

1949

# Orson H. Beal v. Mattie Beal Hansen : Brief of Appellants

Utah Supreme Court

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Dilworth Woolley; Attorney for Appellants;

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# In the Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE

of

Thomas A. Beal, sometimes known  
as T. A. Beal, Deceased.

ORSON H. BEAL, et al,

Appellants,

vs.

MATTIE BEAL HANSEN, et al,

Respondents.

**CASE  
NO. 7369**

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## APPELLANTS' BRIEF

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Appeal from the District Court in and for Salt Lake  
County, State of Utah, Honorable Roald A. Hogenson,  
Judge.

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DILWORTH WOOLLEY,

Attorney for Appellants,  
Manti, Utah

**FILED**

**AUG 19 1949**

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## ASSIGNMENT OF ERRORS

1. The court erred in overruling appellants' motion for a decree distributing the estate of the deceased according to the provisions of paragraph 5 of the will.
2. The court erred in decreeing distribution of the residue of said estate according to the laws of succession and not according to the provisions of the will; and the decree of final distribution is contrary to law.
3. The decree of final distribution is not supported by the facts found.
4. The court erred in its conclusion of law that paragraph 5 of the will of the deceased is inoperative and does not apply in this proceeding and does not govern the distribution of this estate and that the estate must be distributed in accordance with the laws of succession of this state.

# In the Supreme Court of the State of Utah

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IN THE MATTER OF THE ESTATE

of

Thomas A. Beal, sometimes known  
as T. A. Beal, Deceased.

---

CASE  
NO. 7369

**Appellants'  
Brief**

Orson H. Beal, Owen F. Beal, Berdella B. Evans, Allen C. Folster, Mary Cleofa Foulgar, Dean F. Folster, Viva Leone Terry, Leareda Faye Greer, Flora Montess Howard, James Eugene Folster, Thomas Aaron Folster, Elrie Simonsen, Merville Simonsen, Harris Simonsen, also known as H. B. Simonsen, Elva S. Seegmiller, Melba Simonsen Funk, Max Simonsen, Morris Simonsen, Allene Simonsen, Beverley Simonsen, Lucine Simonsen, Apollo Hansen, Glenn Hansen, Wayland Mattson, Carvel Mattson, Annie Charlotte Peterson Frost, Ida Peterson Bills, Charlotte LaVerne J. Johnson, Eva Peterson Jacobson, and Florence Carrie Peterson Thompson,

Appellants,

vs.

Mattie Beal Hansen, Arden B. Olsen, J. Stewart Thompson, Eloise Hertig, Alden Beal, Delva B. Sorensen, DruZella Vance, Mabel Jensen, Margaret B. Bailey, Alta B. Johnson, Aleath Ross, Garnel Sorensen, Robert H. Harden, Sr.,

Robert H. Harden, Jr., Grace H. Ross, Ida Beal Nielson, George Beal, Mary Beal Noyes, Milton Beal, Ralph Beal, Henry E. Beal, Leo N. Beal, George S. Beal, Clare B. Tuttle, Mazie Beal Pahlka, M. D. Beal, Raymond Beal, Margaret Beal, Richard Beal, Burns Beal, Beth B. Thayne, Roma Beal, Irene Beal, Bendetta Christensen, Francis Beal Beverly, Martha B. Spencer, John Beal, Benny Beal, Martha Beal, Nathen Beal, Glenn Beal, Martin Ellis Isaacson, Linden Beal Isaacson, Henry Thorpe B. Isaacson, Sarah Marie Isaacson Denison, Eddie Isaac Isaacson, LaVar Samuel Isaacson, LeConte Isaacson, Valoris Ann Smith Griffith, C. H. Beal, Herbie Beal, Danzel Beal, Delia Beal Werly, Daisy Beal Wilcox, Evelyn Olsen, Shirley Olsen, Berdie Olsen, Carie Amelia P. Tanner, and Berdella B. Evans as administratrix with the will annexed of Thomas A. Beal deceased,

Respondents.

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This is an appeal from the decree of final distribution made and entered in the matter of the estate of Thomas A. Beal, deceased, on June 13, 1949.

The appellants are all of the relatives of the full blood of Thomas A. Beal and his wife, Ida Peterson Beal, except one of the latter, who claim the estate under paragraph 5 of the will; while the list of respondents includes all of the relatives of the half blood of Thomas A. Beal, who share in the distribution with his relatives of the whole blood under the statutes of succession as in cases of intestacy, and also the administratrix of the estate with the will annexed and the one Peterson legatee who does not join in the appeal.

At the time the petition for settlement of final account and for final distribution of the residue of the estate to the persons entitled thereto came on for hearing before the

court, the persons who are joined as appellants appeared in the probate proceeding and moved for an order and decree setting aside the residue to them, and the one who does not join them, under paragraph 5 of the will. This motion was resisted by one of the Beal relatives of the half blood. The court overruled the motion, and decreed a distribution under the laws of succession. Notice of appeal has been served upon all persons whose interests will be adversely affected by a reversal of the decree.

We assign error on the part of the lower court in overruling our motion for a decree of distribution in accordance with the will, in decreeing a distribution according to the laws of succession, and in failing and refusing to decree a distribution in accordance with the will; and claim that the decree as made is contrary to law and is not supported by the facts.

We invoke a decision of this court upon the question whether or not the residue of the estate shall be distributed in accordance with paragraph 5 of the will of the deceased.

## I.

### STATEMENT OF FACTS

There is no dispute regarding the controlling facts, which are disclosed in the findings made by the lower court. We accept as true the facts found; but the following statement, to be found in paragraph 10 of the findings, we regard as a conclusion of law, and erroneous at that, and shall treat it accordingly:

“and the provisions of paragraph ‘Fifth’ thereof are inoperative, do not apply herein, do not govern the distribution of his Estate, and cannot be given any force

or effect; and that the residue of property in said estate available for distribution . . . . must be distributed . . . . in accordance with the laws of succession of the State of Utah."

When Thomas A. Beal made his will his wife, Ida Peterson Beal, was living. They were residents of this state. They had no children or issue, father or mother living. Both had many brothers and sisters of the half blood and nieces and nephews who are children of deceased brothers and sisters of the half blood. Also at that time Thomas A. Beal had seven brothers and sisters of the whole blood, or there were children of such of them as had died leaving children; and Ida Peterson Beal had three brothers and sisters of the whole blood, or there were children of such of them as had died leaving children. So that if the wife should predecease her husband and he should die intestate, the succession would fall to his kindred of the half as well as of the whole blood. (Sec. 101-4-5, subdiv. (4), and Sec. 101-4-17, Utah Code Annotated, 1943.) While if the wife should outlive the husband and then die intestate, the succession would be to her kindred of the half and whole blood.

Thomas A. Beal made his will on March 13, 1941. He died January 3, 1948. His wife, Ida Peterson Beal, died January 6, 1945. The will was admitted to probate and letters of administration with the will annexed were issued to Berdella B. Evans March 20, 1948.

The following is a copy of the will:

#### "LAST WILL AND TESTAMENT

I, Thomas A. Beal, of the City & County of Salt Lake, State of Utah, being of sound mind and memory do make, publish and declare this to be my last

Will and Testament, hereby revoking any other will or testamentary disposition heretofore made by me.

First — I direct that all my just debts and funeral expenses be paid by my Executrix, hereinafter named, and that my body be buried decently in accordance with the condition of my estate, and that simple, permanent stone mark my grave.

Second — I give and bequeath to the School of Business of the University of Utah all my professional library at the University and to the Snow College all my professional books at home, not including family records, books of account, or books of a religious nature.

Third — I give, devise and bequeath all the rest, residue and remainder of my property, both real and personal, of whatsoever kind the same may be, or wheresoever situated, including estates of inheritance of which I may die possessed, or to which I may be entitled to Ida Peterson Beal, my wife, to have and to hold the same to the said Ida Peterson Beal and her assigns forever.

Fourth — I nominate and appoint the said Ida Peterson Beal the Executrix of this, my last Will and Testament, to act without bond.

Fifth — In the event that my wife and I shall perish in a common catastrophe, or disaster, then, and in such event, I give, devise, and bequeath to the President of the University of Utah for the School of Business the sum of \$500.00, and to the President of Snow College for the Snow College a like amount, for the purchase of books in Business and Economics, for the use and benefit of said schools in building up their libraries. And in such case of death, I give, devise, and bequeath all the rest, residue, and remainder of my property, both real and personal, of whatever kind the

same may be, or wherever situated, or to which I may be entitled, to my nearest of kin and my wife's nearest of kin. That is to say, to our brothers and sisters, of the full blood, share and share alike, it being understood that the children of any said brother or sister now dead, or who may predecease us, shall stand in the place of such deceased brother or sister and take a one-tenth interest in the remainder therein devised and bequeathed. Further, in such case, I nominate and appoint Carvel Mattson the Executor of my last Will and Testament, to serve without bond, and I hereby revoke any and all former wills by me made.

In Witness Whereof, I have hereunto set my hand and seal this Thirteenth Day of March, 1941.

Thomas A. Beal."

## II.

### ARGUMENT

#### Point 1

The cardinal rule of construction in all will cases is that the will must be construed in accordance with the intention of the testator.

Section 101-2-1, Code, 1943, reads:

"A will must be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible."

This rule permeates all other rules and is to have full weight in all circumstances.

Mr. Justice Frick, in *In re Popleton's Estate*, 34 Utah 285, 97 Pac. 138, gives emphasis to the importance of this rule in the following language:

"This section controls all other sections in which rules of construction are given, in that no rule provided for is to be given force and effect except for the purpose of ascertaining the real intention of the testator as expressed by him. This is the ultimate object to be kept in mind and to which all rules must yield. Rules of construction, therefore, are to be resorted to as mere aids or guides for the purpose of attaining the ultimate object, namely, the real intention of the testator."

If we read this will with the foregoing rule in mind we find little difficulty in discovering what Thomas A. Beal intended with respect to the disposition of his property upon his death.

It is clear that the testator had in mind as the objects of his bounty (1) The University of Utah and Snow College, (2) his wife, and (3) the kindred of the full blood of himself and wife; and it is likewise clear that he did not intend that his kindred of the half blood should take any part of his estate, who would inherit if he should die intestate. His intention in regard to the University and College is clearly expressed that they should take his professional books, and, also, as we think, that each should take \$500.00 additional in case he and his wife should die in a common disaster or she should predecease him. It is likewise clear beyond all question that he intended that his wife should take all of his property, except his books, if she survived him. Having expressed such intention in the first part of his will, he next came to a consideration of what should be done with the estate should she not be living at his death or should they meet death in a common disaster. Death of both husband and wife in a common disaster, especially on the public highways, is not an uncommon happening.

A glance at the headlines in the newspapers any morning will remind one of such events. Now, the significance of the expression "death in a common disaster" in this will is this: That in such event, absent some provision in the will, the estate would probably be succeeded to by his relatives under the laws of succession. But since he did not want the half bloods to inherit and did want his estate to go to his and her relatives of the whole blood in case she did not survive him to take under paragraph 3, he was prompted to write paragraph 5 of the will to make sure that if such a thing should happen the property would go to them. He was not thinking of death in a common disaster as a condition upon which the property should vest in them. The only condition which he had in mind was that his wife should not outlive him to need his property. The contingency referred to in paragraph 5 is the reason or occasion for making the disposition and was never intended to be a condition upon which the disposition is to become effective. In *Skipwith v. Cabell* (1870) 19 Gratt. (Va.) 758, which is summarized in 11 A. L. R. 858, it appeared that a woman made a will disposing of her property and then added a codicil providing: "In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin, Dr. Carter of Philadelphia, and my cousin Peyton Skipwith of New Orleans, one half of which each must hold in trust for the benefit of their children." The contention was made that the legacy depended upon the sudden and unexpected death of testatrix, and that, since this did not occur, nothing passed by the bequest. The court, however, holds this was not a conditional legacy, saying:

“In cases of this sort, the question to be determined is whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative. . . . Upon the whole, it seems clear that such expressions as those used in this clause could not properly be construed as creating a condition unless accompanied by other language so clear as to admit of no other interpretation. They are not so accompanied in the present case, and, without putting the slightest strain upon the language, we can understand it as designed only to express the reason which led the testatrix to dispose of the residue at the time, and to avoid risk of future delay.”

Another similar case is *Young Women's Christian Home v. French* (1903), 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 187. The case is cited in a note in 43 A. L. R., page 1350.

In that case it appeared that a woman gave half of her estate to her husband for life, with remainder to the Young Women's Christian Home, and the other half to her son, with the provision that

“in the event of my becoming the survivor”

of both husband and son, the entire estate should go to the Young Women's Christian Home. The testator and her husband and son perished in a common disaster, under circumstances affording no evidence of survivorship.

Holding that the estate did not fall into intestacy, but passed under the will to the Young Women's Christian Home, the court said:

“Reading this will from the standpoint of the testatrix, as we must, we think it not open to doubt that

she intended to dispose of all her estate, and did not intend to die intestate as to any part of it; that she had in mind only three objects of her bounty, her husband, her son, and the Home, and that her intention, failing husband and son, was that the Home should take. If husband alone survived, it was to go to the Home at his death. If neither husband nor son survived it was to go to the Home at once. Is her manifest intention to be defeated because, instead of saying: 'If neither my husband nor my son should survive me, I give and bequeath my property to the Home,' she said, 'In the event of my becoming the survivor of both my husband Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I give and bequeath all my property to the Young Women's Christian Home?' We do not feel compelled to so hold, and, by accepting so technical and literal a view, to reach a result on the theory of a change in the burden of proof, or of an accidental omission to prevent it. This is not a case of supplying something omitted by oversight, but of intention sufficiently expressed to be carried out on the actual state of facts . . . . We think, upon principle, that the property of Mrs. Rhodes should go as directed if she survived her son, in the absence of proof to the contrary."

Still another similar case is *In Re Probate of Will of J. Clark Tinsley, Deceased, \_\_\_\_\_ Iowa \_\_\_\_\_*, 174 N. W. 4, 11 A. L. R. 826, in which the testator was about to undertake a journey to California and made this will:

"In case of any serious accident, after my just debts are paid, I direct that my aunt, Miss Mary E. Clark take entire charge of my estate as she sees fit."

In answer to an objection that this was no will since no serious accident occurred, the court said:

"It may well be that the contemplation of a long journey, and its possible dangers and exposures, suggested to the mind of the deceased the wisdom of providing for the succession to his estate in the event of his death, and that, acting upon this thought, he prepared the paper in question. This would indicate no more than that the circumstances mentioned were the occasion for his act, and not at all that his death while on that trip was a contingency without which the will would not become operative."

In 68 C. J., page 630, Section 256, under the title "Wills," subtitle "Contingent Wills," is found a statement of the general rule which we think is applicable in cases of this kind and to this case in particular, as follows:

"Whether a will is to be regarded as contingent turns upon the point whether the contingency is referred to merely as the occasion of or reason for making the will at the time it is made, or is referred to as the reason for making the particular disposition of property which is provided for, and is intended to specify the condition upon which the will is to become operative, it being only in the latter case that the will is contingent. . . .

"Unless the terms of the will clearly show that it was intended to be contingent, it will be regarded as absolute and unconditional."

In the notes to the paragraph from which the above is quoted will be found many cases on both sides of the question to be decided in this case. In speaking of such cases the supreme court of Kentucky, in *Walker v. Hibbard*, 185 Ky. 795, 215 S. W. 800, 11 A. L. R. 833, remarks:

"It will be seen from the description of the two classes of wills that the distinction between them is so

narrow that it is often difficult to decide in which class the paper in question should fall, and in some cases this has influenced courts to attach importance to the relations the beneficiary bore to the testator, and to lean towards that construction most favorable to the natural objects of his bounty."

There is no way in which the cases upon the subject can be reconciled. They will fall upon one side of the line or the other for reasons peculiar to themselves, unless the language is so clear and explicit as to admit of no doubt whatsoever.

In re Searl's Estate, \_\_\_\_\_ Wash. \_\_\_\_\_, 186 P. 2d 913, 173 A. L. R. 1247, is against our side, or so it seems.

In that case the husband's will gave his estate to his wife with the provision that in the event that they should meet death "by accident or otherwise at the same time or approximately the same time," the estate should go to his wife's sister. The wife died May 19, 1945, and the husband July 5, 1945. The court held that they did not die at the same time or approximately the same time, hence this provision was not operative, and distributed the husband's estate under the laws of succession. The court spends most of its writing on the meaning of the word "approximate" and leans heavily on *Glover v. Reynolds*, 135 N. J. Eq. 113, 37 A 2d 90, which is another case apparently in favor of the other side.

We feel that the courts in those two cases have not been as mindful as they should have been about giving force to the manifest intention of the testators. The opinions strike this writer as being too literal, too strict, in their construction of the instruments under consideration.

The opinion in the Washington case does not ring true. It gives forth a hollow sound. One has the feeling, when reading it, that the writer thereof felt convinced from reading the will that the testator intended his wife's sister to have the property in the circumstance which developed but that the court could not give it to her because the testator had not said so in unmistakable language. The opinion gives too much weight to mere words and not enough to ideas, for which words are mere symbols.

Against the two cases last mentioned, we place the case of *Re Hardie* (1941) 176 Misc. 21, 26 N. Y. S. 2d 333, affirmed without opinion in (1942) 263 App. Div. 927, 33 N. Y. S. 2d 389, appeal denied (1942) 263 App. Div. 1061, 34 N. Y. S. 2d 816.

In that case it appears that Charles G. Hardie died October 18, 1940, leaving a will in which he first gives all his estate to his wife absolutely and forever; and then goes on to say:

"Third: In the event that my said wife, Nettie M. Hardie, shall die simultaneously with me, or her death shall closely follow my demise, either as the result of accident or illness of any kind whatsoever, then and in that event, it is my will and I direct my estate shall be disposed of as follows," to certain charities and a relative.

The wife predeceased the husband, dying on August 18, 1939.

It was claimed by relatives that this will was conditional, and they moved for dismissal of the probate thereof. The Surrogate's opinion sustaining the will, which was affirmed by all of the appellate courts of the state, is apt to

the case at bar. The case cannot be distinguished, really, from the case at bar; for in that case the husband and wife did not die simultaneously and her death did not closely follow his demise; but she died first, just as Ida Peterson Beal predeceased her husband. We quote from that opinion:

"It is evident that Charles Hardie did not desire to die intestate, else he would not have made a will, or having made it, he would have destroyed or revoked it. It is also evident that he did not intend to make his relatives the object of his bounty in the event of his dying simultaneously with his wife. This being apparent and clearly reflecting the attitude of the testator toward his relatives, is it not reasonable to presume that this was his attitude and his feelings in any event, and particularly under the situation as it subsequently developed? Having designated his beneficiaries under his will, it does not appear to me that Charles Hardie chose these beneficiaries only in the event of his dying simultaneously with his wife. I believe he intended them to be his beneficiaries in any event and if he had any intention to the contrary, he could and would have made another will for he lived fourteen months after the death of his wife."

So in the case at bar we say it is evident that Thomas A. Beal did not intend to die intestate, else he would not have made his will, or having made it, he would have destroyed or revoked it. It is also evident that he did not intend to make his relatives of the half blood the objects of his bounty and that he did intend to bestow his estate, except for his books, upon his wife and upon his and her relatives of the full blood, in case they died in a common disaster so that she would have no need for his property. This

being his attitude toward his wife and his relatives of the half and the whole blood and her relatives of the whole blood, is it not reasonable to presume that this was his attitude and feeling in any event, and particularly under the situation as it subsequently developed, where she died first? Having designated his beneficiaries under his will, it does not seem to us that Thomas A. Beal chose those beneficiaries only in the event of his dying at the same time as his wife in a common disaster. It seems to us that he intended them to be his beneficiaries in any event, when his wife no longer needed his estate, and if he intended anything to the contrary, he would have made another will, or revoked or destroyed this one.

The surrogate also quotes from *In Matter of Kenny's Will*, 224 App. Div. 152, at page 156, 230 N. Y. S. 74-78, affirmed without opinion by the court of appeals in 25 N. Y. 594, 166 N. E. 337, regarding the latitude which the courts have in giving construction to wills so as to make them express the intention of the testator, as follows:

“On the other hand, great latitude is given to courts to render effective imperfectly expressed testamentary intention. (Citing cases.) Courts may, it is true, transpose words and phrases, and read the provisions of a will in an order different from that in which they appear in the instrument, insert or leave out provisions if necessary, but only in aid of the testator's intent and purpose; never to devise a new scheme or make a new will. (Citing cases.) In the interpretation of a will the consideration of paramount importance is to discover the intention of the testator, as expressed in the will, and all other rules for the interpretation of wills are subordinate to the requirement that the intention of the testator should be sought and given effect,

when that may lawfully be done. (Citing cases.) There is another subordinate canon of construction which has some bearing on the construction of this instrument, viz., that, between two possible constructions, that is to be preferred which avoids intestacy. (Citing cases.)

"I am of the opinion it was the intention of the testator that his estate be disposed of as set forth in the will in the event that he and his wife died simultaneously or in the event that she predeceased him."

We believe this case from the state of New York is a more weighty authority than the two cases above mentioned which reach contrary results on similar facts.

### Point 2

There is another rule for construction of wills which has a bearing in this case. It is found in Section 101-2-10, Utah Code Annotated, 1943, which reads as follows:

"Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy."

The interpretation made by the lower court has resulted in a virtual intestacy; the property has been ordered distributed to the heirs at law of Thomas A. Beal who would take if he had made no will whatever. This result would have been avoided and the will sustained if the court had limited the provision relative to death in a common disaster to the bequests of \$500.00 each to the University and Snow College. The punctuation of the paragraph will support such limitation. The testator says in his will "In the event that my wife and I shall perish in a common catastrophe, or disaster, then, and in such event, I give, devise, and be-

queath to the President of the University of Utah for the School of Business the sum of \$500.00, and to the President of Snow College for Snow College a like amount, for the purchase of books in Business and Economics, for the use and benefit of said Schools in building up their libraries." Period.

That is one complete thought. If the court should feel that death in a common disaster must be held to be a condition precedent to the vesting of any bequest made in paragraph 5, then let that condition be limited to those two bequests to the schools. Let it then be held that the testator intended to increase his bounty to the schools only in the event that he and his wife should meet death in a common disaster, and that, since they did not so perish, such provision to educational purposes cannot be given effect. But why extend that condition to the next provision in paragraph 5? It does not appear to be necessary to do so. The language used does not require such interpretation. Having expressed his will with respect to his professional books and the educational institutions which he wanted to make the recipients of his bounty, he goes on to say: "And in such case of death," which means in case of the death of himself and his wife either in a common disaster, under circumstances in which it might be impossible to say which died first, or in case she died before he did and no longer had need of his property, then his estate is to go to the brothers and sisters of the whole blood. Such an interpretation will give effect to all provisions of the will and will result in harmonizing the decree with the statute above set forth. The words "And in such case of death" do not have such a specific and definite meaning that they must in this case be held to include all the thoughts which are

embraced in the words "In the event that my wife and I shall perish in a common catastrophe, or disaster." They could very well be held to include only the thought that in the event that his wife and he should both perish or die so that she would not take under paragraph 3 of the will, then he wanted his estate to go to the relatives of both of the whole blood.

### Point 3

Death in a common disaster is not a condition precedent to the taking effect of paragraph 5 of the will.

In addition to the cases and authorities cited above in which this subject is discussed, we submit the following.

In 68 C. J., page 630, Section 256, under the title "Wills," subtitle "Contingent Wills," and cases listed under notes 70 (b) and 70 (c), the subject is quite fully treated.

The following sentence is quoted from the text:

"Unless the terms of the will clearly show that it was intended to be contingent, it will be regarded as absolute and unconditional."

We respectfully submit to this court the proposition that there is no word, phrase, clause or sentence in this will which clearly shows that Thomas A. Beal intended his will or paragraph 5 thereof to be contingent upon the happening of the event therein mentioned. The intent to make paragraph 5 contingent upon the happening of the event must affirmatively appear in the will. If upon reading the whole will and placing paragraph 3 alongside paragraph 5, the court has any doubt whether the testator intended the event to be a condition upon which paragraph 5 is to be effective, then, under the authorities which we have cited,

and in harmony with the principles above laid down for the interpretation of wills, paragraph 5 should be upheld.

*Fitzgerald v. Ayers*, (1915) \_\_\_\_\_Tex.\_\_\_\_\_ Civ. App\_\_\_\_\_, 189 S. W. 289, is a case which illustrates how the courts regard similar provisions. In that case it appears that the husband and wife both made wills. He gave his property to his wife if she survived him, she gave her property to him if he survived her, and both named their son as legatee in the event of the prior death of the spouse.

Both died under circumstances raising no inference as to survivorship; so it could not be said that either survived the other.

The court held, nevertheless, that the son took under both wills because it was manifestly the intention of the testators that the son should have the property; it was very plain to the court that it was not the intention of either testator to make the device to the son depend upon a condition precedent which would admit of the property going to a third person. The court said:

“It was not the intention of either Mr. Skinner or Mrs. Skinner to make the device of their property to their adopted son, Carnegie Frank Skinner, depend upon a condition precedent which would admit of the property going to third persons.”

So we say in this case it was not the intention of this testator to make the device to the relatives of the whole blood of himself and his wife depend upon a condition that both should perish in a common disaster, for it is apparent from a reading of the whole will that he intended them to take his property if the wife were not living to take it when the will should become effective by his death.

The same reason which impelled the Texas court to sustain the device in the case last cited should prompt this court, we submit, to sustain the bequest in this case.

Since, as we have shown, the lower court erred in disregarding paragraph 5 of the will and distributing the residue of the estate of the deceased to the persons who would inherit the same if there were no will at all, thus in effect holding that the deceased died intestate, which is something which he manifestly did not intend to do, we respectfully submit that the decree for final distribution should be set aside and the lower court directed to enter a decree distributing the residue of the estate to the persons entitled thereto under paragraph 5 of the will. Appellants should also be awarded their costs.

Respectfully submitted,

DILWORTH WOOLLEY

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