

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of De Jager
and another v. De Jager from the Court of
Appeal of the Colony of the Cape of Good Hope ;
delivered Thursday, 25th February 1886.*

Present :

THE LORD CHANCELLOR.

LORD BLACKBURN.

LORD HOBHOUSE.

SIR RICHARD COUCH.

THE question in this appeal arises upon the construction of a codicil to the will of Carl Johannes de Jager and his wife Susanna, who were married in community of property. The codicil was dated the 19th July 1822, and was in these words:—"We, the undersigned testators
" of this our testament or last will, before
" written, having taken into consideration that it
" would be necessary and useful for our children
" and grandchildren who shall survive us to add
" the subjoined to this our testament as follows:
" We desire expressly and bequeath by these
" presents to our two children procreated in
" wedlock, named Gideon Carolus Johannes
" de Jager and Johannes Stephanus de Jager,
" our dwelling place named Buffel's River,
" situated on the Oliphants River, in the district
" of George, as also a certain piece of ground
" lying on the lower side of the above-named
" dwelling place, and thereunto adjoining (now
" also surveyed), with this understanding, how-
" ever, that our two above-mentioned children
" may not sell, exchange, or pledge, or in any
" way dispose of the same, and that always this
" above-mentioned bequest of our dwelling

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“ place, together with the adjoining piece of
“ quit-rent land, shall remain in the first place
“ for both of them, and secondly, the eldest son
“ among our grandchildren shall always have
“ the same right thereto, and after the decease
“ of their parents remain in possession thereof,
“ with this understanding, however, that the
“ other heirs who may still be born shall enjoy
“ equal share and right thereto. Wishing and
“ desiring we, the testators, this only to be
“ our object, not to let the before-mentioned
“ bequest fall into other hands, but to be for
“ the convenience and benefit of our two children
“ and grandchildren, so that always the eldest
“ son of the grandchildren has the privilege.
“ And since the place is provided with a strong
“ stream of water and with sufficient service-
“ able soil, the grandchildren can, in our opinion,
“ if God grants his blessing, earn their living
“ thereon.”

At the time of this codicil being made the testator and testatrix had the two children named in it, and the younger of the two, Johannes, appears to have been about the age of 19 years. It does not clearly appear that the testator and testatrix might not then have reasonably thought that there was no possibility of another child being born. The wife, who survived her husband, died in 1825, leaving the two sons surviving and not having had any other children.

After the death of the testatrix the elder son Gideon entered into possession of the half of the property, and the question in the appeal arises upon the rights of the parties to the suit to the other half. Johannes, the younger son, died on the 18th July 1876, leaving him surviving ten children, the Respondent being the eldest of them, the Appellants being two of the remaining children, and the others not being parties to the present suit.

The Appellants, who brought the suit, claim, upon what they contend is the right construction of this codicil, to be entitled each of them to a tenth share of the half which came to Johannes. On the other hand the Respondent, the eldest son, contends that he under the terms of the codicil is entitled to the whole of that share.

Now in construing this codicil it is important to look to what is the general intention apparent upon the face of it. It is expressed by that part of it which says: "Wishing and
 " desiring we, the testators, this only to be our
 " object, not to let the before-mentioned be-
 " quest fall into other hands, but to be for the
 " convenience and benefit of our two children
 " and grandchildren, so that always the eldest
 " son of the grandchildren has the privilege.
 " And since the place is provided with a strong
 " stream of water and with sufficient service-
 " able soil, the grandchildren can, in our opinion,
 " if God grants his blessing, earn their living
 " thereon."

In the argument for the Appellants the introductory words were relied upon, but either construction which is contended for would be consistent with them, because supposing the gift is for the benefit of the eldest among the grandchildren, it would be consistent with the wish which is expressed there. So also with regard to what comes at the end of the codicil, that the grandchildren should earn their living upon the farm; that would be consistent with the eldest son among the children of each of the sons taking it and earning his living there; and perhaps the intention rather was that that should be the case, because the testator and testatrix could judge whether, if their farm was divided into two parts to be enjoyed by the two sons and afterwards each part by one of the grandchildren, or it might be if a third son was born then into

three parts, it would be better capable of supporting the family than if it was to go, one portion of it to be divided between the children of Gideon, and the other portion between the children of Johannes.

Now to look more closely at the words of the codicil. The first part gives clearly an estate to the two sons who were living, and named in it, for an interest which is in terms indefinite, but which, having regard to the ulterior gifts, must be for life, and then it proceeds:—"and secondly, "the eldest son among our grandchildren shall "always have the same right thereto,"—that must mean the right which had been given to the two sons—"and after the decease of "their parents remain in possession thereof." So far there is a distinct indication of an intention that they were to take the property in the two shares; that the eldest son of each of the sons was to take the property in the shares in the same way as the fathers were to take, "with this understanding, however, that the "other heirs who may still be born shall enjoy "equal share and right thereto." It is contended that these words, "other heirs," should not be read as applying to children who might be born after the making of the codicil, but that they have reference to grandchildren, and possibly even beyond grandchildren. It appears to their Lordships that the natural construction of these words is, that it was intended to provide for what might have been suggested to the testator and testatrix, if it did not occur to themselves, that another child might possibly be born, and it was necessary to make some provision for that event happening. Their Lordships think they were inserted to provide for that case. Then come the words "but to be for the benefit of our two children and grandchildren." If those words are taken in connexion with what has gone before, they

may mean grandchildren who are the subject of the previous gift, namely, the eldest among the grandchildren. These would be the eldest sons of each of the sons. The words "two children and grandchildren" are satisfied by that construction, and that construction should be put upon them to avoid the inconsistency which would be created by giving them a different construction in the previous gift to the sons. Then it goes on, "so that always the eldest son of the grandchildren has the privilege." These words again point to the construction that it was the eldest son of the grandchildren who, in the prior passages of the will, was contemplated as the sole taker. In immediate connexion with this direction that the eldest son of the grandchildren was to have the privilege, come the words, "the grandchildren can, in our opinion, if God grants his blessing, earn their living thereon," to which reference has already been made. So that looking at the whole of this codicil, it appears to their Lordships that the construction which has been put upon it by the Courts below is the right one. The case was heard in the first instance by Mr. Justice Buchanan, who put that construction upon the codicil, and upon an appeal to the full Court the Judges, with one exception, came to the same conclusion.

It may be well to observe that it is not necessary for their Lordships to say what would be the construction of this codicil with regard to any attempt, if there should be one, to create a perpetuity, or what has been called an entail. That question does not now arise, and their Lordships give no opinion upon it. Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed, and the Appellants must pay the costs of the appeal.

