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In the Privy Council.

No. 9 of 1930.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

IN THE MATTER of the Last Will and Testament and Two Codicils of Thomas Saunders Hobbs, late of the City of London in the County of Middlesex, and Province of Ontario, Merchant, deceased.

BETWEEN

HAROLD FERGUSON FISHLEIGH *Appellant,*

AND

THE LONDON AND WESTERN TRUSTS COMPANY LIMITED, SAMUEL FRANCIS WOOD and JOHN WINER WARDROPE, Executors of the Will and Codicils of Thomas Saunders Hobbs, deceased, EWART FIELD, EVA FIELD HARVEY, ELIZABETH M. FERGUSON, RHODA HOBBS, EVA PUDDICOMBE, WINIFRED KINGSMILL, MARY EDWARDS, W. R. HOBBS, JOHN W. HOBBS, FRANK HOBBS, ELSIE MAY FISHER, BEATRICE DALTON, CONSTANCE BROWN, YVONNE WELD, MARY ANN LIND, NIGEL EDWARDS, IAN EDWARDS, CHARLES D'ARCY KINGSMILL and MARY KINGSMILL, the last four named being infants under the age of twenty-one years *Respondents,*

AND BETWEEN

EWART FIELD, EVA FIELD HARVEY, ELIZABETH M. FERGUSON, RHODA HOBBS, EVA PUDDICOMBE, WINIFRED KINGSMILL, and MARY EDWARDS *Appellants,*

AND

THE LONDON AND WESTERN TRUSTS COMPANY LIMITED, SAMUEL FRANCIS WOOD and JOHN WINER WARDROPE, Executors of the Will and Codicils of Thomas Saunders Hobbs, deceased, HAROLD FERGUSON FISHLEIGH, W. R. HOBBS, JOHN W. HOBBS, FRANK HOBBS, ELSIE MAY FISHER, BEATRICE DALTON, CONSTANCE BROWN, YVONNE WELD, MARY ANN LIND, NIGEL EDWARDS, IAN EDWARDS, CHARLES D'ARCY KINGSMILL and MARY KINGSMILL, the last four named being infants under the age of twenty-one years *Respondents.*

(Consolidated Appeals.)

CASE OF THE APPELLANT

HAROLD FERGUSON FISHLAIGH.

(also a Respondent in 2nd appeal)

Record.
p. 29, l. 30.
p. 16.

1. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario dated 20th September, 1929, affirming a judgment of the Hon. Mr. Justice Middleton, dated 31st March, 1928, in so far as it held that there was intestacy as to one of the five shares into which the residuary Estate of Thomas Saunders Hobbs was by his Will divided.

p. 32, l. 30.
pp. 34, 35.
p. 7, ll. 21-33.
p. 8, ll. 12-29.
p. 5, ll. 16-32.

2. The Testator was a successful manufacturer and merchant of London, Ontario. He died a bachelor on 30th September, 1927, having made a Will dated 19th March, 1902, and two codicils dated 11th and 27th January, 1927. At the date of the Will he had five sisters, Mrs. Field, Mrs. Fishleigh, Mrs. Ferguson, Mrs. Puddicombe and Miss Rhoda Hobbs. Mrs. Ferguson had no children but each of his other married sisters had children.

p. 33, l. 5.

3. By his Will the Testator disposed of his residuary estate as follows :—

“ All the residue of my estate I give to my Executors aforesaid
“ in trust to realise sufficient thereof from time to time as they may
“ find necessary to pay my debts and funeral expenses but with power
“ to continue to hold such stocks as I may die possessed of in Joint
“ Stock Companies as they may think desirable or to continue any
“ business in which I am engaged at the time of my death for a period
“ not exceeding five years from my death and after payment of all
“ my said debts to apply the net income received from my said business 20
“ investments . . . for the term of five years from my decease
“ equally between my Sisters, Sarah Ann Field, Caroline Fishleigh,
“ Elizabeth Mary Ferguson, Eva Puddicombe (wife of Robert
“ Puddicombe) and Rhoda Hobbs, that is to say, my said income is
“ to be divided into five equal portions one of which is to go to each
“ of my Sisters aforesaid for the said term of five years.

* * * * *

“ And I direct my Executors at the end of the said five years to
“ hand over all my estate then in their hands to the London & Western
“ Trusts Company (Limited), to be invested by the said Company
“ under the direction during their lifetime of my said Executors and 30
“ the income from my said estate to be paid to my said five sisters
“ hereinbefore named share and share alike as long as they all continue
“ to live and on the decease of any of them leaving lawful issue then I
“ direct that the said Trusts Company shall expend the income which
“ the parent would have received if living for the benefit of the children
“ of any of my sisters so dying leaving lawful issue. But in case of
“ the death of any of my said Sisters without leaving lawful issue then

“ the income of my estate shall be divided among the residue share
 “ and share alike it being understood in all cases during the first five
 “ years or later that the children of any of my sisters dying shall get
 “ the share of the income which the parent would have received if
 “ living.

Record.

10 “ And I desire that the said London & Western Trusts Company
 “ (Limited) shall so continue to hold my said estate until the death
 “ of all of my said Sisters and until the youngest child born to any
 “ of them shall have attained the age of twenty-one years when I
 “ direct the said London & Western Trusts Company to distribute
 “ my said estate in as many shares as there were Sisters who died
 “ leaving lawful issue and that my said estate shall be divided so
 “ that the children of each of my said deceased Sisters shall get one
 “ share.

20 “ The intention of my Will being to provide an income for each
 “ of my said Sisters during their life equally and for their children
 “ after their decease so that the income of the children of each Sister
 “ shall be the income which their mother would have received if living.
 “ But when my Sisters have all departed this life then that their
 “ children shall continue to receive the income which they would have
 “ received if living until the youngest of their children shall have
 “ attained the age of twenty-one years when there shall be a division
 “ of my estate as aforesaid the children of each Sister receiving one
 “ share of the estate.”

4. Mrs. Field died in 1915 and Mrs. Fishleigh in 1919, the former p. 7, l. 32.
 leaving two children and four grandchildren and the latter leaving her p. 8, l. 12.
 grandson, Harold F. Fishleigh (the Appellant) as her only surviving issue. p. 8, ll. 18-29.

5. By the codicil of 11th January, 1927, the Testator appointed new p. 34, l. 20.
 executors and concluded “ In all other respects I confirm my said Will.”

30 6. By the codicil of 27th January, 1927, the Testator made further p. 35.
 provision for his unmarried sister and gave certain shares of stock in the
 Hobbs Hardware Company to T. H. Wood, and concluded “ In all other
 respects I confirm my said Will and codicil thereto bearing date the 11th
 day of January, 1927.”

7. The Testator at the date of the codicils was well aware that his p. 7, l. 32.
 sisters, Mrs. Field and Mrs. Fishleigh, had died, and that the Appellant p. 9, ll. 4-43.
 Fishleigh was the only surviving issue of Mrs. Fishleigh.

40 8. The Testator, in addition to the five sisters named in the Will, had p. 7, l. 31 to
 one brother, W. R. Hobbs, who died on 17th January, 1927, leaving surviving p. 8, l. 11.
 eight children. One daughter predeceased him leaving two children. No
 reference is made in the Will or codicils to the brother or to any of his
 children or grandchildren.

Record.
p. 3.
pp. 10-15.

9. The Executors applied on 7th December, 1927, by originating notice to the Hon. Mr. Justice Middleton for the construction of the Will and codicils. Mr. Justice Middleton was of opinion that each of the words "issue" and "children" must be given its strict meaning with the result that this Appellant took no share in the income or corpus as he was not one of the "children" of Mrs. Caroline Fishleigh nor was there a gift over to the surviving sisters and children of deceased sisters, because Mrs. Caroline Fishleigh died "leaving lawful issue." He accordingly held that there was intestacy as to Mrs. Fishleigh's share and that those entitled to share in the corpus were: (1) The children of Eva Puddicombe; (2) The children of Mrs. Field; and (3) The next of kin of the Testator determined as of the date of his death. The third class would include the children of the deceased brother, W. R. Hobbs—but not Harold Fishleigh the grandson of the deceased sister. The learned Judge further held that the shares of the children of Mrs. Puddicombe and Mrs. Field vested in them on the death of the Testator.

p. 17.

p. 18.
p. 19.

10. The Appellant Fishleigh appealed to the Appellate Division, and Mrs. Ferguson and Miss Hobbs, sisters of the Testator, and Eva Harvey and Ewart Field, children of Mrs. Field, also appealed, all the Appellants contending that there was no intestacy.

p. 29, l. 30.

11. The appeal was heard by Mulock C.J.O., Magee, Hodgins and Ferguson J.J.A., on 19th June, 1928. Ferguson J.A. having died while the appeal was standing for judgment, the remaining members of the Court pronounced judgment on 20th September, 1929.

pp. 20-23.

The Chief Justice of Ontario was of the view that the word "children" as used in the Will meant the first generation only and not the remoter issue, but he held that as to the corpus the share was not vested and would not become vested until the death of the last surviving sister and until the youngest child born to any of them attains twenty-one.

p. 23, l. 10.

Hodgins J.A. agreed with the Chief Justice of Ontario.

p. 23, l. 11.
p. 28, l. 41.

Magee J.A. found three strong circumstances in favour of construing "children" as meaning "issue"—the consistent manifest intention against intestacy, the gift over to the other sisters and their children only if the sister died "without leaving lawful issue" and the fact that when the Will was confirmed in 1927 there were no living children of Mrs. Fishleigh. Sitting in a Court of First Instance the learned Judge would have been inclined to hold that the word "children" meant "issue," and included grandchildren, but he did not have such confidence in his opinion as to reverse the judgment. He agreed with the Chief Justice of Ontario that the corpus was not vested.

p. 30, l. 15.

12. In the result the Court varied the judgment below by altering the declaration as to vesting but in other respects the judgment was affirmed.

13. The Appellant, Fishleigh, if not entitled to succeed on his appeal, is not interested in the second of the consolidated appeals.

14. The Appellant, Fishleigh, submits that his appeal should be allowed for the following among other

REASONS.

1. Because on the true construction of the Will and codicils the Appellant, Fishleigh, is entitled to a vested one-fifth share in the income and a vested one-third share in the corpus of the residuary Estate.
2. Because the Appellant, Fishleigh, is included in the word "children" as used in the Will.
3. Because the Testator by his Will and Codicils clearly provided against intestacy.
4. Because the Testator in confirming his Will by the two codicils in 1927 manifestly intended to benefit the Appellant, Fishleigh.

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W. N. TILLEY,

C. F. H. CARSON.



In the Privy Council.

No. 9 of 1930.

*On Appeal from the Supreme Court of Ontario
(Appellate Division).*

IN THE MATTER of the Last Will and Testament and Two
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of London in the County of Middlesex, and Province
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BETWEEN

HAROLD FERGUSON FISHLEIGH - - - *Appellant,*

AND

THE LONDON & WESTERN TRUSTS
COMPANY LIMITED, SAMUEL
FRANCIS WOOD and JOHN WINER
WARDROPE, Executors of the Will and
Codicils of Thomas Saunders Hobbs,
deceased, EWART FIELD, EVA FIELD
HARVEY, ELIZABETH M. FERGUSON,
RHODA HOBBS, EVA PUDDICOMBE,
WINIFRED KINGSMILL, MARY
EDWARDS, W. R. HOBBS, JOHN W.
HOBBS, FRANK HOBBS, ELSIE MAY
FISHER, BEATRICE DALTON, CON-
STANCE BROWN, YVONNE WELD,
MARY ANN LIND, NIGEL EDWARDS,
IAN EDWARDS, CHARLES D'ARCY
KINGSMILL, and MARY KINGSMILL,
the last four named being infants under
the age of twenty-one years - - - *Respondents,*

AND BETWEEN

EWART FIELD, EVA FIELD HARVEY,
ELIZABETH M. FERGUSON, RHODA
HOBBS, EVA PUDDICOMBE,
WINIFRED KINGSMILL and MARY
EDWARDS - - - - - *Appellants,*

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THE LONDON AND WESTERN TRUSTS
COMPANY LIMITED, SAMUEL
FRANCIS WOOD and JOHN WINER
WARDROPE, Executors of the Will
and Codicils of Thomas Saunders Hobbs,
deceased, HAROLD FERGUSON FISH-
LEIGH, W. R. HOBBS, JOHN W.
HOBBS, FRANK HOBBS, ELSIE
MAY FISHER, BEATRICE DALTON,
CONSTANCE BROWN, YVONNE
WELD, MARY ANN LIND, NIGEL
EDWARDS, IAN EDWARDS, CHARLES
D'ARCY KINGSMILL and MARY
KINGSMILL, the last four named being
infants under the age of twenty-one
years - - - - - *Respondents.*

CASE OF THE APPELLANT
HAROLD FERGUSON FISHLEIGH.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.