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ALWIS *v.* JUANIS APPUHAMI.

D. C., Colombo, 16,798.

Trustee—Ordinance No. 7 of 1871, ss. 4, 5—Trustee appointed under a post-nuptial settlement deed—Death of trustee without appointing a successor—Successor nominated by District Court—Power of such trustee to substitute another person in his place.

Where a postnuptial settlement deed creating a trust contained a power to appoint a new trustee, and, in the event of the District Court appointing such trustee, that he should have the power to appoint a new trustee,—

Held, that the trustee appointed by the Court can lawfully exercise that power, and appoint a new trustee in his stead.

IN this case the plaintiff, claiming to be the trustee of the post-nuptial settlement of one James Perera and Alice Perera, sued the defendants on a bond, whereby it was alleged the first defendant became bound and indebted in a sum of Rs. 1,500 to one Don Bastian Perera Abeyesekere as trustee for the time being of the said postnuptial settlement.

The plaint also alleged that the said Don Bastian Perera Abeyesekere died without appointing a successor, and that the District Court of Colombo nominated Benedict Oliver Dias trustee

of the said postnuptial settlement, and that the said Benedict Oliver Dias appointed the plaintiff trustee in his stead.

A preliminary issue was framed, whether it was competent for Benedict Oliver Dias to appoint the plaintiff as trustee in his stead, and the learned District Judge (Mr. Joseph Grenier), by order dated 5th May, 1903, held as follows:—

"The preliminary issue was framed by me in this case with the consent of both parties, and upon its determination would depend whether or not the plaintiff is entitled to maintain this action. The facts relating to this issue are admitted, and the only question is whether it was competent for Benedict Oliver Dias to appoint a trustee in his place of the postnuptial settlement pleaded in the plaint. It was submitted for the defendant that, although Dias had in point of fact exercised the power of substitution by indenture dated the 11th July, 1900, whereby he substituted the present plaintiff as trustee, yet that he had not the power to do this, but that reference should have been made to the Court under the provisions of Ordinance No. 7 of 1871, and that the Court should have appointed a trustee. It is necessary, therefore, to examine the appointment of B. O. Dias by the Court to ascertain that powers of substitution were vested in him. By order dated the 6th May, 1897, in special case No. 128, it was ordered and decreed that Mr. B. O. Dias of Panadure be and is hereby appointed trustee under the indenture dated the 23rd and 27th days of January, 1885, in the room and place of the late Don Bastian Perera Abeysekara Tillekeratna, Mudaliyar, the deceased trustee, with as full and similar powers as the said Don Bastian Perera Abeysekara Tillekeratna, the deceased trustee, had under the said indenture of the 25th and 27th day of January, 1885.

"Now it is plain that the appointment by the Court placed Dias on the same footing with the deceased trustee in regard to the exercise of certain powers. Were these powers limited only to the administration of the trust property, or did they embrace the power of substitution? Turning to the indenture itself we find the following words:—'It shall be lawful for the trustees hereby appointed, or for the continuing trustee or trustees for the time being, or if there shall be no continuing trustee, then for the retiring or refusing trustee or trustees, or for the District Court of Colombo in pursuance of the powers and provisions contained in section 4 of the Ordinance No. 7 of 1871, to appoint any other person or persons to be a trustee or trustees,' &c. Further on the indenture says: 'And every such new trustee shall have all the powers and authorities of the trustee in whose place he shall be appointed or substituted.' It seems to me, looking to the terms of

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section 5 of Ordinance No. 7 of 1871, under which Dias's appointment was made, and to the terms of Dias's appointment by the Court, as also to the terms of the original indenture, that Dias's powers were co-extensive with those of the trustees appointed under the indenture; and if those trustees had the power of substitution, it necessarily follows that Dias also had the same power. I apprehend that the Court in appointing Dias and in giving him as full and similar powers as his predecessor neither intended nor made any reservation as regards the power of substitution.

"The words in section 5 are as follows:— 'And such newly nominated trustee or trustees shall thenceforth possess and enjoy all the powers of a trustee or trustees in the same manner as if he or they had been nominated in and by the original deed or instrument creating the trust, and as well in respect of property in the Colony situated out of as in respect of property within the jurisdiction of the Court making the nomination.' The words are very large, and I cannot but construe them as giving the trustee appointed by the Court the same power of substitution as that possessed by the trustee or trustees under the original deed or instrument creating the trust.

"I have not been referred to any direct authority on the corresponding section of the English Act, but Mr. Pereira cited the case of *Cooper v. McDonald* reported in *35 Beavan*, where it was held that the surviving trustees having been appointed by the Court, and not under the power, had no authority to nominate new trustees. That case, however, seems to me to have turned upon the wording of the will containing the trust, and upon the terms of the power itself, and I cannot look upon it therefore as an authority in point.

"For the reasons I have given I hold that it is competent for the plaintiff to maintain his present action. Let the case be fixed for trial for an early date."

The defendants appealed. The case came on for argument on the 8th July, 1903.

Walter Pereira (with him *Samarawikrama*), for appellant.— B. O. Dias, appointed by the Court under the Trustees' Ordinance, had no power to substitute a trustee in his stead. The successor of a trustee appointed by the Court must be also appointed by the Court. The Court could not delegate its responsibility to some one else. The words "all the powers of a trustee," occurring in section 5 of Ordinance No. 7 of 1871, do not include the power of naming a substitute. So long as he is trustee, he can exercise all the powers of the original trustee. But if he is unwilling to act or dies, it is the Court who has to appoint a new trustee. *Cooper*

v. McDonald, 35 Beavan, 504 (1856), resting on section 27 of 23 and 24 *Vict. cap. 145.* [Layard, C.J.—Modern legislation tends to give the Court's trustee the power to name a substitute.] In Lewin *On Trusts*, p. 721, it is said the Court should not authorize new trustees to appoint trustees; that would be a delegation of its own powers. The principle laid down is that a nominee of the Court could not appoint a new trustee, because the original power came to an end when the necessity arose for the Court to intervene and appoint a man. (Godfroy *On Trusts, p. 603.*) The power to appoint a successor given in the deed does not extend to the nominee of the Court, because he gets his power not from the deed giving the power, but from the Court, which has no power to invest its nominee with the right of appointing a successor. Section 5 of the Trustees' Ordinance refers to the powers necessary to administer the estate and no more. The power to name a substitute is an extraordinary power, and cannot be taken unless given. *Cecil v. Langdon (28 Chan. Division, 1).*

H. A. Jayawardene, for respondent.—When the trustee under the deed dies, the Court appoints another to succeed him and invests him with all the powers that the deceased trustee enjoyed under the deed. Here the original trustee under the deed had the power of naming a substitute. Section 5 enacts that the new trustee may exercise all those powers. Why should all mean all but one? The Court does not create a new trust, but continues an old trust created by the deed. *White v. White (5 Beavan, 221).* Even if there had been no statute, the Court had the power to authorize its nominee to appoint a successor. In *Holder v. Durbin (11 Beavan, 594)* the Judges, while not denying that the Court had the power to authorize its nominee to appoint a successor, thought that the Court should not exercise the power. [Layard, C.J.—Is there any difference between our section and the provision under the English Act of 1860?] No. The decision in *35 Beavan* is a continuation of the ruling in *11 Beavan.* [Layard, C.J.—The will in the present case, I see, gives to the trustee appointed by the Court the power of nominating a successor.]

Walter Pereira, for appellant.—But a private person cannot run counter to the law and invest an officer of the Court with more power than the law gives him. [Layard, C.J.—How does he run counter to the law?] If the provision in the will is consistent with section 5, it is useless; if inconsistent, then it cannot be good; so that in either case the provision in the will does not enhance the powers of the Court's nominee. [Layard, C.J.—The will does not limit the statutory powers of the Court's nominee, it simply adds to them.] The will cannot do that, as the

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new trustee is the creature of the Court. The nominee of the Court can only exercise such powers as he derives from the Court. A private person cannot expand the powers of the trustee under the Ordinance.

Cur. adv. vult.

14th July, 1903. LAYARD, C.J.—

The only question argued in this case was whether the trustee nominated by the District Court under the Ordinance No. 7 of 1871 had power to appoint another in his stead.

The settlement in the case contained a power of appointing a new trustee, and expressly provides that, in the event of a trustee being appointed by the District Court in pursuance of the Ordinance No. 7 of 1871, such trustee shall have power to appoint a new trustee. The settlor having expressly authorized the trustee nominated by the Court to exercise the power of appointment, it is obvious that such trustee can lawfully exercise that power. The appeal must be dismissed with costs.

WENDT, J.—

This is an action by the plaintiff, as trustee of a certain settlement, to realize the money secured by a mortgage. The first defendant is the mortgagor, and the second defendant (the wife of the third defendant) is a transferee from him of the mortgaged property. The mortgage was expressed to be in favour of one Bastian Perera, the then trustee of the settlement. He died in 1896, and the District Court of Colombo, in May, 1897, acting under the Property and Trustees' Ordinance, 1871, section 4, appointed B. O. Dias to be trustee of the settlement. Dias being desirous of retiring from the office of trustee, by indenture dated July, 1900, appointed the plaintiff to be trustee and assigned to him the property of the trust.

A preliminary question was tried in the District Court as to the validity of plaintiff's appointment, the second and third defendants contending that once the Court had appointed a trustee, every subsequent appointment must be made by the Court, irrespective (as I understand the argument) of any provision in the instrument of settlement. The District Judge held that plaintiff's appointment was regular, and the second and third defendants have appealed against this ruling.

It appears to me that the question between the parties can be solved by a reference to the instrument of settlement itself. It

is of course open to a settlor to appoint trustees himself or to nominate some other person to do so, and he may confer upon the trustees such powers as he pleases. The commonest of these powers is a power to nominate a successor in the trusteeship. If a sole trustee should die without having exercised this power, and it should therefore become necessary to apply to the Court to appoint under the Ordinance, I see no reason why the settlor should not empower the Court's nominee in his turn to appoint his successor in the trusteeship.

The present settlement provides as follows:—

"It shall be lawful for the trustees hereby appointed, or for the continuing trustee or trustees for the time being, or if there shall be no continuing trustee, then for the retiring or refusing trustee or trustees, or for the District Court of Colombo in pursuance of the powers and provisions contained in section 4 of the Ordinance No. 7 of 1871, to appoint any other person or persons to be a trustee or trustees ..... and every such new trustee shall have all the powers and authorities of the trustee in whose place he shall be appointed or substituted."

The express reference to the appointment of trustees by the Court and the effect of the words in the sentence following this reference distinguish this case from those cited to us by the appellants' counsel. The power to appoint is given to the continuing trustee or trustees *for the time being*, and this from the context must include a trustee appointed by the Court. Even more clearly is this the effect of the words "every such new trustee" which come after the words relating to appointments by the Court. Every such new trustee is given all the powers and authorities of his immediate predecessor, and that includes the power of appointing a new trustee. I see no distinction between such power of appointment and the powers directly relating to the administration of the trust property, where the words of the settlement apply equally to both. In the case of *Bartley v. Bartley* (*3 Drewry, 384*), all the trustees appointed under the instrument having died, the Court appointed three new trustees. The deed contained a power to the continuing or surviving trustees to appoint a new trustee or trustees and directed that the "trustee or trustees for the time being" should receive the income of certain property and apply the same at "their or his entire discretion" for the benefit of certain persons. It was argued that the discretionary power could be exercised by any trustees for the time being, however appointed, provided only that they were lawfully appointed, and Kindersley, V. C., held accordingly.

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The provisions of our Ordinance of 1871 appear to be based on those of section 27 of Lord Cranworth's Act (*23 and 24 Vic. c. 145*), and we were pressed with the authority of *Cooper v. McDonald*, (*35 Beavan, 504*), which was decided some six years after the passing of the Act. That case, it was said, had, in spite of the wide terms of section 27, decided that a trustee appointed by the Court could not exercise the power of appointment under the instrument. But I find that that case was not decided under Lord Cranworth's Act, because by section 34 its provisions were limited to instruments executed after the passing of the Act, and to wills or codicils confirmed or revived by a codicil executed after that date, and the will there before the Court was dated long anterior to the Act. We have not been referred to any case decided upon Lord Cranworth's Act, which would entitle us to hold that the provision in section 5 of our Ordinance, " such newly nominated trustee or trustees shall thenceforth possess and enjoy all the powers of a trustee or trustees in the same manner as if he or they had been nominated or appointed in and by the original deed or instrument creating the trust, " do not include the power of appointing a new trustee. Apart from authority the words themselves, in my opinion, include that power.

I think that the District Judge's order was right, and that it should be affirmed with costs and the case sent back for the completion of the trial.

I would call the District Judge's attention to the incomplete way in which the record has been made up for this Court. There is no copy of the order of Court appointing Dias or of the instrument by which Dias appointed plaintiff, and even for the very terms of the instrument creating the trust we had to depend upon the brief of one of the counsel engaged in the case. The Court should have called upon the plaintiff to supply these documents, and should not have proceeded further until they were produced.