1937 *Present:* **Abrahams C.J., Poyser S.P.J. and Maartensz J.**

DE SILVA *v.* DE ALWIS

276—D. C. Colombo, 397.

Joint will—Massing of property for joint disposition—Meaning of property in "reversion, remainder or expectancy"—Contingent interest included in disposition—Power of the survivor to alienate separate property—Separate property includes contingent interest—Forfeiture on remarriage.

Where a joint will of husband and wife was expressed in the following terms:

"We do hereby give and devise to the survivor of us all our immovable property whatsoever and wherever situate and whether in possession, reversion, remainder or expectancy, nothing excepted, subject to the express condition that such survivor shall not sell, lease, mortgage or otherwise alienate or encumber any such property but shall only enjoy the rents, profits and income thereof during his or her natural life and that after his or her death the said property shall devolve on our children absolutely . . . .

"It is our will and desire that, if on the death of either of us, the survivor shall marry again, he or she shall thereupon forfeit all the life-interest hereby given to the survivor and such survivor so marrying again shall not be entitled to the income of any of our immovable property and all our immovable property shall immediately devolve absolutely on our children",—

Held, that the property of the spouses had been massed for the purpose of a joint disposition and that the survivor had no power, after adiating the inheritance, to dispose of her separate property.

The separate property, which could not be alienated, included property of which the survivor had only a contingent interest at the time of the will and which vested in her after the death of the other spouse.

Held, further, that the expression in reversion, remainder or expectancy included property of which the survivor had only a contingent interest, as for example, the interest of a fideicommissary and that the disposition of such a contingent interest was valid under the Roman-Dutch law.

Held, also, that the forfeiture clause operated to deprive the survivor on re-marriage of her life-interest in her own property as well as in that of the first-dying spouse.

THE plaintiff instituted the present action for declaration of title to an undivided 1/16 share of a land called Bogahawatta, situated at Gasworks street in the Pettah against the four defendants, who are his step children, being the children of his wife by J. P. de Alwis. The plaintiff alleged that his wife executed a deed of gift, in his favour whereby she purported to convey the undivided 1/16 share. Sometime after the execution of the deed of gift, the plaintiff executed a lease in favour of the donor in respect of the undivided share and allowed her to remain in possession of the property as lessee; after the termination of the lease, his wife Eugenie remained in possession and continued to appropriate the rents, notwithstanding the termination of the lease. When the plaintiff instituted action against Eugenie, for the recovery of the rents, as overholding tenant, subsequent to the determination of the lease, she set up the defence, that in 1913, during the lifetime of her first husband she executed a joint last will whereby she forfeited her share of the property to her children consequent on her marriage to the plaintiff and accordingly her deed of gift in favour of the plaintiff was ineffectual to pass title, that her children were now appropriating the rents, and that she has no interest in the property. Accordingly the plaintiff instituted the present action against the defendants for declaration of title and mesne profits.

The defendants pleaded—

(1) That the deed in favour of the plaintiff conveyed no title; (2) that it was not open to Eugenie to execute the deed of gift in the plaintiff's favour. She having executed a joint will with her husband whereby she forfeited all property in remainder, reversion, or expectancy, and that she having adiated the inheritance and accepted benefits under the joint will it was not open to her to make a disposition repudiating the terms of the will; she remained in possession and did so on behalf of the defendants.

The learned District Judge dismissed the plaintiff's action holding—(1) that he was bound by the Supreme Court judgment in *de Silva v. de Silva*[1], as regards the interpretation of the last will; (2) that there was

[1] *37. N. L. R. 388.*

sufficient evidence of *adiation*; (3) that inasmuch as the mother was the guardian of the defendants, she could not acquire a title adverse to the defendants. From this judgment the plaintiff appealed and the appeal was first argued before Hearne and Fernando JJ. who referred the case to a divisional bench.

Hayley, K.C. (with him *N. Nadarajah, H. E. Amerasinghe,* and *Mackenzie Pereira*), for plaintiff, appellant.—Eugenie owned $\frac{1}{8}$ share of the property. By her last will executed jointly with her first husband in 1913, No. 8,249, D 12—a mutual will—her rights in both her husband's and her own property devolved on a second marriage on the defendants who were the children of the first marriage. By the judgment in the District Court of Colombo it was decided that Eugenie forfeited all her rights on her second marriage.

But by deed 94 of May 1, 1926, she conveyed a half of her property to the plaintiff, her second husband whom she had married in 1920. Thus if she forfeited under the will of 1913, she had nothing to convey on deed of 1926. Eugenie married Polycarp de Alwis, her first husband, in 1898.

By deed of gift P 1, No. 1792, John Henry Fernando got $\frac{1}{4}$ of the entire property. This deed of gift was subject to a prohibition against alienation, and it contained several conditions—*vide* judgment—affecting the devolution of this estate of John Henry Fernando. As his son George predeceased him his daughters Eugenie and Mary became each entitled to $\frac{1}{8}$ share. But as the joint will came into operation in 1913, the property did not devolve on Eugenie till six years later, the date of her father's death.

In June 1926 (by bond No. 95) the plaintiff leased the property back to the wife for six years. Subsequently quarrels arose between husband and wife, and in 1930 the plaintiff filed action on the lease, but this case was settled. Again in 1933, the plaintiff brought another action and it was in this action for the first time that the wife pleaded that she had no title on account of the forfeiture under the will. Then the plaintiff's action was dismissed. In 1934 a third action was filed, wherein the plaintiff was more successful. At this time the parties were living in separation. Though in her answer the wife took up the plea of forfeiture of her rights, the plaintiff obtained judgment, the District Judge holding that he had title. This judgment was set aside by the Supreme Court.

The points in this appeal are: (1) The will does not apply to after-acquired property, as is the case of the property in dispute. (2) Does the will apply to Eugenie's property at all ?—*Vide* the forfeiture clause. (3) There is no such massing and adiation as a condition precedent to bind the surviving spouse.

The plaintiff got an undivided 1/16 share; up to date, for fifteen years, the plaintiff and his wife were in possession adverse to that of Eugenie's children—the four defendants. All except the fourth were majors.

H. V. Perera, K.C. (with him *C. V. Ranawake* and *D. W. Fernando*), for defendants, respondents.—Whether the joint will catches up Bogahawatta has to be decided. The words "expectancy, nothing excepted", were intended to catch up every kind of estate including a contingent remainder which is an expectancy in the strict sense. "Espectancy" is used in a broad popular sense to mean any kind of hope, a mere chance as opposed to an "expectancy" in law.

Vide Finance Act, 1894, where an interest in expectancy is equivalent to an estate in remainder or reversion and every future interest is one, whether vested or contingent (vide 5 *Encyl. Laws of England 612 (2nd. ed.).*) An estate in expectancy as opposed to an estate in possession is equivalent to a reversion, remainder, or executive interests (vide *12 Encycl. 648*). An expectancy includes a remainder, and a remainder includes a vested and a contingent remainder (vide 3 *Encycl. 514*). A contingent remainder might never vest. But here, all events are contemplated by the actual instrument, *e.g.*, the rights to the property to vest in A; failing A's appointment, to vest in his sons, and failing sons, in his daughters.

A person who hopes to marry a daughter or who is engaged to one does not belong presently to a class of persons who will get the property on the happening of a contingency. He has no contingent interest. A person who may be the next of kin is not a person having a contingent interest. As regards a contingent interest in land (vide 5 *Encyl. 339*).

After-acquired property means: (1) property acquired afterwards by virtue of a contingent interest, (2) property not referable to a contingent interest.

Property in expectancy may or may not be transmissible; as the transfer may not be the ultimate fideicommissary. Where property is to devolve from A to B and from B to C, and where B predeceases A, the interest does not pass to C, as a contingent interest it cannot survive a person. It cannot be a vested interest.

When dealing with a contingent remainder, it is immaterial whether the contingency is precedent or subsequent. (*2 Blackstone ch. 11.*) A contingent interest cannot survive the death of the owner of the Interest. Here, therefore it is caught up, the whole of the property is thrown into one mass.

In re Parsons, Stockley v. Parsons[1], Kay J. held that a *spes successionis* was not a contingent interest. The next of kin has to be ascertained as at a future date. But here the parties are the children. The class of daughters is a clear and real class, and on the happening of the event will get the property.

Vide Green v. Meinall[2], which held that the *spes successionis* which the brother of a person has during his lifetime to a share of his property as one of his next of kin, in the event of his dying intestate, is not an "interest in expectancy". Here there is a contingent limitation in favour of a class, and my clients are certain members of that class. An expectancy in law is a contingency. If the events must happen, then there is a vested interest. Vide *Gunatilleke v. Fernando*[3] as to the alienability of a contingent interest.

Here all the immovable property was massed, and there is a joint disposition of the whole property, irrespective of its kind; and this disposition is equivalent to massing. The whole of the joint property was massed together so as to go over to "our children" on the remarriage of the surviving spouse. *N.B.* the words "nothing excepted". The property is described as "our property" and not mine or yours. It is therefore clearly a joint disposition of the property consolidated into a mass.

[1] (1890) *45 Ch. Div. 51.*

[2] (1911) *2 L. R. Ch. Div. 275.*

[3] *22 N. L. R. 385, at p. 393.*

The joint will further provides that on the death of one, the survivor shall have a life-interest, but after the death of the survivor, the children are to have the full interest. If there is a joint disposition after the death of the survivor, then there is massing of the property. Further the prohibition against alienation applies to the property of both, not only to the property of the first-dying.

A *fidei commissum* imposed on the children makes the massing all the greater. The rest of the property, on the death of the survivor devolves absolutely on the children ; the point of time at which this devolution is to take place is advanced if the survivor remarries. *N.B.*—" All the life-interest hereby given " and " all our immovable property shall devolve absolutely on our children ", in the event of a remarriage. The property in respect of which the disposition ' passing over, forfeiture on remarriage ' —is the massed property—our property. She can keep to herself a windfall or a legacy subsequently bequeathed to her.

Unless this contingent interest is caught up, she contributes nothing. It is quite clear that the whole of the property is to be passed over, for the words used are " any of our " and not any of the other's property, *i.e.*, a joint disposition after the deceased first dying—vide *Steyn 143*. In this case, there are two dispositions : (1) a joint disposition after the deceased first dying, and (2) a disposition on the remarriage of the survivor.

The appellant argued that this joint will must be construed as the separate will of each ; and it was asked how the property could pass to a third party under her joint will. Vide *Samaradivakara v. De Saram* [1], which held that the rights of a survivor can pass to a devise during the lifetime of the survivor. Therefore it is possible by joint will to give bequests to legatee, *e.g.*, " 2/3 of our property to go to the children on the death of one of the parties to the joint will ". Here the will deprives the widow of her ½ share.

It was contended for the appellant that the property of the survivor cannot pass till her death. It is true that the legal title has not passed. All the rights of the children are equivalent to rights in *personam* in respect of the property against the survivor on her remarriage. Therefore, the children could sue her. The defences available against the survivor are available also against a volunteer from the survivor. An action as well as an exception (if in possession) is available to the children here. Here the plaintiff is a volunteer.

If you are dealing with a survivor or a volunteer under her, you are not to analyse the will and the origin of the property devised. It is not so with the case of a stranger. The case of *Samaradivakara v. De Saram* [1] (*Supra*) is a complete answer to the contention of the appellant regarding adiation. The testator could not prevent the property from going to the children on the joint will, though the property was her own property. Still there is a right in *personam* against her.

Community is not necessary for the purpose of massing in a joint will (Vide *Steyn 155* and *S. Afr. L. R. (1915) 64 at pp. 77, 78.*) Where each spouse could have dealt with the whole of the common property with the consent of the other. Here there is a right in *personam* in respect of a

[1] *14 N. L. R. 321.*

particular piece of land. (N.B.—The Act of 1915 made it a right *in rem.*) Vide *Jones' Leading cases on S. African Law—Persons, Part I., p. 101* Where the alienation is by the survivor, a gift is not permitted.

Adiation can take place at any time. A person who takes the property takes it, subject to the instrument. He takes a defeasible title. Till the adiation by the survivor, there are two wills. Once adiation takes place, there is a joint disposition of massed property. If the contest is between the beneficiaries and a stranger, then again there would be two wills. If the survivor has taken a benefit—here, the enjoyment of the rights in the property—there is sufficient adiation. In this case the widow could not elect between testacy and intestacy. You cannot assume a fictitious intestacy, while in a community marriage, each has half the property even in the case of a testacy. One must either adiate or repudiate. (*3 Nathan 1844.*) A wife married in community can say ' my half share is separate till I die ". But here, she cannot refer the possession of " Rosendale " and " Carlwill ", as by right. An adiation arises where there is a receipt of a benefit under the will. Here there is the collection of rents by Eugenie from the date of her mother-in-law's death, 1919, till her second marriage. She had not the benefit of Bogahawatta as her farther died in 1919. But however small the benefit she enjoyed, it was not referable to any other right ; this it is sufficient to show adiation. Eugenie is living in Carlwill by virtue of her rights under the will.

As regards prescription the suggestion was made that the mother was prescribing against her children. In 1920 only the eldest child had attained majority. The four children (defendants) were born in the years 1899, 1901, 1902, and 1909 respectively. The plaintiff alleges an ouster on May 1, 1933.

Therefore with regard to the last (4th) defendant, prescription cannot run against her. Regarding the third defendant, if one takes the date of ouster from the plaint, there is no prescription against him as well. But plaintiff had no possession of the properties in 1926. The only possible method of occupying these premises was in the collection of rents. Till 1926, the rents were collected by the second son, sometimes by her and at times by her second husband, the plaintiff. The question then is whether after the deed of gift in 1926, the plaintiff had possession. Eugenie says that there was no alteration at all in the way the rents were received.

As between mother and children, they were getting a portion of the rents. There is no adverse possession where she continues to give rents to the children. She was in a position to possess adversely ; one is not automatically in adverse possession.

Enjoyment follows the title to the property. The fourth defendant was educated at the convent and her mother bore her expenses. One cannot say that the mother's possession was adverse when a reconciliation had been brought about between her and her children. It was when the lease was executed that she realized that her second husband wished to deprive her children of their property. But possession depends on the reality of getting the rents from the wife.

Though deeds had been executed, she did not surrender possession. From 1920 to 1926, she gave a portion of the rents to her children. Thus

no prescription arises as the action was in 1934. The plaintiff used to appropriate a part of the rents, but the children's rights were never denied.

Thus if the plaintiff could not count on any possession by the wife he is bound to fail on the plea of prescription.

For conveyancing, we need not go back to the Roman-Dutch law.

Hayley, K.C., in reply.—To deal with the issue of prescription. Has there been any case whereby a mother purports to forfeit all her property, by will ? From 1919 Eugenie was the absolute owner of the property. It is immaterial to the plaintiff whether it is on her husband's or her title. There must be proof of payment of rents to prove an acknowledgment of the children's title.

Plaintiff is entitled to judgment against the first two defendants as they have not asked for a declaration in their favour. Therefore he is entitled as against these two defendants, to his 1/16 share of the property.

Each defendant cannot plead the title of the other to his benefit. If defendants asked for title, they would have to ask for ⅛, the whole of the mother's estate. But here they are barred—*vide* section 207 of the Civil Procedure Code.

"Possession in remainder, reversion or expectancy" is taken over in South Africa from English practice.—Vide *Tenent's Notary's Manual.* These terms are simply a description of property. Vide *28 Halsbury 694*—"All our property". Is the property such as could be included in a will ? Could it be dealt with under Ordinance No. 21 of 1844, section 1 ? Why does a *spes successionis* differ from succession under *fidei commissum ?* English law paid attention to the whole estate in real property ; unlike the Roman-Dutch law. Every form of expectancy may be a contingency. Therefore a *spes successionis* is a contingent remainder. The question is, does it give an actual present interest or a mere *spes successionis.* A can have an estate for life. B the vested remainder, and C can get the contingent remainder. Vide *24 Halsbury 220* for classification of a contingent remainder. The class who are to get on a contingency are having only a *spes successionis.* According to P 1 (in favour of J. Henry Fernando), till J. H. Fernando dies, one cannot say what shares the heirs would get. He might have other daughters. If Eugenie is certain to get something, there is an expectancy. Eugenie's interests expire with herself. If she died before her father, she would have left nothing. Vide *Cowes v. Williams* quoted in *In re Parsons.*

There is no meaning in creating a life estate in Roman-Dutch law. Roman-Dutch law does it by a *fidei commissum.* If Eugenie died before her father, the property would not go to her children as heirs, but would devolve under P 1.

Eugenie had no status till her father died without male children. She had no saleable interest. Exercise of powers of appointment by others would not give her a status or right. Regarding the position of an heir—Vide (*5 Encycl. 334*). In English law *dominium* is absolute ownership in reality—a vested estate as opposed to an estate in expectancy (p. 339).

Where the enjoyment is present enjoyment, you get possession ; where it is in the future, you get an expectancy ; where it is by operation of law, there is a reversion, and where it is by the act of parties, there arises a remainder.

"Vested". The Roman-Dutch law deals only with ownership and not with "estates". Both title and possession are required. If neither exists, then there are no interests whatsoever. Thus if estates are not vested under Roman-Dutch law, one cannot convey an interest in them. (Vide *Lees' Introd. L.R.D.L. p. 348; Vander Linden, bk. 1, ch. 9s. 8, p. 137, of Henry's Translation.*)

Until 1845, by the Real Property Act, contingent interests were not transmissible in English law. The person must wait till the event takes place.

[MAARTENSZ J.—By the time Eugenie died, did the property vest in her? The joint estate continues till Eugenie dies. What is the joint estate is to be determined at the death of both joint testators. By virtue of the joint will the property devolves on her children at her death.]

After acquired property does not pass on Eugenie's death, the joint will becomes a separate will. What she has alienated goes out and only what is left, goes to the children.

In this case if Eugenie or Mary die, the property is not to go to their heirs, but to their uncles Martinus or James.

[ABRAHAMS C.J.—This property is not exempt from seizure, section 218 (*k*), because they are not transmissible by will.]

The Supreme Court has held that under this section a *fidei commissum* does not come. Vide *Mohammed Bhoy v. Lebbe Maricar*[1], where the words in section 218 (*k*) have been interpreted. This case held that the interests of a *fidei commissarius* cannot be sold in execution during the lifetime of the fiduciaries, as it is a contingent interest within meaning of section 218 (*k*).

The case *Gunatileke v. Fernando*[2], does not stand in my way; the obiter of the Privy Council is in support of my contention. There, subsequent to the sale, the vendor got good title. *Semble,* if the alleged vendor had no title. The subsequent title of the vendor will enure to the benefit of the purchaser. But here the property is "our property".

[ABRAHAMS C.J.—Does not *Gunatileke v. Fernando* show a contingent interest in property ?]

There is no indication that a contingent interest cannot be alienated.

[ABRAHAMS C.J.—Does this property form part of "our property" at the date of the will ?]

Property that does not belong to you could be sold under the authority of the *22 N. L. R.* case. This case deals entirely with the terms of a contract, *rei venditae et traditae,* and not with any dominium existing at the time. Here it is "our property"; therefore the Privy Council observation regarding a shadowy *spes* does not cover "our property".

[MAARTENSZ J.—Would not the phrase "property in expectancy" cover property acquired after the will, but which was existing before ?]

Subsequent acquisitions of *dominium* cannot come into the will.

There was no indication that the future property was mentioned. Vide *Messina v. Messina*[3], which included all the property existing at the date of the death of the second dying. Vide *Grotius 2, 47, 2*—"A right in expectancy is one by virtue of which ownership must at some time or other, come to him", and not a contingent interest.

[1] *15 N. L. R. 466.* [2] *22 N. L. R. 385 P. C.*

[3] *(1923) E. D. L. 462.*

As regards forfeiture, under the clause "we give our property"—*vide Mosterts' case.* There would be two separate wills. The latter portion of the will is only on a contractual basis. The question then is what dominium Eugenie had in 1913, when her husband died. Dominium was not in her. The respondent laid great emphasis on the forfeiture of the life-interest hereby given in "our property". Our property means my property or your property as the case may be. My property can only mean "which I, the husband, can give you, the wife". Thus there are two separate wills; a joint will of two separate persons together. Here, that which can be forfeited if the life-interest obtained from the other. Supposing she had no children, would her property also go to her husband's heirs *ab intestato?*

The property over which the forfeiture works is the life-interest.

[MAARTENSZ J.—The District Judge has found that she forfeited all her interests on her remarriage.]

No man would undertake to hand over all his property to his children on his remarriage.

A clause taking off all her property is too drastic. A clause to prevent the remarriage of a surviving spouse has not been heard of.

Cur. adv. vult.

December 17, 1937. MAARTENSZ J.—

The plaintiff in this action appeals from a decree of the District Court of Colombo dismissing with costs his action for declaration of title to an undivided 1/16 share of a land called Bogahawatta, which consists of a number of houses and tenements bearing assessment numbers allotted to Dam street and Gasworks street.

An undivided ¾ share of Bogahawatta admittedly belonged to Adriana Swaris. She by deed No. 1792 (P 1) dated October 8, 1894, gifted an undivided ¼ share to her son John Henry Fernando subject to certain conditions, which I shall presently refer to in detail.

John Henry Fernando died on July 23, 1919, leaving two daughters Mary and Eugenie who in terms of the deed of gift became each entitled to an undivided ⅛ share.

Eugenie by deed No. 94, dated May 1, 1926 (P 2), gifted an undivided 1/16 share of Bogahawatta to the plaintiff who is her second husband. She married him on December 11, 1920. The plaintiff's claim to title is based on this deed of gift. He averred in his plaint that the defendants, who are Eugenie's children by her first husband, James Polycarp de Alwis (hereafter referred to as de Alwis) ousted him in May, 1933.

The defendants pleaded in their answer that by virtue of a joint last will No. 8,249 executed by Eugenie and her first husband, de Alwis (he died on August 18, 1913), the rights of Eugenie on her second marriage with the plaintiff devolved on her children the defendants, and they denied the plaintiff's title to the share claimed by him under the deed of gift No. 94 (P 2).

The following issues were framed in the District Court on the defence set up by the defendants:—

Issue (1).—Did the joint last will No. 8,249 of August 13, 1913, cover the property which devolved on Eugenie after the death of her first husband? (It is admitted that the property in dispute

devolved on Eugenie subsequent to the death of her first husband.)

Issue (4).—Did Eugenie forfeit on her marriage to the plaintiff her rights to $\frac{1}{8}$ share of the property which devolved on her?

This will was judicially interpreted in *Silva v. Silva*[1] case No. 839 of the District Court of Colombo, which was an action brought by Silva (the plaintiff in this action) to recover from his wife Eugenie his 1/16 share of the rents of the premises Bogahawatta which he alleged she had collected and retained from May, 1933. It was there held in effect that the joint will extended to property acquired by the testatrix after the death of the testator and that she had no disposing power over Bogahawatta, and the plaintiff's action was dismissed.

The District Judge in this action held that he was bound by the decision in *Silva v. Silva* (*supra*) and answered the issues quoted above in the affirmative. He also held that Eugenie had adiated the inheritance.

The plaintiff's action was accordingly dismissed.

This appeal which was first argued before Hearne and Fernando JJ. was, for the reasons specified in the reference, referred to a fuller Bench for decision.

The result of the appeal depends, in the main, on the construction of the joint will executed by Eugenie and de Alwis and on the effect of the deed of gift No. 1,792 (P1) executed by Adriana Swaris in favour of John Henry Fernando. As it is earlier in date, I shall first set out the terms of the deed of gift.

The gift to John Henry Fernando is subject to a prohibition against alienation either by will or deed with the proviso that "it shall be lawful for John Henry Fernando to give or appoint by last will or deed subject to such conditions or restrictions as he may think proper the said share hereby assigned to him unto" (the person or persons are specified in the deed of gift).

The deed further provided—

(1) that if John Henry Fernando died without making any gift or appointment his $\frac{1}{4}$ share should devolve on his male children or child who survived him, or, if they predeceased him, on their lawful children or other descendants;

(2) that failing male children and their descendants, the $\frac{1}{4}$ share should devolve on John Henry Fernando's lawful female children or child, or if they predeceased John Henry Fernando, on their lawful child, children or other descendants by representation;

(3) that in the event of the entire failure of all the children, grandchildren, or other descendants of the said John Henry Fernando, his share should devolve on Martinus Fernando and James Fernando or if they or either of them be dead, then on their or his children and descendants by representation.

The relevant provisions of the will are as follows:—This is the joint last will and testament of us, James Polycarp de Alwis and Eugenie de Alwis, husband and wife, residing at 'Carlwill', in Colpetty, Colombo".

[1] *(1935) 37 N. L. R. 388.*

"We do hereby give and devise to the survivor of us all our immovable property whatsoever and wheresoever situate and whether in possession, reversion remainder or expectancy nothing excepted subject to the express condition that such survivor shall not sell, lease, mortgage or otherwise alienate or encumber any such property but shall only enjoy the rents, profit, and income thereof during his or her natural life and that after his or her death the said property shall devolve on our children, absolutely in the following manner :—

"The house and premises called and known as 'Carlwill' . . . . shall devolve on our eldest son James Charles Wilfred de Alwis and the house and premises called and known as 'Rosendale' . . . . shall devolve on our other three children in equal undivided shares".

(Here follows a prohibition against alienation for the benefit of the children of the devisees.)

"All the rest and residue of our immovable property shall on the death of the survivor of us devolve on all our four children absolutely in equal shares.

"It is our will and desire that if on the death of either of us the survivor shall marry again he or she shall thereupon forfeit all the life-interest hereby given to the survivor and such survivor so marrying again shall not be entitled to the income of any of our immovable property and all our immovable property shall immediately devolve absolutely on our children in manner above mentioned".

Eugenie died on June 20, 1937, without revoking the will.

It would appear from the judgment of Koch J. in *Silva v. Silva* (*supra*) that, according to the evidence in that case, Eugenie had nothing at the date of the execution of the will. It is however not clear from the evidence in the present action that that was so, and I think the will should be construed without regard to whether she had property or not.

The appellant's first contention was that the terms of the will were not sufficiently explicit to deprive Eugenie, even if there was a massing of the estates, of her right to dispose of property acquired by her after the death of the testator. In support of this contention we were referred to *Viteyn on Wills, p. 143,* and the case of *Messina v. Messina*[1]. The report is not available, but there is a statement of the facts and the decision of the Court in Bisset & Smith's *Digest of South African Case Law (1923) columns 306 and 307.*

It is unnecessary to discuss this contention as the respondents' Counsel submitted that it was not necessary for him to maintain that the will extended to property acquired by the testatrix after the death of the testator as his contention as regards Bogahawatta is that there was a disposition of this property by the will which dealt with all immovable property "whether in possession, reversion, remainder or expectancy".

The appellant, however, argued that the interest Eugenie had in Bogahawatta when the will was executed was not more than a *spes successionis* analogous to the interest which the next-of-kin of an intestate had before the death of the intestate, which was held not to be an "interest in expectancy" protected by section 2 of The Deceased Wife's Sister's Marriage Act, 1907, in the case of *Green v. Meinall*[2] The

[1] *(1923) E. D. L. 462.*

[2] *(1911) 2 L. R. Ch. Div. 275.*

authority for this ruling was the case of *In re Parsons Stockley v. Parsons* [1], where it was laid down that "it is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other in the property of a living person to which he hopes to succeed as heir-at-law or next-of-kin of such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property.

The law is the same where there is a limitation by will or settlement of real or personal property to the heir or statutory next of kin of a living person. During his life no one can say, "I have a contingent estate or interest as possible heir or next of kin"; just as in the first case no one can have more than an expectation or hope of being heir or next of kin".

Kay J. in the course of his judgment said, with reference to an Irish case *In re Besupré's Trusts* [2] where the contrary was held, "The point of difference to state it shortly is this: '*Nemo est haeres viventis*' should be construed literally. There is no such character in law as the heir of a living person or as his statutory next-of-kin. There is a wide difference, for this reason, between a gift to such of the "children" or "nephews" or even "kindred" of A who shall be living at his death, and a gift to those who shall then be his statutory next-of-kin. During A's life there may be children, nephews, or kindred. Each of them has probably sufficient interest, though contingent, to take proceedings to protect the fund—see per Lord Hatherley in *Joel v. Mills* [3]. Some or all of them might be made defendants in an action to administer the trusts. Neither of these things can be done where the gift is to statutory next of kin. They have no existence whatever in law while the propositus is living. No one can as possible next-of-kin even bring an action to perpetuate testimony as to his kinship during that period. I am unable to agree with the judgments which consider these cases as parallel". The respondents relied on this passage in support of their contention that under the deed P 1 Eugenie had more than a *spes successionis*.

Now in the case of *Selembram et al. v. Perumal et al.* [4] a bequest of a house to A and M subject to the condition that they shall not sell, mortgage or in any way alienate the said house and premises, but that the same shall be always held and possessed by them and their heirs in perpetuity under the bond of *fidei commissum* was held to create a valid *fidei commissum* in favour of the heirs *ab intestato* of A and M for the full period allowed by law. The decision would be equally applicable to a gift of the property to A and M subject to the same conditions. Here the heirs *ab intestato* not being ascertainable until the death of the donees it would not be open to any person who would be an heir *ab intestato* if they were dead to take any steps to safeguard his interests during the lifetime of the donees.

In P 1, however, the female children are an ascertainable class, and if anyone set up a claim to the property gifted by virture of a deed of gift which he alleged was executed by John Henry Fernando in pursuance of the power reserved to him by the deed, it would, in my opinion, have been open to Eugenie to impeach the deed as a forgery, if that was the case, during the lifetime of the donee.

[1] (1890) *L. R. 45 Ch. Div. 51.*
[2] *21 L. R. Ir. 397.*
[3] *3 K. & J. 474.*
[4] *(1912) 16 N. L. R. 6.*

In my judgment the distinction drawn by Kay J. between a gift to an ascertainable class and a gift to an heir *ab intestato* is applicable to the deed P 1, and I accordingly hold that Eugenie had more than a *spes successionis* of the nature which was held by Kay J. not to create an interest in English Law.

Again, after the deed of gift P 1 was accepted by John Henry Fernando, the donor could not by any subsequent act deprive him of the interest created by the deed of gift. (*John Perera v. Avoo Lebbe Marikar*[1]; *Soysa v. Mohideen*[2].)

Eugenie clearly had a contingent interest. In the case of *Gunatilleke v. Fernando*[3], it was held that under the Roman-Dutch law a vested interest in remainder can be alienated. Similarly, an alienation of a contingent interest is not prohibited and an instrument purporting to alienate such an interest was not null and void. In that case the beneficiaries, who had a contingent interest under a deed of gift, sold the property which was the subject of the gift to plaintiff's predecessor in title before the contingencies happened. The contingencies subsequently happened and the vendors acquired title. In the Privy Council the plaintiff relied on two arguments :

(1) That the subsequent acquisition enured to the benefit of the vendee and his successors in title ;

(2) That the vendors did not know what interest they had, but purported to assign all they had got, and they had a contingent interest which ultimately vested and is now vested in possession. Both arguments were upheld. With regard to the latter argument Lord Phillimore said, " that under the Roman-Dutch law a vested interest in remainder can be alienated must be admitted. Both sides claim title under transfers made during the lifetime of Maria. The Roman law saw no objection in principle to the transfer of things not yet come into existence (*Dig., lib. XVIII., tit, 1, ss. 8 and 34*). But as to the alienability of a contingent interest, there appears to be a dearth of authority. None has been brought to their Lordships' notice. No doubt the *spes* which such a remainder-man can alienate is a very shadowy one, for if he predeceases the fiduciary, his heirs take nothing (Pereira's *Laws of Ceylon (2nd ed.), p. 467*), and therefore the alienee could take nothing. But there is, at any rate, no indication either that such an alienation is prohibited by the policy of the law, or that an instrument purporting to alienate is so null and void that it cannot be looked at for any purpose ".

The decision in this case is strong authority that a contingent interest could be alienated, and I see no reason why it should not be disposed of by will. Of course, if the testator predeceased John Henry Fernando, her heirs under the will would take nothing; but if she died with a vested interest the heirs would succeed in terms of the will.

The next question is whether by the terms of the will Eugenie did dispose of her contingent interest. The respondent in support of the contention that there was such a disposition, relied on the words of the devise which gave to the survivor all " our immovable property . . . . whether in possession, *reversion, remainder* or *expectancy* ", particularly

[1] *(1884) 6 S. C. C. 138.* [2] *(1914) 17 N. L. R. 279.*

[3] *(1921) 22 N. L. R. 385.*

the words in italics. It was argued that the definitions of these expressions in Wood Renton's *Encyclopedia of the Laws of England, vol. III, p. 514, vol. V, p. 339, and vol. XII, p. 648* would include the contingent interest created by the deed P 1.

In vol. III. p. 514, a contingent remainder is defined as "an estate limited, to take effect in remainder, that is, to come into possession on the regular determination of some prior estate less than fee-simple (called the particular estate), but to arise only in case some event or events which may or may not happen before the particular estate shall come to an end, shall happen. It is an estate in remainder of which the vesting in interest is made subject to a condition precedent".

In vol. V, p. 339, an estate in expectancy is defined as an estate "the enjoyment whereof is future", which may be in remainder or reversion according to whether it arises by agreement or by operation of law. An estate in expectancy as distinguished from an estate in possession is described as an estate the right to the possession of which will only arise at a future date, *e.g.*, on the determination of a prior life estate.

In vol. XII, p. 648, remainder is defined as "an estate in expectancy", that is to the same extent as a reversion, an incorporeal hereditament, though not a "purely incorporeal hereditament".

We were also referred to Chapter XI. of Blackstone's Commentaries (Kerr's edition), vol. II., entitled "of estates in possession, remainder, and reversion".

Mr. Hayley for the appellant urged that the English law of real property was not applicable to the interest, if any, created by P 1. But some meaning must be given to the expressions relied on by the respondent. The expressions according to the definition referred to above, are applicable to the interest Eugenie had under the deed P 1 and I accordingly hold that the devise amounted to a disposition of that interest.

Mr. Hayley next argued that a contingent interest was not disposable by will under the provisions of section 1 of Ordinance No. 21 of 1844 entitled "An Ordinance to make better provision for the disposal of Landed Property".

The relevant provision is as follows:—"It shall be lawful for every person competent to make a will to devise, bequeath, and dispose of by will all the property within this Colony which at the time of his death shall belong to him, or to which he shall be then entitled, of whatsoever nature or description the same may be, movable or immovable, and all and every estate, right, share, or interest in any property, and which if not so devised, bequeathed, or disposed of would devolve upon his heirs-at-law, executor, or administrator, ... ".

Now, as I said before, the disposition would be of no avail if this was a single will and Eugenie predeceased John Henry Fernando; but if she survived him, and she was vested with the property, the disposition would not be obnoxious to section 1 as her interest would, but for the will, devolve on her heirs-at-law, executor or administrator.

Eugenie Fernando was vested with the property when she died in June, 1937. But the testator de Alwis died before the event and it was argued for the appellant that the disposition of Bogahawatta assuming there was a disposition, therefore failed. It was also contended that there

was no massing of the joint estate, that Eugenie had not adiated the inheritance, and that she therefore had the right to execute the deed of gift (P 2) relied on by the plaintiff in derogation of the will.

The case of *Denyssen v. Mostert* [1], relied on by the respondents settled the law on the following points, formulated as rules in Steyn's *Law of Wills, p. 126,* thus:

Rule 1.—"That joint or mutual wills, notwithstanding their form are to be read as separate wills, the disposition of each spouse being treated as applicable to his or her half of the joint estate.

Note.—This is so even though the joint will of the spouses provides that it should be deemed to be *our will after our death,* because in such a case the words after our death must be construed to mean *after the death of the testator and testatrix* respectively. If the survivor makes no other will, then, unless the joint will was so framed as to be only the will of the first-dying, it will also be the will of the survivor. This is so even though the survivor may have remarried.

Rule 2.—That each spouse is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death.
This rule is subject to an important exception, viz.:—

Rule 3.—That the power which the surviving spouse generally has to revoke the mutual will as far as it affects half of the property (*i.e.,* the survivor's ½ share of the community) is taken away on the concurrence of two conditions:—

(i.) That the will disposed of the joint property of the testators on the death of the survivor, or, as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition, and

(ii.) that the survivor has accepted some benefit under the will".

The spouses in that case were married in community of property.

Eugenie and de Alwis, although not married in community of property, could validly make a joint will (*Steyn on Wills, p. 126*); and "the principles applicable to this class of will are, generally speaking, the same as those which apply to a joint will made by persons married in community of property". (*Ibid,* page 155). Steyn notes that section 115 of an Act which is referred to as Act 24 of 1913 applies only to the massed estates of spouses married in community, and that "where there has been a massing and adiation under a will of persons married out of community . . . . the principles which govern the rights of heirs, legatees and creditors must be sought in cases on massing prior to 1913".

Section 115 enacts as follows: "Where two spouses, married in community, have by their mutual will massed the whole or any portion of their joint estate, and disposed of it after the death of the survivor, conferring upon the latter a fiduciary, usufructuary, or other limited, interest therein, then upon the death of either such spouses after the commencement of this Act adiation and the acceptance by the survivor of the benefits under the will shall have the effect of conferring upon the

[1] *4 L. R. (Privy Council) (1871-1873) 236.*

heirs entitled to the said property after the expiry of the said limited interest the same rights in respect of the survivor's ½ share of such property as they may by law possess in respect of the ½ share which belonged to the spouse who has first died ".

At common law the heir or legatee had merely a *jus in personam* (*Steyn, p. 145*). The defendants had therefore no *jus in re* in the property of Eugenie even though there was a massing of the joint estate and adiation by her.

" Massing is a joint disposition after the death of the survivor of them by two persons in a joint will of their property consolidated into one mass for the purpose of the joint disposition ". (*Steyn, p. 127.*)

" The essential features of massing are (i.) a joint disposition by the spouses, and (ii.) a disposition taking effect on or after the death of the survivor. If these are present the survivor cannot, after adiation, revoke the mutual will, to the extent that it was massed. It will make no difference, (i.) that some of the dispositions of the first-dying take effect upon his or her death, or (ii.) that the whole joint estate is not disposed of provided only that there is a joint disposition of some of the joint estate on or after the survivor's death ". (*Steyn, pp. 127 and 128.*)

Eugenie and de Alwis by the joint will in question devised all their immovables to the survivor for life with a prohibition against alienation, and directed that after the death of the survivor the immovable property should devolve on their children absolutely as provided by the will.

I think this disposition of the immovable property of the spouses cannot in effect be distinguished from the first illustration given by Steyn on page 128 of the massing of the whole joint estate. It is as follows: 'Testators bequeathed the usufruct of the joint estate to the survivor for life and directed that after the death of the survivor the joint estate, after the deduction of certain legacies, should form a poor fund for the support of indigent relations ".

I accordingly hold that there was a massing of the immovable property of the estates of the two persons who made the joint will.

As regards the adiation of the estate it was urged that the evidence did not justify the District Judge's finding that Eugenie accepted some benefit under the will.

The properties left by the testator de Alwis were " Rosendale ", " Carlwill ", and three boutiques in St. John's road. They were subject to a life-interest in favour of the testator's mother Lucia, who died on March 26, 1919. Eugenie stated that she continued to live in " Carlwill " after the death of her husband with her mother-in-law, and after her mother-in-law's death till she married, and that she took the rents and profits of " Rosendale ", and the three boutiques after the death of de Alwis. She maintained her mother-in-law till she died, and appropriated the balance for the maintenance of herself and her children. She added that the receipts were issued by her mother-in-law. In re-examination she stated that she took the rent of " Rosendale ", after her mother-in-law died and before her second marriage. This evidence alone, if believed, establishes that Eugenie accepted benefits from her husband's property. The District Judge has accepted her evidence and found that she adiated

the inheritance and I see no reason to hold otherwise. Eugenie therefore was not entitled to execute the deed of gift P 2 in derogation of the will.

I deferred dealing with the argument that the disposition of the contingent interest failed as the testator died before John Henry Fernando as it appeared to me that "massing" and "adiation" had some bearing on it. If there was no massing of the property of the testator and testatrix he or she is deemed to have dealt with his or her own property. Where there is massing and adiation the first dying is deemed to have disposed of the property of the survivor. If the will with which we are concerned was one of the former class, the death of the testator would not affect Eugenie's devise to the children. Does the fact that there was a massing of the property belonging to each of the makers of the will make a difference? I do not think it does; for even when there is massing and adiation when the first-dying dies the mutual will is read as his or her will only and operates to pass dominium to the heirs of only that portion of the joint estate which is bequeathed to them by the first-dying, and although by adiating, the survivor is prevented from making a new will with regard to the other ½ contrary to the terms of the mutual will, and is bound by the terms of the mutual will with regard thereto, yet as he has not died his portion of the mutual will has not yet spoken, and consequently the heirs cannot be said to have acquired the dominium of that ½ of the joint estate (see the articles on "Alienation by Survivor" in leading cases on *South African Law* by Jones and Ingram, Part I., p 101). This passage is equally applicable to a will made by persons not married in community of property.

Eugenie's portion of the mutual will therefore spoke from her death, that is, after the happening of the contingencies and the vesting of Bogahawatta in her. I am accordingly of opinion that the death of the testator before John Henry Fernando did not affect Eugenie's disposition of her contingent interest in the property in dispute.

In the article I have referred to above it is laid down that a survivor who has adiated under a mutual will where there has been massing cannot validly alienate by gift. The plaintiff therefore acquired no title to 1/16 of Bogahawatta under the deed of gift.

Eugenie had however a right to dispose of her life-interest in Bogahawatta and the plaintiff would be entitled to judgment for a 1/16 share of the rents of the premises until her death, unless she was deprived of the life interest on her second marriage by the forfeiture clause in the will.

The forfeiture clause would, I have little doubt, have deprived Eugenie on her second marriage of her interest in the immovable property of the testator. It was urged that she could not have intended to forfeit her interest in her own property. Whether she did so intend or not depends on the terms of the clause.

The clause provides as follows (I re-state it for convenience of reference): "It is our will and desire that if on the death of either of us the survivor shall marry again he or she shall thereupon forfeit all the life-interest hereby given to the survivor and such survivor so marrying again shall not be entitled to the income of any of our immovable property and all our immovable property shall immediately devolve absolutely on our children in manner above mentioned".

It is expressed in the most comprehensive terms, and is therefore applicable to the property of the survivor as well as to the property of the first-dying, and I am of opinion that Eugenie on her second marriage forfeited her interest in Bogahawatta, and that the plaintiff did not acquire even a life-interest under the deed of gift P 2.

The appellant finally contended that he and his predecessor in title had been in adverse possession of the 1/16 share in dispute for over ten years between the date of Eugenie's second marriage and the date of ouster and that he had acquired a title by prescription to that share.

The date of ouster averred in the plaint is May 1, 1933. The date of ouster mentioned in issue 9 is May 1, 1934. The plaintiff states at page 35 of the record, "I accept my Counsel's position on the last date that I claim rent from these defendants as from 1934". The alteration of the date reduces the rent recoverable by the plaintiff but it gives him a year more in which to acquire a title by prescription. For the purposes of prescription the plaintiff must be held to the date of ouster averred in the plaint. He cannot therefore acquire a title by prescription against the third and fourth defendants who were born on December 15, 1902, and February 10, 1909, respectively. The fourth defendant attained majority by her marriage in February, 1928.

The plaintiff apparently never had possession himself as on June 11, 1926, he executed a deed of lease No. 95 (P 3) of the 1/16 share in favour of Eugenie for a period of six years, commencing from June 1, 1926, and she, according to his plaint (D 4) in action No. 53,500 of the District Court of Colombo, continued in possession after the expiry of the lease.

There was only a period of 12 years and 5 months from the date of the forfeiture (December 17, 1920), to the date of the ouster averred in the plaint. The plaintiff to establish a title by prescription must prove that Eugenie, by paying him rent, possessed a 1/16 share of Bogahawatta on his behalf during the term of the lease.

The plaintiff's plaint P 8 in action No. 38,640 against Eugenie for the recovery of 34 months rent up to and including the month of June show, on the contrary, that she at most paid him rent for 13 months from June 1, 1926 (erroneously referred to as July 1, 1926). She, in her answer P 9, denied paying him any rent or that he was entitled to any rent at all, and his action was dismissed as a settlement was arrived at. The terms of the settlement have not been proved and it cannot be said that she admitted the claim. There was accordingly, on his own showing only a period of 7 years from the date of the forfeiture to the date up to which Eugenie paid the plaintiff rent, which is insufficient to establish a title by prescription.

Moreover in 1927, 10 years had not elapsed since the first defendant and the second defendant, who were born on September 2, 1899, and July 21, 1901, respectively, had attained their majority.

The plaintiff's claim to have acquired a title to a 1/16 share by prescription also fails. I accordingly dismiss the appeal with costs.

ABRAHAMS C.J.—I agree.

POYSER S.P.J.—I agree.

Appeal dismissed.