

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dias v. De Livera from the Supreme Court of Ceylon, delivered 19th December 1879.*

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Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

The following are the material facts of the case now under appeal :—

Don Adrian de Silva Goonetilleka Amarasiri Wardene Modliar, (to be hereafter called Don Adrian), and his wife Cornelia Getruda Authmisz (to be hereafter called Cornelia) being domiciled in Ceylon, and having one daughter Merciana Dorothea, married to Henry Thomas Dias Abeyesinghe Mohandiram, (to be hereafter called Dias), by whom she had an only daughter, named Angeltina, made on the 17th of December 1848, by a notarial deed, a “mutual will,” a form of instrument well known to the Roman Dutch law, which is in force in Ceylon.

The material parts of this will are as follows :—

Firstly. These appearers declared to give and bequeath to the poor a sum of 2*l.*, to be distributed according to the wish and discretion of executors herein-after named.

Secondly. These appearers declared to nominate institute and appoint their beloved daughter, Merciana Dorothea, and her husband, Henry

Thomas Dias Abeyesinghe Mohandiram, of Galle, and their child now existing and also the other children which may hereafter be procreated by their daughter, to be the sole heirs of all the estate, goods, effects, chattels and things whatsoever, and wheresoever the same may be which shall be left at the death of the first deceased of the said appearers, whether moveable or immoveable, and of what kind or nature soever, which they the said appearers are now jointly in possession of as their common estate, that is to say, all the property which the first-named appearer was possessed of jointly with his first wife Johannes Dias Lama Ettenay, who died about the year 1838, an inventory whereof is filed in the late District Court of Amblangodda in the matter No, 42, and all the property, both moveable and immoveable, which the said first-named appearer has since acquired, to be divided according to law amongst their said daughter and son-in-law and their child as aforesaid, as also by the children which may hereafter be procreated by their daughter.

Thirdly. The appearers hereby declared to nominate and appoint the survivor of them, together with their aforesaid son-in-law, Henry Thomas Dias Abeyesinghe Mohandiram, to be the executors of the will of the first deceased of the appearers and administrators of his or her estate and effects, and the said appearers nominate the said Henry Thomas Dias Abeyesinghe Mohandiram to be the executor of this will after the death of both the said appearers and administrator of their estate, hereby giving and granting to them and him jointly or severally all such power and authority as are required or allowed in law, and especially those of assumption, substitution and surrogation.

Don Adrian died on the 6th May 1849.

On the 14th of August 1858, Dias made a will,

constituting his wife and daughter heirs of his estate, and died on the 1st October 1858.

Cornelia died September 3rd 1864. Merciana married on the 13th April 1865, Alfred de Livera, by whom she had four children, two of whom had died before the commencement of the suit.

This action was brought by Angelina against Livera, her mother's second husband, complaining of his preventing her enjoying the share which she claimed of the properties dealt with by the will of Don Adrian and his wife, and praying to be declared entitled to one moiety of the properties in Lists B and D, annexed to her libel, and quieted in the possession of the same. B is a list of all the now forthcoming properties which were disposed of by the mutual will. D is a list of the properties held by Diaz and Merciana during their marriage in community; and the first item in it, to which alone this suit relates, is "one half of all the lands mentioned in the annexed List B." Under the will of Diaz, the Plaintiff is entitled only to one fourth of the property held by him and his wife in community, but, in their Lordships' opinion, it must be taken to have been admitted on the part of the Defendant that Angelina was entitled to half of such property, whatever it may have been, if not by the operation of the will, by gift from her mother, or by family arrangement. By her libel, then, the Plaintiff claimed in effect to be entitled to three fourths of the properties in B, viz., half by virtue of the mutual will, and one fourth by virtue of the will of Dias and the arrangement with her mother.

The questions in the cause, which arose on the construction of the will of Don Adrian and Cornelia, are, first, whether or not the children of Merciana by her second marriage were entitled to share under it; secondly, whether Merciana and Dias took each a share or one share between them.

The District Court of Galle found, firstly, that the children of the second marriage did not take; and, secondly, that Dias and Merciana took one share between them.

The Supreme Court found that the children of the second marriage did take, and that Dias and Merciana took each a share.

It was admitted by the Counsel on both sides, and indeed appears to have been assumed by the Courts, that the rules of construction applied to wills in this country apply to wills in Ceylon, modified as these rules must necessarily be in their adaptation to varying circumstances.

The Supreme Court appear to rest their decision on the first point above stated mainly on the ground that the children "to be procreated" of Merciana formed of themselves a distinct class. They observe, "The gift is to Merciana and her then husband, and her child already born, and to a class (the future children of Merciana), of which class not a single individual was in existence at the time from which, as we hold, the will speaks. This brings the case within another rule mentioned at p. 85, of Mr. Jarman's book, viz., that when there is an immediate gift to children, if there is no child in existence at the testator's death, all subsequently born children will take."

The Counsel for the Respondent conceded that the judgment could not be sustained on this ground, and admitted that the "class" to be benefitted included Angelina, and, indeed, her father and mother. But he based his argument mainly on the following passage from Mr. Jarman's book on wills, and the authorities cited in support of it. (Jarman on Wills, 2nd edition, vol. 2, p. 147.)

"We are now to consider how the construction is affected by the words 'to be born' or 'to be begotten' annexed to a devise or a bequest to children; with respect to which the esta-

“ blished rule is, that if the gift be immediate,  
 “ so that it would but for the words in question  
 “ have been confined to children (if any) ex-  
 “ isting at the testator’s death, they will have the  
 “ effect of extending it to all the children who  
 “ shall ever come into existence, since, in order  
 “ to give to the words in question some operation,  
 “ the gift is necessarily made to comprehend the  
 “ whole.”

In support of this proposition Mr. Jarman cites *Mogg v. Mogg* (1 Merivale, 654, and *Gooch v. Gooch*, 14 Beav., 565).

He refers to *Mogg v. Mogg*, in these terms,  
 “ Where a testator devised real estate to trus-  
 “ tees, in trust to pay the rents towards the  
 “ support and maintenance of the child and  
 “ children begotten and to be begotten of his  
 “ daughter Sarah Mogg, it was contended that,  
 “ notwithstanding the words ‘to be begotten,’  
 “ the devise could apply only to the children  
 “ born before the testator’s death, as these words  
 “ might be satisfied by letting in the children  
 “ born after the date of the will before the death  
 “ of the testator. But the Court of King’s Bench  
 “ (on a case from Chancery) certified that all  
 “ the nine children of Sarah Mogg, including  
 “ those who were born after the death of the  
 “ testator, took under the devise; and Sir W.  
 “ Grant, M.R., expressed his concurrence in the  
 “ certificate.”

It is to be observed that (in accordance with the then practice) no reasons are given for the certificate of the Court of King’s Bench, which was to the effect that all the children of Sarah Mogg took as tenants in tail with cross remainders, nor were reasons given for the concurrence with it of the Master of the Rolls.

In *Gooch v. Gooch* (14 Beav. 565,) a testator devised lands to trustees in trust “during the  
 “ lives and life of the longest liver of all the  
 “ children his daughter, Mary Gooch, hath or

“shall have,” to apply the rents for the support of Mary Gooch and of all her children “which she shall from time to time have living,” directing that when the youngest of her children who should live to attain 21 should have attained that age, the rents should be paid among the said children and the issue of such as should die leaving issue, and the survivor and survivors of them, during the life of the longest liver of the said children.

Sir John Romilly, M.R., held, on the authority of *Mogg v. Mogg*, that children born after the death of the testator were entitled under the trust for children during the minority of the youngest, yet that the time for admission of after-born children was not to be extended to the death of Mary Gooch, but to the period when the youngest child for the time being attained the age of 21. His judgment proceeds much on the effect of particular expressions in the will.

Mr. Jarman, however, admits that this rule of construction does not apply to general pecuniary legacies, when the effect of letting in children born after the death of the testator would be to postpone the distribution of the general estate (out of which the legacies are payable) until the death of the parent of the legatees.

That children born after the death of the testator do not take under such circumstances has been held in many cases.

In *Storr v. Benbow* (2 Myl. and Kean, 46), afterwards confirmed on appeal, Sir John Leach says, “this is an immediate gift at the death of the testator, and is confined to the children then living. The words ‘may be born’ provided for the birth of children between the making of the will and the death. The cases of *Sprackling v. Ramer*\* and *Ringrove v. Bramham*† are direct authorities on this

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\*1 Dick, 344.

†2 Cox. 384.

“ point. To give a different meaning to the words  
 “ ‘may be born’ would impute to the testator  
 “ the inconvenient and improbable intention that  
 “ his residuary personal estate should not be dis-  
 “ tributed until the deaths of all the children of  
 “ either of his brothers.”

Butler *v.* Lowe, 10 Sim., 317, is to the same effect. There the testator gave legacies to each of the children of his nephews and nieces “begotten or to be begotten.” The Vice-Chancellor (Sir Launcelot Shadwell) held the gift confined to children born before the testator’s death, and observed, “if there is a bequest to the children of A, begotten and to be begotten, it has been generally held that the words ‘to be begotten’ show only that the testator contemplated children to be born after the date of his will and before his death.” The same principle was applied by Lord Eldon in Whitbread *v.* Lord St. John, 10 Ves., 152, where the words were “all the children born and to be born.”

In Parker *v.* Tootal (11 House of Lords’ Cases, 164), Lord Westbury thus lays down the rule, “Whenever there are words used in a will indicative of a class, the words must be taken to denote the class, as it is constituted, either at the date of the will or at the death of the testator.”

The late Mr. Justice Williams, than whom there is no higher authority, in his book on the law of executors and administrators, thus states the law applicable to bequests to children, “The leading principle is, that where a bequest is immediate to children as a class, children in existence at the death of the testator, and these alone, are entitled (amongst which children in *ventre sa mère* are to be considered), and it will make no difference that the bequest is to children ‘begotten or to be begotten.’”

In support of this proposition he cites the cases above referred to, as well as others, including *Mann v. Thompson*, Kay 638. He adds, however, in a note, "but a different rule prevails as to real estate," citing *Gooch v. Gooch*. He, of course, admits that a will disposing of personalty may be so drawn as to indicate a clear intention to include after-born children, in which case effect must be given to the intention, as was the case in *Defflis v. Goldsmid*, 2 Merivale, 417.

It does not appear necessarily to follow that a rule which applies where land is devised to trustees, with a continuing trust to pay the rents and profits to those persons who may from time to time become entitled to an equitable estate, must apply where a will contains a simple direction to executors to distribute the corpus of a fund.

It must be borne in mind that many of the distinctions made by our law, founded as it is in some measure on the feudal system, between real and personal property, the estates and interests in them respectively, and their mode of devolution, are unknown to the Roman Dutch law, which recognizes no such estate as that to which the devisees were held entitled in *Mogg v. Mogg*. Though the question is not free from difficulty, their Lordships have come to the conclusion that the rule deduced from the authorities laid down by Mr. Justice Williams with respect to bequests of personal property is more applicable to the will now under consideration than the rule which was acted upon in *Mogg v. Mogg*.

The testator, dealing with his property, whether moveable or immoveable, and treating it as one corpus, simply directs it to be divided among the class of persons whom he had instituted his sole heirs. It appears improbable that he should have intended to deprive his daughter, a member of



that class, of the benefit of the gift he had made to her, by postponing the distribution of the fund until after her death, or even to postpone her enjoyment of it till she, then a young woman, had passed the age of child bearing, and he may be reasonably assumed to have intended the distribution to take place when his will would become operative according to the ordinary rule of law. This interpretation gives effect to the words "which may be hereafter procreated," by applying it to children to be born between the date of the will and his own death. Whether, if grandchildren had been born between his death and that of his wife, they might have been entitled to a share of the whole or of half the property disposed of by the mutual will, does not arise, inasmuch as his wife died before the second marriage of his daughter.

On the question whether Merciana and Dias took one share or two their Lordships agree with the Supreme Court.

The rule of English law that a gift to a man and his wife and to a third person, is to be construed as a gift of a moiety to the husband and wife and a moiety to the third person, is founded on the doctrine of English law that husband and wife are, for most purposes, one person. And yet any indication, however slight, of an intention that each shall take separately has been held to defeat the application of this doctrine. *Warrington v. Warrington* (2 Hare 54), *Paine v. Wagner* (12 Symon 184), and other cases illustrate the nice distinctions which have been given effect to on this subject. Lord Justice Knight Bruce (*in re Wylde De Gex, M. & G.*, 726) attributes the rule to the position, which he describes as "peculiar," of husband and wife under our law.

Under the Roman Dutch law the personal property of the wife is ordinarily, in the absence

of special ante-nuptial agreement, held by the spouses as partners, each on the death of the other being entitled to his or her share, while in this country the whole personal property of the wife, including even such choses in action as he may reduce into possession, become the absolute property of the husband. It would not be difficult to point out many other important differences in the relations of husband and wife under the two systems of law; indeed, so many are these differences, that it would not be incorrect to state as a general proposition that whereas the English law assumes a husband and wife to be, for most purposes, one person, the Roman Dutch law assumes them to be, for most purposes, two. Their Lordships are of opinion that the reason of the rule which applies in England fails in its application to Ceylon, and they construe the words of the will, which direct a division of property between three persons according to what seems their natural meaning, viz., as directing its division into three parts.

But this view does not altogether dispose of the interest of Dias.

The Supreme Court appear to have assumed that the mutual will of Don Adrian and Cornelia "spoke" from the death of the first dying, and that, even if Cornelia might, after the death of her husband, have revoked it, yet, as she did not, it operated from that date upon the whole of the joint property.

Their Lordships cannot assent to this view. A mutual will is, as was pointed out by this Board in *Dennysen v. Mostert* (4, L. R., P. C., App. 236) in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.

They regard the expression in the will, "all the estates, goods, effects, chattels, and things whatsoever and wheresoever the same may

“be which shall be left at the death of the “first deceased of the appearers,” as having no other operation than to describe the property dealt with by the will, excluding, as they do, property after acquired by the survivor.

Their Lordships are, therefore, of opinion that Dias took a third share of the property of Don Adrian on Don Adrian's death; but that, inasmuch as he died before Cornelia, his share of her property lapsed into the residue, which on her death her daughter and her grand-daughter were entitled to divide equally between them.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be reversed, and that in lieu thereof it be declared that the children of Merciana by her second husband took nothing under the will of Don Adrian and Cornelia his wife. That upon the death of Don Adrian his half of the property dealt with by the will became divisible in three equal shares among Merciana, Dias, and the Plaintiff, and that upon the death of Cornelia, her half of the property became divisible in equal shares between Merciana and the Plaintiff; and that the Plaintiff is entitled to half of the property held in community by Dias and his wife, and the cause be remitted, with these declarations, to the Supreme Court of Ceylon. There will be no costs of this appeal.

