

51, 1930

LAW
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No. 9 of 1930.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME COURT
OF ONTARIO.

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 & 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.

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CASE OF THE RESPONDENTS

W. R. HOBBS, JOHN W. HOBBS, FRANK HOBBS, ELSIE MAY
FISHER, BEATRICE DALTON, CONSTANCE BROWN, YVONNE
WELD and MARY JANE LIND.

RECORD

1.—This is an appeal by Harold Ferguson Fishleigh, a grandnephew of
the late Thomas Saunders Hobbs, from the judgment of the Appellate Division
of the Supreme Court of Ontario, dated the 20th day of September 1929,
varying the judgment of Middleton, J., dated the 31st day of March 1928.

p. 29
p. 16

2.—The testator died a bachelor on the 30th September 1927.

p. 6, ll. 28-31

3.—The respondents on whose behalf this case is filed are the surviving
children of W. R. Hobbs, a brother of the testator. Neither W. R. Hobbs
nor his children are named in the Will. These respondents claim to share
with the next of kin under a partial intestacy.

4.—The matters to be determined in this appeal are—

- (a) Whether Harold Ferguson Fishleigh is entitled to any share in the income payable under the terms of the will of Thomas Saunders Hobbs :
- (b) Whether Harold Ferguson Fishleigh is adversely affected by and entitled to appeal from the judgment of the Appellate Division of the Supreme Court of Ontario declaring that the number of shares into which the residuary estate is to be divided and the persons thereto entitled cannot now be determined, and that the said shares have not vested : 10
- (c) Whether (assuming Harold Ferguson Fishleigh is adversely affected by the judgment of the said Appellate Division in so far as it deals with the residuary estate) the said Harold Ferguson Fishleigh will be entitled upon final distribution under the will to a share in the residuary estate.

p. 32, l. 34
p. 33, l. 11
p. 33, l. 16
p. 33, ll. 17-20

5.—On the 19th day of March 1902 Thomas Saunders Hobbs made his Last Will and Testament, in which he provided that the annual income from his business investments should be applied for a term of five years from his decease “equally between my sisters Sarah Ann Field, Caroline Fishleigh, Elizabeth Mary Ferguson, Eva Puddicombe and Rhoda Hobbs, 20
“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.”

p. 33, l. 25
p. 33, ll. 28-38

The will further provided that “at the end of the said five years” the executors should hand over all his estate to the London & Western Trusts Company (Limited) to be invested by the said Company and “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 Trust Company
“shall expend the income which the parent would have received if living for 30
“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.

p. 33, ll. 39-45

“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 & 40
“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.

p. 33, l. 46
p. 34, l. 6

“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.”

6.—Appendix A to this case is a table based on the Record giving the names of the persons of various degrees of kinship to the testator—

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|----|---|--------------|
| | (a) living at the date of the will (19th March 1902); | p. 32, l. 34 |
| 10 | (b) born or dying between the date of the will and the making of the first codicil (11th January 1927); | p. 34, l. 31 |
| | (c) born or dying between the making of the first and second codicils (11th January 1927 to 27th January 1927); | p. 35, l. 31 |
| | (d) living at the death of the testator (30th September 1927). | p. 36, l. 12 |

7.—The information appearing in the Appendix may be summarized thus:

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|----|---|--|
| | (a) At the date of the will there were living five sisters and one brother of the testator. Three of the sisters had children then living. The brother had both children and grandchildren living at the date of the will. | p. 7, ll. 24-33
p. 5, ll. 16-30
p. 8, ll. 12-29
p. 7, l. 40 to
p. 8, l. 11 |
| 20 | (b) Between the date of the will and the making of the first codicil two sisters died (Sarah Ann Field and Caroline Fishleigh) as did the two children of Caroline Fishleigh. A child of the brother also died. In the same period one grandchild was born to Caroline Fishleigh. | p. 7, ll. 32-3
p. 8, ll. 22-9
p. 8, l. 3
p. 8, l. 41 |
| | (c) Between the making of the first and second codicils, the testator's brother died. | p. 7, l. 31 |
| 30 | (d) At the death of the testator two sisters (Caroline Fishleigh and Sarah Ann Field) had died leaving issue living at the death of the testator; one sister (Eva Puddicombe) was alive having issue then alive; and two sisters (Rhoda Hobbs and Elizabeth M. Ferguson), aged respectively 67 and 75, were alive having had no children. | p. 5, ll. 16-30
p. 7, ll. 22-33 |

8.—At the date of the will the appellant had not been born, nor had his father been married. The appellant was born the 11th May 1903. p. 8, ll. 38-42

9.—The appellant's father died 18th September 1904, leaving an estate insufficient to pay his creditors. Material has been filed showing that the testator acted as administrator of this estate and that for many years before his death he sent to the appellant, through Miss Rhoda Hobbs, gifts of \$5. at Christmas time; and that a month after the marriage of the appellant the testator sent him direct a present of \$50. as a wedding gift. p. 8, l. 40
p. 9, l. 6
p. 9, ll. 4-6
p. 9, ll. 32-36

10.—On the 11th January 1927 the testator made the first Codicil to his will. The codicil provided for the appointment of two executors in place of the two named in the will who had died, and then proceeded—“ In all other respects I confirm my said will.” p. 34, l. 30
p. 34, l. 29

p. 35, l. 31 11.—On the 27th January 1927, the testator executed the second codicil to his will. After providing for gifts of the testator's house and of \$25,000. to his sister Rhoda, and of certain stock in the Hobbs Manufacturing Co. Limited to one Samuel Francis Wood, it proceeded—" In all other respects
p. 35, ll. 29-30 " I confirm my said will and codicil thereto bearing date the 11th January
" 1927."

12.—On the 7th December 1927, the executors by originating notice submitted certain questions to the Court for determination, among which were the following :

p. 4, ll. 22-5 " 3. Is Harold Fishleigh, who is a grandnephew of the testator and 10
" a grandson and the only surviving issue of Caroline Fishleigh, sister
" of the testator named in paragraph 3 of the said will, entitled to a
" share of the income payable under the terms of the said will ?"
p. 4, ll. 26-8 " 4. Under the terms of the said will (into) how many shares is the
" corpus of the residuary estate to be divided upon final distribution
" thereof and who are the persons entitled to such shares ?"

p. 16, ll. 20-2 13.—On the matter coming on for argument before Middleton, J., he
directed that the surviving children of W. R. Hobbs should be served with
Notice of Motion as representing the testator's next of kin. This having been
p. 16, l. 24 done, argument was heard on the 3rd February 1928, when judgment was 20
reserved.

14.—On the 31st March 1928, Middleton, J., delivered judgment, finding—

p. 17, ll. 3-10 (a) that Harold Fishleigh was not entitled to a share of the income
payable under the will ;
p. 17, ll. 3-10 (b) that there was an intestacy as to the one-fifth share of the income to
which Caroline Fishleigh or her children would have been entitled
had she or they survived the testator ;
p. 17, ll. 12-18 (c) that the corpus should be divided into three equal parts, and that
those entitled thereto were (i) the children of Eva Puddicombe, 30
(ii) the children of Sarah Ann Field, (iii) the next of kin of the
testator ; and
p. 17, ll. 19-20 (d) that the shares of the children of Eva Puddicombe and Sarah Ann
Field became vested on the death of the testator.

p. 14, ll. 19-27 15.—Middleton, J., said in part :—
" The will I am attempting to construe was prepared, I am told, by
" one of His Majesty's counsel of great experience. He must have
" known the difference between the expressions ' issue ' and ' children.'
" These are used in contrast uniformly throughout the whole will,
" and I do not feel at liberty to attribute to them any other than 40
" their normal significance. Moreover, the words ' parent ' or
" ' mother ' are used coupled not with ' issue ' but with ' children ' ;
" and I can find no place in the whole will in which the words
" ' child ' or ' children ' could be read as ' grandchild ' or ' grand-
" children ' without disorganizing and demoralizing the entire
" will"

16.—On the 7th April 1928, Harold Ferguson Fishleigh appealed against this decision on the ground (among others) that the learned judge erred in holding that there was an intestacy as to part of the income or capital of the testator's residuary estate. p. 18

17.—On the same day Ewart Field, Eva Field Harvey, Elizabeth Mary Ferguson and Rhoda Hobbs appealed against the decision, claiming that there was no intestacy and that the income should be divided into four shares and the corpus into two shares. No appeal was made by Eva Puddicombe, Winifred Kingsmill, Mary Edwards or their children, or by these respondents. p. 19

10 18.—The appeals came on for hearing on the 19th day of June 1928 before the First Appellate Division of the Supreme Court of Ontario (Mulock, C.J.O., and Magee, Hodgins and Ferguson, J.J.A.). Judgment was reserved until the 20th day of September 1929, when the decision of Middleton, J., as to income was affirmed and his decision as to corpus was set aside, it being declared that until the death of the last surviving sister and until the youngest child born to any of them had attained his or her majority, the number of shares into which the residuary estate should be divided and the number of persons entitled thereto could not be ascertained, and that the shares in the corpus of the testator's residuary estate had not vested. p. 29, l. 41
p. 29, l. 33
p. 30, ll. 29-46

20 19.—Mulock, C.J.O., said :—

“ The word ‘ children ’ *prima facie* means the first generation and not
“ remoter issue. That the testator throughout the will used it in this p. 22, ll. 21-33
“ sense is, I think, abundantly clear. He directs that ‘ in all cases during
“ the first five years or later, the children of any of my sisters dying shall
“ get the share of the income which the parent would have received if
“ living.’ ‘ Parent ’ means father or mother, not grandfather or
“ grandmother ; thus children, not remoter issue, are to take the income
“ which the deceased sister of the testator but for her dying would
“ have taken. Further, in the last expository clause in his will, evidently
30 “ *ex abundantia*, he adds : ‘ The intention of my will being to provide an
“ income for each of my sisters during their lives 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.’ That is, those to take must be children whose mother is a
“ sister of the testator.

“ I therefore am of opinion that Harold Fishleigh, not being the
“ actual child of a sister, does not take the share of the income which his p. 22, ll. 34-36
“ grandmother would have taken if living.

40 “ Then what becomes of Caroline Fishleigh's share of the income ? p. 22, ll. 37-40
“ The testator says that ‘ 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.

“ Mrs. Caroline Fishleigh left her surviving her grandson Harold
“ Fishleigh. Lawful issue includes grandchildren, thus she did not die p. 22, ll. 41-45
“ without leaving lawful issue, and therefore the share of the income
“ which she would have taken if living did not pass to the surviving
“ sister, and the testator died intestate as regards it.

p. 22, l. 46
p. 23, l. 5

“ The next question to determine is with reference to the corpus. “ Until all the sisters die, and until the youngest child born to any of “ them attains the age of twenty-one years, there is to be no distribution “ of the corpus. In my opinion the happening of those two events is a “ condition precedent to the vesting of any share in any child *who is* “ *under that age* and should all the children of the sisters die under the “ age of 21 years, there would be an intestacy as to the corpus.”

p. 23, ll. 6-8

“ I therefore think that until the death of the sisters and until “ the youngest child attains its majority or dies, the Court is unable to “ determine who is entitled to share in the corpus.”

p. 23, l. 10
p. 23, l. 11
p. 29, l. 29
p. 29, l. 41

With this Hodgins, J.A., agreed. Magee, J.A., agreed in the result for reasons stated in writing. Ferguson, J.A., had died before judgment was delivered.

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20.—These respondents humbly submit that this appeal should be dismissed and that the judgment of the Appellate Division, so far as it deals with the rights of the appellant, should be affirmed for the reasons stated by Middleton, J., and by Mulock, C.J.O., and Magee, J.A., and for the following among other

REASONS.

- (1) BECAUSE all gifts of income not made to the sisters of the 20
testator were made to the children of sisters ; and the appellant
is not a child of a sister of the testator.
- (2) BECAUSE all gifts of corpus were to children of deceased
sisters of the testator ; and the appellant is not a child of a
deceased sister of the testator.
- (3) BECAUSE the grandmother of the appellant, who was a sister
of the testator, died in the lifetime of the testator, and took no
share of the income.
- (4) BECAUSE the father of the appellant died in the lifetime of
the testator and took no share of the income or corpus. 30
- (5) BECAUSE the appellant, being a grandnephew of the testator
and not mentioned in the will, cannot take under the will.
- (6) BECAUSE there is nothing in the will to indicate that when
the testator used the word “ children ” he meant thereby
“ grandchildren ” or “ issue.”
- (7) BECAUSE even should the decision of the Appellate Division
of the Supreme Court of Ontario, declaring that the shares in
the corpus of the residuary estate have not vested, be found to
be erroneous, the appellant is not affected by that decision and
has no appealable interest in respect of it. 40
- (8) BECAUSE the judgment appealed from is right.

LEWIS DUNCAN.

APPENDIX A

Table of next of kin of T. S. Hobbs at various dates as shown by the Record.

Category	Persons living at date of will	Persons born and dying between date of will and execution of 1st codicil.	Persons born and dying between execution of 1st and 2nd codicils.	Persons living at death of testator.
Brothers and Sisters	Elizabeth Mary Ferguson na. 4.9.52 Rhoda Hobbs na. 27.10.59 Eva Puddicombe na. 25.1.58			Elizabeth Mary Ferguson Rhoda Hobbs
Nephews and Nieces	Winifred Mary Sarah Ann Field Eva na. 16.9.78 Ewart na. 11.9.80 Ernest Claude William Thomas Albert na. 26.10.74 Caroline Fisleigh W. R. na. 12.3.73 John W. na. '75 Frank na. '79 Elsie May na. '85 Annie na. 10.1.70 Beatrice na. '85 Constance na. '87 Yvonne na. '89 Mary Jane na. '71			W. R. John W. Frank Elsie May Annie Beatrice Constance Yvonne Mary Jane
Grand Nephews and Grand Nieces		Charles D'Arcy Mary Nigel Ian		Harold Ferguson Fishleigh Enid William Grant
Date of will, 19 March, 1902				
Brothers and Sisters				
Nephews and Nieces		Sarah Ann Field ob. 4.12.15 Caroline Fisleigh ob. 9.9.19 Ernest Claude ob. 8.12.18 William Thomas Albert ob. 18.9.04		Annie ob. 5.1.08
Grand Nephews and Grand Nieces				
Execution of 1st codicil, 11 Jan., 1927				
Brothers and Sisters				W. R. Hobbs ob. 17.1.27
Nephews and Nieces				
Grand Nephews and Grand Nieces				
Execution of 2nd codicil, 27 Jan., 1927				
Brothers and Sisters	Elizabeth Mary Ferguson Rhoda Hobbs Eva Puddicombe			Elizabeth Mary Ferguson Rhoda Hobbs
Nephews and Nieces	Winifred Kingsmill Mary Edwards Eva Field Harvey Ewart Field			W. R. John W. Frank Elsie May Beatrice Constance Yvonne Mary Jane
Grand Nephews and Grand Nieces	Charles D'Arcy Mary Nigel Ian			Harold Ferguson Fishleigh Enid William Grant
Death of Testator, 30 Sept., 1927				

In the Privy Council.

ON APPEAL

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BETWEEN

HAROLD FERGUSON FISHLEIGH
APPELLANT

AND

**THE LONDON & WESTERN TRUSTS
COMPANY LIMITED ET AL**
RESPONDENTS.

CASE OF THE RESPONDENTS

**W. R. HOBBS, JOHN W. HOBBS, FRANK HOBBS,
ELSIE MAY FISHER, BEATRICE DALTON,
CONSTANCE BROWN, YVONNE WELD and MARY
JANE LIND.**

SUTTON OMMANNEY & OLIVER,
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London, E.C.2,

Solicitors for the said Respondents **W. R. HOBBS,
JOHN W. HOBBS, FRANK HOBBS, ELSIE MAY
FISHER, BEATRICE DALTON, CONSTANCE BROWN,
YVONNE WELD and MARY JANE LIND.**