[HIGH COURT OF AUSTRALIA.]

GELLION AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

ELDER'S TRUSTEE AND EXECUTOR COMPANY LIMITED AND OTHERS . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Will—Construction—Gift to children and grandchildren—Child dying in lifetime of parent—Ambiguity—Canon of construction.

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MELBOURNE, *May* 13, 14; *June* 18.

Isaacs, Gavan Duffy and Rich JJ.

By his will a testator gave a certain part of his estate to trustees upon trust for his daughter for life and after her death for such of her children as she should by deed or will appoint, and in default of such appointment "In trust for all the children of my said daughter living at the time of her death who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry in equal shares and if there shall be only one such child then in trust for that one child But if there shall not be any child of my said daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then" a gift over.

Held, by *Isaacs* and *Rich* JJ. (*Gavan Duffy* J. dissenting), that the gift over would not take effect if there should at any time be a child of the daughter who being a son attained the age of twenty-one years or being a daughter attained that age or married, and whether that child should or should not survive the testator's daughter.

Howgrave v. *Cartier*, 3 V. & B., 79, and *Williams* v. *Haythorne*, L.R. 6 Ch., 782, followed and applied.

Decision of the Supreme Court of South Australia affirmed.

APPEAL from the Supreme Court of South Australia.

An originating summons was taken out by Elder's Trustee and Executor Co. Ltd. and Alexander James Murray, trustees of the will

of Henry John Richman, who died on 2nd August 1902, to obtain the advice and direction of the Supreme Court as to certain matters connected with the administration of the testator's estate. By his will the testator gave his real and personal estate to his trustees upon certain trusts, the only one which is material being that as to three-fifths of his estate, which he directed to be held upon trust for his daughter Frances Alice Gregory for life. The will then proceeded: "And from and after her decease in trust for all or such one or more exclusively of the other or others of the children of my said daughter at such ages or times age or time (not being earlier as to any object of this power than his or her age of twenty-one years or day of marriage) in such shares if more than one and in such manner as my said daughter shall by any deed or deeds with or without power of revocation and new appointment or by her will or any codicil thereto and whether she shall be under coverture or not appoint And in default of such appointment and so far as any such appointment shall not extend In trust for all the children of my said daughter living at the time of her death who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry in equal shares and if there shall be only one such child then in trust for that one child But if there shall not be any child of my said daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then as to one-half of the settled share of my said daughter in my estate Upon trust for such person or persons as my said daughter shall by her will or any codicil thereto appoint And as to the sum of one hundred pounds Upon trust for my second cousins Margaret Moore and Dora Moore or the survivor of them And as to the balance or remainder of the said settled share of my said daughter Upon trust for my said nieces Annie Louden Gellion and Florance Hayward Phillips in equal shares or to such of them as shall be living at the time of the death of my said daughter."

Frances Alice Gregory, who was born on 21st March 1855, had two sons, Hugh Gregory, who was born on 29th April 1886 and died on 26th November 1903 before having attained the age of twenty-one years, and Geoffrey Francis Gregory, who was born on 11th

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May 1890 and was killed in action in France on 25th September 1915, having attained the age of twenty-one years. Geoffrey Francis Gregory left a will by which, after giving certain legacies, he left all his property to his mother, Frances Alice Gregory, and his aunt, Mrs. Harcourt Rose. By release and assignment dated 13th June 1916 Mrs. Rose renounced and disclaimed any benefit under the will and released and assigned any property to which she was entitled thereunder to Frances Alice Gregory. There was no other issue of Frances Alice Gregory, and she had not exercised her power of appointment.

The defendants to the originating summons were Annie Louden Gellion and Florance Hayward Phillips, nieces of the testator, Frances Alice Gregory and Edward Richman, a brother of the testator.

The only material question asked by the originating summons was: "Whether according to the true construction of the said will in default of appointment by the testator's daughter Frances Alice Gregory of the three-fifths of the testator's estate settled by the said will upon the said Frances Alice Gregory and her children, or so far as any such appointment shall not extend, the children of the said Frances Alice Gregory who being sons attain the age of twenty-one years or being daughters attain that age or marry are entitled to the said three-fifths of the testator's estate (subject to the life interest therein of the said Frances Alice Gregory), or who otherwise of the said children are entitled thereto?"

The originating summons was heard by *Gordon* J., who made an order directing, *inter alia*, (*a*) that Geoffrey Francis Gregory, having died in the lifetime of Frances Alice Gregory, was not entitled in default of appointment by her to the three-fifths of the testator's estate or to any share in it by reason of his having attained the age of twenty-one years, and (*b*) that only such child or children of Frances Alice Gregory as she may appoint may become indefeasibly entitled thereto during her lifetime. From that decision Annie Louden Gellion and Florance Hayward Phillips appealed to the Full Court, which, by a majority (*Murray* C.J. and *Buchanan* J., *Gordon* J. dissenting), allowed the appeal and made an order discharging the order of *Gordon* J. and directing that Geoffrey

Francis Gregory became entitled on his attaining the age of twenty-one years to a vested interest in the three-fifths of the testator's estate, and that the trustees of the will of Henry John Richman might pay, transfer and hand over to Frances Alice Gregory absolutely the whole of the three-fifths of the testator's estate.

From that decision Annie Louden Gellion and Florance Hayward Phillips now appealed to the High Court.

The nature of the arguments sufficiently appears in the judgments hereunder.

Ward, for the appellants.

Jessop, for the respondents the trustees of the will.

Cleland K.C. and *C. T. Hargrave*, for the respondent Frances Alice Gregory.

During argument reference was made to *Howgrave* v. *Cartier* (1); *Wakefield* v. *Maffet* (2); *Perfect* v. *Lord Curzon* (3); *Whatford* v. *Moore* (4); *Beaudry* v. *Barbeau* (5); *In re Hamlet*; *Stephen* v. *Cunningham* (6); *Swallow* v. *Binns* (7); *In re Knowles*; *Nottage* v. *Buxton* (8); *Torres* v. *Franco* (9); *Walker* v. *Simpson* (10); *Walker* v. *Mower* (11); *In re Edwards*; *Jones* v. *Jones* (12).

Cur. adv. vult.

The following judgments were read :— June 18.

ISAACS AND RICH JJ. The appellants' case depends on establishing that in the gift over the words "if there shall not be any child of my said daughter" mean "if there shall not be any surviving child of my said daughter." The appellants contend that that is the meaning of the phrase without any doubt. It is, of course, the law, as *Page Wood* V.C. said in *Jackson* v. *Dover* (13), which applied the doctrine of *Howgrave* v. *Cartier* (1) to wills, that "you

(1) 3 V. & B., 79.
(2) 10 App. Cas., 422, at p. 435.
(3) 5 Madd., 442.
(4) 3 My. & C., 270, at p. 289.
(5) (1900) A.C., 569, at p. 575.
(6) 39 Ch. D., 426, at p. 434.
(7) 1 Kay & J., 417, at p. 430.
(8) 21 Ch. D., 806.
(9) 1 Russ. & My., 649.
(10) 1 Kay & J., 713.
(11) 16 Beav., 365, at p. 368.
(12) (1906) 1 Ch., 570.
(13) 2 Hem. & M., 209, at p. 217.

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must not first create the doubt." If there is no ambiguity in a will, there is no room for any construction, and you simply apply the plain words. If there is ambiguity, you may have to apply some canon of construction.

The terms of the gift over are these : " But if there shall not be any child of my said daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then as to one-half of the settled share of my said daughter in my estate Upon trust " (that is, the trustees are to stand possessed of the share upon trust) " for such person or persons as my said daughter shall by her will or any codicil thereto appoint " &c. Construing this provision by the actual words of the testator as they appear in the whole clause, it appears to stand thus :—A power of appointment by deed or will as to the whole fund was given to the daughter of the testator, the objects being her children, and the only condition was that any object appointed should attain twenty-one years or marry. She thus had all her life during which to act, if any object so long lived. In default of appointment a direct gift is made to children who survived her, provided the sons attained twenty-one or the daughters attained that age or married.

The reason for inserting the words " living at the time of her death " in the direct gift is, of course, to be consistent with her full discretion during life, which might supersede the actual gift. But it is quite consistent also that the testator really intended that by one means or the other the interest should vest in any child provided he or she reached twenty-one years or married. The actual words, however, so far are not sufficient for that purpose. Taken alone, the direct gift is limited to surviving children. But there were possible events which were obvious to the testator and were yet unprovided for. Notwithstanding an appointment either by deed or will, all the children might die under twenty-one years and unmarried in their mother's lifetime, or they might outlive her and nevertheless fail to fulfil the condition. The gift over accordingly uses language applicable to both these eventualities, except that it does not refer to the sons marrying. The primary meaning of the phrase " if there shall not be any child of my said daughter who " &c. is " if there shall not at any time

be," and this meaning provides for the two possible events otherwise unprovided for. Altering that meaning would leave the first of those events still unprovided for, and for no assignable reason. The condition is in the negative form. That negative condition may be fulfilled as the result of either of the eventualities mentioned. In either case there would not "be" the "child" specified in the gift over. This interpretation also is strengthened by the consideration that in the gift over the power to appoint to strangers would rationally include the case where the mother, by reason of the death of all her children under twenty-one years and unmarried, would practically know there was no possibility of the condition being satisfied. It would be singular if her power of appointing to a stranger should extend to the case where a child of her own was still alive and might reach twenty-one years, and might therefore defeat her bequest; and could not be exercised where all the children were already dead under twenty-one years and unmarried.

The result is that, since the gift over includes a case where the children do not survive their mother, there is an inconsistency between it and the direct gift taken alone, and the testator's intention discoverable from the words of the gift over taken alone. Judging from the first, Geoffrey would be excluded from benefit; judging from the second, he would be included in benefit. Which is to prevail, seeing there is a doubtful construction upon the whole instrument, that is to say, there is an ambiguity?

The cases such as *Emperor* v. *Rolfe* (1) and *Howgrave* v. *Cartier* (2), *Swallow* v. *Binns* (3), *Williams* v. *Haythorne* (4) and *In re Hamlet* (5), leave no doubt on the matter. In *Howgrave* v. *Cartier* Sir *William Grant* said (6): "If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period, at which, or the contingency, upon which, the shares are to vest, the Court leans strongly towards the construction, which gives a vested interest to the child, when *that child stands in need of a provision*; usually as to sons at the age of twenty-one; and as to daughters at that age or

(1) 1 Ves., 208.
(2) 3 V. & B., 79.
(3) 1 Kay & J., 417.
(4) L.R. 6 Ch., 782.
(5) 39 Ch. D., 426.
(6) 3 V. & B., at p. 85.

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marriage." And the learned Master of the Rolls, after a consideration of the whole will said (1): "Is it then possible to say, that from the whole of this instrument *a clear, definite, and unambiguous, intention is to be collected to exclude* all children, except those, not only attaining twenty-one, but surviving both parents?" In *Williams* v. *Haythorne* Lord *Hatherley* L.C. said (2): "The Court has pushed some of its conclusions to an extreme length for *the purpose of including as many children as possible*, first upon settlements, on the ground that a settlement is itself an indication of all children being intended to be provided for; and then in wills, it has followed the same rule, where a father is providing for his children, or where any person, who has placed himself in *loco parentis*, is providing for the family." That followed the views of *Kindersley* V.C. in *Lee* v. *Lee* (3) and Lord *Cottenham* L.C. in *Bouverie* v. *Bouverie* (4). In *Swallow* v. *Binns* (5) *Page Wood* V.C. says of such a case, the gift over, "according to Sir *John Leach*, makes it necessary for me to infer that children are not to be excluded in consequence of their not having survived their parents." The testator's grandchildren stand in the same position. In *In re Hamlet* (6) the Court, finding no ambiguity, did not apply any rule of construction. But the rule where an ambiguity exists was very clearly acknowledged. The Court of Appeal there quote Sir *William Grant* in *Howgrave* v. *Cartier*; and *Cotton* L.J. says (7): "We have only to consider whether there is ambiguity, and, if there is, then lean to that construction of the ambiguous words which will *best* give effect to what may be presumed to have been the intention of the testator." *Fry* L.J. says (8): "Where we have a will of this description, which is obviously making a provision for the family, it is, *so far as the language will allow*, to be read in such a manner as to make the provisions for children available at the times when such provisions are usually required by the exigencies of the family."

Applying these principles to the present case, we think the judgment was right and should be affirmed.

(1) 3 V. & B., at p. 91.
(2) L.R. 6 Ch., at p. 785.
(3) 1 Drew. & Sm., 85, at p. 87.
(4) 2 Ph., 349, at p. 351.
(5) 1 Kay & J., at p. 436.
(6) 39 Ch. D., 426.
(7) 39 Ch. D., at p. 436.
(8) 39 Ch. D., at p. 440.

GAVAN DUFFY J. The disposition made by the testator in his will with respect to the fund with which we are dealing may be stated thus :—To his daughter Frances Alice Gregory he gives a life interest, and then proceeds to dispose of the remainder. To such of her children as neither reach the age of twenty-one years nor marry, he gives nothing except such part, not exceeding one-half the presumptive share of any such child, as the trustees may apply for his or her advancement in the world. He empowers his daughter to appoint by deed or will the whole or any part of the fund in favour of all or any one or more of her children who reach the age of twenty-one years or marry, and in default of such appointment and so far as such appointment shall not extend, he directs the fund to be held in trust for the children of his daughter living at the time of her death, who, being sons, shall reach the age of twenty-one years, or, being daughters, shall reach that age or marry. So far the testator's scheme is clear. No grandchild is to take any part of the fund except by way of advancement unless and until he or she marries or reaches the age of twenty-one years. On and after the happening of either of these events a grandchild will take such sum and only such sum as the mother may choose to appoint. If the mother dies without appointing, the fund is to go to the child or children who survive her and who attain the age of twenty-one years, or if daughters marry. This class is not coextensive with those who might have benefited under the power of appointment, because it excludes sons and daughters who reached twenty-one years of age or married during their mother's life and have not survived her, and includes sons and daughters who survive their mother but do not reach twenty-one years of age, or if daughters marry, during her life. Next follows a gift over in these words : " But if there shall not be any child of my said daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then " &c.

The gift over is expressly directed to take effect only in the case of no son at any time attaining the age of twenty-one years and no daughter at any time attaining that age or marrying. I think it probable that the word " such " has been omitted before the word " child " in the gift over by a mistake of the draftsman. My reason for so

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thinking is that if it contained that word it would be consistent with the previous dispositions, and with them would form a complete scheme for the distribution of the fund, while in its present form it is inconsistent with the power in Frances Alice Gregory to appoint to a son who marries before attaining twenty-one years, and it does not complete the scheme, but leaves a gap or *lacuna* between the gift over and the preceding gift which may lead to a partial intestacy. But I am not at liberty to alter the unambiguous words of the gift over so as to make it express what I think the testator probably thought it expressed, and, if the word "child" in the gift over is not read as meaning "such child," it is said that a *catena* of cases compels me to read the gift to the children who survive their mother as a gift to all the children who reach the age of twenty-one years or, if daughters, marry, whether they survive their mother or not. If these two gifts stood alone, I might be so compelled in order to prevent the *lacuna* which would otherwise occur between the two gifts; it might then be successfully argued that we should attribute to the testator an intention that the gift to his grandchildren should cover all that is not covered by the gift over. But in my opinion the testator had no intention of benefiting those grandchildren for whom he did not expressly provide; his dominating intention was that his daughter and those whom she selected should enjoy the fund. The clauses which I have endeavoured to summarize show that he thought that, before making the gift over, he had already sufficiently provided for every case in respect of which he wished to exercise his bounty towards his daughter's children. He may have so thought because he overlooked the possibility of any such child attaining the age of twenty-one years or marrying, and then dying before the mother, without any appointment being made in his or her favour, and the possibility of any such child surviving the mother but not attaining the age of twenty-one years, or if a daughter marrying, or he may have wished to exclude all such children from the operation of his bounty. In either view I see no necessity for introducing the suggested artificial construction which would benefit a grandson who attained the age of twenty-one years and died before his mother, while it excluded from benefit a grandson who married and died before his mother and before attaining

that age. Each of these grandsons would be equally capable of taking a benefit under his mother's power of appointment, and unless an artificial construction is introduced each is equally excluded from any benefit under the gift to those children of the daughter who survive her and who attain the age of twenty-one years or, if daughters, marry. I know of no case which compels me to construe any of the provisions I have mentioned in other than its natural sense, and I desire to respectfully adopt and apply to this case the words of Lord *Halsbury* L.C. in *Leader* v. *Duffey* (1):—"My Lords, I am very glad that in the view which I take of this case I am not called upon to resort to those rules of construction upon which so much has been said at the Bar and in the Courts below. The imperfection of human language as an instrument for giving expression to precise and definite thought is not much aided by giving the same words in the same instrument a different meaning when used by a person *in loco parentis* from the meaning the same words would bear if used by a stranger in blood to the objects of his bounty. I think there could be no better illustration of the difficulty of applying such rules of construction to any instrument than the contrast between the language of Lord *Hatherley* in *Swallow* v. *Binns* (2) and Sir *John Leach* in *Bright* v. *Rowe* (3) and Sir *George Turner* in *Farrer* v. *Barker* (4). One learned Judge speaks of 'a necessary inference' and 'an implication of law' and of the Court 'leaning strongly' in favour of this or that supposition; while other learned Judges place restrictions on the rule by the declaration that 'the Court is not to go out of its way by a forced construction to raise this implication,' admitting that the implication must be 'upon the natural and plain construction of the words'; and, to use Sir *John Leach's* expression, 'the rule is not to be one of arbitrary construction.' All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view—which is I think in accordance with reason and common sense—that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument,

(1) 13 App. Cas., 294, at p. 300.
(2) 1 Kay & J., 417.
(3) 3 Myl. & K., 316.
(4) 9 Ha., 737.

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and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made."

I agree with *Gordon* J. in the answers which he gives to questions 1 and 2, and I agree with him in thinking that in the circumstances it is premature to deal with the other questions asked in the summons. In my opinion his order was right and should be restored.

Appeal dismissed with costs.

Solicitors, *Shierlaw & Jessop*, Adelaide.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN TIMBER WORKERS' UNION . . . . . CLAIMANT;

AND

JOHN SHARP & SONS LIMITED AND OTHERS RESPONDENTS.

H. C. OF A. 1919.

MELBOURNE, *July* 28, 31; *August* 4.

Higgins J.

IN CHAMBERS.

Industrial Arbitration—Dispute, proof of existence of—Dispute between organization of employees and employers—No members of organization employed by respondent employers—Probable dispute—Commonwealth Conciliation and Arbitration Act 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), secs. 4, 21AA.

As between an organization of employees and an employer who employs persons doing the same kind of work as is done by members of the organization, although no members of the organization are employed by that employer, an "industrial dispute" may exist or, if members of the organization will probably apply to the employer for employment, may be probable.

Australian Workers' Union v. *Pastoralists' Federal Council*, 23 C.L.R., 22, followed.