1909
Aug. 19.

[CIVIL JURISDICTION.]

[ACTION NO. 10, 1909.]

TWITCHELL *v.* FLOYD AND OTHERS.

Construction of will endowing a Bishopric of Fiji—Bishop in Polynesia appointed.

Held, not Bishop of Fiji within the meaning of the will.

C. MAJOR, C.J. John Campbell, late of Sydney, New South Wales, by his will dated the 8th day of January, 1886, devised and bequeathed his real and personal estate to trustees upon trust for sale and out of the proceeds thereof after payment of sundry liabilities, in case the net proceeds of his Fiji estates should produce a sum of 10,000*l.* to set apart that sum in and towards the founding establishment and endowment of a Bishopric of Fiji in connection with the Church of England, or otherwise for the support and advancement of the same when established, in such manner and form as his trustees should see fit and consider most conducive to the objects sought to be obtained—but in case his said Fiji estates should not produce the sum of 10,000*l.* then the testator directed that the whole net proceeds thereof should be appropriated for the purpose before mentioned of the Bishopric. Various legacies, some of them to various ecclesiastics in Australia for charitable purposes, follow by the will and the testator's residuary estate was bequeathed to Robert Campbell Close, Charles Campbell (two of his three trustees and executors), and his nephew Robert William Campbell.

John Campbell died on the 22nd of January, 1886, Charles Campbell on the 17th of August, 1888, and Robert Campbell Close on the 20th of February, 1901.

In a suit instituted in Australia by Frederick Campbell, the third and surviving trustee of John Campbell's will, against the Attorney-General of New South Wales and others (I presume the representatives of the original residuary legatees), it was declared that, according to the law of New South Wales, the bequest of 10,000*l.* charged on the testator's lands in Fiji as above set forth was a valid charitable bequest and the plaintiff was to be at liberty to apply to this Court for the formation of a scheme for the sale of the lands and the disposition of the funds of accumulated rents and the proceeds of sale. On the hearing of a summons issued out of this Court at the instance of the Attorney-General of New South Wales against Frederick Campbell, it was declared expedient that Frederick

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Campbell, the sole surviving trustee of the charity should appoint the present defendants trustees thereof in his place and that the trust property should be vested in the defendants. That declaration was adopted and confirmed by the Court of New South Wales and the trust property, on the 17th of April, 1907, was transferred to and vested in the present defendants. Until 1907 nothing appears to have been done by the ecclesiastical authorities upon whom any obligations may have lain either for the establishment of a Bishopric of Fiji, or to bring about the presence in the Pacific of a Bishop of the Church of England in any way connected therewith or exercising episcopal jurisdiction therein. In 1908, however, on the Feast of the Ascension, the plaintiff was consecrated to be a Bishop of the Church of England in Polynesia. His Lordship's Commission is addressed more particularly to the clergy and congregations of the Church of England in the Polynesian group of islands in Oceania, in the Pacific, and after reciting the plaintiff's consecration as above and that it was desired that he should as Bishop, exercise episcopal jurisdiction over the clergy and congregations not only in islands within His Majesty's Dominions but also over English clergy and congregations (if any) of the Church of England in islands in other Dominions within the sphere of jurisdiction to be assigned to him, the Commission declares the plaintiff to be thereby authorised and commissioned as Bishop in Polynesia to be and continue to be and to exercise the functions of a Bishop of the Church of England in the Polynesian and other islands of the Pacific within a certain geographical area in the Commission defined. The Colony of Fiji is within that area and the plaintiff is the only Bishop commissioned to exercise episcopal jurisdiction over clergy and congregations of the Church of England within the same.

This summons has been issued by the plaintiff to determine the following questions:—

(*a*) Is the plaintiff the Bishop of Fiji ?

(*b*) Does the Commission appointing the plaintiff Bishop in Polynesia enable the testator's intention regarding the founding establishment and endowment of a Bishopric of Fiji as expressed in his will to be carried into effect ?

(*c*) May the defendants pay to the plaintiff the accumulated income from the said trust funds in their possession in order that the plaintiff may use them in defraying the cost of the erection of a Bishop's residence within the Colony of Fiji ?

During the jejune argument addressed to me by counsel for the parties, reference has been made by Mr. Crompton for the plaintiff to some ecclesiastical literature on the question whether the plaintiff is Bishop of Fiji, or Bishop of Polynesia and therefore Bishop of Fiji. The reference, however, has afforded me no assistance whatever. Mr. Lewis for the defendant Wm. Floyd, has confined himself to the contention that the testator has named a Bishopric of Fiji as the object of his charity, that there is no Bishopric of the kind and that until there is, the testator's directions cannot be carried out. Mr. Caldwell for the defendants Bolton Glanvil Corney and Horace Packe, adopts Mr. Lewis's contention without materially adding to it. No authorities out of the hosts arrayed in the books, have been cited by counsel.

The answer to the first question—is the plaintiff the Bishop of Fiji ?—is in the negative. He is not the Bishop of Fiji in the ordinary acceptation of the expression "Bishop of" a certain place or diocese; he is certainly not the Bishop of Fiji, the person filling the "Bishopric of Fiji" in the sense in which it is plainly to be gathered, the testator used that expression. It has been contended for the plaintiff that, by reason of the terms of his Commission, he is at any rate Bishop of Polynesia and, therefore, in a sense, if not actually Bishop of Fiji, a country lying within the sphere of his episcopal jurisdiction. I cannot agree. I do not think the plaintiff is Bishop of Polynesia in the same way as Dr. Ingram is Bishop of London or Dr. King Bishop of Lincoln, though it is unnecessary for me to decide the point; even if he were, he is not thereby Bishop of Fiji, at any rate within the clear intention of the testator.

It follows that the answer to the second question propounded for the plaintiff—does the Commission appointing him Bishop in Polynesia enable the testator's intention regarding the founding establishment and endowment of a Bishopric of Fiji to be carried into effect ?—is also in the negative. If the plaintiff is not the Bishop of Fiji, there is no Bishopric of Fiji in connection with the Church of England; the testator having named that Bishopric as the object of his charity, it is not by that name and under that description in existence.

The answer to the third question—may the defendants pay over to the plaintiff for use in the erection of a Bishop's house in Fiji, the accumulated income of the trust fund ?—depends upon different considerations. What are the facts ? The Colony of Fiji is part of a fixed area of land and sea in which

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a Bishop of the Church of England has been appointed and commissioned to exercise episcopal jurisdiction. In this Colony that Bishop lives, in Suva, its capital, he has his cathedral.

There is no other Bishop of the Church of England so commissioned within the area mentioned and none other, therefore, in Fiji. The testator died in 1886, twenty-three years ago; during that time no Bishop of Fiji has been appointed; there does not seem any likelihood, particularly in view of the recent consecration and appointment, that a Bishop of Fiji will be appointed. It is possible, of course (and that possibility just makes all the difference to the decision of the matter) for the appointment may be made at some more or less remote period. Must the defendant trustees hold the trust funds until that period arrives? The case of *Attorney-General* v. *the Bishop of Chester* (1 Bro. C. C. 444) in part supplies an answer. In that case, decided in 1785, a testator gave 1,000*l.* to trustees for the purpose of establishing a Bishopric in America then part of the British Dominions. It was contended for the residuary legatees that there being no Bishopric in America and no likelihood of their ever being one, the legacy was void. Lord Thurlow, L.C., held that the money must remain in Court until it should be seen whether the appointment would be made. This case, which is referred to in many of the authorities relating to charitable trusts, came under the consideration of the Courts in a modern case, *Sinnett* v. *Herbert* (L. R. 7 Ch. App. 232) in which it appeared that a testatrix gave the residue of her personal estate to trustees to be applied by them in aid of erecting or endowing an additional church at Aberystwith. There appeared no immediate prospect of a church being built, though there was a possibility of that being done. It was argued for the next-of-kin that there being no object of the intended charity in existence or likely to be in existence within a reasonable time, the gift failed absolutely and that the Court would not keep the fund indefinitely in expectation of an occasion for its application arising. Lord Hatherly, L.C., in giving judgment made amongst others the following remarks:—

> I entertain no doubt as to what ought to be done in this case. Very able arguments on both sides have been addressed to me with respect to the application of the doctrine of *cy-près*, but I do not think that there is any necessity for going into that question at present. As far as I can judge from what has been stated there is a possibility of a church being built at Aberystwith, and therefore I think it is extremely probable that we may never arrive at the application of that

> doctrine at all. I think it is plain in the first place that upon the true construction of the will the bequest must be taken to be a bequest for the purpose of aiding in the erection of any additional church in Aberystwith. I differ so far from the Vice-Chancellor who thought that the testatrix intended to confine her executors to the case of an actual church erected and requiring endowment, or a church in progress of erection at the time of her death. As to the difficulty from the possible remoteness of the time when her intention can be carried into effect, I think the case of the *Attorney-General* v. *Bishop of Chester* is a complete answer. In that case the very point which arises here was suggested. There was a sum of 1,000*l.* left for a good charitable purpose, namely, for the purpose of establishing a Bishop in the King's Dominions in America. There was no Bishop in America. The sum, being only 1,000*l.*, was not very likely in itself to be sufficient to establish a Bishop. Nothing could be more remote, or less likely to happen within a reasonable period, than the appropriation of that fund to that particular object. But the Court did not direct any application of the fund according to the *cy-près* doctrine; it would not allow the fund to be dealt with immediately, but directed the fund to remain in hand for a time with liberty to apply, because it was not known whether any Bishop would be established. But that the Court would continue to retain it forever, waiting until a Bishop should be appointed, I think is a very doubtful proposition.

After referring to the numerous cases of gifts to charities where an inquiry had been directed whether there was anything *in esse* to which the fund of the testator could be properly applied so as to carry out his wishes, the Lord Chancellor said:—

> The course, therefore, that seems to me the correct one, is to direct an inquiry at Chambers whether or not the funds which are effectually given to the trustees for the purpose of aiding in erecting or endowing a church at Aberystwith, or any and what part thereof, can be so laid out and employed.

Sinnett v. *Herbert* throws sufficiently strong doubt on the proposition which is advanced in this case by the defendants, that the trust funds must be held by them forever, waiting until a Bishop of Fiji is appointed, to enable me to reject that proposition altogether. In the *Attorney-General* v. *Bishop of Chester*, moreover, the Court would not allow the fund to be dealt with *immediately* it was directed to remain in hand for a time only with liberty to apply and the testator had died but a short while before the matter came before the Court. John Campbell died twenty-three years ago. In *Sennet* v. *Herbert*, again the Court directed an inquiry because, as the Lord Chancellor said, it appeared that there was a possibility of a church being built, according to the evidence in the case,

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in the near future, and it was therefore unnecessary to invoke the doctrine of *cy-près*. There is no suggestion here that the appointment of a Bishop of Fiji may be made in the near future. On the contrary its possibility only, and that remote, is merely stated.

Chamberlayne and Brockett (8 Ch. App. 206) is another authority in point. It followed *Attorney-General* v. *Bishop of Chester* and *Sennett* v. *Herbert* in declaring that a gift to charity once effectually made is none the less good (to use the words of Lord Selborne, L.C.):—

> Because there is an indefinite suspense or abeyance of its actual application or of its capability of being applied to the particular use for which it is destined.

The learned judge adds:—

> If the funds should either or originally or in process of time be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trust should turn out to be impracticable, this Court has power to apply the surplus, or the whole (as the case may be) to such other purposes as it may deem proper, upon what is called the *cy-près* principle.

To which I desire to add: that after a certain lapse of time greater or less according to the nature of the trust and the likelihood of its object being attained the Court will on being asked to do so step in and considering as is the case remoteness of possibility to be equivalent to impracticability apply the doctrine of *cy-près* rather than lock up the fund as far as can be shown, perhaps "for a century" as one of the judges in *Philpott* v. *St. George's Hospital* (6 H. L. C. 338) remarked when speaking of the case of *Attorney-General* v. *Bishop of Chester*. In *Wallis* v. *Solicitor-General for New Zealand* (1903 A. C. 173), again decided only six years ago the Judicial Committee of the Privy Council affirmed the same principle. Lord Macnaghten, in giving judgment referring to a portion of the argument addressed to the Committee said:—

> Counsel also dwelt on the length of time which has elapsed since the date of the original gift without anything having been done in the way of establishing the proposed school. But it is well settled that where there is an immediate gift for charitable purposes the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all.

And the leaned judge speaks of *Chamberlayne* v. *Brockett* to the judgment of Lord Selborne in which I have already referred.

It is quite plain therefore that this is, in the circumstances which I have enumerated regarding the appointment of a Bishop in Polynesia, eminently a case in which the doctrine of *cy-près* should be applied. Following the principle laid down in a number of authorities of which it is necessary to quote only *Attorney-General* v. *Whitchurch* (3 Vesey 141) where Sir Richard Arden, M.R., said:—

> The doctrine of *cy-près* by which I understand the rule to execute the charitable intention as nearly as possible is administered in this way. The Court will not administer a charity in a different manner from that pointed out, unless they see that though it cannot be literally executed, another mode may be adopted by which it may be carried into effect in substance without infringing upon the rules of law.

And the *Ironmonger's Co.* v. *Attorney-General* (10 C. L. and Finn. 908) where Lord Cottenham says: "*cy-près* means as near as possible to the object which has failed." I cannot conceive a more suitable and proper object one more nearly in accordance with the testator's intention whereto to devote this charity fund than that of supplying the needs of the plaintiff as Bishop in Polynesia, so far as these needs arise in Fiji in connection with the administration of his Bishopric. That does not mean however that I can answer the third and last question propounded by the plaintiff in the affirmative. On the contrary I am of opinion that the defendants cannot pay over to the plaintiff the accumulated income of the trust fund in aid of the erection of a Bishop's residence for two reasons. One is that there is no indication before me of where that residence is to be built and for all I know the erection may be contemplated to be on privately owned land; there is the additional consideration that directly or indirectly the use of the funds for the purpose may contravene the rules of the Statutes of Mortmain. The second reason is that the words of the testator by which I must be guided are: "the founding establishment and endowment of a Bishopric of Fiji." Now none of these words imply building a house or houses in connection with the Bishopric. "Endowment" the strongest word of all and which colours the whole gift, while it may be used of an object to come into being, means not the building or purchasing sites for the purposes of an institution or other object intended to be endowed, but the providing of a fixed revenue for the support of that institution or other object. *Edwards* v. *Hall* (6 De G. M. & G. 74).

I should just like to say here that, as noted above, the Supreme Court of New South Wales has decided that according

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to the law of New South Wales, this bequest of money charged upon the testator's real estate in Fiji is a good and valid charitable bequest. New South Wales probably has no Statute like the English Statute 9 Geo. II, c. 36, and may have a Statute like 54 and 55 Vict. c. 73, the Mortmain and Charitable Uses Act 1891. The former Statute is applicable to this Colony while the latter is not. However that may be, and however different my view of the terms of John Campbell's will may have been on their consideration by the light of the law of Mortmain, the fund in this case comes to the trustees stamped with charitable design. That however does not free this Court from the obligation to see that rules of law governing charitable bequests are observed. If it were shown that the erection of a Bishop's house was to be carried out on lands already in Mortmain, or that it would be placed on lands to be brought into Mortmain I would accede to the proposal. I cannot do so at this stage. The proper course for me to adopt is to direct a scheme for the appropriation of this fund to be submitted by the plaintiff for settlement. I have said enough I think, to guide the plaintiff in the preparation of that scheme. The matter will be adjourned for that purpose and for further consideration, with liberty to the parties to apply.