APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

KUMARASÁMI (PLAINTIFF), APPELLANT,

and

SUBBARÁYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. March 22, 30.

Will—Construction—Trust—Uncertainty.

A Hindú by his will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following directions :—

"You should give my brothers, their wives and children, according to your wishes" :

Held, that no trust was created by these words.

APPEAL from the decree of Kernan, J., in civil suit No. 70 of 1884.

The facts are fully set out in the judgments of the Court (Brandt and Parker, JJ.).

Mr. *Grant* for appellant.

The Acting Advocate-General (Hon. Mr. *Shephard*) for respondents Nos. 3 and 4.

Mr. *Branson* for respondent No. 6.

Mr. *Shaw* for respondent No. 7.

PARKER, J.—The plaintiffs are two of the brothers of the late Krishnasámi Mudali, who died on 21st September 1882. His executors having renounced their office by a deed, dated 24th March 1883, administration with the will annexed was, with the plaintiff's consent, granted to the defendant No. 1 in British Burmah. The will bears date 11th September 1882, and the present suit is brought by the plaintiffs to have the trusts of the will carried out under the direction of the Court.

The testator made several bequests by his will and gave several directions as to his property, but there was no bequest to the executors, nor did they take any benefit under the will. The clause in the will which has led to the present litigation runs as follows :— "You should give my brothers Kumarasámi Mudaliar, "Subbaraya Mudaliar, and Vyapuri Mudaliar, their wives and

* Appeal No. 25 of 1885.

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" (sons) children according to your wishes. You should defray " the expenses of the marriages of Rámasámi Mudaliar's four " daughters. You should pay for the education, &c., of the " aforesaid person's two sons what may be required."

The learned Judge (Kernan, J.) held that as regards the residue of the estate after provision made for the marriage of Rámasámi's four daughters and the education of his two sons, a trust was created by the will for the three brothers of the deceased (plaintiffs Nos. 1 and 2 and defendant No. 1) and their wives and sons, and therefore declared them entitled to one-third each, but subject nevertheless as to plaintiff No. 1, to pay one-third of his share to his son and one-sixth to his wife; and subject as to defendant No. 1, to pay one-third of his share to his son. Plaintiff No. 2 being unmarried, was declared entitled to one-third absolutely.

The appeal against this decree is preferred by the plaintiff No. 1. It is contended for him by Mr. Grant that no precatory trust was created by the will; that the clause as to the gift to the three brothers, their wives and sons was void for uncertainty, and that the Court should have held there was an intestacy as regards the residue of the estate; and that even if there were a trust, the Court should have followed, in making the distribution, the principles of Hindú and not of English law, and divided the property equally among the three brothers for the benefit of whom and of their Hindú families the bequest was intended.

The Advocate-General for the wife and son of plaintiff No. 1 contended that the words were sufficiently definite to create a trust, and that English principles of distribution would apply even though s. 179 of the Indian Succession Act was not applicable. Though his clients did not appeal, they might, he urged, have been entitled to share equally all round, although the learned Judge had ordered distribution *per stirpes*.

Mr. Branson and Mr. Shaw for the two minor sons of the late Rámasámi supported the contention of plaintiff No. 1 that there was an intestacy as to the residue of the estate, but urged that in that case they were entitled to share as the representatives of a deceased brother as well as the three surviving brothers of Krishnasámi.

It appears to me that the words "You should give . . . . . according to your wishes" are not sufficiently imperative and too

uncertain and general to create an implied trust. The words express a wish only and not a command, and though they indicate the objects intended for the testator's benevolence, they are uncertain both as to the property and the way in which it shall go. (*Vide* Lewin on Trusts, 7th Ed., chapter VIII, s. 2, and notes.)

As the words stand, the only persons who could exercise the power given by this general direction are the executors named by the will; but they have not exercised it, and they have renounced the only character in which it was competent for them to exercise it. (*Vide* Williams on Executors and Administrators, Vol. I, page 290.) In such a case the Court will not take upon itself to execute the power (*Keates* v. *Burton*).(1) I would not attach importance to the omission of the will to bequeath the residue of the estate to the executors, for the same formalities cannot be looked for in a Hindú as in an English will. Had the executors proved, the estate would have vested in them, and they could have exercised the power. But they have not chosen to act, and the Court cannot act unless the power is coupled with a trust, (*Brown* v. *Higgs*)(2) and a trust is not created unless the words are imperative and the subject and objects are certain (*Knight* v. *Knight*).(3) Even had the estate been bequeathed to the executors and vested in them on probate, it seems very doubtful whether these words could have been construed as creating a trust for the benefit of the three brothers of the testator and their families over the whole of the residue of the estate (*Mussoorie Bank* v. *Raynor*).(4) If the words communicate a mere discretion no trust will arise (Lewin, 7th Ed., Ch. VIII, s. 2 (7) and notes), and in this case there is nothing whatever to show what would have been a sufficient compliance with the direction.

With all deference therefore to the learned Judge, I am of opinion that no trust is created by the words "You should give my brothers ..... their wives and sons according to your wishes;" and that there is consequently an intestacy as regards the residue of Krishnasámi's estate after the other directions of the will have been complied with.

The other directions of the decree, save as to costs, should be

(1) 14 Ves., 434.
(2) 8 Ves., 561, 569.
(3) 3 Beav., 148.
(4) I.L.R., 4 All., 500.

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confirmed and the costs of this appeal and of the suit should, I think, be paid out of the estate.

BRANDT, J.—The material portions of the will made by M. I. Krishnasámi Mudali on the 12th April 1879 are as follows: "I have appointed," three persons named, "executors for the purpose of conducting matters after my death according to what is mentioned hereunder in regard to all my self-acquired movable and immovable property."

"With the income from my landed property, food (boiled rice) should be given to ten persons daily in Kodumbaukum garden. I should be buried in the said garden."

"One day's Oobhayam or service in the year shall be performed during the Arunáchala Eswarar's Covil Vasantha Ootchavam in the place adjoining Chengah Bazaar within one hundred rupees."

"You should give my brothers Kumarasámi Mudaliar, Subbaraya Mudaliar, and Vyapuri Mudaliar, their wives and (sons) children according to your wishes. You should defray the expenses of the marriages of Rámasámi Mudaliar's four daughters. You should pay for the education, &c., of the aforesaid person's two sons what may be required."

"Rewards shall be given to servants, &c., according to what is mentioned in the list annexed hereto. The debts due to me shall be collected and recovered, and the debts due by me shall be paid off."

"'In this manner do I write and leave the will, while in the enjoyment of good memory and in the presence of witnesses mentioned herein."

The executors having disclaimed probate of the will, did not exercise the powers given under the will, and letters of administration with copy of the will annexed were granted by this Court to the two plaintiffs and defendant No. 1 on the 7th January 1884; and the present suit was brought by the plaintiffs, who prayed that the estate of the testator and the trusts of the will be administered by this Court, and the rights of the plaintiffs and defendants be ascertained and declared, and for the taking of accounts, appointment of a receiver, &c.

The learned Judge (Kernan, J.), before whom the question which we are now called to consider, came for disposal, held that

the executors having renounced and not exercised the powers given to them by the will, could not exercise the power given to them only as executors, though specially named as executors,—the power, that is to say, appearing to be expressed in the clause of the will "you should give my brothers ..... their wives and children according to your wishes;" but that a trust must be held to have been created by this clause in the will for the three brothers of the deceased and their wives and sons, and that the Court should carry out that trust.

The learned Judge then declared that the said three brothers, their wives and sons are entitled to the residue of the estate (after providing for the legacies, charities, debts, &c.); and ordered that the said residue be divided into three shares, one of which plaintiff No. 1, Kumarasámi, was to take subject to his giving or paying to his son, defendant No. 3, one-third of such one-third share, and to his wife, defendant No. 2, one-sixth of such third share; Vyapuri, defendant No. 1, to take one-third subject to his giving or paying to his son Krishnasámi, defendant No. 4, one-third of such one-third share; and plaintiff No. 2, Subbaraya, a one-third share.

Appeal is preferred on the grounds that it should have been held that the clause in the will in respect of which the said order was made should have been held void for uncertainty, and that no trust was created thereby; that there was a mere direction to executors to act according as they pleased; and that the persons named as executors having failed to act, effect cannot be given to the direction, and that the Court should have held that the testator died intestate as to the residue of his estate, and that the residue devolved on his heirs: that even if it be held that a trust was created to which the Court should give effect, regard should have been had, not to the manner in which according to English law or rules of equity distribution might have been made, but to the probable wishes and intentions of the testator and with reference to the Hindú law by which the latter was governed.

We have had the advantage of hearing the case ably argued by Mr. Grant for the appellant, by the Acting Advocate-General for the defendants Nos. 2 and 3 (third and fourth respondents), by Mr. Branson for defendant No. 5 (sixth respondent), and by Mr. Shaw for defendant No. 6 (seventh respondent).

I am of opinion that the terms of the disputed clause in the will are as regards the words of recommendation used not such as

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can be held to be imperative, and that they are too uncertain both as regards the subject and the objects of the recommendation or wish to be construed as a trust.

It cannot be said that there is certainty even as regards the objects of the recommendation, for it might or might not have been a sufficient compliance with the intention of the testator if some provision had been made for the testator's brothers, or for one or more of them, or for the wives only, or one or more of them, or for the children only, or for one or more of them; the words of recommendation are of the loosest description.

But there is still greater uncertainty as to the subject. The disputed clause occurs at the commencement of the will; there is no direction first to provide for specified charges and to pay specified legacies and to dispose of the residue according to discretion, among a class of persons or persons sufficiently indicated; and it appears to me to be a case in which a mere discretionary power was given, which in the absence of *mala fides* on the part of the executors, a Court would not have compelled the executors to exercise (*Brown* v. *Higgs*),(1) and that the words in dispute did not create a power in the nature of a trust.

The executors "did not exercise the power, but renounced the only character in which it was competent to exercise it," (*Keates* v. *Burton*,)(2) and even if it were open to the Court to give effect to the clause in dispute, the Court would, in my opinion, do well not to attempt to execute a power or a trust of such a character as this.

I think further that if the Court had to execute such a trust, it should have regard rather to what may have been the presumed wishes and intention of the testator than to apply principles which would be adopted if the rule to be followed were the rule of English law or equity; and if the English law were applicable all the class would take equally, which rule has not been here followed in its integrity. And I am of opinion that there was in fact an intestacy, and that in any case we could not better follow what may be taken to have been the intention and wishes of the testator than by treating this as a case of intestacy, in respect of the residue of the estate.

It has been well put by the learned counsel for the appellant

(1) 8 Ves., 569. (2) 14 Ves., 437.

that the testator could hardly have contemplated a distribution, which it may be assumed was intended in the first place for the benefit of his brothers, the result of which is to give an absolute estate in respect of a very considerable portion thereof to the widows of two of those brothers. A distribution under which the brothers would have taken equal shares would have been to that extent provision for the widows and children. There is moreover very considerable force in the argument that the Legislature expressly refrained from making applicable to Hindús the provisions of s. 77 of the Succession Act, and the following sections. The Privy Council case(1) is authority for the proposition "that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be certain and well defined." In my opinion neither of these conditions exist in the present case. Their Lordships further expressed an opinion that "the current of decisions now prevalent for many years in the Court of Chancery shows that the doctrine of precatory trusts is not to be extended."

On the whole, and with all deference to the learned Judge from whose decision this appeal lies, I am of opinion that the testator must be held to have died intestate in respect of the residue of his estate now in dispute; and that the decree should be amended accordingly; and that in other respects, and as to reference to take an account except in respect of costs in the original suit from decree in which this appeal is preferred, it should be confirmed, and that the costs in the original suit and in this appeal also be paid out of the estate.

Solicitors for appellant—*Grant & Laing.*

Solicitors for respondents Nos. 3 and 4—*Branson & Branson.*

Solicitors for respondent No. 6—*Grant & Laing.*

Solicitors for respondent No. 7—*Grant & Short.*

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(1) I.L.R., 4 All., 500.