

C N 4 G 2 16, 1951

No. 28 of 1950.
31352

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

UNIVERSITY OF LONDON
W.C.A.

20 JUL 1953

IN THE MATTER of the Will of LOUISA JANE HOLLIS, deceased

INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

LOUISE GWENDOLYN OUTERBRIDGE (Widow) and
MATILDA EVELYN CAFFEE (Widow) (Plaintiffs) *Appellants*

AND

10 ETHEL MACKAY HOLLIS (Widow), AMY HOLLIS
GRAYSTON (the Wife of GEORGE GRAYSTON),
EDITH HOLLIS BACH (the Wife of NORMAN BACH),
MARJORIE OUTERBRIDGE (the Wife of
GEORGE OUTERBRIDGE), PHYLLIS MARIANNE
OUTERBRIDGE (the Wife of PERCY CLISDELL
OUTERBRIDGE) and CHARLES ELYSTAN HAYCOCK
(Defendants) - - - - - *Respondents.*

Case for the Respondents.

RECORD.

1. This is an Appeal from a Judgment of the Supreme Court of
20 Bermuda pronounced on the 17th March 1950 on an Originating Summons
issued for the determination of certain questions arising on the Will of
Louisa Jane Hollis deceased (hereinafter called "the Testatrix") and
dependent on the true construction of her Will. pp. 10-15.

2. The effect of the said Judgment (which was not embodied in any
formal Order) was that the real and personal property which the Testatrix
had by her Will given to her eldest daughter Kathleen Louisa Hollis for
her life was on the death of the said Kathleen Louisa Hollis divisible in
six equal shares among the five children of the Testatrix who survived
the Testatrix namely the Appellants, Louise Gwendolyn Outerbridge
30 and Matilda Evelyn Caffee (the said Kathleen Louisa Hollis, Harry Stuart
Hollis (now deceased) and Mary Logier Haycock (now deceased) and the
successors in title of Austin Wilkinson Hollis (who was a child of the
Testatrix but died in her lifetime). pp. 2, 3, para. 4.

3. The successors in title of the deceased children of the Testatrix are as follows :—

p. 3, para. 8.

(A) The Appellants are the devisees and legatees under the Will of the said Kathleen Louisa Hollis.

p. 3, para. 5.

(B) The Respondent Ethel MacKay Hollis is the sole devisee and legatee under the Will of the said Harry Stuart Hollis.

p. 3, para. 6.

(C) The Respondents Amy Hollis Grayston and Edith Hollis Bach are the devisees and legatees under the Will of their mother Amy Edith Hollis who was the widow of the said Austin Wilkinson Hollis and the sole devisee and legatee under his Will. 10

p. 3, para. 7.

(D) The Respondents Marjorie Outerbridge, Phyllis Marianne Outerbridge and Charles Elystan Haycock are the devisees and legatees under the Will of the said Mary Logier Haycock.

pp. 4-6.

4. The said Will of the Testatrix (which is dated 13th November 1919) contains the following material passages (which are not numbered in the Will but are here numbered for convenience of reference) :—

3. "I give and bequeath to my eldest daughter Kathleen Louisa Hollis for her lifetime, all that portion of land in Hamilton Parish known as the 'Cat Cave' and all structures thereon . . ."

4. "I also bequeath to Kathleen Louisa Hollis the property known as 'Hilgrove' together with the dwelling-house thereon and with all other furnishings of the said house, for the term of her life . . ."

5. "In consequence of the lamented demise of my daughter Erminnie, wife of George W. Barbelmez, to avoid complications, I bequeath to my eldest daughter Kathleen Louisa Hollis, for the term of her life, that portion of land in Hamilton Parish known as 'Cave Hill' together with the cottage thereon . . ."

6. "I desire that George W. Barbelmez husband of my late beloved daughter Erminnie, may have the use of the cottage and premises of 'Cave Hill' during his visits to Bermuda if he so desires." 30

7. "If Kathleen Louisa Hollis desires to sell any or all of the property left to her for her lifetime, and has a good opportunity of selling to a desirable person, I hereby empower her to do so, provided she has the consent and approbation of her Brothers and Sisters, and all emoluments of the sale shall be equally divided between the said Kathleen Louisa Hollis, Harry Stuart Hollis, Austin Wilkinson Hollis, Mary Logier Haycock, Matilda Evelyn Caffee, Louise Gwendolyn Outerbridge, or their heirs or assigns." 40

8. "If Kathleen Louisa Hollis shall retain these properties, I desire and decree that at her death the said properties of 'Hilgrove,' 'Cat Cave' and 'Cave Hill' shall be inherited by my surviving children."

9. "I give and bequeath to my eldest son, Harry Stuart Hollis, that portion of Northland in Hamilton Parish bounded . . ." (the boundaries are therein stated).

10. "In consequence of the lamented demise of my youngest daughter Erminnie wife of George W. Bartelmez, on May 27th 1919, I bequeath to her three children Caroline Jane Bartelmez, Erminnie Hollis Bartelmez, and Theodore Lawrence Bartelmez, the sum of £400 (four hundred pounds) each, which I believe to be the full amount of their mother's portion of the estate of her father Henry H. Hollis."

11. "This legacy I desire that my executors will pay at their discretion, if needed for maintenance or education of the said children, or may be invested for the said children by my executors if they think it desirable."

12. "I desire to give a legacy of £20 (twenty pounds) to each of my grand-daughters whom I now name, Marjory Eleanor Haycock, Edith Constance Hollis, Kathleen Belinda Caffee, Amy Louise Outerbridge, Caroline Jane Bartelmez, as a token of love and remembrance."

13. "I Louisa Jane Hollis do furthermore ordain that all money (with the exception of my legacies to my Grandchildren) Bonds, Mortgages, Stocks, Loans, Bermuda Bank Shares, &c. belonging to the estate of my beloved Husband, the late Henry H. Hollis shall be equally divided between my well beloved children, Kathleen Louisa Hollis, Harry Stuart Hollis, Austin Wilkinson Hollis, Mary Logier Haycock, and Matilda Evelyn Caffee, Louise Gwendolyn Outerbridge or their heirs or assigns."

5. The Testatrix died on 3rd April 1923 and her said Will was duly proved on the 11th April 1923. Her said son Austin Wilkinson Hollis had died on 6th November 1921 but it has not been disputed that the dispositions in his favour made by the said Will were preserved from lapse by the Statute Law of Bermuda (Section 31 of the Wills Act 1940).
 30 Of the five other children in whose favour dispositions were made by the said Will, the said Kathleen Louisa Hollis (hereinafter called "Kathleen") died on 22nd March 1949 and the said Harry Stuart Hollis and Mary Logier Haycock died in the lifetime of Kathleen.

6. Kathleen did not sell any of the said properties which by the said Will were given to her for her life but retained them until her death.

7. On the death of Kathleen it was claimed (A) by the Appellants that they took the said properties as the only children of the Testatrix who survived Kathleen; (b) By the Respondents that they (as heirs and assigns of the said Harry Stuart Hollis, Austin Wilkinson Hollis and Mary Logier Haycock) and the Appellants (in their own right and as heirs and assigns of Kathleen) took the said properties in six equal shares.

8. For the purpose of deciding which of those claims was correct the said Originating Summons was issued by the Appellants on 29th December 1949. It was heard by the Chief Justice (Sir Cyril Brooke Francis) on 1st March 1950. Judgment was reserved and delivered on 17th March 1950.

pp. 10-15.

9. The learned Chief Justice after stating the material facts and the questions put to the Court and the arguments of Counsel for the Plaintiffs (the present Appellants) who had cited the case of *Re Poultney* [1912] 2 Ch. 541, and observing on the difference of the wording of the Will in that case from that of the Will in the present case, proceeded as follows :—

p. 13, ll. 10-29.

“ In the construing of wills the Court is sometimes confronted with suggestions of capriciousness on the part of a testator, and it is accepted that a testator has a right to be capricious if he chooses ; but without some clear expression of such intention, the Court 10 does not attribute to a testator a capricious intention, nor a harsh or whimsical result in his dispositions, where the words of his will can be read otherwise. Accordingly, if the language used in a will admits of two constructions, according to one of which the property disposed of will go in a rational, convenient and ordinary course of succession, and according to another in an irrational and inconvenient course, so that the Court is driven to the conclusion that the testator is acting capriciously, without any intelligible motive, and contrary to the ordinary mode in which men act in similar cases, the Court leans towards the former construction, 20 as being that which was intended, although this may require a meaning to be given to the words different from their ordinary meaning.

“ Now what was the intention of the late Louisa Jane Hollis the head of a large family of children and grandchildren, when she used the expression ‘ inherited by my surviving children ’ ? Surviving when ? Surviving at the date of her death, or surviving at the date of the death of her eldest daughter, Kathleen Louisa ? ”

* * * * *

p. 13, ll. 37-40.

“ As I have said, there are no definite words in her testament comparable with those which appeared in the will in the *Poultney* 30 case, and following the rules of construction which I have just enunciated, her intention must be collected from a consideration of the whole will.”

The learned Chief Justice then referred to Clauses 3, 4, 5, 7, 10, 12 and 13 of the Will, and proceeded as follows :—

p. 14, ll. 12-28.

“ Does not all of this point to the fact that the Testatrix was imbued with a sense of family protection and preservation linked with a feeling of affectionate regard and interest towards the several members of this large family ? I think it does. Is there anything to indicate any whim, caprice or oddity by reason of the 40 working of which she sought to determine that her son’s widow, and her grandchildren were to be excluded from benefits derivable through her children ? I do not see it.

“ Is there anything affirmatively to indicate her intention to restrict her bounty to the longest livers ? I do not see it.

“ Answering these questions as I have, and construing the will then as a whole, I see in it a special intention of the Testatrix to

dispose of her property in a rational, convenient and ordinary course of succession, so that each of her children who survived her (or their heirs and assigns, the words used by her in clause 7) should benefit equally under her will, and that it was not her intention that her beneficence should be restricted to the longest livers."

The learned Chief Justice then declared the rights of the parties in accordance with his Judgment.

10 10. Leave to Appeal to His Majesty in Council from the said Judgment was granted by the Supreme Court of Bermuda on 14th April 1950.

11. It is submitted that the said Judgment was right and ought to be affirmed for the following among other

REASONS.

- 20 (1) BECAUSE the word "surviving" is an ambiguous word, and its true meaning in any particular Will depends upon the construction of the Will read as a whole and regard being had to the surrounding circumstances.
- (2) BECAUSE there is no rule of construction which compels the Court to construe the word "surviving" in a gift by way of remainder after a life estate as referring to the death of the life tenant if on considering this whole Will it appears that such construction would defeat the intention of the Testator.
- (3) BECAUSE the word "surviving" and all its cognate words are rightly regarded by the Courts as flexible words which can be moulded as may be required in order to give effect to the Testator's apparent intention.
- 30 (4) BECAUSE it is impossible to suppose that the Testatrix in this case can have intended that the benefits taken by the successors in title of any child of hers who happened to die in Kathleen's lifetime should depend on accidental circumstances—viz. whether the properties happened to be sold in Kathleen's lifetime or not.
- (5) BECAUSE the reasoning of the learned Chief Justice (set out above) is sound.

NORMAN C. ARMITAGE.

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BETWEEN

LOUISE GWENDOLYN

OUTERBRIDGE and

Another - - - *Appellants*

AND

ETHEL MACKAY HOLLIS

and Others - - - *Respondents.*

Case for the Respondents

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