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In the Privy Council.

No. 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 PRO-
VINCE 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 PUDDI-
COMBE, 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.

RECORD OF PROCEEDINGS.

RECORD IN
1st APPEAL

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In the Privy Council.

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 PRO-
VINCE 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 PUDDI-
COMBE, 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.

RECORD OF PROCEEDINGS

PART I.

PROCEEDINGS, JUDGMENTS, ETC.

No. 1. Notice of Motion.

IN 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.

*In the
Supreme
Court of
Ontario.*

No. 1.
Notice of
Motion,
December
7th, 1927.

TAKE NOTICE that a Motion will be made on behalf of The London
and Western Trusts Company, Limited, of the City of London, County of

*In the
Supreme
Court of
Ontario.*

No. 1.
Notice of
Motion,
December
7th, 1927.

—continued.

Middlesex, Samuel Francis Wood of the same place, Merchant, and John Winer Wardrope of the same place, Accountant, the Executors of the Last Will and Testament and Two Codicils thereto of Thomas Saunders Hobbs, late of the City of London, County of Middlesex, Merchant, at Osgoode Hall, in the City of Toronto, on the 14th day of January, A.D. 1928, at the hour of ten o'clock in the forenoon or so soon thereafter as the Motion can be heard for the opinion and direction of the Court respecting the construction of the Last Will and Testament and Two Codicils thereto of the late Thomas Saunders Hobbs and the distribution of the Testator's property thereunder, and for the determination of the following questions arising from the said Will :

1. By paragraph Two of the said Will the Testator gives and bequeaths to his Sister, Rhoda Hobbs, all insurance on his life including the Policy for \$10,000 in the Imperial Life. Is Rhoda Hobbs entitled to payment of a sum equal to the proceeds of the Policy in the Imperial Life Insurance Company of Canada upon the life of the Testator, the said Policy having matured and being paid to the Testator during his lifetime ?

2. Does the gift of income contained in the Fourth paragraph of the Will include the income from all the testator's residuary estate or only the income from his "business investments" and if the latter, what assets of the residuary estate are included in the term "business investments" ?

3. Is Harold Fishleigh, who is a grandnephew of the Testator and a grandson and the only surviving issue of Caroline Fishleigh, sister of the Testator named in paragraph Three of the said Will, entitled to a share of the income payable under the terms of the said Will ?

4. Under the terms of the said Will 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 ?

5. Is it incumbent upon the Executors under the said Will and Codicils to transfer to S. F. Wood eleven hundred and ten shares of the issued Capital Stock of the Hobbs Manufacturing Company Limited and to provide for the payment of all charges payable in respect of such bequest and transfer, including the Succession Duty out of other portions of the said Estate ?

AND FURTHER TAKE NOTICE that in support of the said Application will be read the Affidavit of John Winer Wardrope and John S. Moore filed and such other material as counsel may advise.

DATED at London this Seventh day of December, A.D. 1927.

IVEY, ELLIOTT & GILLANDERS,
London, Ontario,

Solicitors for the Executors. 40

No. 2.
Affidavit of
John W.
Wardrope
December
7th, 1927.

No. 2.
Affidavit of John W. Wardrope.

I, JOHN WINER WARDROPE, of the City of London, in the County of Middlesex, Accountant, make oath and say :—

1. That I am one of the Executors of the Last Will and Testament and

Codicils thereto of Thomas Saunders Hobbs, late of the City of London in the County of Middlesex, deceased, who died on or about the 30th day of September, A.D. 1927, having first duly made his Last Will and Testament and Codicils thereto, Probate of which Will and Codicils was granted by the Surrogate Court of the County of Middlesex on the 9th day of November, 1927, to The London and Western Trusts Company, Limited, of the City of London, County of Middlesex, Samuel Francis Wood of the same place, Merchant, and to me, this deponent, the Executors named therein, a notarial certified copy of which Probate is now attached hereto and marked Exhibit

*In the
Supreme
Court of
Ontario.*

No. 2.
Affidavit of
John W.
Wardrope
December
7th, 1927.

—continued.

10 "A" to this my Affidavit.

2. Attached hereto and marked Exhibit "B" to this my Affidavit is a true copy of Schedule "A," forms One and Two filed under the Succession Duty Act and which to the best of my knowledge and belief discloses a true and detailed statement of all the assets of the Estate of the said Thomas Saunders Hobbs, deceased.

3. The said Thomas Saunders Hobbs, deceased, left him surviving the following sisters only :—

Rhoda Hobbs, Eva Puddicombe and Elizabeth Mary Ferguson, and the following issue only of all sisters :

20 Ewart Field.....Nephew, Son of Sarah Ann Field, Sister
of the Testator.

Eva Field Harvey.....Niece, Daughter of Sarah Ann Field,
Sister of the Testator.

Winnifred Kingsmill.....Niece, Daughter of Eva Puddicombe, Sister
of the Testator.

Mary Edwards.....Niece, Daughter of Eva Puddicombe, Sister
of the Testator.

30 Harold Fishleigh.....Grandnephew of the Testator and Grand-
son of Caroline Fishleigh, Sister of the
Testator.

4. The Testator's sister, Caroline Fishleigh, had two children who both predeceased her, one of them leaving him surviving his son, Harold Fishleigh.

SWORN before me at the City of London in
the County of Middlesex this 7th day of De- } "J. W. WARDROPE"
cember, A.D. 1927.

"WM. B. HENDERSON"

A Commr. etc.

No. 3.
Affidavit of John S. Moore.

No. 3.
Affidavit of
John S.
Moore,
December
30th, 1927.

40 I, JOHN STEER MOORE, of the City of London, in the County of Middlesex, Manager, make oath and say:

1. THAT I am the Manager of The London and Western Trusts Company, Limited, one of the Executors named in the last Will and Testament of Thomas Saunders Hobbs, Deceased, who died at the City of London, in the

In the
Supreme
Court of
Ontario.

No. 3.
Affidavit of
John S.
Moore,
December
30th, 1927.

—continued

County of Middlesex, on the 30th day of September, 1927.

2. THAT I am informed by the Secretary of the Hobbs Manufacturing Company, Limited, and believe that on the 30th day of September, 1927, the total issued Capital Stock of the Hobbs Manufacturing Company, Limited, consisted of Three thousand six hundred and fifty-three (3,653) Common Shares of the par value of \$100.00 each, of which amount Samuel Francis Wood was the registered owner of seven hundred and fifty-four (754) Shares.

3. That under the Second Codicil of the Will of the said deceased, Samuel Francis Wood is bequeathed sufficient Shares of the Capital Stock of the Hobbs Manufacturing Company, Limited, to give him, together with the Shares of the Hobbs Manufacturing Company, Limited, held by him fifty-one per centum (51%) of the outstanding Capital Stock of the said Hobbs Manufacturing Company, Limited, and the question arises whether it is incumbent upon the Executors to transfer eleven hundred and ten (1110) Shares of the Capital Stock of the said Hobbs Manufacturing Company, Limited, to the said Samuel Francis Wood and also to provide for the payment of all charges payable in respect of such bequest and transfer including the Succession Duty out of other portions of the said Estate. 10

SWORN before me at the City of London, in
the County of Middlesex, this 30th day of } “JOHN S. MOORE” 20
December, A.D. 1927.
“JOHN M. GUNN”
A Commr. etc.

No. 4
Affidavit of
Elizabeth
M. Ferguson
February 2nd
1928

No. 4.
Affidavit of Elizabeth M. Ferguson.

I, ELIZABETH MARY FERGUSON, of the City of London, in the County of Middlesex, Widow, make oath and say :

1. That I am an older sister of the late Thomas Saunders Hobbs, deceased, who died at the City of London in the County of Middlesex on the Thirtieth day of September, 1927. 30

2. That the late Thomas Saunders Hobbs, deceased, died a bachelor leaving him surviving the sisters whose names are set forth in the First Part of Schedule “A” hereto attached, and I have also set forth in the First part of Schedule “A” the date of the birth of each of the said sisters. That the deceased left no brothers or sisters him surviving save and except those named in the First Part of Schedule “A” hereto attached.

3. That I have set forth in the Second Part of Schedule “A” hereto attached the named of the only brother, and sisters of the deceased, who predeceased him leaving issue, and have also given the date of the death of the respective brother and sisters. 40

4. That I have set forth in the Third Part of Schedule “A” hereto attached the names of the children of the late W. R. Hobbs, deceased, and also the names of any children of any deceased children of the late W. R. Hobbs, deceased, giving, insofar as I am able, the date of the birth of the said

children and said grandchildren of the said W. R. Hobbs, deceased, and the date of the death of any of the said children.

5. That I have set forth in the Fourth Part of Schedule "A" hereto attached the names of the children of the late Sarah Ann Field, deceased, giving the date of the birth of the said children of the said Sarah Ann Field, deceased; The late Sarah Ann Field, deceased, left her surviving no child or children of any deceased child or children.

6. That I have set forth in the Fifth Part of Schedule "A" hereto attached the names of the children of the late Caroline Fishleigh, deceased, and also the names of any child or children of any deceased child or children of the late Caroline Fishleigh, deceased, giving, insofar as I am able, the date of the birth of the said children and grandchildren of the said Caroline Fishleigh, deceased, and the date of the death of any of the said children.

*In the
Supreme
Court of
Ontario.*

No. 4.
Affidavit of
Elizabeth M.
Ferguson,
February
2nd, 1928.

—continued.

SWORN before me at the City of London in the County of Middlesex this 2nd day of February, A.D. 1928. } "ELIZABETH M. FERGUSON"
"W. A. THOMSON"
A Commr. etc.

20 SCHEDULE "A" REFERRED TO IN THE AFFIDAVIT OF ELIZABETH MARY FERGUSON.

FIRST PART setting forth the names of the sisters whom the late Thomas Saunders Hobbs, deceased, left him surviving, and also the date of the birth of each of the said sisters.

Name.	Date of Birth.
Rhoda Hobbs.....	October 27th, 1859.
Eva Puddicombe.....	January 25th, 1858.
Elizabeth Mary Ferguson.....	September 4th, 1852.

SECOND PART setting forth the names of the only brother, and sisters of the deceased, who predeceased him, giving the dates of the death of each.

30

Name.	Date of Death.
W. R. Hobbs.....	January 17th, 1927.
Sarah Ann Field.....	December 4th, 1915.
Caroline Fishleigh.....	September 9th, 1919.

THIRD PART setting forth the names of the children of the late W. R. Hobbs, deceased, a brother of the deceased, and also the names of any children of any deceased children of the late W. R. Hobbs, deceased, giving the date of the birth of the said children and grandchildren, and the date of the death of any of the said children.

40

Names of Children of W. R. Hobbs, Deceased.	Date of Birth	Date of Death.	Names of Issue of any Deceased Children.	Date of Birth of Grand- children.
W. R. Hobbs.....	Mar. 12, 1873	....	.....	.....
John W. Hobbs....	1875	....	.....	.....

*In the
Supreme
Court of
Ontario.*

No. 4.
Affidavit of
Elizabeth M.
Ferguson,
February
2nd, 1928.

Frank Hobbs	1879	.....	.....	.....	.....
Elsie May Fisher	June, 1883	.....	.....	.....	.....
Annie Fisher	Jan. 10, 1870	Jan. 5, 1908	| Enid Norman Fisher . . . . .	| June, 1898.	| William Grant Fisher		
Beatrice Dalton	1885
Constance Brown	1887
Yvonne Weld	1889	.....	.....	.....	.....
Mary Jane Lind	Apr. 12, 1871	.....	.....	.....	10
Charles Wesley Hobbs	1877	About 1898.	No issue.				

—continued

FOURTH PART setting forth the names of the children of the late Sarah Ann Field, deceased, a sister of the deceased, giving the date of the birth of the said children.

Names of Children of Sarah Ann Field, Deceased.		Date of Birth.
Ewart Field	September 11th,	1880.
Eva Field Harvey	September 16th,	1878.

FIFTH PART setting forth the names of the children of the late Caroline Fishleigh, deceased, a sister of the deceased, and also the names of any children of any deceased children of the late Caroline Fishleigh, deceased, giving the date of the birth of the said children and grandchildren, and the date of the death of any of the said children. 20

Names of Children of Caroline Fishleigh Deceased.	Date of Birth.	Date of Death.	Names of Issue of Deceased Children.	Date of Birth of Grandchildren.	Date of Death of Grandchildren.
Ernest Claude Fishleigh	Dec. 8, 1918		John Fishleigh.	.....	Died in infancy.
William Thomas Albert Fishleigh	Oct. 26 1874	Sept. 18, 1904	Harold Fishleigh.	.....	Still living.

THIS IS SCHEDULE "A" REFERRED TO IN THE AFFIDAVIT OF ELIZABETH MARY FERGUSON, SWORN BEFORE ME THIS 2ND DAY OF FEBRUARY, A.D. 1928. 30

"W. A. THOMSON"
A Commr. etc.

No. 5.
Affidavit of
Lillie L.
Carder,
February
2nd, 1928.

No. 5.
Affidavit of Lillie L. Carder.

I, LILLIE LOUISE CARDER, of the Village of Chesley, in the County of Bruce, Married Woman, make oath and say :—

1. I was married to Albert Fishleigh, son of Caroline Fishleigh, one of the sisters named in the will of the late Thomas Saunders Hobbs on 24th July, 1902. Albert Fishleigh died on the 18th day of September, 1904, leaving 40 him surviving as his only issue my son, Harold Fishleigh, who was born on 11th May, 1903.

2. Albert Fishleigh received his business training with the Hobbs Hardware Company, Limited, of London, but before his marriage started in

business for himself at Hagersville. After our marriage we resided at Hagersville, until early in 1903, when we moved to Wingham, where we resided until his death.

3. The late Thomas Saunders Hobbs attended the funeral of Albert Fishleigh at London and was subsequently appointed administrator of my said husband's estate on my nomination. The estate turned out to be insufficient to pay creditors in full and all that I received was about \$4,000, being the proceeds of certain life insurance policies made payable to me.

4. After my said husband's death I went to reside with my mother at
10 Hagersville, taking my son with me. Following this for a few years I resided in different places acting as soloist and organist in a number of churches, and also teaching music. During this period my son resided with my mother at Hagersville. Later I went to Chesley as organist and choir leader and at the request of Mr. and Mrs. Fishleigh I made my home with them in a house given to Mrs. William Fishleigh by her brother Thomas Saunders Hobbs. While living there my son lived with me.

5. I married my present husband, Thomas Carder, on the 22nd day of December, 1914, and my son resided with us until he went to College.

6. Ernest Fishleigh, the only other child of the said Caroline Fishleigh,
20 also received his business training with the Hobbs Hardware Company, Limited, of London. Subsequently he went to western Canada as Manager of a hardware store and he later took up railroading and was engaged in that occupation up to the time of his death which occurred in the year 1917 at the City of Calgary. The widow of Ernest Fishleigh returned to Ontario after her husband's death and she and I were present at the funeral of William Fishleigh, husband of Caroline Fishleigh in June, 1918, and at the funeral of Caroline Fishleigh in September, 1918. These funerals took place at London, and the said Thomas Saunders Hobbs was present at each of them. On the
30 day of William Fishleigh's funeral, the widow of Ernest Fishleigh and I dined with the said Thomas Saunders Hobbs at his house and he was well aware of the death of the said Ernest Fishleigh in the preceding year.

7. For many years before his death the said Thomas Saunders Hobbs sent to my son Harold Fishleigh at Christmas \$5 as a Christmas present, the amount being transmitted through his sister, Miss Rhoda Hobbs, and in August, 1927, after my son's marriage in July, 1927, the said Thomas Saunders Hobbs sent him a cheque for \$50.00 as a wedding gift.

8. My said son visited London each year for many years and on these occasions he called on his great-uncle, the said Thomas Saunders Hobbs; the last of these visits occurred in the spring of 1927.

40 9. The said Thomas Saunders Hobbs on the respective dates when he executed two codicils to his last will and testament was well aware that the only issue then living of his deceased sister Caroline Fishleigh was my son, Harold Fishleigh.

SWORN before me at the City of Toronto, in
the County of York, this 2nd day of February,
1928.

"D. GUTHRIE"

A Commissioner, etc.

"LILLIE L. CARDER"

*In the
Supreme
Court of
Ontario.*

No. 5.
Affidavit of
Lillie L.
Carder,
February
2nd, 1928.

—continued.

*In the
Supreme
Court of
Ontario.*

No. 6.
Affidavit of Harold F. Fishleigh.

I, HAROLD FERGUSON FISHLEIGH, of the Village of Chesley, in the County of Bruce, Esquire, make oath and say :—

No. 6.
Affidavit of
Harold F.
Fishleigh,
February
2nd, 1928.

1. I have read over the affidavit made herein this day by my mother, Lillie Louise Carder, and the statements contained in paragraphs 7 and 8 thereof as to presents given to me by my great uncle, Thomas Saunders Hobbs, and as to my visits to him are true.

SWORN before me at the City of Toronto,
in the County of York, this 2nd day of
February, 1928.

“D. GUTHRIE”

A Commissioner, etc.

“HAROLD F. FISHLEIGH” 10

No. 7.
Reasons for
Judgment of
Middleton,
J.A., March
31st, 1928.

No. 7.
Reasons for Judgment of Middleton, J.A.

WEEKLY COURT—TORONTO.

14th January, 1928, and 3rd February, 1928.

IN THE MATTER OF THE ESTATE
OF THOMAS SAUNDERS HOBBS.

Copy of Reasons for Judgment of
Middleton, J.A., delivered 31st
March, 1928. 20

R. G. IVEY, for the Executors.

HELLMUTH, K.C., and RAMSEY, for Mrs. Edwards and Mrs. Ferguson.

ROWELL, K.C., for Miss Rhoda Hobbs and others.

D. W. SAUNDERS, K.C., for Mrs. Kingsmill and others.

TILLEY, K.C., and THOMSON, for Harold Fishleigh.

LEWIS DUNCAN, representing the class entitled to take in the event
of an intestacy.

MCGREGOR YOUNG, K.C., for infants and any unborn issue of the
sisters of the deceased.

MASON, K.C., and HOOPER, for S. F. Wood.

Thomas Saunders Hobbs of the City of London, manufacturer, departed 30
this life on the 30th September, 1927, having made his will bearing date the
19th day of March, 1902, and two codicils bearing date the 11th January,
1927, and the 27th January, 1927, which will and codicils were duly admitted
to probate on the 9th November, 1927.

Upon this motion, several questions were submitted for decision ; all
of these, save one, admit of easy solution.

First the testator gives to his sister Rhoda Hobbs, among other things, a
policy of insurance in the Imperial Life Assurance Company of Canada for
\$10,000. This was paid to him in his lifetime, so this specific legacy was
adeemed. The testator may have had this in his mind when by codicil he gave 40
to her large benefits, \$25,000 and the house and furniture.

2. There is a gift of "income from business investments." Does this include the income from the whole estate? Counsel are agreed that it does, and in view of the complicated provisions of the will I agree, and it may be so declared.

3. By a codicil, sufficient stock in the Hobbs Manufacturing Company is given to Samuel F. Wood to give him when added to his own holding, 51% of the outstanding stock in that company. The question asked is this: Has Mr. Wood the right to have the succession duty payable on this legacy recouped out of the estate? Was it the testator's intention that he should have this legacy free from this burden of succession duty? The duty is, *prima* 10 *facie*, payable by the legatee, and I can find nothing to indicate any intention to cast this burden upon the estate. It may be that such difficulty (if any) that Mr. Wood may be put to in raising this large amount—some \$60,000 it is said—was not present to the mind of the testator, but to relieve the legatee from the burden of this tax there must be a clear expression of such intention on the part of the testator.

4. The remaining question is exceedingly troublesome and concerns the interest (if any) of Mr. Fishleigh in the estate under the terms of the will.

The testator had one brother and five sisters. This brother had many children—eleven it was said. He died on the 17th January, 1927, a week 20 after the first codicil and ten days before the second codicil. Neither he nor any of his children is named in the will. At the date of the will the five sisters were all living and are all named in the will. One was unmarried and is still unmarried, four were married. One of these then had and still has no children.

In January, 1927, when the codicils were made, one of the married sisters had died, leaving children her surviving. One had died on 1918, having had two children who are both dead, one grandchild, Harold Fishleigh, whose claim has now to be considered.

It is unlikely that the unmarried sister or the married sister having no children will have children, and thus, when the provisions of the will are 30 considered, the discussion really narrows itself to this: When the ultimate division takes place are there to be two shares of approximately \$750,000 each or three shares of \$500,000 each? Does Harold Fishleigh take a share or is there an intestacy as to the share set apart for his grandmother which his mother and his aunt or one of them would have taken had they survived the testator?

Turning now to the will. After the appointment of executors and the gift to Rhoda Hobbs, all the residue of the estate is given to the executors in trust with power to continue the testator's business for a period not exceeding five years, and after payment of debts the net income for these five years is 40 to be divided equally between the testator's sisters—who are named—in five equal portions. At the end of the term of five years certain other legacies are to be paid, and the executors are to hand over the estate to a trust company and the income is then to be paid to the five sisters share and share alike "so long as they 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 the benefit of the children of any of my sisters so dying leaving lawful issue. But in case of the death

*In the
Supreme
Court of
Ontario.*

No. 7.
Reasons for
Judgment of
Middleton,
J.A., March
31st, 1928.

—Continued

In the
Supreme
Court of
Ontario.

No. 7.
Reasons for
Judgment of
Middleton,
J.A., March
31st, 1928.
—continued.

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." The Trust Company is then directed to continue to hold the 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 Trust 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. 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." 10

"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 21 years when there shall be a division of my estate as aforesaid, the children of each sister receiving one share of the estate."

Caroline Fishleigh, one of the sisters mentioned by the testator in his will, died on September 9th, 1919. She had two sons, Ernest Claude Fishleigh, who died on December 8th, 1918, who had had one son, John Fishleigh, who died in infancy, and William Thomas Albert Fishleigh, who died on September 18th, 1904, leaving him surviving Harold Fishleigh, Mr. Tilley's client upon this application. What, if anything, does he take? 20

The whole difficulty is occasioned by the use of the words "children" and "issue" in the will. "Issue" *prima facie* includes all descendants; "children," *prima facie*, includes the first generation only and does not include grandchildren. It must also be borne in mind that the question to be discussed concerns the suggested lapsing of a legacy by reason of the death of Mrs. Fishleigh and her two children during the lifetime of the testator. This is quite distinct from the problem presented where death takes place after the death of the testator. 30

It is, I think, desirable to discuss the exact provisions of the will before looking at any of the numerous cases referred to upon the argument. It is in the first place important to note that the word "issue" in this will is not used anywhere to describe those to whom either income or capital is given. It is uniformly used in the indication of an event in which a gift is made. In defining those to whom anything is given the word uniformly used is "children" and in some cases this word is coupled with the word "mother" or "parent." 40

After giving the income to the five sisters, there is this provision: "on the decease of any of them leaving lawful issue" the income "which the parent would have received" is to go to "the children" of any sister dying without leaving "lawful issue." This is followed by a provision covering the case of the death of "sisters without leaving lawful issue," when the share goes to the other sisters.

The first expository clause states the intention as to income to be that

“the children of any of my sisters dying shall get the share of the income which the parent would have received if living.”

With reference to capital. The period of distribution is fixed as the date when “the youngest child born to any of” the sisters attains the age of twenty-one, when there are to be as many shares created as there were “sisters who died leaving lawful issue” when “the children” of each of the said deceased sisters shall get one share.

The second expository clause reiterates the intention to provide the income for the five sisters for their respective lives and “for their children after
10 their decease so that the income of the children of each sister shall be the income which their mother would have received if living.” And these children are to have this income when the youngest of these children attain twenty-one. The intention as to capital is put laconically : “There shall be a division of my estate as aforesaid, the children of each sister receiving one share of the estate.”

If in all this, the words “die without leaving lawful issue” and “children” are given their strict meaning, there will be a share of both income and capital set apart for Mrs. Fishleigh for she did not die without issue, but there is no effectual gift, for it is given to her children, as she and they had both predeceased the testator. So as to it, it seems to me there must be an intestacy.

I do not at all suppose that this result is in accordance with the actual
20 wish on the part of the testator. His intention was plainly to die testate as to his whole estate, and I take it to be the duty of the court to attain that result if upon any fair reading of the will this can be accomplished, and I therefore proceed to examine the will and the decisions to see if I can find anything which would justify me in holding that the expressions used have some secondary meaning which can permissibly be given to them so as to avoid the result which I am satisfied the testator did not intend. Unless this can be accomplished intestacy must follow, not because the testator intended to die intestate but because he has not expressed any testamentary wish applicable
30 to the circumstances that have actually happened. I can only construe the will as it is written, and I cannot supplement by now making provisions to meet unforeseen events.

The problem here presented is not at all the same as that faced by the Court of Appeal in *In re Edwards* (1906) 1 Chy. 570, but there is a certain analogy, and the observations which I am about to quote from the judgment of Lord Justice Romer express I think the true principle applicable. There a testatrix gave all her property to trustees in trust for her children who attained twenty-one or married, with a gift over to other persons in the event of her death “without leaving any children surviving me.” There was one child
40 who did survive but who died an infant. It was argued that to avoid intestacy the condition of the gift over should be read as though it had been “without leaving any such children surviving me.” Lord Justice Romer says: (page 574) “I am strongly of opinion that where you have clear words used by a testator those words ought to be adhered to unless there is something in the context which shows that a contrary effect ought to be given. I find here clear words. . . . Those words are free from ambiguity, and I see nothing in this will which would enable me to say that those words ought not to be adhered to.

*In the
Supreme
Court of
Ontario.*

No. 7.
Reasons for
Judgment of
Middleton,
J.A., March
31st, 1928.

—continued.

In the
Supreme
Court of
Ontario.
—
No. 7.
Reasons for
Judgment of
Middleton,
J.A., March
31st, 1928.
—continued.

It is said that the Court leans against an intestacy. I do not know whether that expression at the present day means anything more than this, that in cases of ambiguity you may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate, but it cannot be that, merely with a view of avoiding intestacy, you are to do otherwise than construe plain words according to their plain meaning. A testator may well intend to die intestate. When he makes a will he intends to die testate only so far as he has expressed himself in his will." I would add that in many cases where a testator intends to die testate he may in fact die intestate because he has failed to make any provision in his will for that which has actually happened.

10

This does not stand alone, for example it was suggested by Lord Campbell in *Wing v. Angrave*, 8 H.L.C. 183, at 202 : "A Judge is to construe, and not to make a will ; and if an event has happened for which a testator has not provided, from not having foreseen it, although if he had foreseen it there is a strong probability that he would have provided for it in one particular way, his supposed wishes shall not prevail, *quod voluit non dixit* : we are to give effect to the expressed, not the conjectural or probable intention of the testator."

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 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 "grandchildren" without disorganizing and demoralizing the entire will. The words "child" or "children" are it is true flexible but they are *not as flexible* as the word "issue." It would be comparatively easy to read "issue" as "children," but this would in no way help Mr. Fishleigh.

30

The case of *Sibley v. Perry* (1802) 7 Ves. 522, has been much criticized but I think unjustly. I do not discuss the facts of that case but content myself by giving its effect as stated by Lord Justice Cozens-Hardy in the judgment of the Court of Appeal in *re Timson: Smiles v. Timson* (1916), 2 Chy. 362: (at p. 365) "It is an established rule that where the parent is spoken of the word "issue" is *prima facie* restricted to children of the parent." This rule is said to govern unless there is some context which induces the court to arrive at a different conclusion. Thus used, the rule is described (p. 366) as "a good rule, although like other rules of the kind its application may be cut down by the context of the will." This is of no value here save as to show how impossible it is to treat the word "children" as equivalent to "issue" because the former word is so coupled with the controlling words "parent" and "mother" that even if the word "issue" had been used it would probably have to yield to the context.

40

I have read a multitude of cases but refrain from discussing them as I failed to find anything in them helping me, and little would be accomplished by enumerating them and pointing out why they have nothing to do with the matter now in controversy.

[The result of this is that during the period in which this Trust Fund is to be held undistributed by the Trust Company the income is to be divided into five shares, and the share which would have been for Mrs. Fishleigh had she survived is to be distributed as upon an intestacy because the gift to the remaining sisters is only operative upon the death of a sister without leaving lawful issue.] If either of the sisters who survived and who have no children die without leaving lawful issue their shares "will be divided among the residue," that is among the surviving sisters or their children.

10 [When the capital comes to be divided, it is to be divided into as many shares as there were sisters who died leaving lawful issue, so that one share—probably one-third—would have to be set apart as representing Mrs. Fishleigh's at one time possible interest, and as to this there will be an intestacy.]

As already indicated, I think different considerations apply to the case of the sisters who survived the testator. I think that many cases justify my holding that the words "die without leaving issue" means "die without *having had* issue." This unfortunately does not help Mr. Fishleigh. In his case the same meaning must be attributed to the same words; but the unfortunate thing in his case is that there then is a gift to the children, and these children having pre-deceased the testator there is a lapse. In the case of those who
20 survived the testator there is *no lapse* but a *vested interest*; the enjoyment postponed for the period named by the testator, namely, until the youngest child of any of the sisters attains majority.]

One other matter should be mentioned: the effect of the codicil ratifying the will. Viewing this from every aspect, I cannot believe that it really has any bearing on the problems which I have to solve. It unquestionably makes it far more difficult to know what is in the mind of the testator. He unquestionably knew the family history and just how matters stood, but he does not appear to have given the problem presented any thought. I can conceive
30 no reason why he should have left his grand-nephew unprovided for, nor can I think it likely that he intended him to have so much more than any of the others standing in a similar relationship; but as Lord Watson said in *Scale v. Rawlins* (1892), A.C. 342: "We are not at liberty to speculate upon what the testator may have intended to do or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of his will." I could quote many similar references but they would not help. It may well be that the true solution of the making of the codicil in its present form is that the testator intended to deal with the matters mentioned in the codicil only, leaving as sacrosanct the main body of his will and that the confirmatory clause, though adopted by the testator, was
40 really the work of the conveyancer.

This disposes, I think, of all the questions argued before me.

There remains only the question of costs. The claim put forward by Mr. Wood appears to me quite without foundation, and I do not think I should give him any costs out of the estate, nor do I think that his claim has materially added to the costs of the motion. So, so far as he is concerned, there will be no costs. Subject to this, the costs of all parties may be well borne by the estate.

*In the
Supreme
Court of
Ontario.*

No. 7.
Reasons for
Judgment of
Middleton,
J.A., March
31st, 1928.

—continued.

*In the
Supreme
Court of
Ontario.*

No. 8.
Formal Judgment of Middleton, J.A.

No. 8.
Formal
Judgment of
Middleton,
J.A., March
31st, 1928.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE } Saturday, the 31st day of
MR. JUSTICE MIDDLETON. } March, 1928.

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.

10

UPON Motion made unto this Court on the 14th day of January, 1928,
by counsel on behalf of the Executors of the Estate of the said Thomas Saun-
ders Hobbs, in the presence of counsel for Eva Puddicomb and Winnifred
Kingsmill, and counsel for Ewart Field, Eva Field Harvey, Elizabeth M.
Ferguson and Rhoda Hobbs, and counsel for Mary Edwards and counsel for
Harold F. Fishleigh, and counsel for S. F. Wood and for the Official Guardian,
for the advice and opinion of the Court upon the certain questions arising
under the Will of the said Thomas Saunders Hobbs, and the Codicils thereto;
AND IT APPEARING to this Court that the surviving children of the late 20
W. R. Hobbs, a brother of the Testator, should be served with Notice of
Motion as representing the Testator's next-of-kin, and Notice of Motion
having been served accordingly, and this Motion coming on for further hearing
on the 3rd day of February, 1928, in the presence of counsel for all parties as
aforesaid and counsel for W. R. Hobbs, John W. Hobbs, Frank Hobbs, Elsie
May Fisher, Beatrice Dalton, Constance Brown, Yvonne Weld and Mary
Jane Lind, children of the said W. R. Hobbs, deceased brother of the said
Testator, UPON HEARING READ Probate of the Last Will and Testament
of the said Thomas Saunders Hobbs and of the Codicils thereto, and the 30
Affidavits of John Winer Wardrope, John S. Moore, Elizabeth M. Ferguson,
Harold F. Fishleigh and Lily L. Carder filed, and the exhibits therein referred
to, AND UPON HEARING counsel aforesaid; THIS COURT WAS PLEASED TO
DIRECT that the Motion stand over for Judgment and the same coming on
this day for Judgment :—

1. THIS COURT DOTH DECLARE that according to the true construc-
tion of the said Will and Codicils Rhoda Hobbs is not entitled to pay-
ment of a sum equal to the proceeds of the policy in the Imperial Life Assur-
ance Company of Canada upon the life of the Testator, and that the legacy of
the proceeds of the said policy is adeemed, AND DOTH ORDER AND ADJUDGE 40
THE SAME ACCORDINGLY.

2. AND THIS COURT DOTH DECLARE that according to the true con-
struction of the said Will and Codicils the gift of the income contained
in the Fourth Paragraph of the Will includes the income from all the Testa-

tor's residuary estate and also the income from his business investments, AND DOOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

3. AND THIS COURT DOOTH FURTHER DECLARE that according to the true construction of the said Will and Codicils Harold F. Fishleigh, a grandnephew of the Testator, and a grandson and only surviving issue of Caroline Fishleigh, sister of the Testator, who died before the Testator and left no children surviving the Testator, is not entitled to a share of the income payable under the terms of the said Will and that there is an intestacy as to the one-fifth share of such income, to which Caroline Fishleigh or her children would have been entitled had she or they survived the Testator, AND DOOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

4. AND THIS COURT DOOTH FURTHER DECLARE that according to the true construction of the said Will, the corpus of the residuary estate is to be divided into three equal parts and those entitled thereto are :

- (1) The children of Eva Puddicomb,
- (2) The children of Sarah Ann Field,
- (3) The next-of-kin of the Testator, such next-of-kin to be determined as of the date of the Testator's death,

and that the shares of the children of the said Eva Puddicomb and of the said Sarah Ann Field became vested upon the death of the Testator, AND DOOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

5. AND THIS COURT DOOTH FURTHER DECLARE that S. F. Wood is not entitled to have transferred to him the shares of issued Capital Stock of the Hobbs Manufacturing Company Limited given to him free and uncharged from Succession Duty, but that the said S. F. Wood is liable to pay the Succession Duty levied on the value of the said shares, AND DOOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

6. AND THIS COURT DOOTH FURTHER ORDER that the costs of all parties, other than the costs of S. F. Wood, be paid out of the estate of the said Thomas Saunders Hobbs, forthwith after taxation thereof, those of the executors to be taxed as between solicitor and client.

7. AND THIS COURT doth not see fit to make any Order as to the costs of the said S. F. Wood of and incidental to this Motion.

Judgment signed this 30th day April, 1928.

"D'ARCY HINDS"

Asst. Registrar.

Entered J.B. 38, pages 120-122,
April 30, 1928.

40 M.S.

*In the
Supreme
Court of
Ontario.*

No. 8.
Formal
Judgment of
Middleton,
J.A., March
31st, 1928.

—continued.

No. 9.
Notice of Appeal by Harold Ferguson Fishleigh.

*In the
Supreme
Court of
Ontario.
(Appellate
Division.)*

No. 9.
Notice of
Appeal by
Harold
Ferguson
Fishleigh
April 7th,
1928.

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.

TAKE NOTICE THAT Harold F. Fishleigh appeals to a Divisional Court from the judgment pronounced by The Honourable Mr. Justice Middleton, on the 31st day of March, 1928, in so far as it holds that there was an intestacy as to any part of the income or capital of the testator's residuary estate on the following grounds :

1. Thesaid judgment is wrong in law.
2. 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.
3. The learned Judge erred in holding that the words "child" and "children" of a deceased sister did not include the grandson of such deceased sister.
4. The learned Judge erred in not giving effect to the confirmation and republication by the testator of his will by the execution of the two codicils thereto in the month of January, 1927, having regard to the fact that the testator had then full knowledge of his family history and of the death of Mrs. Fishleigh and of her two sons.
5. The learned Judge should have held that the said Harold F. Fishleigh is entitled to the income on the share of the residuary estate set aside for the said Mrs. Fishleigh and to one share of the capital of the residuary estate when the period of distribution arrives.

DATED the 7th day of April, 1928.

TILLEY, JOHNSTON, THOMSON & PARMENTER,
255 Bay Street, Toronto,
Solicitors for Harold F. Fishleigh. 30

TO MESSRS. IVEY, ELLIOTT & GILLANDERS,
London, Ont.,
Solicitors for the Executors.

MESSRS. HELLMUTH, CATTANACH & RAMSAY,
Solicitors for Mrs. Edwards and Mrs. Ferguson.

MESSRS. ROWELL, REID, WRIGHT & McMILLAN,
Solicitors for Miss Rhoda Hobbs and others.

MESSRS. SAUNDERS, KINGSMILL, MILLS & PRICE,
Solicitors for Mrs. Kingsmill and others.

LEWIS DUNCAN, ESQ.,
Solicitor representing class entitled on intestacy. 40

THE OFFICIAL GUARDIAN.

MESSRS. SKEANS & HOOPER,
Solicitors for S. F. Wood.

No. 10.
**Notice of Appeal by Eva Field Harvey, Elizabeth M. Ferguson, Ewart Field
 and Rhoda Hobbs.**

IN 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 PRO-
 VINCE OF ONTARIO, MERCHANT, DECEASED.

*In the
 Supreme
 Court of
 Ontario.
 (Appellate
 Division.)*

—
 No. 10.
 Notice of
 Appeal by
 Eva Field
 Harvey,
 Elizabeth M.
 Ferguson,
 Ewart Field
 and Rhoda
 Hobbs,
 April 7th,
 1928.

TAKE NOTICE THAT Mrs. Alexander Harvey, Mrs. Elizabeth M.
 10 Ferguson, Ewart S. Field and Miss Rhoda Hobbs appeal to a Divisional
 Court from the judgment pronounced by The Honourable Mr. Justice Middle-
 ton, on the 31st day of March, 1928, insofar as it holds that there was an
 intestacy as to any part of the income or capital of the testator's residuary
 estate, on the following grounds :

1. That the judgment is wrong in law.
2. That the learned Judge erred in holding that there was an intestacy
 as to any part of the income or capital of the testator's residuary estate.
3. That the learned Judge should have held that the testator used the
 word "issue" in the will as meaning children.
- 20 4. That the learned judge erred in holding that the income was to be
 divided into five shares ; he should have held that it should be divided into
 four shares.
5. That the learned Judge erred in holding that the corpus should be
 divided into three shares. He should have held that it should be divided into
 two shares.

Dated the 7th day of April, A.D. 1928.

ROWELL, REID, WRIGHT & McMILLAN,
 Solicitors for Mrs. Alexander Harvey,
 Mrs. Elizabeth M. Ferguson,
 Ewart S. Field, and Miss Rhoda Hobbs.

30 To MESSRS. IVEY, ELLIOTT & GILLANDERS,
 London, Ont.

Solicitors for the Executors.

MESSRS. TILLEY, JOHNSTON, THOMSON & PARMENTER,
 Toronto, Ont.,
 Solicitors for Harold Fishleigh.

MESSRS. HELLMUTH, CATTANACH & RAMSEY,
 Solicitors for Mrs. Edwards and Mrs. Ferguson.

MESSRS. SAUNDERS, KINGSMILL, MILLS & PRICE,
 Solicitors for Mrs. Kingsmill and others.

LEWIS DUNCAN, ESQ.,
 Solicitor representing class entitled on intestacy.

THE OFFICIAL GUARDIAN.

40 MESSRS. SKEANS & HOOPER,
 Solicitors for S. F. Wood.

*In the
Supreme
Court of
Ontario.
(Appellate
Division.)*

No. 11.
Reasons for
Judgment of
First Divi-
sional Court
(Mulock,
C.J.O.),
September
20th, 1929.

No. 11.
Reasons for Judgment of First Divisional Court

IN THE MATTER OF THE
WILL AND CODICILS OF
THOMAS S. HOBBS,
DECEASED.

TILLEY, K.C., and A. J. THOMSON, K.C., for
the appellant, Harold Fishleigh.
R. G. IVEY, for the executors.
I. F. HELLMUTH, K.C., for Mrs. Edwards.
N. W. ROWELL, K.C., for Mrs. Rhoda Hobbs,
Mrs. Ferguson, Mrs. Harvey and Mrs.
Field.
D. W. SAUNDERS, K.C., for Mrs. Kingsmill 10
and Mrs. Puddicomb.
LEWIS DUNCAN, for the Class entitled on
Intestacy.
MCGREGOR YOUNG, K.C., for the children of
Mrs. Edwards and Mrs. Kingsmill.

MULOCK, C.J.O. : This is an appeal from the order of Middleton, J.A.,
construing the will and codicils of the testator Thomas S. Hobbs.

The questions involved in this appeal are : Who are entitled to share,
and in what proportions

- (a) in the income of the residuary estate of the testator during the 20
period of five years from his death.
- (b) in the income thereafter until arrival of the time for distribution of
the corpus,
- (c) in the corpus ?

The will bears date the 19th March, 1902, the following being the
portions thereof which bear on the questions to be determined :

"All the residue of my estate I give to my executors aforesaid in
trust . . . to apply the net income . . . for the term of five years
from my decease equally between my sisters Sarah Ann Field,
Caroline Fishleigh, Elizabeth Mary Ferguson, Eva Puddicomb 30
(wife of Robert Puddicomb), 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 and Western
Trusts Co. 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 trusts company shall expend the income which the parent 40
would have received if living, for the benefit of the children if 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

10 the children of any of my sisters dying shall get the share of the income which the parent would have received if living. And I desire that the said London and Western Trusts Co. 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 and 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. 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."

20 The testator added two codicils to his will, dated respectively the 11th and the 27th January, 1927, and died on the 30th September, 1927.

By the earlier codicil he appointed two executors to his will to fill the place of two who had died, and added :

"In all other respects I confirm my said will."

By the later codicil he gave to his sister Rhoda certain property in London, and \$25,000, and to Samuel Francis Wood certain shares in the Hobbs Manufacturing Company, and added :

"In all other respects I confirm my said will and codicil."

30 When he made his will, the five sisters named therein were alive. At the time of his death, three of them, Mary Rhoda Hobbs, Mrs. Puddicombe and Mrs. Ferguson were alive, but his sisters Mrs. Field and Mrs. Fishleigh had predeceased him. Mrs. Field left two children, Eva and Winnifred who survived the testator.

Mrs. Fishleigh had had two children, both of whom predeceased her, one of them, Albert, left a son, the appellant Harold Fishleigh. Mrs. Puddicombe at the present time has two children.

40 Numerous authorities were cited for the purpose of assisting the Court in its effort to ascertain the testator's intention, but where, as here, the intention may be ascertained by giving to the testator's language its ordinary meaning, a microscopical research to discover some other meaning, serves no useful purpose. In my opinion the testator's words admit of no ambiguity, the interpretation of which could be aided by the interpretations which learned Judges have given to other wills not in the identical language of the present one.

Turning then to the will : It discloses a scheme for disposing of the income of the estate until the corpus is to be distributed, and then for its distribution. The testator gives nothing but income to his sisters. During the first period

*In the
Supreme
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No. 11.
Reasons for
Judgment of
First Divisional
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(Mulock,
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September
20th,
1929.

—continued.

In the
Supreme
Court of
Ontario.
(Appellate
Division.)
—
No. 11.
Reasons for
Judgment of
First Divi-
sional Court,
(Mulock,
C.J.O.),
September
20th, 1929.
—continued.

of five years from his death "the 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."

Two of his sisters, Mrs. Field and Mrs. Fishleigh, had predeceased the testator, but the survivors' shares of the income for the first term of five years, being limited to one-fifth each, the one-fifth that each deceased sister if living would have taken, lapsed unless the will otherwise provides.

The testator deals with the case of the death of his sisters during the first period of five years as follows :

"It being understood in all cases during the first five years or 10
later that the children of any of my sisters dying shall get the share
of that income which the parent would have received if living."

Mrs. Field, who predeceased the testator, left her surviving two children, and they are entitled to the share of the income which their mother would have taken but for her death.

They do not take through their mother, but directly from the testator.

Mrs. Fishleigh and her two children, having predeceased the testator her grandson Harold Fishleigh took no share either of the income or of the corpus unless the word "children" as used by the testator includes grand- 20
children.

The word "children" *prima facie* means the first generation and not remoter issue. That the testator throughout the will used it in this 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 *ex abundantia*, he adds : "The intention of my will being to provide 30
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 grandmother would have taken if living.

Then what becomes of Caroline Fishleigh's share of the income ? 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." 40

Mrs. Caroline Fishleigh left her surviving her grandson Harold Fishleigh. Lawful issue includes grandchildren, thus she did not die 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.]

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.

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.

Costs out of the Estate.

10 HODGINS, J. A. : I agree.

MAGEE, J.A. : Appeals from the order of Mr. Justice Middleton construing the will and codicils of Thomas Saunders Hobbs, deceased, on the application of the executors thereunder.

Mr. Hobbs was unmarried. He died on 30th September, 1927, leaving a will dated 19th March, 1902, with two codicils dated 11th and 27th January, 1927.

At the date of the will in 1902, he was a man of considerable means, a manufacturer and merchant residing at London in Ontario. He then had living five sisters and one brother. Of the sisters, one, Mrs. Ferguson, was a widow without issue, another, Miss Rhoda Hobbs, was unmarried, another, Mrs. Field, was married with a daughter and son born in 1878 and 1880. Another sister, Mrs. Fishleigh, was married with two sons Ernest and William, the latter born in 1874; and the fifth sister, Mrs. Puddicombe, was married, with two daughters. The brother, William R. Hobbs, was married and had nine children then surviving, one having died without issue. One of the daughters was married, and then had two children, born in 1898 and 1899.

Having these relatives living, Thomas S. Hobbs made his will of 1902. Thereby, after appointing two executors and giving to his unmarried sister certain life insurance and mining stocks and household effects and a farm and personal property connected therewith, he gave all the residue of his estate to his executors in trust to realize sufficient thereof to pay his debts and funeral expenses but with power to continue to hold his stocks in joint stock companies or to continue his business for a period not exceeding five years from his death, and after payment of all his debts to apply the net income received from his said business investments including eight named companies for the term of five years from his decease equally between his sisters (naming the five). That is his said income was to be divided into five equal portions one of which was to go to each of his said sisters for the said term of five years and at the end of such five years to pay three legacies of \$2,500 each to named legatees and to hand over all his estate then in their hands to the London and Western Trusts Company, Limited, to be invested by that Company under the direction of his said executors. The will then proceeded as follows :

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No. 11.
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(Mulock
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September
20th, 1929.

(Hodgins,
J.A.),

(Magee, J.A.)

*In the
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(Appellate
Division.)*

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sional Court,
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—continued.

“ 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 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. 10

“And I desire that the said London and 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 and 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.” 30

The two codicils do not affect the wording of the will as to the division of the residuary estate or the income therefrom. The first codicil appoints three executors in place of the two named in the will who had both died ; and by the second codicil the testator made additional gifts to his sister Rhoda of a house and lot in London, with its contents and furnishings and a sum of \$25,000, and made a bequest of shares in a company to Samuel F. Wood, but to each codicil is added the not unusual clause that in all other respects he confirmed the will. There is however, no indication in either codicil that there was in fact any reading over or consideration of the wording of the will or any necessity for its perusal, and it may well be that the words in the codicils confirming the will were only inserted as a matter of course by the draughtsman, but they must be taken as the words of the testator. 40

Besides the death of the executors, changes had taken place among his relatives. Mrs. Sarah Ann Field had died in 1915 leaving her son Ewart Field and her daughter Eva then Mrs. Harvey. Mrs. Caroline Fishleigh had died in 1919 leaving as her only surviving issue one grandson Harold Fishleigh born in 1903, the only child of her son William who had died in 1904, her other

son Ernest having predeceased her in 1918 leaving no surviving issue. William Fishleigh, father of Harold, had married in July, 1902. He had received his business training with the Hobbs Hardware Company but had started business for himself in Hagersville. At his death his estate was insufficient to meet his liabilities. His uncle Thomas S. Hobbs was, on his widow's nomination, appointed administrator. The widow, who received some \$4,000 insurance on her husband's life, taught and practiced music, and for some years she and her son Harold resided with her husband's parents in a house given Mrs. Fishleigh by her brother Thomas S. Hobbs. The widow of William re-married in 10 1914. For many years before his death Thomas S. Hobbs yearly sent Harold a Christmas present, and on his marriage in July, 1927, sent him a wedding gift. There is no suggestion of any estrangement between them.

Between the dates of the two codicils the testator's brother, Wm. R. Hobbs, who was also a prominent manufacturer and merchant in Toronto, had died in January, 1927, leaving three sons and five daughters and a son and daughter of another daughter who had died in 1908.

The testator thus left him surviving three sisters, Mrs. Ferguson, Mrs. Puddicombe, and Miss Rhoda Hobbs, and two daughters of Mrs. Puddicombe, two children, son and daughter of his deceased sister, Mrs. Field, and one grand- 20 son of his deceased sister Mrs. Fishleigh besides the issue of his deceased brother William. His estate as valued for succession duty exceeded \$1,100,000. The only real estate was that devised to his sister Rhoda so that we have to deal only with the question of personal estate.

The executors applied for the opinion of the Court upon several questions, some relating to the legacies to S. F. Wood and to Rhoda Hobbs, but the only questions involved in this appeal are (1) Whether Harold Fishleigh was entitled to a share of the income under the terms of the will and (2) 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.

30 The order of Mr. Justice Middleton, so far as material on this appeal declares (a) that Harold Fishleigh is not entitled to a share of the income payable under the will and there is an intestacy as to the one-fifth share of such income to which Caroline Fishleigh or her children would have been entitled had she or they survived the testator, and (b) that the corpus of the residuary estate is to be divided into three equal parts and those entitled thereto are (1) the children of Eva Puddicombe, (2) the children of Sarah Ann Field and (3) the next of kin of the testator, to be determined as of the date of his death, and that the shares of the children of the said Eva Puddicombe and of the said Sarah Ann Field became vested upon the death of the testator. 40 The order also declared that the gift of the income from his business investments included the income from all his residuary estate and this is not appealed from.

From this order Harold Fishleigh appeals and the two sisters, Mrs. Ferguson and Miss Rhoda Hobbs and Mrs. Harvey and Ewart Field, the daughter and son of Mrs. Field, deceased, also appeal, all protesting against there being intestacy as to any part of the estate, and Harold claiming that he is entitled to one-fifth of the income and corpus and the others claiming that

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the income should be divided into four shares not five, and the corpus into two shares, not three.

There are three general subject matters in question, namely, the disposition of the income of the residuary estate for the first five years, the disposition of the income thereafter till the period of division of the corpus and the disposition of the corpus itself.

It is convenient, if not indeed necessary, to consider first the income after the five year period. It is given to the five sisters, share and share alike, so long as they all continue to live. Then on the decease of any of the sisters leaving lawful "issue" her "children" are to have the benefit of the income 10 which the "parent" would have received. But in case of any of the sisters dying without leaving lawful "issue" then the income of his estate is to be divided among "the residue." The will goes on to declare the intention to be to provide an income for each of the sisters during her (their) life and for her (their) children after her decease so that the income of her children shall be the income which their mother would have received if living, but when the sisters have all died then "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 is to be a division 20 of the estate. The wording of the will as to that division has also to be borne in mind in relation to the income. The estate is to be held until the death of all the five sisters and until the "youngest child born to any of them" shall have attained the age of twenty-one years and then the estate is to be distributed in as many shares as there were sisters who died leaving issue, and shall be divided so that the children of each of his "said deceased sisters" shall get one share and then at the end is added "the children of each sister receiving one share of the estate."

One thing would seem manifest that the testator did not contemplate any intestacy as to any part of his estate. He let the will remain unchanged for those many years and then twice confirmed it in 1927. He evidently thought 30 he was disposing of it all. But the difficulty arises over the use of the word "issue" which would include grandchildren and which is repeated as to both income and corpus with the repeated word "children" and the words "parent" and "mother." It is said that the will having been drawn by a solicitor the latter words are more likely to have been used in their strict sense, but we can hardly reconcile the wording with full opportunity for consideration of what was written. The absence of the phrase "child or children" would make one more ready to consider that the word "children" was used in a general sense. Personally I would be inclined to attach more weight to the use of the word 40 "issue" by a professional draughtsman as being deliberate than upon the other words. However, we have to deal with them all. We can find a similar phrasing even in the Wills Act. By section 5 a married woman between 1859 and 1873 was empowered to devise or bequeath her separate property to or among her child or children, issue of her marriage, and failing there being any issue then to her husband or as she might see fit. Thus if children did not mean descendants a wife could not will to her husband or her grandchildren or any one else if she happened to leave only grandchildren because there

would be no children and no failure of issue. Here the contention is that although Mrs. Fishleigh left issue, her grandson Harold, yet he cannot take under the will because the word "children" cannot be construed to include grandchildren or other descendants and she was not his "parent" or "mother."

We find many instances of Biblical use of the word "children" in the sense of descendants and mother in the sense of ancestress; but ordinarily a gift to children of a person would not be construed to be a gift to grandchildren or other issue. In *Redcliffe v. Buckley*, 1804, 10 Ves. 195, the will gave the residue to the children of four deceased brothers and a
10 deceased sister of the testator to be divided among them in their respective parents' share. None of the sister's children were then living, but there were several of her grandchildren and some great grandchildren, and it was held that they were not entitled to share and the Master of the Rolls pointed to the absence of any word "issue" and said that the residue was so given that no part would lapse and cause intestacy.

In *Pride v. Fooks*, 1858, 3 DeG. & J. 252, the will gave the residue to such child or children as two nephews and a niece should respectively leave, one-third to the child or children of each, and if only one child all to that child, and
20 if any one of the three left no children or child that third was to go to the children or child of the other or others leaving children or a child; and in case all died without leaving any issue then the whole residue was to go to children of the testator's step daughter. The two nephews died without issue, the niece left only grandchildren—the residue was claimed by those grandchildren and by the stepdaughter's children and by the testator's next of kin. On appeal from the Master of the Rolls, it was held that the "Child or children" did not mean descendants, that "any issue" did not mean "such issue" and hence there was an intestacy and the next of kin were entitled.

In *Moor v. Raisbeck*, 1841, 12 Sim. 123, one-third of a fund was given to such of the children of an aunt of the testatrix's husband as should be living
30 at the decease of the testatrix, equally if more than one and two other thirds similarly to others. The aunt had no child living but only grandchildren. Shadwell, V.C., held that there was nothing in the will making it necessary to construe children to include the grandchildren and that the testatrix had in several instances used the word in its proper sense and he was not at liberty to put a different construction on this part where the aunt's children were spoken of.

In each of these three cases, the Court found good reason on the face of the will for the limited construction, but in each it was conceded that the word might in a proper case be given wider meaning.

40 On the other hand in *Crooke v. Brooking*, (1688) 2 Vern. 50, it was said that if the gift be to the children of the person dead at the date of the will who has left grandchildren but no children then living and if the testator was aware of that, that laid the ground for construing the word to include grandchildren or descendants.

In *Fenn v. Death*, 1856, 23 Bev. 73, the will gave a residue to the children of T. or such of them as should be living at the testator's decease, and if more than one such child then to be equally divided between them. T. had died

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long before and all his children were dead at the date of the will, but there were grandchildren and great-grandchildren, and it was held that the grandchildren took all.

In *Berry v. Berry*, 1861, 3 Giffard, 134, 9 W.R. 889, after a devise to the children of the testator's late brother John in equal shares, and if only one to that one, and a bequest to the issue of John in equal shares and if only one child of John then to such only child there was a gift of the residue to and in equal shares among the children of John living at the testator's wife's decease. At the testator's death, John's children were dead, but there were grandchildren, and Stuart, V.C., citing various authorities held that the grandchildren of John took the residue, the word "issue" helping out this decision, and it was a proper course to prevent total failure of the gift. 10

In *re Smith*, 1887, 35 Ch. D. 558, the testator gave a one-sixth share of the residue to the children of his sister who should be living at his death and similarly one-sixth to the children of two brothers and three other persons. At the date of the will there were no children of the sister but there were two grandchildren. It was held by Kay, J., that "children" was used in the sense of offspring and so the grandchildren were entitled. Before that case in *re Kirk*, 1885, 52 L.T.R. 346, there was a trust to divide the residue into four shares and pay one-quarter to the children of the testator's late brother James and similarly one-quarter to the children of two other brothers and a nephew. James had three children, all of whom had died before the will as the testator knew but there were grandchildren and great grandchildren of James living at the testator's death. Pearson, J., considered there was nothing to show that a wider meaning of the word "children" was intended and that the rule was to take the literal meaning except upon proper construction of the will itself and that the judgement in *Berry v. Berry* was not happily worded, and he held that there was an intestacy. 20

In *re Atkinson Pybus v. Boyd*, 1918, 2 Ch. 139, there was a bequest for such of the children of three deceased cousins as should be living at the death of the testatrix and if all dead then for such remoter issue per stirpes as should then be living, and the residue to such of the children of four late uncles and aunts as should be living at her death. At the date of the will there were no children of any of the four living but there were grandchildren and remoter issue. Younger, J., pointed out that the will drew the distinction between children and remoter issue and said the alleged rule that if there were no children at the date of the will the grandchildren would take would require a decision by the House of Lords and thought *Crooke v. Brooking* hardly deserved the attention paid to it and that *re Kirk* established the true limit and there was no hard and fast rule. That case, however, did not require the application of the rule to which he took exception. 30

Here we find 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 there were not issue of the sister dying and the fact that when he confirmed his will there were no living children of Mrs. Fishleigh. Against these we have the direction that the children were to take the parent's share or mother's share, but if by children 40

was meant issue then those words parent and mother were manifestly a more familiar word than some phrase progenitress or ancestress or some large phrase, and referred to the sister's dying and leaving issue and whose issue was thus to share. I do not overlook the fact that it is not a case of inheritance from the deceased sister but of a gift after the sister's life interest. If sitting in a Court of first instance I would be inclined to the view that the word children meant issue and included grandchildren, but I find myself in the position of the Lord Chancellor in *Sibley v. Perry*, 7 Ves. 522, where considering the whole will and the wording of gifts to others he inclined to the opinion that the testator by a gift to issue meant children, but he added :
 10 "I have not such confidence in my opinion to have altered the contrary determination if it had come before me on appeal." I therefore would affirm the judgment appealed from as to the income after five years. As to the income for the first five years that was at first given absolutely to the testator's sisters, and if the interpretation of the will as to the subsequent income is that "children" does not include grandchildren, then the grandchildren cannot take the five years' income.

As to the corpus of the estate it is not to be divided until all the five sisters shall have died and the youngest child of any of them shall have attained
 20 the age of twenty-one years. The effect of this is that the shares do not vest until the death of the last surviving sister : assuming that there will not be children hereafter born to any of them. If any one of the sisters now living should survive her children and leave only grandchildren then as to that share of the estate there will be an intestacy just as in the case of Mr. Fishleigh.

The present judgment therefore in declaring that the estate is now divisible should be varied and no declaration at present made or only a declaration of the contingency.

Under the circumstances as the questions have arisen through the testator's wording of his will the costs of all parties should be paid out of the estate.

In the Supreme Court of Ontario. (Appellate Division)

No. 11. Reasons for Judgment of First Divisional Court, Magee, J.A., September 20th, 1929.

—continued.

30

No. 12
 Formal Order of First Divisional Court
 IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE THE CHIEF JUSTICE OF ONTARIO. THE HONOURABLE MR. JUSTICE MAGEE. THE HONOURABLE MR. JUSTICE HODGINS.	}	Friday, the 20th day of September, 1929.
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No. 12. Formal Order of First Divisional Court, September 20th, 1929.

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.

40 UPON MOTION made unto this Court constituted as above mentioned along with the Honourable Mr. Justice Ferguson, since deceased, on the 19th day of June, 1928, by Counsel on behalf of Harold F. Fishleigh and UPON MOTION made at the same time by Counsel on behalf of Ewart Field, Eva

*In the
Supreme
Court of
Ontario.
(Appellate
Division.)*

Formal
Order of
First Divi-
sional Court,
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—continued.

Field Harvey, Elizabeth M. Ferguson and Rhoda Hobbs by way of appeal from the judgment of the Honourable Mr. Justice Middleton pronounced on the 31st day of March, 1928, in the presence of Counsel for the Executors, of Counsel for Eva Puddicomb and Winifred Kingsmill, of Counsel for Mary Edwards, of Counsel for W. R. Hobbs, John W. Hobbs, Frank Hobbs, Elsie May Fisher, Beatrice Dalton, Constance Brown, Yvonne Weld and Mary Ann Lind, the surviving children of the late W. R. Hobbs, deceased, a brother of the testator and of the Official Guardian, no one appearing for S. F. Wood although duly served with notice of appeal as appears by affidavit of service filed, upon hearing read the material filed on the Motion before the Honourable Mr. Justice Middleton and the said judgment AND UPON HEARING what was alleged by Counsel aforesaid, this Court was pleased to direct that the said Motions stand over for judgment and the same coming on this day for judgment, 10

1. THIS COURT DOTH ORDER that the said judgment of The Honourable Mr. Justice Middleton dated the 31st day of March, 1928, be varied and as varied be as follows :—

“ 1. THIS COURT DOTH DECLARE that according to the true construction of the said Will and Codicils Rhoda Hobbs is not entitled to payment of a sum equal to the proceeds of the policy in the Imperial Life Assurance Company of Canada upon the life of the Testator, and that the legacy of the proceeds of the said policy is adeemed AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY. 20

“ 2. AND THIS COURT DOTH DECLARE that according to the true construction of the said Will and Codicils the gift of the income contained in the Fourth Paragraph of the Will included the income from all the Testator's residuary estate and also the income from his business investments, AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

“ 3. AND THIS COURT DOTH FURTHER DECLARE that according to the true construction of the said Will and Codicils, Harold F. Fishleigh, a grandnephew of the Testator, and a grandson and only surviving issue of Caroline Fishleigh, sister of the Testator, who died before the Testator and left no children surviving the Testator, is not entitled to a share of the income payable under the terms of the said Will and that there is an intestacy as to the one-fifth share of such income, to which Caroline Fishleigh or her children would have been entitled had she or they survived the Testator, AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY. 30

“ 4. AND THIS COURT DOTH FURTHER DECLARE that according to the true construction of the said Will, the shares in the corpus of the testator's residuary estate have not vested and will not vest until the death of the last surviving sister of the testator and until the youngest child born to any of them has attained his or her majority, and that until then the number of shares into which the residuary estate is to be divided and the persons entitled thereto cannot be ascertained, and DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY. 40

“ 5. AND THIS COURT DOTH FURTHER DECLARE that S. F. Wood

is not entitled to have transferred to him the shares of issued capital stock of the Hobbs Manufacturing Company Limited given to him free and uncharged from Succession Duty, but that the said S. F. Wood is liable to pay the Succession Duty levied on the value of the said shares, AND DO TH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

In the Supreme Court of Ontario. (Appellate Division.)

“6. AND THIS COURT DO TH FURTHER ORDER that the costs of all parties, other than the costs of S. F. Wood, be paid out of the estate of the said Thomas Saunders Hobbs, forthwith after taxation thereof, those of the executors to be taxed as between Solicitor and Client.

No. 12. Formal Order of First Divisional Court, September 20th, 1929.

10 “7. AND THIS COURT DO TH not see fit to make any Order as to the costs of the said S. F. Wood of and incidental to this Motion.”

—continued.

2. AND THIS COURT DO TH FURTHER ORDER that save as aforesaid the said Appeals be and the same are dismissed.

3. AND THIS COURT DO TH FURTHER ORDER that the costs of all Parties of and incidental to the said Appeals other than the costs of S. F. Wood, who did not appear on the appeal, be paid out of the estate of the said Thomas Saunders Hobbs, forthwith after taxation thereof, those of the Executors to be taxed as between Solicitor and Client.

20 [SEAL] “C.B.” Nov. 1st/29.
Entered O.B. 108, pages 319-20-21.
Nov. 1, 1929.
“E.B.”

“E. HARLEY,”
Senior Registrar, S.C.O.

(Appellate Division.)

No. 13.

Order of Hodgins, J.A., approving security and admitting appeal.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE MR. JUSTICE } Tuesday, the 19th day of
HODGINS IN CHAMBERS. } November, 1929.

No. 13. Order of Hodgins, J.A., approving security and admitting appeal, November 19th, 1929.

30 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.

[L.S. \$1.40]

1. Upon the application of Counsel for Harold Ferguson Fishleigh in the presence of Counsel for 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, 40 Elsie May Fisher, Beatrice Dalton, Constance Brown, Yvonne Weld and Mary Ann Lind, and of the Official Guardian representing Nigel Edwards, Ian Edwards, Charles D’Arcy Kingsmill, and Mary Kingsmill, infant grandchildren of Eva Puddicombe, upon hearing read the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario

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Order of
Hodgins,
J.A., approv-
ing security
and admit-
ting appeal,
November
19th, 1929.

—continued

pronounced on the 20th day of September, 1929, the reasons for said judgment and the bond of the Dominion of Canada General Insurance Company dated the 8th day of November, 1929, filed and upon hearing what was alleged by Counsel aforesaid and it appearing that the case is one in which the said Harold Ferguson Fishleigh has under the provisions of the Privy Council Appeals Act, R.S.O. 1927, Chapter 86, a right to appeal to His Majesty in His Privy Council.

2. IT IS ORDERED that the said bond be approved and allowed as good and sufficient security that the said Harold Ferguson Fishleigh will effectually prosecute his appeal to His Majesty in His Privy Council from the judgment of the First Divisional Court and will pay such costs as may be awarded in case the said judgment is confirmed. 10

3. AND IT IS FURTHER ORDERED that an appeal by the said Harold Ferguson Fishleigh to His Majesty in His Privy Council from the said judgment of the First Divisional Court be and the same is hereby admitted.

4. AND IT IS FURTHER ORDERED that the costs of this application be costs in the said appeal.

“E. HARLEY”

Senior Registrar, S.C.O.

19/11/29

“C.B.”

[SEAL]

Entered O.B. 109, pages 223-4,

Nov. 19, 1929.

“E.B.”

20

PART II.

EXHIBITS.

Part Exhibit “A”

(to affidavit of John W. Wardrope.)

Will of Thomas Saunders Hobbs

(Applicant's Exhibit)

30

Exhibits.
Part of “A”
(to affidavit
of John W.
Wardrope).
Will of
Thomas
Saunders
Hobbs,
March 19th,
1902.

THIS IS THE LAST WILL AND TESTAMENT of me THOMAS S. HOBBS of the City of London in the County of Middlesex, Wholesale Hardware Merchant, made this Nineteenth day of March, in the year of our Lord one thousand nine hundred and two.

I hereby nominate constitute and appoint Mr. Robert W. Puddicombe of the said City of London Gentleman and Mr. George C. Gibbons of the same place Barrister the Executors of this my said Last Will and Testament.

I give and bequeath to my Sister Rhoda Hobbs all Insurance on my life including the Policy for \$10,000 in the Imperial Life, the Benefit Certificates in the Independent Order of Foresters for \$3,000, and in the Commercial Travellers' for \$2,000; also all Mining Stocks such as the 'Blacktail', 'Sand- 40

poil', 'Jumbo' and 'Iron Monitor', which I shall die possessed of and also all household chattels for her own benefit exclusively I also give and devise to my said Sister my farm in the Township of London also all chattels and personal property connected therewith.

All the residue of my estate I give to my Executors aforesaid in trust to realize 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
 10 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 investments, which shall include all my interest in the Hobbs Hardware Company, the Hobbs Manufacturing Company, the Independent Cordage Company, the Canada Furniture Company, the Ontario Binder Twine Agency, the Consolidated Plate Glass Company, the London Bolt and Hinge Works, and the Western Alberta Railroad, 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
 20 which is to go to each of my Sisters aforesaid for the said term of five years.

At the end of the said term of five years I direct and desire my Executors to pay to Miss Lorna C. Gibbons, Miss Helen Gibbons, George S. Gibbons, and Miss Marjorie Gibbons, children of Mr. George C. Gibbons, the sum of \$2,500.00 each (Two thousand five hundred dollars each).

[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 the income from my said estate to be paid to my said five sisters hereinbefore named share and share alike as long as they
 30 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.

And I desire that the said London & Western Trusts Company (Limited)
 40 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.

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

*In the
Supreme
Court of
Ontario.*

Exhibits.
Part of "A"
(to affidavit
of John W.
Wardrope).
Will of
Thomas
Saunders
Hobbs,
March 19th,
1902

—continued

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Part of "A"
(to affidavit
of John W.
Wardrope).
Will of
Thomas
Saunders
Hobbs,
March 19th,
1902.

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.]

IN WITNESS WHEREOF I have hereunto set my hand the day and year first above written.

THOMAS S. HOBBS.

Signed published and declared by the said Thomas S. Hobbs as and for 10 his Last Will and Testament in the presence of us who at his request in his presence and in the presence of each other have hereunder subscribed our names as witnesses.

WILLIAM KENNEDY.
MARGARET EVANS.

Part Exhibit "A"
(to affidavit of John W. Wardrope)

First Codicil
(Applicant's Exhibit)

Exhibits.
Part of "A"
(to affidavit
of John W.
Wardrope).
First Codicil
January
11th, 1927.

I, THOMAS S. HOBBS, of the City of London in the County of Middle- 20 sex, Wholesale Hardware Merchant and Manufacturer, declare this to be a Codicil to my last Will and Testament which said last Will and Testament bears date the Nineteenth day of March in the year of our Lord one thousand nine hundred and two.

I HEREBY APPOINT Samuel Francis Wood, John Winer Wardrope and The London & Western Trusts Company, Limited, to be the Executors and Trustees of my said Will in the place and stead of Robert W. Puddicombe and George C. Gibbons, the Executors named therein who are deceased.

IN ALL OTHER RESPECTS I confirm my said Will.

IN WITNESS WHEREOF I have set my hand this eleventh day of January 30 in the year of our Lord one thousand nine hundred and twenty-seven.

T. S. HOBBS.

SIGNED by the Testator, in the presence of us, who, in his presence, at his request and in the presence of each other, have hereunto subscribed our names as witnesses.

JOHN S. MOORE.
MARK QUINNEY.

Part Exhibit "A"
(to affidavit of John W. Wardrope)

Second Codicil
(Applicant's Exhibit)

*In the
Supreme
Court of
Ontario.*

Exhibits.
Part of "A"
(to affidavit
of John W.
Wardrope).
Second
Codicil,
January
27th,
1927.

THIS IS A CODICIL to the last Will and Testament of me, THOMAS S. HOBBS, of the City of London, in the County of Middlesex, Wholesale Hardware Merchant and Manufacturer, which Will bears date the Nineteenth day of March, 1902.

1. I GIVE, DEVISE AND BEQUEATH To my Sister, Rhoda Hobbs,
10 of the City of London, in the County of Middlesex, in addition to any provision which I have already made for her under my said Will, the following :

(a) The real estate, consisting of house and lot, at 530 Ridout Street in the City of London, together with all contents and furnishings of whatsoever nature or kind.

(b) The sum of Twenty-five Thousand Dollars.

2. In consideration of our long friendship and of his faithful and efficient services in building up the Hobbs Manufacturing Company, Limited, I GIVE, DEVISE AND BEQUEATH to Samuel Francis Wood sufficient shares of the Capital Stock of the Hobbs Manufacturing Company, Limited, to give him,
20 together with the shares of the Hobbs Manufacturing Company, Limited now held by him, fifty-one per cent. of the outstanding Capital Stock of the said Hobbs Manufacturing Company, Limited ; and in case at the time of my death, I do not own any shares in the said Hobbs Manufacturing Company, Limited, or not sufficient shares for the said purpose, I HEREBY DIRECT AND AUTHORIZE my Executors to purchase from The Hobbs Hardware Company, Limited, sufficient shares of the Hobbs Manufacturing Company, Limited owned by them for the said purpose, and have the said shares transferred to the said Samuel Francis Wood.

3. In all other respects I confirm my said Will and Codicil thereto
30 bearing date the 11th day of January, 1927.

IN WITNESS WHEREOF I have hereunto set my hand and seal the 27th day of January, A.D. 1927.

T. S. HOBBS.

SIGNED, PUBLISHED AND DECLARED by the said Thomas S. Hobbs as and for a Codicil to his last Will and Testament, in the presence of us, who both present at the same time, in his presence, at his request, and in the presence of each other have hereunto subscribed our names as witnesses.

JOHN S. MOORE.
MARK QUINNEY.

40

A true Copy.
"EDMUND WELD"
Registrar.

Part Exhibit "A"
(to affidavit of John W. Wardrope)

Letters Probate
(Applicant's Exhibit)

*In the
Supreme
Court of
Ontario.*

Exhibits.
Part of "A"
(to affidavit
of John W.
Wardrope).
Letters
Probate
November
9th, 1927.

CANADA.

PROVINCE OF ONTARIO.

IN HIS MAJESTY'S SURROGATE COURT OF THE COUNTY OF MIDDLESEX.

BE IT KNOWN that on the Ninth day of November in the year of our Lord one thousand nine hundred and twenty-seven—THE LAST WILL AND TESTAMENT and two Codicils of THOMAS SAUNDERS HOBBS late of the City 10 of London, in the County of Middlesex and Province of Ontario, Merchant, who died on or about the Thirtieth day of September, in the year of our Lord one thousand nine hundred and twenty-seven at the said City of London, and who at the time of his death had a fixed place of abode at the City of London aforesaid, was proved and registered in the said Surrogate Court, a true copy of which said last Will and Testament and two Codicils is hereunto annexed, and that administration of all and singular the property of the said deceased and in any way concerning his Will and two Codicils was granted by the aforesaid Court to THE LONDON AND WESTERN TRUSTS COMPANY, Limited, of the City of London, in the County of Middlesex, SAMUEL 20 FRANCIS WOOD of the same place, Merchant, and JOHN WINER WARDROPE of the same place, Accountant, the Executors named in the said Will and two Codicils, the Manager of the said Company and the said Samuel Francis Wood and the said John Winer Wardrope having been first sworn that the Executors would well and faithfully administer the same by paying the just debts of the deceased and the Legacies contained in his Will and two Codicils so far as they are thereunto bound by law, and by distributing the residue (if any) of the property according to law and to exhibit under oath a true and perfect Inventory of all and singular the said property and to render a just and full account of their Executorship when 30 thereunto lawfully required.

WITNESS HIS HONOUR : Talbot Macbeth, Judge of the said Surrogate Court at the City of London, in the County of Middlesex, the day and year first above written.

[SEAL] By the Court.

"EDMUND WELD"
*Registrar of the Surrogate Court
of the County of Middlesex.*

This is Exhibit "A" referred to in the affidavit of John Winer Wardrope sworn before me at the City of London this 7th day of December, 1927. 40

WM. B. HENDERSON,
A Commr. etc.

Exhibit "B"
(to affidavit of John W. Wardrope)

Schedule to Succession Duty Affidavit
(Applicant's Exhibit)

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
"B"
Schedule to
Succession
Duty
Affidavit.

IN THE SURROGATE COURT OF THE COUNTY OF MIDDLESEX.

In the Matter of the Estate of Col. Thomas Saunders Hobbs, deceased,
late of the City of London, in the County of Middlesex

REAL ESTATE		Fair market value of property, exclusive of liens and encumbrances.	
10	Give short description of each parcel or lot with dimensions for purposes of identification.		
	Lot 12 on the East side of Ridout St., Kent's Survey, Plan 199 $\frac{1}{2}$ City of London, described as Municipal No. 530 Ridout St. Southeast quarter Lot 31 in the 3rd Concession, Twp. of London, containing 40 acres, and part of Lot 31 in the 3rd Concession, Twp. of London, containing 13 acres.	\$	c.
		10,000	00
		5,000	00
	Total.....	15,000	00

MONEYS SECURED BY MORTGAGE.

20	Name of Mortgagor	Short Description of Land	Other Particulars, including date, principal, payments on account, rate of interest, and date from which interest has been accruing to date of death.	Principal		Interest		Total	
				\$	c.	\$	c.	\$	c.
	Mary C. Richardson	Lot 230, on N.S. Dupont St. C y of Toronto.	Due 7 May, 1914, Int. 6% 1 May, 1 Nov.	1000	00	24	98	1024	98
30			Total.....	1000	00	24	98	1024	98

BOOK DEBTS AND PROMISSORY NOTES, ETC.

In the
Supreme
Court of
Ontario.
—
Exhibits.
"B"
Schedule to
Succession
Duty
Affidavit.

—continued

Name of Debtor or Payor	Address (City, Town or Province)	Particulars, including date due, principal, payments on account, rate of interest, and date from which interest has been accruing to date of death.	Principal		Interest		Total	
			\$	c.	\$	c.	\$	c.
W. J. McLeod	London	P/N. Demand dated 17 Dec. 1926. No interest.	500	00			500	00
Hobbs Hardware Co. Ltd.	London	Balance at credit of personal account.	68,549	26			68,549	26
Hobbs Mfg. Co.	London	do.	10,991	80			10,991	80
		Total	80,041	06			80,041	06

SECURITIES FOR MONEY, INCLUDING LIFE INSURANCE AND CASH ON HAND AND IN BANK.

Name of Company or otherwise.	Particulars.	Principal.	Interest	Total.
Ontario Commercial Travelers Association, London, Ontario.	Mortuary Benefit Cert. No. 216, payable to sister, Miss R. Hobbs.	\$ 490.00	\$	\$ 490.00
Sons of England, London.	Mortuary Benefit Cert. payable to Miss R. Hobbs	100.00		100.00
Independent Order of Foresters, Toronto, Ont.	Policy No. 188403 payable to Miss R. Hobbs.	1,593.00		1,593.00
London & Western Trusts Co. Ltd., London, Ont.	Investor's Receipt No. 533.	9,000.00	\$ 224.87	9,224.87
do.	Inv. Receipt No. 550.	6,000.00	149.92	6,149.92
\$5000 Dominion of Canada	5½% Bonds due Dec. 1, 1927	5,000.00	91.16	5,091.16
\$5000 Dominion of Canada	5½% Bonds due Nov. 1, 1932.	5,150.00	114.52	5,264.52
Independent Cordage Co., Toronto, Ontario.	Cheque for salary to Sept 30, 1927.	333.33		333.33
Bank of Nova Scotia	Cash at credit of Savings A/C in London Branch	57,217.33	417.85	57,635.18
Standard Bank of Canada, Toronto, Ontario	Cash at credit of Savings A/C.	1,677.18	8.40	1,685.58
London Bolt & Hinge Co London, Ontario.	One-half interest in business governed by agreement.	60,000.00		60,000.00
\$1000 Ontario Club.	5% Second Mtge. Bonds due July 1, 1931. (Doubtful value).			
		\$146,560.84	\$1,006.72	\$147,567.56

BANK STOCKS AND OTHER STOCKS.

No. Shs.	Name of Company	Kind of Stock	Amount Paid-up	Par Value	Fair Market Value	In the Supreme Court of Ontario.
3321	The Hobbs Hardware Co. Ltd., London, Ontario.	Capital Stock	\$332,100.00	\$332,100.00	\$664,200.00	Exhibits. "B" Schedule to Succession Duty Affidavit.
1141	Hobbs Manufacturing Co., Ltd., London, Ont.	"	114,100.00	114,100.00	171,150.00	
228	Independent Cordage Co., Toronto, Ontario	"	11,400.00	11,400.00	13,680.00	—continued
10 30	The London & Western Trusts Co. Ltd., London, Ontario.	"	3,000.00	3,000.00	4,350.00	
120	Winnipeg Electric, Winnipeg Manitoba.	Preferred.	12,000.00	12,000.00	12,720.00	
48	do.	Common.	4,800.00	4,800.00	4,272.00	
10	The Trusts & Guarantee Co., Toronto, Ontario.	Capital Stock	1,000.00	1,000.00	830.00	
100	London Realty Co., Ltd., London, Ontario.	Preferred.	10,000.00	10,000.00	7,500.00	
20 30	Power Corporation of Canada, Ltd., Montreal.	6% First Cumulative Pref.	3,000.00	3,000.00	2,887.50	
25	do.	Common (No par Value)			1,343.75	
200	London Arena Ltd., London, Ont.	Capital Stock	5,000.00	5,000.00	1,250.00	
150	Stevenson Gardens, Inc., Detroit.	Capital Stock	1,500.00	1,500.00	1,500.00	
22	The Steel Co. of Canada, Hamilton, Ontario.	Preferred.	2,200.00	2,200.00	3,520.00	
30 1	London Hunt & Country Club, Ltd., London, Ont.	Capital Stock (No commercial value).	50.00	50.00		
10	Thistle Club of London, Ont.	do.	100.00	100.00		
					\$889,203.28	

MISCELLANEOUS ASSETS NOT HEREINBEFORE MENTIONED, IF ANY

		Fair Market Value	
		\$	c.
40	<i>Give full particulars here</i>		
	Household Goods and Furniture.....	1500	00
	Pictures, Plate and Jewelry.....	1000	00
	Stock-in-Trade of Business or Industrial Concerns.....		
	Goodwill of Business of Industrial Concern.....		
	Farm Implements.....		
	Farm Produce of all Kinds.....		
	Horses.....		
	½ interest in certain freehold leases in Newfoundland. No value....		
	Any other Property..... Cadillac Car.....	1000	00
Total.....		3500	00

NOTE.—State fully if bonds, debentures and other securities, owned by a foreign decedent, are in his possession elsewhere than in Ontario, and are actually listed on a register out of Ontario where a transfer can be made without any act being required at the head office in Ontario.

SUMMARY.

	Principal or Market Value		INTEREST		TOTAL	
	\$	c.	\$	c.	\$	c.
Real Estate	15,000	00			15,000	00
Moneys Secured by Mortgage.....	1,000	00	24	98	1,024	98
Book Debts and Promisory Notes.....	80,041	06			80,041	06
Securities for money including Life Insurance and Cash in Bank and on hand.....	146,560	84	1,006	72	147,567	56
10 Bank Stocks and other Stocks.....					889,203	28
Miscellaneous Assets not hereinbefore men- tioned (if any).....					3,500	00
Total.....					\$1,136,336	88

*In the
Supreme
Court of
Ontario.*

Exhibits.
"B"
Schedule to
Succession
Duty
Affidavit.

—continued.

This is Schedule "A" referred to in the affidavit of value and relationship of

Sworn before me on the _____ day of October A.D. 1927.

A Commissioner, etc., or a Notary Public, etc.

This is Exhibit "B" referred to in the Affidavit of John Winer Wardrope
sworn before me at the City of London this 7th day of December, A.D. 1927.

"WM. B. HENDERSON"

A Commr. etc.