MENDIS v. MOHIDEEN.

D. C., Colombo, 13,506.

1902.
January 16.

Spouses married in community—Joint will as to massed estate—Survivor to succeed to the whole estate and after death the estate to devolve on others—Husband dying, widow leases for a term of eight years—Death of widow before expiry of lease—Action by executor of the joint will against tenant for rent due for use and occupation—Adiation of will by survivor—Right of survivor to pass title to a bonâ fide *purchaser.*

Where two spouses who were married in community of property made a joint will granting to the survivor of them the whole estate and providing that after the death of the survivor it was to devolve on certain persons. and where the widow surviving leased a house for eight years and died when there were about five years more to run. and where the executor of the joint will sued the assignee of the lease for rent due for use and occupation,—

Held, that the plaintiff was not entitled to succeed without determination of the issue whether the assignee of the lease was a *bonâ fide* purchaser or not.

Per BONSER, C.J.—In the case of a joint will, a survivor may repudiate it after the death of the first dying spouse and stand upon his or her legal rights as the surviving member of the community.

If the survivor adiates the will, he or she is in equity at least not entitled to act inconsistently with that will. He cannot make a new will or dispose of. the property by gift, but the *dominium* over the share belonging to the survivor continues to be in him. and he can pass title to a *bonâ fide* purchaser.

TWO spouses, Gabriel Fernando and Poroliana, who were married in community of property, made a joint will granting to the survivor of them the whole estate, and after the death of the survivor it was to devolve on certain persons. Poroliana, surviving her husband, let a house included in the estate to one Juan on 13th August, 1896, for eight years. She died on 5th March. 1899. The lessee sublet it to defendant for three years from April. 1899. Probate was taken out on 5th June of the same year.

The executor of the joint will (Francisco Mendis) sued the assignee of Juan's lease for rent due for use and occupation of the house since Poroliana's death.

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The issues framed by agreement were (1) whether Poroliana was entitled only to a life interest in the houses; and (2) whether the defendant was liable for use and occupation.

The District Judge (Mr. J. H. de Saram) found as follows:--

"The defendant had a defence to this action for use and occupation, but as one of the issues agreed to by his proctor, is, whether Poroliana Mendis was entitled to only a life interest in the houses in question, the plaintiff must succeed if that issue is determined in the affirmative.

"It seems to me, upon reading clause 4 of the last will of Gabriel Fernando and Poroliana Mendis, that the survivor of them was entitled only to a life interest. That was their intention, and that is the plain meaning of clause 4. Poroliana Mendis survived her husband. She is dead. The defendant is in possession under a lease executed by her, which has been assigned to him. The plaintiff, who is the executor of her last will, must succeed. I answer the first issue in the affirmative, and give the plaintiff judgment as claimed and costs."

Defendant appealed.

Van Langenberg, for appellant.—The joint will nowhere specifies the extent of the survivor's interest in the common estate. Provision is made only as to devolution of property after the death of both spouses. In cases decided in the Cape it has been held that. where a mutual will has massed the joint estate and the survivor has adiated and accepted benefits under the will and then transfers or mortgages the joint estate to a *bonâ fide* purchaser or mortgagee. the transfer or mortgage as to half the joint estate, *i.e.*, the survivor's half, is valid and cannot be set aside by the legatees, who in such a case have a personal claim against the survivor for damages only. Juta's *Leading Cases*, 121. In the present case, the widow adiated the will and granted the lease for a good consideration. The executor cannot repudiate it, so as to injure the sub-lessee. He is at least entitled to hold the half share of the widow, being a *bonâ fide* holder of her interest.

Pieris, for respondent.—The question is whether the lease is good after the death of the widow. The lessee was in rightful possession up to her death, but since that event the executor is bound to collect rent for the benefit of the estate. The rent claimed is tantamount to damages for unlawful possession. The doctrine prevailing in the Cape has been carried much further than the law as understood in Ceylon.

Van Langenberg replied.

16th January, 1902. BONSER, C.J.—

I think this appeal must succeed, and the action was misconceived.

The facts of the case are shortly these. One Gabriel Fernando was married in community of property to one Poroliana. and during the existence of the community became possessed of a house in Colombo street, Kandy. The spouses made a joint will by which they left, amassed together, all their property, and provided that the survivor should enjoy the property during his or her life, and that after the death of the survivor the property should be divided amongst certain persons named. The husband died first. The surviving widow purported, after his death, to grant a lease of this property to one Juanis for eight years, leasing the whole of this house, not merely her share of it. She then died, and the present plaintiff in this action was the executor of the joint will, and he, having proved both wills, became the legal personal representative of both spouses. Juanis sublet the premises for three years to the defendant at an increased rent. The executor of the joint will brought an action against the defendant for what he called the use and occupation of these premises, and the District Judge gave judgment accordingly.

It seems to me that in this he was wrong, and that the matter could not be disposed of in such a summary way. The question of joint wills is one involved in some obscurity. There is no doubt that a survivor in the case of a joint will may repudiate that will after the death of the first dying spouse, and say that he or she will not be bound by it, and may refuse the benefits conferred by the will and stand upon his other legal rights as the surviving member of the community. It is also clear that if the survivor accepts the benefits given by that joint will and, what is called, adiates the will, he or she is in equity at least not entitled to act inconsistently with that will. He cannot make a new will or dispose of the property by gift, but it has been held in certain cases by the Cape Courts that the *dominium* over the share belonging to the survivor is still in the survivor after the death, and that the survivor is able to pass a title to *boná fide* purchaser. The person who takes no notice that the survivor is acting inconsistently with the will after having accepted its benefits is not considered to be a *boná fide* purchaser, and any mortgage or conveyance is liable to be set aside on the ground of notice.

In the present case the question is not determined whether the widow did adiate this will or, if she did, whether the lessee was a *boná fide* purchaser of the interest of the widow, because

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it was argued for the defendant that he was entitled at all events to be paid his interest in the share of the surviving widow in the terms granted by the lease. That would seem to depend on this question, whether he was a *bonâ fide* purchaser or not.

This question not having been considered or even raised in the Court below, we think that the just course will be to leave the plaintiff if he thinks fit to institute further proceedings.

WENDT, J.—I am of the same opinion.