

The motion was heard in the Weekly Court, Toronto.  
 M. C. McLean, for the executor.  
 F. W. Harcourt, K.C., for the infants.

MIDDLETON, J., in a written judgment, said that under the will there was a gift to F.S.S. to be handed to him upon his attaining the age of 21 years. The will proceeded: "In the event of the said F.S.S. not surviving me and dying before he attains the age of 21" the property shall go to the heirs of the testator.

F.S.S. survived the testator and was still under 21. It was sought to have it declared that his interest was absolute, so that his property might be used for his benefit.

When there is an absolute gift, and it is provided that if the donee dies under 21 and without issue it shall go over, "and" is not to be read as "or;" so to read it would be to change the expressed wish of the testator and to make the gift over operative in events other than those mentioned by the testator: *Malcolm v. Malcolm* (1856), 21 Beav. 225; *Coates v. Hart* (1863), 32 Beav. 349.

Here, if the testator knew the law, the provision is meaningless, as it is a provision that there shall be a lapse upon the death of the legatee during his life—and this would be so even if he left issue—but this is not enough to warrant changing the words written.

"And" should be read as "and" not as "or" unless it is clear that the testator meant "or," and not merely because "or" would make what might be regarded as a more artistic or logical will.

Order declaring that, the donee having survived the testator, his interest is not subject to be divested.

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MIDDLETON, J.

MARCH 30TH, 1918.

# RE DRAPER.

*Will—Construction—Fund to be Divided among Surviving Members of a Class on the Death of two Annuitants—Class Ascertainable at Time of Later Death—Member of Class Surviving one Annuitant and Predeceasing the other.*

Motion by the executors of the will of Chester Draper, deceased, for an order determining the true construction, meaning, and effect of the will.