

[See also *Kemble v. Farren* (1); *Lucas v. De la Cour* (2)]

The principle of this rule is, that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the others; and this rule, as I take it, is enacted, though in a somewhat concise form, in s. 18 of the Indian Evidence Act.

As this is the only point of law raised which is worthy of notice, I think that the appeal should be dismissed with costs.

GHOSE, J.—I concur in dismissing the appeal, as I think there was sufficient evidence in point of law to justify the finding of the Courts below.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

MALOHUS (PLAINTIFF) v. BROUGHTON AND ANOTHER (DEFENDANTS.)

Will—Construction—Charitable gift—Cy præs doctrine—Lapse.

A testator directed his executor to set apart a sum of Rs. 7,000 to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, such boys to be natives of Calcutta, of poor and indigent parents, or fatherless children of Armenian or other Christian religion. The testator died in 1867. In 1864, the St. Paul's School, Calcutta, was removed to Darjeeling. In the St. Paul's School, Calcutta, the fees for day-scholars and day-boarders were Rs. 8 and Rs. 10 respectively. In the St. Paul's School, Darjeeling, there were no day-scholars nor any day-boarders; and the cost of a regular boarder would be about Rs. 400 per annum.

Held, that the gift did not lapse, being a general charitable bequest, and that under the circumstances it must be executed *cy præs*.

On the 20th day of June 1859, Nicholas Isaac Malchus, an Armenian inhabitant of Calcutta, made and published his last will and testament, whereby, after making several pecuniary and other bequests, he directed as follows in the 5th clause of his will:—

"I direct my executor to invest the sum of Company's rupees seven thousand in the purchase of Company's paper and to

(1) 3 O. & P., 623.

(2) 1 M. & S., 249.

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stand possessed thereof in trust by means of the income of the same to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, to be from time to time nominated for that purpose by the trustee for the time being of this my will, such boys to be natives of Calcutta, of poor and indigent parents, or fatherless children of the Armenian or other Christian religion, and such income to be paid to the Governors, Trustees or Managers of the school for the time being for the purpose of such education; and I direct that no boy shall be eligible for admission to the benefit of this provision at an earlier age than seven, or at a later age than twelve, nor shall he continue the enjoyment thereof after he shall have attained the age of seventeen, though entitled to its benefit up to then; and whenever a vacancy shall occur either by removal of any such boy at the age aforesaid, his earlier death, or from any other cause, the trustee for the time being of this my will shall fill up the vacancy by appointing some other boy of the character and qualifications hereinbefore in that behalf stated, and each boy admitted to the school shall be subject to the government and discipline thereof."

The last clause of the will, so far as is material for the purposes of this report, ran as follows: "I do hereby nominate and appoint my said wife executrix and trustee of this my will during her life, and after her decease or renunciation of such office I hereby nominate and appoint the Administrator-General of Bengal for the time being the executor and the trustee of this my will."

The testator died on the 23rd of December 1867, leaving a widow, and the plaintiff his only son, him surviving. The widow obtained probate of the will and administered the estate until her death in February 1881, when the Administrator-General of Bengal took upon himself the administration of the estate.

In September 1863, the St. Paul's School, Calcutta, was closed by order of the committee of the school. It had for some years previously been a failure financially from want of success in competing with other schools newly established in Calcutta, and the committee thought it would be desirable to give up the school in Calcutta and establish one in the hills either at Hoptown or

Darjeeling. This was done. The committee sold the Calcutta property; and with the proceeds purchased some lands in Darjeeling, where, in March 1864, they established the school thenceforward known by the name of the St. Paul's School, Darjeeling. This proceeding was always referred to by the school authorities as the transfer of St. Paul's School from Calcutta to Darjeeling.

During the year 1877, Mrs. Malchus paid the interest on the Rs. 7,000, namely Rs. 280, to the Governors and Trustees of St. Paul's School, Darjeeling, for the education of one boy. From the year 1877 no payments were made either by Mrs. Malchus or by the Administrator-General. On the 11th of February 1884, the plaintiff instituted the present suit for the construction of the will of the testator so far as it related to the bequest contained in the 5th paragraph; for a declaration that the St. Paul's School, Calcutta, had ceased to exist at the time of the testator's death; and that the legacy of Rs. 7,000 had lapsed and fallen into the residue of the estate of the said testator to which the plaintiff was entitled, for accounts and for general relief. The defendants were the Administrator-General, and the Venerable Archdeacon Atlay who was appointed by the governing body of St. Paul's School, Darjeeling, under the provisions of Act XXI of 1860, under which Act the school had in 1867 been registered as a society. From the evidence it appeared that the fees at the St. Paul's School, Calcutta, ranged from Rs. 8 and Rs. 10 per month for day scholars and day boarders to Rs. 35 and Rs. 40 per month for regular boarders. At the St. Paul's School, Darjeeling, there were none but boarders, the average cost for each being about Rs. 400 per annum.

Mr. O'Kinealy (the Advocate-General Mr. G. C. Paul with him) for the plaintiff.—The plaintiff's contention is that the gift of Rs. 7,000 has lapsed and fallen into the residue. This contention involves two questions: *first*, whether the St. Paul's School, Calcutta, was in existence at the death of the testator in 1867; *secondly*, if not, whether this is a gift which the Court will execute *cy præs*? As to the first question it is submitted on the evidence that the school pointed out by the testator was not in existence at the death of the testator. The St. Paul's School, Darjeeling, is not the

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St. Paul's School, Calcutta, merely transferred to Darjeeling. It is entirely different in its aims and in its character. As to the second question this is not a gift which the Court will execute *cy près*—*Clark v. Taylor* (1); *Russell v. Kellett* (2); *Fisk v. Attorney-General* (3).

Mr. Hill (Mr. Stokoe with him) for the Trustees and Governors of St. Paul's School, Darjeeling.—This is a general charitable gift and cannot fail in any case. (He was stopped on this point.) My clients are entitled to the fund. It was given to St. Paul's School, and the mere transfer of the school from Calcutta to Darjeeling was immaterial so far as the bequest was concerned. Even if the Court were disposed to think the gift should be executed *cy près* we are the parties entitled; as the St. Paul's School, Darjeeling, is the successor of, and resembles more nearly than other institution, the school mentioned by the testator.

Mr. White (Mr. Allen with him) supported the contention of the other defendants.

The judgment of the Court was delivered by

PIGOT, J.—The plaintiff claims in this suit that the legacy under para. 5 of the testator's will has lapsed. It has been argued by his Counsel that the legacy was intended for St. Paul's School, Calcutta; that the school came to an end; and following the principle laid down in *Clark v. Taylor* (1), *Russell v. Kellett* (2), and *Fisk v. The Attorney-General* (3), the object of the bequest having disappeared it must lapse, and that he as son of the testator becomes entitled to the fund. Now the question depends, as has been all along admitted by counsel on both sides, entirely on the construction of para. 5 of the will.

Counsel are not at issue on any question of law.

I think on looking at all the terms of this paragraph of the will I must hold that the intention of the testator was not to make a gift either to or for the benefit of the school but for the furtherance of the education of the sort of persons described in the paragraph as "two or more boys, natives of Calcutta, of poor and

(1) 1 Drew, 642.

(2) 3 Sm. and G., 264.

(3) L. R. 4 Eq. 521.

indigent parents or fatherless children, of the Armenian or other Christian religion."

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In the first place there is no bequest of the money to the school at all. There is simply a direction that the trustees or rather the executors shall invest Rs. 7,000 in Company's Paper, stand possessed thereof, and by means of the income provide a fund for or towards the education of boys of the description mentioned at St. Paul's School, Calcutta.

Not merely is there no bequest to the school but the will contains directions as to what the boys are to get as objects of the testator's bounty, that is education; and that education they are to have, by its being paid for it at St. Paul's School, Calcutta. It appears to me that to bring the case within the scope of the cases cited it would be necessary that the money should pass to the institution, which it is suggested by the plaintiff's Counsel was the object of the bequest. That is not what is done in this paragraph, I think that the name of the school is introduced in two places in the will—once with the object of directing that the education contemplated shall be obtained there. He appears to use a reference to St. Paul's School, Calcutta, in a subsequent part of the will as an indication of the standard of education he wishes the objects of the bounty in that part of the will to receive, and I so use it here. Holding, therefore, that the bequest is not to an institution such as the school, the case does not fall within the authorities cited, and therefore I cannot hold that the legacy has lapsed. It is not necessary now to decide the question argued by Mr. O'Kinealy, and discussed by Mr. Hill, as to whether the St. Paul's School at Darjeeling is a continuation of the school which existed in Chowringhee twenty years ago. I must have done so had I been with the plaintiff in his construction of the 5th para. of the will; as I am not, and having regard to the view I entertain of the other part of the case, it is not necessary to determine this question. It appears to me, that whether or not the Darjeeling school is the same institution as existed in 1863 in Calcutta, if it be the case that the education there given cannot under the circumstances be given to children answering the description of the objects of the testator's bounty, that the doctrine of *cy pres* must come in, and it appears

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on facts admitted that that is so. The object of the testator, as I understand it, was to provide education for two or more boys, natives of Calcutta, children of poor and indigent parents or fatherless children, of the Armenian or other Christian religion.

Now it is clear that this small endowment on the face of it is insufficient to provide the expenses of even one boarder at the Darjeeling school as it now stands. It was insufficient to defray the expenses of one boarder in the school at Calcutta as it was in 1862-63. I cannot but suppose that the testator when he fixed the purpose to which the fund was to be applied knew the circumstances of the charges made at the school at that time, as given in evidence here, and knew that the fund could not be applied for children to board at the school. I think, taking all the facts into consideration, that he must have contemplated the education of children as day-scholars only or as day-boarders such as were attending school at that time, and for such purpose I think the fund must now be applied.

The character of the education given at St. Paul's School, Darjeeling, is I am satisfied such as the testator would have wished, that I hold to have been an education at a school where religious teaching was imparted according to the form of belief of the English Protestant church. I do not intend to exclude the possibility, such as has been suggested by Mr. *Hill*, that should there be found some other fund, and the persons at whose disposal such fund is should be willing to supplement the fund in this suit, so as to provide for the education of the boys in Darjeeling. If that could be done, no doubt, the object of the testator would be amply satisfied. That can be inquired into in the reference which I must order. When I say I conclude that the testator contemplated at best day-boarders only, though he has not actually specified that class, I do so on the assumption that he can get nothing better than that sort of education for the available income.

There must be a reference to the Registrar to report on the question in what manner the wishes of the testator can be best carried out having regard to the decision I have come to.

Attorney for plaintiff : *H. H. Remfry.*

Attorney for defendants : *Carruthers and O. C. Gangooly.*