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*March 7, 8.
*March 21.

CARRIE SHEARER (DEFENDANT) ....APPELLANT;

AND

ANDREW S. HOGG (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Will—Universal legacy—Powers vested in legatee—Devise by legatee of residue undisposed of at her death—Substitution—Words and phrases—"Or not disposed of"—"In her possession."

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 (Q.R. 40 S.C. 139, *sub nom. Shearer* v. *Forman*), 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.

APPEAL from the Superior Court, sitting in review, at Montreal(1), affirming the judgment of Lafontaine J., in the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The action was originally instituted by Addie M. Shearer, one of the children of the testator, against her sister, the present appellant, and John Forman, her husband. The original plaintiff died and the present respondent, by *reprise d'instance,* became plain-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) Q.R. 40 S.C. 139, *sub nom. Shearer* v. *Forman.*

tiff as the executor of the last will and testament. The action was dismissed in so far as it affected John Forman and was maintained in respect of the present appellant; no appeal having been taken in regard to the decision in favour of Forman, the judgment of the Court of Review merely affirmed the judgment of Mr. Justice Lafontaine against the appellant, Carrie Shearer. The clauses of the will of the late Andrew Shearer, in respect of which the dispute arises on the present appeal are quoted in the judgments now reported.

Leo H. Davidson K.C. for the appellant.

W. D. Lighthall K.C. for the respondent.

THE CHIEF JUSTICE.—The circumstances under which this will was made may help us materially to ascertain by interpretation of the language used what the intention of the testator was. Married under conditions which established community of property between himself and his wife, the testator wished evidently to provide for her and her four young daughters, two of whom were for some reason the object of his special solicitude. He had managed to accumulate a modest fortune barely sufficient, as he foresaw, to provide for the maintenance of those dependent on him in a very humble way. His estate at his death was valued at $7,000. Having confidence in his wife's prudence and capacity, which confidence has been fully justified, and to avoid, no doubt, the partition of the community, a costly and cumbersome proceeding, he gave her his estate burdened, however, with these obligations: 1st. That she should, during her lifetime,

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keep her children with her and provide for their education and maintenance according to their station in life; 2ndly. That such portion of the estate as might remain undisposed of or in her possession at her death should go to their four children in certain proportions which he fixes.

The words used in the will, and the interpretation of which has resulted in this litigation, are:

> 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," etc.

The words which have created the embarrassment are, "or not disposed of." Are those words mere surplusage in the sense that they add nothing to those that precede, as for instance, the words "her heirs and assigns" in the disposing clause; or are they words of amplification conferring power upon the widow to dispose of the estate by will, as they would if they were construed without reference to the context?

Taken literally, I would be disposed to say that these words might be construed, in view of the context, to convey the right to dispose of the residue of the estate in her possession at death by will. In that way effect is given to each word; property which is the object of a testamentary disposition remains until death in the possession of the testator. "Le mort saisit le vif." It is also possible to say that these words are mere surplusage, that is, the testator meant that property in possession of his wife in the sense that it was not disposed of by her by deed *inter vivos* would go to their children. That being a possible construction should, in my opinion, prevail as being most consistent with the clear intention of the testator

whose chief desire evidently was to provide for the support and maintenance of those dependent upon him as far as his modest estate would permit. To hold that the widow had an absolute power of disposition by will would be to defeat the clearly-expressed object of the testator. Nothing is more apparent than his solicitude for the care and maintenance of his young and helpless family, and if he gave his widow the power free from any limitation of making a will she might in the event of her death following close upon his dispose of the estate for the benefit of absolute strangers. Nothing could be further from the thought of the testator. Any possible construction of the terms used by him which would prevent the happening of such a contingency should be adopted.

I would dismiss this appeal and confirm the judgment below.

DAVIES J.—The controversy between the parties to this appeal depends for its solution entirely upon the construction given to the will of the late Andrew Shearer of Montreal.

The respondent claims that there was a substitution created by the will on the death of Mrs. Shearer and that he was the heir of one of the substitutes. The appellant's contention is that the will did not create a substitution, that the devise to the wife was absolute and that the power of disposition given to her of the property extended as well to a testamentary disposition as to one made in her lifetime.

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. The rules with respect to the construction of wills in

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the Province of Quebec are not different from those which prevail in all the other provinces of Canada. Articles 872 and 928 C.C. In all cases the intention of the testator, to be gathered from the whole instrument, is to govern.

By his will, executed in 1867, Andrew Shearer devised and bequeathed all the property, estates and rights, without exception, of which he should die possessed or entitled to unto his wife Elizabeth Crowe and her heirs and assigns for ever.

Following this absolute devise of his property are the two paragraphs in question which read as follows:

> And, it is further my will and wish, that my said beloved wife keep with her our daughters as long as any of them may wish to remain, and especially that our daughters Addie and Edith, have such education and upbringing as she will be able to afford them according to their station in life, and that inasmuch as our second daughter, Tina, is afflicted with sickness that she should be her mother's special care, during her said mother's lifetime with such necessaries as she may be able to provide her with.
>
> 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 that upon her said decease, the same should be divided among our said children as follows:—One-half thereof to our said daughter Tina, and the other half to our children, or those then living, in equal shares, one share to each of them, and their heirs and assigns forever.

I do not think any reasonable doubt can exist as to the testator's intention as expressed in and gathered from the entire will.

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 power of the wife to dispose of the property or any part of it for the purposes specified in the will during her life was unquestionable. The will then provided that if at her death any

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of the property remained "in her possession or not disposed of" *upon her decease* the same should be divided among their children in the manner he then proceeds to specify.

The whole question before us resolves itself into this:—Do the words "should my wife die leaving any of my said property or rights *in her possession or not disposed of*" give the wife the power of testamentary disposition over the property; or is the disposition referred to one to be made by her during her life?

I think the latter expresses the true intention of the testator. There seemed to be much difficulty in giving a meaning to the words "in her possession" preceding those "or not disposed of." I am inclined to think they were inserted to cover the possible case of proceeds of property disposed of by the wife and which were at her death in her possession and held by her to be applied as the will prescribed for her own maintenance and that of her children. At any rate they are applicable to such a condition and to such process. The remainder of the property not sold would be embraced by the words "or not disposed of." General words giving a power of disposition unless controlled by their context may well be held to embrace testamentary disposition. I cannot think they do so as they stand in this will. Such a construction would seem to me to be opposed to the testator's entire plan as to the disposition of his property. His wife gets the absolute power of disposition over it during her life for her own and her children's maintenance and the latter's education, and all the property not, in the wife's judgment, disposed of by her in her lifetime, for the persons and purpose he specially indicates, is to be divided among his children in the pro-

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portions he specifies. To construe the words "or not disposed of" as giving the wife a testamentary power of disposition which might be used to give the property to strangers or, as in fact the widow attempted to use it, to give the undisposed of property to one child to the exclusion of the others would be to defeat the testator's intention and the plan and object he evidently had in mind when framing his will.

I conclude, therefore, that the respondent's construction of the will is the correct one and that it created a substitution, on the death of Mrs. Shearer, with respect to the then undisposed of property in favour of the testator's children.

I would dismiss the appeal.

IDINGTON J.—As I interpret the language of the will in question, it cannot be construed otherwise than as creating the substitution found therein by the courts below and, therefore, would dismiss the appeal with costs.

DUFF J.—It is conceded by counsel on both sides that if the words "desire, will and wish," in the fifth paragraph of the will, are properly construed as words of disposition and not of recommendation merely then the disposition effected by that paragraph is in law incompatible with the vesting in the widow of powers of disposition by will. I have no doubt that the words in question must be construed as words of disposition; and it follows, consequently, that the widow had no power of disposition by will and that a substitution *de residuo* was created.

ANGLIN J.—Notwithstanding the absolute terms in which the testator has couched the legacy to his

wife, observing the fundamental rule of construction which prescribes that testamentary intention should be gathered from the entire will (arts. 928 and 872 C.C.), this bequest must be held to be subject to such qualifications and restrictions as will give due effect to the provisions which follow it. By the first of these the widow's power of disposition of the property during her life is made subject to the rights of her daughters Addie, Edith and Tina to maintenance, care and education. It is the manifest intention of the testator that the property bequeathed to his wife shall be used by her for these purposes and for her own support. Actuated by the same wish he proceeds to state that it is his "desire, will and wish," not that his wife shall by her will make a designated disposition of so much of his property as shall at her death be left "in her possession or not disposed of," but that such property shall under the operation of his own will pass to his children in defined shares. While this is clearly intended as a dispositive provision, its effect is perhaps not so obvious.

The subject of the gift over to the children is such of the property bequeathed to her as the widow dies "possessed of" and such of it as she leaves "not disposed of." It is a little difficult, at first blush, to appreciate what the testator had in mind which might be property not disposed of and yet not in possession of his widow at her death. But, although at first inclined to read "or" as "and," since it is conceivable that some of the property though not disposed of might, nevertheless, be out of the widow's actual possession at the time of her death, I do not think we would be justified in substituting "and" for "or." It is not clear that it is necessary to do so in order to carry out the testator's intention.

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What is the restriction imposed upon the widow's power of disposition? On a literal reading of the will she is first denied the power to alienate any of the testator's property of which she dies possessed. This *primâ facie* excludes the power of disposition by will because, ordinarily, she would die possessed of property which she might thus dispose of. Confining the application of the words "or not disposed of" to such property (if any) as though not in her physical possession yet belonged to her at her death (*i.e.,* had not been alienated) as must be done to give to them any effect, when read in conjunction with the other words "in her possession," do they import a power of disposition by will? I think not. Although, if they stood alone, the words "not disposed of" might well mean "not disposed of by act *inter vivos* or by will" (Pothier, Œuvres, vol. 8, "Des Substitutions," s. 4, No. 149), when taken in conjunction with the words "in her possession" and treating these latter words as not being mere surplusage, but as intended to impose some real restraint on the widow's power of alienation, I think the words "not disposed of" should be read as "not disposed of by act *inter vivos*" and, therefore, as not implying a right in the widow to make a disposition by will. On this question of construction, *Stevenson* v. *Glover*(1), referred to by Mr. Justice Lafontaine, is in point.

The words "not disposed of" are satisfied by a construction which restricts them to disposal by acts *inter vivos,* and that construction seems to me to best accord, not only with the words immediately preceding, but also with what appears to be the governing

(1) 14 L.J.C.P. 169.

intention of the testator, namely, that, while giving his wife the control, management and disposition of his entire estate during her life in order to provide for her own needs and for the education, maintenance and care of his children, he wishes by the dispositions of his own will to secure to the children what should remain of his estate upon his wife's decease.

In view of the form of the bequests to the wife (art. 944 C.C.), the powers of disposition given her (arts. 952, 975, 976 C.C.), and the dispositive provision by which the daughters take the property undisposed of or in the widow's possession at her death not from her, but directly from the testator (art. 962 C.C.), and having regard to article 928 C.C., I respectively concur in the conclusion of the learned judges of the Superior Court and Court of Review that we have here a case of substitution of residue. Its scope and extent I have indicated above.

The appeal fails and should be dismissed with costs.

BRODEUR J.—For the reasons given by the Chief Justice I am of the opinion that this appeal should be dismissed and the conclusions of the judgments of the Superior Court should be confirmed.

Appeal dismissed with costs.

Solicitors for the appellant: *Davidson & Ritchie.*
Solicitors for the respondent: *Lighthall & Harwood.*