

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Stuart and others v. Norton, from the Supreme Court of Civil Justice, British Guiana; delivered November 29, 1860.*

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Present :

LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

LORD JUSTICE TURNER.

THE question here, except so far only as mere form and mere expression are concerned, is substantially whether a trustee resident in England, appointed by the will of a proprietor, who was resident in England, of lands in British Guiana, must, in order to act in the trusteeship, be personally resident in Guiana (for the controversy amounts to that), or may appoint a person to act there, not as a substitute for the trustee, but as the agent and attorney of the trustee in the matter of the trust. In this instance it happens that there are other trustees resident in Guiana, who, according to the terms of the will by which they were appointed, may act alone or together with the trustee resident here. In that state of things, the trustee resident here has appointed an attorney, against whose integrity, capacity, or fitness, no suggestion has been made. He is resident in the colony. He is appointed to act there for the trustee resident here in respect of the matters of the trust. The powers purporting to be conferred certainly are very full; but the question is not here what particular acts to be done by the attorney may be, or may not be, within the just limits of the powers. It is, generally, whether the trustee in England may appoint such a person as I have described to act in Guiana for the trustee in the affairs of the trust.

It is said that, according to the English law, a trustee cannot delegate discretion, cannot act by another in a matter of discretion; but even in the English law that general rule may be open to exception, and their Lordships are not at the present moment prepared to say that a trustee in England, under an English will, may not effectually appoint an attorney to act in matters of discretion connected with the trust in a colony or any foreign country.

That point, however, it is unnecessary to decide, for this case must be regulated by the Dutch Law prevalent in British Guiana; and no authority has been cited to their Lordships, nor are their Lordships aware of any, rendering such an act inconsistent with the principles or practice of the Dutch law. What the practice is, as far as the colony is concerned, the judgment, indeed, of the learned Judge in the present case shows. Nor are their Lordships disposed, in point of principle, precedent, or usage, to deny or question the position that a trustee—an English trustee—appointed by a will, made in England, of a proprietor of land in an American Colony, governed by the law of Holland, may appoint a competent person, such as the gentleman in question, to act in the colony in matters of discretion, as well as in other matters connected with the trust. It is said that this point is precluded by the judgment in the suit which was instituted by Mrs. Norton in the year 1857 against her co-trustees in the colony; but when the papers are referred to, that claim seems to have been very much of the same nature as that now made by the co-trustees against herself, namely, that she desired to have exclusive possession of the property, and to intercept and prevent her co-trustees from all power of action during her life. The Court by its judgment, of which their Lordships see no reason to doubt the propriety, held that the lady was not entitled to any such exclusive possession. That, however, does not decide the point now in question; it seems rather an authority on this occasion for the present Respondent, if it has any bearing upon the case. The particular wording of the sentence under appeal, adopting very much the language of her last claim, has been observed upon as not strictly accurate. Perhaps it may not be so, but it may fairly receive the exposition which their Lordships have

given to it ; and it can hardly be worth while—if I may use such an expression—to make any alteration in the language used, when the intention is sufficiently evident. It has been observed also, that the will of the owner of the property forbids assumption, substitution, and surrogation : but the act of necessity, substantially, from the circumstances of the case, which has been done, is not an act of assumption, substitution, or surrogation within the meaning of the will ; it only enables the Respondent to act in a distant colony by means of a fit person in respect of matters in which it is impossible for her to act personally while resident here, and it being consistent with her duty that she should not be resident there. For these reasons, and with that understanding of the language of the sentence which has been declared, their Lordships think the present appeal unreasonable, and that it must be dismissed with costs.

*Mr. Lush, Q. C.*—Do your Lordships intend to decree the costs out of the estate ?

*Lord Justice Knight Bruce.*—Their Lordships do not intend that the costs should fall on the estate.

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