[HIGH COURT OF AUSTRALIA.]

THE TRUSTEES, EXECUTORS AND AGENCY COMPANY LIMITED . . . . APPELLANT;
DEFENDANT,

AND

RAMSAY AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1920.

MELBOURNE, *Feb.* 18.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Will—Construction—Codicil—Vested or contingent interest—Unsuccessful appeal by beneficiary—Costs.

By his will a testator directed that the residue of the income of his estate after certain payments had been made should be divided equally between (*inter alios*) such of the children of certain of his brothers as should be living at his death and such of the issue living at his death of any of the children of those brothers who had died in his lifetime leaving issue, such issue taking only the share which the parent if living at his death would have taken. He also directed that after the death of his widow the whole of his property should be divided between (*inter alios*) such of the children of those brothers as should then be living in equal shares *per capita*, and the issue then living of any of those children who should die during his widow's lifetime leaving issue living at her death, such issue to take only the share which the parent if living at the death of the widow would have taken. By a codicil the testator declared that the children of two other brothers should "be entitled to an equal share with my other nephews and nieces under the provisions of" his will, and that the issue living at his death of any of the children of those two brothers who had died in his lifetime leaving issue living at his death should take the share which their parent if living at his death would have taken.

Held, that the nephews and nieces of the testator benefited by the codicil took the same interests in the income and the corpus of the testator's estate as those referred to in the will, and therefore that those of the nephews and nieces referred to in the codicil who died during the lifetime of the testator's widow took no interest in the corpus.

Decision of the Supreme Court of Victoria (*Mann* J.) affirmed.

H. C. OF A. 1920.

TRUSTEES, EXECUTORS AND AGENCY CO. LTD. v. RAMSAY.

APPEAL from the Supreme Court of Victoria.

William Swan Urquhart, who died on 14th January 1881, had made a will dated 24th March 1870 and a codicil thereto on 17th February 1874. By the will the testator, after making certain bequests to his wife, Margaret Urquhart, devised and bequeathed to his trustees his real estate and the residue of his personal estate upon trust out of the annual produce thereof to pay a certain annuity to his wife. The will then continued: "and upon trust during the life of my said wife to pay or divide the residue of such annual produce equally between such child or children of my sister Catherine widow of Robert Trotter late of Garguston Ross shire in Scotland of my sister Margaret the wife of John MacLachlan of Maidstone in the County of Kent in England of my late sister Ann widow of Charles Fraser of Killearnan Ross shire in Scotland aforesaid of my brother Roderick Urquhart of Yangery near Warrnambool in the said Colony of Victoria and of my brother Angus Urquhart late of Inverness in Scotland as shall be living at the time of my death and such of the issue living at the time of my death of any of the children of my said sisters and brothers who may have died in my lifetime leaving issue living at my death as being a male or males shall attain the age of twenty-one years and being a female shall attain that age or marry to take in equal shares *per stirpes* so that the issue of any of the children of any of my said sisters or brothers who may have died in my lifetime as aforesaid shall only take the share which the parent of such issue would have taken if living at my death And upon further trust after the death of my said wife to divide the whole of my property between the children of my said sisters Catherine Trotter Margaret MacLachlan and Ann Fraser and of my said brothers Roderick Urquhart and Angus Urquhart as shall then be living in equal shares *per capita* and such of the issue then living of any of the children of my said sisters and brothers who may have died in the lifetime of my said wife leaving issue living at her death as being a male or males shall attain the age of twenty-one years and being a female or females shall attain that age or marry to take in equal shares *per stirpes* so that the issue of any of the children of any of my said sisters or brothers who may have died in the lifetime of my wife as aforesaid shall only take the

share which the parent of such issue would have taken if living at her death." By the codicil the testator provided as follows: "I declare that the children of my deceased brother Hugh Urquhart late of Cornwall Canada West and of my deceased brother Farquhar Urquhart late of Canada West shall be entitled to an equal share with my other nephews and nieces under the provisions of my said will And I further declare that such of the issue living at the time of my death of any of the children of my said brothers Hugh Urquhart and Farquhar Urquhart who may have died in my lifetime leaving issue living at my death as being a male or males shall attain the age of twenty-one years and being a female shall attain that age or marry shall take in equal shares *per stirpes* so that the issue of any of the children of my said two brothers who may have died in my lifetime as aforesaid shall only take the share which the parent of such issue would have taken if living at my death."

The testator left him surviving his widow, who died on 23rd August 1918. One child of Hugh Urquhart and four children of Farquhar Urquhart survived the testator, but all died during the lifetime of the testator's widow.

An originating summons was brought by Robert Andrew Ramsay, one of the trustees of the will and codicil asking for the determination by the Supreme Court of the following question (*inter alia*): "Are the persons (if any) entitled under the codicil to share in the division of the corpus of the testator's estate to be ascertained by reference to the date of the widow's death or to the date of the testator's death?" The defendants to the summons were the Trustees, Executors and Agency Co. Ltd. as administrator of Angus Urquhart and as representing all other persons who, being children of Hugh Urquhart and Farquhar Urquhart, were living at the death of the testator but were not living at the death of the testator's widow, and also as administrator of Robert Trotter, a son of Catherine Trotter, and as representing all other persons who, being children of the brothers and sisters of the testator, were living at the death of the testator but were not living at the death of the testator's widow; Angus Fraser, a son of Ann Fraser, who was sued on his own behalf and as representing all other persons who, being children of the brothers and sisters of the testator, were living at the death

H. C. OF A. 1920.

TRUSTEES, EXECUTORS AND AGENCY CO. LTD. v. RAMSAY.

of the testator's widow; John Trotter Wilson, a great-grandson of Catherine Trotter, who was sued on his own behalf and as representing all other persons who, being great-grandchildren of the brothers and sisters of the testator were living at the death of the testator's widow; and Robert William Trotter, a grandson of Catherine Trotter.

The summons was heard by *Mann* J., who answered the question by saying that the persons mentioned in the question were to be ascertained by reference to the date of the death of the testator's widow.

From that decision the Trustees, Executors and Agency Co. Ltd., as administrator of Angus Urquhart and as representing all other persons who, being children of Hugh Urquhart and Farquhar Urquhart, were living at the death of the testator but were not living at the death of the testator's widow, appealed to the High Court.

A. H. Davis, for the appellant. The intention expressed in the codicil as a whole is to give the children of Hugh Urquhart and Farquhar Urquhart (who may be called the Canadian nephews and nieces of the testator) a vested interest in the corpus on the death of the testator. If the substitutionary provision had been omitted, that might not have been so. But that provision shows that the testator intended to approximate the gift made by the codicil of both income and corpus to the gift of income made by the will to the other nephews and nieces of the testator (who may be called his Australian nephews and nieces). That provision is an explanation of the meaning of the word "share" in the principal gift. The principal gift should be construed by the light of the substitutionary gift (*In re Swain*; *Brett* v. *Ward* (1)). [Counsel also referred to *In re Turney*; *Turney* v. *Turney* (2); *Gellion* v. *Elder's Trustee and Executor Co.* (3).]

Weigall K.C. (with him *Clyne*), for the respondent Fraser. The codicil gives to the Canadian nephews and nieces the same interest in corpus and income respectively as was given by the will to the

(1) (1918) 1 Ch., 399, at p. 406. (2) (1899) 2 Ch., 739, at p. 745.
(3) 26 C.L.R., 292, at p. 298.

Australian nephews and nieces, but a substitutionary gift is made to issue in respect only of income. [Counsel was stopped.]

Ham, for the respondent Wilson.

Gregory, for the respondent Trotter.

Pigott, for the respondent trustee.

A. H. Davis, in reply. The appellant should have its costs out of the estate as in *Knowles and Haslem* v. *Ballarat Trustees, Executors and Agency Co. Ltd.* (1).

[RICH J. Where a primary Judge has given a decision and a party not satisfied with it appeals, he should do so at his own risk as to costs.

[KNOX C.J. That has been a recognized rule for many years.]

KNOX C.J. On this particular point we think it unnecessary to reserve our decision. The question is raised on the construction of a codicil made by William Swan Urquhart to his will made some four years previously. By that will it is quite clear that he gave to his Australian nephews and nieces interests in the income and corpus of his estate. The interest which he gave them in the income was an interest vested on his death, that is to say, each of the nephews and nieces comprised in that class who survived the testator took on his death a vested interest in a certain portion of the income. The interest which he gave them in the corpus was contingent, the effect of the will being that each of the nephews and nieces of that class who survived the widow of the testator took an interest in the corpus but took no interest except on the contingency of surviving the widow. This being so, the testator made certain substitutionary provisions by his will both as to income and as to corpus—provisions which are quite apt and appropriate to the respective gifts. That as to income was that the share which any nephew or niece dying in the lifetime of the testator would have taken if he or she had survived the testator should go to certain of his or her descendants. The provision as to corpus was that the share which any nephew or niece would have taken in the event of his or her surviving the widow

(1) 22 C.L.R., 212.

H. C. OF A. 1920.

TRUSTEES, EXECUTORS AND AGENCY CO. LTD. v. RAMSAY.

KNOX C.J.

of the testator should go to certain of his or her issue if such nephew or niece predeceased the widow of the testator. By the will the benefaction to the nephews and nieces of the testator was limited to what may be described as his Australian nephews and nieces, no benefit being given to the children of two deceased brothers of the testator who had resided in Canada. By the codicil the testator declared that the children of these two deceased brothers "shall be entitled to an equal share with my other nephews and nieces under the provisions of my said will." The main question turns on the meaning of that provision, another question being whether any modification ought to be introduced into that provision by the substitutionary provision which follows. In my opinion the gift to nephews and nieces there is clear. It is a gift to certain nephews and nieces of equal shares with the other nephews and nieces under the provisions of the will. In my opinion it is tantamount to saying: "I have limited the benefactions in favour of my nephews and nieces to the children of certain of my brothers and of my sisters. I now declare that the children of my other brothers Hugh and Farquhar shall participate with those whom I have already benefited on an equal footing." I have no doubt that if the codicil had stopped there the result would have been that whatever interests the Australian nephews and nieces took in the corpus and income under the will the Canadian nephews and nieces would have taken under the provisions of the codicil. Then it is said that an alteration is made in the direction of giving the Canadian nephews and nieces a vested interest in the corpus instead of a contingent interest as under the construction I have just mentioned, because in the codicil the testator went on to provide a substitutionary gift of the shares which any deceased nephews and nieces, children of Hugh and Farquhar, would have taken if they had been living at the death of the testator, that substitutionary gift being in favour of the issue of those nephews and nieces. I do not think that that can have any effect on the plain meaning of the gift to the nephews and nieces. In the first place, the words of that gift are unambiguous and there is no reason why resort should be had to some other part of the codicil to create an ambiguity for the purpose of resolving it. In the next place, the subject matter of the gift over is the share

which the parent would have taken if he had been living at the death of the testator. That can only refer to income, because, the gift being of an equal share, under the will the only subject matter which vested in the parent on his surviving the testator simply was income. I see no reason for cutting down or altering the plain meaning of the words in the codicil which include the nephews and nieces children of Hugh and Farquhar, with the other nephews and nieces, nor do I see anything in the codicil on which the Court would be justified in declaring that the children of Hugh and Farquhar took any different interest from the children of the Australian brothers and sisters.

For these reasons I am of opinion that the decision of *Mann* J. is perfectly correct, and that the appeal should be dismissed.

The appellant should pay the costs of this appeal of the trustee respondent and one set of costs of the opposing respondents as between party and party; the trustee respondent to take out of the estate the difference between party and party and solicitor and client costs and any deficiency which he fails to recover from the appellant.

ISAACS J. I agree that the appeal should be dismissed for the reasons given by the Chief Justice. I would only say that I think that the codicil in saying that the children of the deceased Canadian brothers "shall be entitled to an equal share with my other nephews and nieces under the provisions of my said will" placed all the nephews and nieces on an equal footing in all respects. If that view is adhered to, it is fatal to the contention of the appellant.

With regard to costs I agree. I think it desirable to mention the rule referred to by *Rich* J. in argument, and stated by him in *Gale* v. *Gale* (2) as follows: "Where a beneficiary is not satisfied with the construction of the will by the primary Judge and appeals, he must, apart from special circumstances, pay the costs." I think that correctly states the rule which applies to this case.

GAVAN DUFFY J. I agree that the Canadian nephews and nieces took no more and no less than the other nephews and nieces of the testator. For that reason I think that the judgment appealed from is correct, and that the appeal should be dismissed.

(1) 18 C.L.R., 560, at p. 574.

H. C. OF A. 1920.

TRUSTEES, EXECUTORS AND AGENCY CO. LTD. v. RAMSAY.

RICH J. I agree.

STARKE J. I agree.

Appeal dismissed. Appellant to pay costs of appeal of the respondent trustee and one set of costs of the opposing respondents as between party and party; the respondent trustee to take out of the estate the difference between party and party and solicitor and client costs and any deficiency which he fails to recover from the appellant.

Solicitors for the appellant, *Tolhurst & Druce.*

Solicitors for the respondents, *Gair & Brahe*; *Malleson, Stewart, Stawell & Nankivell*; *àBeckett & Chomley*; *G. Shaw.*

B.L.

[HIGH COURT OF AUSTRALIA.]

BUZACOTT & COMPANY LIMITED . . APPELLANT; DEFENDANT,

AND

CYCLONE PROPRIETARY LIMITED . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

H. C. OF A. 1920.

MELBOURNE, *March* 9.

KNOX C.J., GAVAN DUFFY AND RICH JJ.

Practice—High Court—Appeal from Justice of High Court—Admission of further evidence—New trial—Terms—Rules of the High Court 1911, *Part II., Sec. I., r.* 10.

On an appeal to the Full Court of the High Court from the judgment of a Justice of that Court the appellant applied for leave to call further evidence. The Court, being of opinion that further evidence should be taken, set aside the judgment and ordered a new trial on the terms that the appellant should pay the costs of the first trial and of the appeal.