1913.

Present: Lascelles C.J. and Wood Renton J.

WIRASINGHE *et al. v.* RAJAPAKSE *et al.*

45—D. C. Tangalla, 1,250.

Joint will bequeathing all property to children—Property acquired by one spouse after death of the other—May servivor alienate such property to outsiders?

A husband and wife made a joint will bequeathing their property to their children and reserving life interest for the survivor. After the death of the wife the husband acquired the land in question and sold it to the defendants. The heirs of the testators brought this action for the land aganist the defendants, and contended that the husband had only a life interest over the land.

Held, on the construction of the will, that it was not the intention of the joint testators to dispose of any property which should be acquired by one of them after the death of the other.

LASCELLES C.J.—But the decision of the case really depends upon the extent to which the Roman-Dutch law attaches the character of irrevocability to joint wills in cases like the present one, where the surviving spouse has adiated and accepted benefits under the will..... It is only with reference to the common estate, and not with reference to property acquired after the death of one of the spouses, that the surviving spouse is held to be precluded by the terms of the will from disposing of the property.

THE facts are set out in the judgments.

De Sampayo, K.C., for the defendants, appellants.

A. St. V. Jayewardene, for the plaintiffs, respondents.

Cur. adv. vult.

April 18, 1913. LASCELLES C.J.—

David Ekanayaka and his wife Felicia, being married in community, made a joint will, which was judicially interpreted in *Weerasinghe v. Gunatilleke*.[1] It was there held that the survivor of the two testators had a mere usufructuary interest in the joint property, so that he or she had a right to possess the joint property during his or her life, and that after the death of both testators the whole of the property was to go absolutely to the testators' children and their descendants.

The present action relates to property which was not part of the joint estate, but was purchased by David Ekanayaka in 1888, after the death of his wife, which took place in 1883. In 1889 David Ekanayaka sold the property to the defendants. The plaintiffs are the grandchildren of the testators, and they claim on the footing that David Ekanayaka had, under the joint will, no more than a usufructuary interest in the property, and that the sale by him to the defendants did not pass title. The question then is whether David Ekanayaka was precluded, by the terms of the joint will, from alienating the property which was acquired after the community had been dissolved by the death of Felicia. The learned District Judge has decided in favour of the plaintiffs, and from his decision the present appeal has been filed.

The property disposed of by the will is described in the first clause of the will as " our movable and immovable property which we now possess, and which we may hereafter get and tarn for the sake of our livelihood." It appears to be mainly an account of this reference to after acquired property that the learned District Judge has given his decision in favour of the plaintiffs' contention. But when it is remembered that the community of goods by marriage includes everything acquired by the spouses during marriage, as well as everything possessed by them at the date of the marriage, it would seem that the language of the will is appropriote to the purpose of disposing of only the common estate of the spouses. And I doubt whether it was the intenvion of the joint testators to dispose of any property which should be acquired by one of them after the death of the other.

But the decision of the case really depends upon the extent to which the Roman-Dutch law attaches the character of irrevocability to joint wills in cases like the present one, where the surviving

[1] *(1910) 14 N. L. R. 38.*

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spouse has adiated and accepted benefits under the will. From the text books on Roman-Dutch law it appears clear that it is only with reference to the common estate that the surviving spouse is held to be precluded by the terms of the will from disposing of the property. (*Van Leeuwen's Commentaries, vol. I., p. 223; Burge, 1st edition, vol. IV., p. 405; Van der Keessel, s. 283;* see also *South African Association v. Mostert* [1] *and Haupt v. Van der Heever's Executor.*[2])

No passage in the text books was cited in support of the proposition that the surviving testator is precluded from disposing of property which did not form part of the common property, but which was acquired after the community had been dissolved by the death of one of the spouses.

For the above reasons, I am of opinion that the judgment appealed against should be set aside, and the plaintiffs' action dismissed with costs here and in the Court below.

WOOD RENTON J.—

This case raises a question as to the interpretation of the joint will of one David Ekanayaka and his wife Felicia Dissanayake. The plaintiffs-respondents are their grandchildren. The defendants-appellants claim under a deed of transfer from David Ekanayaka dated February 16, 1889. The joint will was executed on July 2, 1883. The spouses were married in community of property. Felicia Dissanayake died in August, 1883, and her husband acquired the property claimed by the respondents in the present case after her death. The will in question was construed by the Supreme Court in *Weerasinghe v. Gunatilleke* [3] as having conferred on the surviving spouse only a usufruct of the property with which it dealt. That decision is binding upon us, and if there were no more to be said, the appellants clearly could not have acquired any title by their conveyance from David Ekanayaka. Their contention, however, is that the property in suit, having been acquired by David Ekanayaka after the death of his wife, did not fall into the joint estate disposed of by the will. The learned District Judge has overruled this contention, and has given judgment in favour of the respondents. The defendants appeal.

The general rule of law applicable to the construction of joint wills by which reciprocal benefits are secured to the spouses has been clearly stated by Van der Keessel in these terms:—

"A surviving spouse, who has made a will jointly with a predeceased spouse as regards their common property, and has been appointed heir to such predeceased spouse, cannot make a different disposition in respect of that portion of the common property which ought to revert to the substitutes of the predeceased; but as regards

[1] *41 L. J. P. C. 41.*

[2] *Juta on Wills (Part II.) 112.*

[3] *(1910) 14 N. L. R. 38.*

that portion which would devolve on his own heirs he may legally make a disposition, unless both the spouses have by common consent made a disposition of the common estate or of the share of the survivor." (See *Burge, 1st edition, vol. IV., p. 405; Juta L. C. 2, pp. 111, 167-168; Denyssen v. Mostert;* [1] and *Dias v. De Livera.*[2])

The respondents contended, and the learned District Judge has held, that the general rule as to the power of a surviving spouse over his own property has been excluded in the present case by the language of the will itself, which professes to deal with " all our movable and immovable property which we now possess, and which we may hereafter get and earn for the sake of our livelihood."

These words are no doubt wide enough to cover property acquired by one spouse after the death of the other, and there is, of course, no reason in law why effect should not be given to such a provision in a will if we can really find it there. But, on the whole, I think that the intention of the spouses was to deal merely with property belonging to them at the time of the marriage or acquired by either of them while the marriage subsisted. The learned District Judge attaches importance to the third clause, which is in these terms: " It is directed that after the death of both of us all the movable and immovable property belonging to us shall devolve on the children, grandchildren, and such other heirs descending from us." But the meaning of the words " belonging to us " is, I think, fixed both by the word " we " in the general clause above quoted and by the provision in clause 2 that " all the movable and immovable property belonging to us be possessed by us, the above named, during the lifetime of both of us ....., and in the event of one of us predeceasing the other, the above-named property be possessed according to the wish and dealt with according to the pleasure of the survivor."

I think that the construction placed by the learned District Judge on the joint will with which we are here concerned is wrong, and I would set aside the decree under appeal and direct that the respondents' action be dismissed, with the costs of the action and of the appeal.

Set aside.

[1] *(1872) L. R. 4 P. C. 236.*

[2] *(1879) 5 A. C. 137.*