RAMDASSI *v.* JAGANNATH.

[Civil Jurisdiction (Thomson, J.) October 11, 1946.]

Construction of will—estate left absolutely to testator's brother "subject to proviso"—"proviso" that brother allow testator's widow to occupy house and provide her with maintenance out of the estate—further "proviso" that testator's brother execute a will in favour of testator, or if testator should not survive, in favour of testator's widow and brother's widow equally—whether a trust created—extent of trust—whether provision for mutual wills and taking out of probate creates a trust in respect of brother's estate.

Jagannath and his brother Nanhu carried on a partnership business as storekeepers at Labasa from 1925 to May 27, 1943 under the name "Jagannath, Nanhu & Co." On August 21, 1937 Nanhu executed a will appointing Jagannath his sole executor and trustee and leaving all his estate to Jagannath absolutely "subject" to the "proviso" that he should during his lifetime allow Nanhu's wife Ramdassi to live in a certain dwellinghouse and supply her out of the estate with money and goods sufficient to maintain her, and that Jagannath should make a will in favour of Nanhu or his wife. Nanhu died on May 27, 1943 and probate of the will was granted to Jagannath on March 3, 1944. The estate included *inter alia* undivided half shares in seven leasehold properties. On September 1, 1944 a transmission of Nanhu's interests in the seven leases was registered to Jagannath as executor and, on September 19, 1944 Jagannath registered a transfer of the same to himself. In June, 1945 Jagannath sold one leasehold property for £25. In July, 1945 he transferred the remaining six leaseholds to his nephew Jaduram in consideration of natural love and affection and also transferred to Jaduram all his interest in the partnership business and assets of Jagannath Nanhu & Co., the transfers were registered on August 10, 1945 together with three encumbrances over the six leasehold properties securing annuities each of £120 to Ramdassi (plaintiff), Jagannath (defendant) and one Bacheoni (Jagannath's wife).

HELD*.—(1) On the true construction of the will a trust is created which attaches to the estate of Nanhu deceased and is irrevocable except either under the sanction of the Court or with the consent of all parties interested.

(2) No trust is created in respect of property other than Nanhu's estate.

(3) Subject to the life interest of Ramdassi, the plaintiff, Jagannath takes a life interest in the property to which the trust attached together with an interest in the whole estate absolutely contingent on his surviving Ramdassi and his wife Bacheoni.

(4) Subject to their surviving Jagannath, Ramdassi and Jagannath's wife Bacheoni each takes an interest absolutely as to half the trust property or, if only one of them survive Jagannath, such one as to the whole of the property.

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* *See, however, Privy Council Appeal No. 13 of 1947.*

Cases referred to :—

(1) In *the Estate of Mary Heys, Wallern v. Gaskill* [1914] P. 192 ; 83 L.J.P. 152 ; 111 L.T. 941 ; 30 T.L.R. 637 ; 44 Dig. 182.
(2) *Dufour v. Pereira* [1769] 21 E.R. 332 ; 44 Dig. 181.
(3) *Dennyson v. Mostart* [1872] L.R. 4 P.C. 236.
(4) *Stone v. Hoskins* [1905] P. 194 ; 74 L.J.P. 110 ; 93 L.T. 441 ; 21 T.L.R. 528 ; 44 Dig. 182.
(5) *in re Oldham Hadwen v. Myles* [1925] Ch. 75 ; 94 L.J. Ch. 148 ; 132 L.T. 658 ; 44 Dig. 182.
(6) *Gray and ors. v. Perpetual Trustee Co. Ltd.* [1928] A.C. 391 ; 97 L.J.P.C. 85 ; 139 L.T. 469 ; 44 T.L.R. 654 ; 44 Dig. 182.
(7) *in re Hagger, Freeman v. Arscott* [1930] 2 Ch. 190.
(8) *Legard v. Hodges* [1779] 30 E.R. 447 ; 43 Dig. 551.
(9) *in re Diggles, Gregory v. Edmonson* [1888] 39 Ch.D. 253 ; 59 L.T. 884 ; 43 Dig. 579.
(10) *in re Dayrell, Hastie v. Dayrell* [1904] 2 Ch. 496 ; 73 L.J.Ch. 795 ; 91 L.T.373 ; 44 Dig. 571.
(11) *University College of North Wales v. Taylor* [1908] P. 140.
(12) *Boyes v. Cook* [1880] 14 Ch.D. 53.
(13) *Lord Walpole v. Lord Orford* [1797] 30 E.R. 1076.
(14) *re Lane's Estate, Meagher and or. v. National Gallery of Ireland and or.* [1946] 1 A.E.R. 173.
(15) *in re Wilfords Estate, Taylor v. Taylor* [1879] 11 Ch.D. 267 ; 48 L.J. Ch. 243 ; 38 Dig. 694.
(16) *Comiskey v. Hanbury* [1905] A.C. 84 ; 74 L.J.Ch. 263 ; 21 T.L.R. 252 ; 92 L.T. 241 ; 43 Dig. 570.
(17) *In the Goods of Piazzi-Smith* [1898] P. 7 ; 77 L.T. 375 ; 67 L.J.P. 4 ; 44 Dig. 181.

ORIGINATING SUMMONS, for determination of the following questions :—

(*a*) Whether upon the true construction of the provisions contained in the will of Nanhu deceased and in the events which have happened a trust is created ?

(*b*) Whether the trust in question is revocable by the defendant Jagannath who has accepted the benefit of the bequest under the said provisions in his own favour ?

(*c*) Whether in view of the fact that the defendant Jagannath has accepted the benefit of the bequest in his own favour the said trust attaches only to the estate of the said deceased or to the defendant's own property belonging to him at the time of the death of the said deceased as well ?

(*d*) If the said trust attaches to both the aforesaid properties, whether the defendant takes only a life interest in the said properties ?

(*e*) If the defendant takes a life interest only, whether he holds the remainder in trust for the plaintiff Ramdassi and the defendant's wife Bacheoni in equal shares absolutely ; and, if so, whether the said interest in remainder is vested from the moment of Nanhu's death, or contingent on both or either of the plaintiff and the defendant's wife Bacheoni surviving the defendant after his death and the survivors or the survivor of them taking the whole property absolutely ?

(*f*) If the trust attaches only to the estate of the said deceased Nanhu, whether the said trust confers any interest in the said trust property on the defendant ?

(*g*) In the answer to (*f*) is in the negative, whether the defendant in that case holds the trust property in trust for the plaintiff and the defendant's wife Bacheoni in equal shares absolutely ?

(*h*) If the answer to (*f*) is in the affirmative, whether the defendant takes only a life interest with remainder over to the plaintiff and the defendant's wife Bacheoni in equal shares absolutely ; and if so, whether the said interest in remainder is vested from the moment of Nanhu's death, or contingent on both or either of the plaintiff and the defendant's wife Bacheoni surviving the defendant after his death and the survivors or the survivor of them taking the whole property absolutely ?

(*i*) Whether the defendant, whatever the nature of the trust, has any power to dispose of the trust property contrary to the terms of such a trust ?

Said Hasan, for the plaintiff: Plaintiff's case is that certain trusts have arisen which defendant is bound to carry out since he has taken out probate and accepted benefit under the will (*Legard v. Hodges*). There was a contract between the two brothers to make mutual wills. That contract can be enforced (*Taylor v. Taylor, Dufour v. Pereira*). (He referred to an affidavit of H. B. Gibson, Solicitor, who drew up the wills, and who deposed to a discussion between the brothers when Nanhu wished Jagannath to leave all his property to him absolutely with a provision only for the maintenance of Jagannath's wife and Jagannath agreed only after Nanhu promised to make a like will in Jagannath's favour). Even apart from the contract, defendant is bound by his acceptance of the terms of Nanhu's will (*Legard v. Hodges*). Jagannath has persuant to the agreement made a will substantially the same as Nanhu's (*Stone v. Hoskins*). The intention was that the whole estate should be held in trust after the death of the first brother. The Court should give effect to the intention of the parties, which can be clearly gathered from the language used (*re Lane's Estate*). The provisions of the will create a trust which attaches not only to the testator's property but also to defendant's. The effect is to give a life interest to defendant in this common property and then the property is to go to the two widows in equal shares.

(He quoted *Dennyson v. Mostert ; in re Hagger*).

In this case the wills are themselves evidence of the contract—Nanhu made his will subject to defendant making a similar will. If there was no contract why did defendant accept the terms of the will by taking out probate ? By doing this he became a trustee (*Gray & ors. v. Perpetual Trustee Co. Ltd.*) Even if we cannot prove an agreement, equitable interests have arisen. These affect defendant's estate as well as Nanhu's. If defendant predeceased Nanhu the property went to the widows jointly, it must be that they contemplated that the property would be pooled. (*Lewin on Trusts* (1939 Ed.) pp. 48, 52, 92). In the light of *in re Hagger* the effect of Nanhu's will is to confer a life interest on defendant and a vested interest in the reversion on the widows.

G. F. Grahame, for the defendant referred to *Jarman on Wills* 7th Edition) Vol. I p. 428 and *in re Dayrell.* The skill and knowledge of the draftsman must be imputed to the testator. (He referred to the

affidavit of the solicitor who drew the will). The root of the matter is in the affidavit—the testator was only concerned with the maintenance of his widow. The intention of the testator was to give his property to the defendant subject to the defendant providing for the maintenance of the testator's widow. Plaintiff's alleged right may arise in testamentary law from an express trust declared in Nanhu's will or in equity from the application of the principle of constructive trusts. If plaintiff relies on contract no question of breach can arise until defendant is dead. Defendant has in fact the will and it is before the Court. Nanhu's will certainly does not create a trust. It was the word " absolutely ", then " proviso ". Even use of the word " trustee " does not itself create a trust (*in re Diggles*). This was a substantial partnership business conducted by two brothers and worth £12,000. Yet there are no directions whatsoever to the trustee and no power to continue the business. My friend's interpretation is too vague and uncertain (*Underhill on Trusts* (9th Edition) p. 20),. The will was a conditional devise to the defendant—on condition that he maintained the widow and made a reciprocal will for the widows benefit. The conditions neither create nor necessitate a trust. Parol evidence is not admissible (*Jarman on Wills* Vol. I pp. 460, 482 *University College of North Wales v. Taylor ; Boyes v. Cook* 56) ; No words in the will can be read as giving the defendant a life estate or as creating a trust over the property of the testator or anyone else. The plaintiff must establish that there was a contract and that it was a term of the contract that neither testators would revoke his will. If there is a contract it is simply a contract to make mutual wills—and the defendant has made a will accordingly. Until defendant breaks his contract no right action arises on it. (He referred to *in re Oldham ; Gray v. Perpetual Trust Co.; Dufours v. Pereira*). A joint will is not the same as mutual wills—a joint will is something like a contract on the face of it (*Walpole v. Orford*). There is no evidence of the alleged intention to pool the property (*in re Heyes*).

Said Hasan, for the plaintiff, in reply : It is immaterial whether the wills are joint or severally executed (*In the goods of Piazzi-Smith*). As to the meaning of " absolutely " see *Comiskey v. Hanbury ; Snell's Equity* (1939) p. 82. By accepting Nanhu's will defendant accepted it in full, and the trust involves defendant's own estate as well as what he took under the will (Fry on " *Specific Performance* " 6th Edition pp. 496, 1,061).

THOMSON, J.—This summons raises certain questions, which it is not necessary to state in terms at this stage, relating to the estate of one Nanhu, the deceased husband of the plaintiff and brother of defendant. In effect what has to be decided is the true construction of Nanhu's will and what equitable rights and obligations have flowed from it and from the actions of defendant in taking probate of it and accepting benefit under it.

The facts are not in dispute. Deceased, who died on 27th May, 1943, had on 21st August, 1937, made a will the material portions of which read as follows:

> " THIS IS THE LAST WILL and testament of me NANHU son of Birma of Labasa on the island of Vanualevu in Fiji merchant I HEREBY revoke all former wills and other testamentary writings by

me heretofore made and I declare this to be my last and only will and testament I APPOINT my brother Jagannath son of Birma merchant who is also my brother to be my sole executor and trustee I GIVE devise and bequeath unto my said trustee all real and personal property of whatsoever nature and wheresoever situate of or to which I may be entitled or over which I may have a disposing power at the time of my decease absolutely save only with the proviso that he shall, during her lifetime, allow my wife Ramdassi to live in the dwelling house at Nasea where she and I now live and shall supply her out of my estate with money and goods sufficient to maintain her during her lifetime in the manner in which she has lived with me in my lifetime but having regard always to the state of our business and to any economic conditions which may effect the same and further that he shall himself make a will leaving the whole of his estate to me should he predecease me and otherwise to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath or, in the event of the death of either, to the survivor of them SHOULD my said brother Jagannath predecease me I give devise and bequeath the whole of my estate including such property as I shall inherit from the said Jagannath and remain possessed of at the time of my decease to be divided equally between my said wife Ramdassi and Bacheoni the wife of the said Jagannath and I direct that if either the said Ramdassi or the said Bacheoni shall predecease me that the whole of my estate shall go to the survivor of them and, in such an event or events, I appoint the said Ramdassi and the said Bacheoni or the survivor of them, to be my executrices and trustees ".

What was the intention of the testator when he made his will in these terms ? That intention is, if possible, to be deducted from the terms of the will itself and, to my mind, to do so is not a task of undue difficulty. He appoints defendant to be " my sole executor and trustee " and gives to his "said trustee " the whole of his estate " absolutely save only with " a certain " proviso ". That proviso is divided into two parts. The first is that defendant shall allow plaintiff to live in a certain dwelling house and supply her " out of my estate " with a sufficient maintenance, and the second is the defendant shall make a will leaving his whole estate to the testator, should he survive defendant, or, should testator first die, to testator's widow and defendant's widow to be divided equally between them or, in the event of the death of either, to the survivor.

If the foregoing be a fair summary of the terms of the will, how can it be said that no trust was intended by the testator as regards the interest that passed under it ? The will may or may not be skilfully drawn (I express no opinion on the point) but it appoints defendant " trustee " as well as executor, it provides that plaintiff's maintenance for the whole of her lifetime shall come out of the estate and it only gives what it does give to defendant subject to certain " provisoes " which can only mean " conditions ". Nor does any difficulty arise from the consideration that the gift to defendant as " my trustee " is given " absolutely save only with " the provisoes. A gift of personal property (and here all the estate is personal property) to a trustee " absolutely " is not unusual (see " *Encyclopædia of Forms and Precedents* ", Vol. XV, p. 404), and thought it gives the trustee an unlimited

interest at law (which in this case it is necessary he should have if he is to carry out the terms of the trust) the question of whether or not it gives him an unlimited interest in equity is entirely dependent on the terms of the will as a whole.

In my view, then, it is clear on the terms of the will considered in detail and as a whole that the testator intended to create a trust, and on the face of it there are no grounds for saying that it is bad for want of certainty. Its precise terms will be for consideration later, but the intention to create a trust is certain, that that trust was intended to affect his whole estate is cerain, and that it was to benefit the widow, defendant, and defendant's widow to clearly ascertainable extents is no less certain. It is true that the will is gravely lacking in precision as to the powers given to the trustees to deal with the estate, but that is a difficulty which could have been (and still can be) overcome by an appropriate application to the Court and is by no means fatal to the creation of the trust.

Nor is it any less clear that defendant accepted the trust. Whatever its terms be, and I am coming to that presently, he took probate of the will as executor and he accepted substantial benefits under it, and in these circumstances he cannot be heard now to say that he did not accept the trusts imposed upon him.

To answer the question of what these trusts are it is necessary to revert to testator's intentions so far as they are to be deduced from the terms of the will but only in so far as they related to the circumstances as they existed at the time of his death, that is to say with plaintiff, defendant and defendant's wife Bacheoni all alive, for it is as at the time of his death that his will must be supposed to speak.

As far as these three persons are concerned it seems abundantly clear that the intentions of testator were as follows. Plaintiff, for the joint lives of defendant and herself, was to have her maintenance as described in the will, and on the death of defendant, if she survived him, was to take either the whole or a half share of the balance of the estate according to whether Bacheoni was or was not then alive. Bacheoni, if she survived defendant, was to have either the whole or a half share of the balance of the estate according as to whether she did or did not survive plaintiff. And defendant was to have the rest. That is to say, for the joint lives of himself and plaintiff, he was to have all that was left out of the life interest in the estate after satisfying the maintenance of plaintiff. If he survived plaintiff he was to have the whole interest in the estate subject only to the succession rights of Bacheoni, and if these rights determined during his life time by reason of the death of Bacheoni he was to have the whole estate absolutely.

These, in my opinion, were the intentions of testator as regards his own estate, these are the trusts which I find in his will and these are the trusts upon which defendant must be held to have accepted the trusteeship to which he was appointed by the will.

Having reached these conclusions, it will be a matter of little difficulty to answer the questions contained in the summons so far as these relate to the estate of the deceased, but there remains the question of whether any trust has been created affecting the property of defendant which has at no time formed part of the estate.

Whether or not there was an agreement made between the testator and the defendant in 1937 to make mutual wills, there can be no doubt that when on the death of the testator in 1943 defendant took probate of the will and acted as executor of it and took benefits under it he did so subject to the conditions contained in it. One of these was that he would make a will leaving the whole of his estate to plaintiff and Bacheoni. It is admitted that that is a condition with which he was bound to comply, it is admitted that some years before the death of testator he had in fact made a will which did comply with it, and I understand it to be admitted that that will has, up to the beginning of these proceedings at any rate, not been revoked. On the authorities cited on behalf of the plaintiff, it may well be that he is not at liberty to revoke that will, or at any rate that on his death the Court will, if so moved, intervene to see that his estate is dealt with as if it had not been revoked.

It is, however, an altogether different thing to say that the condition in Nanhu's will as intended by the testator and understood by the defendant was that as from testator's death defendant's estate other than what he took under the will should be subject to trusts of any sort. Counsel for the plaintiff, in the course of a long and learned and wholly admirable argument, laid great stress on the different versions of what Lord Camden is said to have said in the case of *Dufour v. Pereira* (Dick. 418). But the circumstances there were not on all fours with those in the present case. That case was decided in 1769, long before Married Women's Property Act, and all the wife's property flowed from her deceased husband's will. As His Lordship, dealing with the facts, says (in the Dickens report): " The husband by the mutual will assents to his wife's right and makes it separate ". Here, on the other hand, we are concerned with property which came to defendant other than under the testator's will.

On a consideration of the authorities cited by counsel the conclusion cannot be avoided that the question is not a question of what does or does not arise by mere operation of law but a question to be decided on the facts of each individual case. In *Gray v. Perpetual Trustee Co.* (1928 A.C. 391) Viscount Haldane discussed the decision in *Dufour v. Pereira* (*supra*), he pointed out that in that case an agreement not to revoke mutual wills had been inferred, and went on to say: " The agreement (i.e., not to revoke mutual wills), which does not restrain the legal right to revoke, was the foundation of the right in equity which might emerge, although it was a fact which had in itself to be established by evidence, and in such cases the whole of the evidence must be looked at." Later His Lordship stated the conclusion of the Board in the following words: " The case . . . is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shown to have been made . . . The mere fact of making wills mutually is not, at least by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can no more be a trust in equity than a right to damages at law ".

That the question is primarily one of fact is illustrated by the two cases cited of *in re Hagger* (1930 2 Ch. 190) and *in re Oldham* (1925 Ch. 75), and indeed, on any other basis, it would be difficult, if not impos-

sible, to reconcile these two decisions with each other. In *Hagger* there was a joint will by husband and wife containing a long recital setting out that they had been engaged for many years past in a certain business to which they had devoted their joint energies and as a result had acquired certain properties and money which they had always treated as their joint property and of which no division had ever been made. Clauson J. in his judgment stated the facts and, after some preliminary observations, went on to say: " It is perfectly clear that when the husband and wife made this joint will they contemplated that the property which they were pooling would all go to the same beneficiaries, whether in its inception it was the property of the husband or the property of the wife ". In the event he held that the whole of the joint property was affected by certain trusts. In *Oldham,* on the other hand, which was a case where a husband and wife had made mutual wills but where the surviving wife had revoked her will after her husband's death, Astbury J. examined the authorities at length and pointed out that the mere fact that two wills are made in identical terms does not of necessity imply any agreement beyond that so to make them. He considered the evidence before him, and, after observing that he could not " build up a trust on conjecture ", came to the conclusion that he had no sufficient means for deciding with certainty what, among may possible inferences, was the sole inference that should be drawn from the circumstances of the case and that accordingly there was no implied trust preventing the wife from disposing of her property as she pleased.

In this present case, so far as the estate of testator is concerned, the position is clear but it cannot be said that there is anything approaching the same degree of clarity regarding defendant's own property. Nothing is to be drawn from the recital of the will beyond the fact that defendant was testator's brother and partner, there is not a scrap of evidence as to the terms of the partnership between them, there are no words anywhere in the will even suggesting, far less making, a specific imperative condition that defendant should set up any sort of trust affecting his own estate during his lifetime or that anything should be paid to anybody out of his estate during his lifetime. If such had been his intention testator could well have said in his will, " I give my partner my estate on condition that as from my death he holds the whole of the partnership assets in trust for himself and my widow and his own wife." He could have said, " I give him my estate on condition he pays my widow's maintenance out of the profits of our partnership and makes a will giving the whole of the partnership assets to my widow and his own widow." But he has not said either of these things, he has said nothing at all, and with respect I propose to adopt the words of Astbury J. and say that I refuse to build up a trust on conjecture as to what he intended to say and did not say.

The answers, then, to the questions raised in the summons will be as follows:—

(*a*) On the true construction of the will of Nanhu deceased, executed on 21st August, 1937, and in the events which have happened, a trust is created.

(*b*) The said trust cannot be revoked save either under the sanction of the Court or with the consent of all parties interested under the said trust and being *sui juris.*

(*c*) The said trust attaches only to the estate of the said Nanhu deceased.

(*d*) Subject to the life interest of plaintiff the defendant takes a life interest in the property to which the trust attaches together with an interest in the whole estate absolutely contingent on his surviving plaintiff and his wife Bacheoni.

(*e*) As the defendant does not take a life interest only, this question does not arise.

((*f*) The trust confers interest on the defendant as set out previously.

(*g*) As the answer to (*f*) is in the affirmative, this question does not arise.

(*h*) The interest taken by defendant is as set out in (*d*) above. Subject in the case of each of them to their survivng defendant, plaintiff and defendant's wife Bacheoni take an interest absolutely to the trust property as it exists at the death of defendant, each of them as to one half of the said property, or, if only one of them survive defendant, then such one as to the whole of the property.

(*i*) The defendant has no power to dispose of the property which is affected by the said trust save under the sanction of the Court or with the consent of all parties interested under the said trust and being *sui juris*.

There remains the question of costs. I see no reason why the costs of both parties should not come out of the estate, and it is ordered accordingly.

R. *v.* JOSEPH RAMA.

[Criminal Jurisdiction (Seton, C.J.) October 15, 1946.]

Marriage according to Hindu custom performed in Fiji prior to April 1929—provisions of Marriage Ordinance (Cap. 118) as to registration etc. not complied with—subsequent ceremony of marriage during lifetime of spouse—second ceremony in Christian church and all requirements of Marriage Ordinance observed—whether second ceremony bigamous—validity of first marriage in issue.

Joseph Rama, then a Hindu, and a woman Achamma went through a form of marriage in accordance with Hindu custom in Fiji prior to April 1, 1929. The ceremony was performed by a Hindu priest who was at that time not registered as a marriage officer and none of the requirements as to notices etc. were complied with. Rama went through a second ceremony of marriage during the life of Achamma with Toroca Tanvola, this ceremony being performed by a Wesleyan minister at Levuka in accordance with the Marriage Ordinance.

HELD.—(1) A marriage solemnised in Fiji prior to April 1, 1929 in accordance with Hindu custom and without observance of the formalties prescribed in the Ordinance is a valid marriage the consequences of which are regulated by the personal law of the parties.