

Privy Council Appeal No. 76 of 1917.

**The Permanent Trustee Company of New
South Wales and Another** - - - *Appellants*

v.

Bailia Minia Iankelevna Fels - - - *Respondent.*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 16TH JULY, 1918.

Present at the Hearing:

EARL LOREBURN.

LORD BUCKMASTER.

LORD SUMNER.

[*Delivered by* LORD BUCKMASTER.]

This appeal raises for consideration two questions—the one as to whether certain documents were rightly admitted in evidence, and the other as to the true effect and construction of these documents if they be admitted.

There is no real controversy as to the facts which have preceded and caused the litigation. On the 22nd March, 1915, Frederick Fels died at Sydney in New South Wales leaving considerable property. His will was dated the 24th December, 1912, and by it he appointed as executors the appellants, to whom probate was duly granted on the 6th July, 1916. Before the grant, namely, on the 8th September, 1915, the respondent instituted against the appellants the proceedings out of which this appeal has arisen, claiming that she was the wife of the testator, and as his wife was entitled by virtue of a marriage settlement to one-half of the property that he had acquired during their marriage; she included in her claim certain property at Springwood in New South Wales, but this was held by the learned Judge who tried the case to be the sole property of the appellant, Dora Fels, and from that part of his judgment no appeal was brought. The rest of the claim he decided in favour of the respondent, and against this decision the present appeal is brought.

The respondent was admittedly married to the testator at Warsaw in Poland, on the 29th April or the 11th May, 1879, by a religious ceremony, and on the 10th or 22nd May, 1879, by a civil ceremony, the variation in the dates being due to the difference between the old and the new style of computing the days of the month. There were five children of the marriage—two sons and three daughters—of whom one son and one daughter died in infancy, the remaining son and two daughters being still alive. In 1885 the testator deserted his wife, left Warsaw for England, and from thence sailed to New York; from New York he went to San Francisco, and ultimately to Sydney. The appellant, Dora Fels, who is also a native of Warsaw, had herself left Warsaw independently of the testator, but they were known to each other, and on meeting an attachment sprang up, which the testator sought to solemnise by marriage in San Francisco. He accordingly attempted to divorce his wife and went through a ceremony of marriage with the said appellant, who doubtless believed that the divorce had been effectual. For reasons into which it is unnecessary to enquire it has been, however, decided by the learned Judge who tried the case that no divorce was in fact effected; but the testator lived with the appellant, Dora Fels, as his wife before the whole world until he died, but there seems to have been no issue of the union. She appears to have been a woman of considerable character and skill, and, by means of her energy and talent, there was obtained the means by which the testator built up a substantial fortune, which, subject to the respondent's claim, formed his estate at the date of his death.

The detailed terms of the testator's will are not important. He gave an annuity of 5*l.* to the respondent, and, after certain other annuities and legacies, gave the residue to the trustees and directed payment of the income to the appellant Dora Fels, whom he described as "my present wife," for her life, she maintaining throughout his son, Frederick Fels, and educating and bringing up in a manner suitable to her station his granddaughter Bessie Strickgold while she remained unmarried, the ultimate trust of the residue being in favour of his children Stanley Fels and Salis Danziger, and his granddaughter Bessie Strickgold.

The real question is not, however, as to anything contained in the terms of the will, but upon what estate the will is capable of operating. That the property which passed at the testator's death was entirely made either by the testator alone or by the joint efforts of himself and the appellant, Dora Fels, is beyond dispute; but the respondent asserts that by a marriage settlement duly executed on the 21st March, 1879, it was provided that all the property gained by the endeavour of either of the spouses during their lives should be the common property of both, and accordingly upon his death one-half of the property so acquired by the testator belongs to her.

That a marriage settlement was in fact executed is

proved, but the original is in the custody of the courts at Warsaw and cannot be produced, and the respondent was therefore entitled to rely on secondary evidence of its contents. To furnish this evidence she has put forward two alleged copies of the settlement which were admitted by the learned Judge, and the first and the most difficult question upon this appeal was whether that admission was rightly made.

According to the law of Warsaw, a marriage settlement is always prepared by a notary; the original is contained in one of his books of records duly signed by the parties, and authenticated copies are given by him to the husband and the wife. Upon the death of the notary his books of records go to the archives of the Warsaw District Court, by whom they are retained, and from whose custody they are not permitted to depart. The original, therefore, cannot possibly be produced, and if copies are properly proved they become good secondary evidence.

Two copies are furnished in the present case, neither of which is the original copy delivered by the notary to the wife on the marriage. The first is dated 1885 and came into existence because the respondent lost the original copy given to her. Upon its loss she applied to her father-in-law for a further copy, and he handed to her the first of the two documents which it is sought to use. The second copy came into existence in connection with the trial. It bears upon it the seal of the Deeds Registry of the then Warsaw Circuit Court and also the seal of the Warsaw Circuit Court itself, and contains the following endorsements:—

“This copy, which is exactly alike, word for word, with the original Act executed in the year 1879 in the Register No. 81, in the presence of the late Warsaw notary, Lev Bushkovski, whose records are kept in the Deeds-Registry Department of the Archives of the Warsaw Circuit Court, is issued to Bailia Mina Fels, daughter of Yankel, city of Warsaw, 29th May/10th June, 1915.

(Seal.)



“The Secretary of the Deeds-Registry,

“(Signature)”

“The President of the Circuit Court of Warsaw certifies the authenticity of the signature of the secretary of the Deeds-Registry,, which is here applied.

“The fees of the Chancery have been paid, the 29th May, 1915.

“For the President,

“(Signature)

“Secretary,

“(Signature)”

“*Translation from French.*

“No. 112. The Chancery of the Governor-General of Warsaw certifies the authenticity of the legalisation applied above by the Circuit Court of Warsaw.

“Warsaw, the 5th/18th June, 1915.

“The Privy Councillor,

“(Signature, m.p.) WIENIAWSKI.”

It is contended on behalf of the respondent that one or both of these documents are admissible either under the Common Law or by virtue of the provisions of the New South Wales Act known as "The Evidence Act, 1898." These two contentions are distinct and need separate examination. The argument in favour of the admissibility at Common Law depends upon the assumption that all official acts are rightly performed, and that the admitted circumstance that the two documents are literally identical is evidence that they were made from a common source which was faithfully transcribed.

Their Lordships are unable to accede to this contention. Until evidence is furnished, that the documents are in fact copies they cannot be looked at, their identity cannot be established and the inference that can be drawn from their identity does not arise. Nor is the record of an official by whom the document has been prepared any evidence that it is in fact a copy. At Common Law it would be necessary to prove that an alleged copy was a copy in fact, either by calling the man who made it or some person who had compared the copy and the original, and proved that one faithfully reproduced the other. No signature, however trustworthy, nor authentication by the most unimpeachable official can take the place of the evidence required at Common Law to prove that a certain document is the copy of an original that is not produced. It was, however, urged that the earlier copy might be admitted since it was produced from the proper custody where it had remained for over thirty years. This contention also cannot prevail, for although in certain circumstances copies produced from proper custody may after the lapse of time be treated as good evidence, yet this cannot be the case where an original is in actual existence and a copy is capable of being obtained and properly proved.

So far therefore as the claim rests upon Common Law it could not be conceded. There remains, however, the consideration of the Evidence Act of 1898. This closely follows in language, though not in form, the Evidence Act of 1851, 14 & 15 Vic. c. 99, applicable to this country. But no decision has been called to their Lordships' attention, and they are familiar with none which renders any assistance in its interpretation upon this point. The relevant section in the New South Wales Act of 1898 is section 21, and it is in the following terms:—

"Evidence of—

"(a.) Any judgment, decree, rule, order, or other judicial proceeding of any Court of Justice out of New South Wales; or

"(b.) Any affidavit, pleading, or other legal document filed or deposited in any such Court;

"may be given by the production of a copy thereof—

"(c.) Proved to be an examined copy thereof; or

"(d.) Sealed with the seal of such Court; or

"(e.) Signed by a Judge of such Court, with a statement in writing attached by him to his signature on such copy that such Court has no seal, and without any proof of his judicial character or of the truth of such statement."

The earlier copy cannot come within the provisions as it satisfies none of the conditions, and it is clearly only by subsection (b) if at all that the later copy can be used. It is properly authenticated by the required seal of the Court. But does the original settlement come within the provisions of the section? If so, it must come under the general phrase "other legal documents"; but this the appellants assert cannot be the meaning of the phrase, since these words must according to their contention be interpreted in the light of the two earlier words "pleadings or affidavits," so that it must be a document of the same class as those named. There is no doubt that, in a phrase of this description, the doctrine known as that of *ejusdem generis* does apply, but it still remains necessary to ascertain what are the characteristics by which the genus is constituted. According to the appellants the documents must be documents that have come into existence in the course of a lawsuit and form part of legal proceedings. But this contention fails to give effect to the word "deposited." Dealing with the proceedings in our own Courts, to which together with all other Courts out of New South Wales the section applies, counsel for the appellants have been unable to mention any document of such a character which can be said to be deposited in Court. It would seem, therefore, that some wider interpretation must be given to the words than a meaning so limited.

Now the purpose of this part of the statute, as shown by its contents, is to provide that documents that are in the lawful custody of a Court and therefore are difficult or incapable of production should be proved by a copy authenticated by the seal of the Court, and if these are taken as the characteristics by which the class of documents can be ascertained, there is no difficulty in defining the words "other legal documents," so as to cover such a document as that in the present case. It is a legal document, for it creates a solemn legal obligation of an important nature. It is deposited in Court, and the evidence is clear that the original cannot possibly be taken away. In these circumstances their Lordships think that the second copy produced on behalf of the respondent satisfies the necessary conditions and was properly admitted in evidence. They are fortified in this opinion by consideration of section 22, which deals with documents that come into existence in the course of bankruptcy proceedings in New South Wales, the language there used is "instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceeding," language which effects what the appellants contend is the true meaning of section 21 but is in marked contrast to the former words. Their Lordships have not the advantage of a considered judgment upon this point by the learned Judge by whom the evidence was admitted, but the general statement in his judgment referring to the admission of the copy appears to show that he thought the

statute applicable. The main part of his judgment deals with the question of construction, upon which two points are raised. The first that property acquired must be acquired by the joint efforts of the spouses; and the second that the period during which the promise operates is measured by the time during which the husband and wife are actually living together. Upon the first of these two points there is no dispute as to the true translation of the document which retaining the Russian language for the disputed words is as follows:—

“All property whereof either of the future consorts is now possessed, and which at any future time may devolve upon him by gift or by inheritance will constitute his exclusive property; whilst all the property acquired by the care and the labours of the consorts *vo vremya sooprojoeskoe sojitie* will be the common property of them both.”

Their Lordships see no reason so to limit the general words “property acquired by the care and labours of the consorts,” as to make them only applicable to that limited class of property which has been jointly earned particularly as they follow words which clearly point to individual acquisition. The other is a question rather of translation than construction, and depends upon the exact meaning to be given to the words “sooprojoeskoe sojitie.” Upon this there was a considerable amount of evidence given. It is plain that the words are flexible and are capable of many shades of meaning. One interpretation which is to be found by examining certain articles in the code confines it to actual cohabitation, but this meaning is so narrow that it is rejected by the appellants; they say, however—and in this they are supported by several witnesses—that the essential underlying meaning of the words is that of a common life lived together and not apart. This view is certainly open on the general meaning of the words, but it is in direct contradiction to the evidence of a witness who was called before the learned Judge—Alexander Nicolivitch d’Abaza. He was the Imperial Russian Consul-General for the Commonwealth of Australia, a native of Russia, and a Licentiate of Law, and he asserts in unmistakable terms that the words mean during the time of married life, and says that he has not the slightest doubt that this is their meaning. His evidence was accepted by the Judge who saw the witness, and their Lordships are not prepared to reject it in favour of the other evidence on which the appellant rightly relies.

There remains only the question as to the extent of the property upon which the wife’s claim operates. The appellants contend that it only affects one-half of the nett estate after paying expenses and costs. It is unfortunate that upon this point there appears to have been little or no discussion in the Court below and no evidence as to the legal operation of such a clause in Warsaw. If the true effect of the settlement be that property acquired during marriage is held in common, with right on the part of the husband to spend or give it away, and

the right on the part of the wife to claim at death her share of the property that remains, such share ought not to be diminished by any claim except the claim existing at the death of debts, which would be properly payable out of the joint estate.

Their Lordships regard this as the true interpretation and operation of the clause, and in this also they are in agreement with the learned Judge in the Court below.

The final question is really a question of words about the costs payable out of the estate. The learned Judge has directed that the costs of the Permanent Trustee Company should be those of a submitting party. The right of an executor is to receive an indemnity out of the estate for all costs properly incurred in the discharge of his office. In a case such as the present it was clearly the duty of the Company to sever their defence from that of their co-executor, who was an interested person. After such severance it may be that certain costs might properly be incurred by the Company in obtaining material to lay before the Court. It is more than likely that no such case arose, and their Lordships regard the statement of the learned Judge as nothing more than an indication that two independent sets of costs, treating both defendants as though they were hostile litigating parties separately, ought not to be allowed. There was no suggestion of any wilful misconduct on the part of the executors, and they are therefore entitled to their costs "properly incurred." To prevent any misunderstanding, their Lordships will advise that the order of the learned Judge be altered by substituting these words for the words used by him, and, subject to this slight modification, they think the judgment should be affirmed and this appeal should be dismissed with costs. They will humbly advise His Majesty to this effect

In the Privy Council.

THE PERMANENT TRUSTEE COM-
PANY OF NEW SOUTH WALES AND
ANOTHER

v.

FELS.

DELIVERED BY LORD BUCKMASTER.

PRINTED AT THE FOREIGN OFFICE BY G. E. HARRISON,
1918.