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CASSIM *et al. v.* PERIA TAMBY *et al.*

D. C., Mátara, 1,048.

Charter of 1801, clause 32—Mohammedan Law—Will, construction of.

The will of a person falling under the designation "Mussulman native," as used in the Charter of 1801, must be construed, not according to the Roman-Dutch Law, but according to the laws and usages of the Mussulmans, as provided by clause 32 of that Charter.

THE facts of the case appear in the judgment of BONSER, C.J.

Layard, A.-G., for appellants.

Dornhorst, with *Wendt*, for respondents.

15th September, 1896. BONSER, C.J.—

This is an action to recover an undivided moiety of a garden situated at Mátara, which was bequeathed by the will of the testator who died in 1826. The testator appears to have had two children then living, a daughter who was betrothed, and being of tender years not given in marriage to her husband, and also a son, who was also of tender years. The testator by his will gave certain charitable and other legacies and annuities.

With respect to certain immovable property, which was specified in a certain schedule appended to the will, he directed that his nephew, the intended husband of his daughter, whom he had appointed executor, should take charge of this property until his children respectively attained majority, when the executor was to deliver over possession to the children of the immovable property bequeathed to them respectively with the accumulations. The land which is the subject of the present action was included amongst the immovable property which was bequeathed to the son. In the year 1839 the executor sold this land, and it has been enjoyed ever since, until the institution of this action, by the purchaser and his successors in title, without any disturbance, except as to one undivided half thereof. It is admitted that at the time of the sale both the children were minors. I should mention that one undivided half of this land was bequeathed to the son, and the other to the daughter. In March, 1857—the daughter being then dead—her children instituted an action against the purchaser to recover the half share of the garden, which had been devised to their mother, on the ground that the clause of the will which I now proceed to read constituted a *fidei commissum* in their favour. The clause is as follows :—

"It is further declared that the immovable property be-
"queathed to my said two children and enumerated in the 7th and
"8th paragraphs of the account hereunto annexed be always

" possessed by my said two children or their descendants, but that " they cannot at any time either sell or mortgage the same to " any person whomsoever." The District Judge who heard the case appears to have decided the case against the plaintiffs. The case then came on in appeal to this Court, which decided that the provision in the will did create a valid *fidei commissum*, and that the plaintiffs were entitled to recover a moiety of the said land. Now, it will be seen that this judgment construes this will as being a will governed by the Roman-Dutch Law. But the testator was what is commonly known as a " Moorman "—one of that class who in the Charter of 1801 were denominated " Mussulman natives." I cannot gather from the report of the case that this fact was present to the minds of the learned Judges who decided this case. It seems probable that it was treated by all parties as being a will which was governed by the Roman-Dutch Law. If I were satisfied that this Court in 1867 had deliberately determined that this will was governed by the Roman-Dutch Law I should hesitate before I decide otherwise, and in any event I should not venture to dissent from the interpretation put upon that will by this Court in 1867.

It seems to me, however, that this will ought not to be construed by the Roman-Dutch Law, but in accordance with the laws and usages of the Mussulmans, as provided by clause 32 of the Charter of 1801, which Charter was in force at the time this will took effect at the death of the testator. If the attention of the Judges had been called to this point, I have no doubt they would have decided the use according to the laws and usages of the Mussulmans, for I find that the same Judges in 1869, in a case reported in Vanderstraaten, p. 9 (D.C., Colombo, 51,428), applied Mohammedan Law to the construction of a very similar will. In the present case the District Judge has followed, as he was bound to do, the former decision of this Court. But in my opinion the case must be sent back that the true construction of the will may be determined according to Mohammedan Law. The principal questions, it seems to me, on which it will be necessary to ascertain what the Mohammedan Law is, are, (1) as to whether, under the circumstances of the case, the executor had power to sell this property: it is quite clear that had it been a will governed by the Roman-Dutch Law the executor would not have had power; (2) to what extent, if any, the clause restricting alienation binds this property. We will leave the District Judge a free hand in this matter. In some cases I see that Moorish assessors have associated with the District Judge. He can associate with him or not Moorish assessors as he may think best. He will hear such evidence as

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may be brought before him, and have recourse to such sources of information as may be available with respect to Mohammedan Law as it prevails in this Colony. The costs of this appeal will be costs in the cause.

WITHERS, J.—

I fully concur. In my own part also, if this will is one which should be construed according to Roman-Dutch Law, I should not hesitate to follow the interpretation put upon it by the Judges before whom the former case was heard in appeal.

As this is the will of a Mussulman, I feel confident that it ought to be construed according to the laws and usages of Mussulmen in Ceylon.

The Code of special laws concerning Moors or Mohammedans relating to matters of succession, rights of inheritance, or other incidents occasioned by death was sanctioned by the Governor in Council in 1806, and is still in the statute book; and in matters of this description, for which this Code does not specially provide, it has been usual for the Courts of this Island to ascertain what Moorish Law or usage applies to the particular case.