1903.
May 5.

Present: The Hon. F. C. Moncreiff, Acting Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

NAGAMMA *v.* SATHAPPA CHETTY *et al.*

D. C., Colombo, 13,004.

Last will—Instituted heir—Exclusion of part of the property from the will—Inheritance ab intestato*—Roman Law—Roman-Dutch Law.*

According to the Roman-Dutch Law, if a testator excludes part of his property from the operation of the will, such property descends to his heirs *ab intestato*, and not to the instituted heirs.

THE facts and arguments sufficiently appear from the judgments.

Walter Pereira (*H. Jayewardene* and *H. J. C. Pereira* with him) for the appellant (plaintiff).

Sampayo, for the respondents (defendants).

Cur. adv. vult.

5th May, 1903. MONCREIFF, A.C.J.—

Nagamma and her husband Kaleappa Chetty Sarawana Chetty, who were married in community of property, executed a joint last will which is dated 2nd July, 1862. The testator died in November 1867, and the will was proved in March, 1868. The executors appointed by the will were Kaleappa Chetty Sarawana Chetty and Kaleappa Chetty Mutu Carpen Chetty, who are both dead.

The material part of the will deals with four events:—

(1) *The event of Nagamma's surviving her husband.* The disposing parties will and devise that "if the said Kaleappa Chetty Sarawana Chetty should die first leaving the said Nagamma him surviving, she shall be entitled, as an annuity during her natural life, for maintenance, to all the rents, income, and produce of the lands, houses, and gardens which belong to the said Kaleappa Chetty Sarawana Chetty and are situated at New Bazaar, within the gravets of Colombo, but not from any other lands, houses, or gardens; and she shall be entitled to retain in her possession all the jewels, furniture, and apparels which she now uses, and live and occupy half part of the house and premises in which we now live and reside for and during her natural life."

(2) *The event of Sarawana Chetty's surviving Nagamma.* In that case Sarawana Chetty was to be the "sole and universal heir of all and singular the movable and immovable properties left behind."

(3) *The event of Sarawana Chetty's leaving issue.* If the testator should " procreate any child or children by the said Nagamma or by another marriage according to our customs, rights, and manners, then shall such child or children be the sole and universal heirs or heiresses to our estate."

(4) *The event of both spouses dying without issue.* " In the event of us both dying without issue, all our properties shall go to the children of Kaleappa Chetty Muttu Carpen Chetty as our lawful heirs."

The decision of this case turns on the construction of the last-mentioned provision. Nagamma is the plaintiff and seeks to recover a just half of the rents and profits of the premises which under the will would pass to the children of Muttu Carpen Chetty " as our lawful heirs," in the event of "our both dying without any issue ; " also Rs. 35 per mensem until the recovery of half of the premises. The six defendants are children of Muttu Carpen Chetty or their representatives.

From the general sense of the will I think that the spouses intended to refer to the death of Nagamma without issue by the testator. She is still alive, but without issue; the testator died without issue.

The will provided for the event of the death of both spouses without issue. It made no provision as to the disposal of the rents in question between the death of Sarawana Chetty and the death of his surviving spouse, but it provides that if Nagamma survived her husband she was to have as an annuity for her maintenance the income of property at New Bazaar, " but not from any other lands, houses or gardens." It is agreed that the question is whether she is entitled to one half of the rents and profits of the premises specified in the plaint.

In my opinion the property in dispute was not disposed of by the joint will of the spouses, and its destination must be determined according to the principles which apply to such cases of partial intestacy without regard to the restriction of the widow's annuity to the rents and profits of the property at New Bazaar. I think we are to assume, if we can, that the omission in this carefully drawn will to deal with the rents and profits of the premises in question was intended by the disposing spouses; and, if so, that Nagamma in joining in the omission cannot have intended to part with the share to which she was entitled by law.

The general rule according to English law is that dispositions of a will which exclude the next of kin or heir-at-law from sharing in the property disposed of are to be regarded as having been made only with reference to the property dealt with by the will, and not as affecting the right of the next of kin or the heir-at-law to their

1903. May 5.

MONCREIFF A.C.J.

share of the property which is not disposed of. According to Van Leeuwen the principle stated in *Voet* (*lib.* 28, *tit.* 1, *n.* 1) that it was not according to law *unumquemque qui testandi jus habet etiam pro parte testatum et pro parte intestatum mori posse* was never adopted in the Roman-Dutch Law. In that law it appears to be the rule that if a testator excludes part of his property from the operation of his will, it descends as *ab intestato*, and not to the instituted heirs.

I am therefore of opinion that this appeal should be allowed and judgment entered for the plaintiff in terms prayed for.

WENDT J.—

The information furnished us by the parties at our request after the case was argued explains the preference which the will in question exhibits for the husband over the wife. It seems that the wife brought only a dowry of Rs. 1,000, and that all the lands forming the estate were purchased from time to time by the husband between the years 1844 to 1866. This fact accounts for the seemingly small provision made for the wife in case of her surviving the husband. An additional reason is that the spouses had practically lost all hope of having issue of their marriage. As there was no reason for conferring any great benefit on the wife, so there was no reason for regarding any issue she might have by a subsequent marriage. Where issue by a later marriage is mentioned, it is only in the case of the husband. Clause 2 entirely disposes of the wife and her claims, and clause 3 is concerned with the husband alone. I therefore read the contingency " in the event of us both dying without any issue " as meaning " in the event of the husband leaving no issue."

Nothing is said as to the disposal of the rents and profits of the lands after than those in New Bazaar during the surviving widow's lifetime, and I think we must regard the husband as having died intestate in respect of his moiety of them. As to the widow's moiety, it is equally undisposed of. Had it been expressly dealt with by the will, she might now be unable to gainsay that disposition, as she has taken benefit under the will in the shape of the rents and profits of the New Bazaar property. As matters stand I think she is entitled to claim that moiety as she does in this action.

The District Court decree should be reversed and judgment entered in plaintiff's favour for a sum computed at the rate of Rs. 360 per annum (as agreed at the trial) from 1st February, 1898, to 30th April, 1903, and for a further sum at the rate from the latter date until possession is given to plaintiff with costs in both Courts.

MIDDLETON J.— 1903.
May 5.

By their joint will dated 2nd July, 1862, Kaleappa Chetty Sarawana Chetty and Nagamma, husband and wife, married in community of property, jointly willed and devised that if the said "Kaleappa Chetty Sarawana Chetty should die first leaving the said Nagamma him surviving she shall be entitled, as an annuity during her natural life for maintenance, to all the rents, income, and produce of the lands, houses, and gardens which belong both to the said Kaleappa Chetty Sarawana Chetty and are situated at New Bazaar within the gravets of Colombo, but not from any other lands, houses, or gardens" . . . . . that "if the said Kaleappa Chetty Sarawana Chetty should survive the said Nagamma, he shall be the sole and universal heir of all and singular the movable and immovable properties left behind, but if the said Kaleappa Chetty Sarawana Chetty should procreate any child or children either by the said Nagamma or by another marriage according to our customs, rites, and manners, then such child or children shall be the sole and universal heirs or heiresses to our estate. That in the event of us both dying without any issue all our properties shall go to the children of Kaleappa Chetty Muttu Carpen Chetty as our lawful heirs, but under any circumstances after our death our said heirs or issues or their heirs or issues shall not sell or mortgage or alienate any of the lands or immovable properties belonging to our estate, but they shall be held and possessed by ten generations under the said restrictions and in the form of *fidei commissum.*"

The testators appointed Kaleappa Chetty Sarawana Chetty and Kaleappa Chetty Muttu Carpen Chetty as executors. The question in this action was whether the plaintiff, who is the surviving spouse Nagamma, was entitled to one half the rents and profits of the premises described in the plaint, and which are admittedly not described in the annuity clause in the will. Kaleappa Chetty Sarawana Chetty died in November, 1867, without revoking the will and without issue by the plaintiff or any other marriage. The will was proved and probate granted to Kaleappa Chetty Muttu Carpen Chetty, the executor named therein, in March, 1868.

Kaleappa Chetty Muttu Carpen Chetty died leaving his four children, the first, third, and sixth defendants, and one Werethal, since deceased. The fourth defendant is her husband and the fifth defendant is her only son. The second defendant is the husband of the first defendant.

The first question is when the devise in favour of the children of Muttu Carpen Chetty takes effect.

1903. *May* 5. MIDDLETON J.

The will is a joint one, which according to Roman-Dutch Law is considered as two separate wills. The plaintiff could therefore, by repudiating her benefit under it, alter the will as regards her half (*Van Leeuwen, vol.* 1, *p.* 318), as a will does not take effect till the death of the testator. I should hold that any benefit accruing under the will to the defendants would not vest until the death of the plaintiff. If this be so, the will only disposes of the rents and profits touched by the annuity clause for the present giving all property on death of both testators without issue to the defendants.

There is, therefore, no disposal by the will of the rents and profits of the other immovable property pending the lifetime of the plaintiff.

The will, however, excludes plaintiff's participation in the rents and profits of any other property than that mentioned in the annuity clause.

Are the words of exclusion sufficiently wide to oust any claim of the plaintiff to share *ab intestato*?

According to Theobald on *Wills*, p. 648, in English law, directions excluding the heirs-in-law or next of kin from any share in the testator's property, will, as a general rule, be taken to have inserted only for the purpose of the disposition made by the will and will not exclude the heir-at-law or next-of-kin from taking property undisposed of.

By Roman-Dutch Law the rule of Ruman Law, *Nemo paganus pro parte testatus pro parte intestatus decedere potest* has been abolished, so that portion to which no heir has been appointed do not accrue to the instituted heir, but remain and devolve *ab intestato* upon those who are nearest in blood to the testator (*Van Leeuwen*, translated by Kotze, *vol.* 1, *pp.* 316, 345, 365).

Taking into consideration these principles, I think that the words of exclusion used in the will should be construed as meaning that the intention of the testator was that so much and no more was disposed of under the will.

I think therefore that the plaintiff is entitled to succeed in this action on the footing that there has been an intestacy as regards the rent and profits of half share which she claims, and that the judgment of the District Judge should be set aside and judgment entered for the plaintiff in terms of the 11th paragraph of the plaint, with costs here and in the Court below.