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February 26.

TILLEKERATNE *v.* ABEYESEKERE *et al.*

D. C., Colombo, No. 2,925.

[*Judgment of the Privy Council.*]

Present :—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, SIR RICHARD COUCH.

Fidei commissum—*Construction—Descent of property*—Jus accrescendi —*Ordinances Nos. 21 of 1844, 10 of 1863, 7 of 1871.*

Simon Gomes Appuhami and his wife Maria Perera Hamine made a joint will in 1858, which contained the following clause :—

" After the debts which we have incurred have been satisfied, all " the movable and immovable property belonging to us shall be " possessed by the survivor of us ; after which the three children " of Ana Catherina Gomes Lama Etana (the deceased of our two " children), viz., Dona Johana Maria Abeyesekere Hamine, Don " John Paules Abeyesekere Appuhami, and Dona Loisa Abeyesekere " Hamine, these three, and our second daughter Maria Martina " Gomes Lama Etana, the three children of the aforesaid daughter, " and the second daughter shall divide into two and inherit " according to custom, they and their descendants, and possess, " without interruption. Furthermore, if there remain any balance " still due after our paying the said debts during our lifetime from " the income of the property, the same shall be paid by selling a " land situated beyond the gravets at Colombo. Should there " be a balance still remaining due, it is directed that the same shall " be paid by selling a land situated at Colombo, which the children " do not wish to retain ; and, moreover, after the said debt is " satisfied, the other lands within the gravets of Colombo are " created *fidei commissum*, so that they may not be sold, mort- " gaged, or otherwise alienated ; and in order that the said power " (*fidei commissum*) may be effectual, we direct that the heirs " shall pay to St. Joseph's Church at Colombo the sum of five " shillings a year."

Two of the three grandchildren above-named survived both their grandparents, the testator and testatrix. The other, Don Paules Abeyesekere, survived his grandfather, but predeceased his grandmother, leaving him surviving his wife, Cecilia Perera Samarasinhe, and a daughter Isabella.

Isabella survived both her grandparents and died unmarried and intestate in 1883, leaving her surviving her mother. Plaintiff, as administrator of Isabella's estate, brought this action to recover her one-sixth share of the estate, of which the defendants were in possession, claiming to have succeeded Isabella's father under the law of *fidei commissum*.

Held, that the moiety settled upon the grandchildren was subject to one and the same *fidei commissum*, and that the bequest was not in the form of a disposition of one-third share of the whole to each of the institutes, but of a gift of the whole to the three institutes jointly, with benefit of survivorship, and with substitution of their descendants.

Held also, that Ordinances Nos. 21 of 1844, 10 of 1863, and 7 of 1871 have in no way altered the law of *fidei commissum*.

For these reasons the plaintiff was held not entitled to recover Isabella's one-sixth share of the estate.

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APPEAL from a judgment of the Supreme Court. The facts are sufficiently set forth in the judgment of the Privy Council.

Crackanthorpe, Q.C., and *Rawlins, Q.C.*, for the defendants, appellants.

No appearance for plaintiff, respondent.

The judgment of the Privy Council was delivered as follows, on the 26th February, 1897, by Lord WATSON :—

Simon Gomes Appuhami and Maria Regina Perera Hamine, two Sinhalese spouses, executed a joint will disposing of their whole estate, real and personal, in November, 1858, at which time their issue consisted of one unmarried daughter and three children of a daughter deceased. The marriage was dissolved by the death of Simon Gomes in 1865. His widow died in the year 1883.

By the will it was provided that all the property belonging to the testators, after payment of the debts which they had incurred, should be possessed by the survivor of them ; after which " the " three children of Ana Catherina Gomes Lama Etana (the deceased " of our two children), viz., Dona Johana Maria Abeyesekere " Hamine, Don John Paules Abeyesekere Appuhami, and Dona " Leisa Abeyesekere Hamine, these three, and our second daughter " Maria Martina Gomes Lama Etana, the three children of the " aforesaid daughter, and the second daughter shall divide into two " and inherit according to custom, and they and their descendants " possess without interruption. Furthermore, if there remain any " balance still due after our paying the said debt during our life- " time from the income of the property, the same shall be paid by " selling the land situated beyond the gravets of Colombo. Should " there be a balance still remaining due, it is directed that the " same shall be paid by selling a land situated at Colombo which " the children do not wish to retain ; and, moreover, after the " said debt is satisfied, the other lands within the gravets of Colombo " are created *fidei commissum*, so that they may not be sold, mort- " gaged, or in any way alienated ; and in order that the said power " (*fidei commissum*) may be effectual, we direct that the heirs shall " pay to St. Joseph's Church at Colombo the sum of five shillings " annually." Two other bequests are made by the will, but the passage quoted contains the whole provisions which have any bearing upon the matter of this appeal.

At the death of the surviving testator all the descendants appointed *nominatim* to take in that event were alive, with the single exception of John Paules, the grandson, who had died in

November, 1868, leaving an only child, Isabella. Upon the determination of the surviving spouse's usufruct, it appears that probate of the will was obtained, and that thereafter their daughter entered into possession of the moiety destined to her, whilst one-third share of the remaining moiety was possessed by each of their two surviving grandchildren and by their great grandchild Isabella, who took the share of which her father was the institute.

Isabella died unmarried and intestate in October 1883, and the share which she had enjoyed was taken possession of, and was held by the appellants, Dona Maria and Dona Leisa, her paternal aunts, until August, 1892, when the present action was brought against them, before the District Court of Colombo, by the respondent, who is married to the widow of deceased John Paules. The action is in the nature of an ejectment suit ; and the plaintiff's title consists of letters of administration duly appointing him to administer the estate of his stepdaughter Isabella. His success must therefore depend upon his being able to establish that at the time of her death in 1883 a beneficial interest in the one-third of the moiety which is in question had vested absolutely in Isabella, and was descendible to her heirs *ab intestato*.

The Judge of the District Court, Mr. D. F. Browne, dismissed the action with costs ; the learned Judge holding that the descent of the share in dispute continued, after the death of Isabella, to be governed by the *fidei commissum*. On appeal to the High Court his decision was set aside, and judgment entered for the respondent by Lawrie and Withers, J.J., who were of opinion that the share had vested absolutely in Isabella, unaffected by the trusts of the will. The case was heard in review by a Full Bench consisting of Lawrie and Withers, J.J., together with Mr. D. F. Browne, acting as a Puisne Judge, when, all the learned Judges retaining their original views, the order of the High Court was confirmed.

The present appeal having been heard *ex parte*, their Lordships think it right to notice that in his first judgment Mr. Justice Lawrie directed attention to the fact that neither in the respondent's plaint nor in the defence is there any averment to the effect that the lands in controversy are situated within the gravets of Colombo, although, if not so situated, they would not be within the terms of the *fidei commissum*. There is, no doubt, a defect of averment upon that point ; but, on the other hand, the pleadings of both parties appear to their Lordships to be expressly framed upon the assumption that the lands are within the *fidei commissum*, and, that according to its construction one way or another the rights of the appellants must be determined. Their Lordships

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find that Mr. Justice Withers, in his original judgment, states that " the lands referred to are within the gravets of Colombo, and " are admittedly the subject of a *fidei commissum* ;" and that the opinions delivered on a re-hearing by the three learned Judges all proceed upon that footing. In these circumstances their Lordships are satisfied that the appellants are entitled to have the case disposed of upon the same footing in this appeal.

Apart from the provisions of certain Ordinances enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council, to which they will subsequently refer, the conflicting claims of the appellants and the respondent appear to their Lordships to depend, not upon any disputed principle of the Roman-Dutch Law, but upon the construction of that part of the will which regulates the destination of that moiety of the testators' estate which was devised to the three children of their deceased daughter and their descendants. If the will constitutes three *fidei commissa*, severally applicable to the shares destined to each of these children, the respondent would be entitled to prevail; because in that case the descendants of John Paules having become extinct in her person, the share of Isabella was unaffected by any substitution, and therefore belonged to her in fee. On the other hand, if the entire moiety was the subject of the *fidei commissum*, the right of Isabella was, at the time of her death, burdened with a substitution in favour of the institutes and lineal descendants of the institutes, and no interest in the share which she enjoyed passed to her heirs-at-law. There being no controversy raised in this suit with regard to the moiety possessed by Maria Martina, the daughter of the testators, it is unnecessary to consider whether both moieties of the estates are included in the *fidei commissum* or are subjects of separate *fidei commissa*.

Their Lordships have had little difficulty in coming to the conclusion that according to the terms of the will the entire moiety settled upon grandchildren is made the subject of one and the same *fidei commissum*. The bequest is not in the form of a disposition of one-third share of the whole to each of the institutes, but of a gift of the whole to the three institutes jointly, with benefit of survivorship, and with substitution of their descendants. Following the terms of the gift, the substitution must be read as referring to the whole estate settled upon the institutes as a class. The words " and inherit according to custom" were obviously not meant to imply that the estate was to devolve in terms of law, so as to defeat the interests of heirs-substitute. They refer to the succession, not of the substituted heirs, but of the institutes, and simply indicate that the shares bequeathed to them are the same

which they would have taken had there been no will. Their Lordships are accordingly of opinion that no right of succession could arise, on her decease, to the heirs-at-law of Isabella, who were not in the direct line of descent from the testators, so long as any person was in existence who could show the title either as an institute or as a substitute under the provisions of the will.

It appears to have been argued in the Court below on behalf of the respondent, that assuming the effect of the will to be that which their Lordships have just indicated, the law has been altered by Ordinances relating to the rights of joint tenants so as to give Isabella an absolute fee of the third share which she possessed. The Ordinances relating to the matter of joint tenancy are No. 21 of 1844, No. 10 of 1863, and No. 7 of 1871. Mr. Justice Lawrie does not refer to or rely upon any of these enactments as a ground of judgment; but Mr. Justice Withers was of opinion that, under the provisions of the Ordinance of 1844, the destination of the will must be regarded as a devise to tenants in common, *sine jure accrescendi*.

Section 7 of the first of these Ordinances enacts that when the owner of any landed property, or of an undivided share or interest in any such property, shall die after the Ordinance shall commence and take effect, and two or more persons become co-proprietors of undivided shares or interests in such property, whether under the will of such deceased owner or as his heirs-at-law, it shall be the duty of the executor or administrator to make partition of the property among all the persons entitled to shares or interests therein, whether as devisees or heirs-at-law of the deceased.

Section 2 of the Ordinance of 1863 provides that, when landed property shall "belong in common" to two or more owners, it shall be competent to one or more of such owners to compel a partition of the property, and also that, if partition be impracticable, the Court may direct a sale.

Section 3 of the Ordinance of 1871 enacts that all property, whether movable or immovable, which any persons shall be possessed of or entitled to, in equal undivided shares, as trustees, shall be held by such persons as joint tenants, with the right or quality of survivorship between or amongst them in the same manner as subsists between or amongst joint tenants by the Law of England, notwithstanding anything by the Ordinances No. 21 of 1844 and No. 10 of 1863 to the contrary provided.

Not one of these enactments professes to deal with or alter the law of *fidei commissum*, and in their Lordships' opinion they cannot be construed as having that effect. The first and second of them appear to be limited to cases in which the persons

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interested, whether as joint tenants or as tenants in common, are full owners, and are not burdened with a *fidei commissum*; and even if they were not held to be so limited, the partition which they authorize would not necessarily destroy a *fidei commissum* attaching to one or more of the shares before partition. The Ordinance of 1871 has no bearing upon the point, its enactments really being intended to prevent a lapse of trust, title, and administration, in the event of the death of one or a body of trustees holding equal undivided shares, although their title may not be that of joint tenants.

Their Lordships will humbly advise Her Majesty to reverse the judgments appealed from and to restore the judgment of the District Court Judge, with costs to the appellants in both courts below. The respondent must pay to the appellants their costs of this appeal.