was then brought to this Court.

Held: The appeal should be dismissed.

On a consideration of the contents of the document itself and the evidence, the judgment of the Appellate Division of the Supreme Court of Alberta was right in holding that the document did contain a deliberate, fixed and final expression as to the disposition of the property of the deceased on her death and that it was a valid holograph will within the meaning of s. 5(*b*) of *The Wills Act,* R.S.A. 1955, c. 369.

*PRESENT: Locke, Fauteux, Abbott, Martland and Ritchie JJ.

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Re Gray; Bennett et al. v. Toronto General Trusts Corp. et al., [1958] S.C.R. 392, applied; *Re Snowball*, [1941] O.R. 269, referred to.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, reversing a judgment of Primrose J. holding that a certain document was not intended to be a testamentary instrument. Appeal dismissed.

M. E. Moscovich, Q.C., for the defendants, appellants, A. M. Smith and A. F. Smith.

D. C. McDonald, for the defendant, appellant, Canada Permanent Trust Co.

G. E. Trott, for the plaintiffs, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The question in issue in this appeal is as to whether a document dated April 22, 1953, admittedly wholly in the handwriting of Ann Cameron Smith, deceased, is a valid holograph will. Wills in holograph form are recognized as being valid under s. 5(*b*) of c. 369, R.S.A. 1955, which provides:

> 5. A will is not valid unless it is made in one of the forms hereafter in this section permitted, that is to say, unless
>
> * * *
>
> (*b*) It is a holograph will, wholly in the handwriting of the testator and signed by him, whether made or acknowledged in the presence of any witness or not.

The document in question reads as follows:

April 22, 1953

I would like Laura to have this property—house and lots.
Barbie the money in ~~Continental~~ Canada Permanent Mortgage Co.
Ena $1,000.00 in National Trust
Bill ~~Continental~~ Champion Savings Corporation deposits.
Allan choice of pictures
Jean lace table cloth
Barbie Little Chieftan (Lithograph) and other things I designated.
Sandy Bowling Bowls and choice of books.
Duncan choice of books pictures ornaments and furniture and half war bonds.
Bobby half war bonds
Allan $2000.00 National Trust
Alex $X200.00 National Trust

Balance in National Trust after those bequests and expenses attended to to be divided among my two nieces and four nephews.

Duncan Silver tea service and candlesticks.

Phyllis Gross Smith to choose silver and dishes

Marjorie Brodie Smith to choose silver and dishes.

Nieces including Phyllis (A.C.) Smith to choose trinkets.

Ann C. Smith

Laura—fur coat.

In addition to the two places in this document in which the word "Continental" has been deleted, there were two other changes which appear on the face of the document. Immediately following the word "Ena" it appears that some figure other than "$1,000.00" had originally been included and that a portion of the first figure had been scratched out, with the apparent intention thereafter of leaving the figure "1". Also, after the word "Alex", initially some figure other than "$200.00" had appeared and what had been written immediately prior to the figure "2" had been obliterated.

The learned trial judge, without giving reasons, found that this document was not intended by the deceased to be a testamentary instrument. The Appellate Division of the Supreme Court of Alberta, by a majority of two to one, was "of the firm opinion that the document in question is a holograph will and it contains a deliberate and fixed and final expression as to the disposal of property upon death."

The deceased, a retired school teacher who resided in Edmonton, died on April 26, 1958. Following her death and a search of her effects, no will had been found and letters of administration were granted to The Canada Permanent Trust Company as attorney for the two brothers of the deceased, Allan Findlay Smith and Alexander Mutchmor Smith, and her sister Laura Frazer Bowman. Another sister of the deceased, Christina Smith (known to the deceased as "Ena"), died on September 24, 1958.

In September 1959, Barbara Jean Bowman, the daughter of Laura Frazer Bowman, while looking through some letters which had belonged to the father of the deceased and which were in a small cardboard box at Mrs. Bowman's house in Calgary, discovered the document above quoted.

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Prior to the death of the deceased this box had been located in a cupboard in her bedroom. The letters related to the preparation of a family tree.

Allan Findlay Smith testified that in April 1958, prior to the funeral of the deceased, he had searched her house for a will and that he had seen there the box containing the letters regarding the family tree. He also saw the box there in December 1958, when he was making an inventory of the contents of the house. He stated that he examined the contents of the box, but did not see the document now in question.

The deceased had a strong box which was unlocked. Following her death, it was found to contain various documents of hers, including the title to her house, insurance policies, share certificates and Canadian Government bonds. In it was an envelope, marked with the words "Last Will and Testament", which was empty.

The requisites required to make a holograph paper a valid holograph will were stated in the judgment of Fauteux J., delivering the judgment of the majority of this Court in *Re Gray; Bennett et al. v. Toronto General Trusts Corp. et al.*[1]

> There is no controversy, either in the reasons for judgment in the Courts below, or between the parties, that under the authorities, a holographic paper is not testamentary unless it contains a *deliberate or fixed and final expression of intention* as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature: *Whyte et al. v. Pollok,* (1882), 7 App. Cas. 400; *Godman v. Godman,* [1920] P. 261; *Theakston v. Marson,* (1832), 4 Hag. Ecc. 290, 162 E.R. 1452.

In my opinion the contents of the paper in question here do contain the evidence to show the kind of intent to which he refers in this passage. The wording of the document is a statement of the wishes of the deceased respecting the disposal of her property and it is implicit in the document read as a whole that she wished such disposition to be made following her death. In addition, the word "bequests", which she used following reference to various dispositions previously mentioned in the document, is a term which is ordinarily applicable to property taken by will (see *Re Snowball*[2]).

[1] [1958] S.C.R. 392 at 396.

[2] [1941] O.R. 269 at 272.

The document does not appoint executors, nor does it refer to the disposition of the residue of the estate. However, so far as the latter point is concerned, it appears from the evidence that the document did dispose of all the assets which the deceased owned at the date it was made and that the only subsequent additional assets which she acquired prior to her death consisted of twenty shares of the capital stock of the Alberta Gas Trunk Line Limited.

With respect to the extrinsic evidence, it appears that the deceased retired in 1952 and that in January or February, 1953, she expressed to her niece, Barbara Jean Bowman, her intention to make a will. It also appears from the evidence that the persons named in the document included all of the brothers and sisters, nephews and nieces of the deceased.

The appellants Allan Findlay Smith and Alexander Mutchmor Smith contend that the form of the document is not testamentary and they point out that it had words struck out and numbers blotched. They urged that it was not the kind of a document which the deceased, who, the evidence indicated, was a tidy woman, would have intended as a will. Emphasis was also laid on the fact that the document was not placed by the deceased in her strong box with her other documents, but had been left in the cardboard carton.

After considering the contents of the document itself and after examining the evidence, it is my opinion that the judgment of the Appellate Division of the Supreme Court of Alberta was right in holding that the document did contain a deliberate, fixed and final expression as to the disposition of the property of the deceased on her death and that it is a valid holograph will.

I would dismiss the appeal, the costs of the parties involved to be paid out of the estate.

Appeal dismissed with costs payable out of the estate.

Solicitors for the defendants, appellants, A. F. Smith and A. M. Smith: Moscovich, Moscovich, Spanos, Matisz & Yanosik, Lethbridge.

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Solicitors for the defendant, appellant, Canada Permanent Trust Company: McCuaig, McCuaig, Desrochers, Beckingham & McDonald, Edmonton.

Solicitors for the plaintiffs, respondents: White, Trott & White, Edmonton.