Present: Mr. Justice Moncreiff, Mr. Justice Middleton, and Mr. Justice Grenier.

1905. *February 6.*

DE KROES *v.* DON JOHANNES

D. C., Colombo, 13,981

Specific devise—Assent of executor—Vesting of property—Residuary legatee.

No assent on the part of the executor is necessary to pass to the devisee immovable property which has been specifically devised to him by will.

Cassim v. Marikar (1 *S. C. R.* 80) followed.

MONCREIFF J.—The provision in a will that the whole of the residuary estate should devolve on certain persons named therein is to be regarded as specific in regard to the immovable property.

MIDDLETON J.—A residuary devise of real estate is not specific. But a specific appropriation of immovable property to specific person is a specific devise.

APPEAL from a judgment of the District Judge of Colombo.

The facts sufficiently appear in the judgments.

E. W. Jayawardene, for defendant-appellant.

Dornhorst, K.C., and *Pereira, K.C.*, for plaintiffs respondents.

Cur. adv. vult.

(1) (1868) 2 *B. L. R.* (*F.B.*) 49. (2) (1874) 11 *Bom. H. C. Rep.* 159.
(3) (1872) 14 *Moore's Indian App.* 543.

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6th February, 1905. MONCREIFF J.—

This action was brought by Mary Elizabeth de Kroes and her children to eject the defendant, C. Don Johannes, from No. 46, 1st Cross street, Pettah. The defendant objects that the property is vested in the executor of the will of J. G. de Kroes, and that (under section 472 of the Civil Procedure Code) he is a necessary party.

The premises formed part of the estate of the late W. M. de Kroes, and in order to understand the pretensions of the parties it is necessary to consider the testamentary dispositions of that gentleman.

The intentions ascribed by the respondents to the testator are laudable and not unnatural—but I do not see them in these testamentary provisions. It is only by the exercise of unusual subtlety that they can even be formulated as the effect of the will and codicils. We have to construe these writings, but not to make a will for the testator. What I do see in the condicils is that the testator was in a state of excessive mental perturbation, the result being that it is difficult, if it is possible, to make sense of the codicils. The will was executed on the 15th of December, 1879, when he was dying and knew that his son Gregory was insolvent. Three days later he made the first codicil, on the 21st he made the second codicil, and he died on the 25th. We can hardly hold the notary responsible for these codicils. I have no doubt he did what he could to give effect to the instructions he received, and that the testator in his distress gave instructions for the second codicil which seemed to him to offer an escape from his embarassment. It might be wiser to abandon the attempt to construe these codicils, but I put upon them what seems to be the only possible meaning.

The will contains the following clause:—

> I give, devise, and bequeath all the rest and residue of my property, immovable and movable, unto my son Gregory, under the express condition, however, that he shall enjoy only the issues, rents, and profits of the said immovable property, and that the said property or any part thereof or the said issues, rents, and profits or any portion thereof shall not be sold, mortgaged, or otherwise alienated or encumbered, and shall not be liable for any of his debts whatsoever. I will and devise that, in the event of my said son finding it necessary to sell any of the said immovable, he shall not do so except after application to the District Court of Colombo, and the proceeds of any such sale or sales shall be deposited in the said court until a suitable investment in the purchase of other immovable

property or upon mortgage security shall be available, and every and all such property so purchased or every and all principal sum or sums of money so invested shall be subject to the same condition as the above in respect of the immovable property I now possess and hereby devise. After the death of my son I desire that the said immovable property, or such other as aforesaid, and all principal moneys that may arise from any sale or sales as aforesaid shall be divided share and share alike amongst the child or children of my said son, the child or children of any deceased child taking the share to which her or their father or mother would be entitled if living. In the event of my son predeceasing his wife, I desire that the said issues, rents, and profits shall be paid to her for the maintenance and suport of herself and my son's children, and for the education of the said children, and so long as she shall remain my son's widow."

Three days after executing this will be testator by his first codicil dealt with the " capital or principal sums of money not bequeathed by my said will and which shall go to my son Gregory." Gregory was not to spend them. They were to be invested on mortgage, and he was to be entitled only to the interest of the same. They were not to be liable for Gregory's debts, and were to be deposited in the Loan Board until they should be invested on mortgage or the purchase of immovable property. Landed property so bought was to be treated in accordance with the provisions in the will relating to the testator's landed property.

We have had many suggestions as to the identity of the " capital or principal sums of money not bequeathed by my said will and which shall go to my son Gregory;" but all our speculations have been, in my opinion, fruitless. I should therefore be at a loss to give effect to this codicil. My brother Middleton thinks that the words " not bequeathed " are plainly intelligible, berause W. M. de Kroes had bequeathed Rs. 40,000 to the children of his daughter Matilda. There is a clear intention that certain capital sums are not to be spent by the testator's son, but to be treated in a certain way; but, if I am asked to say that the distinguished notary who drew this codicil described the Rs. 40,000 bequeathed in the will to Matilda's children as " capital or principal sums of money not bequeathed by my said will, and which shall go to my son Gregory," I confess I am not able to comply. I suppose it is meant that this codicil revoked the bequest to Matilda's children.

Three days later the testator, by his second codicil, provided that his son Gregory should have Rs. 10,000 out of the capital or

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principal moneys to pay his debts and carry on the testator's business and that he should " have the right of disposing by will of all and singular the property he shall be entitled to under the provisions of my will and first codicil—and that in the event of his dying intestate the said property shall devolve on his heirs, and not on his widow or her heirs. "

To what was Gregory entitled under the first codicil ? I cannot say whether it was that part of the movable property which was in the shape of capital sum of the sums of money realized by sale of immovable property; under the provisions of the will it was made subject to restrictions similar to those in the will affecting the immovable property. But I cannot see how effect is to be given to the codicil.

What then did the testator mean by " the property he shall be entitled to under the provisions of my will ?" Not the movable property, because by the terms of the will Gregory had already the power to dispose of it by will. There remains only the immovable property; but it is said that the testator could not have had that in his mind, because the will affected it with a *fidei commissum*, and it cannot be said that *fidei commissarius*, who is under the obligation to make restitution to substituted heirs at his death, is " entitled to " the property. I think, the argument is not correct. The testator instituted Gregory heir of his immovable property upon conditions, *inter alia*, that he should at his death restore the property to the substituted heirs, namely, his children or grandchildren. He " gave, devised, and bequeathed " the property; he gave Gregory the ownership, but a burdened ownership. That is a good *fidei commissum*. Gregory then having the ownership, and the immovable property passing under the will being the only property to which the provision in the second codicil can apply, I should say that the codicils gave Gregory power to dispose of the immovable property by will and will only. The will of his father had already forbidden him to sell, mortgage, or otherwise alienate or encumber the property.

Counsel for the respondents endeavoured to found a subtle argument upon the provision of the will to the effect that, although Gregory was to enjoy the issues, rents, and profits of the immovable property, he was not to sell, mortgage, or otherwise alienate or encumber them; nor were they to be liable for any of his debts. These words are hardly consistent with the " enjoyment " of the rents; they make it difficult to say that Gregory was even " entitled to " the rents. The argument is somewhat extravagant.

The creation of this power of disposition might alter, but would not destroy, all the provisions of the will; the *fidei commissium* would remain, but only to take effect in the event of the fiduciary's dying

intestate. The authorities on this point are collected in the 2nd volume of Burge, page 104.

On this view the effect of the will and codicil is—(1) that Gregory could alienate or dispose of by will the residue of the movable property, (2) that he could dispose of the immovable property by will only. He could neither mortgage, alienate, nor encumber it; nor make it liable for his debts.

John Gregory de Kroes being armed with this power of disposition, by his will dated the 5th of January, 1895, left the whole of his residuary estate to his three daughters. He died on the 19th of July, 1897. I have already said in 166, Colombo, 1,173, that I do not think that Mrs. de Kroes took any interest under the wills of her husband and father-in-law.

The premises in dispute forming part of W. M. de Kroes' residuary immovable estate, I should find the first issue relating to Gregory de Kroes' testamentary power over them in the affirmative. Gregory made use of that power and bequeathed the residue of the property, including these premises, to his three children. But the defendant questions their title to sue. In Ceylon it was held that land passes to an executor exactly as personal property passes to an executor in England, and that a legatee cannot take possession of land devised to him by will without the assent of the executor *Ondaatjie v. Juanis* (1). Such apparently was the view taken by the Privy Council. And the defendant's contention would generally be supported by section 472 of the Civil Procedure Code. When property is vested in an executor in any action in which " the contention is between the persons beneficially interested in such property and a third person, the executor shall represent persons so interested " The executor, therefore, if vested with the property in dispute, would be a necessary party to this action.

But we are confronted with the judgment of the full court in *Cassim v. Marikar* (2) which, however much we may fail to understand it, we are bound to follow. According to that decision no assent on the part of the executor is required to pass to the devisee immovable property which has been specifically devised to him by will. That is not now in accordance with the English law. By the Land Transfer Act of 1897 real estate generally devolves upon the personal representatives of a deceased person, and the representatives may either assent to devise of land made by the testator's will or give the devisee a conveyance. But it would appear from the English authorities that all devises of real estate are specific. Yet Jessel, M.R., in *Bothamley v. Sherson* (3) said that " there

(1) 8 *S. C. C.* 192. (2) 1 *S. C. R.* 180. (3) *Law Rep.* 20 *Eq.* 312.

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was no difference between the law of devises of real estate—that is, specific devises—and the law of specific legacies," and that the law was not altered by the Wills Act, No. 1 Vict. C. 26. Lord Selborne also says in *Giles v. Melsom* (1) that the word " specific " had the same meaning whether applied to land or to personal estate. Yet, while the devise of land is said to be always specific, the bequest of all a man's personal property generally is not specific; in *Robertson v. Broadbent* (2), the House of Lords held that a bequest of " all my personal estate and effects of which I shall die possessed and which shall not consist of money or securities for money, to E. A. Robertson for his own use and benefit absolutely " was not specific. Yet we are told there is no difference in the meaning of the word as applied to bequests of personal property and devises of real estate. Under the old law no land could pass by will, of which the testator was not seized at the date of the will; therefore all devises of land were considered specific. The change in the law made the will speak, as to devises of real estate, from the death of the testator. Such being the circumstances, I suppose the provision in the will of Gregory de Kroes to the effect that " the whole of my residuary estate shall devolve upon my said three children " is to be regarded as specific in reference to the immovable property.

My colleagues consider that this property passed under the will of W. M. de Kroes. Although by that will it fell into " the rest and residue " of the movable and immovable property, it was only part of the residue, and would be regarded as the subject of a specific devise. I think that the appeal should be dismissed with costs.

MIDDLETON J.—

This is an action claiming ejectment of the defendant from a house No. 46, 1st Cross street, Pettah. The defendant is a sub-tenant of the house of one George Walles, lessee under a lease for ten years, dated 1st June, 1883, from John Gregory de Kroes, deceased.

The plaintiffs are the widow and children of the said J. G. de Kroes and claim title to the house amongst other property under the will of W. M. de Kroes dated 15th December, 1879. W. M. de Kroes died the same year, leaving his son J. G. de Kroes surviving him.

J. G. de Kroes was made an insolvent on the 19th October, 1879, and died on the 19th July, 1897.

The defence was that W. M. de Kroes had left two codicils to his will dated respectively the 18th and 21st December, 1879, by which he gave his son J. G. de Kroes power of disposing by will of this and other property, and that by will dated 5th June, 1895,

(1) *L. R.* 6 *H. L.* 30. (2) 8 App. Cas. 816.

the said J. G. de Kroes had disposed of the said property appointing C. H. Aliph his executor, and died without revoking the said will. The defendant further traversed the plaintiffs' right to bring the action, which right they alleged was in th eexecutor only.

The issues settled were—(1) Under the last will of W. M. de Kroes or any of the codicils thereto, had J. G. de Kroes the power to dispose of the land in claim by will? (2) If he had such power, then can plaintiffs maintain this action independently of the executor of J. G. de Kroes? The District Judge decided in favour of the plaintiffs and the defendant appealed.

The property in question here formed part of the immovable property disposed of by the will of W. M. de Kroes, and I have already held in 230, Negombo 3,890, that J. G. de Kroes had no power of testamentary disposition under the second codicil of his father's will in respect to any of the immovable property dealt with and settled in *fidei commissum* under W. M. de Kroes' will and therefore I find the first issue in the negative. I do not propose, therefore, to deal with that question any further, but to consider the second point raised here as to whether it is necessary to join the executor of J. G. de Kroes' will as a plaintiff in this action.

In my view of W. M. de Kroes' will the properties, without power of alienation of the immovable property settled under W. M. de Kroes' will, vested in J. G. de Kores, and upon his death in 1897 it was to be divided amongst his children. J. G. de Kroes made a will, appointed an executor, and purported to exercise testamentary powers which, in my opinion, he did not possess.

According to *Ondatjie v. Juanis* (1) land passes to an executor in the same way that personal property passes to an executor in England, and consequently it must vest in the executor.

In *Cassim v. Marikar* (2), a decision of the Full Court, and binding on us, it was held that specifically devised property passed direct to the devisee and not to the executor.

This decision is hardly in consonance with the theory that the position of an executor in Ceylon as regards land is the same as the position of an executor in Engand as regards personal property or chattels real.

The only house in 1st Cross street, Pettah, mentioned in the inventory of W. M. de Kroes' estate is under No. 31, but it may be that the numbering has been changed as no question is raised on this point in the pleadings.

If the house in question here formed part of the estate of W. M. de Kroes, it was bequeathed by him with his other immovable

(1) 8 *S. C. C.* 192.

(2) 1 *S. C. R.* 180.

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property generally as *fidei commissum* to his son J. G. de Kroes and at his death to be divided amongst his heirs.

Williams on Executors p. 1171, 7th Ed., says, "if the testator directs his freehold or leasehold estate to be sold, and disposes of the proceeds in such a form as to evince an intention to bequeath them specifically, the legacy will be properly specific."

Again, at p. 1169, the same author says, "every devise of land is specific," although in a note it has been considered that since the Wills Act (1) a residuary devise of real estate is not specific.

I take leave to think this is not a residuary devise under W. M. de Kroes' will, but a specific appropriation of his immovable property to specific persons.

If this, therefor, be a specific devise under the will of W. M. de Kroes to his grandchildren, I must hold that the case of *Cassim v. Marikar* concludes me, and find the second issue in the affirmative.

If I had thought that the case was not covered by the decision in *Cassim v. Marikar*, and that the property did vest in the executor of J. G. de Kroes, I do not think it would have been right to dismiss the action on that ground, but I should have been inclined to send the case with a view to the defect being cured by adding the executor, if that were possible.

The appeal must therefore be dismised with costs.

GRENIER A.J.—I entirely agree and have nothing to add.