

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Amoyot
v. Dwarris and others, from the Supreme Court
of Judicature of Jamaica (in Equity); delivered
the 4th February 1904.*

Present :

LORD MACNAGHTEN.

LORD ROBERTSON.

LORD LINDLEY.

SIR ARTHUR WILSON.

[Delivered by Lord Macnaghten.]

THE point raised on this Appeal is a very short one and in their Lordships' opinion free from difficulty. The question, such as it is, turns on one passage in the will of Sir Fortunatus William Dwarris. After certain limitations which have failed or determined, he disposed of a property called "Golden Grove" by giving it in these words:—"To the eldest son of my sister Frances McKeand Gibney and his heirs for ever." It appears that at the time when the testator made his will Mrs. Gibney had two sons. There was, therefore, at that time in existence a person answering the description of the "eldest son" of his sister Frances. It was contended that the word "eldest" was not properly applicable to the elder of two persons, and that, if the testator had really meant Mrs. Gibney's first-born son, he would have said "elder," not "eldest." In their Lordships' opinion that objection savours of hypercriticism. If a man has two sons, and only two, the ordinary way of speaking of the first-born, if not designated by name, is to call him the eldest son of so-and-so. There being then a person in existence at the time answering the description

in the will, their Lordships are of opinion that that person, though he died afterwards in the testator's lifetime, was the object of the testator's bounty. There is nothing in the context to warrant any departure from the proper and ordinary meaning of the words employed.

All the authorities from *Lomax v. Holmden* (1 Ves. Sen. 290) to *Meredith v. Treffry* (12 Ch. D. 170) point in the same direction. The case of *Re Harris' Trust* in 2 W.R. 689 (1854), on which the Appellate Court seems to place some reliance, cannot be regarded as an authority to the contrary. The learned Vice-Chancellor who decided that case was at the time of the decision under a misapprehension as to the operation of the Wills Act. He seems to have thought that with reference to the objects of testamentary bounty the Act had an effect similar to that which it has "with reference to the real and personal estate comprised in it" (sec. 24), an error afterwards corrected by the Court of Appeal in *Bullock v. Bennett* (1855), 7 D. M. & G. 283.

Their Lordships will therefore humbly advise His Majesty that the Appeal ought to be allowed, and that Question 1 ought to be answered by saying that the testator died intestate as regards the fee simple expectant upon the failure or determination of the limitations set out in paragraph 5 of the Special Case, and that upon the facts stated in the Special Case the estate is now vested in the Appellant.

As an arrangement has been made as to costs, there will be no order as to costs except that the parties are to be at liberty to apply for an order to tax their costs.
