

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Escallier and another v. Escallier and others,
from the Supreme Court of Trinidad ; delivered
25th March 1885.*

Present :

LORD BLACKBURN.

SIR BARNES PEACOCK.

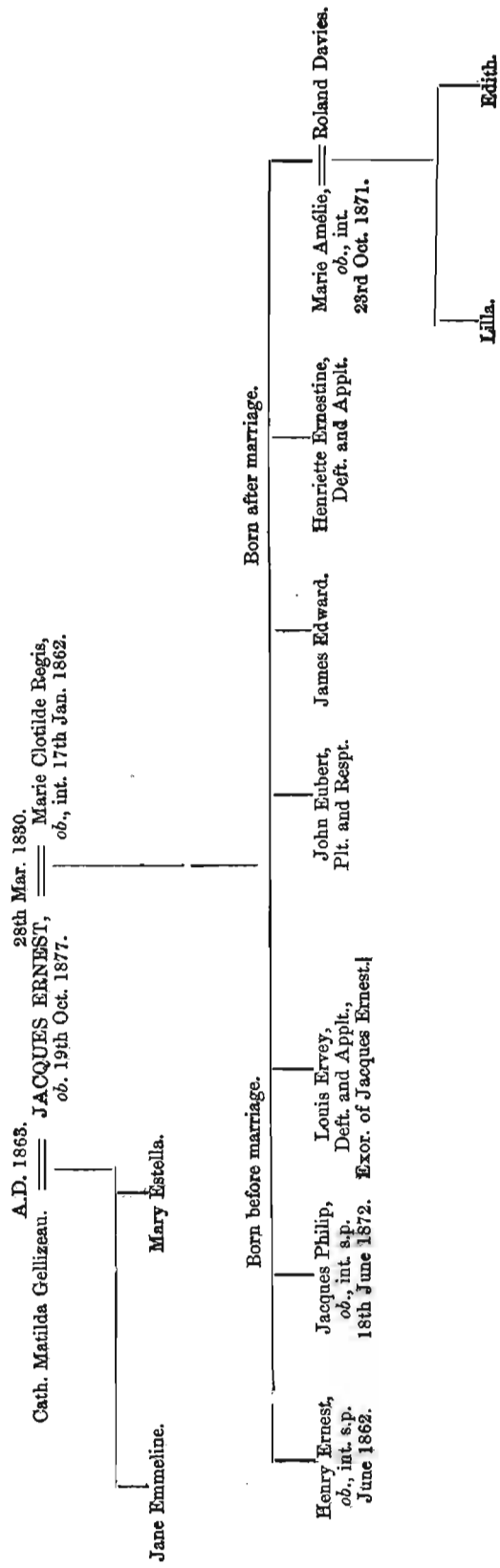
SIR ROBERT COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

The position of the Escallier family and the questions arising among them will be best understood by reference to a pedigree which their Lordships have caused to be framed for the purpose of this judgement. It is based on the findings in the Judge's certificate of the 7th March 1882.

Pedigree of Escallier Family.



The first question which the Supreme Court had to decide relates to the succession of Marie Clotilde's children to her share of the Ganancial property. By their judgement upon the hearing of the cause on the 6th May 1879, they decided that the whole seven took in equal shares.

They give their reasons as follows :—

“ There is no doubt that, according to the Spanish laws in force in this island at the time of the intermarriage of the said Jacques Ernest Escallier and Marie Clotilde Regis, his first wife, by the fact of their marriage, a quasi partnership was created between them in respect of all property acquired by purchase by both or either of them during the marriage. It is also clear that these laws gave to the children born before marriage the same rights to the inheritance of their father and mother as to the children born after marriage, and that those rights having been saved by Section 12 of Ordinance No. 24 of 1845, there is therefore no difference between the *ante nati* and *post nati* children of the marriage of the said Marie Clotilde Regis and Jacques Ernest Escallier.”

The Court here have assumed, though they have not said, that the subsequent Ordinance of 1858 Sect. 1, which requires that when any question arises after that ordinance comes into force, “ as to the effect of any intestacy or “ partial intestacy, or the devolution of any “ property, real or personal, by reason of such “ intestacy or partial intestacy, every such ques- “ tion shall be decided according to the law of “ England,” did not apply to the intestacy of Marie Clotilde, though occurring some years after the Ordinance of 1858 came into force. The learned Judges have not set forth the grounds on which they considered that the old law was saved by Sect. 12 of the Ordinance of 1845, but their decision may be rested on the true construction of Sect. 5 of that Ordinance.

Other questions relating to the bar of the suit by lapse of time, and to the will of Jacques Philip, were decided at the hearing, and are out of consideration now. With respect to the inheritances of the two *ante nati* Henry Ernest and Jacques Philip, all that was decided at the hearing was, their shares did not devolve upon their father Jacques Ernest, and that, the claim of the Crown to take by escheat being abandoned and requiring no discussion, the bill should be dismissed with costs as against the Attorney General.

At the hearing of the 18th April 1882 for further consideration, the Court declared that the shares of the two deceased *ante nati* had devolved upon the Plaintiff as the eldest of the *post nati*. Their reasons were not stated at the time, but by the desire of this Committee were put into writing on the 25th January 1884, and are in the Record. Shortly stated, they are as follows:—Section 1 of the Ordinance of 1858 applies the law of England to all successions of land in Trinidad *ab intestato*. Section 11 repeals all laws in force at the cession of the island relating to the same subject: the exceptions from these provisions are not applicable to the present point: part of the law of England is the well known doctrine of *Doe v. Vardill*, which requires birth in wedlock as a condition of succeeding by inheritance to land in England: therefore the same condition is now necessary for succeeding by inheritance to land in Trinidad. Then they conclude, “on the authority of the “ above-mentioned case, the Court was of opinion “ that the shares of the said H. E. Escallier and “ J. P. Escallier went to the Plaintiff as being “ the eldest remaining brother born in lawful “ wedlock.” By the Appellant’s case it is claimed that these two shares have devolved on the Appellant Louis Ervey as the eldest surviving brother of the two intestates.

The learned Judges do not say why they consider that the exceptions contained in the Ordinance of 1858 are not applicable to the present point; neither do they explain the steps by which they reach the conclusion that the doctrine of *Doe v. Vardill* can operate to make one of the *post nati* the heir of any of the *ante nati*. In the case of Don's estate (4 Drew. 194) it was held to have the contrary effect. But it is not necessary to express any opinion as to this, if Sect. 5 of No. 24 of 1845 applies as much to the shares of the intestate sons as to the entire succession of the intestate mother, and is not affected by the Ordinance of 1858.

It is convenient first to treat the case as if the deaths intestate, which in fact took place after 1858, had taken place after 12th March 1846 when the Ordinance of 1845 came into force but before 1858, and as if the question had been raised as to the succession before 1858. When it is ascertained what would then be the true construction of the Ordinance No. 24 of 1845, the question must be considered what effect, if any, the Ordinance of 1858 has in altering the law.

The Ordinance No. 24 of 1845 is, as far as regards the first four sections, an exact transcript of the first four sections of 3 & 4 W. 4, c. 106. The 6th, 7th, 8th, 9th, and 10th sections are exact transcripts of the 5th, 6th, 7th, 8th, and 9th sections of the same statute. So far the Ordinance complies with the object stated in its preamble, "that it is expedient that the law of inheritance in this colony should be assimilated to the law of England."

The 12th section prevents the celebration of a marriage after the 12th March 1846 from legitimating the *ante nati* children. But the *ante nati* children of Marie Clotilde had already acquired the status of legitimate children for

every purpose except that of succeeding as heirs to real estate in England; and instead of saying as is said by the Court below that Section 12 saves those rights, it would be more correct to say that there is nothing in that section to take them away.

But Section 5 is in the following words:—

“And be it enacted that, as amongst the children or other issue of the purchaser, there shall be no right of primogeniture nor preference of males to females, but such children, and the issue of any deceased child for the share or portion of such child, shall inherit equally as co-heirs; but as amongst collateral relations the same person shall be heir who in the like case would answer the description of heir according to the law of England, so that males shall be preferred to females, and the elder brother shall inherit to the exclusion of his younger brothers, and the eldest son of the elder brother shall inherit to the exclusion of the brothers of such elder brother.”

This enactment is introduced clumsily and out of place, but it establishes in the law of Trinidad rules of inheritance which are neither the English law of primogeniture nor yet the old Spanish law of equal succession.

It is not questioned that on the death of Marie Clotilde leaving seven children (some *ante nati* and some *post nati*, some sons and some daughters), the Court rightly held that one seventh of the estate of Marie Clotilde went to each of the seven children, without any distinction between *post nati* and *ante nati* or sons and daughters. The words “but such children and the issue of any deceased child for the share or portion of such child shall inherit equally as coheirs,” do not, as it seems to their Lordships, refer to the rule introduced for the first time by the Ordinance for the purpose of tracing the descent from the purchaser, but merely express the nature of the interests which the children and issue are to take *inter se*.

But as Henry Ernest and Jacques Philip, both *ante nati*, survived the purchaser their mother, and died intestate without children,

the further question arises, and it is upon that the appeal is brought, what is the effect of the Section 5 upon the succession to those two sevenths which vested in the two *ante nati* on the death of Marie Clotilde the purchaser.

The five children of Marie Clotilde who survived the two eldest sons, all fell under the description of "children or other issue" of Marie Clotilde, and of "collaterals" to the two intestates. What then is the true construction of Section 5 as applicable to such a state of facts, assuming for the moment, contrary to the fact, that the question had arisen before 1858?

The answer seems to their Lordships to depend upon what is the antecedent to which the word "collateral" is a relative. The general rule is that the relative relates to the last antecedent. Here the word purchaser is the only antecedent expressed. And though this general rule may be got rid of when applying it will work an absurd result, or perhaps even a result contrary to what must have been contemplated, that is so far from being the case here, that their Lordships think those who framed the 5th section, if they had foreseen this case, would probably have used clearer language to express the same result, viz., that the four surviving children of the purchaser, and the issue of the deceased daughter, should each take one fifth of the two sevenths which had, on the death of the purchaser, vested in her two deceased sons.

But in fact those deaths were all after 1858, and the question arises what is the effect of the Ordinance No. 7 of 1858 on the case. The Court below have decided that it totally changes it. Their reasons, as far as it is necessary to notice them, are as follows:—

"According to Section 5 of Ordinance No. 24 of 1845, which came into operation on the 12th March 1846, 'Amongst collateral relations the

‘ same person shall be heir who, in the like case,
 ‘ would answer the description of heir according
 ‘ to the law of England.’

“ According to Section 1 of Ordinance No. 7 of 1858, all questions as to the effects of intestacy or partial intestacy, or the devolution or distribution of any property, real or personal, by reason of such intestacy or partial intestacy, shall be decided according to the law of England.

“ Several exceptions are contained in Sections 5, 6, 7, 8, which are not applicable to the present point.

It has been observed that the Judges below do not give their reasons for what their Lordships cannot but think a hasty opinion, that Section 7, to say nothing of Section 6, is not applicable to the present point.

The seventh section is in the following terms:
 “ Provided also, that this Ordinance shall not
 “ affect the right of the children or other issue
 “ of any person to inherit equally as co-heirs of
 “ such person.”

If the true construction of Section 5 of No. 24, 1845, be that already put upon it, it would seem that the right of the five surviving children of Marie Clotilde to inherit as her coheirs could hardly have been more expressly saved. No doubt the word “ purchaser,” might have been used, but that would not make the sense more clear.

The two shares in question have been spoken of as devolving in fifths for the sake of brevity, and because that is the ultimate result of the two deaths. Of course it would not be the formal process of devolution; but the share of the one first dying (it is not shown which did die first) would be divisible into sixths, and then the share of the survivor, including his accrued sixth, into fifths.

The result is, that on this part of the case the decree under appeal must be varied, and a

declaration made in favour of the Appellants and of those in the same interest with them. There are still some lesser points to dispose of.

Jacques Ernest assumed by his will to make specific devises of the Ganancial property among his children, who have been declared the indefeasible heirs of Marie Clotilde's share of it. In respect of those devises, and in respect of the legitimate portions of the testator's children, a case for election arises. On the 25th November 1881 Louis Ervey, James Edward, and Henriette Ernestine filed a declaration that they claimed the benefits to which they then believed themselves to be entitled as indefeasible heirs of their father and mother. This was intended as an election to take against the will. But at the hearing of the 18th April 1882 their right to elect was disputed, and by the decree then made the Court declared that they were not entitled to elect, but that Lilla and Edith Davies, being infants, were entitled.

The reasons given by the Judges for this decision are as follows :—

“The reasons of the Court on the point of election were that the contention of the Defendants, Louis Ervey Escallier, James Edward Escallier, and Henriette Ernestine Escallier (who were of age), by their answer, and orally at the original hearing which took place as far back as the 6th May 1879, had been in favour of the will. Their election to take under the will had already been made, and it was therefore too late for them to elect to take as heirs.”

There must be some mistake about this. Neither James Edward nor Henriette Ernestine put in any answer, nor, as appears by the preamble to the decree made at the hearing, did any one then appear for them. Louis Ervey did put in an answer, but there is nothing in it which so much as points to any question of election. If he did no more at the hearing than he did by his answer, he made no election. He was certainly not in a good position to elect

when important questions remained undecided. Even the declaration of November 1881 proceeds on a theory of his interests which is now held to be unsound. But the three adults adhere to that election, and their Lordships hold that they are entitled to do so.

It was suggested at the bar that Louis Ervey was precluded by Section 13 of the Ordinance of 1845 from claiming any legitimate portion of his father's estate, and that he could not make such an election as he assumed to make. The suit seems to have been conducted on a different theory, but their Lordships express no opinion about it, because Louis Ervey desires to take against the will, whatever his rights may be. Of course, he cannot by his declaration give himself any greater rights than he has got.

The Appellant Louis Ervey also objects to the following portion of the decree :—

“ That the said Judge do take an account of all moneys received or paid by the said Louis Ervey Escallier on account of the estate and succession of the said testator since the nineteenth day of October 1877, and do ascertain what is due by the said Louis Ervey Escallier on foot of such account, including the sum of eleven thousand and fifty-two dollars and sixty-six cents (\$11,052. 66), mentioned in the said certificate as due by the said Louis Ervey Escallier, and interest on the same at the rate of six dollars per centum per annum; and the said Louis Ervey Escallier do pay such balance, when ascertained, into Court to the credit of this cause.”

The certificate shows no ground for charging Louis Ervey with interest on this balance. It shows a balance due from Gellizeau the co-executor, and one due from the two executors jointly, and in each of those cases the certificate shows that interest is payable. It is not usual to charge interest against an executor, unless he has given ground for it by neglect or by making profit of the money, or in some other way. There can hardly have been any misconduct on Louis Ervey's part, seeing that the same decree makes him receiver of the estate. The learned

Judges give no reason for this decision; indeed they say that the only points raised at the hearing for further consideration were those which have been already dealt with, viz., the succession to the shares of Henry Ernest and Jacques Philip, and the case of election. Their Lordships cannot help thinking that there has been some mistake on this point also. At all events they think the decree should be varied in this part of it.

It would seem to be quite right that Louis Ervey should have been ordered at once to pay in the balance found due from him, and that the accounts of his receipts and payments should be continued. But the decree does not do that. It directs a new account, not against both executors but against Louis Ervey alone, from the day of the testator's death, thereby overlapping and apparently opening the accounts already taken and stated in the certificate which has been confirmed, and the balance found by which had been treated as a fixed sum due from Louis Ervey. It postpones payment of the balance found by the certificate until the new account has been taken. And it charges him with interest in terms which, though not free from ambiguity, certainly extend to the balance of \$11,052. 66, the payment of which is postponed, and to such other balance as may be found due from him under circumstances at present unknown, and may be taken to have a wider meaning. Though their Lordships are clear that Louis Ervey has a right to complain of such a direction, it is impossible that they can know what is the proper order to make now, and they think that the Supreme Court should be left to work it out.

As the matter is of some complexity, their Lordships think it may be useful to the parties if they now state in some detail the heads of the

decree which they will humbly advise Her Majesty to make. They are as follow :—

- a. Vary the decree of the 18th April 1882, by striking out of it the declaration relating to the shares of Henry Ernest Escallier and Jacques Philip Escallier, and by substituting for it the following declaration :—
Declare that upon the death of the two deceased children of Marie Clotilde Escallier, Henry Ernest Escallier and Jacques Phillip Escallier, the two seventh shares to which they succeeded as co-heirs of Marie Clotilde Escallier in her estate became divisible in such manner that Louis Ervey Escallier, John Eubert Escallier, James Edward Escallier, and Henriette Ernestine Escallier and Marie Davies became entitled each to one fifth part of such two seventh shares, and that Lilla and Edith Davies have become entitled to the fifth part of the share of Marie Amélie Davies in equal shares.
- b. Vary the same decree by striking out the declaration relating to election by the Appellants and by James Edward Escallier, and by substituting for it the following declaration :—
Declare that Louis Ervey Escallier, James Edward Escallier, and Henriette Ernestine Escallier have elected to take such interests as they are entitled to against the will of their father the testator.
- c. Declare that no ground was shown at the hearing of the 18th April 1882 for directing that Louis Ervey Escallier should up to that date pay interest on the balance of \$11,052. 66 found due from him by the Judge's certificate, or should pay interest on such further balances as might be found due from him.

d. Vary the accounts directed by the same decree so far as is necessary for giving effect to the declarations hereby made, and refer the cause to the Supreme Court, to direct such accounts and make such further orders as may be just and proper, having regard to the foregoing declarations.

And that in other respects the said decree should be affirmed.

As the Appellants have succeeded in varying the decree, but upon the principal question it has been varied in a way quite opposed to the ground upon which the appeal is based, their Lordships think there should be no costs of the appeal.

