14th February 1922.

CLAUD DANVERS RICHARDS & Others *Appellants.*

v.

EUSTACE de KOLA RICHARDS & Others *Respondents.*

Originating summons—Construction of will—Special power of appointment among "children"—General power of appointment—Interpretation of words in a will by words in subsequent codicil—Payment of costs by Trustees in absence of misconduct.

Elizabeth Davies, by her will, devised premises to her son, Joseph D. Richards, for life, with a special power of appointment among his children, limitations over in default of the exercise of this special power and a general power of appointment to J. D. Richards. There was also a subsequent codicil to the will of Elizabeth Davies benefiting certain named natural children of J. D. Richards.

J. D. Richards never married, but had illegitimate children by two different women. The Plaintiffs-Respondents were the children of the first family, and were all born at the date of Elizabeth Davies' will. The Defendants-Appellants were the children of the second family. These were not born at the date of Elizabeth Davies' will.

Held, reversing the judgment of the Court below, that the special power of appointment was incapable of being exercised by J. D. Richards owing to the fact that he had no legitimate children, and that the general power vested in him was exercised by him by express reference in his will, and executed under the provisions of section 27 of the Wills Act.

Appeal from a judgment of Van der Meulen, J., in the Supreme Court of the Colony of Gambia.

Wright for Appellants cites:—

Boyes & Cook, L.R., 14 Ch. D., p. 53.
Lewis *v.* Green, L.R. (1905), 2 Ch., p. 344.
Halsbury, Laws of England, Vol. 23, pp. 28, 29, 33.
Encyclopædia of Forms and Precedents, Vol. 12, p. 76.
Halsbury, Vol. 28, pp. 735-736. Note "D."
Dorin *v.* Dorin, 7 Ch. App., p. 586.
Re Pembroke (1890), 63 L.T., 159.
Alliance Insurance Co. *v.* Francis, 1914, 1 Ch. D., p. 254.
Farwell on Powers, 2nd Edition, pp. 9 and 463.
Wills Act, 1837.
Halsbury, Vol. 23, p. 293.
Airey *v.* Bower, L.R., 12 A.C., p. 263.
Farwell on Powers, pp. 106-107.
Halsbury, Vol. 28, pp. 159-160.
In *re* Chennell, Jones *v.* Chennell, 8 Ch. D., p. 492.

Graham for Respondents cites:—

Halsbury, Vol. 23, p. 58.

Jarman on Wills, Vol. II., pp. 1746-1754, 1760 and 1780.

O'Loughlin *v.* Bellew, 1906, Irish Reports 487.

Re Loveland, Loveland *v.* Loveland (1906), 1 Ch., p. 542.

Paul *v.* Children, L.R., 12 Eq., p. 16.

PURCELL, C.J.

This is an appeal from the Supreme Court of the Gambia from a judgment delivered by Sir Frederick Van der Meulen on the 18th of June, 1919.

This appeal raises questions with regard to the construction of the Wills of two persons, mother and son. The method chosen by the Plaintiffs (Respondents in this appeal) was to bring the matter before the Court on an Originating Summons and at the trial it is to be observed that Mr. Roberts on behalf of the Defendants (now the Appellants) raised a preliminary objection, such objection being that the Court had no jurisdiction to deal with this matter on an Originating Summons when the claim of the Plaintiffs was adverse to that of the Defendants, and cited authorities for his objection which it is unnecessary now for me to deal with. The Court overruled the objection and proceeded to deal with the matter.

Mr. Wright, who appeared for the Appellants, took the same preliminary objection when the appeal was argued before us, and without going into the matter and without expressing any definite opinion on the question involved, we felt, in view of all that happened, especially in regard to the length of time which had elapsed since this litigation first began, that it would be a grave misfortune, to say the least of it, if the appeal succeeded on such a ground. The learned Judge exercised his discretion and allowed this matter to be dealt with on an Originating Summons, and for the reasons I have just stated we felt, all things considered, that it would be the best way for us to deal with it.

With all respect to the learned Judge, I think it highly probable, knowing as much as I do about this case at the present time, that I should have refused to have dealt with it by way of an Originating Summons had I been the Judge in the Court below. In my opinion the record in this case leaves much to be desired, and from the way the matter was presented to the Court, as appearing from the notes, it is somewhat difficult to discover what it is all about. As I laboriously conned the pages

of the record I could not help recalling those words of the late Lord Tennyson—

"Mastering the lawless science of our law,
"That codeless myriad of precedent,
"That wilderness of single instances."

Had this matter come before the Court in the ordinary way, that is, in the form of an action for a declaration, with pleadings and, as I suppose, a considered judgment, our task would have been far easier than it has been. However, perhaps I have said enough about this and I will now proceed to come to close quarters with the case itself.

These proceedings were brought in order to decide whether or not Joseph Davisson Richards, deceased, had in his Will properly exercised the General Power of Appointment which was vested in him by the will of his mother, Elizabeth Davies, deceased. This man Joseph Davisson Richards had never married, but had two families by two women—Hannah Elliott and Yassin N'jie. Plaintiffs (Respondents), with the exception of Annette, are children of Hannah Elliott. Two of the Defendants (Appellants), of the name of Richards, are the children of Yassin N'jie. It is to be noted that the Will of Elizabeth Davies is apparently well drawn, either because it had been copied from some precedent, or because the draughtsman knew his business. It contained in a form very usually adopted in wills and settlements the following limitations:—

(1) A special or limited power of appointment to Joseph Davisson Richards amongst his children.

(2) Limitations over, in default of exercise of the special or limited power.

(3) A charge on the rents of the premises in question.

(4) A general power of appointment to Joseph Davisson Richards.

The first question which arises for consideration is, was the special power exercised by Joseph Davisson Richards? It is admitted on all hands that it was not exercised and therefore with regard to that point there is no controversy.

The next point that arises for consideration is, was it possible for Joseph Davisson Richards to exercise the special power of appointment given to him, in other words did the objects of the special power fail? The answer must be in the affirmative, because the objects of the power of appointment to him were his "children" which in law prima facie must be legitimate children, as was decided in Hill *v.* Crook, 42 L.J. Ch., p. 702,

and Dorin *v.* Dorin, 45 L.J. Ch., p. 652, and he had no legitimate children. Where the gift is a future gift, as in the case of a power it always must be, and as in this case it is, illegitimate children cannot take at all if by any possibility legitimate children might arise who could take. In the present case Joseph Davisson Richards might have married and brought legitimate children into existence.

It has been argued on behalf of the Respondents that the words " subject as aforesaid and without prejudice to the limitations hereinbefore mentioned " were in the nature of a saving clause, and made the special power a trust, and one which Joseph Davisson Richards was bound to exercise before resorting to the general power, provided the object or objects of the special power were still in existence.

The Appellants argued that the objects of the special power were never in existence, as " children " must be taken to mean in law legitimate children and not illegitimate, and further that Joseph Davisson Richards, the donee of the special power, was under no obligation to exercise it, as a power of appointment is a mere authority to be exercised or not as the donee pleases.

The last question which arises for consideration is, whether there was a general power of appointment vested in Joseph Davisson Richards and whether it was executed.

As I understand it, it was admitted by both counsel, and I think it is perfectly clear, that section 27 of the Wills Act does in fact execute the general power of appointment. The Respondent has argued that the general power was improperly exercised for the following reasons:—

(1) Because Elizabeth Davies' property was thereby given to illegitimate children of Richards not in existence at her death in 1891.

(2) The special power to appoint his children meant the illegitimate children in existence at her death, who were well known to her, and this special power was in the nature of a trust.

(3) The general power could only be exercised subject to the special power and its limitations, *i.e.*, to the children of Richards living at Testator's death. The special power could only give way to the general power when the objects of the special power cease to exist.

To sum up the conclusions I have arrived at which may be summarised as follows:—

(1) The special power was not exercised by Joseph Davisson Richards.

(2) The word " children " cannot be construed to include illegitimate children.

(3) There was no obligation on Joseph Davisson Richards to exercise the special power of appointment.

(4) The general power of appointment vested in Joseph Davisson Richards was exercised by him and was executed under the provisions of section 27 of the Wills Act.

The results of these findings will be that the judgment of the Court will be set aside and judgment entered for the Appellants with costs.

With regard to the question of costs the Judge in the Court below ordered the costs to be paid by the Defendants (Appellants) personally. As I understand it, executors and Trustees can only be ordered to pay costs personally when they have been guilty of misconduct. There is ample authority for this proposition. Here, so far as I am aware, there was no misconduct, all that the Defendants did was to put their views properly before the Court, as they were entitled and indeed bound to do, having been made Defendants. Were any justification necessary for their conduct, the result of these proceedings would furnish it. In my judgment the Appellants should have their costs both in this Court and in the Court below. I cannot take leave of this case without expressing the obligation this Court is under to both the learned Counsel who have argued in this appeal. Both of them have been of the greatest assistance to us. I do not wish to draw invidious distinctions, but during Mr. Wright's arguments, not only in this case but in the other Gambia appeal which came before us, I could not help recalling what had been written of a great advocate who became Lord Chancellor of England shortly after the middle of last century. The passage I refer to is as follows:—

> " But where he stood supreme was in the power of
> " concise and lucid exposition of marshalling his facts and
> " his comments and his law, in an order which was so logical
> " that it seemed not merely appropriate but inevitable.
> " Under his hand doubt vanished, the obscure became plain,
> " the most tangled and intricate propositions were resolved
> " into perfect simplicity."

SAWREY-COOKSON, J.

I agree, and only desire to add that this appears to me to be one of those unfortunate cases in which it could be wished that authority were not so compelling as to require that no effect can be given to what might well have been at one time the intention

of a testator. The case for the Appellants has been extremely ably argued by Mr. Wright, and he has satisfied me beyond any doubt that this being essentially an English Will, indeed, as perfectly drawn a Will as could well be met, it falls to be construed strictly in accordance with English authority, and the authority he relies upon drives me to the following conclusion:—The term " children " must be taken in this instance where the gift under the Will is not immediate but future, to mean children legally, *i.e.*, legitimate children, as much as if the word legitimate had been written before it. As long as there is a possibility of legitimate children being born, " children " shall have no other meaning but legitimate children. The Courts in England have on several occasions found themselves faced by extremely hard cases as a result of the abundant authority to the above effect, but have nevertheless invariably felt bound to give effect to it. Moreover, reference to the Codicil to the Testatrix's Will points to the possible contemplation that there might be illegitimate children to benefit under her Will as she there uses the term " natural " children and takes the precaution to name them. I agree, too, that the only power of appointment which was exercised by Joseph Davisson Richards was the general power, and that even if he had exercised the limited or special power, the objects of that power not being legitimate children, must be taken to have failed.

The appeal must therefore be allowed, and I can find no reason for depriving the Appellants of any costs, but think they should have them both here and below.

McDONNELL, Acting J.

I concur.