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CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. BOYLSON.

RICH J. I agree that there was evidence to support the findings of the jury as to negligence on the part of the defendant and the absence of negligence on the part of the deceased. I also agree that prospective loss accrued to Miss May Boylson from the death of her mother.

Appeal dismissed with costs.

Solicitor, for the appellant, *John S. Cargill.*
Solicitor, for the respondent, *T. J. Purcell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

KELLY . . . . . APPELLANT;
DEFENDANT,

AND

KELLY AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *April* 20.

Griffith C.J., Isaacs and Rich JJ.

Will—Construction—Gift to persons living at a certain time—Exception of person not then living—Implication of gift to person then deceased.

A testator gave part of his estate "upon trust for all my brothers and sisters living at the date of this my will . . . and who shall survive me and the children or child living at the time of my death of every such brother or sister of mine (living at the date of this my will) who shall predecease me (except the children of my deceased brother G.C.K. who are otherwise well provided for) . . . as tenants in common in equal shares as between brothers and sisters but so that the children collectively of any such deceased brother or sister of mine if more than one shall take equally between them

only the share which their parent would have taken if he or she had survived me and acquired a vested interest under the trust lastly hereinbefore contained."

Held, that the children of a brother of the testator, other than G.C.K., who had died before the date of the testator's will took no interest under the gift.

Decision of the Supreme Court of New South Wales (*Simpson* C.J. in Eq.) reversed.

APPEAL from the Supreme Court of New South Wales.

By his will, dated 7th April 1913, Hubert Hugh Kelly, who died on 20th December 1913, after making certain bequests devised and bequeathed the residue of his estate real and personal to his trustee upon certain trusts for his wife and children, and, in the event of there being no child of his who being a son should attain the age of twenty-one years or being a daughter should attain that age or marry, "then subject to the trusts hereinbefore declared the said trustee shall stand possessed of my trust estate upon trust for all my brothers and sisters living at the date of this my will that is to say 7th April 1913 and who shall survive me and the children or child living at the time of my death of every such brother or sister of mine (living at the date of this my will) who shall predecease me (except the children of my deceased brother George Coleman Kelly who are otherwise well provided for) who being male attain the age of twenty-one years or being female shall attain that age or marry under that age with the consent of their guardian or guardians as tenants in common in equal shares as between brothers and sisters but so that the children collectively of any such deceased brother or sister of mine if more than one shall take equally between them only the share which their parent would have taken if he or she had survived me and acquired a vested interest under the trust lastly hereinbefore contained."

The testator left him surviving his widow, his brothers Anthony Bowes Kelly and Aloysius Kelly, and his sisters Mary Geneveve Kelly, Marcella Coull, Charlotte Wallscourt Parkes, and Jane Wallscourt Daniell, but he left no children. The testator had had two other brothers, both of whom died before 7th April 1913, namely, John Cornelius Kelly and George Coleman Kelly,

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the latter of whom was mentioned in connection with the gift set out above. John Cornelius Kelly left him surviving one son, Oswald Phipps Kelly, and two daughters, Linda Mary Boyd and Lavinia Louise Tucker, all of whom survived the testator, and one son who predeceased the testator.

The testator appointed the Perpetual Trustee Co. Ltd. to be the trustee of his will.

An originating summons was taken out by Oswald Phipps Kelly and his two sisters asking the following question:— "Whether upon the true construction of the said will and in the events that have happened the plaintiffs take any and if so what interest under the said will?"

The summons coming on for hearing before *Simpson* C.J. in Eq., the learned Judge held that the estate of the testator should be divided into seven shares, one for each of the surviving brothers and sisters and one for the children who survived the testator of John Cornelius Kelly.

From that decision Anthony Bowes Kelly, who represented the brothers and sisters of the testator living at his death, now appealed to the High Court.

Langer Owen K.C. and *Sheppard*, for the appellant.

Knox K.C. (with him *Waddel*), for the respondents other than the trustees.

During argument reference was made to *Bund* v. *Green* (1); *Jarman on Wills*, 6th ed., pp. 565, 679; *Wilkinson* v. *Adam* (2); *Parker* v. *Tootal* (3); *Scalé* v. *Rawlins* (4); *Towns* v. *Wentworth* (5); *In re Wroe*; *Frith* v. *Wilson* (6); *Mellor* v. *Daintree* (7); *Lett* v. *Randall* (8).

GRIFFITH C.J. The point for decision in this case is a very short one, and I am unable to entertain any real doubt upon it, although the learned Judge felt himself able to take another

(1) 12 Ch. D., 819.
(2) 1 Ves. & B., 422.
(3) 11 H.L.C., 143.
(4) (1892) A.C., 342.
(5) 11 Moo. P.C.C., 526, at p. 543.
(6) 74 L.T., 302.
(7) 33 Ch. D., 198.
(8) 3 Sm. & G., 83, at p. 89.

view of the words of the will, and I should myself have felt much more satisfaction if I had been able to take that view.

The testator gave part of his estate upon trust in these terms: —"Upon trust for all my brothers and sisters living at the date of this my will," which was 7th April 1913, "and who shall survive me and the children or child living at the time of my death of every such brother or sister of mine (living at the date of this my will) who shall predecease me." The testator twice repeats the words "living at the date of this my will," so emphasizing that the class of persons to take is limited to his brothers and sisters then alive and their children. I leave out for a moment the words upon which the respondents rely. The will continues:—"who being male attain the age of twenty-one years or being female shall attain that age or marry under that age . . . as tenants in common in equal shares as between brothers and sisters but so that the children collectively of any such deceased brother or sister of mine if more than one shall take equally between them only the share which their parent would have taken if he or she had survived me and acquired a vested interest under the trust lastly hereinbefore contained." Between the two sets of words I have quoted are interposed the words "except the children of my deceased brother George Coleman Kelly who are otherwise well provided for." The respondents are the children of another brother of the testator named John, who died in 1887. They contend that the words I have just quoted show that the testator thought that the children of all his brothers were included in the gift, notwithstanding his emphatic repetition of words limiting it to living brothers; and the Court is asked to say that they operate as an implied enlargement of the class so as to take in the children not only of brothers and sisters alive at the date of the will, but also of any other brothers and sisters who had died before that date. The question is whether the Court can and ought to do so.

In my judgment the only inference that the Court can fairly draw is that at one time, either during the preparation of this will or of some previous will, the testator had entertained the design of giving some part of his estate for the benefit of all his

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brothers and sisters and their families, but that when he made this will he had changed his mind and desired to emphasize the fact that the gift was limited to brothers and sisters living at the date of the will and their families. That intention, which is plainly expressed, seems to me to be the dominant intention of the testator as appearing on the face of the will. The provision following the words on which the question arises would be apt words in either case. The respondents' contention involves the rejection of clear words twice repeated and is based upon what is at best a probable or plausible conjecture.

I do not think that in accordance with any recognized principles of interpretation a conjectural implication can be admitted inconsistent with a clearly expressed intention.

Under these circumstances, I am compelled—I confess with reluctance—to hold that the appeal must be allowed.

ISAACS J. I agree with what has been said and will only add a few words. The whole stress of the respondents' argument is laid upon the rule sometimes followed that the statement of an exception implies that but for the exception the thing excepted would be in the principal part. That is used in this way, namely, to set up a double implication. The only persons mentioned in the exception are the children of George Coleman Kelly, and it is suggested that by implication but for the exception they are included in the previous gift contrary to the distinct words of that previous gift. Then on that is founded another implication of a gift to the children of another brother who are not mentioned in the principal gift or in the exception. In my opinion, to accede to the respondents' view would not be interpreting the will but would be reconstructing it.

I agree that the appeal must be allowed.

RICH J. I also agree.

Appeal allowed. Order appealed from varied by declaring that the residuary estate is divisible into six shares and

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that the plaintiffs are not entitled to any share in it. Costs of appeal of both parties to be paid out of the estate.

Solicitors, for the appellant, *Creagh & Creagh.*

Solicitors, for the respondents other than the trustees, *Windeyer & Williams.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MOCATTA . . . . . APPELLANT;

AND

MOCATTA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—Gift to "representatives" of deceased person.

H. C. OF A. 1915.

SYDNEY, *April* 16, 19.

Griffith C.J., Isaacs and Rich JJ.

By his will a testator directed that during the lives of his children and the lives and life of the survivors and survivor of them his trustees should pay the annual rents and profits of certain land to and amongst the children who should be alive and the executors or administrators of such of them as should happen to die, "the representatives of any deceased" child "to receive the part or share to which such" child "if living would be entitled."

Held, that the word "representatives" meant the executors or administrators of any deceased child.

Decision of the Supreme Court of New South Wales (*Harvey* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

By his will, dated 16th February 1859, Henry Osborne, deceased, devised certain land to his trustees, and as to it directed as follows:—"I direct that during the lives of my sons and