Present: Ennis J. and Shaw J.

1916

PEDRIS *et al.* v. FERNANDO *et al.*

137—D. C. Colombo, 5,424/5,429.

Joint will—One daughter disinherited—Property bequeathed to survivor—Survivor dying without making another will—Does survivor die intestate?—Does property pass to the children of joint testators except the disinherited daughter?

Where an heir or next of kin has been disinherited by a will and no specific devise or bequest has been made of the property to others, the disinheriting clause is not invalid; in such a case the next of kin, other than the persons named as excluded, are entitled to succeed.

Lidolis and Bocha were married in community of property and had three daughters, Lilian, Rosaline, and Madeline. By their joint will they confirmed certain deeds of gifts to their daughters, and a deed (No. 111) whereby Rosaline was "to receive Rupees

[1] *(1906) 9 N. L. R. 251.*

Thirty per month after our death." The will proceeded to declare that, beyond this, Rosaline should have no right to their estate, and expressly disinherited her. The will further contained a bequest of the residuary property to the survivor. Lidolis died first, and then Bocha, without having made another will.

Held, that Bocha had not died intestate.

ENNIS J.—The contention that the will under consideration cannot be taken as the will of the survivor Bocha, because as such it names no heir, is unsound.

SHAW J.—The clause in the will disinheriting Rosaline amounts to a gift by implication to the other two daughters of the testatrix of the residue of the estate to the exclusion of the disinherited daughter.

THE facts are set out in the judgment.

H. J. C. Pereira (with him *A. St. V. Jayewardene* and *Canekeratne*), for appellants.

Bawa, K.C. (with him *M. W. H. de Silva*), for first and second respondents.

E. G. P. Jayetileke (with him *A. V. de Silva*), for third and fourth respondents.

Cur. adv. vult.

November 24, 1916. ENNIS J.—

The first of these appeals is from a judgment declaring one Bocha Fernando to have died intestate, and directing the appellants, the applicants in No. 5,429, to pay costs. The second is from an order granting administration to Rosaline Fernando, the applicant in No. 5,424. Both appeals are in the matter of the estate of Hewadewage Bocha Fernando. It appears that one Lidolis, or Theodoris Fernando, and Bocha Fernando were married in community of property and made a joint will. They had three daughters, Lilian, Rosaline, and Madeline. The will confirmed certain deeds of gift to the daughters. It also confirmed a deed, No. 111 of February 5, 1900, whereby Rosaline " is to receive a sum of Rupees Thirty (Rs. 30) per month after our death out of the rents and profits of the premises given and granted by the said deed. "

The will proceeded to expressly declare " that save and except the said monthly sum of Rupees Thirty (Rs. 30) which the said Hewadewage Rosaline Fernando is to receive during her lifetime after the death of her parents, in terms of the provisions of the said deed No. 111 of the Fifth day of February, One thousand Nine hundred, she shall have no manner of right to, or interest in, any share or part of our estate, and we do hereby expressly disinherit her and her descendants." The will then contained a bequest of the residuary property to the survivor. Lidolis Fernando died first. Bocha Fernando then died, without having executed any

other will. The learned Judge found that the will operated only as the will of Lidolis Fernando, and did not operate as the will of Bocha Fernando, and he accordingly found that Bocha Fernando had died intestate.

In *Juta's Leading Cases, Part II., at page 114*, there is a note: "Although every mutual will is the separate will of each of the spouses, it by no means follows that the mutual will is the will of the survivor. A mutual will may be drawn in such terms—and often is—that it operates as the separate will of each of the spouses, but only of the one who dies first: upon his or her death the mutual will comes into operation as the will of the first dying, whichever of the spouses died; but with that the mutual will ceases to have any further effect."

The respondents rely on this note, but it seems to me to be against their contention. In *Michau's case* (*page 115*) the will contained a disposition of property by the "first-dying" spouse only. Clearly such a will could not operate as the will of the survivor, and the survivor having died without making a new will, it was held that he died intestate. It was argued for the respondents that this would be the effect of any mutual will which did not make dispositions of the property to operate after the death of both spouses, and it was contended that the will in question makes no such disposition. *Barry's case* (*page 147*) shows that where the mutual will disposes of part of the joint property after the death of both spouses, the survivor cannot revoke the disposition as to that part by another will, but it does not support the contention that in the absence of another will the survivor would die intestate as to all property, except the part disposed of by the joint will. In *Mastert's case* (*page 110*) the Privy Council laid down the following propositions:—

"(1) That mutual wills, notwithstanding their form, are to be read as separate wills, the dispositions of each spouse being treated as applicable to his or her half of the joint property.

"(2) That each of the spouses is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator.

"(3) That either of the spouses is at liberty to revoke his or her part of the will after the death of the co-testator, subject, however, to the following:—That the surviving spouse has no right or power to revoke a mutual will if (*a*) the mutual will disposes of the joint property on the death of the survivor, or, as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition of it; and (*b*) the survivor has accepted some benefit under the will."

Unless the words of the joint will are such as to apply to the estate of the first dying only, I imagine the will would be effective as the separate will of the survivor if the survivor made no new will. The contention that the will under consideration cannot be taken as the will of the survivor Bocha, because as such it names no heir, is unsound. The heirs are successors in law, and by Roman-Dutch law the term applies to succession to both real and personal property, and there can be more than one heir (in England there is only one heir, and heirship applies to real property only). In the provisions of the joint will disinheriting Rosaline there is a disposition of the property among the heirs; moreover the will clearly shows, that the other heirs are to benefit, for it confirms certain gifts made *inter vivos* to the other children, and refers to this confirmation as a disposition of shares " of our estate. " In my opinion, therefore, the first appeal must succeed, and, consequently, the appellants in the second appeal are entitled to letters of administration.

I would allow both appeals, the costs both on appeal and in the District Court should be paid out of the estate.

SHAW J.—

These are appeals, the one from the refusal of the District Judge to grant Lilian Pedris, the eldest daughter of Bocha Fernando, deceased, administration of the estate of Bocha Fernando with the will of July 29, 1901, annexed, and the other from the order of the District Judge granting letters of administration to a younger daughter, Rosaline Fernando.

According to the rule enunciated by the Privy Council in *S. A. Association v. Mostert*,[1] the mutual will of Bocha Fernando and her husband must, in my view, be considered as the separate wills of the spouses, and I can see nothing in the other cases cited to us from *Juta* to show that the form or wording of this particular will takes it out of the general rule and makes it the will of the first-dying spouse only, as was contended on behalf of the respondents. On the contrary, the provision for the disinheriting of the daughter Rosaline seems to show the intention was the reverse, as that provision can have no meaning except as a disposition by the surviving spouse.

It was contended on behalf of the respondents that the English cases show that where an heir or next of kin has been disinherited by a will, and no specific devise or bequest has been made of the property to others, that the disinheriting clause is invalid, and the heir or next of kin nevertheless takes the property.

So far as the rule may apply, when the heir at law has been excluded from the succession to real property, it has no application here, where we have no sole heir to either immovable or movable property.

[1] *Juta's Leading Cases, Part II., p. 107.*

How far it would apply here if a testator disinherited the whole of the next of kin I need not discuss, because the testatrix in the present case has purported to disinherit one of her next of kin only. The English cases do not, however, show that if a testator excludes some only of the next of kin, without specifically bequeathing his portion to some one else, the disinheriting clause is of no effect; on the contrary, they seem to me to show that the disinheritance enures for the benefit of the other next of kin.

The English rule on the subject is very fully discussed in the judgment of Vice-Chancellor Kindersley in *Lett v. Randall.*[1] The Vice-Chancellor there gives the reason for the rule rendering the disinheritance of no effect when the testator excludes the heir at law from inheriting real property, or the whole of the next of kin from inheriting his personality, namely, that it would amount to a declaration that no one should succeed, as there could be no escheat to the Crown so long as there is an heir or next of kin; he then goes on to say, " but the exclusion by declaration of one or some only of the next of kin, if it be valid, must enure for the benefit of the rest, and has the same effect as a gift by implication to them of the share of those who are excluded. "

The more recent case of *Bund v. Green* [2] also shows that where some only of the next of kin are excluded and there is an intestacy as to the residue of the estate, the next of kin, other than the persons named as excluded, are entitled to succeed.

In the present case the clause in the will disinheriting Rosaline, in my opinion, amounts to a gift by implication to the other two daughters of the testatrix of the residue of the estate to the exclusion of the disinherited daughter; not only does this result follow from the mere exclusion of her as one of the next of kin upon the principles I have stated above, but in the present case the intention of the testatrix seems to me to be clearly shown from the context of the part of the will where the disinheriting clause occurs, where the testatrix is specifically dealing with the provision that has been made for the three daughters.

I would therefore allow both appeals and direct letters of administration, with the will of July 29, 1901, annexed, to issue to the appellant Lilian Pedris, and would direct that the costs of the proceedings, including the costs of this appeal, should come out of the estate.

Appeal allowed.

---

[1] *3 Sm. & Giff. 83, at page 89.*

[2] *12 Ch. Div. 819.*