Privy Council Appeal No. 9 of 1930.

Harold Ferguson Fishleigh - - - - - - - *Appellant*

v.

The London and Western Trusts Company, Limited, and others - *Respondents*

Ewart Field and others - - - - - - - *Appellants*

v.

The London and Western Trusts Company, Limited, and others - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE, 1930.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD DARLING.
LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

These appeals raise for decision questions of the true construction of the will and codicils of Thomas Saunders Hobbs.

The testator was a bachelor. At the date of his will he had 5 sisters living of whom four were married, viz., Mrs. Field, Mrs. Ferguson, Mrs. Fishleigh and Mrs. Puddicombe. Mrs. Ferguson was the only married sister who had no children. Mrs. Fishleigh had 2 sons alive, viz., Ernest Claude Fishleigh and William Thomas Albert Fishleigh. In these circumstances the testator executed his will which bears date the 19th March 1902.

After making certain dispositions of specific items of property, the testator dealt with the residue of his estate in manner following : –

For the term of 5 years from his decease his executors were to apply the " net income derived from my business investments " equally between his five named sisters, " 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."

The phrase " the net income received from my said business investments " has been judicially declared to include the income from all the testator's residuary estate.

At the end of the term of five years the executors are directed to pay certain pecuniary legacies. The will then proceeds and concludes as follows :—

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

After the date of his will and while the testator was still alive, the following events occurred :—

In 1903, Harold Ferguson Fishleigh (a son of William Thomas Albert Fishleigh) was born. In 1904, William Thomas Albert Fishleigh died. In 1915, Mrs. Field died leaving 2 children. In 1918, Ernest Claude Fishleigh died, childless. In 1919, the testator's sister Mrs. Fishleigh died.

On the 11th January 1927 the testator executed a codicil to his will by which he appointed new executors and in all other respects confirmed his will. On the 27th January 1927 he executed a second codicil by which he made certain specific devises and bequests and gave a pecuniary legacy, and in all other respects confirmed his said will and codicil.

The testator died on the 20th September 1927. He was survived by (1) Mrs. Ferguson who is 77 and has never had a child; (2) Mrs. Puddicombe who is 72 and has had 2 children who are living, and who have children living; (3) Miss Rhoda Hobbs who is aged 70; (4) Ewart Field and Mrs. Eva Harvey, the 2 children of Mrs Field deceased; and (5) Harold Ferguson Fishleigh, the only grandson of Mrs. Fishleigh deceased.

In these circumstances questions arose as to the persons entitled to the income and corpus of the testator's residuary estate: and the executors applied to the Supreme Court of Ontario by notice of motion dated the 7th December 1927 for the determination of (among other) the following questions:—

"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 3 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?"

By his order dated the 31st March 1928, Middleton J. made the following declarations in regard to the questions aforesaid:—

"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.

"4. And this Court doth 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 Puddicombe,

(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 Puddicombe and of the said Sarah Ann Field became vested upon the death of the testator, and doth order and adjudge the same accordingly."

Stated shortly, the view of the learned judge upon the question numbered 3 was this:—

That although there were references in the will to the existence of issue of the testator's sisters as a condition of a gift to children of the sisters, there was nowhere in terms a gift to the issue of the sisters but only to the children of the sisters, and

that there was no context in the will which would justify the reading of the word "children" so as to include remoter descendants.

He accordingly rejected the claim of Harold Ferguson Fishleigh to the one-fifth share of the income to which his grandmother would have been entitled if living. The learned judge disposed of the question as to the actual destination of this share of income in the following words :—

> "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."

In regard to the question numbered 4 the learned judge expressed his views in the following language :—

> "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 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."

On appeals to the Appellate Division (1) by Harold Ferguson Fishleigh and (2) by the 2 children of Mrs. Field, Mrs. Ferguson and Miss Rhoda Hobbs, the decision of Mr. Justice Middleton on question No. 3 and the declaration made by him in answer thereto were affirmed.

Mulock C.J. and Hodgins J.A. agreed with the view of Middleton J. that the word "children" could not be construed to include "grandchildren" and that Harold Ferguson Fishleigh, not being a child of the testator's sister, Mrs. Fishleigh, could not take Mrs. Fishleigh's share of income. Magee J.A. inclined to the view that the word "children" meant "issue," but had not such confidence in his opinion as to alter the contrary determination coming before him on appeal. Ferguson J.A. died while the appeal was standing for judgment.

As regards the actual destination of this share of income Mulock C.J. (with whose judgment Hodgins J.A. agreed) reasoned thus :—

> "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.'

> "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."

Magee J.A. does not discuss this particular point.

Although no one had appealed from the declaration made by Middleton J. in regard to shares of corpus vesting at the death of the testator, the Appellate Division without, as their Lordships were informed, having heard any argument upon the point, varied his order in this regard. As varied, the declaration in answer to question No. 4 runs thus:—

> "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."

From the order of the Appellate Division two appeals were brought to His Majesty in Council, one by Harold Ferguson Fishleigh who sought to establish his title to a share of income and a vested share of corpus; the other by Mrs. Ferguson, Miss Hobbs, Mrs. Puddicombe, the two children of Mrs. Field and the two children of Mrs. Puddicombe, who contended that while the appellant Fishleigh had no claim, there was no intestacy as to the share of income to which Mrs. Fishleigh would have been entitled had she survived the testator, but that the income of the residuary estate should be divided into four shares and be paid to (1) Mrs. Ferguson, (2) Miss Hobbs, (3) Mrs. Puddicombe, and (4) the two children of Mrs. Field. They also advanced certain contentions in regard to the division of the corpus and the vesting of the shares therein.

In the course of the discussion before their Lordships it appeared to them premature to decide any question relating to the corpus of the residuary estate. In view of the ages of the surviving sisters of the testator and of the fact that all children born to them have already attained the age of 21 years, the corpus of the estate will be distributable on the death of the last surviving sister. When that event happens the persons interested in arguing the various contentions may well be different from the persons so interested at the present time. In these circumstances the suggestion was made and assented to that the said question No. 4 should for the present be left unanswered. Their Lordships accordingly will only deal in this judgment with the question who is entitled to the share of the income to which the testator's sister, Mrs. Fishleigh, would be entitled if she were now alive.

In regard to this their Lordships find themselves in agreement with the Judges of the Supreme Court in so far as

they held that Harold Ferguson Fishleigh was not entitled to that share. There is no gift to a grandchild of a sister, unless the word "children" can be read as including remoter descendants. While no doubt it is possible that a will may be so worded as to indicate that the testator means to include remoter descendants in the word "children," their Lordships are unable to discover in the document now under consideration any context or indication which would justify a departure from the ordinary meaning of the word.

Nor can their Lordships understand how the confirmation of the will by codicils executed after the deaths of Mrs. Fishleigh and her sons can make any difference in this regard.

Their Lordships, however, do not agree with the view which has prevailed in the Supreme Court that this share of income devolves as on an intestacy. The foundation of this view must be that the provision in the will that "then the income of my estate shall be divided among the residue share and share alike," only applies in the case of the death of a sister "without leaving issue," and that Mrs. Fishleigh did not die "without leaving issue."

If "issue" bears its *prima facie* meaning, the provision in question would not apply, and there being no other disposition of the share, an intestacy would result.

It was, however, contended before their Lordships that upon the true construction of this will the word "issue" was confined to children and that upon no other view could a consistent interpretation be placed upon the whole document.

The argument addressed to their Lordships in support of this view was of the following nature:—That although the testator uses both words "children" and "issue" he nowhere indicates that he treats them as two distinct classes; that he never uses the word "issue" as descriptive of persons to take, but only in the description of the event on the happening of which someone is to take; that unless "issue" is read as meaning "children," you get the peculiar result that a gift is made to children upon a contingency which according to its description may be fulfilled although no children exist; that the direction that on the decease of any of his sisters "leaving lawful issue" the trustee should expend that sister's share of income "for the benefit of the children of any of my sisters so dying leaving lawful issue" indicates that the testator was proceeding on the footing that a sister who died leaving lawful issue necessarily left children; that all difficulties or peculiarities disappear if the word "issue" is read as meaning "children"; and finally, that the testator himself shows that he intends to confine issue to the degree of children by his reference immediately after and in connection with the word "issue" to the "parent."

Their Lordships are not aware to what extent these or similar arguments were advanced for the consideration of the Judges of the Supreme Court, and they have not the assistance which they would have derived if the judgments under appeal had specifically dealt therewith.

Their Lordships, however, enjoyed the benefit of full and careful criticism of these arguments by Counsel who appeared on behalf of the next-of-kin, and notwithstanding such criticism they are of opinion that these arguments should prevail.

The word "issue" is an elastic word which yields more easily to a context than the word "children"; and while (as already indicated) their Lordships can find nothing to indicate that the testator intended the word "children" to include remoter descendants, they do find in the wording of this particular will sufficient indications to satisfy them that the testator intended to confine the word "issue" to issue of the first degree, viz., "children," and that notwithstanding the fact that his will contains both expressions.

If this is the correct view then the testator has provided that in the case of a sister dying leaving children, then the children are to take her share, but in the case of a sister dying without leaving lawful children (which was the case with Mrs. Caroline Fishleigh), then "the income of my estate shall be divided among the residue share and share alike." The phrase "the residue" is a curious one, but it must, their Lordships think, be taken to mean the other beneficiaries who are entitled to the income, thus including the children of a dead sister, in respect of one share.

The result is that, in their Lordships' opinion, the appeal of Harold Ferguson Fishleigh fails and the other appeal succeeds. There should be one order made on the consolidated appeals varying the order of the Supreme Court of Ontario (Appellate Division), dated the 20th September 1929, by striking out sub-paragraphs 3 and 4 of paragraph 1 thereof and by substituting for such sub-paragraphs the following:—

> "3. And this Court doth further declare that according to the true construction of the said Will and codicils, Harold Ferguson Fishleigh is not entitled to a share of the income payable under the terms of the said Will and that upon the true construction of the said Will and in the events which have happened the income of the testator's residuary estate is at the present time divisible into four shares and payable as to one such share to Elizabeth Mary Ferguson, as to another such share to Eva Puddicombe, as to another such share to Rhoda Hobbs, and as to the remaining such share to Ewart Field and Eva Field Harvey, children of Sarah Ann Field deceased. And doth order and adjudge the same accordingly.
>
> "4. And this Court doth not deem it advisable to make any declaration at the present time in regard to the corpus of the testator's residuary estate."

The costs of all parties of these appeals will be paid out of the estate of the testator.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

HAROLD FERGUSON FISHLEIGH

v.

THE LONDON AND WESTERN TRUSTS COMPANY, LIMITED, AND OTHERS.

EWART FIELD AND OTHERS

v.

THE LONDON AND WESTERN TRUSTS COMPANY, LIMITED, AND OTHERS.

DELIVERED BY LORD RUSSELL OF KILLOWEN,

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.