

[PRIVY COUNCIL.]

J. C.* AMYOT APPELLANT ;
 1904
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 Feb. 4.      DWARRIS AND OTHERS . . . . . RESPONDENTS.

AND

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

*Construction of Will—"Eldest Son of my Sister"—Lapsed Gift.*

A gift "to the eldest son of my sister and his heirs for ever" operates in favour of the elder of her two sons living at the date of the will, though he predeceased the testator, in the absence of any contrary intention appearing in the context. As the gift lapsed on the death of the donee, there was an intestacy in favour of the heir-at-law.

APPEAL from a decree of the Supreme Court of Jamaica (Equity) dated May 1, 1903, on a special case agreed to by the parties.

The question was as to the proper construction of a devise contained in the will of Sir Fortunatus William Dwarris, deceased, upon the failure or determination of certain limitations therein expressed in favour of the testator's wife and issue of a plantation and the hereditaments and appurtenances thereto belonging known as Golden Grove situate in the island of Jamaica.

The testator by his will dated October 11, 1822, devised in the events which happened Golden Grove, as follows: "And immediately from and after the decease of my said wife to the eldest son of my sister Frances McKeand Gibney and his heirs for ever, he and they taking and bearing the name of Dwarris." The will did not contain any devise of the residuary real estate.

The first-born sons of the testator's sister Frances McKeand Gibney were William Gibney and George Gibney (who were a twin pair). Both of them were living at the date of the said

\* *Present*: LORD MACNAGHTEN, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

will, but they both predeceased the testator without leaving issue.

The next son of Frances McKeand Gibney was John Wallington Bonner Gibney, who was born after the date of the said will and survived the testator. He died on October 25, 1867, prior to the failure of the said limitations under the said will terminating with the life interest of the testator's wife. He attained his full age of twenty-one years, and married, but he died intestate and never had any issue. Her fourth son was the respondent Robert Dwaris Dwaris.

The heir-at-law of the said John Wallington Bonner Gibney was his father William Gibney, who died in the year 1872, having by his will devised and bequeathed all his property to his children, the respondents.

If the testator died intestate as to the ultimate fee simple in Golden Grove, it vested in the appellant as the surviving trustee of the will of the testator's heir-at-law.

The special case submitted the following questions, namely, (a) Whether the testator, Sir Fortunatus William Dwaris, died intestate as regarded the fee simple of Golden Grove expectant upon the failure or determination of the said limitations, and, if so, in whom such estate was vested. (b) If the testator did not die intestate, whether John Wallington Bonner Gibney died seised under the testator's will of a vested estate of inheritance in fee simple in remainder expectant upon the determination of the said limitations, and whether upon the death and intestacy of the said John Wallington Bonner Gibney such estate vested in the said William Gibney as the heir-at-law of the said John Wallington Bonner Gibney. (c) Whether the plaintiff Robert Dwaris Dwaris, on the failure of the said limitations, became and was entitled for an estate in fee simple in possession to Golden Grove in virtue of the limitations contained in the will of the testator Sir Fortunatus William Dwaris in favour of the eldest son of the said Frances McKeand Gibney.

The Supreme Court held that there was no intestacy; that the devise to the "eldest son of my sister Frances McKeand Gibney" was not a devise to her first-born son as persona

J. C.

1904

AMYOT

v.

DWARIS.

J. C.  
1904  
~  
AMYOT  
v.  
DWARRE.  
—

designata, but was a devise to such person as shall answer to the description of eldest son of Mrs. Gibney at the time when the estate in remainder should vest.

The Court further held that the estate in remainder vested in Mrs. Gibney's eldest surviving son at the testator's death. There was nothing in the will which postponed the vesting until the prior limitations were determined, or which favoured the claim of Mrs. Gibney's only surviving son at the date of such determination.

*Macnaghten K.C.*, and *J. Austen-Cartmell*, for the appellant, contended that this view was erroneous, and that an order ought to be made declaring that the testator died intestate, in the events which happened as regards the fee simple of Golden Grove, and that the appellant as representing his heir-at-law was entitled to succeed. Mrs. Gibney's elder twin son answered the description of the person directed to take. The devise lapsed by reason of his death in the testator's lifetime, and consequently intestacy resulted. The rule of construction is that a devise to the eldest son of a person, when such person has an eldest or first-born son living at the date of the will, is a devise to such person as a *persona designata*. Reference was made to *Bathurst v. Errington* (1); *Trafford v. Ashton* (2); *Meredith v. Treffry* (3); *Re Harris' Trust* (4); *In re Whorwood*. (5)

*Norton, K.C.*, and *Waggett*, for the respondents, contended that, according to the true rule of construction applicable to the case, the person referred to by the testator as "the eldest son of my sister" meant and designated the person who answered that description at the time when the will took effect and the estate in remainder was vested and made the subject of gift. That estate vested in the person so designated at the death of the testator, and the rule of construction as regards this estate contended for on the other side led to intestacy, which ought to be avoided, as inconsistent with the intention of the testator.

(1) (1877) 2 App. Cas. 698, 709.

(3) (1879) 12 Ch. D. 170.

(2) (1710) 2 Vern. 659.

(4) (1854) 2 W. R. 689.

(5) (1887) 34 Ch. D. 446.

Reference was made to *Lomax v. Holmden* (1); *Thompson v. Thompson*. (2)

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was 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 Dwarries. 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) to *Meredith v. Treffry* (3) point in the same direction. The case of *Re Harris' Trust* (4), 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

J. C.

1904

AMYOT

v.

DWARRIS.

(1) (1749) 1 Ves. Sen. 290.

(3) 12 Ch. D. 170.

(2) (1844) 1 Coll. 381, 388; 66 R. R. 109, 113.

(4) 2 W. R. 689.

J. C.  
1904  
AMYOT  
v.  
DWARREIS.

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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" (s. 94), an error afterwards corrected by the Court of Appeal in *Bullock v. Bennett*. (1)

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.

Solicitors for appellant: *Parkes & Browne*.

Solicitors for respondents: *Guscotte, Wadham & Co.*

(1) (1855) 7 D. M. & G. 283.