

became entitled upon the death of her husband, intestate. The clause is as follows: "This is my last will and testament. My husband made his will. Its contents I know not. What he gives me and for my disposal I wish to give to the family of my brother Josiah."

It is argued by Mr. Grier, I think correctly, that this clause cannot operate upon the property which the wife has taken upon her husband's intestacy. She thought that her husband had made a will. Under it she expected to take some benefit; what, she did not know. Whatever she took in this way from her husband she desired should go to the family of the brother, who, according to a later clause in the will, had shewn her greater kindness than she could ever repay.

I have little doubt that, if the testatrix had supposed that her husband was going to die intestate, she would have given to Josiah or his family all that would in that event have come to her from her husband's estate. But the difficulty is, that I am not allowed to make a will for the testatrix, but merely to interpret the language which she used. In the construction of wills the Courts lean against intestacy; but where there is in fact an intestacy the law must take its course.

It is argued that the expression used here is capable of being so construed as to cover this property. I do not think that the language permits the construction suggested. When the testatrix used the expression "what he gives me and for my disposal," it can be fairly interpreted, having regard to the context, only as relating to that which the husband by his will gives to the wife and for her disposal. It would be juggling with words to read it as suggested by Mr. McMaster—"what he gives me by his will or leaves by intestacy for my disposal;" because it is quite plain that what the testatrix had in her mind was a will which she thought was in existence and which she expected would confer some property rights upon her. In *Re Lenz*, 2 O.W.N. 721, I discussed the principle which I think is here applicable, and I need not again refer to the cases.

One of the brothers has, I understand, conveyed his interest to the family of Josiah, thus recognising the real, as against the expressed, intention of his sister. Those entitled to the other third have not seen fit to adopt this course, and they are entitled as upon an intestacy so far as this fund is concerned.

Costs of all parties to be paid out of the estate.