1948 *Present :* **Wijeyewardene A.C.J., Jayetileke S.P.J. and Windham J.**

MARY NONA *et al.*, Appellants, *and* EDWARD DE SILVA, Respondent

S. C. 88—D. C. Kandy, 408 Testy.

Last will—Joint will by husband and wife—No massing of property—Death of husband—Remarriage of wife—Revocation of her will—Prevention of Frauds Ordinance, section 6.

Where there is no massing a joint will must be read as separate wills of the testators and after the death of one testator the right of revocation remains to the other. A will may be revoked by the second marriage of the testator subsequent to the execution of the will.

In re the Estate of K. V. Johannes Muppu (1879) 2 S.C.C. 14 not followed.

APPEAL from a judgment of the District Judge, Kandy.

H. W. Jayewardane, with *S. Wijesinha*, for the 9th, 10th, 11th respondents, appellants.—The joint will P1 was made by one Charles de Silva and one Elizabeth, husband and wife, in the year 1921. By clause A both movable and immovable property belonging to both husband and wife were given and devised to Margaret, a daughter of Charles by a previous marriage. Clause B went on to state that if Charles was the survivor Charles would be entitled absolutely to all the property belonging to the joint estate, and that if Elizabeth was the survivor Elizabeth would be entitled to the control of all the property and to enjoy the rents and profits thereof but that Elizabeth would not be at liberty to sell or dispose of that property. By clauses C and D certain sums of money were disposed of for certain purposes. Charles died in 1922 and after Charles' death Elizabeth contracted a marriage with one Warakaulle who died in 1938 leaving Elizabeth considerable property. Elizabeth died in 1943 and at her death was possessed of a considerable amount of property, a good portion of which she had acquired after the death of Charles.

The issue that has to be decided in this case is whether the property acquired by Elizabeth subsequent to the death of Charles in 1942 passed under the joint will P1 of 1921 or whether these appellants are entitled to such property.

If on the interpretation of the will there has been massing for the purpose of the joint disposition, the property massed can be only the property which belonged to the testators at the time the joint will was made or, in any event, property which belonged to them at the time of the death of the first dying, that is, of Charles in 1922. The joint will P1 therefore operated only in respect of the joint estate of both the testators and, therefore, property acquired by Elizabeth after the death of Charles was not dealt with under P1. See *Denyssen v. Mostert*[1]; *Meiring's Executors Dative v. Meiring's Executors Testamentary*[2]; *Weerasinghe*

[1] *(1871–3) 4 P. C. Appeals 236 at 254.*

[2] *(1877) 7 Buchanan 93 at 95.*

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et al. v. Rajapakse et al.[1] ; *De Silva v. De Alwis*[2] ; *Fan Eyre v. The Public Trustee*[3] ; *Sangaramorthy v. Candappa et al.*[4] ; *Ex parte Estate Willemse*[5]. See also *Nathan's Common Law of South Africa pp. 1844 and 1846.*

Massing is a joint disposition after the death of the survivor of them by two persons in a joint will of their property consolidated into one mass for the purpose of the joint disposition. See Steyn on Law of Wills, p. 127. The clause B negatives the essential condition that the disposition should be on the death of the survivor because, if Charles is the survivor, he takes all the property absolutely on the death of Elizabeth. Further, there is a strong presumption against massing generally and where possible that construction must be preferred whereby the will is regarded as the will of the first dying alone. See *Steyn* pp. 137 and 138.

H. V. Perera, K.C., with *E. G. Wikramanayake, Kingsley Herat* and *T. B. Dissanayake,* for the petitioner, respondent.—On the question whether there was massing or not, clearly there has been massing for the purpose of the joint disposition in the case of this joint will P1. The definition of massing is found in Chapter XI of Steyn's *Law of Wills,* p. 127. The essentials of massing according to the definition are (1) joint disposition of property, and (2) to take effect after the death of the survivor. Clause A of P1 contains both these requisites. " All our property, both movable and immovable, wherever found or situate " is wide enough to cover all property owned by Elizabeth at the time of her death, and the disposition to Margaret is clearly on the death of the survivor.

Giving the power of alienation to the survivor does not negative massing or render nugatory the earlier disposition. There is nothing wrong in conditional massing or in the power of alienation given to the survivor by the will. The will will operate subject to the condition imposed and, with respect to whatever is left after the survivor has exercised his power of alienation, on the death of the survivor. See *Steyn,* p. 142 and p. 238.

On the question whether remarriage of Elizabeth revoked the will, that question has not been raised in the form of an issue in the lower Court. There is, however, distinct authority of this Court that section 6 of Prevention of Frauds Ordinance does not have the effect of revoking the will of a person who was married at the time of making the will. Provisions of that section apply only to persons who were unmarried at the time of making the will. The wording of that section favours and justifies that interpretation. See *In the Matter of the Estate of K. D. Johannes Muppu*[6]. Counsel also cited *Steyn,* p. 194 and *Voet* 7.1.10.

Cur. adv. vult.

August 6, 1948. WIJEYEWARDENE A.C.J.—

This appeal comes before us on a reference made by Dias and Basnayake JJ. under section 775 of the Civil Procedure Code.

[1] *(1913) 16 N. L. R. 356.*
[2] *(1937) 40 N. L. R. 7 at 22.*
[3] *(1944) 46 N. L. R. 59.*
[4] *(1932) 33 N. L. R. 361 at 372.*
[5] *S. A. L. R. (1946) C.P.D. 897.*
[6] *(1879) 2 S. C. Circular 14.*

One Charles de Silva, a widower, married Elizabeth after 1877. Charles had a daughter Margaret by a previous marriage. Charles and Elizabeth executed a last will P1 in 1921. Charles died in 1922 leaving his widow, Elizabeth, and his daughter, Margaret. The last will P1 was duly proved and probate was issued to Elizabeth. After the death of Charles, Elizabeth acquired certain properties. Elizabeth contracted a second marriage with one Warakaulle, who died in 1938 leaving a last will. Elizabeth who had no children by either marriage died in 1943. The ninth, tenth, eleventh respondents-appellants and some others claim to be cousins of Elizabeth and her intestate heirs. Margaret died in 1944, leaving as her heirs her children, the first, second, third, fourth and fifth respondents. The petitioner applied to have P1 proved in respect of the estate of Elizabeth.

The question that has to be decided on this appeal is whether the property acquired by Elizabeth after the death of Charles pass under the last will P1 to the first, second third, fourth and fifth respondents or devolve on her intestate heirs.

The relevant clauses in the will read as follows :—

Clause A.—" We give and devise all our property both movable and immovable wherever found or situate to our daughter Panditaratnagamage Dona Margaret de Silva."

Clause B.—" We hereby declare that in case I the said Panditaratnagamage Don Charles de Silva shall be the survivor I shall be absolutely entitled to all the residue and remaining property, movable as well as immovable belonging to our joint estate, and that in case I the said Kirinde Liyana Aratchige Dona Elizabeth de Silva shall be the survivor I shall be entitled to keep all the said residue and remaining property under my control and to enjoy the rents and profits thereof, but I shall not be at liberty to sell, mortgage or otherwise dispose of the same."

Clause C.—" We give and bequeath a sum of Three Thousand Rupees (Rs. 3,000) to be spent at the discretion of the executors towards the improvement and spread of Buddhist Education in the Island."

Clause D.—" We also give and bequeath a sum of One Thousand Rupees (Rs. 1,000) to the Buddhist Society of Great Britain and Ireland towards the spread of the Dhamma in England and other European countries."

I have referred to clauses C and D as they help to interpret what the testator and testatrix meant when they referred to the " residue and remaining property " in clause B. It is conceded by both parties that by " residue and remaining property " the testator and testatrix intended to refer to what was left out of the property governed by the last will after the payment of the two legacies of Rs. 3,000 and Rs. 1,000. The two clauses that have to be examined carefully for the purpose of deciding this appeal are clauses A and B.

If the last will stopped at clause A and did not include clause B, the property of Elizabeth acquired after the death of Charles would have passed to the first, second, third, fourth and fifth respondents. I am not considering at this stage the effect of the second marriage of Elizabeth. Does the clause B nullify the effect of clause A ? It is contended that the words " joint estate " in clause B restrict the operation of the last will to the properties that Charles and Elizabeth had at the time of the execution of P1, or, in the alternative, to the properties of Charles and Elizabeth at the death of Charles. Certain local cases and decisions of the South African Courts were cited to us in support of that contention. In all those cases the spouses who made the last will were married in community of property. The words " joint estate " or " common estate " used by such spouses would, in the absence of any evidence to the contrary, mean the property which became " joint " or " common " by reason of the marriage in community of property. In such cases there must be strong reason for bringing into the " joint estate " or " common estate " property acquired after the death of the first dying spouse, as such property would not generally fall into community. But, in the present case the position is different. There was really no " joint estate " between these two spouses who were not married in community. The " joint estate " came into existence as a result of the last will. I think the words " joint estate " were used in P1 for the sake of convenience of reference to denote the property mentioned in clause A. In those circumstances clause B has not restricted the scope of clause A as suggested by the Counsel for the appellants.

As Elizabeth has taken certain benefits under the last will, it would have become irrevocable if it had effected a " massing " of the estates of Charles and Elizabeth.

" Massing " is a *joint disposition after the death of the survivor of them* by two persons in a joint will of their property consolidated into one mass for the purpose of the joint disposition (Steyn on Wills, p. 127). Now, in the present case, if Elizabeth died first, the surviving husband Charles, would have been " absolutely entitled to all the residue and remaining property ". I am unable to hold that, in spite of this provision, the last will P1 discloses an intention on the part of the two spouses to make a joint disposition of their " joint estate " after the death of the survivor. " There is a strong presumption against massing, and where possible that construction must be preferred whereby the will is regarded as that of the first dying alone and as containing the separate wills of each of the spouses wherein their individual shares of the community are disposed of." (Steyn on Wills, p. 137).

In the absence of " massing " the interpretation most favourable to the first to fifth respondents is that P1 contains separate wills. Elizabeth would have had the right to revoke her last will after the death of Charles. The second marriage she contracted would have, therefore, resulted in revoking her last will contained in P1 (Prevention of Frauds Ordinance, section 6). It was contended by Mr. H. V. Perera that section 6 of the Prevention of Frauds Ordinance did not have the effect of invalidating a will of a married person by reason of a second marriage subsequent to the execution of the will, and he relied on the opinion expressed by

Stewart J. in *Re the estate of K. D. Johannes Muppu* (1879) 2 Supreme Court Circular 14. That opinion was an *obiter dictum*, as it was not necessary for Stewart J. to consider section 6 in view of the definite decision reached by him that the last will in that case had become irrevocable, since the testator and testatrix there had massed their estates and the surviving testator had adiated the inheritance. With due respect to the learned Judge, I find myself compelled to disagree with the view expressed by him as to the scope of section 6. I would answer the issue raised in this case in favour of the appellants.

The appellants are entitled to the costs here and in the District Court.

JAYETILEKE S.P.J.—I agree.

WINDHAM J.—I agree.

Appeal allowed.