# DE TORRILLA and others v ATTORNEY GENERAL and others

Supreme Court
Unsworth, C.J.
29 September 1969

*Mortmain — whether Mortmain and Charitable Uses Act, 1736, applied in Gibraltar.*
*Limitation — vesting of estate on death — when period of limitation begins to run.*

The testatrix died in 1898, having by her will left certain legacies and annuities and the residue on trust for sale for certain charitable purposes. The persons who would have been entitled on intestacy claimed that the charitable gifts were void as offending against the Mortmain and Charitable Uses Act, 1736. The trustees denied that the Act applied to Gibraltar and asserted, in the alternative, that the claim was barred by the Real Property Limitation Act, as amended by the Act of 1874.

**Held:** (i) The Mortmain and Charitable Uses Act, 1736, never applied in Gibraltar.

(ii) If the gift to charity had been void, the period of limitation would have begun to run at the date of the death of the testatrix.

**Note.** The Mortmain and Charitable Uses Ordinance, 1948 (No. 35 of 1948), to which reference is made in the judgment, was repealed by the Charities Ordinance, 1962 (No. 16 of 1962; Cap. 20, 1964 Ed.).

**Cases referred to in the judgment.**

*Attorney-General v Stewart,* (1817) 2 Mer. 143.
*Whicker v Hume,* (1851) 14 Beav. 509.
*Whicker v Hume,* (1858) 11 E.R. 50.
*Jex v McKinney,* (1889) 14 App. Cas. 77.
*Jephson v Riera,* (1835) 3 Knapp 130.
*Mayor of Lyons v East India Company,* (1836) 1 Moo. P.C.C. 175.
*Mayor of Canterbury v Wyburn and Melbourne Hospital,* [1895] A.C. 89.

*In re Hoyles*, [1911] 1 Ch. 179.
*Greville v Browne*, (1859) H.L. Cas. 689; [1843-60] All E.R. 888.
*Gravenor v Hallum*, (1767) Amb. 643.
*Churcher v Martin*, (1889) 42 Ch.D. 312.
*In re Lacy*, [1899] 2 Ch. 149.

**Action**

This was an action to determine whether certain charitable gifts made by will were void as being in breach of the Mortmain and Charitable Uses Act, 1736.

J.N. Arnold Q.C., and L.W. Triay for the plaintiffs.
E.M. Russo for the first defendant.
J.E. Vinelott and A.V. Stagnetto for the other defendants.

**22 October 1969: The following judgment was read—**

The plaintiffs in this case seek the determination of certain questions arising out of the will of the late Maria Teresa Bonell who died on 25 July 1898, leaving certain legacies and annuities and subject as aforesaid giving the residue of her estate to trustees on trust for sale and directing that they should stand possessed thereof for certain charitable purposes which are set out in the will. The trustees of the charity were the same persons as the trustees of the will.

The questions which I am asked to decide are these:—

1. Whether upon the true construction of the Will of Maria Teresa Bonell deceased the gift of two one-fifths part of the proceeds of sale of the residuary real estate of the Testatrix to the Vicar Apostolic of Gibraltar and the gift of the remaining three-fifths respectively of the proceeds of sale of the residuary real estate of the Testatrix to the Lady Superioress of the Little Sisters of the Poor in Gibraltar the Lady Superioress of the Sisters of Bon Secours and the Lady Superioress of the Convent of Saint Francis Javier in Gibraltar were valid gifts or whether such gifts were rendered invalid by the provisions of the Mortmain Act 1736 or any other law relating to gifts in Mortmain applicable to Gibraltar at the date of the testatrix's death.

2. If such gifts were invalid at the date of death of the said testatrix Maria Teresa Bonell upon what trust if any do the Trustees of the Will of Maria Bonell deceased now hold the property representing such invalid gifts.

The plaintiffs submit that the gifts to the charities were void by virtue of the Mortmain and Charitable Uses Act, 1736, which they contend applied to Gibraltar at the material time. The trustees say that this Act did not apply to Gibraltar and plead that, in any event, any claim against them is barred by the Real Property Limitation Act, 1833, as amended by the Act of 1874. I will refer to the Mortmain and Charitable Uses Act, 1736, later in this judgment as the Mortmain Act as it was so described in the cases to which reference has been made.

It is not in dispute that the gifts would be void if the Mortmain Act applied to Gibraltar at the material time and the first issue for my decision is whether the Act did in fact apply as part of the English law in force in Gibraltar.

The history of the application of English law to Gibraltar is set out in an address delivered by the Chief Justice at the Opening of the Legal Year on 1 October 1951, and it is agreed that this address correctly sets out the historical facts. The relevant law relating to the application of English law is an Order of Her Majesty in Council dated 2 February 1884. This Order as in force at the material time is set out in the 1890 edition of the laws at p. 254 and reads as follows:—

> 1. Except in respect of matters which now are or hereafter may be provided for by any Order in Council or local Ordinance for the time being in force in Gibraltar, or by any Act of Parliament expressly, or by necessary inference, extending to Gibraltar, or by any proclamation or other instrument issued under the authority of such Order in Council, local Ordinance, or Act of Parliament, the law of England, as it existed on the 31st day of December, 1883, shall be hereafter in force in Gibraltar, so far as it may be applicable to the circumstances thereof.

The question whether the Mortmain Act applies to a colony has been the subject of judicial decision in a number of cases which were referred to in the course of argument.

The first of these cases is *Attorney-General v Stewart* [1] where it was held that the Mortmain Act did not apply to Grenada. Sir William Grant, M.R., said this in the course of his judgment [2]

> "Whether the statute of mortmain be in force in the island of Grenada, will, as it seems to me, depend on this consideration—whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed. I conceive that the object of the statute of mortmain is wholly political—that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation. It is incidentally only, and with

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[1] (1817) 2 Mer. 143.

[2] At pp. 160 and 162.

reference to a particular object, that the exercise of the owner's dominion over his property is abridged." . . . .

"The statute contains some exceptions. These exceptions are also local, and still further show the local nature of the law, and how little it can be considered as a general regulation of property.

The two English universities, and the three great English schools or colleges, are exempted from its operation. This law cannot have the like effect in another country as it has in England. There are some English objects, in favour of which an English testator may devise land in mortmain. But there are no colonial objects in favour of which a colonial testator could so devise. If there were universities or great schools in the colony, this law would not permit a devise to be made to them. If the legislature of a colony were disposed to adopt a similar law, they would surely not transcribe this act, as it stands, into their statute book. They would in all probability specify some useful institution or establishment of their own, in favour of which they would make such an exemption as is made here in favour of the two universities, and the three schools mentioned in the statute; or, if they did not think it fit to make an exception in favour of their own institutions, they surely would not continue the exception in favour of institutions of another country. If this law were in force in Grenada, the consequence would be, that a Testator could not by will give an acre of land for the support of a school in the island, while he might give his whole estate to augment the endowments of an English college.

Then, with respect to alienations in mortmain inter vivos, they are not prohibited, but regulated. One of the regulations required, as necessary to their validity, is enrolment in his Majesty's High Court of Chancery. This further shows that the act is throughout local, and throughout inapplicable to any other country than this. It is undoubtedly the Court of Chancery of England that is here designated. In that Court there is an ancient office for the enrolment of deeds. There is indeed a Court of Chancery in Grenada, but there is no such establishment as an enrolment office belonging to it. The requisition of the law could not therefore be complied with in the island, so that what is a qualified prohibition here, would become an absolute prohibition there. They have a register of deeds, but the registration of a deed in a register office would be perfectly unavailing, where it is an enrolment in the Court of Chancery that is specifically required. If the legislature of the island think any measure of the same kind necessary, they may so shape and modify it, as to adapt it to their own circumstances and situation. But, framed as the mortmain act is, I think it quite inapplicable to Grenada, or any other colony. In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred as it stands into the code of any other country. I am of opinion, therefore, that it constitutes no part of the law of the island of Grenada, and that the Exception must consequently be allowed."

The second of these cases is *Whicker v Hume* [1] where it was held that the Mortmain Act did not apply to New South Wales. The case was heard at first instance by the Master of the Rolls and his decision was affirmed on

[1] (1851) 14 Beav. 509.

appeal to the Lords Justices and later on a further appeal to the House of Lords [1] where Lord Chelmsford, L.C., dealt with the matter in this way [2] —

> "That brings me to the second question, which is, as to the effect of the Statute of Mortmain upon a devise of lands in New South Wales. In the course of the argument, your Lordships intimated a strong opinion that the Mortmain Act did not apply to the colonies, at all events not to the colony of New South Wales. It will, therefore, be necessary for me to address your Lordships only very shortly upon that subject. I consider that this question is almost determined by the opinion of the Master of the Rolls, Sir William Grant, in the case of the *Attorney-General v Stewart*, because, although a distinction was sought to be established between that case and the present by reason of the island of Grenada, which was the colony in that case, being a conquered country, and this being a settled colony, yet I apprehend it will be found, that unless the Act of 9 Geo. 4, c. 83, applies to this particular case, the principle involved in the decision of Sir William Grant would be completely conclusive on the present question. It is true that the inhabitants of a conquered country have those laws only which are established by the Sovereign of the conquering country, and that the colonists of a planted colony, as it is said, carry with them such laws of the mother country as are adapted to their new situation. But the opinion of Sir William Grant related generally, I think, to the Statute of Mortmain, as applicable to all colonies."

Lord Chelmsford went on to consider whether the Mortmain Act had been transplanted to the colony by a provision of an Act relating to the administration of justice but held that this Act was not relevant. The question whether the principles in *Stewart's* case apply where English law has been adopted in general terms by statutory provision came up for consideration in *Jex v McKinney* [3] and the Judicial Committee of the Privy Council held that the principles were applicable in such a case. In that case the decisions in *Stewart's* case and *Whicker's* case were approved and it was held that the Mortmain Act did not apply to British Honduras. Lord Hobhouse after referring to the statutory provisions dealt with the matter in this way [4] -

> "This condition of applicability to the Colony runs through the whole of the enactments above stated. It is expressly attached to the common law dealt with by sect. 5 of the Act of 1856, and to the laws dealt with by sect, 7. When laws in abrogation or declaratory of the common law are mentioned, they are not expressly qualified by the same condition; but it must be implied, because it would be absurd to suppose that common law is to prevail in the Colony only if suitable, and that laws abrogating it are to prevail whether suitable or not.
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> It has been argued at the bar that the laws described are to prevail if they are applicable or can be applied, and that the latter words give a wider sense to the word "applicable." Their Lordships read the words "can be" as meaning "can reasonably be," agreeing herein with Lord Justice Knight Bruce, who in *Whicker v Hume* placed that construction upon similar words in a New South Wales Act. The change of expression would rather seem to point to such cases as are provided for by the Ordinance of 1879, where some amount of

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1 (1851) 14 Beav. 509.
2 (1858) 11 E.R. 50.
3 (1889) 14 App. Cas. 77.
4 At p. 81.

moulding in formal or insignificant details is required before an English statute, suitable in its nature to the needs of the Colony, can be actually applied to them.

If the Colonial enactments are to be construed in this way, we are brought back to the question whether the statute of George II is suitable to a young English colony in a new country. The principle on which such questions should turn has been laid down by Blackstone in his Commentaries, vol. i. p. 108. It has been applied to the statute of George II in two English decisions, and every judge who has addressed his mind to the question has come to the same conclusion. In *Attorney-General v Stewart*, with reference to Grenada, Sir William Grant; in *Whicker v Hume*, with reference to New South Wales, Lord Romilly at the Rolls, Lord Justices Knight Bruce and Cranworth in the Court of Appeal; Lord Chelmsford, Lord Cranworth, and Lord Wensleydale in the House of Lords; all decided that the statute was framed for reasons affecting the land and society of England, and not for reasons applying to a new colony. Their Lordships think the reasoning on which those decisions are founded is sound reasoning and is applicable to British Honduras as the Court below has applied it."

There are also a number of other cases which were referred to by learned counsel in the course of argument.

The first of these cases is *Jephson v Riera* [1] where the Judicial Committee of the Privy Council had to decide whether a widow in Gibraltar was entitled to dower in accordance with the English law or whether Spanish law applied so that she would not be so entitled. The Judicial Committee held that the English laws relating to real property were in force "so far as they were applicable to the situation of Gibraltar" and that there was nothing in the nature of the claim for dower which was inapplicable to the situation in Gibraltar. The law of dower accordingly applied. The position is set out in the judgment of the Judicial Committee [2] as follows:—

"And by a subsequent charter, made in the 57th year of the reign of King George the Third, after reciting all these three charters, the King revokes them, and erects a new Court of Judicature; and, adopting the language employed in the charter of the 13 Geo. 2d, declares His Majesty's "will, that the laws of England be the measure of justice to be administered between the parties, as near as may be." Can there be any reasonable doubt that the purpose and object of these charters was to make the laws of England, as far as they were applicable to the situation of Gibraltar, the law of that place in all questions of property, whether real or personal .....

Their Lordships are therefore of opinion, that as the charters of justice appear to have been issued under the Great Seal, and therefore under the advice of a known responsible minister of the Crown; and as the language plainly and explicitly declares the will of the King, that the English law shall be the measure of justice in Gibraltar; that the law of England has been lawfully substituted for the law of Spain in that place; and that as there is nothing in the nature of the plaintiff's claim of dower inapplicable to the situation of that part of the King's dominions, that the judgment of the Court below is well founded, and should be affirmed with costs."

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[1] (1835) 3 Knapp 130, and p. 4 supra. [2] At pp. 151 and 153.

The second case is *Mayor of Lyons v East India Company* [1] where it was held that the English law incapacitating aliens from holding real property did not apply to the East Indies. Lord Brougham in delivering the judgment of the Judicial Committee referred to *Stewart's* case in this way [2] —

> "Mr. Justice Blackstone, says, that only so much of the English law is carried into them by the settlers as is applicable to their situation, and to the condition of an infant colony. And Sir William Grant, in *Attorney-General v Stewart,* applies the same exception even to the case of conquered or ceded territories, into which the English law of property has been generally introduced. Upon this ground, he held that the Statute of Mortmain does not extend to the Colonies governed by the English law, unless it has been expressly introduced there, because it had its origin in a policy peculiarly adapted to the circumstances of the mother country." .....
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> "Sir William Grant's reasons for confining the Mortmain Act to England have a manifest application to this case; for though they are mainly drawn from the provisions of that act being adapted to the peculiar circumstances of the mother country, they plainly proceed upon the assumption, that the intention of the Legislature to confine the operation of the act may be gathered from thence; and it should seem that such intention is even more directly to be gathered from the fact, that the provisions in question are manifestly inapplicable to the circumstances of the settlement."

The third case is the *Mayor, etc. of Canterbury v Wyburn and Melbourne Hospital* [3] where it was held that the Mortmain and Charitable Uses Act of 1888 did not invalidate a gift for the purchase of land in England which was valid by the Laws of Victoria where the will was made and where the testator had been domiciled.

The fourth case is *In re Hoyles* [4] in which it was held that the Mortmain Act applied to a gift by a domiciled Englishman in respect of land in Ontario as the evidence established that the law relating to Mortmain was the same in Ontario as in England.

These are the authorities and in all the cases where the application of the Mortmain Act to a colony was directly in issue (*Whicker's* case and *Jex v McKinney,* hereinafter referred to as the mortmain cases) it was held that the statute did not apply to the colonies concerned. Sir William Grant in *Stewart's* case (which was followed in the other cases) set out the principles in that part of his judgment which reads as follows:—

> Whether the statute of mortmain be in force in the island of Grenada, will, as it seems to me, depend on this consideration—whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed. I conceive that the object of the statute of mortmain is wholly political—that it grew out of local circumstances, and was meant to have merely a local operation.

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1 (1836) 1 Moo. P.C.C. 175.
2 At pp. 273 and 276.
3 [1895] A.C. 89.
4 [1911] 1 Ch. 179.

It was submitted on behalf of the plaintiffs that the mortmain cases are distinguishable in the circumstances of Gibraltar and this led to some argument as to how far I can consider questions of fact in the absence of evidence. I cannot, of course, make findings of a kind which require evidence but I take judicial notice of the geographical position and size of Gibraltar and also other notorious facts including the historical fact that in 1884 Gibraltar was a mature community and not a new or young colony.

The substance of the main submissions on behalf of the plaintiffs and my views on them are these:—

(1) That at the material time Gibraltar was not a new or young colony but a mature society to which the Mortmain Act could be applied. It is true that there was reference in the mortmain cases to new and young colonies, but in my view, this factor was not the basis of the decisions in these cases. In my view it is clear from the judgments in the mortmain cases that the primary reason for the decisions lay in the nature of the Mortmain Act itself rather than the conditions in the particular colonies.

(2) The land shortage in Gibraltar was a relevant consideration in deciding whether the Mortmain Act applied. There is no evidence on this point but if the geographical size of Gibraltar necessitated a restraint on the alienation of land then, in my view, the appropriate way of dealing with it would have been by way of local legislation.

(3) That the English law of descent had been put into force in Gibraltar and, if the law under which an heir inherited, was in force so also was the law which protected him from dispossession. In my view this does not necessarily follow as any general application of law is subject to the qualification that a particular law applies only in so far as it is applicable to the circumstances of Gibraltar. This view is supported by the decision in *Jephson v Riera* where it was said that "the laws of England, so far as they were applicable to the situation of Gibraltar" was "the law of that place in all questions of property whether real or personal". I take this opportunity of drawing attention to the fact that the headnote to *Jephson's* case is misleading in so far as it implies that the English laws of real property applied to Gibraltar without qualification as what was in fact decided was that the English law of real property applied to Gibraltar in so far as it was applicable. The view that I have expressed on this point is also supported by the decisions in the mortmain cases and, in particular, *Jex v McKinney* where the English laws of universal application relating to inheritance had been applied to the colony concerned but it was held that the Mortmain Act did not apply.

(4) That the exception in the Mortmain Act relating to English universities was capable of application to Gibraltar. I think that there is substance in this point but it does not follow from this that the other provisions were applicable.

(5) That the requirement in the Mortmain Act that deeds should be enrolled in the Chancery Court in England was applicable to the circumstances

in Gibraltar. It would, of course, have been possible for the deeds to be so enrolled but, in my view, it would have been extremely inconvenient both from the point of view of enrolment and also of inspection by persons living in Gibraltar, particularly having regard to the fact that in 1884 there was no air communication between Gibraltar and the United Kingdom. I do not think that the provisions relating to the apportionment and barring of dower (referred to by counsel for the plaintiffs) are comparable as these provisions could be complied with locally in Gibraltar for the reasons set out in *Jephson v Riera*.

(6) That the Mortmain Act was applied to Gibraltar under the early Charters of Justice which applied English law without qualification and continued in force under the Order of 1884. I do not think that the early Charters applied laws which were inapplicable to the circumstances of Gibraltar and, in my view, the Charters must be read subject to the qualification that English law was in force so far as it was applicable. This view is supported by the decisions in *Stewart's* case and *Whicker's* case where English law applied generally and also by *Jephson's* case where it was held that the English laws relating to real property applied "so far as they were applicable to the situation of Gibraltar" even though these words did not appear in the Order of 1817 which was the relevant order at the time. In any event any doubt which may have existed on this point was removed by the Order of 18 November 1867, (Laws relating to Gibraltar Vol. II 1861-82 page 8 A) which made it clear that the only laws which were to remain in force were those which were applicable to the circumstances of Gibraltar.

(7) That the Mortmain Act applied to Wales. I presume the reason for this was that the Legislature considered that the mischief which the statute was designed to restrain extended to Wales or, at any rate, to part of that Principality. It seems to me that the more important point which arises out of the application of the statute is the fact that it did not apply to Scotland which clearly showed that the statute was of local and not general application even in the United Kingdom.

The conclusions which I have reached after considering the facts of which I have taken judicial notice, the judicial authorities and the arguments of counsel is that the Mortmain Act did not apply to Gibraltar. I so find for substantially the same reasons as those which were the basis of the decision in *Stewart's* case, *Whicker's* case and *Jex v McKinney*. The Mortmain Act in its causes and objects as set out in the preamble to the Act; its qualifications and provisions which required enrolment in the Court of Chancery in England and in its exceptions in so far as they related to schools were wholly local, calculated for purposes of local policy and not applicable to the circumstances of Gibraltar in 1884.

I have had no hesitation in reaching this conclusion in view of the authorities and it is therefore unnecessary for me to consider the provisions of the Mortmain and Charitable Uses Ordinance, 1948, where the Gibraltar Legislature (mistakenly in my view) appear to have been under the impression that the Mortmain Act had previously applied to Gibraltar.

The replies to the questions which have been submitted to me are as follows:—

(1) Upon the true construction of the will of Maria Teresa Bonell the gifts for charitable purposes therein mentioned were not rendered invalid by the Mortmain Act, 1736, or any other law relating to gifts in mortmain.

(2) This does not arise in view of my opinion on the first question.

In view of the findings that the Mortmain Act did not apply to Gibraltar it is unnecessary for me to consider whether any claim against the trustees would have been barred by the Real Property Limitation Act, 1833, as amended by the act of 1874. I think, however that this is a case in which it would be helpful if I were to express my opinion on the alternative issue.

It is not in dispute that the Limitation Acts applied and the argument on this part of the case centred around the date from which the period of limitation would commence to run.

The main argument on behalf of the trustees was that, if the gift to charity was void, the legal estate in the realty would have vested directly in the heir at law subject to a charge for the payment of the annuities and that the period of limitation accordingly ran as from the date of the death of the testatrix and expired twelve years thereafter. In reply to this it was submitted on behalf of the plaintiffs that the trustees took the residuary estate for all the purposes of the will including the charge so that the trustees would retain the property for those purposes until the annuities had been satisfied. It was further argued on behalf of the plaintiffs that in the circumstances the trustees held on an express trust within the meaning of s. 25 of the Real Property Limitation Act, 1833, in which case the period of limitation would not even now have commenced to run.

In my view the trustees did not take the residue for all the purposes of the will because that was not the way in which the testatrix had devised her property. She did not make a general devise of her property to trustees and then direct them to apply it for certain purposes but granted certain legacies and annuities and then "subject as aforesaid" gave the residue to the trustees for charitable purposes. The effect of this was not to vest the residue in the trustees for all the purposes of the will but merely to create a charge on the residue for the payment of legacies and annuities if the personalty was insufficient for this purpose in accordance with the rule in *Greville v Browne* [1].

In the circumstances mentioned above the residuary estate would (if the gift to charity had been void) have devolved to the person on whom the law, in the absence of disposition, cast that species of property which in the case of realty would be the heir at law, who would take the property subject to the charge in accordance with the principles established in *Gravenor v Hallum*[2]. The legal estate would have vested directly in the heir at law as from the date

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[1] (1859) H.L. Cas. 689; [1843-60] All E.R. 888. [2] (1767) Amb. 643.

of the death of the testatrix in accordance with the law in force in England before the Land Transfer Act, 1897, which is the relevant law for the purposes of this case.

I am satisfied, in these circumstances, that the statutory period would (if the bequest for charitable purposes had been void) have commenced to run as from the date of the death of the testatrix and expired twelve years thereafter in accordance with the principles in *Churcher v Martin* [1]. The trustees, who were in possession, would not, in my view have held the residue on express trust for the heir at law and would have been entitled to rely on the statute (*In re Lacy* [2], and referred to in the note in para. 969 of Halsbury 2nd Edition Vol 20 p. 724).

For the reasons mentioned above I hold that the period of limitation would, if the gift for charitable purposes had been void under the Mortmain Act, have commenced to run as from the date of the death of the testatrix and expired on 25 July 1910.