

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Barlow v. Orde and others, from the Court of the Judicial Commissioner of the Punjaub ; delivered 9th March, 1870.*

---

Present :—

LORD WESTBURY.

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

---

SIR LAWRENCE PEEL.

THE question in this Appeal depends on the construction and legal effect of the will of Colonel James Skinner, who was an officer in the service of the East India Company.

Colonel Skinner died in the month of December, 1841, and, at the time of his death, he was resident and domiciled in the Delhi territory, which then formed part of the North-Western Provinces of India, but which, after the mutiny, was placed under the administration of the Punjaub Government.

The construction and effect of the will, therefore, must depend on the law of the domicile, if that can be ascertained. At the time of the Colonel's death there was no *lex loci* of the province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal status, which again, mainly depended on his religion.

Thus the succession of an Hindu would, as a general rule, fall to be regulated by Hindu law, and of a Mahometan by Mohammedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personæ*, regard was to be had to the mode

of life and habits of the individual, and to the usages of the class or family to which he belonged.

If no specific rule could be ascertained to be applicable to the case, then the Judges administering justice in the province were to act according to justice, equity, and good conscience.

Such is the substance of the regulations (as explained in the case of *Abraham v. Abraham*, 9 Moore, Indian Appeals, 195) which were made by the East India Company for defining the jurisdiction of the Courts of the Province in which Colonel Skinner was domiciled, and which were in force at the time of his decease.

There is little evidence from which the personal state of Colonel Skinner may be ascertained, beyond that which is afforded by the Will.

It is stated, and there is proof, that he was illegitimate, being probably the child of a native woman by an European father. As a commander of a corps of irregular light horse, he acquired great distinction in the military service of the East India Company, and, in consideration of his services, he obtained grants of large landed estates, situate partly in the North-Western Provinces, and partly in the territory of Delhi.

The form of a renewed grant of some of these estates made to Colonel Skinner by the Marquis of Hastings when Governor-General, may be material to be noticed. The grant was made to the Colonel in "Altumga," to take effect from the beginning of the year 1226, Fuslee era, and contained this special form of limitation, viz. :—"To Colonel Skinner "and his heirs after him, or to such persons as he "may devise by his last Will and testament, or by "any other valid instrument, with their heirs, in "the proportions in which he may devise the same "to them respectively, so that each holding and enjoying his own share, shall conform himself to the "dispositions of the said Will." Had the grant been simply to the Colonel and his heirs in "Altumga," the grant would have come to an end on the death of the Colonel without leaving lawful issue, and the superadded special power of testamentary disposition, therefore, is regarded as an indication that the grantee was conscious that he was not likely to leave lawful issue, and, therefore, obtained the grant of a power of disposition. This argument, however,

is not of much weight. Colonel Skinner does not appear to have been ever married, but he seems to have kept several native women as part of his family, with whom he cohabited and by whom he had several children.

There is nothing to indicate the religious belief or profession of the Colonel or of his family, or what were their habits or usages.

His origin is unknown; being illegitimate, he belonged to no family, and all that can be collected is, that he was probably a soldier of fortune, who rose by his courage and military skill to a certain rank and distinction in the service of the East India Company.

It is impossible, under these circumstances, to affirm that any particular law is applicable to the construction of the Colonel's Will or the regulation of his succession. Any questions that may arise respecting them must, therefore, be determined by the principles of natural justice.

In English law there is a technical rule of construction, that under a testamentary gift of children as a class, illegitimate children, although recognized by a testator in his lifetime, cannot be permitted to share jointly with natural, lawful children; and the Respondents contend that this rule is applicable to the construction of the Will of Colonel Skinner: but, for the reasons we have already given, we are of opinion that Colonel Skinner's succession is not to be administered according to English law, and that there is no room therefore for the application of this English rule of construction. The word "children" where it occurs in Colonel Skinner's Will, must be taken in that sense, and receive that signification in which it is plain from the language of the Will, and the dispositions it contains, that it was used by the testator, that is to say, its extent of meaning in the vocabulary and mind of the testator must be determined from the Will itself.

The testator had at the times of making his Will and of his death, five sons and two daughters, all of whom were illegitimate, for it seems to be certain that no rite or ceremony of marriage had ever taken place between the Colonel and any one of the mothers of these children.

All of these sons and daughters, however, appear to have been acknowledged by the testator during

his life as his children, and they are expressly called by him in his Will his "sons and daughters."

Thus the Will begins with a general gift "to my sons Joseph, James, Hercules, Alexander, and Thomas," and after giving various pensions to servants and others for life, the testator directs that they shall revert "to my sons."

The sons are again in a subsequent part of the Will referred to under the term "male children," and afterwards they are called "my reputed children."

It appears that the testator had a brother, Major Robert Skinner, who like himself had never been married, but at the date of the Colonel's Will was dead, leaving several illegitimate children, who had been treated and acknowledged by their father during his lifetime as his children.

It appears also from the Will of the Colonel, that he had been appointed trustee or guardian of these children, and must be taken to have been well acquainted with their real status, or condition of illegitimacy. It is important therefore that we find in the Will a devise in certain events "to my late brother, Major Robert Skinner's children and their issues in equal shares."

Here the illegitimate offspring of Major Robert are called his children, and are associated as tenants in common with the testator's daughters and granddaughter and their lawful issues.

The correctness of the interpretation which we put on the word "children" in this Will, as denoting the offspring of sons, is much confirmed by the fact that there is a marked change of expression in the Will when the Colonel speaks of the issue of his daughters.

It is natural to suppose that he would shrink from the thought of his daughters forming any other connections than those of lawful marriage, or of their having any but lawful issue. Accordingly when he provides for the event of the death of all his reputed children (meaning his five sons) without issue or children, and directs that the property given to them shall devolve to his daughters Louisa and Elizabeth, and his granddaughter Sophy (who was born in wedlock), or their *lawful issues*, we find a remarkable change of expression which is not to be found in any of the gifts to the children or issue of his sons.



It appears also from the evidence that the Colonel's eldest son Joseph (who died in the year 1855) had no lawful issue, but had one illegitimate son, named George, who was born some years before the death of the Colonel, and was always recognized and treated by the testator as his grandson; and it is also proved that on the death of his father, Joseph, George—this reputed son—was permitted to succeed his father, and has, in fact, taken the share devised to Joseph by the Will.

The limited signification which in our law is put upon the word "children," when used as the designation of a class, and not as *descriptio personarum*, is probably the result of the Christian law of marriage.

According to natural law, the children of a man mean the issue begotten by him, and the criteria of this condition are, the being born of a wedded wife or wives, or, if born of other women, the being recognized and acknowledged as children by the father.

With regard to his sons, the Colonel probably felt the same indifference as to their being married or not, which he had shown in his own case.

The conclusion therefore at which their Lordships have arrived is, that the word "children" in the Will of Colonel Skinner denotes and includes as well illegitimate as legitimate children, whenever such illegitimate children are acknowledged or treated as his children by their putative father.

We proceed to apply this conclusion to the case which is before us, and which arises on the following clause in the testator's Will:—"I will and declare that it is my intention and meaning, that "in the event of all or any of my aforementioned "sons, Joseph, James, Hercules, Alexander, and "Thomas Skinner dying and leaving issue or children, that the share of the fathers shall devolve "on the issue or children, to be by them divided "in equal shares." As has been already stated, the first son Joseph died intestate in the year 1855, without lawful issue, but leaving an illegitimate son George, who, with the assent of the majority of his uncles, succeeded to his father's share under the devise.

James, the second son, died in the year 1861, leaving one legitimate daughter, Sophia Orde, and an illegitimate son, James Skinner; and the ques-

tion is whether the share of James the father in the property devised to his five sons by the Will of Colonel Skinner vests, as to the share of James, in his daughter Sophia exclusively, or in the said daughter and the son James as tenants in common. For the reasons we have already given, we are of opinion that the share of the son James belongs to Sophia Orde and James the son equally as tenants in common. James is named and described as his son in the Will of his father James, and therefore there is a natural equality of status between him and his sister, Mrs. Orde, and both take equally under the aforesaid gift made by the Will of their natural grandfather.

The next and subordinate question in this Appeal relates to the Will and succession of James, the second son of the testator.

By his Will, dated 10th November, 1859, after devising all his share of the landed interests devised to him by the Will of his late father, and which he particularly mentions, and after also bequeathing all sums of money due to himself at the time of his decease, and also all other debts, money bonds, or other securities, unto his daughter, Mrs. Sophia Evelina Orde, and his son James, to be equally divided, the Will contains the following passage:—

“As my son James is not educated or otherwise provided for, I leave and bequeath to him and to his mother, Fanny Barlow, *alias* Villaetee Begum, the whole of the villages, landed property, etc. etc. etc., which have been purchased for the estate since the late Colonel Skinner’s demise, and in which I have a fifth share, as also my house, out-offices, and other lands at Hausee.”

The question between the Appellants and Respondents is, What property passed under this last devise?

The facts, although they are not very clearly stated, appear to be, that whilst the estates devised by the Colonel to his sons were under the management of the executors or managers appointed by the Colonel’s Will, considerable sums, being surplus rents of the devised estates, but not drawn by the devisees, the sons, were laid out in the purchase of additional landed property; and it is contended by the Respondents that these new acquisitions must be regarded in law as accretions to the original de-

vised estates, and as passing with them under the gifts made by the Will.

If this were so, the share of James, the son, in the purchased estates would be divisible, like his share in the original estates, between his daughter, Mrs. Orde, and his son James, under the Colonel's Will, and would not pass under the devise contained in his own Will.

But their Lordships find no ground for this conclusion, and they are of opinion that the purchased estates follow the ownership of the purchase-money, which was the absolute property of the five sons in equal shares; and they are of opinion, therefore, that the testator James's fifth share in these purchased estates passed under the aforesaid devise in his Will.

But another question was raised at the Bar by the Respondents' counsel, who stated that some leases granted to Colonel Skinner by the Government of certain villages and lands expired at the death of the Colonel, and that renewals were made by the Government to the Colonel's devisees, which renewed leases were, it was contended, obtained by virtue of the original ownership of the devised estates, and must therefore in equity be subject to the gifts made by the Will of the devised estates.

It was incumbent on the Respondents to have stated and proved the facts on which this claim is founded, so as to have enabled their Lordships to decide the question; but this has not been done, and it does not appear to have been considered and determined by the courts below.

If, however, Mrs. Sophia Orde requests, and is content to take at her own risk, an inquiry on this subject, their Lordships will recommend that such inquiry shall form part of the order to be made. Their Lordships will humbly recommend Her Majesty to reverse the Decree appealed from, and to declare that Mrs. Sophia Orde and James, the son and daughter of Major James Skinner, are entitled in equal shares by virtue of the Will of Colonel Skinner, to one equal fifth part of all the estates and property thereby devised and bequeathed to the testator's five sons in equal shares, and also to declare that one equal fifth part of all the estates and property purchased or acquired after the death of the Colonel by means of the rents, profits, or

income arising from the estates and property devised and bequeathed to the said five sons of the testator, belonged absolutely to his second son, James Skinner, and passed, under the Will of the last-named James, to Mrs. Fanny Barlow and his son James absolutely in equal shares; and, at the request and risk of Mrs. Sophia Orde, let an inquiry be made, by or under the direction of the Court from whose decree this Appeal is brought, whether any renewals or leases of lands that had been held by the Colonel during his lifetime were made or granted by the Government or any other persons to the executors or managers of the Colonel's Will, and under what circumstances and for what consideration the same were made.

There remains the subject of costs.

On the first hearing of the cause no costs were given to either party. From the decision of this first Court on the matters in question Mrs. Orde appealed, and obtained a judgment with costs, from which the present Appeal is brought. In the opinion of their Lordships, Mrs. Orde was wrong on both points; and further in contending that the fifth share of her father belongs to herself exclusively, she is claiming inconsistently with what was done by the family in the case of George, the illegitimate son of Joseph. Their Lordships see no reason, therefore, why the ordinary rule should not prevail. The difficulty has arisen, not from any uncertainty in the language of the Colonel's will, but from the contention of Mrs. Orde that it ought to be interpreted by English law, which has no application. Their Lordships, therefore, condemn Mrs. Orde to pay the Appellant's costs in the Court below, the judgment of which is hereby reversed, and also to pay the Appellant's costs of this Appeal. No order is made as to the costs of the Respondent Alexander Skinner.