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SHARAT CHUNDER BURMON v. HURGOBINDO BURMON.

against the plaintiffs' assignors. The Subordinate Judge was wrong in laying down that the lands were allotted subject to the plaintiffs' incumbrance on them, and we reverse his decree, declaring the plaintiffs' title, and restore the Munsif's decree, dismissing the plaintiffs' suit with costs. The plaintiffs will also pay the costs of this appeal.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Broughton.

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Sept. 11 & 12.

FEHRSEN *v.* SIMPSON.

Will—Power of Appointment—Execution of Power.

A testator, after giving certain specific bequests, disposed of his property as follows: "I request that the interest of my property, invested in Government securities, be disposed of from time to time as follows:—*First*,—to my dear son *A* two shares; to my two dear daughters *B* and *C*, each one share; the interest to be paid to them quarterly or half-yearly as may be most convenient. *Second*,—I request that these shares shall not be transferable during their lifetime. *Third*,—at the demise of any of my children without issue, any such share to be divided in the above proportion to the survivors. *Fourth*,—in the event of issue, they may bequeath their share to any one of their children they may select, subject to the above conditions." *C* married in 1874, and, by a settlement made in consideration of the marriage, her share was assumed to be assigned to trustees upon certain trusts. In 1875, *C* and her husband made the following joint will:—"We do hereby constitute the survivor of us to be executor or executrix in our estate and sole heir of the same, together with the child or children begotten in our marriage." *C* died shortly after the execution of the above will, leaving one child. In a suit by *C's* husband and the trustees of the settlement of 1874 for the administration of the testator's estate and for the construction of his will,—*Held*, that the settlement of 1874 could not operate upon *C's* share in consequence of the direction of the testator, that it should not be transferred in the lifetime of *C*, and that the plaintiffs took nothing under the settlement.

Held also, that the power of appointment given by the will of the testator had not been properly exercised by the joint will, and that the child of *C* took the whole of her mother's share.

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DR. A. SIMPSON, by his will dated the 11th day of November 1864, after giving various legacies which are not material to this case, disposed of his property as follows:

"After payment of the above bequests and charges of administration, I request that the interest of my property, invested in Government securities, be disposed of from time to time as follows:—*First*,—to my dear son George Alexander two shares; to my two dear daughters, Emily and Catherine, each one share; the interest to be paid to them quarterly or half yearly as may be most convenient. *Second*,—I request that these shares shall not be transferable during their lifetime. *Third*,—at the demise of any of my children without issue, any such share to be divided in the above proportion to the survivors. *Fourth*,—in the event of issue, they may bequeath their share to any one of their children they may select, subject to the above conditions."

The testator died in the year 1864, and his will was proved by one of his executors, Mr. Abercrombie, who paid the interest up to a recent date as directed by the will, and, now in the present suit, asked the direction of the Court as to the disposal of the share of the daughter Catherine under the following circumstances:—

All the three children survived their father, the testator. The son George Alexander and the daughter Emily, now Mrs. Warrack, were still alive. Catherine Agnes, in May 1874, married James McCall Fehrsen, and died at Cradock in the colony of the Cape of Good Hope in February 1875, leaving her husband and an only child, Alexander Oloff Malcolm Fehrsen, born a few days before her death. Prior to the marriage of Mr. and Mrs. Fehrsen, and in consideration of the marriage on the 19th of May 1874, a disposition of deed of trust or settlement was executed by them, and it was registered in the Court of the Sheriff of Aberdeen in 1876 after her death. Shortly after the execution of the deed the marriage took place, and Mr. and Mrs. Fehrsen went to the Cape of Good Hope.

By the deed of the 19th of May 1874, the share of Mrs. Fehrsen was assumed to be assigned to trustees in trust for the payment, in the first instance, of the principal and interest of a

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certain bond for £450, and for the payment of the annual premium of a life-policy, and, then, for payment of the annual income of the trust funds to Mrs. Fehrsen for life; such payments to be to her separate use, and "in the event of there being children of the said intended marriage, or their issue surviving at the dissolution thereof, the said trust funds were to be held by the trustees for and on behalf of the children of the said Catherine in life rent, for her life rent use allenarly (1), and the children of the said intended marriage in fee," etc.

On the 16th of February 1875, the day before her death, Mrs. Fehrsen and her husband made a joint will in the following terms:—"We, the undersigned, James McCall Fehrsen and Catherine Fehrsen (born Simpson), do hereby constitute the survivor of us to be executor or executrix in our estate and sole heir of the same, together with the child or children begotten in our marriage." The plaintiffs, the trustees of the settlement of May 1874, and the husband of Mrs. Fehrsen, who survived, were willing that the fund should be wholly appropriated to the child of the marriage. But the brother George Alexander and the sister Emily contended, that there had occurred an intestacy as regards Mrs. Fehrsen's share under her father's will, and that being the case, that the fund was divisible into three parts, one of which should go to each of them, George Alexander and Emily, and the other to the estate of Catherine.

Mr. *Bell* and Mr. *Fergusson* for the plaintiffs.

Mr. *Piffard* for Mr. Abercrombie.

Mr. *Jackson* for Mr. Fehrsen.

Mr. *Fergusson* for the child of Mr. Fehrsen.

Mr. *Phillips* for Mrs. Warrack and Mr. Simpson.

(1) A technical term in Scotch conveyancing, meaning 'only,' 'merely.' "Where lands are conveyed to a father for his life 'rent use *allenarly*,' the effect will be to restrict the father's right to a mere life rent, or at least to a fiduciary fee, even in circumstances where, but for the word 'allenarly' the father would have been unlimited fiar."—*Bell's Dictionary of the Law of Scotland.*

Mr. *Fergusson*.—The words in Dr. Simpson's will, though only purporting to give an estate for life to the children, are such words as give an absolute interest. The request that the shares shall not be transferable during the lifetime of the children will not cut down the absolute gift—*Administrator-General of Bengal* v. *Apcar* (1). The latter words must be read with reference to the former in such a way as to reconcile them with the preceding language—*Pulbrook* v. *Bratt* (2). The gift is in the direction to pay—Theobald on Wills, p. 274; *Williams* v. *Clark* (3); *Re Maxwell's Will* (4).

Mr. *Piffard*.—There is a gift by implication. If a power is given to a parent to devise only among his issue and no one else, then there is an absolute gift to the issue—*Witts* v. *Boddington* (5).

Mr. *Jackson*.—There is an implied gift to the children of Mrs. Fehrsen. It is clear that the general intention of the testator was to benefit a class, coupled with a particular intention in favour of particular individuals of the class, to be selected by some one else. The case is on all fours with the cases cited in Hawkins on Wills, p. 57. There is a gift to the children subject only to the power of selection given to the parent—*Burrough* v. *Philcox* (6). The intention of the testator was to benefit the children with a power of selection—*Brown* v. *Higgs* (7); 1 Jarman on Wills, 514, 3rd edn. The power has been properly executed; it empowers any of the children to bequeath their share to any one of their children. The joint will is valid according to the law of the country where it was made, and is such an instrument as has been specified by the author of the power—Farwell on Powers, pp. 1 & 3. Supposing the power to exist, there is a valid exercise of it, and the will validly disposes of half the interest under Dr. Simpson's will—Farwell on Powers, p. 245; *Bruce* v. *Bruce* (8).

(1) I. L. R., 3 Calc., 553.
(2) 5 Jur., N. S., 330.
(3) 4 De. G. & S., 472.
(4) 24 Beav., 246.
(5) 3 Bro. C. C., 95.
(6) 5 My. & Cr., 72.
(7) 5 Ves., 501.
(8) L. R., 11 Eq., 371.

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Mr. *Fergusson.*—Whether the power of selection is properly executed or not, the Court will carry out the intention of selection under the doctrine of *cy pres.*

Mr. *Phillips.*—There is an intestacy, as the power is not properly executed. Mrs. Fehrsen had only an interest in the corpus for her life, and she could not dispose of it by will. It is clear that if she died without issue, it was to go over—1 Jarman on Wills, p. 526, 3rd edn. This power is not in the nature of a trust—Sugden on Powers, p. 588, 8th edn. It cannot be a trust for one child, and if it is, it must be for one to be selected, and the Court will not impose that condition on a parent—Sugden on Powers, pp. 592, 595, 8th edn. A donee of a power may execute it without referring to it or taking the slightest notice of it, provided that the intention to execute it appear—Sugden on Powers, p. 289, 8th edn. Here no intention is apparent. There is no reference to the fund—1 Jarman on Wills, p. 647; *Re Owen's Trust* (1). The will gives the wife's property to persons not objects of the power—*Alexander* v. *Alexander* (2). There was no gift to Mrs. Fehrsen beyond her life. There is no trust in the power to select, and no gift by implication. The question turns on whether the power was executed. It was not executed by the will, it is not complete, and it is in excess. Either the husband takes the life estate, and then the children, or all take jointly or take as tenants-in-common, and in any case the power is bad.

BROUGHTON, J. (after stating the facts of the case as above, continued):—Mr. Piffard, for Mr. Abercrombie, contended, that the deed of 1874 is, according to Scotch law, a will and a disposition of the fund in terms of the will of Dr. Simpson. But there is no evidence of a Scotch domicile of Mr. and Mrs. Fehrsen, and if there were, this deed is not a disposition by bequest in terms of the will of Dr. Simpson, such bequest is there directed to be made "to any one of the children they may select."

(1) L. R., 12 Eq., 316. (2) 2 Ves., 640.

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It appears to me that the deed of 1874 could not operate upon the fund in consequence of the direction of the testator, Dr. Simpson, that it should not be transferred in the lifetime of his daughter.

I concur in the argument of Mr. Phillips, for the brother and sister of Mrs. Fehrsen, that she had nothing to settle under her father's will, and that the plaintiffs in this case consequently take nothing under the settlement. I also agree with his contention that the will cannot be said to be an execution of the power, for, even if it referred to the power or to the fund, it would have been an appointment embracing objects not designated by the power.

It is said by Lord St. Leonards in his work upon Powers, 8th edn., p. 505, "that it is well settled that such a gift is wholly void, and the fund cannot be given to those to whom it might have been legally appointed."

It appears to me that the power given by Dr. Simpson to his daughter Catherine was never exercised by her. The questions then remain, To whom does the fund go in default of appointment? What was the intention of Dr. Simpson? He gave the fund to any one of the children of his daughter to whom she might bequeath it, and in default of children of his daughter, it was to be divided between her brother and sister.

This is a disposition of the property very similar to that which was the subject of the case of *Witts* v. *Boddington* (1), where the gift was to the wife for life, with power for her by will or otherwise to give and bequeath the same unto or amongst some or one of the child or children of his daughter in such manner and proportions as his wife should think proper; but in case no such children of his daughter should be alive at the time of his wife's decease, then over. The gift over was considered as indicating an intention to benefit his children, and in default of appointment they were held entitled equally. It has been always considered that the Court should favour a construction which will give the share of a child on his death to his children, and a slight indication of such an intention should be sufficient

(1) 3 Bro. C. C., 95.

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for the purpose of giving the fund to the issue of the deceased child who in his lifetime enjoyed it.

I think, therefore, that, on the proper construction of the will of Dr. Simpson, the settlement of Mr. and Mrs. Fehrsen and their will, the corpus of the fund, of which the interest was paid to Mrs. Fehrsen during her lifetime, devolved at her death upon her only child.

The costs of the parties must be paid out of the estate.

APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice Macleam.

1878
Sept. 13.

MADHOO PROSHAUD SINGH AND OTHERS (DEFENDANTS) *v.* PURSHAN RAM AND OTHERS (PLAINTIFFS).*

Sale for Arrears of Rent—Previous Purchase by Mortgagee of Portion of Tenure—Ejectment—Right of Purchaser to question by Suit the validity of Decree for Ejectment if not a party to the Rent-suit.

In a suit for arrears of rent by a mokuraridar against his dur-mokuraridar, a decree was passed ejecting the latter, and, as a consequence, the tenure of the dur-mokuraridar was cancelled. *Held*, that a mortgagee from the dur-mokuraridar, who had, previously to the rent-suit, obtained a decree on his mortgage and purchased himself at the auction-sale, and who had not been made a party to the rent-suit, was entitled to question by suit the validity of the decree obtained in the rent-suit ordering ejectment of the dur-mokuraridar.

THE plaintiffs sued as the auction-purchasers at an execution-sale held on the 15th June 1875, to obtain possession of the right of one Parbhu Singh in a dur-mokurari tenure. They stated that one Uzimaddin Khan originally was the owner of seven-half annas in a certain mokurari tenure; that he subse-

* Special Appeal, No. 2173 of 1877, against the decree of Baboo Mutadin, Officiating Subordinate Judge of Zilla Gya, dated the 16th of July 1877, affirming the decree of Moulvi Feda Hosain, Munsif of Aurrungabad, dated the 19th of June 1876.