should be borne by the estate of the deceased.

Judgment for the plaintiff.

JOHNSON v. THOMAS and OTHERS
JOHNSON v. CROWN and OTHERS

Supreme Court (Butler-Lloyd, Ag. C.J.): February 17th, 1925

[1] **Land Law — joint tenancy — creation — devise to A and her lawful children, their heirs and assigns forever — if A had child or children at date of will, A and children take absolutely in joint tenancy unless contrary intention indicated in will:** When a testator devises property "to *A* and her lawful children, their heirs and assigns forever," the general rule is that if *A* had a child or children at the date of the will, the words "and her lawful children" will *prima facie* be taken as words of purchase and *A* and her child or children will take absolutely in joint tenancy, but this rule may be disregarded when it would defeat the testator's intention as collected from the rest of the will: (page 121, lines 9—11; lines 27—39).

[2] **Succession — wills — construction — devise to A and her lawful children, their heirs and assigns forever — if A had child or children at date of will, A and children take absolutely in joint tenancy unless contrary intention indicated in will:** See [1] above.

[3] **Succession — wills — construction — devise to "all the children of A" means prima facie children in existence at testator's death — children born later included only if gift not to take effect in possession at death:** A devise or bequest to "all the children of *A*" means *prima facie* the children in existence at the testator's death and it is only when the gift to children is not to take effect in possession at the death that it can open to let in children born after the death and before the possession (page 122, lines 13—15; page 122, line 28—page 123, line 8).

The plaintiff brought two actions against the defendants claiming the partition and sale of certain properties devised under separate clauses of her grandfather's will.

The defendants in the action *Johnson* v. *Thomas* were the plaintiff's mother, Mrs. Thomas, with her other children who were alive at the date of the testator's death, and in the action *Johnson* v. *Crown* the defendants were the same with the exception of Mrs. Thomas. The two cases were argued together.

The defendant Mrs. Thomas was a daughter of the testator and already had children at the date when he made his will. Under cl. 8 of the will property consisting of a house and land was devised to

Mrs. Thomas "and her lawful children, their heirs and assigns forever," but under cl. 3 the testator gave all the furniture and effects in the house to Mrs. Thomas alone.

Under cl. 15 of the will the testator devised certain other real property to "all the lawful children of my daughter Edith Iris Evelyna Thomas as tenants in common."

The plaintiff brought the proceedings *Johnson* v. *Thomas* for the partition and sale of the property devised under cl. 8 of the testator's will, contending that the effect of the devise was to create a tenancy in common or a joint tenancy between Mrs. Thomas and such of her children as were living at the date of the testator's death, or alternatively at the date of the will.

In reply the defendants contended that although the devise *prima facie* created a joint tenancy this was not the intention of the testator, that it was clear from cl. 3 of his will that he intended that Mrs. Thomas should take the whole estate during her life and that the plaintiff therefore had no estate in possession on which to base a claim for partition.

The plaintiff also brought the proceedings *Johnson* v. *Crown* for the partition and sale of the property devised under cl. 15 of the will, contending that the devise was limited to those children who were alive at the date of the testator's death and that they were therefore entitled to ask for partition and sale of the property.

In reply the defendants contended that the word "all" in the devise showed that it was intended that even children born after the death of the testator should be included and that since other children might yet be born the plaintiff was not entitled to ask for partition and sale of the property.

The court dismissed the plaintiff's suit in the first proceedings but ordered the sale of the property devised by cl. 15 of the testator's will and distribution of the proceeds.

Cases referred to:

(1) *Byng v. Byng* (1862), 10 H.L. Cas. 171; 11 E.R. 991, applied.

(2) *In re Powell*, [1898] 1 Ch. 227; (1898), 77 L.T. 649, applied.

(3) *Scott v. Harwood* (1821), 5 Madd. 332, 56 E.R. 922, applied.

(4) *Wild's Case* (1601), 6 Co. Rep. 16; 77 E.R. 277, distinguished.

BUTLER-LLOYD, Ag. C.J.:

These two cases have been argued together although neither the parties nor the points at issue are identical. The course taken,

however, was no doubt convenient inasmuch as the plaintiff was the same in each action and the defendants the same with one exception and both cases turned on the construction of the clauses in the same will. But for the purposes of the judgment it will be necessary to deal with them separately.

In the case of *Johnson* v. *Thomas* the action was brought by a grand-daughter of the testator George Georgius Cole, who died in 1915, asking for the partition and sale of property consisting of a house and land in Sackville Street, which was devised by cl. 8 of the testator's will — ". . . unto my daughter Edith Iris Evelyna Thomas and her lawful children, their heirs and assigns forever." The plaintiff is the eldest daughter of this Mrs. Edith Thomas and on her behalf it was argued that the effect of the above devise was to create a tenancy in common or a joint tenancy between Mrs. Thomas and such of her children as were living at the date of the testator's death or alternatively at the date of the testator's will, it being immaterial for practical purposes which of these dates be taken since no births or deaths occurred in the interval. One of the four younger children, all of whom were living at the time of the testator's death, was represented in the case and associated herself with the claim for the partition. On behalf of the defendants, Mrs. Thomas and her remaining children, it was argued that the effect of the above devise was to give Mrs. Thomas either an estate for life with remainder to her children, or an estate tail, in either of which cases the plaintiff, not having an estate in possession, would not be entitled to ask for partition.

It was admitted that the devise was within the scope of the second part of what is known as the rule in *Wild's Case* (4) namely, that where there is a devise to a person and his children and the person has a child or children at the date of the will the words "and his children" will *prima facie* be taken as words of purchase and he and his child or children will take absolutely in joint tenancy: see Underhill & Strahan, *Interpretation of Wills & Settlements*, 2nd ed., at 222—223 (1906). But it is clear from the passage there quoted from the judgment of Lord Cranworth, L.C. in *Byng* v. *Byng* (1) that the courts have always considered themselves at liberty to disregard this rule where an adherence to it would defeat the intention of the testator as collected from other passages from his will.

Now in this case I am clear, not only from the wording of the devise in question, but also from the fact that by cl. 3 of his will

the testator gave all the furniture and effects in the dwelling house to his daughter Mrs. Thomas, that he intended that she should take the whole estate during her life. Were she to take only in joint tenancy with her children the purpose of this clause would be at once stultified by an action such as the present one. I have therefore no difficulty in holding that Mrs. Thomas has an estate tail in the property devised by cl. 8 of her father's will and that her children have no estate in possession on which they can base a claim for partition.

In the case of *Johnson* v. *Crown* the parties were the same except for Mrs. Thomas, a daughter of the testator and mother of the remaining parties. In this case the testator by cl. 15 of his will devised certain real property in Henry Street to "all the lawful children of my daughter Edith Iris Evelyna Thomas as tenants in common." As in the other case the eldest daughter of Mrs. Thomas seeks partition and sale of the property so devised and Mrs. Crown, the first-named defendant, has in the course of the case associated herself with this demand. On behalf of the two remaining defendants it was argued that the devise in question includes children born after the death of the testator. One such child was actually born and was originally joined as defendant in this action but, notice of discontinuance of the action against her having been given, she is no longer before the court. If this contention were correct it would obviously be difficult if not impossible to divide the estate up now while there is still the possibility of further children being born to Mrs. Thomas who would, on this construction, be entitled to share with those already in existence, but I am unable to accept it. The rule of law is clearly stated in *Hawkins on Wills*, 2nd ed., at 90 (1912) as follows: "A devise or bequest to the children of A., or of the testator, means, *prima facie*, the children *in existence at the testator's death. . .*" and this statement of the rule was quoted with approval by Kekewich, J. in the case of *In re Powell* (2). Emphasis was laid on the word "all" in the devise in question as showing that after-born children were intended to be included, but in *Scott* v. *Harwood* (3) quoted in *Hawkins*, (*ibid.*, at 91) the use of the words "all and every" was held not to have this effect. In the judgment in that case I find the following passage (5 Madd. at 335; 56 E.R. at 924):

> "The devise to all and every the children of his sister, lawfully begotten, and their heirs, is, according to the force of the expression, to take effect in possession at his death;

and unless it be plainly controlled by what follows must be confined to children living at his death. It is only when the gift to children is not to take effect in possession at the death that it can open to let in children born after the death and before the possession."

This decision seems to me conclusive to show that only those children who were living at the testator's death take an interest under his devise, and having regard to the nature of the property and the fact that two out of the five persons interested now asked for partition and sale I think that the interests of all concerned will be served by taking this step.

An order will therefore be made for the sale of the property devised by cl. 15 of the testator's will and the distribution of the proceeds among the five children of Mrs. Thomas who were living at the date of the death of the testator George Georgius Cole. The sale is to be conducted by the plaintiff's and defendants' solicitors and the proceeds paid into court, the Master to execute the conveyance and distribute the proceeds after payment of solicitors' costs, the shares of infants to be paid to their father.

The plaintiff having failed in the first issue the costs of that issue will be borne by her. The costs of the second issue will come out of the proceeds of the sale.

Order accordingly.

BANGURAH v. CHIEF BRIMAWEI

Supreme Court (Butler-Lloyd, Ag. C.J.): April 27th, 1925

[1] **Courts — native courts — appeals — right of appeal — Mende Tribal Ruler cannot deny right to appeal to him from decision of Santigi or headman:** A Mende Tribal Ruler may appoint a Santigi or tribal headman to carry out judicial duties on his behalf but cannot deny any person the right to take his case directly to the Tribal Ruler, or the right to appeal to him against the decision of the Santigi (page 125, line 40—page 126, line 14).

[2] **Courts — native courts — constitution — headman may exercise judicial duties delegated by Mende Tribal Ruler — Tribal Ruler cannot refuse to hear case brought directly to him or deny right of appeal against headman's decision:** See [1] above.