

STATE OF ANTIGUA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1975

BETWEEN:

ERNEST RANDOLPH HENRY (Defendant/
Appellant)

and

ESME OTLEY, AUDREY NICHOLAS,
MERLE HENRY, EULALIE HENRY, (Plaintiffs/
ARTHUR HENRY, DONALD HENRY Respondents)
EMMANUEL HENRY

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: Claude Francis and Forde with him
for the Appellant

Bruce Procope Q.C. (T'dad) and T.H. Kendall
with him for the Respondents

1977, March 14, 15, June

J U D G M E N T

ST. BERNARD J.A.:

The respondents being persons entitled on intestacy under a lapsed devise under the will of the late Ernest Victor Henry, who died, a bachelor, on the 28th November, 1964, sought by summons the interpretation of paragraph 4 of the said will which reads -

"I give devise and bequeath my Plantation or Estate known as Ffryes in the Parish of Saint Mary, in the Island of Antigua, together with all livestock buildings and appurtenances there on onto my two sons, namely, HERSCHELL VICTOR HOXWORTH HENRY herein named as sole Executor and ERNEST RANDOLPH HENRY his brother and the son of DAISY TURNER of Bolans Village, in the Parish of Saint Mary, in the Island of Antigua,

/that.....

that the said HERSCHELL VICTOR HOXWORTH HENRY be made responsible through the proceeds derived from time to time from the said Plantation or Estate, for the maintenance and education of his brother ERNEST RANDOLPH HENRY until the latter shall have attained the age of twenty-one (21) years, at which time they both shall become equal partners of the said Plantation and Estate. And in the event of any disagreement between the two, that a settlement by mutual understanding be arrived at in a choice between them of the eastern or western portion of the said Plantation and Estate so separated and visible marked by the Public Highway running through it from North to South, and in addition to this, an equitable division of all livestock."

The trial judge interpreted the above paragraph as creating a tenancy in common in equal undivided shares between the appellant and Herschell Victor Hoxworth Henry, deceased, whose share had lapsed under the will, and made the following declaration -

"(2) The defendant Ernest Randolph Henry is entitled to one undivided half-share of the plantation or estate known as "Fryes" but not entitled to exclusive occupation of any part thereof to the exclusion of the second to eighth plaintiffs whether as representing the interest of the personal representative of Adeline Agatha Lewis, deceased, or as issue of the brothers of the full blood, Adolphus Stanley and Harold Alexander."

The appellant contends that upon a true construction of the said paragraph the trial judge was in error when he held there was a tenancy in common and that the share of the deceased Herschell Victor Hoxworth passed to the persons entitled on an intestacy. He submitted that the language used in the paragraph was clear and that what passed to the appellant was the devise of a specific portion of the estate and he was entitled to that portion of the estate specifically devised to him. He stated that he occupied

/the.....

the eastern portion of the estate and was entitled to that portion. He further submitted that the question of a tenancy in common never arose by virtue of section 4 of the Intestates Act, Chapter 39 of the Laws of Antigua. He stated that if Herschell Victor Hoxworth had not predeceased the testator, the appellant and himself would have been tenants in common.

In my view section 4 of the Intestates Act, has nothing to do with tenancies in common. Such tenancies are created by will, conveyance or other act of parties and where the tenancy is created by an instrument it is that instrument which must be looked at in order to determine the type of tenancy intended to be created by the maker of the instrument. Section 4 of the Intestates Act deals with the manner in which the residuary estate of an intestate maybe distributed or held in accordance with the statutory trusts set out in the section. If therefore the instrument is a will, as in this case, the intention of the testator and the words creating the tenancy must be examined. If a tenancy in common is created the death of one the devisees before that of the testator cannot in my view, change the tenancy. The devise lapses into residue and the persons entitled to the residue or those entitled on intestacy, as the case may be, would take the lapsed devise as tenants in common with the other devisees. In Volume 49 of the English and Empire Digest (

/of.....

of a case where a testator appointed A and B as executors and trustees of his will and after making other provisions gave his residuary estate to his trustees for their absolute use and benefit. By a codicil he appointed C as an additional executor and trustee of his will and declared that the residuary bequest should be read as if the names A, B and C were inserted instead of the names A and B. A died before the testator and it was held that A, B and C were tenants in common but his share lapsed to the next of kin.

The words used in paragraph 4 of the will show that the devise to the brothers of the Ffryes Estate was as equal partners. The testator then expressed a wish that in the event of disagreement between the devisees they should settle that difference by mutual understanding in a certain manner. Nowhere in the devise is there anything which maybe construed as devising a specific portion of the estate to the appellant. In my opinion the trial judge was right in his interpretation of paragraph 4 of the will and the respondent was entitled to the declarations granted. I would dismiss this appeal with costs.

The respondent advanced argument to show that this court should try to achieve finality in this matter by granting to the respondent certain orders. The granting of these orders was not an issue in this appeal and I would deny them.

/N.A. Peterkin.....

(E.L. St. Bernard)
JUSTICE OF APPEAL

I agree

(N.A. Peterkin)
JUSTICE OF APPEAL

I also agree

(Sir Maurice Davis)
CHIEF JUSTICE