IN RE ALLIE (DECEASED)

SUPREME COURT (Smith, C.J.): November 27th, 1953
(Civil Case No. 107/53)

[1] **Charities — charitable purposes — public benefit — general public utility not charitable purpose unless benefits public—trust no less charitable because incidentally benefits rich as well as poor:** All purposes of general public utility are not necessarily charitable: for a trust to be charitable as being beneficial to the community the public must benefit by the gift, though it is no less charitable because incidentally it benefits the rich as well as the poor in the community (page 342, lines 3–29).

[2] **Charities—charitable purposes—public benefit—provision of money to members of testator's family for expenses of visit to Freetown not charitable:** Where a testator purports to provide money "to defray the travelling expenses and maintenance of any member of my family who may come to Freetown on a visit from home at Jaber," such a devise is not charitable since it produces no benefit to the public and is invalid in that it offends against the rule against perpetuities (page 342, lines 30–37).

[3] **Charities—charitable purposes—test of charitable purpose—trust must be for relief of poor, advancement of education or religion, or other purpose beneficial to community:** "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community (page 341, line 40—page 342, line 3).

[4] **Charities—rule against perpetuities—valid charitable trust not void for perpetuity:** A trust which is in perpetuity is void on this account unless it is a valid charitable trust (page 341, lines 22–24).

[5] **Conflict of Laws—succession—immovable property—law applicable —Mohammedans—Mohammedan law applicable to intestate estate —English law ousts Mohammedan law to determine validity and effect of will made and probated under English law:** Where a deceased person was a native and a Mohammedan, Mohammedan law will be applied to determine the succession to his estate on intestacy; but where he leaves properties in tenures of English law in a will made and probated under English law, that being the general law of the Colony, English law will oust Mohammedan law and must be applied to determine the validity and effect of the will (page 341, lines 24–34).

[6] **Land Law—perpetuities—excepted interests—valid charitable trust not void for perpetuity:** See [4] above.

[7] **Succession—administration of assets—payment of debts—specific and residuary devises rank together in payment order—devisees of sold realty entitled to contribution from devisees of unsold realty proportional to value of realty as whole:** Specific devises and residuary devises rank together for the purpose of payment of the testator's debts; and if some of the real estate has to be sold to settle the debts, the devisees of such properties are entitled to a contribution from the devisees of those properties which have not been sold in proportion to their values in relation to the value of the real estate as a whole (page 345, line 28—page 346, line 9).

[8] **Succession — law applicable — Mohammedans — Mohammedan law applicable to intestate estate—English law ousts Mohammedan law to determine validity and effect of will made and probated under English law:** See [5] above.

[9] **Succession—wills—construction—"issue" means descendants only whereas "heirs" includes collaterals and ancestors:** In the construction of a will, the word "heirs" has a different meaning from "issue"; it includes collaterals and ancestors whereas "issue" is confined to descendants (page 343, lines 35–37).

[10] **Succession—wills—construction—testator's intention ascertained from will as whole—intention may be expressed or inferred from words of will or supporting circumstances:** The court must construe a will so as to give it its proper effect as a whole, regard being had to the language used, and to discover the intention of the testator, whether expressly declared or collected by just reasoning upon the words of the will or evidenced by the supporting circumstances where they can be called in aid (page 341, lines 6–11).

[11] **Trusts—express trusts—dispositions contrary to public policy—trust in perpetuity void unless charitable:** See [4] above.

An application was made to the Supreme Court to construe and determine the effect of three clauses of a will.

The testator was a Mohammedan with a number of wives and children, and also the owner of a considerable number of properties. In his will he directed, *inter alia*, that: certain properties be rented out and the money realised used for paying overheads, with the balance to be used for "travelling expenses and maintenance of any member of my family who may come to Freetown on a visit from home in Jaber"; the residue of the estate to be left to his children subject to certain conditions as to their age at death, when they died, and whether they left issue of their own; and any mortgage debts to be paid out of the rents received from the leased properties, the specific legacies and other sums of money, but not by sale of any of the properties. The testator left substantial debts but not enough

ready money to pay for them. All his children except one survived him, and that one died under 21 years of age leaving an infant son, one of the claimants. The court was asked to construe and determine the effect of the three clauses in question.

Cases referred to:

(1) *Baddeley* v. *Inland Rev. Commrs.*, [1953] Ch. 504; [1953] 2 All E.R. 233; on appeal, *sub nom. Inland Rev. Commrs.* v. *Baddeley*, [1955] A.C. 572; [1955] 1 All E.R. 525.

(2) *In re Good, Harington* v. *Watts*, [1905] 2 Ch. 60; [1904–7] All E.R. Rep. 476.

(3) *In re Grove-Grady, Plowden* v. *Lawrence*, [1929] 1 Ch. 557; [1929] All E.R. Rep. 158.

(4) *Income Tax Special Purposes Commrs.* v. *Pemsel*, [1891] A.C. 531; [1891–4] All E.R. Rep. 28, *dictum* of Lord Macnaghten applied.

(5) *In re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451; [1895–9] All E.R. Rep. 154, considered.

(6) *In re Wedgwood, Allen* v. *Wedgwood*, [1915] 1 Ch. 113; [1914–15] All E.R. Rep. 322, considered.

The Official Administrator appeared in person.
Mahoney and *Zizer* for the claimants.

SMITH, C.J.:

In this petition I am asked to construe and determine the effect of three clauses of the will of the late Mormodu Allie.

The testator, who made the will on August 30th, 1946, was a Muslim and the owner of a considerable number of properties and had a number of wives and children. I am told that in his will he left something to every one of his children who were then living, and that all these children survived him with the exception of one daughter Kadia who died at Medina under 21 years of age leaving an infant son.

Although the estate as a whole is solvent and of considerable value, the testator left substantial debts but very little ready money to pay them, and it has been necessary to sell some of his properties in order to discharge these debts. One of the points to decide is whether Kadia's infant son is entitled to the properties left to his mother under the will, and another is as to the construction and validity of the devise in cl. 26 of certain properties to the trustees of the will on trust to defray the travelling and living expenses of

any member of the testator's family who may visit Freetown from his home at Jaber.

A general perusal of the will indicates that it was not drawn by a skilled hand and the draftsman used a number of legal terms in the will, evidently without any clear idea of their real meaning and effect. Nevertheless, it is my duty to construe the will so as to give it its proper effect as a whole, regard being had to the language used, and to discover the intention of the testator, either expressly declared or collected by just reasoning upon the words of the will or evidenced by the supporting circumstances where they can be called in aid.

I shall deal with the three points in the inverse order in which I have mentioned them and decide first the meaning and effect of cl. 26. In that clause the testator devised to his executors and trustees eight properties in Freetown—

> "upon trust that they shall put them out to rent and utilise the rents accruing therefrom for the payment of the respective rates, taxes and repairs, and the balance to be deposited by them in the bank to defray the travelling expenses and maintenance of any member of my family who may come to Freetown on a visit from home at Jaber."

The trust, on the face of it, is in perpetuity, and it is plain that if English law is to be applied it is void on this account unless it is a valid charitable trust. On the other hand, it is suggested that as the testator was a native and a Mohammedan, and the trust is one that would be valid under Mohammedan law, I should apply that law in determining its validity. I do not consider that I can do this. The properties concerned are in tenures under English law. The document creating the trust is a will made and probated under English law, which is the general law of the Colony. Although, as the testator was a native, Mohammedan law might have become applicable to distribute his estate on intestacy, the fact that he made a will in the form recognised by English law leads me to conclude that I must apply English law in determining its validity and effect.

The English law on charitable trusts has a long and complicated history, but it is sufficient here if I go back to the case of *Income Tax Special Purposes Commrs.* v. *Pemsel* (4), where Lord Macnaghten gave what has since been accepted as the classical definition of a charity in these words ([1891] A.C. at 583; 65 L.T. at 637):

> "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of

education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."

The trust in this case is not confined to benefiting only the poor relations of the testator. Rich relations and poor alike are entitled to be maintained out of it whenever they may visit Freetown. It therefore does not fall in the first class defined by Lord Macnaghten, nor is it in any way connected with the second or third. There remains therefore the fourth class. Is it a trust for other purposes beneficial to the community? Though, as pointed out by Lindley, L.J. in *In re Macduff, Macduff* v. *Macduff* (5) ([1896] 2 Ch. at 466; 74 L.T. at 709), all purposes of general public utility are not necessarily charitable, it has been held under this class that a trust for the provision of humane slaughtering of animals was a valid charitable trust (*In re Wedgwood, Allen* v. *Wedgwood* (6)) but a trust to establish a sanctuary for wild animals was not (*In re Grove-Grady, Plowden* v. *Lawrence* (3)). A valid trust was created by a bequest to the officers' mess of a regiment to provide a library and plates, but another bequest in the same will of two houses for the use of old officers of the same regiment at a small rent during their life was not charitable and was invalid, "old" being there construed as "former" as opposed to "aged": see *In re Good, Harington* v. *Watts* (2). In this case Farwell, J. indicated that if he could have construed the word "old" as meaning "aged" he would have held the trust to be valid.

The test to be applied is: "is the public benefited by the gift?" In this instance I can see no benefit accruing to the public by the payment of travelling expenses and maintenance of members of the testator's family who may visit Freetown, and I hold that, as it does not fall within the fourth class as defined by Lord Macnaghten and as it offends against the rule against perpetuities, it is invalid and the properties therein devised lapse into the residue of the estate.

Since writing the above, I have read the case of *Baddeley* v. *Inland Rev. Commrs.* (1), in which the question is most elaborately discussed, and I find that the reasoning and conclusions in that case support my finding.

I now turn to the construction of cl. 33 of the will, which is as follows:

> "And I further declare and direct that in case any of my children herein named shall die whether in my lifetime or after my decease under the age of 21 years or shall die in my lifetime after attaining that age but without leaving issue surviving him or her or them I direct the estate share and interest under this my will of such child or children so dying shall go and belong to and devolve upon and become vested in my other children herein named in equal shares and as tenants in common."

If the clause had not appeared in the will, the Wills Act, 1837 would have come into effect and the issue of any named child who predeceased the testator would have taken the gift intended for the dead parent. On the other hand, any child, of whatever age, who survived the testator would not have lost the gift if they subsequently died under 21, and, instead of the gift of any child who might die without issue before the testator lapsing into the residue, this clause substituted a gift over to surviving children. It is unlikely that either the testator himself or the draftsman of his will had any clear idea of how the Wills Act would operate in these respects and they were trying to make somewhat similar provisions.

Although I have no evidence before me as to exactly which of the testator's children already had issue or how old the children were when the will was made, though cl. 31 indicates that some of them were minors at the time, I note that in most of the specific devises the testator gives the properties concerned to trustees "upon trust for the child his heirs and assigns in fee simple and as tenants in common," though at times he uses different wording.

These particular words, of course, make nonsense in most of the clauses in which they appear. So far as the testator is concerned he cannot make the child's "assigns" tenants in common with the child, but they do show, in my opinion, a plain intention on the part of the testator that the child should take an estate of inheritance which would pass on in due time to his heirs. "Heirs" has a different meaning from "issue"; it includes collaterals and ancestors while "issue" is confined to descendants. In this clause the testator is purporting to deal with three contingencies: a child dying in his lifetime under 21, a child dying after him and still under 21, and a child over 21 predeceasing him. In the third case he plainly makes the gift over only if that child left no issue surviving. The

question I have to decide is whether this condition of non-survival of issue is tacked on to the other two contingencies. If, for instance, this condition of issue is not tacked on to the second contingency, a child who survived the testator and yet died under 21, whether leaving issue or not, would in effect take only a life estate and then the gift over to the other children would operate. If the testator had written:

> "And I further declare and direct that in case any of my children herein named shall die whether in my lifetime or after my decease under the age of 21 years or in my lifetime after attaining that age but without leaving issue surviving him her or them,"

the proviso as to issue would clearly have applied to all three groups. Does it make any difference to the meaning when he repeated "shall die" in front of the third group? The repetition of the verb does emphasise the distinction between the two main classes, *i.e.*, those who die under 21 and those who die after attaining that age; but the introduction of the conjunction "but" introduces another pause in the run of the passage. He does not say "shall die in my lifetime after attaining that age without leaving issue," so describing one group all in one breath, so to speak. He pauses by inserting "but." Furthermore the survival of issue is not at the time of the testator's own death but at the time of the death of the child. He says "without leaving issue surviving him her or them" not "surviving me." These factors, coupled with the intention expressed that, apart from the question of surviving, the various children should take the full fee simple of the properties devised to them, leads me to construe the testator as intending to cut down these estates only if the original devisees left no issue. I therefore hold that on the proper construction of cl. 33, Kadia's infant child is entitled to the properties devised to her.

I now turn to cl. 30 of the will, which is as follows:

> "I hereby declare and empower my said executors and trustees to allow no sale of any of the properties herein devised and that any house devised herein, and being under shortage or any charge, such mortgage debt should be paid by my said executors and trustees from the rents of all my properties as well as my funeral testamentary expenses and just debts (if any) and any legacies bequeathed by this my will."

Though I must also note the provision in cl. 31 to the effect that during the minority of any of the testator's children the trustees

were directed to rent the properties devised to such minor, and after paying outgoings to pay such portions of the residue of the rent as they shall think fit to the guardian of such devisee to be applied for maintenance, etc., this is "subject however to the payments as mentioned in cl. 30 of this my will."

I am told that there were no mortgages or other encumbrances on any of the testator's properties at the time of his death. He bequeathed no legacies in his will, but, as I have already observed, he left substantial unsecured debts far beyond the value of his personalty. It was suggested that cl. 30 is wholly invalid, in as much as its effect is to prevent the due payment of the testator's debts, but that is not so. It is not binding on the testator's creditors and cannot affect their rights to be paid at the proper time; nor can it restrict the power of the court to allow the executors to sell. I construe the clause as charging the rents of all the properties with the payment of the debts. It is clear too that the direction to pay debts out of the rents does not have the effect of exempting personalty. Therefore the primary fund for the payment of debts is such personalty as the testator may have left. This, however, I am told, is not sufficient and it is necessary to resort to the realty to settle the balance. In cl. 30 the testator appropriates the rents of all properties for this purpose, and in providing for the disposal of the income from properties devised to minors during minority he directs how the income shall be applied "subject however to the payments as mentioned in cl. 30 of this my will." I do not read this as casting a heavier burden for the payment of debts upon these particular properties as distinct from the properties devised to other devisees.

As the testator made a devise of the residue of his real property and there is no intestacy as to any of his property, there is no property within this category which might otherwise have been the next to resort to before touching specific devises. When the case was being argued in court, I was under the impression that properties in the residuary devise should be used to pay debts before specific devises were touched. That is the law in England now, by virtue of the Administration of Estates Act, 1925. This Act, however, does not form part of the law of Sierra Leone, and I therefore have to turn to English law as it stood before this Act was passed. A reference to this makes it plain that specific devises and residuary devises rank together. I am informed that some of the real estate has been sold to pay debts. The particular devisees of these estates are entitled to a contribution from those other devisees whose

properties have not been sold, in proportion to the values of these latter properties in relation to those that have been sold. For the purposes of valuation the prices at which the properties were sold are to be taken as their respective values. As to the unsold properties, they will have to be valued, if this has not already been done, and each devisee will have to pay that proportion of the total debts (less the amount realised from personalty) which his particular property or properties bear in relation to the total value of all the real estate. This will be a matter of accounting which the administrator of the estate will have to work out, and I give him liberty to apply to the court if he should require further directions.

The costs of all parties who have appeared before me and argued these questions are to be paid out of the estate.

Order accordingly.

MARKE *v.* JOHNSON

SUPREME COURT (Boston, Ag.J.): December 2nd, 1953
(Civil Case No. 425/53)

[1] **Criminal Law—homicide—killing by fetish—not punishable under Fangay Ordinance (cap. 78) but only as homicide if elements of offence proved:** The Fangay Ordinance (*cap.* 78), which makes it a criminal offence for anyone to practise fangay, was intended to prevent persons practising frauds and extorting money by the false pretence of possessing supernatural powers or occult means; therefore it does not include killing by fetish which is punishable only as murder or manslaughter if the ingredients of either offence are present (page 348, lines 11–28).

[2] **Criminal Law—witchcraft—practice of fangay—Fangay Ordinance (cap. 78) designed to prevent fraud and extortion by pretence of occult means or supernatural power—alleged killing by fetish not fangay:** See [1] above.

[3] **Tort—damages—special damages—slander—special damage must be proved unless slander actionable per se:** In an action for slander, special damage must be proved except in certain cases in which the words are held to be actionable in themselves without proof of special damage (page 347, line 40—page 348, line 2).

[4] **Tort—defamation—slander—slander actionable per se—imputation of criminal offence—words accusing person of killing by fetish do**