#021

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 743 of 1993

BETWEEN:

1. JOSEPHINE HENRY LOUISY
2. MATTHEW HENRY LOUISY
3. VILNA HENRY LOUISY

Plaintiffs

and

1. MARTHA LOUISY as P.R. of Peter Matthew Henry Louisy
2. RAYMOND JOSEPH HENRY LOUISY

Defendants

Mr. D. Theodore for Plaintiffs
Mr. V. Cooper Q.C. for Defendants.

1996: May 17;
June 7.

J U D G M E N T

MATTHEW J.

By originating summons filed on November 30, 1993 the Plaintiffs sought the interpretation and construction of the Wills of their parents, Henry Clermont Louisy and Marie Edith Louisy and other associated relief. The summons was supported by an affidavit of Plaintiff No. 1 sworn to an filed on the said November 30, 1993.

There were several exhibits accompanying the affidavit and others were tendered in evidence during the hearing. There were the probates of the Wills of the parents; a letter by Peter Matthew Henry Louisy to which was attached certain statements of accounts; a hypothecary obligation by Marie Edith Louisy and Peter Matthew Henry Louisy; a designation and vesting deed by Marie Edith Louisy of the immovable property passing under the Will of her husband; a deed of donation by the parents to Matthew Henry Louisy; and a copy of a land register certificate naming Peter Matthew Louisy as

Executor of the Estate of Marie Edith Louisy as the registered owner of 52.0 hectares of land, parcel No. 0620B 11 located in the Registration Quarter of Laborie.

The Defendants who are also the children of Henry Clermont Louisy and Marie Edith Louisy entered appearance on January 11, 1994 and Peter Matthew Henry Louisy filed two affidavits in reply, the first containing one paragraph filed on June 8, 1994 and another one containing facts and legal arguments filed on July 5, 1995.

By order of the Court made on April 24, 1996 Martha Louisy was substituted for her husband, Peter Matthew Henry Louisy, who passed away since the proceedings were initiated.

This matter after several months of unsuccessful negotiations between the Parties in order to arrive at a settlement came up for hearing on May 17, 1996. No viva voce evidence was taken and the submissions of learned Counsel are adequately reflected in what is perhaps wrongly described as the notes of evidence. They are in fact the notes of the submissions which form part of the file record.

The main issue is whether the residuary estate or more particularly, the Saphyr estate, is to be shared between four or five of the legitimate children of Henry Clermont Louisy and Marie Edith Louisy. Learned Counsel for the Defendants at the beginning of his submissions puts the matter succinctly when he said: "The basic question is which Will is dominant, Henry Clermont's Will or Marie Edith's Will".

There is one paragraph of each Will which calls for interpretation. Henry Clermont's Will was made on March 16, 1939. He died on March 1, 1971. His Will named his wife, Marie Edith as the Sole Executrix. The Will was probated on July 16, 1971 and registered on August 3, 1971 in Volume 125A 96425. Paragraph 4 of the Will is

as follows:

> "Subject to the above legacy I devise and bequeath to my said wife the whole of my property real and personal movable and immovable of which I may die possessed hereby constituting my said wife my sole universal legatee and devisee. But in the event of my said wife predeceasing me or dying without disposing of all or any of my said properties, it is my desire that my said properties or any of them shall revert in equal shares and with the right of accretion and survivorship among them to my legitimate children named (a) Raymond Joseph Henry Louisy (b) Josephine Henry Louisy (c) Matthew Henry Louisy (d) Peter Matthew Henry Louisy (e) Vilna Monica Henry Louisy and (f) any other child or children that may be born of my marriage with my said wife for which purpose my said legitimate children shall be deemed my universal legatees and devisees."

Neither side has argued that there were any other children but the five who are Parties to this suit. Marie Edith Louisy made her Will on September 26, 1972. She named Peter Matthew Henry Louisy the sole Executor of her Will. Marie died on October 17, 1976. Her Will was probated on August 17, 1977 and registered six days later in Volume 130A No. 117423. Paragraph 5 of her Will is as follows:

> "I give devise and bequeath unto the following four only of my five lawful children (my son Burton having been adequately provided for by my late aforesaid husband during my said husband's lifetime) namely: (1) Raymond Louisy of Castries aforesaid, shopkeeper (2) Raymonise Louisy of Castries aforesaid store clerk (3) my executor Peter Louisy aforesaid and (4) Vilna Louisy, student at present absent from the said State, all my property, movable and immovable real and personal wheresoever situate and to whatsoever value the same may amount hereby constituting them my universal legatees and devisees."

The Parties are agreed that Burton is the said Matthew Henry Louisy; and that Raymonise is the said Josephine Henry Louisy. So in brief the issue is whether or not Matthew Henry Louisy is entitled to a share in the Saphyr estate which Marie Edith Louisy did not dispose of in her lifetime, neither in part nor in the whole.

The view of learned Counsel for the Defendants in short is that Marie Edith took an absolute title under her husband's Will and so she could devise the residuary property to the four of her five children. Towards the end of the second affidavit of Peter Matthew Henry Louisy he said; and I presume that is his lawyer's opinion:

> "Finally it is my opinion that the words in the Will of the deceased, Henry Clermont Louisy, namely, 'It is my desire' should be construed as precatory and not mandatory as in the case of Re Diggles 1888 39 Ch. 253 and therefore the wife Edith Louisy took by way of an absolute gift."

The view of learned Counsel for the Plaintiffs is that there was a substitution in accordance with Article 861 of the Civil Code and all five legitimate children are entitled to the residuary estate comprising the Saphyr estate.

Learned Counsel for the Respondent relied on the following authorities:

1. LAMBE v. EAMES 1871 6 Ch. App. 597;
2. RE ADAMS 1884 27 Ch. D. 394; and
3. RE DIGGLES 1888 39 Ch. D. 253.

In Lambe, L bequeathed to his wife his freehold house and all his personal property, the whole "to be at her disposal in any way she may think best for the benefit of herself and family." The Court held that these words did not operate to create any trust, but the widow was entitled to dispose of the property by her Will as she pleased.

In Adams, George Smith, the testator provided in his Will as follows:

> "I give devise and bequeath all my real and personal estate and effects whatsoever and wheresoever unto and to the absolute use of my wife, Harriet Smith, her executors, administrators and assigns in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by Will after her decease."

The question was whether this was an absolute gift, or whether the property was subject to a trust in favour of the children. The Court of Appeal held that the widow took absolutely. Cotton L. J. stated that the question before the Court was one of interpretation of the particular Will. He said:

> "The question before us is whether upon the true construction of the Will of George Smith he imposed upon his wife Harriet a trust."

In Diggles, the testatrix gave all her property, real and personal to her daughter, "her heirs and assigns; and it is my desire that she allows to my relative and companion A.G. an annuity of 25 Pounds during her life, and that A.G. shall if she desire it have the use of such portions of my household furniture as may not be required by my daughter." The daughter and her husband were appointed executors. It was held that no trust or obligation to pay the annuity was imposed upon the daughter, but there was only a request to the daughter, not binding her in law, to make that provision for A.G.

Learned Counsel for the Plaintiffs referred to part of Article 861 as follows:

> "Fiduciary substitution is that in which the person receiving the thing is charged to deliver it to another either at his death or at some other time.

Substitution takes effect by operation of the law at the time fixed upon, without the necessity of any actual delivery or other act on the part of the person charged to deliver."

Learned Counsel for the Respondents made what appears to be a pertinent submission when he said that since the law of trusts in England is now the law of St Lucia and since the construction of testamentary dispositions is the same as in substitutions the rules of trusts in England in the construction of Wills are those to be applied in this matter and in this context he referred to Article 916 of the Civil Code. I think he meant Article 916A which sought to incorporate the law of trusts in England into the law of Saint Lucia. But this provision had not the effect of repealing Article 861 and paragraph 3 of Article 916A specifically states that the rights, powers and duties of trustees and beneficiaries under a trust in English law are subject to the provisions of the Civil Code.

Learned Counsel for the Plaintiffs relied on the following authorities:

1. SHEARER v. HOGG, Supreme Court of Canada Vol. XVI, Page 492;
2. RE THOMSON'S ESTATE 1880 XVI Ch. 263.
3. DOE d. STEVENSON v. GLOVER 1845 14 L.J.C.P. 169.

In Shearer, S. by his Will gave all his property absolutely to his wife with a direction that their children should be suitably maintained and educated by her. The Will then provided "that should my said wife die leaving any of my said property or rights, in her possession or not disposed of" upon her said decease the same should be divided "among our said children" in the manner specified.

Held, affirming the judgment of the Court of Review sitting at Montreal that this provision did not empower the wife to dispose of

the residue at the time of her death by Will but had the effect of creating a substitution de residuo in favour of the children.

It is necessary to analyse this case more closely and to compare the actual words used by the testator to those used by Henry Clermont Louisy.

The learned Chief Justice at Page 494 stated the exact words in Shearer's Will as follows:

> "And finally it is my desire, will and wish that should my said wife die leaving any of my said property or rights in her possession or not disposed of, the same should be divided among our said children as follows:"

So I do not think learned Counsel for the Defendants is correct when he stated in the affidavit of Peter Matthew Henry Louisy the following:

> "With the greatest respect I must say that I cannot find any similarity between the words 'desire' in the Will of the Deceased and 'shall' in the case of Shearer v. Forman".

As seen above the word "desire" was used in Shearer's case and there was no use of the word "shall". The word "should" was used which has a different connotation.

The learned Chief Justice went on to state at page 495 that "to hold that the widow had an absolute power of disposition by Will would be to defeat the clearly-expressed object of the testator."

The judgment of Davies J. is even clearer. He stated at the beginning of his judgment that "the whole question is one of the testator's intention which is to be gathered not from any one phrase or sentence, but from the instrument read as a whole". He stated that by his Will Andrew Shearer devised and bequeathed all his property without exception of which he should die possessed or

entitled unto his wife and following this absolute devise there were two paragraphs.

The effect of these two paragraphs in my view seem to cut down or take away from this absolute devise and the learned Judge had this to say of one of the paragraphs:

> "He first gives the property to his wife absolutely and then he impresses upon his gift a trust during her lifetime for the maintenance, support and education of his daughters".

The other paragraph is in similar terms as cited by the Chief Justice and referred to above.

Of less persuasive authority is Re Thomson's estate. A testator by his Will gave all his property to his widow "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease, should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons.

Held by the Court of Appeal that the widow had no power to dispose of the property by Will, and that on her death it went to the ulterior takers named in the husband's Will. James L.J. stated at page 264:

> "If there is one thing clearer than another in the case, it is that the testator intended his own Will, and not that of his wife, to be that by which the destination of his property was to be determined."

In Doe d. Stevenson, A by his Will, gave a copyhold tenement unto my son G, to hold the same unto him and his heirs and assigns for ever; but in case my said son G shall happen to depart this life without leaving any issue of his body, lawfully begotten, then living, or being unto such issue, and he my said son shall not have

disposed and parted with his interest of and in and to the said copyhold estate and premises, then and in such case, I give and devise the same "messages and unto and to the use of my illegitimate daughter A.S. and of her heirs and assigns for ever.

Held that the limitation over to A.S. was valid, and that upon the death of G without issue and without having disposed of the property, A.S. was entitled to it in fee. Held, also, that a disposition by G, by his Will, was not within the meaning of the Will, and that A.S. was entitled to the land, although G had devised it to another person by his Will.

Quite frankly, apart from authority, I would have held that the use of the word "desire" would have inclined me to the view that no trust was intended. Of all the cases cited Shearer v. Hogg was the latest, the only one coming for decision in this century. It is also based on the Civil Code of Quebec and the doctrine of substitutions. This case in substance is closer to the one before me. I shall follow it.

I therefore take the view that the five legitimate children of Henry Clermont Louisy and Marie Edith Louisy are entitled to the property that was left by Henry Clermont and not disposed of by Marie Edith during her lifetime and that includes the Saphyr estate.

Following on that determination and in accordance with Article 654 et seq of the Civil Code I order that Matthew Henry Louisy do return to the general mass the donation received by his parents in the father's life time, Exhibit F, if he is to take his one-fifth share of the residue.

The Will of Henry Clermont provided for accretion and survivorship among the legitimate children. The matter becomes relevant in a sense since Peter Matthew Henry Louisy has passed away. Learned

Counsel for the Defendants submitted that accretion and survivorship could only occur if Peter Matthew Henry Louisy had no children. He cites in support Article 836 of the Civil Code which is as follows:

> "Every testamentary disposition lapses if the person in whose favour it is made, or his children, do not survive the testator."

Counsel also relied on the decision of Manning J. in suit 19 of 1952 Marie Egyptienne Alexine v. Ferdinand Decaine decided on March 23, 1953. As I understand the judgment the learned Judge distinguished between accretion and survivorship, the one occuring before the testator's death and the one occuring after the testator's death.

In our case there was no accretion for all the children survived their father. The Article cited above would be relevant if Peter had died before his father and leaving children, then presumably the children would be entitled to his share under Article 836.

In the Alexine case Edgar had died without issue before the testator. His share lapsed and that was described as accretion. There was no provision for survivorship in the case. Let me cite pages 4/5 of the judgment.

"Mr. Mathurin, for the defendant urges that 'accretion' in the case of Wills has a definite meaning and applies only to a lapse due to the death of a beneficiary before the death of testator. It does not mean 'survivorship'. As to the meaning of 'accretion' he referred me to Mignault's Droit Civil Canadien Vol. 4, p.323 and to Ripert's Traite de Droit civil, Vol. 3 p.681, 682; and to Vincent v. Claude, Quevec Reports, p.152.

Mr. Compton agrees with the usual meaning of 'accretion' to be derived from the authorities cited by Mr. Mathurin; but asserts

that in this particular case it is clear that the testator meant something different.

I am unable to agree with him."

So on the strength of that decision cited by Mr. Cooper what we have here is survivorship which is provided for in Clermont's Will together with accretion. In the Alexine case the testator only provided for accretion.

So strictly speaking according to the terms of the Will of Henry Clermont the share of Peter Matthew Henry Louisy would pass to increase the shares of the other four children but one of the heads of relief sought by the Plaintiffs was a declaration by the Court that the said limitation of accretion and survivorship is capable of being severed or being put an end to by deed with the mutual consent of all the legitimate children.

Although Peter Matthew Henry Louisy has passed away since the filing of the originating summons learned Counsel for the Plaintiffs has asked the Court to permit him to share in the estate. He is in effect conceding or agreeing to the heirs of Peter Matthew Henry Louisy taking the share of the Deceased.

I accordingly grant the declaration in paragraph (3) of the originating summons.

In paragraph 4 of her Will Marie Edith Louisy stipulated that her children named as her beneficiaries should reimburse her executor, Peter Matthew Henry Louisy, for all his personal expenses he shall have lawfully made or incurred in respect of her Will and her succession and in respect of the Will and Succession of her husband.

In that connection attached to a letter by Peter Matthew Henry Louisy to his brothers and sisters were some accounts which show that Peter Matthew Henry Louisy received a total sum of $97,023.63 as income from the estate from 1986 to 1992 but in the same period had expended $1,293,513.00.

By paragraph 17 of the affidavit of Josephine Henry Louisy she says the beneficiaries are willing to pay the Executor all his proper personal expenses but his figures are exorbitant, unsatisfactory, grossly excessive and/or improper.

At paragraph 4 of the originating summons the Plaintiffs ask for certain relief in this regard. In his response learned Counsel for the Defendants submitted at the hearing that he had discussions with learned Counsel for the Plaintiffs the previous day and he was of the view that the matter would not come up in Court and he suggested that the Parties be asked to go and settle the matter since Peter is entitled to remuneration for his services.

Earlier I made mention of the failure of the Parties to resolve their dispute. There is no reason to believe that they can now settle the financial aspect. The fact is that Peter Matthew Henry Louisy put figures to the Court on a piece of paper but there are no receipts or documents to substantiate them. This is totally inadequate and I reject the account or figures submitted by Peter Matthew Henry Louisy already referred to already referred to.

I order Peter Matthew Henry Louisy or rather his Executrix who is now a Party to the action to:

(a) serve on each of the Parties, apart from herself, and file in Court, a full, detailed and proper account vouched for by receipts and an affidavit of all personal expenses she shall have lawfully made or incurred in respect of the Will and succession of the said Marie

Edith Louisy and in respect of the Will and Succession of Henry Clermont Louisy;

(b) serve on each of the Parties hereto, apart from herself, and file into Court a full, detailed and proper account, vouched for by affidavit and receipts and expenses by her in respect of the portion of the Saphyr estate from the date of the death of Marie Edith Louisy up to the date of such account.

(c) file the said accounts on or before September 30, 1996.

I further order the Executrix of Peter Matthew Henry Louisy to execute not late than August 31, 1996, a Vesting Assent of the Saphyr estate in favour of the five legitimate children of Henry Clermont Louisy and Marie Edith Louisy at their joint expense.

I find that the administration of the estates of Henry Clermont Louisy and Marie Edith Louisy were difficult administrations not to mention the error of law which arises as a result of my finding above. I think proper rendition of the accounts ordered above shall settle what is due to each of the beneficiaries and I refuse to make the declaration requested at paragraph (6) of the originating summons.

Learned Counsel for the Defendants made no submission opposing the request for partition and so I order the Executrix of Peter Matthew Henry Louisy and the other Parties to the action to agree on a surveyor to view and examine the Saphyr estate with a view to its partitioning among the persons entitled, the costs of such partition to be borne in equal shares.

I now come to a consideration of the hypothec, Exhibit "D". During his submissions learned Counsel for the Defendants stated:

> "On the question of the mortgage, no problem with that. They are both liable to half."

He did go on to question why Peter should be liable to more than half. That is explained by the fact that the other half is to be borne by the heirs of Marie Edith Louisy and Peter is one of such heirs.

I order that the amount of the mortgage debt is to be met by the heirs of Peter Matthew Henry Louisy to the extent of half of the debt and the other half to be met by the heirs of Marie Edith Louisy.

Learned Counsel for the Plaintiffs referred to Articles 975, 977 and 978 during his submission that Peter Matthew Henry Louisy is to be regarded as a volunteer in the administration of the affairs of the Saphyr estate. I agree with learned Counsel for the Defendants that all the Parties accepted Peter as manager of Saphyr estate and under the provision of Article 978 it is my view that when he has submitted the accounts referred to above, the Parties can agree among themselves to "reimburse in all necessary or useful expenses" and upon their failure to agree the Court can make an appropriate order.

The last thing I want to refer to is the land certificate with the registration of Peter Matthew Louisy as Executor of the Estate of Marie Edith Louisy. It is clear that Peter is not registered as owner in his own right and that registration does not give him proprietorship of Saphyr estate in preference to any of the other beneficiaries. There is here no challenge of his personal entitlement. Under that registration at least four of the children inclusive of Peter, are entitled. But the result of my finding on the main issue is that the registration becomes an error in law in that I have held that from the time of the death of Marie Edith all five children and not only four were entitled to the Saphyr estate.

The costs of these proceedings are to be borne by the respective Parties.

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A.N.J. MATTHEW
Puisne Judge