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agreed upon. To dislodge that *prima facie* presumption, something more, it seems to me, is necessary than a statutory provision directed toward bringing the insuring corporation within reach of the beneficiary so that it might be sued within the province in which the insured resided and in which the policy was delivered. And to enter suit in the courts of the province it was convenient, if not necessary, to provide that the obligation under the contract should be payable in lawful money of Canada. That interpretation of the statute does not destroy the contract made between the parties as to the amount of insurance to be paid. It would require very clear and precise language to lead to an interpretation which would have the effect of destroying the contract between the parties in so far as the extent of the obligation is concerned.

I would therefore allow the appeal and restore the decision on the motion for judgment on the pleadings, with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellants: *McMaster, Montgomery, Fleury & Co.*

Solicitors for the respondents: *Hunter & Hunter.*

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* May 8.
* June 10.

PHILIP A. HAUCK AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

JOSEPHINE SCHMALTZ AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Will—Construction—Intention of the testator—"Advances heretofore made by me to my children"—Whether debts or notes owing by certain children discharged.

The will in question in this case devised and bequeathed "all my real and personal estate of which I may die possessed," and, after giving certain specific legacies, contained the following clause: "The balance of my property to be divided between my ten children (naming them), and so that the said Joseph P. Hauck shall receive one thousand dollars less than the shares coming to the other chil-

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

dren named, in consideration of advances previously made to him by me, and with this exception no account shall be taken or had of advances heretofore made by me to any of my children." Four of the sons were indebted to the estate on promissory notes given by them individually to the testator. Joseph P. had received $1,000 from his father in connection with some partnership transaction in land which they had entered into together. Other than the above-mentioned transactions with the five sons, the only advances were wedding presents of not over $100 each to the four daughters.

Held, reversing the judgment of the Appellate Division ([1934] 3 W.W.R. 335), that the debts represented by the notes were discharged by reason of the words in the will "and with this exception no account shall be taken or had of advances heretofore made by me to any of my children." According to the intention of the testator, ascertained by a fair construction of the will and under the circumstances of the case, the words being given their usual and ordinary meaning, the moneys covered by the notes ought to be treated as no longer owing.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ewing J. and dismissing the appellants' action, upon an issue directed by Simmons C.J. as to the construction of the will of the father of the parties in this case, the question being the alleged release by the testator of certain debts represented by promissory notes owing to him by some of his sons at the date of his death.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

R. D. Tighe K.C. for the appellants.

H. J. Macdonald for the respondents.

The judgment of the Court was delivered by

LAMONT J.—This is an appeal by the plaintiffs from a judgment of the Appellate Division of the Supreme Court of Alberta (1) which reversed (Lunney and McGillivray JJ. A. dissenting) the judgment of Ewing J. in favour of the plaintiffs.

The question in the appeal is as to the proper construction of the will of Engelbert Hauck which, after making provision for a couple of small bequests, reads as follows:—

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I give, devise and bequeath all my real and personal estate of which I may die possessed in the following manner, that is to say:

Twenty-five hundred (2500) dollars and my household furniture and effects (if still undisposed of at the time of my decease) to my beloved wife, Annie Hauck, free from succession duty;

The balance of my property to be divided between my ten children, Joseph P. Hauck, Josephine Schmaltz, Albin Hauck, Annie Waechter, Tillie Heidmiller, Mary Heisler, Philip A. Hauck, Henry Hauck, Clarence Hauck and Edwin Hauck, and so that the said Joseph P. Hauck shall receive one thousand dollars less than the shares coming to the other children named, in consideration of advances previously made to him by me and with this exception no account shall be taken or had of advances heretofore made by me to any of my children.

And I nominate and appoint Philip A. Hauck, Henry Hauck and Clarence Hauck to be executors of this my last will and testament. * * *.

The will was made on the 29th day of October, 1930, and Engelbert Hauck died on the 15th day of June, 1931, at Heisler, Alberta. He left him surviving his widow, Annie Hauck, and ten children—six sons and four daughters. At the date of the will the daughters were all married.

Upon the application of Joseph P. Hauck, Josephine Schmaltz, Annie Waechter and Mary Heisler, all beneficiaries under the will, and it appearing that four of the sons, namely, Philip, Clarence, Henry and Albin, had made certain promissory notes in favour of Engelbert Hauck, deceased, for moneys advanced, which notes the respective makers thereof claimed had been discharged and satisfied by the provision of the will, an issue was directed wherein Philip, Clarence, Henry and Albin were directed to be plaintiffs; and Matilda Heidmiller, Joseph P. Hauck, Josephine Schmaltz, Annie Waechter and Mary Heisler were directed to be defendants, and the question to be tried was:—

The plaintiffs affirm and the defendants deny that the plaintiffs, and each of them, were and are fully discharged and released from any and all liability in respect of the promissory notes given by the plaintiffs respectively to Engelbert Hauck.

The promissory notes referred to were the following:—

Promissory note for $5,000 dated November 1, 1925, made by Philip Hauck in favour of Engelbert Hauck, payable one year after date with interest at 5 per cent. Promissory note for $70 dated May 1, 1925, made by Philip Hauck in favour of Engelbert Hauck, payable six months after date with interest at 5 per cent. Promissory note for $250 dated November 1, 1925, made by Philip Hauck in favour of Engelbert Hauck, payable one year after date with interest at 5 per cent. Promissory note for $1,500 dated November 1, 1925, made by Philip Hauck in favour of Engelbert Hauck, payable one year after date with interest at 5 per cent. Promissory note for $8,066 dated November 1, 1928, made by

Clarence A. Hauck, payable at the Imperial Bank of Canada, Daysland, Alberta, as soon as possible after date. Promissory note for $7,200 dated December 1, 1926, made by H. Hauck in favour of Engelbert Hauck, payable as soon as possible after date. Promissory note for $1,000 dated March 1, 1927, made by Albin Hauck in favour of Engelbert Hauck, payable three years after date with interest at 4 per cent per annum. Promissory note for $2,000 dated March 30, 1922, made by Albin Hauck in favour of E. Hauck, payable twelve months after date with interest at 4 per cent.

The issue came on for trial before Mr. Justice Ewing at Edmonton, on the 22nd March, 1934. That learned judge construed the will to mean that the plaintiffs were discharged of their obligations under the notes. On appeal to the Appellate Division that judgment was reversed (Lunney J. A. and McGillivray J. A. dissenting) (1). The plaintiffs now appeal to this Court.

The question for determination is: What was the intention of Engelbert Hauck, did he intend to discharge and release the plaintiffs from their respective liabilities on the promissory notes which he held, or did he intend that these notes should still be obligations on the part of his sons and form part of his estate?

For the purpose of ascertaining the intention of a testator the will is to be read in the first place without reference to or regard to the consequences of any rule of law or canon of construction. The words are to be given their usual and ordinary meaning, the particular passage concerned being taken together with whatever is relevant in the rest of the will to explain it.

The will gives, devises and bequeaths

all my real and personal estate of which I may die possessed in the following manner, that is to say: * * *

No assistance can be derived from this disposition of his property, as, later on in the will, he directs that, with the exception of the advance to Joseph, no account shall be "taken or had of advances heretofore made by me to any of my children." These are the words requiring interpretation. Without these words the notes would undoubtedly have formed part of his estate. But the question is: To what was he referring when he used the word "advances"?

From the language of the will it appears that Joseph owed his father $1,000, which the father says was "in consideration of advances made to him." From the evidence put in

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this was shewn to be in connection with some partnership transaction in land which Joseph and his father had entered into together in 1910. The will speaks of it as advances to Joseph. But whether it was cash loaned to Joseph or money paid by the father for Joseph's share in the partnership is not disclosed. At any rate in the end it was a debt which Joseph was to pay into the estate, but, with the exception of that advance, the executors were directed not to take into account any other advance which the father may have made to any of his children.

The word "advances" primarily means advances of money whether by way of loan or payment at the request of the legatee. *In re Jacques, Hodgson* v. *Braisby* (1). In that case Stirling J., at page 274, said:

> The word primarily refers to advances of money. And advances of money is commonly spoken of, and the expression is perfectly intelligible to everyone; but an advance of a house or a chattel would not be understood without explanation by anyone but a lawyer.

In referring to his "advances" to Joseph the father used the word in its primary meaning. What reason have we for concluding that he did not give it its primary meaning when referring to advances to his other children?

The evidence put in shews what the moneys represented by the notes was given for. In every case it was cash given to the son, or paid out by the father at the son's request, or property sold by the father to his son and a promissory note taken for the price, or a part thereof. It was admitted by the plaintiffs that they looked upon the money received from their father as loans and that they had always intended to pay them when they got in a position to do so.

If the words "advances heretofore made" do not refer to the moneys for which the plaintiffs gave notes, there is nothing either in the will or in the evidence which shews to what it does refer. It was suggested that it might refer to some gift of money or household furniture (not over $100) which the evidence discloses was given to each of the daughters on her marriage. In my opinion this suggestion cannot be accepted, not only on account of the smallness of the amount but also because it is highly improbable that the father would have kept track of wedding presents, or would have expected them to be returned to him or paid

(1) [1903] 1 Ch. 267.

for. None of the members of the family know of any other moneys having been loaned or given to any of the children.

In the case at bar we are asked to read "advances" in the sense of the expression "advancement by portion" and then apply the equitable presumption against double portions. I do not think this presumption can have any application to a case of this kind. The father was making loans to his sons to help them along, he was not advancing to them a portion of what they were to receive out of his estate. They were loans which the boys intended to pay back. No doubt he was not pressing either for principal or interest, but some of the boys were paying interest regularly. Then, on October 29th, 1930, he came to make his will. In doing so he must be supposed to have reviewed in his mind the circumstances of each of his children, and then to have done, as Lord Cottenham said in *Pym* v. *Lockyer* (1), quoted with approval by Bowen L.J. in *In re Lacon* (2):

> A father who makes his will, dividing his property amongst his children, must be supposed to have decided what under the then existing circumstances ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess.

The survey of the circumstances of his children would shew the testator that his four daughters were all married and were in fair financial circumstances; that, owing to the hail and drought of 1929 and 1930, the crops around Heisler were, in these years, almost negligible. The farmers were unable to pay their bills with the result that his sons, who were in business there, had suffered great losses and were themselves faced with insolvency and would be forced into bankruptcy if called upon to pay the notes he held which they would be upon his death unless they were protected. The sons who were farming in the west were experiencing the results of bad crops or no crops at all from drought and depression. Joseph, who was living in Ontario, may have been well-to-do. So far as the will or the evidence discloses no sums other than those secured by the plaintiffs' notes were ever given by the father to any of his children. Why then reject the construction that he intended to cancel the notes? The objection taken to this construction is that it contravenes the view of law that

(1) (1840) 10 L.J. Ch. 153. (2) (1891) 60 L.J. Ch. 403, at 410.

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equality is what the father in dealing with his children would in most cases presumedly intend. This presumption, however, does not apply where the language is clear and plain, and, where it does apply, it may be rebutted. Whatever reason the father had for making Joseph pay the advance to him while cancelling the notes of the other sons, we need not inquire, for in unambiguous language he directs that Joseph's debt should be charged against what Joseph was receiving from the estate. Now it is a paramount rule that a testator can do as he likes with his own property. All he has to do is to say, in clear and unambiguous language, to whom it is to go and the courts will respect his wishes. In my opinion the language of this will is sufficiently clear and unambiguous and, as there were no moneys advanced by him except those covered by the notes, I think the notes are what he was referring to.

I therefore agree with the trial judge that the fair construction of the will is that the moneys covered by the notes were not to be brought into hotchpot but were to be treated as no longer owing. It is, in my opinion, not sufficient answer for a court to say: "We do not know what the testator meant by 'advances heretofore made by me to my children' but as the construction given to it in the court below works an inequality as between the children, the testator could not have meant that."

I take it that this father, along with many another father in the western provinces, in the last five years, was confronted in making his will with the question, not: How can I divide my estate so that all my children will get an equal share? But: How can I distribute it so as to keep them from being forced into bankruptcy?

The appeal will therefore be allowed, the judgment below set aside and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the Appellants: *Tighe & Wilson.*

Solicitors for the respondents: *Wood, Buchanan & Macdonald.*