Dec. 20, 1910

Present : Hutchinson C.J. and Grenier J.

WEERASINGHE *et al. v.* GUNATILLEKE *et al.*

206[1] *and* 207—*C. R. Matara*, 5,625.

Usufruct—Fidei commissum—*Joint will—Death of all children after mother, but before father.*

The joint will of A and his wife B, who were married in community of property, contained the following clauses :—

"(2) It is directed that all the movable and immovable property belonging to us, be possessed by us, the above-named, during the lifetime of both of us according to our wish, and in the event of one of us predeceasing the other, the above-named property be possessed according to the wish, and dealt with according to the pleasure, of the survivor.

"(3) It is directed that after the death of both of us all the movable and immovable property belonging to us shall devolve on the children, grand-children, and such other heirs descending from us."

Held, that under the will the surviving spouse was entitled to merely a usufruct.

THE facts are set out in the judgments.

Van Langenberg, for the first defendant, appellant.—The first defendant purchased only a half-share of the land, the share belonging to the surviving testator. On the death of the testatrix the surviving testator did not lose his right to deal with his property as he pleased, in spite of the joint will. A joint will contains two wills ; on the death of one spouse his or her will takes effect. If by a joint will the entire property is disposed of, one spouse does not lose his or her right to deal with his or her share of the property

[1] Portions of the judgment dealing with appeal No. 206 have been omitted from this peport.

merely by the death of the other spouse. The heirs or legatees of the deceased spouse may have a personal claim against the surviving testator if he should alienate his or her share. The heirs do not have a real action to vindicate title to property alienated. The alienation by the surviving spouse of his or her share, though it be contrary to the will, is not null and void. The sale to the first defendant is therefore valid.

2. Even if the survivor does not have an unfettered right to dispose of his property, the plaintiffs cannot succeed in this action. The learned Commissioner has held that the will created a *fidei commissum*; the surviving spouse would then be a *fiduciarius*; even then the *fidei commissum* would have failed, as the children of the testator had both predeceased the survivor. The words "grandchildren and other such heirs descending from us" in clause (3) of the will should be construed as words of limitation, like the words "heirs of the body."

3. Under the joint will the heirs take only a gift of the residue.

Counsel cited *Juta's Leading Cases, Wills, pp.* 112, 119, *and* 120; *Ferdinandus v. Fernando:*[1] *Mendis v. Mohideen:*[2] *Kurunathapillai v. Sinnapillai;*[3] *Samaradiwakara v. De Saram*[4].

Sampayo, K.C., for the plaintiffs, respondents.—It would not matter whether under the joint will the survivor was a *fiduciarius* or *usufructuarius*. If the property vested in the children on the death of the testatrix, the survivor had only a usufruct, and he could not have alienated the property to first defendant. If the survivor was a *fiduciarius* under the will, the property would devolve on the grandchildren on the death of the survivor. The fact that the children had predeceased the surviving testator would not cause the *fidei commissum* to fail, as the grandchildren were specially mentioned in the joint will.

Elliott, for second defendant, respondent.

Van Langenberg, in reply.

Cur. adv. vult.

December 20, 1910. HUTCHINSON C.J.—

This appeal was referred by Grenier J. to a Court of two Judges, as the decision in it may affect other properties besides that which is the subject of this action. It raises a question on the meaning of a clause in a joint will of the late David Ekanayaka, Mudaliyar, and his wife, who were married in community of property before 1876, and made their joint will on July 2, 1883.

[1] *(1903) 6 N. L. R. 328.*
[2] *(1902) 5 N. L. R. 317.*
[3] *(1897) 3 N. L. R. 194.*
[4] *(1910) 2 Cur. L. R. 97, 104.*

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The will was in Sinhalese. The 2nd and 3rd clauses of it, according to the translations filed by the plaintiffs in this record, are as follows :—

"(2) It is directed that all the movable and immovable property belonging to us, be possessed by us, the above-named. during the lifetime of both of us according to our wish, and in the event of one of us predeceasing the other, the above-named property be possessed according to the wish, and dealt with according to the pleasure of the survivor.

"(3) It is directed that after the death of both of us all the movable and immovable property belonging to us shall devolve on the children, grandchildren, and such other heirs descending from us."

The testatrix died on August 10, 1883. There were two children of the marriage : Anne Charlotte and Alice Mary. Anne Charlotte died in 1891 leaving three children only, who are the first three plaintiffs. Alice Mary died in 1892 leaving one child only, who is the second defendant.

The will was produced in a case in the District Court of Tangalla in 1887, but probate does not seem to have been issued until July, 1908, when letters of administration with the will annexed were granted in No. 1,601, Matara (Testamentary), to the fourth plaintiff.

The testator died in 1907. The first defendant alleges that by deed dated June 18, 1894, the testator conveyed to him one-half of the land, which is the subject of this action, and which admittedly was part of the joint estate, and he now claims that half. The three children of Anne Charlotte brought this action alleging that the surviving testator did not require an absolute title to the joint property, but only a right to possess it during his life, and that on his death the plaintiffs and the first defendant became entitled to all the property in the proportion of three-fourths to the plaintiffs and one-fourth to the second defendant, and they claim a declaration that they are entitled to three-fourths of the land and to eject the first defendant.

The first defendant in his answer claimed under his purchase from the testator and denied the title of the plaintiffs and the second defendant, and denied the validity of the will and of the clauses referred to in order to make a valid prohibition against alienation. The second defendant denied the plaintiff's title to three-fourths, and asserted that he is entitled to one-half and the three plaintiffs to the other half ; that question is the subject of another appeal.

The fourth plaintiff was added when the issues were settled; he is the administrator of the Mudaliyar's estate, and has taken no active part in this action.

Independent translations of clauses (2) and (3) of the will have been made by the interpreters of this Court. They do not differ materially from the translation given above.

I think that the two clauses are quite reconcilable. The survivor of the testators has the right to possess all the joint property and deal with it as he or she pleases during his or her life, and after the death of both of them the whole of the joint property is to go absolutely to their children and descendants.

The issue settled, so far as the contest on the present appeal is concerned, was : " Does the will make a valid *fidei commissum* in favour of the plaintiffs, or did the survivor have a mere usufruct ? " The Commissioner held that the will created a *fidei commissum*, and that the plaintiffs and the second defendant were entitled to the land. I should construe the will as giving the survivor a usufruct, in the same way as the will which had to be construed in *Mendis v. Fernando*,[1] but the result is the same so far as the appellant, the first defendant is concerned.

The appellants' counsel contended that, if there was a direct gift to the children on the death of both the testators, the gift to them failed on their death in their father's lifetime, and that the words " grandchildren and other such heirs descending from us " should be construed as words of " limitation," like the words " heirs of the body " in an English grant to a man and the heirs of his body. But that construction is, I think, not possible. I cannot believe that Sinhalese testators using those words meant them to be construed as creating an estate tail according to the artificial rules of English conveyancing.

He also contended that, if there was a *fidei commissum* in favour of the children and descendants, the surviving testator, the *fidei commissarius*, who has adiated the inheritance, can make a good title to his one-half of the estate to a *bona fide* purchaser who does not know of the *fidei commissum*. Assuming that to be good Roman-Dutch Law, and that there was here a *fidei commissum* there is nothing to show that the first defendant was such a purchaser, and in the absence of such evidence this contention cannot be supported.

The appeal should therefore be dismissed with costs.

GRENIER J.—

The land in question in this case was admittedly the property of David Ekanayaka and his wife Felicia Dissanayaka Wijesinghe. They were married in community of property, and on July 2, 1883 they executed a joint will which was duly proved in D. C. Matara, No. 1,601. The testatrix died on August 10, 1883, and the testator on May 2, 1907. They had two children ; Anne Charlotte, the

[1] *(1906) 9 N. L. R. 77.*

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mother of the plaintiffs, who died on September 8, 1891, and Alice Mary, the mother of second defendant, who died on February 21, 1892. At the time of the execution of the will both Anne Charlotte and Alice Mary were alive.

The case for the plaintiffs, is that as there was a *fidei commissum* imposed by the joint will the survivor, David Ekanayaka, had only a right to possess the common property during his lifetime, and that he had no right to alienate the same; and, further, that the survivor adiated the will, and during his lifetime possessed the entirety of the common estate in terms thereof. The plaintiffs accordingly claim to be entitled to possess three-fourths of the land, conceding to the second defendant the remaining one-fourth.

The case for the first defendant was that no *fidei commissum* was created by the will, and that by right of purchase from David Ekanayaka on deed No. 29,926 dated June 18, 1894, which was called for by me after the first argument, the first defendant is the absolute owner of one-half of the land in question, the other half being in possession of the heirs of the testator and testatrix. The first defendant specifically denied that any *fidei commissum* existed with reference to this land. At the argument before me, sitting singly, the contest was practically narrowed down to the determination of the question whether or not the will created a valid *fidei commissum*. The learned Commissioner was of opinion that there was a valid *fidei commissum*. As I had much doubt in regard to the correctness of the translation upon which the Commissioner based his opinion, the Chief Sinhalese Interpreter of this Court, at my request, made a translation of the material parts of this will, but as counsel for the respondent was not disposed to accept it as correct, another translation was made by C. W. d'Alwis, Interpreter Mudaliyar of this Court, who seems to have taken the same view that his brother interpreter had taken as to the absolute character of the disposition in the will.

At the second argument before His Lordship the Chief Justice and myself all the three translations were referred to, and the strong inclination of my opinion is that the words employed in the will are not sufficiently clear and distinct to support the contention for the plaintiffs that there was a *fidei commissum* imposed by the will. There are no words in it showing an intention on the part of the testator and testatrix to create a trust in favour of their children and grandchildren and their descendants; and as I understand the will in its entirety, the survivor was simply entitled to the usufruct, and not to the right of dominion in the immovable property dealt with by the will. The word "possess" is very loosely used in wills in this country, but it is generally associated, not so much with the right of absolute ownership, as with the right of personal exclusive enjoyment during the lifetime of the person to whom the property is gifted or devised. I must confess that I have no

knowledge of the technical and grammatical meaning of certain words used in the will, which is in Sinhalese, but putting a reasonable construction upon the two principal clauses in the will, namely, the 2nd and the 3rd, the intention was, I think, that the survivor was to " possess " or enjoy the property during his or her lifetime, without the right to alienate it, and that after his or her death it should descend to the children, or, if there were no children living, to the grandchildren. The 3rd clause is worded as follows : " It is directed that after the death of both of us all the movable and immovable property belonging to us should devolve on our children, grandchildren, and such other heirs descending from us." Admittedly the children of the testator and testatrix died before the testator but after the death of the testatrix, and looking to the wording of clause (3), and the intention to be gathered from it, it is impossible to suppose that the survivor was given the right of dominium and not merely usufruct. Respondents' counsel very properly conceded that it was not necessary for his case to contend that there was a *fidei commissum*, and that it was sufficient for his purpose to show that all that the survivor was to get under the joint will was the usufruct. Although the issue as originally framed in the Court below was whether a valid *fidei commissum* was created in favour of plaintiffs, it was subsequently amended by the addition of the words " or did the survivor have a mere usufruct," so that it is open to us on this appeal to find that, although there was no *fidei commissum* created by the will, the survivor was only entitled to the usufruct, and that on his death the property passed to the grandchildren of the testator and testatrix, the children being dead.

The District Judge was right in so finding. I would dismss the appeal.

Appeal dismissed.