Judgment of the Lords of the Judicial Committee of the Privy Council on the two Consolidated Appeals of Farnum v. *The Administrator General of British Guiana, and Willems and wife* v. *The Administrator General of British Guiana, from the Supreme Court of British Guiana; delivered* 25*th July* 1889.

Present :

LORD WATSON.
LORD BRAMWELL.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

These consolidated appeals involve the construction of the administrative clauses in the last will and testament of Henry Marius Alexander Black, who died in Europe on the 2nd September 1886. The testator, at the time of his death, was domiciled in British Guiana, and the instrument, which was executed in Demarara on the 6th April 1886, must be construed according to the law of the Colony.

By the first clause of the will, the testator expresses his desire that his debts and funeral expenses be paid as soon as possible after his death. By the third, fourth, fifth, sixth, and eighth, he bequeaths a number of pecuniary and other legacies. By the seventh he bequeaths an annuity of 300 dollars to Lucretia Johanna Cobrian, the mother of his natural children;

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and by the ninth he leaves and bequeaths the residue of his estate to his three natural daughters, two of whom were in minority, " nominating and constituting them my uni- " versal heiresses and residuary legatees." The tenth, eleventh, and twelfth clauses express his wishes with respect to the realization of certain immoveable estate in the Colony.

The testator then provides for the administration of his estates by the 13th clause, which is in these terms :—" I nominate, constitute, and appoint as " executors to this my last will and testament, " as administrators of the annuity made and " bequeathed to the said Lucretia Johanna " Cobrian, and as guardians of my minor " heiresses and legatees, *and as administrators* " *of the property made and bequeathed to my* " *heiresses and residuary legatees for the pur-* " *poses herein stated,* the said Edward George " Barr and John Moore, jointly and severally ; " and in case of the death, refusal, or inability " to act of either of them, then I nominate, " constitute, and appoint in the place of any " one of them so dying, refusing, or being " unable to act, John Parry Farnum, the " younger, of this Colony ; and in case of " both dying, refusing, or being unable to act, " then I nominate, constitute, and appoint " the said John Parry Farnum, the younger, " and Samuel Augustus Harvey Culpeper, also " of this Colony, jointly and severally, giving " and granting to them all such ample power " and authority as are granted by law or custom " to executors, administrators of annuities, *and* " *to guardians and administrators of funds and* " *properties belonging to heirs and residuary* " *legatees,* especially the right to sell, convey, " transport, and to make over immoveable, " moveable, and other property, bank shares, " insurance scrip, debts, securities of all kinds,

" mortgages, or otherwise belonging to me, or " to which I may be entitled at the time of my " death, *and also the powers of assumption,* " *surrogation, and substitution to any of them to* " *the two last surviving of them, and to any by* " *them assumed, surrogated, and substituted for* " *the purposes aforesaid.*" Upon this clause the observation occurs that the testator confers a variety of offices upon the persons therein named. He first appoints them to be executors, in which capacity he apparently intended that they should discharge his debts and pay and make over legacies. But it does not appear that he intended them to exercise that office with respect to the remainder of his estate. On the contrary, he expressly nominates them to be "administrators" of the annuity payable to Lucretia Johanna Cobrian, and also of the residue bequeathed to his three daughters; and in relation to that part of his estate he gives them such power and authority as are granted by law or custom to " administrators of funds and properties " belonging to heirs and residuary legatees."

It is necessary to refer in this connection to the terms of the second clause of the will, by which the testator leaves to each of his executors, guardians, and administrators afternamed the sum of 100*l.* sterling, "in full of all " commission to which they might otherwise be " entitled by law or custom." The legal allowances to the executors and administrators would have been considerably in excess of the sum which he fixes as remuneration for their services; and in case of the failure of the administration provided by the will, the management of his estates would have been assumed by the Administrator General of the Colony, an officer of Court acting, at the date of the will, under the Colonial Ordinance No. 8 of 1865, whose fees would have been higher still. There can be little

doubt that it was the purpose of the testator to secure private administration at a cheap rate, and to avoid if possible official administration and official fees.

Edward George Barr and John Moore accepted office, and took possession of the whole property of the testator. Barr resided in England, but was represented by Moore until the latter quitted the Colony on the 9th July 1887. On the 29th June 1887 Moore, professing to act under the powers conferred upon him by the thirteenth clause, and on the narrative that he was about to leave the Colony "for good," executed a notarial act, by which he substituted the Administrator General of British Guiana, the Respondent in these appeals, to be in his place and stead an executor, guardian, and administrator under the will. The Colonial Ordinance No. 15 of 1887, which was passed by the Governor and his Court of Policy on the 25th May, came into operation on the 1st day of July 1887. Section 12 enacts that "No testamentary exe-" cutor or guardian having the power of sub-" stitution or surrogation shall substitute or " surrogate the Administrator General without " leave of the Court, and if any such substitution " or surrogation be executed without leave of " the Court, the same shall be void and of no " effect." There being no time to lose, the Respondent, on the 30th June 1887, made an inventory of the testator's estate and effects in the Colony which constituted the residue of the estate, and took and still holds possession of the same, in virtue of Moore's appointment. Barr has never indicated any intention to withdraw from the administration, and has, as their Lordships were informed by the parties at the bar, granted a power of attorney to a resident in the Colony, empowering the latter to act as his representative. Since he executed the notarial

act of 29th June 1887, Moore has been out of the Colony, and has admittedly taken no part in the administration of the estate.

On the 22nd July 1887, the Appellant John Parry Farnum and Samuel Augustus Harvey Culpeper, two of the persons named in Clause 13 of the will, presented a petition to the Supreme Court of the Colony, praying to have Moore's act substituting the Respondent declared to be null and void, to have themselves declared to be the true and lawful executors, guardians, and administrators under the will, and also that the Respondent should be directed to cease administering or interfering with the estate of the testator, and to hand over the whole estate to them, "without any deduction whatever for fees "or otherwise."

On the 3rd November 1887 the Appellants Pierre Jacques Willems, and his wife, the eldest of the three residuary legatees, who was married before the date of the will, presented a petition to the same tribunal, craving an order upon the Respondent to deliver to them a proper account of the estate then in his hands, and to make payment to them of 1,000*l.* to account of the lady's share of residue, on the ground that it was payable at the testator's decease. They alleged that the substitution of the Respondent by Moore was invalid, and that the administration of the Respondent was without title. The main object of the application was to have it found that, in settling the lady's share of residue, the Respondent was not entitled to take credit for the large fees payable to him as Administrator General under the Ordinance of 1865.

The Respondent resisted both petitions, on the ground that he was duly appointed to the offices of executor and administrator, and had therefore right not only to hold and manage the

estate but to charge for its administration the usual fees exigible by him in his official capacity. He also pleaded, in defence to the petition at the instance of the Appellants Willems and his wife, that the lady's share of residue was not payable until her youngest sister attained majority or married. The Supreme Court, consisting of Chief Justice Chalmers, Judge Sheriff, and Acting Judge Kirke, on the 6th January 1888 disposed of both petitions by refusing the prayer thereof and ordering the costs of all parties to be paid out of the testator's estate. In the petition at the instance of Farnum and Culpeper the Chief Justice differed from his brethren, holding that, according to the true construction of Clause 13 of the will, Moore had no power to substitute the Respondent in his room and stead. That point having been determined against his opinion in the first case, the learned Chief Justice in the second acquiesced in the judgment of the majority.

It appears to their Lordships to have been the plain intention of the testator to provide, by the thirteenth clause, for the continuous management of his estate by a series of private administrators, notwithstanding the failure by death, declinature, or otherwise of those who had entered upon office and acted. The considerations in favour of that view, which are apparent on the face of the instrument, are substantially the same with those which were given effect to by Kindersley, V.C., in "Travis *v.* Illingworth" (2 Drewry and Smale, 344). The testator names four persons of his own selection in whom he reposed confidence. Two of these are preferred in the first instance, that is to say Barr and Moore; on the failure of one of them, he puts the Appellant Farnum in his place; and on the failure of both, Farnum and Culpeper are appointed their successors. So far, the meaning of the clause is not doubtful; but the testator then proceeds,

after conferring ample administrative powers, to make provision against the possible failure of the persons he had previously named, by giving in addition powers of assumption, surrogation, and substitution. The real question to be determined in these appeals is, who are the donees of the power of substitution? The Chief Justice was of opinion that the sole donees of the power are the two last surviving of the four persons named by the testator; whereas the majority of the Court seem to have held that the power was given to all the accepting and acting executors and administrators jointly and severally, so that Moore, as one of them, could competently substitute the Respondent.

All the Judges in the Court below held that the words "to any of them to the two last "surviving of them" apply to the same subject matter, the majority being of opinion that they are applicable to and descriptive of the donees of the power. The Chief Justice said that he could not divorce the words "to any of them" from the immediately succeeding words "to the "two last surviving of them." On that assumption a serious ambiguity arises, which the Chief Justice has solved by denying effect to the first of these expressions, and his colleagues by treating the second as meaningless. Their Lordships do not think that the language of the testator, when fairly construed, raises the ambiguity which has been so elaborately and learnedly discussed in the Court below. In their opinion it is obvious that the testator used the first expression with reference to the faculty he was conferring, and the second with reference to the persons upon whom he meant to confer it; and that the sentence must be read just as if it had run thus, "giving and granting" . . . . "to the two last surviving of them, "the powers of assumption, surrogation, and "substitution to any of them." That reading

does no violence to the context; it attributes a meaning to every word in the sentence, and fits into, instead of subverting, the general scheme which the testator has previously framed for continuing the future administration of his estate. Moore was not, in June 1887, one of "the two last surviving of them" within the meaning of the will, and he had therefore no power to confer any administrative office upon the Respondent.

It was urged for the Respondent that, according to the Roman-Dutch law, which prevails in the Colony, Barr and Moore were executors and that upon their acceptance of office the nomination of Farnum and Culpeper became inefficacious. Coming from such a quarter the argument was a very singular one, because, if pushed to its logical consequences, it would not only deprive Farnum and Culpeper of the right to take up the administration in the events provided by the testator, but would invalidate the substitution by Moore of the Respondent himself. But in truth the argument rests upon the fallacious assumption that the office conferred by the testator in Clause 13 is that of executor in the sense in which the term is understood in the law of England. The Roman law did not recognize the office of executor; the *hæres institutus* was a true heir, although he might be burdened with legacies and *fideicommissa*. This Board had occasion, in the recent case of "De Montmort *v.* Broers" (13, Ap. Ca., 154) to explain that, according to Roman-Dutch law, the executors of a testament are in reality procurators, and that their powers, in relation to the estate falling to the testator's heirs, are merely those of management. That such is the law of British Guiana appears from a judgment delivered, in the year 1861, by a former Chief Justice (Arundell) of the Colony, which is printed in the papers before us. He

states the law of the Colony to be that "the "authority of the executors is derived from the "will of the testator, which governs and defines "the limits of that authority"; and in the case before him he held, in respect of the intention of the testator, as appearing from the text of his will, that the appointment of executor was more of the nature of an attorney or administrator than of a pure executorship. In the present case, the testator has not left in doubt the nature of the office which he meant to confer upon the persons named in Clause 13 of the will. He specially constitutes them "administrators" of the property bequeathed to the residuary legatees, and gives them all the powers by law or custom incident to that office.

The only other argument of the Respondent deserving of serious notice was to the effect that the Appellant Farnum cannot prevail in his petition, because the legal effect of declaring his act of substitution void will be to reinstate Moore in office. To that proposition their Lordships are unable to assent. Moore's act of substitution was not merely equivalent to a representation that he was unwilling or unable to continue to administer, but was an actual demission of his office. It was also suggested, in the course of the Respondent's argument, that Moore ought to be made a party to these proceedings before any decree can be pronounced ordaining the Respondent to make over the estate and its titles and vouchers to the Appellant Farnum. The plea, which ought to have been stated *in limine*, comes somewhat late; but their Lordships do not see what object could have been gained by Moore's appearance, except that he might now have been subjected in the expenses occasioned by a gross breach of trust on his part.

Seeing that the Appellant Farnum is now the only qualified administrator resident in the Colony where the estate is situated, the fact that Barr, who is resident in England, also claims to share in the administration can be no impediment to a decree ordaining the Respondent to transfer to him in terms of the prayer of his petition. There is no charge of malversation made against the Respondent, and he will therefore be entitled, in accounting for the estate, to deduct all outlays necessarily and properly incurred by him; but he will not be entitled to any official fees or to remuneration for personal services in the administration of the estate, which he illegally took possession of, and has wrongfully withheld from those entitled to it.

In the petition at the instance of the other Appellants the question as to the time at which Mrs. Willems' share of residue became payable under the will has ceased to be of any practical consequence, because her youngest sister attained majority in January 1889.

In these circumstances their Lordships will humbly advise Her Majesty to reverse the judgment appealed from in each of these cases; in the petition of the Appellant Farnum and Culpeper, to declare the act of substitution by John Moore to be null and void, as being contrary to the terms of the will, and to ordain the Respondent, the Administrator General of the Colony, forthwith to transfer and deliver to the said Appellant the whole estate of the testator, with the accounts and vouchers thereof, and also to pay to the said Appellant and Culpeper their costs in the Court below; and in the petition at the instance of the Appellants Pierre Jacques Willems and his spouse, to declare the substitution of the Respondent by John Moore to be null and void to find it unnecessary to pro-

nounce any further deliverance, and also to find neither of the parties to the said petition entitled to their costs in the Court below. The Respondent must pay the cost of these appeals.