

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Galliers and Others v. Rycroft and Another, from the Supreme Court of Natal; delivered 3rd July 1900.*

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Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR HENRY DE VILLIERS.

SIR FORD NORTH.

[*Delivered by Sir Henry De Villiers.*]

The will which their Lordships are called upon to construe was executed in Natal, but the testator, William Galliers, senior, was an Englishman who had married in England before he settled in Natal. The will is in the English language and is in the following terms:—"I give and bequeath all and singular my real and personal estate . . . unto my dear wife Matilda Galliers (born Sabin) for the use and benefit of herself and my children during her lifetime, and after her decease I direct that the same may be equally divided among my children or such of them as may be then alive." The testator died in 1864 leaving him surviving his wife, one son and three daughters. The son William Galliers, junior, died in 1875, after executing a will by which he bequeathed all his property to his wife Fanny Galliers. He left him surviving his wife and one son, William

Elton Galliers. The wife of the testator (William Galliers, senior) died in 1897 leaving her surviving her three daughters already mentioned and her grandson William Elton Galliers. The executors of William Galliers senior thereafter awarded the whole of his estate to the three daughters. Objections were filed against the distribution on behalf of the widow and the son of William Galliers junior, they claiming to be entitled to share in the distribution of the estate. The Supreme Court, by its order, the Chief Justice dissenting, directed the executor "to frame and file an amended account so as to include in it William Elton Galliers junior as taking his father's share in the capital of the estate of William Galliers senior and also his father's share of the income of that estate from the date of the death of the widow of William Galliers senior." Against this judgment the three daughters have appealed. The widow of William Galliers junior has joined her son in supporting the judgment, but she claims that, if her son should be held not to be entitled to his father's share, she as the sole heiress under her husband's will, is entitled to it.

The ground upon which a majority of the Natal Supreme Court supported the claim of the testator's grandson was "that the law of Natal (differing in this respect from English law but following Roman law) applies to cases of the present kind a rule of construction that where a parent has appointed children (or remoter descendants) as heirs and directed that upon their death their share should go over either to a stranger or to another child then the going over or substitution is subject to the tacit condition implied by law that the deceased child left no issue." This statement of the rule, if confined to the case of fideicommissary substitutions, appears to their Lordships to be a

fair deduction from the Roman and Dutch authorities on the subject. The rule had its origin in a response given by Papinian and quoted in the Digest (35. 1. 102) as follows:—

“A grandfather having instituted as his heirs  
 “ a son and a grandson born of another son  
 “ requested the grandson, if he should die within  
 “ his thirtieth year, to restore the inheritance to  
 “ his uncle. The grandson died within the  
 “ age mentioned leaving children. From a  
 “ conjecture of dutiful conduct I answered that  
 “ the condition of *fideicommissum* had failed  
 “ because it would be found that less had been  
 “ written than spoken.” It is obvious that in  
 this brief opinion Papinian was not referring to  
 the case of a direct or ordinary substitution, that  
 is to say the substitution of the son on failure of  
 the grandson to take under the will, but to the  
 case of a fideicommissary substitution, that is to  
 say the substitution of the son for the grandson  
 by virtue of a trust imposed on the latter to  
 restore the inheritance on the happening of a  
 certain event after he had entered on it. The  
 term *fideicommissum* used by Papinian would  
 not be applicable to a direct substitution nor  
 would the grandson be *requested* or able to  
 restore (*restituere*) an inheritance which he  
 had never entered upon. The law relating  
 to *fideicommissa* had been fully developed  
 in his time and it was a very common practice  
 for Roman testators, in creating such trusts,  
 to make them conditional upon the fiduciary  
 heir dying without children. Papinian held,  
 in effect, that this condition *si sine liberis*  
*decesserit* should be read into every will whereby  
 the burthen of *fideicommissum* is imposed on  
 a grandchild of the testator. The authority of  
 Papinian stood so high that the response was  
 accepted as law and it was confirmed by two  
 Imperial rescripts quoted in the Code (6. 25. 6

and 6. 42. 30) which extended the application of the rule to the case in which descendants of whatever degree are burthened with *fideicommissum* and even to the case of natural children who are so burthened. The terms of both rescripts clearly show that the condition *si sine liberis* was intended to be read only into wills by which *fideicommissa* were created. None of the Dutch Commentators on the Digest or the Code who were cited in the judgment of the Court below has extended the rule any further. Voet (36. 1. 17. *et seq.*), Perezius, Wissenbach and Strykius treat the matter as part of the law relating to fideicommissary dispositions and all the illustrations given by them are cases of fideicommissary substitution. Bruneman, in his Commentary on the cited passage of the Digest, confines the rule to fideicommissary substitutions and, in his Commentary on the Code (6. 42. 30), he expressly states, on the authority of Peregrinus (*de fideicommissis*) and other writers that the condition is not implied in the case of ordinary substitution unless the instituted heir is also burthened with a *fideicommissum* in favour of the substituted heir. Burge, in his Commentaries (vol. 2, p. 109) says:—"The condition "*si sine liberis* is in certain cases implied when " it has not been expressed. If a father or " grandfather institute his son or grandson who " at the time has no children, with a *fidei-* " *commissum* to restore the inheritance to a third " person, this condition *si sine liberis* is implied." He then proceeds, following Voet, to specify the limitations upon the rule of construction thus broadly stated and he treats the matter as falling entirely under the law relating to fideicommissary substitutions. No decision of any Court administering the Roman-Dutch law has been cited to show that the condition has ever been implied in the case of a will under which the heir or

legatee, if he took his inheritance or bequest at all, would take it free from any trust or burthen. The case of *Mylne* (1 Natal Law Reports, p. 88) which was mainly relied upon by the Court below, was treated by the Court which decided it as one of fideicommissary substitution. The testator in that case bequeathed the annual proceeds of his estate to the children of his daughter Jessie, who had been first married to one Robertson and then to one Tollner. The will then proceeded thus:—"In the event of any " one of these my heirs dying, whether of the " Robertson or Tollner families, the dividend or " share of the deceased shall revert to and be " paid to the survivors of that family to which " the deceased belonged." After the death of the testator the children of Jessie received the annual proceeds and two of them claimed payment of the *corpus* of the estate free from any limitation over, but Connor C.J. decided that they were not entitled to succeed on the distinct ground that the substitution was intended to apply after as well as before they had entered on their inheritance. So far as the substitution was intended to take effect after the testator's death it was clearly fideicommissary, for the children of Jessie were mentioned as *heirs* whose shares on their death should *revert* to the survivors of their respective families. That being so, the condition *si sine liberis* was read into the will but, as it could not be known until the applicants' death whether they would die without issue, the Court refused to order the payment to them of the *corpus* of their shares as their absolute property. The case therefore is no authority for the proposition that the condition *si sine liberis* can legally be read into a will which merely substitutes one heir or legatee for another in the event of the instituted heir or legatee not entering on the inheritance or legacy.

By the will now in question the testator, after giving a life interest in his estate to his wife for the benefit of herself and his children, directs that after her decease the estate shall be equally divided among his children or such of them as might then be alive. The effect of this direction was virtually to institute the children as heirs on the death of their mother and to substitute the survivors for such of the children as might die before their mother. It is a case, therefore, of direct and not of fideicommissary substitution. The children are not requested to part with their inheritance after they have once entered on it and consequently those who survived their mother took their inheritance free from any burthen. Those who died before their mother entered upon no inheritance and possessed nothing to restore. Their Lordships' attention has however been called to the English case of *Sturgess v. Pearson* (4 Mad. 411) in which it was held that a bequest to several or to a class "or" to such of them as shall be living at a given period should be construed as a vested gift to all, subject to be divested in favour of those living at that period and that, consequently, if none are then living, all are held to take. Their Lordships are not aware that this doctrine of vesting and divesting has ever been adopted in the Roman or the Dutch Law, but assuming that it has been so adopted, such a vesting and divesting would be a very different matter from the *aditio* and *restitutio* by an heir or legatee under a fideicommissary substitution. If William Galliers jun. had survived his mother his inheritance would, under the will, have belonged to him absolutely. Having died before her he acquired nothing in respect of which a *fideicommissum* could be imposed on him. The will itself is free from ambiguity and contains no indication of any desire on the testator's part to

benefit his grandchildren in preference to his surviving children, and the question to be determined is whether this is a case in which a Court administering the Dutch law could legally supply the omission of a supposed natural duty. To read into a will words which the testator has not used, to presume an intention which the testator has not expressed, can only be justified by a positive rule of construction having the force of law. Such a rule cannot now be extended beyond the special circumstances to which the law originally confined it, even although the reason which led to the introduction of the rule may be applicable to other circumstances also. It is said that the principle underlying the rule of construction now under consideration is that the testator must be presumed to have overlooked the contingency of his instituted children or other descendants having issue. This principle would, no doubt, also be applicable to the case of direct substitution, but it would be equally applicable to many other cases than that of substitution, whether direct or indirect. The text of the Roman law has applied the rule of construction only to *fideicommissa*, no text writer or decided case under the Dutch law has extended it any further, and those commentators who discuss the question whether the rule should be extended to wills which contain no fideicommissary substitution answer the question in the negative. Their Lordships are therefore unable to agree with the majority in the Court below that the rule should be applied to the construction of the will now in question. It is not implied in this decision that the application of the *conditio si sine liberis* to direct legacies to children with a substitution has been an illegitimate extension of the principle by those Courts of Law (as in Scotland) which have derived it from the Roman Law, and their

Lordships recognise the strength of the reasoning by which that extension is justified. It is enough for the decision of the present case to say that the Roman-Dutch law has not so proceeded, and it is for their Lordships to apply the law as it stands.

But another rule of construction bearing a close resemblance to the one just considered, has been called in aid by the Respondents and it is this, that where a testator confers benefits by will on his "children" he must be presumed to have intended to include under that term all other descendants. The reason for this supposed rule is variously stated and one of the grounds on which it is supported is the extreme improbability that the testator would have omitted to mention other descendants if he had thought of them. It is clear, however, from the reasoning of Voet (36. l. 22) that in his time at all events no such hard and fast rule of construction was recognised. The conclusion at which he arrived is that the word "kinderen," which is the Dutch equivalent for "liberi" and for "children," must *prima facie* be taken to refer to descendants of the first degree but that, if it can be gathered from the context of the will or from other circumstances that the testator had regard to descendants of a remoter degree, the word should be construed as having such wider signification. He adds that the question in each case is not one of law but rather of intention. It appears from later authorities, that in the case of a bequest to the testator's own "children" the Courts of Holland required much slighter evidence of a desire to benefit further descendants than in the case of a bequest to the children of another person.

It is difficult to find in the terms of the short will now under consideration such an indication of a desire to benefit the children of the testator's



children as to justify their Lordships in giving to the term "children" the wider signification contended for. The Judges in the Court below held the same view and moreover relied upon the case of *Martin v. Lee* (14 Moore P. C. C. 142) which was decided by their Lordships' Board on appeal from Lower Canada. There the testatrix, a married woman, domiciled in Lower Canada, had made a will in the English language. By the will she devised her estate to her husband for his life and after his decease to her children, living at the time of her decease. One of her children predeceased her, leaving a child who was held by the Court of Lower Canada to be entitled to take under the will on the ground that the term "children" included grandchildren. Their Lordships, however, held that, upon the true construction of the will, the intention of the testatrix was to restrict the gift to her children which intention countervailed the general force given by the law of Lower Canada to the word "enfants." Their Lordships added that it might well be that the will "having been written in the English language, the proper mode of dealing with the case may have been for the Courts in Canada to ascertain what, according to the English law, was the meaning of the word 'children' as used in the will." The point was not decided nor is it necessary for their Lordships now to decide it, seeing that, in their opinion, the children of the testator's children would not have been included in the word "kinderen" even if the will had been in the Dutch language and that word had been employed.

In regard to the Respondent Mrs. Rycroft, she claims to be entitled, as sole testamentary heiress of William Galliers junior, to his share of the estate in case his son should fail in his claim.

Their Lordships, however, fully agree with the Judges of the Natal Court that the words in the will "or such of them as may then be alive" prevent such a vesting of the inheritance in any child dying before his or her mother as would make the inheritance transmissible to his or her heirs. It is only in the event of William Galliers junior dying after his mother that Mrs. Rycroft would have been entitled to his share of the inheritance. As he died before his mother, his sisters, being the persons substituted for him under their father's will, are entitled to the share which he would otherwise have taken.

The result is that, in their Lordships' opinion, the judgment proposed by the learned Chief Justice was right and they will humbly advise Her Majesty to allow the Appeal, to disallow the objections to the distribution and to order that the costs of all parties in the Court below be paid out of the estate of William Galliers, senior. The costs of all parties on Appeal will also be paid out of the estate.

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