APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. December 8, 9.

MINAKSHI AMMAL (DEFENDANT), APPELLANT,

v.

VISWANATHA AIYAR (PLAINTIFF), RESPONDENT.*

Will—Mutual and joint wills—Power of survivor of joint will to revoke—Survivor can revoke unless he derives some benefit under the will.

Where two persons agree to make mutual wills, and one of them dies, the survivor can revoke his will unless he has taken some benefit under the will of the deceased testator.

Stone v. *Hoskins*, [(1905) *L.R., Prob., Dn.* 194], referred to.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 950 of 1906, presented against the decree of K. S. Lakshmi Narasaiyer, District Munsif of Valangiman, in Original Suit No. 315 of 1905.

The facts of this case are sufficiently stated in the judgment.

P. S. Subrahmania Ayyar for The Hon. The Advocate-General for appellant.

T. R. Krishnasawmy Ayyar for respondent.

JUDGMENT—SIR ARNOLD WHITE, C.J.—In this case one Subbier and one Seshi Ammal who were the father and mother of the defendant in the suit and the grandfather and grandmother of the plaintiff (the plaintiff being the son of the defendant) made a joint will in December 1897. In the year 1899 the testator died. In the year 1904 the testatrix executed a gift to her daughter, the defendant, of the amount which the plaintiff in the present suit claims he is entitled to recover from the defendant as a legacy bequeathed to him by the will.

Now if the testatrix's will is irrevocable and that is the view taken by the District Judge, the plaintiff is entitled to succeed. If, on the other hand, the testatrix's will is revocable, it must be taken that it had been duly revoked or superseded by the gift in 1904 to the defendant and the plaintiff is not entitled to succeed. That was the view taken by the District Munsif who dismissed the suit.

* Second Appeal No. 1428 of 1907.

The will is to this effect. It recites that the testator and the testatrix have no male heirs and have only female heirs and that they have made the arrangements set forth in the will so that their daughters and their heirs may have no misunderstandings after their death in respect of the immoveable and moveable properties possessed by them. Then the will proceeds to refer to properties of the value of Rs. 800, which belonged to the testator, and to property of the value of Rs. 1,200 which belonged to the testatrix, making Rs. 2,000 in all. Then the two properties are dealt with together. Out of the Rs. 2,000 one daughter is to take Rs. 800 and pay Rs. 400 to another daughter. The eldest daughter is to take Rs. 1,200 and out of that pay Rs. 400 to another daughter's son. Then the will further provides that the heirs of the eldest daughter—the eldest daughter being the mother of the plaintiff—shall perform the funerals and that the eldest daughter shall pay Rs. 400 to the plaintiff after the funeral ceremonies. We will take it that the plaintiff fulfilled the condition precedent as regards the performance of the funeral ceremonies. If, therefore, the disposition under the will is irrevocable he is entitled to recover this Rs. 400.

The law with regard to the question we have to decide is laid down in Theobald on "Wills," 6th edition, page 17: "Persons may make joint wills, which are however revocable at any time by either of them or by the survivor . . . . A joint will may be made to take effect after the death of both testators; and if the joint will is not a disposition by each testator of his own property, but a disposition of joint property after the death of the survivor, the will cannot be proved till the death of the survivor. . . . . It seems that two persons may agree to make mutual, wills which remain revocable during the joint lives by either with notice to the other, but become irrevocable after the death of one of them, if the survivor takes advantage of the provisions made by the other." A similar statement of the law is to be found in Williams on "executors", 10th edition, page 94 and in Jarman on "Wills", 1893 Edition, Volume I, page 27. With regard to the authorities, so far as I am aware, the only authority which can be said in any way to support the contention advanced by the plaintiff, who is the respondent before us, is a judgment of Lord Comden which is very shortly reported in a case in Chancery decided so

WHITE, C.J., AND KRISHNASWAMI AYYAR, J.

MINAKSHI AMMAL v. VISWANATHA AIYAR.

long ago as 1769, *Dufour* v. *Periera*(1). That case, however, was discussed and distinguished in the later case of *Walpole* v. *Orford*(2) and the decision in that case is clearly against the plaintiff's contention that the will is irrevocable. The Privy Council case *Denyssen* v. *Mostert*(3), is an appeal from the Cape of Good Hope, and it turns, at any rate to some extent, on questions of Roman and Dutch Law. So far as I know, there is nothing in that case which helps the contention put forward on behalf of the plaintiff. But the most recent, and, as it seems to me, the clearest exposition of the law on this question is that given by Lord Barnes, Sir Gorell Barnes, as he then was, in the case of *Stone* v. *Hoskins*(4), he says: It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because by the death of the other party, the will of that party and the arrangement have become irrevocable; but that case is entirely different from the present, where the first person to die has not stood by the bargain and her 'mutual' will has in consequence not become irrevocable." By the "mutual will" he means the will made by the survivor. "The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death."

Applying that principle to the facts of the case before us, we have to see whether it can be said that the survivor has taken a benefit. It was suggested that she took a benefit by the death of the co-testator. That may be. It may be that in this case if the wife died first the husband took a benefit and if the husband died first the wife took a benefit; but the benefit so taken was under the ordinary law and not under the provisions of the will. As I understand the will, there is nothing which gives the surviving testator or testatrix a benefit on the death of the testator or testatrix who predeceases.

No doubt the object of the will was to give the issue certain advantages. Those advantages would accrue to the issue on the

(1) 1 Deck, 419.
(2) (1797) 30 Eng., Rep., 1076.
(3) (1872) L.R., 4 P.C., App. 236.
(4) (1905) L.R., Prob. Dn., 194 at page 197.

death of both the testator and the testatrix and not before. But we should be extending the equity doctrine if we were to hold that it applied to an advantage of that sort. The advantage contemplated by the doctrine and recognised in the cases apparently is a benefit or an advantage obtained by the survivor under the provisions of the will. Now I do not think it possible to say that that happens in this case. I must hold that in my judgment the District Munsif is right and the District Judge is wrong. I come to this decision with some reluctance; but the law seems to me to be so clear that I can come to no other conclusion. The result is that the decree of the lower Appellate Court is set aside and that of the District Munsif restored with costs throughout.

KRISHNASWAMI AYYAR, J.—I agree with the learned Chief Justice. The suit is to enforce a legacy. A will was made by the plaintiff's grandparents. It is called a mutual will. So far as one can see from the language of the instrument it really is a will by two persons, each of his or her own property, but the dispositions are contained in one paper. In this case no agreement or arrangement between the testator and the testatrix is alleged and in none of the cases that have been discussed by the learned Chief Justice was it competent to any person to set up that the will was irrevocable in the absence of a plea that there was an arrangement between the persons who made their wills that each should stand by the other.

Now, as I have already said, the dispositions contained in this will are dispositions by each of his or her own property and as the plaintiff has not started his case with any allegation of an arrangement between the two, it seems to me that the plaintiff is bound to fail on this very ground. But assuming that there was an arrangement to be implied from the language of this instrument, even then it is clear on the authorities that it cannot be said that the wills are irrevocable. For, it is plain upon the cases that have been discussed that, in order that the will should be irrevocable, it is necessary that the person attempting to revoke it should have received a benefit under the will of the other.

Now in this case if the wife died first, I think it would be impossible to contend that the husband would succeed to the properties She disposed of the properties after the death of the husband, it is true, in favour of her daughters and the plaintiff, a

WHITE, C.J., AND KRISHNASWAMI AYYAR, J.

MINAKSHI AMMAL v. VISWANATHA AIYAR.

daughter's son. But so far as any intermediate estate is concerned that is, the estate undisposed of by the will, it will pass under the law of intestacy to the daughters and not to the husband. It may be that, so far as the husband is concerned, if he dies first, his life-estate will pass to the widow; but it passes not under the terms of the will but under the law of intestacy. But, so far as I have been able to understand the authorities, it is only in cases where a benefit is received by a mutual testament under the terms thereof that he or she can be said to be precluded from revoking the will. I come therefore to the conclusion that the will is really superseded by the gift which the testatrix has made. The gift deals with properties which are dealt with by the will and if all the properties dealt with by the will are disposed of by this gift, there is no property left upon which the will could operate. The second appeal must, therefore, be allowed, the decree of the District Judge reversed and that of the District Munsif restored. The plaintiff must pay the costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1909. December 17.

CHIDAMBARA REDDIAR (FIRST PLAINTIFF), APPELLANT,

v.

NALLAMMAL AND OTHERS (SECOND PLAINTIFF AND SIXTH TO EIGHTH DEFENDANTS), RESPONDENTS NOS. 1 TO 3, 5.*

Hindu Law—Reversioner, suit by—Suit by next male reversioner maintainable without proof of collusion of nearer female reversioner.

The rule that suits to set aside alienations by a female heir having a limited interest should be brought by the next reversioner and that a remote reversioner cannot sue without showing collusion between the female heir and the next reversioner, does not apply where the next reversioner is a female and the suit is brought by the nearest male reversioner.

Where a widow having daughters makes an alienation, the nearest male reversioner may sue without proving collusion between the widow and daughter.

SECOND APPEAL against the decree of E. L. Thornton, District Judge of Trichinopoly, in Appeal Suit No. 120 of 1906, presented

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* Second Appeal No. 1409 of 1907.