

(1904) 10 AHC CK 0001
In the Allahabad High Court

Richard Ross Skinner

APPELLANT

Vs

Durga Prasad and Thomas William Skinner and Another

Thomas William Skinner Vs Durga Prasad

RESPONDENT

Date of Decision : 17-10-1904

Acts Referred:

Citation : (1909) ILR (All) 239

Hon'ble Judges : John Stanley, J;Burkitt, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Stanley, Kt., C.J. and Burkitt, J.—These three appeals arise out of two suits which were brought in the Court of the Subordinate Judge of Meerut, one by Richard Ross Skinner against one Durga Prasad and Thomas William Skinner and the other by Thomas William Skinner against Durga Prasad to recover possession of the village of Sherpur in the district of Bulandshahar and for mesne profits; both of which suits were dismissed. Appeal No. 106 is an appeal by Thomas William Skinner in the suit brought by Richard Ross Skinner against the finding of the lower Court that he is not a legitimate son of the late Thomas Brown Skinner, who was the father of himself and brother of Richard Ross Skinner. Appeal No. 107 is an appeal by the same appellant in the suit which was instituted by him" against the same finding, and also against the decision of the lower Court upon the construction of the will of the late Thomas Skinner, grandfather of the appellant. Appeal No. 123 is an appeal by Richard Ross Skinner in the suit instituted by him against the decision of the Court below holding that Thomas Brown Skinner took an absolute estate in the zamindari property of the testator, Thomas Skinner. The three appeals have been heard together, and one judgment will govern all.

2. Two questions, and two questions only, arise in the case. One is as to the true construction of the will of the late Thomas Skinner, dated the 22nd of October 1864; and the other is the question of the legitimacy of Thomas William Skinner.

3. The founder of the family was Colonel James Skinner, C.B., an Indian soldier of fortune, who had for military services obtained from the East India Company in the beginning of the last century a grant of a large estate situate in the Bulandshahr District in the North-Western Provinces. The origin of the family is obscure. It appears from a suit which was instituted over thirty years ago to establish the will of Major James Skinner, an illegitimate son of Colonel Skinner, that it was then alleged, and there was some proof, that Colonel Skinner was illegitimate, being probably the child of a native woman by a European father. That case went on appeal to their Lordships of the Privy Council, and it is to be found reported in 13 Moore's Indian Appeals, p. 277, and is entitled *Musammat Fanny Barlow v. Sophia Eveline Orde*. In the course of his judgment in that appeal Lord Westbury observes of the origin of Colonel Skinner as follows: His origin is unknown; being alleviated he belonged to no family, and all that can be collected is that he was probably a soldier of fortune who rose by his courage and military skill to some distinction in the service of the East India Company." The testator in the present case, Thomas Skinner, is a son of Colonel James Skinner. He was a resident of Bilaspur in the Bulandshahr district, and at the time of his death, which occurred on the 9th of November 1864, was possessed of immovable property of considerable extent and value. The testator had three sons and four daughters by his wife Eliza Ann Skinner, of whom Thomas Brown Skinner was the elder son and Richard Ross Skinner the second son. It appears that Thomas Brown Skinner was born before the marriage of his parents, and so was illegitimate. By his will, which is divided into seven paragraphs, Thomas Skinner provided for the payment of his debts and an annuity for his wife, and also allowances for his children, and then as to his zamindari he gave the following directions in the fourth and fifth paragraphs, namely: "that my private zamindari, presented to me by Government as a repaid for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from time to time to the original grant, may at my demise descend to my eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance. In the event of my eldest son Thomas Brown Skinner dying without lawful male children, the above-mentioned private zamindari, et cetera, shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, et cetera, shall descend to my female children, or, in the event of their death to the female children born in wedlock of my sons in succession." The will was executed on the 22nd of October 1864, that is, 18 days before the testator's death. After his death his son Thomas Brown Skinner succeeded to the property, but he did not enjoy it long. He appears to have been of extravagant tastes and soon became immersed in debt. In execution of a simple money decree obtained against him by Durga Prasad his interest in the property in dispute in these appeals was sold and purchased by Durga Prasad. It is contended on behalf of the latter that upon the true construction of the will of Thomas Skinner his son Thomas Brown Skinner acquired an absolute estate in the property, and that he (Durga Prasad) is entitled now by virtue of his purchase to an absolute estate. Thomas William

Skinner, alleging that he is the legitimate son of Thomas Brown Skinner, contends that his father had merely a life estate in the property and that upon his death the property devolved upon him. Richard Ross Skinner also supports the contention of Thomas William Skinner that his father had only a life estate, but he alleges that Thomas Brown Skinner is illegitimate, and consequently is not entitled to the estate, and he claims it as Being the eldest legitimate son.

4. The learned Subordinate Judge has found that Thomas William Skinner was illegitimate, but he has decided that, according to the construction of the will of Thomas Skinner, Thomas Brown Skinner took an absolute estate, and consequently Durga Prasad is now entitled to the property absolutely, He therefore dismissed both suits. Hence the present appeals.

5. There are two questions therefore now before us. The first is as to the true construction of the will of Thomas Skinner in regard to the devise of his immovable property, and the second is as to the legitimacy of Thomas William Skinner. We shall first deal with the will. The testator died before the passing of the Indian Succession Act of 1865, so that that Act does not aid us in the matter. His domicile was in the North-Western Provinces of India, and there is no particular law of that domicile applicable to this case. The Privy Council held in the case of *Barlow v. Orde* to which we have made allusion, and which had to do with the will of Colonel James Skinner, son of the founder of the family, that having regard to the circumstances of the family it was impossible "to affirm that any particular law is applicable to the construction of the Colonel's will or the regulation of his succession" and that "any question that may arise respecting them must therefore be determined by the principles of natural justice." That case, their Lordships held, fell to be decided, as directed by the Regulations, by the principles of natural justice, equity and good conscience. There was nothing before their Lordships in that case to indicate the religious belief or profession of Colonel Skinner or of his family. In the case of the testator Thomas Skinner and his family the evidence shows that they were Christians, but we do not think that this fact would justify us in interpreting his will upon any other principles than those which were applied in the case of *Barlow v. Orde*. We do not think that we should apply to its interpretation any technical rules of construction such as are applicable to English wills, The territorial law of British India is not strictly speaking English law but a modified form of English law--*The Secretary of State v. The Administrator General of Bengal* (1868) 1 B.L.R. 87 O.C.; *Abraham v. Abraham* (1863) 9 Moo. I.A. 193 199 and *Broughton v. Pogose* (1873) 12 B.L.R. 74. It was contended before us by the learned Counsel for the respondent Durga Prasad that the will should be construed according to English law, and that according to that law, under the rule in *Wild's case* (6 Coke, 17), Thomas Brown Skinner took an estate tail, and that, as we understand the argument, such an estate must be regarded as an absolute estate in these Provinces, where estates tail are unknown. The qualified estate known as an estate tail had its origin in the ancient feudal system, the foundation of English jurisprudence as regards landed property. That system finds no place in the territorial law of these

Provinces. In Western India a land tenure is to be found closely resembling it, as, for example, the Jaghirs of the Mahratta country, but in these Provinces no such tenure exists. If it had been possible to create an estate tail in the land and the estate so created vested in Thomas Brown Skinner was such an estate, the case of the respondent Durga Prasad would not, as it appears to us, be advanced, for that estate was never barred, if there existed a means of barring it, and consequently on the death of Thomas Brown Skinner it passed on to the next heir. The learned Counsel for Durga Prasad recognized this difficulty and was obliged to call in aid of his argument the provisions of Section 84 of the Indian Succession Act of 1865, asking us to hold that words which in a devise of land in England would confer an estate tail would in this country pass the whole interest of the testator. He asked us to apply this section as if the Act had retroactive operation. "Under that section, unless a contrary intention appear by a will, the whole interest of a testator will pass under a gift to a man and the heirs male of his body, words which in England are appropriate to confer an estate tail. We cannot accede to this argument. The Succession Act is not retroactive, and even if it were, the section in question is only applicable if a contrary intention does not appear by the will. Now the rule in Wild's case is based upon the presumed intention of the devisor that the children of the devisee should take the property, and that, inasmuch as they cannot take as immediate devisee, inasmuch as they are not in existence, and by way of remainder they cannot take, for that was not the devisor's intent, the gift being immediate, therefore the word Children shall be taken as a word of limitation. The rule is only a rule of construction, but it is a rule which in England will not be departed from in cases properly falling within its scope--Clifford v. Koe (1880) 5 A.C. 447 but it has been frequently criticised as a rule which in many instances has defeated the intention of testators. That eminent lawyer Sir Edward Sugden, when Lord Chancellor of Ireland, in the case of Heron v. Stokes (1842) Dr. and War. 89 S.C. 59 R.R. 652 suggested that the more natural construction of a gift to a man and his children, there being no children in case at the time, and that which he would have adopted in the absence of authority the other way would be to hold it to be a good gift to the parent for life with remainder to the children. Now the primary object in construing a will is to ascertain the intention of the testator. In order to gather what the intention of the testator was in regard to the disposition of his zamindari we must read the fourth and fifth paragraphs of his will together. In the fourth -paragraph he directs that it shall descend to his eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance. The words "according to the law of inheritance" must not be overlooked. They seem to indicate that the children of Thomas Brown Skinner were objects of the testator's bounty, and that the words "lawful male children" were not used merely as words of limitation, that the testator's intention was that they should enjoy the property after the death of their father according to the law of inheritance; that is, that the eldest son living at the father's death should succeed to the estate. If the words to "his lawful male children" are treated as words of limitation merely, that is, as marking out the estate which

Thomas Brown Skinner was to enjoy, the words "according to the law of inheritance" are unnecessary and out of place. The learned Subordinate Judge does not appear to us to have attached due weight to these words, or to have properly interpreted them. He says: "Now he (the testator) does not say that his eldest son, Thomas Brown Skinner, should only have a life interest, and we have no right to import into the will those words. Then again, when he says clearly that the property should descend to his eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance, we all know that according to the law of inheritance the eldest son of Thomas Brown Skinner does not take only a life interest. "The answer to this is that the testator did not give the estate to Thomas Brown Skinner according to the law of inheritance, but he gave it to Thomas Brown and to his lawful male children according to that law. The words according, to the law of inheritance" are not so much applicable to and explanatory of the gift to Thomas Brown Skinner as they are of the gift to his lawful male children. If the testator had intended to give the property absolutely to Thomas Brown Skinner, the introduction of the words "and to his lawful male children" was quite unnecessary and inappropriate. The succeeding paragraph makes this more clear. By it the testator provides that if Thomas Brown Skinner should die without lawful male children his property should descend to the testator's next male heir, i.e., to his second, or other son who should be living at the death of Thomas Brown Skinner. Then follows the provision that if all his sons should die without lawful male children, the zamindari should descend to his female children, and in default of such children, then to the female children of his sons in succession. Reading these two paragraphs together, it appears to us that it was clearly not the intention of the testator to give an absolute estate in his zamindari to Thomas Brown Skinner. The testator indicates his wish that his sons Mho shall acquire the property sham have a life estate only and that the absolute estate shall devolve upon the eldest son of the son of the testator who shall be entitled to the property for life and shall leave a son surviving him.

6. In order to gather the intentions of the testator we must place ourselves in his position and see what were the circumstances of the family, the will was made shortly before his death. He had a wife. Eliza Ann Skinner, and six children, namely, three-sons and three daughters. Of these children the two eldest Thomas Brown and a daughter Jane Sophia were not born in wedlock, the testator having been married to their mother after their birth. It seems highly improbable that, if the intention of the testator was to give his eldest son an absolute estate, he should have introduced into his will elaborate provisions for the devolution of the property such as are contained in paragraphs 4 and 5 of the will. If such was his intention he would not, we think, have gone on to provide for the devolution of the property, not merely in the event of the death of Thomas Brown Skinner, in his (the testator's) lifetime, but for the succession of daughters in the event of his sons dying without male issue. It is evident that the testator was desirous that his zamindari should be retained in the family, and this was not un natural seeing that it had been given to him as a reward for public

services. In the 6th paragraph of his will, in which he makes provision for the payment of his debts, he directs that "on no account shall my private zamindari, et cetera, be sold to pay such debts." Reading the will as a whole and taking into consideration the circumstances, we have no hesitation in holding that Thomas Brown Skinner took merely a life estate and not an absolute estate in the property.