1899.
August 29 and September 4.

TIAGARAJA *et al. v.* TAMBYAH.

D. C., Colombo, 10,759.

Donation—Construction of deed of gift—Intention of grantor.

Where T gifted a land to his son S with full dominium and after him to S's son S T, with reversion to himself should he survive his son and grandson, and where it was provided in the deed of gift that, if S contract a second marriage, his child or children by such marriage shall at S's death become entitled to a share in the said property equally with S T, and where S contracted a second marriage and had several children thereby, *held*, that the intention of the grantor was to give to the child of the first bed one-half of the property, and to the children of the second bed the remaining half.

IN this action plaintiffs prayed for a declaration that six of them, as the grandchildren of one Tambyah Mudaliyar, deceased, are entitled with the defendant to a one-seventh share of two houses in Colombo. The facts of the case were not disputed, and the only question for consideration was as to the construction of certain words used by the deceased owner in the two deeds relating to the two houses in question.

It appeared that one Tambyah Mudaliyar executed on the 17th July, 1893, two deeds, by which he granted to his son Suppramanian a life interest in the two houses after the grantor's death. Each of these deeds contained seven conditions and provisos, only one of which was material to the present issue. At the date of these deeds Suppramanian was a widower, and had an only child, viz., S. Thambyah, the defendant. One of the clauses of the deeds made the defendant the reversioner in fee after the death of the grantor and life tenant. The sixth proviso, however, stated that, if Suppramanian should contract a second or any subsequent marriage, then " his child or children by such " marriage shall at his death become entitled to a share in the " said property equally with the said S. Thambyah " (defendant).

The District Judge held that these words meant that defendant should take one moiety, and all the plaintiffs together the remaining moiety; and that the distribution was to be *per stirpes;* and he dismissed plaintiffs' action with costs.

Plaintiffs appealed.

Layard, A.-G. (with *Wendt*), for appellants.

Dornhorst (with him *Sampayo*), for respondents.

Cur. adv. vult.

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4th September, 1899. WITHERS, J.—

The question in this case is, like many legal questions, easier to ask than to answer. A grandfather donated certain property to his son Suppramanian Mudaliyar for life, and to his grandson Suppramanian Tambyah with full dominium, with reversion to himself should he survive his son and grandson. But the deed contain this proviso: "If the said ..... (son) shall contract "a second or any subsequent marriage, *his child or children shall* "*at his death become entitled to a share in the said property* "*equally with* the said Suppramanian Tambyah, but neither his "second wife nor any subsequent wife, nor his heirs, nor any "other person, shall be entitled to any share in such property "at any time."

Suppramanian Mudaliyar married a second time leaving issue, and the question is whether the child of the first bed is to take one moiety of the property and the children of the second bed the other moiety, or whether the children of the two beds are to take share and share alike *per capita?* The Acting District Judge is not disturbed by any doubt on the matter, and is unable to see that there can be any reason for doubt. He has declared that the donor's intention was to give the grandson Suppramanian Tambyah, who was alive at the date of the donation, half the estate, and to let the children of the second bed, if any, take the other half. The language of the will is certainly capable of bearing the District Judge's construction.

There is very little in the context to assist us. Both parties argued that the proviso following the one quoted favoured their views. This gave the property directly to any issue of a second marriage, if such issue was alive and the son and grandson were dead at the date of the donor's death. But when we regard the state of things existing when he signed this bequest, I think we shall be able to perceive his intention better. At that time there were living the old man, his son Suppramaniam Mudaliyar, and his son's son Suppramanian Tambyah. It is clear, he hoped, that there would be descendants to take this property, but in case there were no descendants he directed that the property should revert to himself. He clearly intended that his grandson Suppramanian Tambyah should take the whole of his property if the then boy's father did not marry again. And then he provided, as we have seen, that if his son should marry again then his child or children by such marriage should at his death become entitled to a share in the said property equally with the said Suppramanian Tambyah. He was so anxious that no one else, save his descendants, should have this property, that he

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excluded any wife by a subsequent marriage with his son from any interest in the property.

As the Acting District Judge observes, the words "a share" are used, and not shares in the instrument, indicating an intention to cut the property in two and give the child of the first bed one-half and the children of the other bed the other half. That intention conforms to the *stirped* division by our Common Law between children of different beds of property on intestacy. I think the District Judge's judgment is right, and ought to be affirmed.

English cases were cited by both sides to support their respective contentions, but the words of the instrument were not the same, and, after all, the principle common to all these cases is how to get at the testator's intention. Perhaps the nearest is the English case *Alker v. Barton, 12 L. J. Ch. 16.* Thomas Barton bequeathed £800 to his executors upon trust to pay the yearly interest and produce thereof to his daughter Margaret during her life for her separate use, and the testator disposed of the *corpus* thus: " and immediately after her death I give the said sum of " £800 equally among her children and their representatives " share and share alike." Margaret had seven children, of whom only one was then living with the petitioner. Of the six who died in Margaret's lifetime, five died without issue. The sixth child Ann had four children, of whom three were then living, and two of them had issue. The fourth child of Ann was dead and had left children, who were living. The petitioner asked for a moiety of the fund. It was contended on the other side that the fund ought to be divided into equal parts between the petitioner Ann's children and the grandchildren. But the Master of the Rolls ordered that half the fund should go to the petitioner. That seems a still stronger case than the present, but I prefer to rest my judgment on other support.

BROWNE, A.J.—

The question is whether we should follow the strict wording of the bequest, " shall become entitled to *a share* equally with " S. J.," or read it as meaning " shall become entitled to *share* equally," &c. I had thought possible that might have been by some clerical or other error prefixed to " share," but neither does the original deed, which was exhibited to us, warrant this suggestion, and the words " any share " in the latter portion of the bequest indicate to me that " share " in the clause is a substantive and not a verb.

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The proviso (7) I construe as a devise in the event of the death of both the son and grandson in the lifetime of the testator, and to be truly a provision to condition No. 5. It was not made as a proviso against section 20 of Ordinance No. 21 of 1840, but to provide against any intestacy as to the grandson's moiety should he predecease the testator.

With these remarks I adopt entirely my brother's views, and see no reason to disturb the decision.