



gift the two conditions to be justified by the wife being a request to the executors to purchase the home and her approval of the home they proposed to purchase pursuant to that request.

It is the plaintiffs' case that the gift was an absolute one which vested in the widow from the date of her husband's death and that it therefore forms part of her estate to which the plaintiffs as her executors are entitled. The defendant's case is that the gift was conditional and, the conditions not having been fulfilled by the widow during her lifetime, it lapsed on her death. In so far as the interpretation of the words in the will is concerned no authorities were cited by Mr. Henriques for the defendant and his submission is that the authorities cited by Mr. Ireland for the plaintiffs cannot be relied on because they deal with settlements where the question of vesting is not in issue whereas in this case vesting is the issue which the court has to determine.

In the construction of wills the cardinal rule is to ascertain the intention of the testator and, if the words used in the will so permit, to give effect to that intention. It seems to me to be clear that the testator in the instant case intended that his wife should, in addition to the other benefits which she received under the will, have a home of her own. In order to achieve this he first of all made clear provisions for the matrimonial home to go to the wife, but he also went on to make provisions as to what would be done in the event of his not owning a matrimonial home at the time of his death. It is those provisions that I am required to construe. If those provisions are to be construed as effecting a conditional gift then the testator would be making an absolute gift of a home if he owned one at his death but a conditional gift if he did not. It seems to me that the only true condition attached to the gift is that the funds available from the estate should be sufficient to meet the specified maximum amount of \$5,000 involved in the gift. Subject only to this, it seems to me that the testator was imposing on his executors an immediate obligation to purchase a home for his wife and the words "to be approved by her" indicate merely that in carrying

/.....

out the obligation they must have regard to the wishes of the wife as to the choice of a home. In so far as the words "at the request of my said wife" are concerned I would adopt with respect the views of the Master of Rolls in Thornton v. Hawley 10 Ves. 129 at page 136 :

" Nothing is more common than to direct money to be laid out upon request. The object of that is only to insure that the act shall be done, when the request is made; **not to prevent it until request.** "

It is true that the facts of that case are different in that it was concerned with a settlement where there had clearly been a vesting whereas in the instant case the question for consideration is whether a vesting has been effected at all. I am of the view, however, that the principle used there in construing the words "after request to them" would be equally applicable in this case. It seems to me that the words in paragraph 10 of the will permit and do not negative the apparent intention of the testator to provide a home for his wife and, with that intention, to impose on his executors the obligation, effective at his death, to purchase such a home.

In the circumstances, the plaintiffs as executors of the will of Catherine Jones Robinson are entitled to have payment made to them by the defendant of the amount of \$10,000 together with so much of the income from that amount as was not paid to Mrs. Robinson during her lifetime.

The costs of the summons will be paid out of the Estate of the deceased Fitzclarence Carmichael Robinson.