1958
*May 19
Dec. 18

ROSS J. PRATT, Executor, and ANNA GUDMUNDSON, ROSA PETERSON and MARGARET PETERSON ..... APPELLANTS;

AND

SIGRIDUR JOHNSON, GUDRUN JOHNSON, FREDA PALMER, JONINA HALLGRIMSON, and MESSRS. BATTEN, FODCHUK and BATTEN, Barristers, representing the Estate of HELGA BJORNSON, deceased ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Joint will by husband and wife—Interpretation on death of husband—Subsequent transfer of all assets to surviving wife—Whether trust on wife by virtue of agreement leading to joint will—Beneficiaries named in joint will—Whether wife can add other beneficiaries by her will—Whether previous interpretation of joint will was res judicata.

A and J, husband and wife, made a joint will in 1945, providing that their respective estates should be held by the survivor "during his or her life to use as such survivor may see fit", and upon the death of the survivor the property was to be divided equally among five named beneficiaries. A died in 1947, without having made any other will. On an application for directions, it was found by an order made in 1948 that the agreement between A and J in the joint will was to the effect that the survivor should have complete right to use the estate of the other and that only such portion of it as might remain at the time of the death of the survivor should go to the named beneficiaries. J was then given possession of A's estate. In 1952, J made a will by which bequests were made to three beneficiaries in addition to the five beneficiaries named in the joint will.

On an application for directions, it was held that the executor of J's will must distribute the estate in the manner provided for by the joint will, as all the property which the two spouses held at the date of A's death was impressed with a trust under the terms of the joint will. This judgment was affirmed by a majority in the Court of Appeal. The three new beneficiaries appealed to this Court.

Held (Rand and Cartwright JJ. dissenting): The assets received by J from the estate of her husband, which remained in her possession as of the date of her death and those which were her separate property as of that same date, were subject to a trust in favour of the five beneficiaries named in the joint will.

Per Kerwin C.J. and Locke and Martland JJ: It was clear from the terms of the joint will and from the evidence supplied by the first affidavit in the 1948 proceedings, that A and J had intended that upon the death of one of them the survivor should enjoy the use of both the estate of the survivor and of the deceased, in his or her

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Martland JJ.

lifetime, but that upon the death of the survivor what then remained of the estate in the hands of the survivor should be divided equally among the five named beneficiaries. The second affidavit made by J showed that it had been agreed between the husband and the wife that these five beneficiaries should benefit by the will.

Although the three beneficiaries added by J to her will were not parties to the application made in 1948, their rights were affected by the order then made to the extent that it declared that a trust had been created by the joint will.

Dufour v. Pereira, 1 Dick. 419; *Walpole v. Orford,* 3 Ves. 402; *Gray v. Perpetual Trustee Co.,* [1928] A.C. 391; *Stone v. Hoskins,* [1905] P. 194; *Re Green,* [1950] 2 All E.R. 913, and *Re Oldham,* [1925] Ch. 75, referred to.

Per Rand and Cartwright JJ., *dissenting:* The application to the Court in 1948 raised only the question of the construction of the joint will in so far as it was the will of A, and the question whether J had agreed not to revoke the joint will in so far as it was her will was not *res judicata.* The interest of J in the estate of A was a life estate with a power to take for herself all or any part of the corpus, with a gift over to the five beneficiaries on her death of so much of the estate as she had not in her lifetime taken for herself. As J effectively took over as her own absolute property the whole of A's estate, the five beneficiaries ceased to have any interest therein and could take nothing under A's will. Since neither the wording of the joint will nor anything in the material filed established an agreement by J not to revoke her will made jointly with A, her estate was not therefore held in trust for the five beneficiaries, and should be distributed under the terms of her will made in 1952.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Graham J. Appeal dismissed, Rand and Cartwright JJ. dissenting.

H. C. Rees, Q.C., for the appellants.

No one appeared for the respondents.

The judgment of Kerwin C.J. and Locke and Martland JJ. was delivered by

LOCKE J.:—The proceedings in this matter were commenced by a notice of motion given by the executor of the late Johanna Johnson for advice and directions with respect to the administration of her estate. The application was made, I assume, under the provisions of s. 72 of the *Trustee Act,* R.S.S. 1953, c. 123. Certain of the questions arising in relation to the estate of Arni Johnson, the husband of Johanna, who predeceased her, might more appropriately have been disposed of in an action but, as

[1] (1957), 21 W.W.R. 289, 8 D.L.R. (2d) 221, *sub nom. Re Johnson.*

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

the propriety of the proceedings has not been questioned and all interested parties were given notice of them, these issues may properly be dealt with on this appeal.

It should be said at the outset that no question of interpretation arises in connection with the will of Johanna Johnson made on November 17, 1952, or the codicil to that will. The matter to be determined is rather as to whether the assets received by her from the executor of the estate of her deceased husband which remained in her possession and those which were her separate property as of the date of her death were subject to a trust in favour of the beneficiaries named in the joint will executed by her and by her husband on April 7, 1945. If so, her will, by which she bequeathed part of these assets to other persons, was without effect.

It is common ground that the questions decided by Chief Justice Brown by his order dated July 6, 1948, are *res judicata* as between the estate of Arni Johnson, the estate of his widow and the beneficiaries named in the will of January 19, 1948: Freda Palmer, Jonina Hallgrimson, Helga Bjornson, Sigridur Johnson and Gudrun Johnson. As to the other beneficiaries named by Johanna Johnson in her will of November 17, 1952, they were not parties to the application made to the Court in 1948 but their rights may be affected by the order then made, to the extent that it declared the terms upon which Johanna Johnson received the assets of her husband's estate and held the assets which were owned by her as of the date of her husband's death and of her own.

The terms of the joint will of April 7, 1945, the will of Johanna Johnson made on January 19, 1948, following her husband's death, the notice given of the motion considered by Chief Justice Brown, the reasons given by that learned judge and the operative part of the order made by him are stated in the reasons for judgment of my brother Cartwright.

The language of the joint will which requires consideration reads:

> We desire that all property real and personal of which we may die possessed at the time of the decease of either of us shall be held by the survivor during his or her life to use as such survivor may see fit.

Upon the decease of the survivor it is our desire that our property both real and personal shall be divided as follows:—

To (the above named persons) equally amongst them share and share alike.

The first will made by Mrs. Johnson following her husband's death was dated January 19, 1948, and bequeathed all her property in equal shares to the legatees named in the joint will. On the same date she made an affidavit, apparently for use upon the application to construe her late husband's will which was heard before Brown C.J., the concluding paragraph of which read:

I further say that in executing the said Joint Will it was my intention and understood by me that the survivor as between my husband and myself was to have the full right to dispose of the whole of the property and to enjoy full rights of ownership over the same and that the beneficiaries thereafter named should receive only such portion of the said property as remained upon the death of my said husband and myself.

On May 4, Mrs. Johnson made a further affidavit for use upon the application, stating that at the time of the making of the joint will she was the owner of a substantial amount of property in her own right, that the will had been prepared on the instructions of her husband and that it was her intention to make a disposition in favour of him under which he would receive the whole of the beneficial interest without any restriction, and that she believed it was his intention to make a similar disposition of his own property in her favour.

Paragraph 4 read:

In the discussions of the matter between my said late husband and myself it was agreed that the relatives of my said husband and myself, who are named in the said will, should receive benefits only subject to the complete and unrestricted rights over the property by the survivor of us and it still is my intention that the persons so named should receive benefits at my death and I have executed a new will of my own to insure that such disposition will be made of all the property of which I may die possessed including that of my late husband.

The learned Chief Justice, in the reasons for judgment delivered by him, said in part:

I think it clear that these parties each intended that the survivor should have the complete and unrestricted right to use the estate of the other, both real and personal, both income and corpus, as he or she should wish and that only such portion of it as might remain at the time of the death of the survivor should go to the named beneficiaries.

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

The widow has already made a will disposing of her estate to the named beneficiaries, a copy of which has been put in evidence, and thus she has carried out what was intended by both husband and wife.

It was then said that it would be in order for the executor to transfer to the widow without restriction all the estate of the deceased, both real and personal, upon her written request.

The formal order repeated the last mentioned portion of the reasons and said further:

> It is further ordered that the widow shall have the complete and unrestricted right to use the estate both real and personal, both income and corpus as she may wish and that only such portion of the estate as may remain at the time of her death shall go to the named beneficiaries.

I see no ambiguity in the language of the joint will and, in my opinion, that portion of the affidavit of Mrs. Johnson in which she stated that it was her intention in executing the will, and equally the intention of her husband, that the survivor should receive "the whole of the beneficial interest without any restriction whatever" was inadmissible. This appears to me to directly contradict that portion of the will which declares the desire of both that on the death of the survivor "our property both real and personal" should be divided among the five named beneficiaries. It is apparent that Brown C.J. did not accept this evidence since both the reasons given and the formal order declare that such portion of both estates as remained in the hands of the survivor at the date of her death should go to the said beneficiaries. This is quite inconsistent with the idea that she might deprive them of the whole or any part of such property by her will. I agree with Graham J. and with the majority of the judges of the Court of Appeal[1] that Johanna Johnson held such portion of the assets of her husband as remained in her hands at the time of her death and her own assets both real and personal as of such date in trust for the five beneficiaries named in the joint will.

The question to be decided is, in my opinion, not as to whether there was evidence of an agreement between the husband and wife not to make a disposition of the property referred to in the joint will in a manner inconsistent with its terms, but rather whether there was

[1] (1957), 21 W.W.R. 289, 8 D.L.R. (2d) 221, *sub nom. Re Johnson.*

evidence of an agreement between them that the property in the hands of the survivor at the time of his or her death should go to the said five beneficiaries and, since nothing was done by Johanna Johnson to alter the terms of the joint will until after the death of her husband, the property received by her from the executor of her husband's estate and such estate of her own of which she died possessed were impressed with a trust in favour of the five named beneficiaries. If the answer to this question is in the affirmative, it must then be decided whether the five named beneficiaries are estopped by the order of Brown C.J. from asserting their rights under the joint will.

While not contained in the printed case, the proceedings leading up to the grant of probate of the will of Arni Johnson and that of Johanna Johnson are before us and disclose that, as of the death of the former, his estate consisted of 11 pieces of farm lands, farm machinery, bonds, a considerable amount of cash and some miscellaneous assets and was valued at a sum in excess of $71,000. Following the making of the order by Brown C.J. the widow, Johanna Johnson, requested the executor to transfer all of these assets to her and this was done and a release given by her to the executor in connection with his administration of the estate. On the death of Johanna Johnson on October 19, 1955, the papers show the value of her estate, which included what remained of the assets received from her husband's executor, as being in value approximately $57,000. The inventory of her estate would indicate that the farm lands had been sold by her and other investments made but it is impossible from the information available to determine what portion of the assets possessed by her as of the date of her death were received from the executor of her deceased husband.

It appears to me to be quite clear from the terms of the joint will and from the evidence supplied by the first affidavit that Johnson and his wife intended that upon the death of one of them the survivor should enjoy the use both of the estate of the survivor and of the deceased in his or her lifetime but that, upon the death of the survivor, what then remained of the estate in the hands of the survivor should be divided equally among the five

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

named beneficiaries. It seems to me to be impossible to sustain an argument that the right of the survivor to use the entire estate gave to such survivor the right to deal with it by will in a manner inconsistent with the concluding paragraph of the will. The second affidavit made by Mrs. Johnson on the application for the interpretation of the joint will where it is said in part:

> it was agreed that the relatives of my said husband and myself, who are named in the said will, should receive benefits only subject to the complete and unrestricted rights over the property by the survivor of us *and it still is my intention that the persons so named should receive benefiits at my death.*

suggests, if it does not state, that the agreement was that the five named persons should simply receive some portion of the remaining estate and not the undivided one-fifth portion given to them by the joint will. If this was intended, it is clearly an attempt to contradict the express language of the will.

It seems to be equally clear that Chief Justice Brown, while being of the opinion that the widow was entitled to possession of the assets of the estate of Arni Johnson and the right to their use, including the right to dispose of at least portions of it for her own purposes, found that it was the intention of both parties that such portion of the estate as remained in the possession of Johanna Johnson as of the date of her death was to go to the five named beneficiaries. Only the first of the two wills made by Johanna Johnson was in existence at the time of the application before Brown C.J. and, referring to that will, he said:

> The widow has already made a will disposing of her estate to the named beneficiaries, a copy of which has been put in evidence, and thus she has carried out what was intended by both husband and wife.

The affidavit of the widow made on May 4, 1948, does suggest that either party might after the death of one of them dispose by will of the assets of either of them in a manner stated in the provisions of the joint will. That view was clearly rejected by the learned Chief Justice.

The question, as I have said, is not one of construction but rather of determining the nature of the obligation imposed upon Johanna Johnson by the terms of the joint will in these circumstances. This must be decided by the application of equitable principles.

In Snell's Equity, 24th ed., p. 156, the following appears:

> Where two persons make an arrangement as to the disposal of their property and execute mutual wills in pursuance thereof, the one who predeceases the other without having departed from the arrangement dies with the implied promise of the survivor that it shall hold good . . . The arrangement will not be presumed from the simultaneous execution of virtually identical wills but must be proved by independent evidence of an agreement not merely to make indentical wills but to dispose of the property in a particular way. Until the death of the first to die either may withdraw from the arrangement, but thereafter it is irrevocable, at least if the survivor accepts the benefits conferred on him by the other's will.

This passage is based upon the author's appreciation of what was decided in *Dufour v. Pereira*[1]; *In re Oldham*[2]; *Gray v. Perpetual Trustee Co. Ltd.*[3] and *Stone v. Hoskins*[4].

The passage from Snell does not distinguish between a joint will such as that which was considered in the leading case of *Dufour v. Pereira* and separate wills made at the same time by husband and wife, as was the case in *re Oldham* and in *Gray v. Perpetual Trustee Co. Ltd.* It is, however, in my opinion, unnecessary to decide in this case whether there is any distinction to be drawn between the two, in view of the evidence of the agreement between husband and wife afforded by the affidavit of Mrs. Johnson and the finding made by Chief Justice Brown.

In *Dufour's* case, according to the short report in 1 Dick. 419, the husband and wife had agreed to make what is referred to as a mutual will and this was signed by both. Upon the death of the husband the wife proved the will and afterwards made another, inconsistent with the terms of the joint will. Camden L.C. said in part (pp. 420-1):

> Consider how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor, is not a confirmation of it. I am of opinion it is.
>
> It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it had given notice to the other of such revocation.

[1] (1769), 1 Dick. 419, 21 E.R. 332.
[2] [1925] Ch. 75, 94 L.J. Ch. 148.
[3] [1928] A.C. 391.
[4] [1905] P. 194.

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

But I cannot be of opinion that either of them could, during their joint lives, do it secretly; or that after the death of either it could be done by the survivor by another will.

It is a contract between the parties which cannot be rescinded but by the consent of both. The first that dies carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.

The defendant Camilla Rancer hath taken the benefit of the bequest in her favour by the mutual will; and hath proved it as such; she hath thereby certainly confirmed it; and therefore I am of opinion the last will of the wife, so far as it breaks in upon the mutual will, is void.

There is a more complete report of the judgment in this case in vol. 2 of Hargrave's Juridical Arguments commencing at p. 304, contained in an article by the learned author on the decision in the case of *Walpole v. Orford*[1]. At p. 310, Lord Camden is stated to have said:

The parties by the mutual will do each of them devise, upon the engagement of the other, that he will likewise devise in manner therein mentioned.

The instrument itself is the evidence of the agreement; and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him.

I have perhaps given myself more trouble than was necessary upon this point; because, if it could be doubtful, whether after the husband's death his wife could be at liberty to revoke her part of the mutual will, it is most clear, that she has estopped herself to this defence, by an actual confirmation of the mutual will,—not only by proving it, but by accepting and enjoying an interest under it. She receives this benefit, takes possession of all her husband's estates, submits to the mutual will as long as she lives, and then breaks the agreement after her death.

In *Stone v. Hoskins,* a husband and wife agreed to make mutual wills and did so and the wife during the lifetime of her husband revoked her will and made another disposing of her property in a manner contrary to the arrangement. Gorell Barnes P., holding that she was entitled to do so, referred to what had been said by Lord Camden in *Dufour v. Pereira* as reported by Hargrave and said (p. 197):

If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from

[1] (1797), 3 ves. 402, 30 E.R. 1076.

the arrangement on his part, because, by the death of the other party, the will of that party and the arrangement have become irrevocable; but that case is entirely different from the present, where the first person to die has not stood by the bargain and her "mutual" will has in consequence not become irrevocable.

In *re Green*[1], the husband and wife executed wills in identical form, *mutatis mutandis*, the wills each containing a recital that it was agreed between the spouses that if the survivor of them had the use of the other's property during his or her lifetime, he or she would provide in his or her will for carrying out the wishes expressed in the will of the other. Vaisey J. referred to the passage from the judgment of Sir Gorell Barnes P. in *Stone v. Hoskins* which I have quoted above and adopted it and found that the husband who survived his wife received the portion of her estate affected by the will on the trust declared by it, saying (p. 919):

> As I have held that para. 6(c) of the first will took effect in conscience—"compact" is the word Lord Camden, L.C., used in *Dufour v. Pereira*—giving rise to a trust, it follows, I think, that effect must be given to the various provisions under cl. 6(*c*) out of the fund available for their implementation.

In *Birmingham v. Renfrew*[2], the principles declared in *Dufour v. Pereira* were applied by Latham C.J. I refer to the comments of that learned judge upon that case and *Gray v. Perpetual Trustee Co. Ltd.*, at pp. 675 and 676.

Much reliance was placed by the appellant upon the decision of Astbury J. in *re Oldham*. In that case, a husband and wife made mutual wills in the same form in pursuance of an agreement so to make them, but there was no evidence of any further agreement in the matter. Each gave his or her property to the other absolutely with the same alternative provisions in case of lapse. The wife survived and accepted her husband's property and then made a fresh will, ignoring the provision of her own will. It was held that there was no implied trust preventing the wife disposing of her property as she pleased. Astbury J. referred amongst others to the authorities above mentioned and distinguished *Stone v. Hoskins* on the ground that there the agreement to dispose of their properties was

[1] [1950] 2 All E.R. 913. [2] (1937), 57 C.L.R. 666.

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

made out in the wills and decided that the mere fact of the execution of the mutual wills was insufficient to establish such an agreement.

This portion of the judgment in *re Oldham* was referred to with approval by Viscount Haldane delivering the judgment of the Judicial Committee in *Gray v. Perpetual Trustee Co. Ltd.* The head note, which accurately reports what was decided, reads in part:

> The fact that a husband and wife have simultaneously made mutual wills, giving each to the other a life interest with similar provisions in remainder, is not in itself evidence of an agreement not to revoke the wills; in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh will inconsistent with her former will, even though her husband has died and she has taken the benefits conferred by his will.

Neither of these cases affect the present matter in my opinion, where the question is as to whether an agreement between the parties should be implied from the terms of the joint will or found to have been made, in view of the statement made by Mrs. Johnson in the second affidavit where, referring to what had taken place between her husband and herself, she swears that "*it was agreed* that the relatives of my said husband and myself who are named in the said will should receive benefits." While the following portion of the clause, in so far as it might be construed as contradicting the terms of the will, should, I consider, be held to have been inadmissible, the statement appears to me to substantiate the fact that there was in truth an antecedent agreement in the terms of the will. Gordon J.A., with whom the Chief Justice of Saskatchewan and McNiven J.A. agreed, was of the opinion that the judgment of Brown C.J. should be construed as holding that an agreement had been made between the two spouses, a conclusion with which I also respectfully agree.

I am unable, with respect for differing opinions, to understand what bearing it has upon the matter that, in the reasons for judgment delivered by that learned judge, he mentioned the case of *Re Shuker's Estate*[1]. In that case, it was held that by the terms of the will in question the widow was given a life interest and a general power of appointment over the testator's estate. No question of

[1] [1937] 3 All E.R. 25.

the obligations imposed upon testators by a will such as the joint will in this case was involved or considered. If, as I think to be the case, the estates of both Arni and Johanna Johnson were affected by a trust in favour of the five beneficiaries to the extent above indicated, no question of the widow having a general power of appointment which she might exercise without restriction in her own favour during her lifetime can arise.

I would dismiss the appeal. In the circumstances, I would direct that the costs of all parties be payable out of the estate.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] dismissing an appeal from a judgment of Graham J., whereby it was declared, (i) that the late Johanna Johnson "was bound by trust to leave her estate including all assets received by her from Arni Johnson, deceased, in accordance with the joint will of herself and the said Arni Johnson, deceased"; (ii) "that the provisions of the will of Johanna Johnson, deceased, insofar as they are contrary to the provisions of the said joint will are void"; and (iii) "that Ross J. Pratt, as executor of the estate of Johanna Johnson, deceased, is fixed with the resulting trust and must distribute the assets of the estate of Johanna Johnson, deceased, in the manner provided for in the said joint will." Procter and Culliton JJ.A., dissenting, would have allowed the appeal.

The application to Graham J. was made by the appellant Pratt,

> as Executor of the estate of Johanna Johnson, deceased, for advice and directions from the said Judge with respect to the administration of the said estate and the distribution of the assets of the estate amongst the beneficiaries named in the last Will and Testament of the said Johanna Johnson, deceased, dated the 17th day of November 1952 and the codicil thereto dated the 8th day of March A.D. 1955, and whether all named in the said Will are to share in the Estate or only those named as beneficiaries in the last will of Arni Johnson, deceased.

[1] (1957), 21 W.W.R. 289, 8 D.L.R. (2d) 221, *sub nom. Re Johnson.*

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

Arni Johnson and Johanna Johnson were husband and wife. The former died on April 25, 1947, and the latter on October 19, 1955. On April 7, 1945, they executed a joint will reading as follows:

KNOW ALL MEN BY THESE PRESENTS that we ARNI JOHNSON and JOHANNA JOHNSON, Husband and Wife of the Post Office of Leslie in the Province of Saskatchewan, do make, publish and declare this instrument to be jointly as well as severally our last Will and Testament. HEREBY REVOKING all former Wills.

WE NOMINATE AND APPOINT Bogi Peterson of the Post Office of Wynyard in the Province of Saskatchewan to be the executor of this our last Will and Testament.

WE DESIRE that all property real and personal of which we may die possessed at the time of the decease of either of us shall be held by the survivor during his or her life to use as such survivor may see fit.

UPON THE DECEASE of the survivor it is our desire that our property both real and personal shall be divided as follows:—

To Jonina Johnson, Helga Bjornson, Sigridur Bjornson, Gudrun Bjornson all of Cavalier in the state of North Dakota, one of the United States of America and Fred Paulson of Grafton in the said State of North Dakota one of the United States of America equally amongst them share and share alike.

On January 19, 1948, proceedings were commenced by way of originating notice. The notice was headed "In the Matter of the Estate of Arni Johnson Deceased". The notice reads in part as follows:

TAKE NOTICE that you are required to attend before the presiding Judge in King's Bench Chambers at the Court House at the City of Saskatoon, in the Province of Saskatchewan, on Friday the 26th day of March, A.D. 1948 at the hour of ten o'clock in the forenoon, or so soon thereafter as there may be a Judge in Chambers and the Application can be heard on the hearing of an Application on the part of *BOGI PETERSON,* of WYNYARD, Saskatchewan, Farmer, Executor of the Will of the above named *ARNI JOHNSON* deceased, for an Order,

(a) Determining the nature of the interest of *JOHANNA JOHNSON,* widow of the said *ARNI JOHNSON,* deceased, in the estate of the said *ARNI JOHNSON* under the terms of a certain WILL made jointly by the said Johanna Johnson and the said Arni Johnson deceased, dated 7th April, A.D. 1945, Probate of which said WILL was granted by the Surrogate Court of the Judicial District of WYNYARD on the 11th day of August, A.D. 1947 and particularly where (sic) such interest comprises to the said Johanna Johnson an Estate for life.

(*b*) Determining the interest in the said Estate of the other beneficiaries named in the said Will.

AND FURTHER TAKE NOTICE that in support of the said Application, will be read, this Originating Notice with Proof of Service thereof, the original Letters Probate granted to the said *BOGI PETERSON,* exhibiting the said Will, and the several Affidavits of the said Bogi Peterson and the said Johanna Johnson, an inventory of the property

of the said Estate as presented to the Inspector of Succession Duty for the Dominion of Canada and such further and other material as Counsel may advise and the court permit.

The notice was addressed to, and served upon, Johanna Johnson and the five persons named in the fourth paragraph of the joint will. The motion was heard by Brown C.J.K.B. who, on July 6, 1948, delivered the following reasons:

This is an application for the interpretation of the will of the deceased Arni Johnson made jointly with his wife Johanna Johnson.

I do not see any purpose in reviewing the various authorities that have been cited to me in connection with this application by Mr. Rees and which have been very helpful as well as his argument bearing on same and especially do I refer to the case of Re Shuker's Estate (1937) All E.R. Volume 3, page 25.

In my opinion the affidavit of the widow filed herein indicating the intention of the husband and wife when the will was made gives a fair interpretation that should be put upon the will. I think it clear that these parties each intended that the survivor should have the complete and unrestricted right to use the estate of the other, both real and personal, both income and corpus, as he or she should wish and that only such portion of it as might remain at the time of the death of the survivor should go to the named beneficiaries. The widow has already made a will disposing of her estate to the named beneficiaries, a copy of which has been put in evidence, and thus she has carried out what was intended by both husband and wife. It will therefore be quite in order for the executor to transfer to the widow without restriction all the estate of the deceased both real and personal upon a written request from the widow to him that such be done.

Pursuant to these reasons a formal order was taken out, the operative part of which reads as follows:

It is hereby ordered that it will be in order for the Executor to transfer to the widow, Johanna Johnson, without restriction, all the estate of the deceased, both real and personal upon a written request from the widow to him that such be done.

It is further ordered that the widow shall have the complete and unrestricted right to use the estate both real and personal, both income and corpus as she may wish and that only such portion of the Estate as may remain at the time of her death shall go to the named beneficiaries. Costs of both parties to be paid out of the Estate.

The Will made by Johanna Johnson on January 19, 1948, and referred to in the reasons of the learned Chief Justice reads:

This is the Last Will and Testament of me, Johanna Johnson, of the Town of Wynyard, in the Province of Saskatchewan, Widow, hereby revoking all former Wills and Testamentary dispositions by me at any time heretofore made and declare this only to be and contain my last Will and Testament.

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

I direct payment of all my just debts, funeral and testamentary expenses and appoint Bogi Peterson, as and to be Executor of this my Will.

I devise and bequeath all my property, real and personal, whatever situate, in equal shares to:

Freda Palmer, former widow of my deceased brother.
Jonina Hallgrimson, sister of my deceased husband.
Helga Bjornson, my sister.
Sigridur Johnson, my sister.
Gudrun Johnson, my sister.

On November 18, 1952, Johanna Johnson made a further will reading as follows:

This is the Last Will and Testament of me Johanna Johnson of the Town of Wynyard in the Province of Saskatchewan, widow of Arni Johnson late of Leslie in the said Province, deceased, hereby revoking all former wills and testamentary dispositions by me at any time made and declaring this only to be and contain my last Will and Testament.

I direct payment of all my just debts, funeral and testamentary expenses and appoint Bogi Peterson of Wynyard, Saskatchewan, Farmer, as and to be sole executor of this my will.

I direct my said executor to convert the whole of my estate into money and to pay the same in equal shares to the following persons, namely: Jonina Johnson, Helga Bjornson, Sigridur Bjornson, Gudrun Bjornson, Freda Palmer, all of the state of North Dakota, Anna Gudmundson of Elfros, Saskatchewan, Rosa Peterson of Wynyard, Saskatchewan and the said Bogi Peterson and for the said purpose I devise and bequeath the whole of my estate in trust to my said executor.

In the event of the said Rosa Peterson predeceasing me I direct that the gift to her under this my will shall not lapse but shall be paid in equal shares to her children in her stead.

In the event of the said Bogi Peterson predeceasing me I direct that the gift to him under my will shall not lapse but shall be paid to his widow in his stead.

On March 8, 1955, Johanna Johnson executed a codicil to her will of November 18, 1952, reciting the death of Bogi Peterson and appointing the appellant, Pratt, executor in his stead. Probate of the last mentioned will and codicil was granted to the appellant, Pratt, on December 23, 1955.

The judgment of Graham J., which has been affirmed by the Court of Appeal, proceeds on the view that Johanna Johnson was bound by an agreement not to revoke her will as contained in the joint will and that while this, of course, did not prevent her later will revoking the former one, her executor under the later will holds all her property in trust for the five beneficiaries named in the former will.

In both Courts below, it was assumed that the question which Graham J. was called upon to decide, was *res judicata* by reason of the judgment of Brown C.J.K.B. and that the task of the Court was simply to interpret that judgment. With the greatest respect I think that this was a misconception.

When a plea of *res judicata* is raised, to decide what questions of law and fact were determined in the earlier judgment the Court is entitled to look not only at the formal judgment but at the reasons and the pleadings. The cases dealing with this question are collected in Halsbury, 3rd ed., vol. 15, pp. 184, 207 and 208; and I think it necessary to refer only to the following passage in the judgment of the Court of Appeal delivered by Slesser L.J. and concurred in by Clauson L.J. and du Parcq L.J. in *Marginson v. Blackburn Borough Council*[1]:

> In our view, however, Lewis J. was entitled to have regard to the reasons given by the learned county court judge, and we have not hesitated to avail ourselves of that assistance. We are dealing here not so much with what has been called estoppel by record, but with the broader rule of evidence which prohibits the reassertion of a cause of action which has been litigated to a finish-estoppel by res judicata. In such a case the question arises, what was the question of law or fact which was decided? And for this purpose, it may be vital in many cases to consider the actual history of the proceedings. Thus, in *In re Graydon,* on a question whether a judgment of the county court constituted an estoppel, Vaughan Williams J. refers to an inference to be drawn from the observations of the learned county court judge when asked for leave to appeal; and in *Ord v. Ord,* also on a question of res judicata, references to proceedings before the judge were considered by Lush J.. But, even if there were no authority to show that this had in fact been done, we can see in principle no objection, when the question before the Court is what was actually decided at an earlier trial, to have recourse to that information which is to be derived from reading a record of the proceedings.

In the case at bar, it appears from the terms of the originating notice that the application before Brown C.J.K.B. dealt solely with the estate of Arni Johnson and with the interpretation of his will.

In my opinion the following passage in Halsbury, 2nd ed., vol. 34, para. 12, pp. 17 and 18 correctly states the nature and operation of a joint will:

> A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties, or of their joint property. It is not, however,

[1] [1939] 2 K.B. 426 at 437.

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

recognised in English law as a single will. It operates on the death of each testator as his will disposing of his own separate property, and is in effect two or more wills.

I do not pause to inquire whether, under the Saskatchewan practice, the question whether a living person is contractually bound to dispose of her estate in a certain way can be determined on originating notice, as I think it clear that that question was not raised in the proceedings before Brown C.J.K.B.

There is, however, no doubt that the questions determined in the judgment of Brown C.J.K.B. as to the construction of the will of Arni Johnson are *res judicata* in the present proceedings; and it becomes necessary to interpret that judgment. That this task is not an easy one is evident from the differences of opinion in the Courts below.

The questions raised in the notice of motion were as to the nature of the interest of Johanna Johnson in the estate of Arni Johnson, particularly whether such interest was an estate for life, and the interest in the said estate of the other five beneficiaries, now represented by the respondents. The possible answers to these questions would seem to be as follows:

(i) There is a gift of a life estate to Johanna Johnson with a gift over on her death to the five beneficiaries.

(ii) There is a gift of the whole estate to Johanna Johnson with all the rights incident to absolute ownership, but added to this is a gift over to the five beneficiaries of that part of the estate which remains in specie at her death. It has been said that a gift over of this nature cannot be made. See the judgment of Middleton J.A. in *Re Walker*[1].

(iii) There is a gift of a life estate to Johanna Johnson with a power in her unfettered discretion to take for herself, during her lifetime, all or any part of the corpus, with a gift over to the five beneficiaries on her death of so much of the estate as she has not in her life-time taken for herself.

On this branch of the matter, I am in substantial agreement with the reasons of Procter J.A. and of Cullitton J.A., and agree with their conclusion that Brown C.J.K.B., adopting alternative (iii) set out above, has

[1] (1925), 56 O.L.R. 517 at 522.

construed the will of Arni Johnson as having the same effect as that dealt with by Simonds J., as he then was, in *Re Shuker's Estate, Bromley v. Reed*[1]; had it been otherwise, and had the learned Chief Justice considered that the assets of the estate of Arni Johnson after being handed over to Johanna, would remain impressed with a trust in favour of the five beneficiaries, it appears to me most unlikely that he would have authorized the executor to turn over the whole estate to Johanna "without restriction". The difficulty in adopting this interpretation arises from the concluding words of the formal judgment "and that only such portion of the estate as may remain at the time of her death shall go to the named beneficaries"; but I have concluded that on their true construction these words describe such portion of the estate as may remain in the hands of Arni Johnson's executor at the time of Johanna's death, or as may, at that time, remain in the estate of Arni Johnson in the sense of not having been taken by Johanna as her absolute property.

I agree with Procter J.A. and Culliton J.A. that Johanna Johnson effectively took over as her own absolute property the whole of the estate of Arni Johnson and that from the time of her doing so the five beneficiaries ceased to have any interest therein.

It follows from this that the respondents take nothing under the will of Arni Johnson; but the question remains whether Johanna Johnson was bound by an agreement not to revoke her will contained in the joint will. If she was so bound then the appellant Pratt would hold her estate in trust for the respondents.

While I have stated my view that this question was not raised or decided in the proceedings before Brown C.J.K.B., it was raised before Graham J., and falls to be determined on the material which was before him, which I take to have included the material filed on the application before Brown C.J.K.B. On this branch of the matter I am again in agreement with Procter J.A. and Culliton J.A. that neither the wording of the joint will nor anything in the material filed establishes an agreement by Johanna Johnson not to revoke her will of April 7, 1945. In particular,

[1] [1937] 3 All E.R. 25.

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

I agree with the views that they express as to the application of the decisions in *In re Oldham*[1] and *Gray v. Perpetual Trustee Company*[2].

I have carefully considered the cases of *re Hackett*[3], *Re Payne*[4], *Re Kerr*[5] and *Re Fox*[6], referred to in the reasons of the learned Chief Justice of Saskatchewan. In the last mentioned case there was a written agreement that the mutual wills should, except as to certain specified items, be irrevocable. In so far as any of these cases decide that the mere circumstance of two persons making a joint will or making mutual wills is in itself evidence of an agreement not to revoke the wills they are, in my opinion, in conflict with the principles stated in *re Oldham, supra,* and in *Gray v. Perpetual Trustee Company, supra,* and ought not to be followed.

The question to be decided is not whether Arni Johnson and Johanna Johnson agreed to make their wills in identical terms *mutatis mutandis*—it may be assumed that they did—but rather whether the evidence establishes an agreement that the wills so made should not be revoked. I agree with the submission of counsel for the appellants, founded on the two last mentioned cases, that the fact that the two wills were made in one document and in identical terms does not necessarily connote any agreement beyond that of so making them; and I am unable to find any other evidence on which the Court could hold that there was an agreement that the provisions for the respondents contained in the joint will should be irrevocable. The passages in the affidavits of Johanna Johnson relied upon by the respondents as furnishing such evidence appear to me to depose only to the terms of an agreement as to the nature of the interests to be given to Arni and Johanna and the nature of the provisions to be made for the respondents, which agreement was carried out when the joint will was executed. As has been pointed out above, the question whether there was any agreement not to revoke the wills was not before Brown C.J.K.B.; if, in spite of this, the material filed before him and used on

[1] [1925] Ch. 75, 94 L.J. Ch. 148. [2] [1928] A.C. 391.
[3] (1927), 32 O.W.N. 331.
[4] (1930), 39 O.W.N. 314, 40 O.W.N. 87.
[5] [1948] O.R. 543, 3 D.L.R. 668. [6] [1951] O.R. 378, 3 D.L.R. 337.

the application before Graham J. had disclosed the making of an agreement not to revoke, I do not suggest that the Court should not act upon it, but, as I have already said, I can find no such evidence in the affidavits.

For these reasons, I would allow the appeal, set aside the judgments below and direct that judgment be entered declaring that the estate of the late Johanna Johnson should be distributed in accordance with the terms of her will dated November 18, 1952, and the codicil thereto dated March 8, 1955. The costs of all parties in the Courts below and in this Court should be paid out of the estate, those of the executor as between solicitor and client.

Appeal dismissed, Rand and Cartwright JJ. *dissenting.*

Solicitors for the appellants: Rees, Reynolds & Schmigelsky, Saskatoon.

Solicitors for the respondents: Batten, Fodchuk & Batten, Humboldt.