

Ethel Gilmour and another - - - - - *Appellants*

*v.*

Angus Owen MacPhillamy and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 15TH JULY, 1930.

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*Present at the Hearing :*

LORD BLANESBURGH.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD TOMLIN.]

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This is an appeal from an order dated the 20th December, 1928, of the Supreme Court of New South Wales in its equitable jurisdiction.

The order was made by Mr. Justice Harvey upon an originating summons issued by the trustees of the will and codicil of Charles MacPhillamy deceased.

The only question upon this appeal is whether upon the true construction of the will the word "survivors" having regard to the context and circumstances is to be construed literally, or is to be read as referring to survivorship by stirps. The Supreme Court has decided in the former sense and the appellants who are grandchildren of the testator and are interested in contending for a stirpital construction of the word have by an order dated 2nd September 1929, duly obtained leave to appeal to His Majesty in Council.

The testator died on the 15th March 1906, having made a will dated the 12th September 1899, and one codicil which is not material to the question under appeal.

The testator left nine children surviving him. Five of his

children died prior to the 14th November 1924, one a son without having had issue and without leaving any widow, and four daughters leaving children who are still living and of whom some have issue living.

On the 14th November 1924, Harold Arkell MacPhillamy, a son of the testator, died a bachelor, and on the 18th July 1927, Edith MacPhillamy, who was the only daughter of the testator then living, died a spinster.

She was survived by two brothers the last survivors of the testator's nine children. They are both still living. One of such brothers is a bachelor. The other is married and has issue children and grandchildren.

The question under appeal is as to the destination of the shares original and accruing of Harold Arkell MacPhillamy and Edith MacPhillamy.

The result of the order of the Supreme Court is to carry these shares to her two surviving brothers and their issue to the exclusion of the issue of any brother or sister who predeceased her.

The relevant passage in the testator's will relates to the disposition of his residue and is in the following terms :—

“ And as to all the rest and residue of my real and personal estate whatsoever and wheresoever the same shall be upon trust for my said Trustees after payment of my just debts funeral and testamentary expenses to pay the rents income and profits thereof to the whole of my children Charles Smith MacPhillamy Walter John MacPhillamy Norman Robert MacPhillamy Harold Arkell MacPhillamy Sophia Fox Elizabeth Adams Lucy Ashe Emily Pilcher Edith MacPhillamy and Evelyn MacPhillamy in equal shares for the terms of their respective natural lives and after the decease of my said children then their his or her shares or share in the said trust funds shall be as hereinafter mentioned. Provided however that if any of my said children shall die without leaving lawful issue or widow or widower living at the date of their his or her decease, the shares or share of the said child so dying shall be equally divided amongst the survivors upon the same trusts and conditions. But in the event of any of my sons so dying leaving a widow or widows or of my said daughters or daughter so dying leaving widowers or a widower then one third part of the income to which my said son or sons or daughter or daughters so dying was or were entitled shall be for such widow or widows or widower or widowers (as the case may be) for the term of her his or their natural life or respective natural lives or until she he or they shall marry. And upon such respective death or deaths or marriage or marriages the share to which the said widow or widower was entitled shall thereupon be payable as the balance of the income of such child or children of me so dying and the balance of the income shall be for the lawful issue (if any) of such child or children of mine so dying in equal shares as tenants in common per stirpes and not per capita I declare that the estates of all females entitled under this my Will shall be for their respective separate use and free and clear from the debts control interference or engagements of husbands I declare that after the death of any child of mine his or her share in my said trust estate shall (subject to the hereinbefore provision for widows and widowers) be upon trust for his or her children in equal shares in manner following namely : the share of any grandchild of me who is in existence at my death to be upon trust for him or her for life and after

his or her death for such grandchild's children in equal shares to vest at their attaining the age of twenty-one years and the share of any grandchild of me who may come into existence after my death to be upon trust for him or her absolutely to vest at his or her attaining the age of twenty-one years."

Their Lordships have been invited by the appellants whose parents predeceased Harold Arkell MacPhillamy and Edith MacPhillamy to place upon the word "survivors" an artificial meaning which will enable them to participate in the distribution of those shares.

In order to justify a departure from the natural and ordinary meaning of any word or phrase there must be found in the instrument containing it a context which necessitates or justifies such departure. It is not enough that the natural and ordinary meaning may produce results which to some minds appear capricious or fail to accord with a logical scheme of disposition.

In their Lordships' view there is nothing in the context of the present will rendering it necessary or even possible to give to the word "survivors" any but its natural and ordinary meaning. On the contrary their Lordships think that the phrase "shall be equally divided amongst the survivors upon the same trusts and conditions" can only be read as meaning "shall be equally divided amongst the survivors so that each survivor takes a life interest with remainder to his children as in the case of his or her original share." In their Lordships' judgment this construction concludes the matter because it necessarily involves the idea of successive trusts and of the survivor being someone intended to take an interest and therefore living. This will is in line with the will considered by their Lordships' Board in *Auger v. Beaudry* [1920] A.C. 1010, and their Lordships agree with the judgment of the Chief Judge in equity.

The appeal therefore fails and their Lordships will humbly advise His Majesty accordingly.

The costs as between solicitor and client of all parties appearing before their Lordships will be provided for out of the capital of the disputed original and accruing shares of Harold Arkell MacPhillamy and Edith MacPhillamy.

In the Privy Council.

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ETHEL GILMOUR AND ANOTHER

vs.

ANGUS OWEN MACPHILLAMY AND  
OTHERS.

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DELIVERED BY LORD TOMLIN.

Printed by  
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.  
1930.