

'ANANIA NIU AND ORS v. LITIA FIFITA.

(Civil Action : J. B. Thomson C. J. Nuku'alofa, 28th November, 1946).

Will not revoked by subsequent marriage — English law does not apply — Asset disposed of by will included in Letters of Administration — Widow's right to house in town allotment — Two houses — Court's direction — Provisions of will to be supported.

The Plaintiffs claimed a house included by the defendant, a widow, in the letters of administration of her husband's estate and damages for its removal. The facts sufficiently appear in the judgment.

HELD. That the Defendant's husband, before his marriage to her had validly disposed of the house in question by will and that the will had not been revoked by his subsequent marriage, as it would have been in English law. That although the widow was entitled to the house on the town allotment (S. 15 Cap. 7) in this case there were two houses and the Court in deciding which one should go to the widow should decide so that effect be given to the provisions of the will.

Verdict for the Plaintiffs. £90 and costs.

Vete for the Plaintiffs.

Finau for Defendant.

C. A. V.

THOMSON C. J. The Plaintiffs in this case are relatives and the Defendant is the widow of Seteone Nunu, a Tongan subject who died in Tonga in April, 1944.

The material facts are not in any serious dispute. Many years ago, certainly before the Accession of Her Majesty the present Queen, the deceased had built for him upon his Town allotment with the aid of subscription from various members of his family a weatherboard house (fale papa).

On the 23rd February, 1933 he made a will appointing the late Tungi (who in the event predeceased him) executor and giving the weather board house to the present plaintiffs, (whom he named) "To be a family property" for them all. On the 2nd March, 1933, being then some 65 years of age, he married the present defendant and he and she lived together at most times in the weatherboard house but occasionally in a Tongan styled house (fale Tonga) which had subsequently been built on the same town allotment.

On the 5th April, 1944 Seteone died and on the 19th April the Defendant applied for letters of administration in respect of his estate. In her affidavit she stated that there was no will and in the inventory attached to it she included the weatherboard house but omitted to include the Tongan type house (fale Tonga). Letters of administration were in due course issued as applied for and the Defendant who in the event of the deceased being intestate was entitled to the whole estate, proceeded to remove the weatherboard house (fale papa) to another part of the country.

The Plaintiffs are now claiming the value of the house and damages for its removal.

The plaintiffs claim depends on the validity or otherwise of the will of the deceased which is in evidence and I fail to see any ground on which the validity of that instrument could be successfully contested.

It is clear from the terms of the Probate Act 1915 that the law of Tonga clearly recognises the right of Tongan subjects to make wills disposing of their property and I am satisfied that the will in this case was properly executed in accordance with the provisions of the Act. The Act, moreover, contains no provision corresponding to Section 34 of the English Wills Act, 1837, whereby a will is revoked by a subsequent marriage and in the absence of any such statutory provision I see no grounds whatever for holding that the rule of English law should apply. The will, then, was of full effect at the death of the deceased and the plaintiffs are entitled to the benefit of it so far as the law allows.

The only provision which might be invoked to restrict the plaintiff's enjoyment of the benefits of the will is S. 15 of the Probate Act which provides that irrespective of whether or not the deceased leaves a will the widow shall inherit the dwelling house of the deceased on his town allotment. But the Section goes on to provide that if there be more than one dwelling house the Court shall decide which one shall go to the widow. In this case I am satisfied on the evidence that there are two dwelling houses — the fale papa mentioned in the will and the fale tonga — and in deciding which of these is to go to the widow I am of the opinion that I am bound by the terms of the will and it is only by deciding that her portion is the fale Tonga that effect can be given both to the provisions of the will and the provisions of the Act.

The action then must succeed and the plaintiffs must have damages which will be the value of the house together with the damage they have suffered by its removal. I assess the former amount at £80 and the latter at £10 and there will accordingly be judgment for the plaintiffs for £90 and costs.
