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

1903. *May* 7.

FERNANDO *et al. v.* FERNANDO *et al.*

D. C., Colombo, 7,016.

Fidei commissum residui—*Alienation by* fiduciarius—*Security—Joint will—Residue—Fraud—"Inheritance"—Property passing under will.*

Property which passes by will falls within the scope of the word "inheritance" (*hereditas*).

In the case of a *fidei commissum residui*, as a general rule, the *fiduciarius* must hand over one-fourth to the substituted heirs, and give security (*cautio*) for its restitution. But where spouses by joint will vest their property in the survivor with power of alienation, subject to the restitution of the residue to the heirs of both spouses, the survivor is not called upon to find *caution* for the restitution of a fourth, and is at liberty to alienate the whole in his lifetime, but not by will, but such alienation must be made in good faith, and not with the view of defrauding the substituted heirs.

THE facts and arguments sufficiently appear in the judgments.

Peiris, for the substituted plaintiff, appellant.

Dornhorst, K. C. (*Sampayo, K. C.*, with him), for the respondents.

Cur. adv. vult.

7th May, 1903. MONCREIFF J.—

This was a suit for partition. The Judge has dismissed it on the ground that the plaintiffs had no title to any portion of the property sought to be partitioned.

Engeltina, the first plaintiff, was the wife of the second plaintiff. Husband and wife are both dead, and are represented by an administrator of their estate. Engeltina was a daughter of Manuel Fernando and Adriana Swaris, who executed a joint will on the 31st December, 1860. Her four brothers, W. Johannes, John Henry, Martinus, and James Fernando, alone out of the twenty-one defendants answered and appeared. When Manuel Fernando died in 1890 he was survived by twelve children and his widow. There seems to be no doubt that the claims of all their children (if we except Engeltina and the four respondents) upon the estate of their parents were satisfied or extinguished before the death of their mother in 1894.

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We have two translations of the fourth clause of the joint will. The first, which is put forward by the appellant, runs thus:— "After the death of one of us the survivor can possess all the movable and immovable property belonging to us according to his or her pleasure; and whatever property remains after the death of both of us shall be equally divided among our children."

The Judge says, that the following is a literal translation of the clause.—"The survivor having done as (he or she) pleased with all our movable and immovable property, (and) having possessed (the same), afterwards on the death of both of us, it is our will that whatever remains shall be divided equally amongst our children." I append a third translation made by the Interpreter Mudaliyar of the Supreme Court.

On the 13th of August, 1870, the spouses executed a transfer of certain property to their daughter Engeltina in consideration of their mutual love and affection for her; and Engeltina renounced all claim to inheritance out of their estate.

Manuel Fernando died in 1870. His widow died in 1894, having disposed of the whole of the property remaining, by deed of gift and by will, both dated the 8th October, 1894, in favour of her sons, the four respondents.

The respondents say that Engeltina is concluded by her renunciation. I was at first attracted by the argument that, although Engeltina renounced any claim to inheritance, and that at a time when the joint will had been executed and both parents were alive, yet the joint will not having been altered and speaking from the death of the disposing spouses, it was impossible to say that the spouses had not changed their intention and determined to give Engeltina her share of the inheritance in addition to the donation made in their lifetime.

The joint will of Manuel Fernando and Adriana Swaris was executed on 31st December, 1860.

The deed of donation to Engeltina was executed on 13th August, 1870. Manuel Fernando died on 12th November, 1870. Therefore both of the disposing spouses were alive on the 13th of August, 1870. Engeltina signed with a cross, testifying that she did thereby thankfully accept the above gift; and the donation was made and accepted subject to the condition and restriction that Engeltina was not to "claim hereafter any inheritance out of the estate of the said Wattamulage Manuel Fernando and B. Adriana Swaris."

Property which passes by will falls within the scope of the word "inheritance" (*hereditas*). Engeltina bound herself not to claim any inheritance which according to the terms of a will (whether executed

at, or to be executed after, the date of her renunciation) would pass to her out of the estate of her parents. I cannot accept the restricted meaning put upon the word " claim " by Mr. Peiris. Engaltina claimed the inheritance, whether she asked for it as due *ab intestato* or as left to her by will. To adopt the appellants' view of this question would be to admit not only that Engeltina did not renounce her claim to what her parents had left her in their executed joint will, but that no renunciation in these terms could include inheritance by will. I see no reason for thinking that the donors and Engeltina spoke of inheritance in a restricted sense.

On this ground, therefore, I think that there was no cause of action. But suppose Engeltina was not concluded, did the 4th clause of the joint will give Adriana Swaris, the surviving spouse, power to alienate, and did Adriana Swaris in fact alienate in her lifetime? I think threre is little difference in effect, if any, between the translations of the 4th clause. The clause seems to me to create a *fidei commissum residui*, a *fidei commissum* upon the residue which shall remain unspent at the death of the surviving spouse. In general the *fiduciarius* must hand over one-fourth to the substituted heirs and give security (*cautio*) for its restitution; but it appears from *Voet* 36, 1, 56, that where spouses by joint will vest their property in the survivor with power of alienation subject to the restitution of the residue to the heirs of both spouses, the survivor is not called upon to find caution for the restitution of a fourth, and is at liberty to alienate the whole in his lifetime, but not by will. According to Van Leeuwen (*Censura Forensis, pt.* 1, *bk.* 3, *ch.* 7, 15, *and* 16) this power of alienation in the surviving spouse is only effectual in so far as the alienation is made in good faith; it cannot be exercised with a view to defrauding the substituted heirs. *Voet* (36, 1, 54) says: *sed moribus hodiernis magis est, ut factæ per fiduciarium dolosæ donations, fidei commissi intervertendi ac fidei commissarii fraudandi causa, probandæ non sint ..... Ut tamen in dubio animus intervertendi fidei commissi in fiduciario præsumendus non sit, sed probatio ex indiciis manifestis per eum, qui se fraudatum ait, fieri debeat.* But there is no such *probatio* here. On the contrary, it is said that all the substituted heirs, except the four respondents, were otherwise provided for in their mother's lifetime.

Finally it was urged that the deed of gift of 8th October, 1894, by Adriana Swaris to her sons John Henry, Martinus, and James was a testamentary document and of no effect because the *fiduciarius* could not dispose of the *residuum* of the property by will that it was not an alienation sanctioned by the joint will of 1860.

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By the deed Andriana Swaris granted, assigned, transferred, set over, and assured "a fourth of the property to each of the grantees." She was to "take, receive, and enjoy" the rents, profits, &c., and to have the power of altering or modifying the conditions stated in the deed. Each grantee had power to "give or appoint his share by last will or deed among his children or descendants according to stated terms. On the failure of his line his share was to pass to the two brothers who were his co-grantees, or their descendants, on stated terms. The three grantees signified their acceptance by signing the deed.

A donation is a voluntary delivery to another without cause. By a donation *inter vivos* the donor divests himself gratuitously at the time and irrevocably of the subject of donation to another who accepts it. From the words used in the deed and the limited power of appointment which the donees could exercise in the lifetime of the donor it must be thought that Adriana Swaris divested herself of the property and delivered it to her sons. She reserved no power to revoke the deed. It was suggested that there was no delivery because she reserved to herself the enjoyment of the rents and income. A donation, however, may be conditional, and I do not know that it is invalid because the donor stipulates for the enjoyment of the income during his life. Reference was made to two cases mentioned by Van Leeuwen (*Censura Forensis*, *pt.* 1, *bk.* 3, *ch.* 8, 16.) One of these cases arose in connection with the will of Hugo Koedyk, in his lifetime, Burgomaster of Leyden. Koedyk's wife instituted him heir to all the property with full power of alienation, provided that half of the *residuum* at the time of his death should be enjoyed by her relations. Koedyk, after his wife's death, made over to his maid servant by deed in consideration of her faithful services the full right in an obligation of 4,000 guilders, reserving the yearly income thereof to himself. The donation was held to be invalid, but, so far as I understand, on the ground that it was made in fraud of the heirs designated by the will of the wife I cannot see how the deed of the 8th October, 1894, was in fraud of the substituted heirs. With the exception of the four respondents they had all renounced on receiving compensation, and the four respondents set up the deed. For all I know the deed may have been executed *mortis causa*; it is dated the 8th October, 1894, and Adriana Swaris died on the 2nd of December, 1894; but there is no such allegation. I hesitate to say that it was a testamentary disposition.

The will of the 8th October, 1894, which left the remaining fourth of the property to W. Johannes Fernando, the tenth

defendant, is, I imagine, void on the principle that a widow enjoying property with power of alienation by virtue of the joint will of her husband or herself, subject to a *fidei commissum residui*, cannot dispose of the residue by will. But, if the plaintiffs are excluded by Engeltina's renunciation, the matter does not concern them. I think that their action was rightly dismissed with costs, and that their appeal fails.

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I have had the advantage of reading my brother's judgment, and shall not therefore refer to the facts of the case, which are there sufficiently set out.

The first question is whether the appellants on behalf of the children of Engeltina by Engeltina's action in becoming a party to the deed of 13th August, 1870 (D2) are now estopped from claiming any share in the joint estate of Manuel Fernando and Adriana Swaris, the father and mother of Engeltina. The joint will of these two persons, which was dated 31st December, 1860, would take effect first on the death of Manuel on the 12th of November, 1870. The will disposed generally of all " the movable and immovable property belonging to them " at the time of the death of the first of them. In my opinion at the death of Manuel Fernando the property mentioned in D2, had already been disposed of, and was not therefore subject to the will. The condition of its alienation as it affected Engeltina was that she should not "claim any inheritance " out of the estate of her father and mother. The meaning of the word " inheritance " according to counsel for the appellants is restricted to a derivation *ab intestato*, and he argues that therefore the testators under the will intended that Engeltina should benefit thereunder as well as by the deed. The will, however, was in existence when the deed was executed, and remained unaltered, from which the inference may be drawn that the testators as parties to the deed thought and intended that the word " inheritance " had and should have the wider meaning given to it in Van Leeuwen (*Kotze's translation, vol. II., p.* 312), or it seems to me that after the execution of the deed the will should have been altered. In my opinion the word " inheritance " would include not only property derived in intestacy. A demand to be considered one of the persons entitled to the residue under a will cannot, it seems to me, be otherwise than a claim of inheritance out of the estate but also by will. Putting on one side, therefore, the meaning attributed by the learned counsel to the word " claim " as

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sophistical, I hold that the appellants are estopped by the deed of 13th August, 1870, from making any claim to any share in the residue of the estate of Manuel Fernando and Adriana Swaris. The fact that by the terms of D2 the donors renounced the life-interest hitherto reserved by them seems to me also to dispose of the argument that D2 would be invalid as it could only take effect as a will.

If, however, the heirs of Engeltina are not barred by the deed of 1870 (D2), we have to consider what is the meaning of the words the translations of which are in dispute in the will of 1860 (D1).

Looking at the translation of the 4th clause of D2, the correctness of which is contended for by the appellants, it seems to me that the words "whatever property remains" contemplate a possible dispossession of part of that which was "to be possessed according to pleasure." They would hardly, I think, operate to prevent the sale of a portion of the estate for the debts of the surviving testator upon the judgment of a competent Court. If their meaning extended to this, it would be difficult to say that it did not embrace a right to alienate at pleasure, at any rate up to a certain extent. These words, inferring a power of disposition in favour of the co-testator or co-testatrix, are however limited by the restriction as regards the residue for the benefit of the joint testator's children.

There is no prohibition against alienation, but there are persons designated on whom a contemplated residue is to devolve.

The intention of the co-testators was therefore in my opinion that the survivor of them should enjoy the joint estate with all the powers of an absolute owner, save and except the right of testamentary disposition thereon; such powers to be exercised without wanton waste, given away, or spending (*Van Leeuwen, Kotze's translation, vol. I., p.* 381). This is a form of *fidei commissum* which is known, I believe, as *fidei commissum residui*, and is common in the case of husband and wife, the survivor of whom is not bound to make an inventory or account (*Van Leeuwen, id vol. I., p.* 386), but according to the text of *Van Leeuwen, Censura Forensis*, translated into English, *Ch. VII., bk. III., p.* 94, in point of alienation as limited to the discretion of a trustworthy person who it has been decided is not permitted to alienate more than three-fourths.

As regards the translation of the 4th clause of P2, I should be inclined to accept that laid down by the learned Judge in the District Court considering his undoubted knowledge of his own language, and this unquestionably discloses a power of alienation in the surviving spouse, but, as I have said before, a right to alienate is

in my opinion deducible from the wording of the translation put forward by the appellants themselves.

The decision of the Supreme Court in the case D. C., Colombo, 56,846, relied on by counsel for the appellants and reported in *Vanderstraaten* 203, was based on the ground that the will disclosed no express power to alienate, which theory, I presume, was derived from the presumed precise terms of the Sinhalese words used, but if the English words be taken after " 5thly " at page 203, there is strong reason to suppose that the learned District Judge was right in his view of the case.

We then come to the question whether the conveyance by deed of gift of 8th October, 1894, by Adriana to her sons John Henry, Martinus, and James was of no effect as in fact amounts to a testamentary disposition of the residue contrary to the intention of the *fidei commissum*.

In my opinion this was a donation which it was intended by the parties should not take effect until after the death of Adriana. If this is so, it practically amounts to a testamentary disposition which would not be permissible. My opinion is founded on the terms of the paragraph of the document No. 1,792 marked " First, " where it is covenanted that Adriana is to take, receive, and enjoy the rents, profits, and income of the premises purporting to be assigned during her lifetime and to have the right which is hereby expressly reserved of altering or modifying the conditions therein contained and of creating or imposing any further condition in respect of the premises gifted or the rents, profits, or income thereof without assigning any reason therefor, and that " after her death the said premises " hereby assigned shall devolve on the said John Henry, &c.

The property purporting to be assigned is not to devolve till after the death of the donor, and the donor is to take the rents and profits during her life and to have the power of imposing any conditions she chooses. In my view nothing but a tenancy at will was granted under this deed by Adriana to her three sons; the property was only to devolve on the death of the would-be donor, and this, I think, is an attempt to make a will by way of deed of gift.

Although I have the misfortune to disagree with my learned brother on this point in the case, I fully agree with him that the will of 8th October, 1894, would be also void.

Taking, however, the view I do on the first part of the case, that the appellants are estopped by the deed of 1870 from making any claim on the residue of the estate of Adriana and Manuel, I think that their appeal should be dismissed with costs.