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March 1.

Regular Appeal No. 7 of 1864.

WILLIAM WEBBE.....*Appellant.*
WILLIAM LESTER and others .....*Respondents.*

"Justice, equity, and good conscience"—English Law—Joint Speculation in improving land—Survivorship—Jus Accrescendi—Joint Tenancy and Tenancy in Common—Reg. VI. of 1827, Sec. 26—Reg. XVIII. of 1827—Will—Stamp.

In deciding a case, in the absence of specific law and usage, according to justice, equity, and good conscience (Reg. IV. of 1827, Sec. 26), the Court should be guided by the principles of English law applicable to a similar state of circumstances.

A joint speculation in improving land on a hazard of profit and loss is treated in Equity as in the nature of merchandise, and the *jus accrescendi* not allowed.

The survivorship in the case of joint tenancy is not an incident to it in the case of real estate only, but exists also in the case of leasehold property and personal estate.

Reg. XVIII. of 1827 does not require a Will to be stamped during the testator's lifetime.

THIS was a regular appeal from the decision of C. Walter, Acting Judge of the Puná District, in Original Suit No. 134 of 1864.

The facts of the case sufficiently appear from the following extracts from the judgment of the District Court :—

"This suit is instituted against the defendants to obtain the possession and management of certain mirás land, the claim being laid at the amount of the assessment. The grounds of action are that, in 1831, Mr. Webbe (the plaintiff) and Mr. Sundt (deceased) obtained from Government, by sanad, through the Collector, Mr. Giberne, the said Government land situate in the villages of Mundve and Hadapsar, in the Haveli táluká ; that Mr. Sundt died in 1856, consequently that Mr. Webbe (plaintiff) has become, by English law, vested with the sole proprietary right in the whole and the right of management. But it is urged that the defendant Mr. Lester, on behalf of himself and the other defendants, forcibly and without any authority occupies the said land. It is sought to eject him ; the lands are detailed ;

and it is further set forth that a bungalow and out-houses situate on the said land were erected by the plaintiff at his own expense.

"Mr. W. Lester answers that the deceased Mr. Sundt made a will, dated the 22nd of May 1854, appointing Mr. Clugston and himself trustees; and that, since his death, they have been managing the estate for the benefit of the parties named in the will; that Mr. Webbe has been a consenting party to their doing so, and hence that his claim will not lie; (2) that Mrs. Lester (the cestui que trust) being illegitimate, the English law which is in force in England cannot properly be made applicable to the case, which should be disposed of according to the usage of the country; (3) that Mr. Webbe alone did not build the bungalow, &c., as stated in the plaint, but that the expense of the buildings was borne by Mr. Sundt and Mr. Webbe conjointly; (4) that they have raised no objection to the equitable rights of the plaintiff, so that there is no cause of action; that the plaint contains false averments, and should, therefore, be thrown out.

"The case being called on, the Court finds the following points admitted on both sides:—(1) That the land in dispute was granted to Mr. Webbe and the late Mr. Sundt conjointly, in October 1831, by the sanad, under Mr. Giberne's signature, produced, and recorded No. 12; (3) that the land was thenceforward enjoyed by Mr. Webbe and Mr. Sundt in partnership, until the decease of the latter, in 1856; (3) that when Mr. Sundt died he left a wife, Mary, and an illegitimate daughter, Jeanette (Mrs. Lester), in the interest of whom he made the present defendants Mr. W. Lester and Mr. Clugston trustees of his real and personal property under the will produced, and recorded No. 14."

The issues laid down by the Judge were as follows:—(1) What law should govern this case; (2) In the case of a joint tenancy, like the present, in the absence of heirs of a deceased partner, does the surviving tenant succeed by law to the whole joint estate; (3) Is it competent to a joint tenant to will away at his decease his share of such joint property; (4) Is the will recorded, No. 14, valid as regards its stamp; (5) Is

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the property in dispute actually conveyed under the will or not; (6) Is the bungalow erected on the land in dispute a part of the joint estate, or does it belong exclusively to the plaintiff as having been built by him; (7) Whether Mr. Webbe is estopped by any previous admissions, in which he may have from time to time recognised Mr. Lester &c.'s claim to the half-share, from now asserting his claim to the whole.

The Judge found that the English law should govern the case; and on the second and third issues, found that "in this country, on the death of a joint tenant, the surviving partner in an estate like the present is only entitled to succeed to the whole estate in the absence of heirs, either of the body or by will, of such deceased; and that it is competent to a joint tenant at his death to devise his interest." But, as his decision upon these points was based upon grounds which, in the opinion of the High Court, were untenable, it is unnecessary to specify them.

On the fourth issue he found that the fact of the will having been stamped before it was produced in court authorised its reception in evidence.

His finding on the fifth issue was, "that the share in the estate in dispute must be held to pass under the general terms used in the will, viz., 'rest and residue of all my estates and effects whatsoever.' I can find no reason for limiting the meaning of these very comprehensive terms so as to exclude it. It is argued that as two houses are specifically mentioned, then why was not the garden distinctly alluded to in the same manner? I think that this is explained by the consideration that the evident reason why the two houses were specifically mentioned was simply in consequence of their being the particular items of property which the testator directed should not be sold, but be reserved to other uses."

His finding on the sixth issue was: "Plaintiff has produced no evidence to establish the fact of his having built and exclusively paid for the bungalow, &c., as he avers in

his plaint. Hence the defendants, along with the half-share of the joint estate, have a similar claim to the tenement standing thereon."

He considered it unnecessary, after these findings, to go into the question raised in the seventh issue; and concluded as follows:—

"The claim is, therefore, thrown out with costs; and it is directed that the parties do continue to exercise the joint management of the estate and the tenement thereon, in the same manner as it was formerly exercised, before the demise of Mr. Sundt in 1856, by the deceased and Mr. Webbe."

The case was heard before COUCH and NEWTON, JJ.

Anstey and *Dallas* for the appellant.

Bayley, Vishvanáth Nárâyaṇ Mandlik, and *Bhairavanáth Mangesh* for the respondents.

Cur. adv. vult.

COUCH, J.:—The principal question in this case is whether the plaintiff (the appellant) and the deceased Mr. Sundt were the owners of the land, which is the subject of the suit, as joint tenants with a right of survivorship; or must be considered to have been tenants in common, with no right of survivorship between them.

The late Judge of the District Court, in drawing the distinction which he appears to have done between real and personal property, and in allowing that if this is to be considered as real property there would be a right of survivorship, has not, we think, taken quite a correct view of the question before him, and has been thereby led to rest his decision upon a ground upon which it cannot be supported. The right of survivorship in the case of a joint tenancy is not an incident to it in the case of real estate only, but exists also in the case of leasehold property and personal estate. "Personal property may be held by two or more persons in joint tenancy, or in common; and in the former case the same principle of survivorship applies which exists in the case of a joint tenancy in lands:" 2 Kent's Commentaries,

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350. "The personal property in which the deceased had but a joint estate or possession will survive to his companion, and his executor or administrator will not be entitled to a moiety of it, for a survivorship holds regularly as well between joint tenants of goods and chattels, in possession or in right, as between joint tenants of inheritance or freehold:" Williams on Executors, 5th ed., 576.

The doctrine, therefore, adopted by the District Judge, with regard to the law of England in force in India, upon the authority of the decision of Sir A. Anstruther, will not be sufficient to determine the question in this suit; and it is not enough to say that the property in dispute may be treated like leasehold or personalty. It appears to us that the question must be decided on higher grounds, and by rules applicable equally to personal as to real estate. The English law is confined within the limits of the charters of the Supreme Courts; and is not the law of the Mofussil, where, by Reg. IV. of 1827, Sec. 26, the law to be observed in the trial of suits is "Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone."

There is no evidence that either the deceased Mr. Sundt or the defendants must be considered as natural-born subjects of the Queen, so as to make the English law their law, nor any evidence of any specific law or usage by which, as the law of the defendants, the suit ought to be decided; and the rights of the parties must, therefore, be determined according to justice, equity, and good conscience. In doing this we may be guided by the principles of English law applicable to a similar state of circumstances; and we have come to the conclusion that according to both justice, equity, and good conscience, and to English law,—which, in Courts of Equity, ought to be identical,—there was in this case no right of survivorship.

In considering the question, the statements made by the

plaintiff after the death of Mr. Sundt are important, and must not be overlooked. In *Harrison* v. *Barton* (*a*), Vice-Chancellor *Wood*, in considering a similar question between two brothers, held that he could not overlook the transactions which took place after the death of one of them. Now on the 6th of October 1852 the plaintiff, in a letter to the defendant Lester (exhibit No. 32), says: "Besides, I should be consulted, as *I am half-owner of the sanad.*" On the 22nd of July 1861 he says, in another letter to Mr. Lester (exhibit No. 33): "I have given up all idea of selling *my share* in the garden at present." On the 4th of August 1863 (exhibit No. 34) he writes to Mr. Lester, referring to an offer that had been made of Rs. 60,000 for the garden and lands appertaining to it:— "We may wait long enough for a better price without any hope of obtaining: therefore, on mature consideration, I have accepted the offer *on my part*, and I trust you will coincide with me and do the same;" and on the 6th of October 1857 (exhibit No. 36) he wrote to Mr. Lester that it would be necessary that a yearly account of the amount received and expended, and the balance remaining in his hands, should be exhibited for Mr. Lester's information. These statements are important as showing that, according to the belief of the plaintiff at the time, it was not the intention of himself and Mr. Sundt that the property should be held with a right of survivorship; and his subsequent view of his rights appears from his letter to Mr. C. R. Ovans, First Assistant Collector and Magistrate of Puná, to be founded on a passage in Blackstone's Commentaries, which he refers to as showing the English law, and it is probable that his present claim was caused by this supposed discovery of a rule of English law in his favour. He or his advisers had better have taken a wider view of the subject, and inquired somewhat more fully into the English law before making the claim.

The leading case in the English Courts of Equity on the question before us is *Lake* v. *Gibson*, *Lake* v. *Craddock* (*b*); where it was laid down by Sir Joseph *Jekyll*, Master of the

(*a*) 30 Law J., Chan. 213. (*b*) 1 Wh. & Tu., L. C. Eq., 143.

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Rolls, his decree being affirmed by the Lord Chancellor on appeal, that where several persons make a joint purchase for the purposes of a joint undertaking or partnership, either in trade or any other dealing, although they are joint tenants at law, in equity they will be considered as tenants in common, and the survivors as trustees for those who are dead. The maxim of the common law, *jus accrescendi inter mercatores pro beneficio commercii locum non habet*, has been applied where, from the nature of the transaction, it can reasonably be implied that a tenancy in common was intended. Illustrations of this may be found in the notes to *Lake* v. *Craddock*, in the work we have referred to, and it is unnecessary for us to state them; but we may mention in addition to them the cases of *Robinson* v. *Preston* (c) and *Bone* v. *Pollard*. (d).

In *Dale* v. *Hamilton* (e), where the decisions on this subject are fully considered, *Wigram, V.C.*, says: "*Lake* v. *Craddock* shows that the joint speculation in improving land on a hazard of profit and loss is treated in this Court as in the nature of merchandise, and the *jus accrescendi* not allowed;" and Lord *Eldon's* comment on the case is this (9 Vesey 597): "the purchase of the land was made to the intent that they should become partners in the improvement; that it was only the substratum for an adventure, in the profits of which it was previously intended they should be concerned."

Now the evidence in this suit appears to us to show that the taking of the land from the Government by the plaintiff and Mr. Sundt was a transaction of this nature. We have not in evidence the letter of the Government of the 13th of May 1831; and the grant or sanad from Mr. Giberne to Mr. Sundt and the plaintiff throws no light upon their intentions, except that it may be gathered from it that a considerable outlay would be required to make the lands available as garden lands, and that this was in the contemplation of the parties. But in a letter written by Mr. Sundt and the plaintiff to the Collector of Puná, dated the 8th of April 1856 (exhibit No. 38), on the subject of the railway passing through the property, there is this passage: "We, therefore,

(c) 4 Kay & J. 505. (d) 24 Beav. 283. (e) 5 Hare 384.

humbly request you will be pleased, through your kind intercession, to have the line removed as above stated, and the evil be avoided, otherwise we will feel the loss severely, and may eventually cause us to give up the garden, after a great outlay which we expended in improving it during the last 25 years;" and then follows an estimate of the expenses incurred and the improvements made in the garden from the year 1831 to that time, amounting to Rs. 18,330, the particulars of which are given.

A still more important document is the exhibit No. 56, which is a letter addressed, by the plaintiff and the defendant Lester, to Captain Francis, Superintendent of the Puná and Tháṇá Survey, and Mr. Leighton, First Assistant Collector of Puná, dated the 16th of September 1857, in which, after stating the particulars of their claim for compensation for damage done by the railway, they say:—"Although we would fain confess that we view it as a very inadequate compensation for serious damage sustained by the severance of the best and fairest portion of our farm, which has been held for the last 26 years, and on which, besides the visible and valuable improvement thereon in the shape of a permanent stone dam, watercourses, and buildings, &c., we have incurred an expenditure in trees and experiments of upwards of Rs. 20,000, to which may be added the purchase money (Rs. 946), as per deed granted in miras, under Government instructions bearing date 19th Oct. 1831. Besides, the unconditional and unrestrictive nature of the grant conferred on the grantees a valid and permanent title to the occupancy, which induced them, with no small amount of confidence, to incur the risk they have of laying out capital for the improvement of these lands."

Looking at the statement made by the plaintiff in this letter, as well as to the other evidence in the suit, we are of opinion that this was a joint speculation in improving the land on a hazard of profit and loss, and that the purchase of the land was made with the intent that the parties might become partners in the improvement, the land being only the substratum for the adventure; and that, therefore, the

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plaintiff and Mr. Sundt must be considered in equity to have been tenants in common, and that the plaintiff has no right by survivorship to the share which he now claims.

In this court we are, happily, not bound to observe the distinction between law and equity, according to which the legal interest in the whole of the property would be vested in the plaintiff, and he would be a trustee of Mr. Sundt's share for his representatives, in which case it would be necessary for the defendants to prove their title under his will. But we are of opinion that they have done so. Reg. XVIII. of 1827 does not require a will to be stamped during the testator's lifetime; and there is no analogy, as was argued by the appellant's counsel, between the want of a stamp and the want of his signature. We think the will was properly admitted in evidence; and that the words "all the rest and residue of my estates and effects whatsoever" are sufficient to pass the testator's share in the property in dispute without naming it, and it cannot be inferred from the two houses being specifically mentioned that this was not the testator's intention.

There is also no foundation in the evidence in the suit for the argument of the appellant's counsel, that the testator must be taken to have devised with a knowledge that he had no power to dispose of his share in the property. The state of his mind was probably the same as that of the plaintiff, who appears until recently to have had a very different view of the rights of himself and his partner. The decree of the District Judge must be affirmed with costs.

Decree affirmed.