

defendant Marianne Ball, from a part of the judgment of a Divisional Court (2 O. L. R. 169) reversing the judgment of FALCONBRIDGE, C.J., at the trial, and declaring that the alternative provisions contained in the second paragraph of the will of the late Thomas Henning, made on the 10th June, 1887, never took effect, and that his estate descended to his next of kin as upon an intestacy, and that the executors appointed by the alternative provisions of the will, to whom probate was granted, became trustees for the next of kin. The testator, by the first clause of his will, gave all his estate to his wife and appointed her executrix. The second clause began: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property." And he then went on to divide his estate and appoint executors. The appellants were given life interests in part of his estate, and so was one of the plaintiffs, the testator's brother, John Henning. The executors proved the will, upon the assumption that the testator and his wife died at the same time, and retained the corpus of the estate under their control, paying out the income to the persons named as beneficiaries. The wife of the testator died on the 11th December, 1888, and the testator on the 27th of the same month. Both were ill at the same time, of the disease which caused their respective deaths, but there was an interval of 16 days between the two. The Divisional Court held that they were not "deprived of life at the same time," and, as the other event, of the testator surviving his wife, had not been provided for by the will, that he, in effect, died intestate.

A. B. Aylesworth, K.C., and A. S. Ball, K.C., for appellants, contended that the testator and wife both died, or were both dead, "at the same time," within the meaning of that expression as used in the will.

C. Robinson, K.C., H. J. Scott, K.C., and H. O'Brien, K.C., for plaintiffs.

J. G. O'Donohue, for defendant Clara Henning.

OSLER, J.A.:—I am unable to understand how two persons can, by any reasonable intendment, in the construction of plain language, be said to have been deprived of life "at the same time," no matter what may have been the cause of their deaths, when one of them has survived the other by a fortnight. If, therefore, the event of the testator and his wife being deprived of life at the same time was an event or