Present: Wood Renton J. and Grenier J. 1912.

VYRUPULLE *v.* PERERA *et al.*

20—D. C. Kandy, 21,025.

Last will—Direction to executors and trustees to give rents and profits to specified persons—Executors directed to distribute, after death of legatees, rents and profits among "widows, orphans, really deserving destitute people of the Burgher community"—Vesting of property on legatees—Property seized as belonging to legatees—Claim by trustee nominated by surviving trustee.

A testator by his last will gave and bequeathed to certain specified persons all the rents and profits arising from his properties, and further directed that the share of the rents of the legatee or legatees dying should be distributed among the widows, orphans, and really deserving destitute people of the Burgher community according to the discretion and judgment of the executors.

Held (by Grenier J. and *obiter* by Wood Renton J.), that the trust in favour of the Burgher community was not void on the ground of its being vague.

THE facts are set out in the judgment.

Bawa, K.C., for the appellant.

Allan Drieberg (with him *Vernon Grenier*), for the respondents.

Cur. adv. vult.

[1] (1902) 2 *K. B.* 743.

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March 4, 1912. WOOD RENTON J.—

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The plaintiff-appellant obtained judgment against the second defendant-respondent, Selina Ashbourne, who is now the wife of the third defendant-respondent, Richard Oswald Estrop, in cases Nos. 20,782 and 20,784 of the District Court of Kandy. In the execution of the decrees entered up in pursuance of those judgments, he seized the alleged interest of Mrs. Estrop in premises No. 47, Trincomalee street, and Nos. 1, 1A, and 2, Cross street, Kandy, under the will of her uncle, Edward Theodosius Gerlitsz. The first defendant-respondent, who is the executor of Gerlitsz, claimed the premises as forming part of the estate of his testator. The claim was upheld. The appellant consequently brings this action under section 247 of the Civil Procedure Code, and claims in his plaint (1) a declaration that Mrs. Estrop is entitled to the premises or a share thereof, and to the rents and profits thereof; and (2) a declaration that the said premises, or the interest of Mrs. Estrop therein, and her interest in the rents and profits, are liable to seizure and sale under the above-mentioned decrees. The learned District Judge has dismissed the appellant's action with costs. The present appeal is brought against that decision. Mr. Gerlitsz's will, which was made on June 28, 1877, directs (clause 1) the payment of all his just and lawful debts and funeral and testamentary expenses by the "executors hereinafter named" out of his personal estate. Clause 2 is important. It is in these terms:—

> I give and bequeath to my dearly beloved sister Frederica, now the wife of Mr. J. H. Perera, to my unmarried sisters Anetha Gerlitsz, Margaret Cecilia Gerlitsz, and to my niece Selina Ashbourne, all the issues, rents, and profits arising from my real and personal property situate at Kandy, Nuwara Eliya, and Badulla, or wheresoever situate and all the interest and dividends arising and accruing from the moneys now laid out at interest on the mortgage of real property situate at Kandy and at Badulla, in equal shares and proportions, and I direct that the same be paid to them by my executors during the term of their natural life, and after the death of any one or either or all of the said legatees, I direct that the share of the rents and interest aforesaid of the legatee so dying should be distributed among the widows, orphans, and really deserving destitute people of the Burgher community according to the discretion and jugment of my executors hereinafter named.

Clause 3 directs an expenditure of Rs. 1,500 by the executors out of the estate for the purpose of placing a tablet in the Church of St. Mark at Badulla, and for the erection of a monument with a stone over the testator's grave. Clause 4 prohibits the sale of the houses and lands situated in Kandy, but enables the executors, if they think it desirable, to dispose of any house and lands situated in Nuwara Eliya or in Badulla, and concludes as follows:—

> In the event of such sale, I direct that the proceeds thereof, together with the other moneys of my estate, be held in trust by

them and be invested in a good and sufficient security of landed property, and the interest and dividends arising therefrom be paid as hereinbefore provided for in the second clause of this my will.

Clause 5 prohibits the executors from mortgaging, hypothecating, or otherwise encumbering any of the real property, and enables the executors to maintain the property in good repair out of the income of the estate, provided that the expenditure is not such as will materially diminish the life interest of the testator's sisters and niece. Clause 6 is in these terms:—

I direct that my said sisters and niece shall not be allowed to mortgage, alienate, assign, or otherwise encumber their life interest in this my estate or to draw the same in anticipation.

Clause 7 is also of importance, and provides as follows:—

I do hereby nominate, constitute, and appoint the Reverend George Henry Gomes, James Hugh Sproule, and George Henry Oorloff, all of Badulla, to the executors and trustees of this my last will, and in the event of the death, inability, or unwillingness of any of my said executors to act in the execution of the trusts of this my will, I direct that the person or persons nominated by such executor or executors so dying, being unable, or unwilling to act as aforesaid, be substituted and appointed in his or their place and stead.

Of the three original executors, Mr. Gomes and Mr. Sproule are dead. The third, Mr. Oorloff, on his resignation owing to old age, acting under the power created by clause 7, appointed the first defendant-respondent to be an executor and trustee in his stead.

At the trial of the action the proctors for the appellant suggested one set of issues, and the proctor for the first defendant-respondent another. There is nothing to show directly which set of issues the learned District Judge accepted.

I will proceed now to deal with the points urged by Mr. Bawa in support of the appeal. His first contention was that the first defendant-respondent, although he might be regarded as Mr. Gerlitsz's executor, was not in the position of one of the original trustees as regards the carrying out of the trust created by the will. It is only, said Mr. Bawa in effect, to the executors "hereinafter named"—that is to say, Mr. Gomes, Mr. Sproule, and Mr. Oorloff—that the trust is committed. In my opinion this point is bad. The nominee of a surviving trustee would, I think, be included in the words "hereinafter named," or, to use the language of clause 5, "hereinafter mentioned." Such a nominee is specifically indicated in clause 7. But, apart from that, it seems to me that the language of clause 7 expressly puts the nominee of a retiring executor and trustee in the same position as one of the original executors and trustees for all the purposes of the will. "In the event," says the testator, "of the death, inability, or unwillingness of any of my said executors to act in the execution of the trusts of this my will," the nominee of any such executor is to be substituted and appointed in his place and stead.

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Mr. Bawa's next argument was that in any case the first defendant-appellant could not set up the right of Grebe, the alleged purchaser at a Fiscal's sale against Mrs. Estrop in case No. 18,545 of the District Court of Kandy of her interest in the premises in question. Grebe himself might have claimed that interest under the Fiscal's sale. But so far as the first defendant-respondent was concerned, it was a *jus tertii* which he could not asert. To this argument it appears to me that there are two answers. In the first place, not only was the point not taken in the District Court, but the parties went to trial on an issue suggested by the appellant's proctors themselves as to whether such a seizure and sale had taken place. Moreover, as I have already mentioned, the appellant in his prayer in the present action claims a declaration of title in Mrs. Estrop to the premises dealt with by Gerlitsz's will itself, and further, a declaration that these premises should be declared liable to seizure and sale in execution of the appellant's decrees. Under these circumstances, I think that the first defendant-respondent, as the executor and trustee of Mr. Gerlitsz's will, was quite entitled to prefer a claim at the inquiry, and to meet the appellant's present action under section 247, by contending that Mrs. Estrop had no interest in the corpus of the property under the terms of the will, and had been divested of her interests in the rents and profits by the proceedings in D. C. Kanady, No. 18,545.

Mrs. Estrop, it would appear, is now the sole surviving legatee under the will, and Mr. Bawa contended that she had a seizable and saleable interest in the corpus of the property itself on the two-fold ground: (1) That there was nothing in the will to vest the property in the executors and trustees; and (2) that in any case the trust in favour of the classes indicated of the "Burgher community" was so vague as to be void. With reference to the first branch of this argument, I think that the intention of the testator clearly was to vest the corpus of the property in his trustees for all the purposes of the will, and that he has used language sufficiently apt to give effect to that intention. The estate was undoubtedly vested in the trustees for purposes of administration. But there is more than that. The trust created by clause 2 could only be carried into effect if the estate was vested in the trustees for the purpose of the trust itself. Clause 4 deserves notice in this connection. While prohibiting the sale of the houses and lands in Kandy, it confers on the executors a power, which might be exercised at any time after the death of the testator, to sell the houses and lands in Nuwara Eliya and Badulla, and expressly provides that the proceeds of any such sale should be held in trust and invested on good and sufficient security of landed property, and that the interest and dividends arising therefrom should be dealt with under clause 2 of the will. In my opinion the trustees were vested with the legal estate—to use the familiar term of English law—in the property

dealt with in the will for the purpose of the trust. There was no gift of the corpus or any portion of it to the legatees. The interest conferred upon them by clause 2 was a life rent only. As the learned District Judge has pointed out, no provision was made for the heirs of any of the legatees. There is no analogy between the present case and the well-known cases under the Roman-Dutch law, in which a gift of the usufruct, coupled with a prohibition of alienation, has been held to carry with it a gift of the dominium. In the present case it is the trustees alone who are prohibited from alienating certain classes of the property. The beneficiaries (see clause 6) are prohibited merely from alienating or anticipating their life interest. I may say in passing that I agree with the District Judge in his construction of the following clause of the will:—

> After the death of any one or either or all of the said legatees, I direct that the share of the rents and interest aforsaid of the legatee so dying shall be distributed among the widows, orphans, and really deserving destitute people of the Burgher community according to the discretion of my executors hereinafter named.

I do not think that in the present case the objection that the trust is too vague to be capable of execution can be taken in appeal. It is distinctly a point that, if it was to be raised at all, should have been made the subject of an issue. The question whether there is any such indefiniteness in the phrase "the Burgher community" as to prevent the trust created by clause 2 from being carried out is obviously one the answer to which might depend on evidence. Moreover, a determination of the question referred to is at present unnecessary. Mrs. Estrop, one of the original legatees under the will, is still alive, and the only point to be determined is whether she has only present interest under the will which is executable under the appellant's writs. That question must be answered in the negative. If it had been necessary to decide the point, I should have been disposed to hold that there is no such vagueness in the meaning of these words now as to make that part of the trust created by clause 2 bad. The wide discretion conferred by clause 2 on the executors is sufficient to obviate any difficulty in regard to the selection of persons within the classes of "the Burgher community" mentioned by the testator. On these grounds I would dismiss this appeal with costs.

GRENIER J.—

I have had the advantage of reading the judgment of my brother Wood Renton, and I agree with him on all the points dealt with in his judgment. The case presented no difficulties to me at the argument. The will in question contains clear and plain directions in regard to the manner in which the trust created by it was to be

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administered. There were three executors and trustees appointed by the will, and the first defendant, who was nominated by one of them, Mr. Oorloff, has undoubtedly, under clause 7, the same powers as the original trustees, unless we gave the words of that clause a strange and distorted meaning. I was unable to follow the argument for the appellant that the trust in favour of the classes indicated of the "Burgher community" was so vague as to be void. The testator had perfect confidence in the executors appointed by him, and he left the matter in their hands so far as the selection of the widows and orphans belonging to that community was concerned. As rightly pointed out by the learned District Judge, the term "Burgher community" as used by the testator in 1877 was well understood and recognized, but, speaking for myself, I cannot see any reason why the description "widows and orphans and really destitute people of the Burgher community" should not embrace the larger class created solely by the Legislature and now in actual existence. The executors were given absolute discretion in the selection, and it is nobody's business to interfere with it. The objection as to the vagueness of the trust has absolutely no foundation to rest upon. The reasons given by the learned District Judge for the conclusions he arrived at impressed me very strongly at the argument, and I agree to dismiss the appeal with costs.

Appeal dismissed.