*Present:* Lascelles C.J. and Wood Renton J.

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RABÔT *et al. v.* NEINA MARIKAR *et al.*

*332—D. C. Colombo, 33,129.*

*Joint will*—Fidei commissum—*Power to survivor to sell property in the event of its becoming dilapidated—Sale in breach of trust by surviving testator—Rights of* bona fide *purchaser—Death of* fidei commissarius *before* fiduciarius.

A surviving spouse has no right to revoke a mutual will (*a*) if the mutual will disposed of the joint property on the death of the survivor, that is to say, where the property is consolidated into one mass for the purpose of a joint disposition of it; and (*b*) if the survivor has accepted some benefit under the will.

Even where a mutual will has massed the joint estate and the survivor has adiated and accepted benefits under the will, and he transfers or mortgages the joint estate to a *bona fide* purchaser or mortgagee, the transfer or mortgage as to half the estate, namely, the survivor's half, is valid and cannot be set aside by the legatees, who in such a case have a personal claim against the survivor for damages.

A joint will provided that the property was not to be mortgaged by the surviving testator, and that after the death of both the testators the property was to devolve on their daughter A, and after her death on her children and grandchildren. The joint will, however, permitted the surviving testator to sell the property only in the event of its becoming dilapidated; in that case he was obliged to invest the proceeds of the sale in accordance with the *fidei commissum*. The surviving testator sold the property in breach of the trust to one S, from whom the defendants derived title.

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*Held*, that if the defendants were *bona fide* purchasers for valuable consideration (and without notice of the breach of trust), they were entitled to a half share of the property.

*Held*, further, that the *fidei commissum* did not fail on A dying before the surviving testator, as A died leaving children.

THE facts are set out in the judgment of Wood Renton J.

*Bawa, K.C.* (with him *Allan Drieberg* and *Bartholomeusz*), for the appellants.—(1) Christina had an absolute power to sell the property under the joint will; the will only took away the right to mortgage; a prohibition against alienation should not be imported into the will; the presumption is always a prohibition against alienation.

(2) The Court was wrong in holding that Christina had sold the properties in breach of the trust created by the joint will; the onus was on the plaintiffs to have proved affirmatively that the sale was effected in fraud of the legatees. The District Judge cannot question the sale by Christina; she was the sole judge as to whether the house was dilapidated or not. The evidence shows that the house is an old house. It is not open to the District Judge to go behind the decision of Christina.

(3) Christina had a right to sell at least a half share of the joint estate to a *bona fide* purchaser; the District Judge has not found that the appellants were not *bona fide* purchasers, and it is not averred that the appellants were not acting *bona fide* in purchasing the properties. The surviving testator in the case of a joint will is not in the position of a *fiduciarius*. He has full *dominium* as to a half share of the estate. The legatees have only a personal action against the surviving testator or the estate of the surviving testator; they have no real right to vindicate the lands from purchasers. *Juta on Wills, 119-121, 112; Mendis v. Mohideen;*[1] *Lewin on Trusts, 11th ed., pp. 527, 514.*

(4) The *fidei commissum* failed on the death of Antoinette before Christina; Christina had therefore full right to sell a half share of the properties. *Galliers v. Kycroft;*[2] *Mohommad Bhai v. Silva.*[3]

(5) The joint will has not been proved on the death of Christina; there is no proof to that effect; the will was only proved on the death of her husband.

*F. de Zoysa*, for the respondents.—(1) It is clear from the evidence that Christina sold the property with the object of getting rid of the *fidei commissum*, and not as the house was dilapidated. If Christina had honestly thought that the house was in a dilapidated condition,

[1] *(1902) 5 N. L. R. 317.*

[2] *(1898) 3 Bal. 74.*

[3] *(1911) 14 N. L. R. 193.*

the Judge cannot question that opinion. But the District Judge has found that she acted *mala fide*.

(2) All the authorities cited by counsel for the appellants refer to a purchase by a *bona fide* purchaser. The purchaser from Christina was not a *bona fide* purchaser. The defendants cannot be in a better position than the person from whom they claim title. The sale by Christina being invalid, the subsequent sales are also invalid. The deed of sale by Christina expressly refers to the will. Anyone reading the will and the recitals in the deed must say that the sale was not for the purposes indicated by the deed.

(3) The question whether Christina had a right to sell a half share was not raised in the lower Court; none of the issues framed covers the point. The point cannot be raised here for the first time.

(4) The *fidei commissum* is not affected by the death of Antoinette, as she left children behind. This will was considered in *Gould v. Souza*.[1] At page 381 Moncrieff J. said that if the *fidei commissarius* predeceased the *fiduciarius* leaving issue, the *fidei commissum* would not fail. Counsel also cited *Samaradiwakara v. Saram*,[2] *Samaradiwakara v. Saram*.[3]

*Bawa, K.C.*, in reply, *cited 2 Burge (1st ed.), pp. 129, 133.*

*Cur. adv. vult.*

February 26, 1913. LASCELLES C.J.—

It is unnecessary to recapitulate the facts of this case, which are fully set out in the judgment of my brother Wood Renton, which I have had the advantage of seeing.

The first issue is whether Christina Baldersing transferred the property in dispute to Edward Reginald Spalding for the purpose of and in accordance with the terms of the will. The joint will, in the clause constituting the *fidei commissum*, declared that the immovable property should not " be liable to be mortgaged after the death of either of us," but that it should be possessed by the survivor during his or her natural life, and that after their respective deaths the houses Nos. 3 and 4, Maradana, were given and bequeathed to the joint testators' daughter Antoinette, to be possessed by her during her natural life; after her death it was to devolve and revert to her children and grandchildren " in the manner that the said houses Nos. 3 and 4 shall not be in any way liable to be seized or sold for any debts which may be contracted by our daughter or her husband, but the same is hereby entailed and prohibited from being mortgaged or sold or in any way encumbered."

[1] *(1902) 2 Br. 378.*

[2] *(1910) 2 Cur. L. R. 97.*

[3] *(1911) 14 N. L. R. 321.*

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The fourth clause in the joint will contains the following provision:—

> "And although we have prohibited from mortgaging our landed property, still in case the landed property and its buildings be old and decayed, then our executor or the survivor of us may sell the same without any order of Court, and with the proceeds of such sale purchase other landed property, which is to remain as entailed, or that the proceeds be deposited in the Loan Board or otherwise invested, for the benefit of the children, to whom such property is hereby bequeathed."

Reading these clauses together, the intention of the joint testators as to the powers of alienation to be exercised by the fiduciary legatees appears to be clear. The property was not to be mortgaged at all, neither was there any general power of sale, but the surviving spouse or the executor was given a restricted power of sale. He or she was permitted to sell the house property only in the event of its becoming dilapidated, and in that case he or she was obliged to invest the proceeds of the sale in accordance with the *fidei commissum*. Then arises the question of fact whether the sale by Christina to Edward Spalding was a proper exercise of the restricted power of sale given to her by the will.

The question whether a building is so dilapidated that it is in the interest of the beneficiaries that it should be sold is to some extent a question of opinion, and if the evidence showed that Christina Baldersing sold the property in the honest belief that the condition of the property was such that it could be sold under the power in the will, it would be difficult to impeach the sale on the ground that Christina Baldersing had formed an erroneous opinion as to the condition of the property.

But the evidence leaves no doubt as to the breach of trust which was committed. Christina, at the time of the sale, was living with her son-in-law Francis Perera, who was the father-in-law of Edward Spalding. Francis Perera and Edward Spalding between them acquired the entirety of the property left by Jacobus Baldersing, and there is nothing to show that the proceeds of the sale were applied in accordance with the will. The purchase by Spalding of the property in question was, as the District Judge puts it, not made because the premises were decayed, but was a step in the operation of Francis Perera and himself to obtain for themselves the property owned by Christina Baldersing. That the property was sold in breach of the terms of the *fidei commissum* is, I think, clear on the evidence. There can be no doubt but that, if the defendants had knowledge or notice of the terms of the will, the legatees would be entitled to set aside the transfer in their favour; but what is their position, assuming that they had not such knowledge of notice?

The Roman-Dutch law on this point is summarized in the notes to *Juta's Leading Cases* with reference to the decision of the Privy Council in *S. A. Association v. Mostert* [1] and the Cape Colony case of *Haupt v. Van der Heever's Executor* [2] in the following terms:—

> " Even where a mutual will has massed the joint estate and the survivor has adiated and accepted benefits under the will, and he transfers or mortgages the joint estate to a *bona fide* purchaser or mortgagee, the transfer or mortgage as to half the estate, namely, the survivor's half, is valid, and cannot be set aside by the legatees, who in such case have a personal claim against the survivor for damages."

The principle being that the acceptance of benefits under the mutual will by the survivor gave the legatees not a real right to the property bequeathed, but a personal right against the survivor. The *dominium*, it was considered, was not in the legatees, and the survivor, as the owner, could sell or mortgage his half; but if the purchaser or mortgagee had knowledge or notice that the alienation was contrary to the terms of the will, then the Court would allow the legatees to set aside the sale or mortgage on the ground that the transaction was fraudulent.

The rights of the defendants, in my opinion, are determinable on this principle, and I agree to the order proposed by my brother Wood Renton. I also agree that we ought not at this stage to take notice of the objection, raised now for the first time, that the record does not disclose proof that the joint will, regarded as the will of the wife, had been admitted to probate. The objection, if relied on, should have been taken at an earlier stage.

The appellants have also attacked the plaintiffs' title by contending that the *fidei commissum* failed by reason of the death of Antoinette in the lifetime of the *fiduciaria* Christina. In support of this contention we were referred to the decision of the Privy Council in *Galliers v. Kycroft* [3] and to other local cases.

But these authorities are not in point. There is no question in this case whether the condition *si sine liberis decesserit* should be read into the will. It is there already. The intention of the joint testators that the gift to Antoinette should not go over in the event of her dying leaving children is clearly indicated by the words " and in case our said daughter Antoinette Baldersing, being married, dies without issue, then the said houses Nos. 3 and 4 are to revert to us and to our heirs, so that her husband may not have any right or title to the said property."

[1] (1872) *Juta L. C., Part. II., p. 107.* [2] (1888) *Juta L. C., Part. II., p. 113.*
[3] (1898) *3 Bal. 75.*

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It was only in the event of Antoinette dying without children that the substitution in favour of the joint testators was to take effect. In the face of the language of the will I do not think that it can be contended that the *fidei commissum* lapsed on Antoinette's death.

For the above reasons I agree with the order proposed by my brother.

WOOD RENTON J.—

This case arises under the joint will dated December 6, 1855, of Jacobus Baldersing and his wife Christina, who were married in community of property. Each of the spouses bequeathed to the survivor all the property to which he or she was respectively entitled, subject to the following condition:—

> "That all the houses and lands and all immovable property shall not be liable to be mortgaged after the death of either of us, but the same shall be possessed by the survivor during his or her natural life, and that after their death respectively the landed property of our estate is to be disposed of in manner following, that is to say, the houses Nos. 3 and 4, situate in Maradana, we give and bequeath to our daughter Antoinette Baldersing, to be possessed by her during her natural life, and after her death the same is to devolve and revert to her children and grandchildren."

The terms of the general clause just quoted were qualified by the following provision:—

> "And although we have been prohibited from mortgaging our landed property, still in case the landed property and its buildings be old and decayed, then our executor or the survivor of us may sell the same without any order of Court, and with the proceeds of such sale purchase other landed property, which is to remain as entailed, or that the proceeds be deposited in the Loan Board or otherwise invested, for the benefit of the children, to whom such property is hereby bequeathed."

The premises in dispute in the present action form part of houses Nos. 3 and 4, Maradana, mentioned above. Jacobus Baldersing died in 1856. Christina died on May 14, 1910. Their daughter Antoinette died in 1861, leaving one child, the first plaintiff-respondent, who claims title under the joint will. The second plaintiff-respondent is the husband of the first. The defendants-appellants derive title from Christina in the following way. By deed No. 4,488 of December 10, 1889, purporting to act under the power of sale created by the will, she sold the premises to Edward Spalding. By deed No. 1,509 of August 26, 1905, Spalding sold the portion

here in dispute to Jane A. Perera, who by deed No. 1,510 of even date transferred it to George Horatio Don. By deed No. 1,511, also dated August 26, 1905, Don in turn transferred the portion to Podi Nona Rupesinghe, who by deed No. 1,756 of May 2, 1909, transferred it to Sieneris Ranesinghe. By deed No. 1,101 of February 15, 1909, Sieneris Ranesinghe sold the portion in question to the defendants-appellants, who by deed No. 1,699 dated February 27, 1911, transferred it to themselves and to two other persons, whose names are immaterial, as trustees for them. The respondents allege that since May 14, 1910, the appellants have been in wrongful possession of the property in suit, and claim a declaration of title, ejectment, and damages.

The case went to trial on three issues:—

(1) Did Christina Baldersing transfer the portion in dispute to Edward Reginald Spalding for the purposes and in accordance with the terms of the will?

(2) Is such sale valid without the leave of Court?

(3) Was the purchaser bound to see that the proceeds were applied in manner provided by the will to render the transfer valid?

The learned District Judge held that the burden of proving the first issue was on the appellants, and the burden of proving the second and third on the respondents. The only witnesses examined were Mr. Spalding on behalf of the appellants, and the second respondent on the other side. In the results the learned District Judge answered the first issue in the negative and the third in the affirmative. The second issue was apparently abandoned at the trial. On these findings he gave judgment in favour of the respondents.

It was argued in support of the appeal that, while the joint will had been proved in so far as it was the will of Jacobus Baldersing, there was no affirmative evidence of probate of the will regarded as that of Christina. That point was not taken in the District Court, and I do not think that we ought to allow it to be raised for the first time in appeal. The next point on which the appellants' counsel relied was that, as Antoinette had died during the lifetime of Christina, there was in any case a lapse of the *fidei commissum* in so far as Christina's share in the property was concerned, and further that, as the effect of the will was to vest the property in Christina on the death of Jacobus Baldersing, and it did not provide for a *fidei commissary* substitution of the children of Antoinette in the event of the death of their mother, the *fidei commissum* failed as a whole when Antoinette died, survived by the *fiduciaria* Christina. In my opinion this argument fails in view of the language of the will itself, which does in terms substitute the children and grandchildren of Antoinette for their mother, and

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shows clearly that the property was to revert to the spouses and their heirs only in the event of her having died without issue. Moreover, the will massed the property of the two spouses for the purpose of the *fidei commissum* in favour of Antoinette and her children and grandchildren.

The judgment under consideration was, however, attached more strongly in regard to the findings of the District Judge on the first and third issues. It was contended that the will conferred on Christina a power of sale unfettered by the control of the Court under the circumstances which it contemplated; that that power must be presumed, in the absence of evidence to the contrary, to have been honestly exercised; that if it was so exercised, the Court had no right to review Christina's discretion; that the title which the appellants derived through her was unimpeachable, and that neither Mr. Spalding nor any of the subsequent purchasers through whom the appellants claim was bound to see that the proceeds of the sale by Christina had been applied in conformity with the provisions of the joint will. As I interpret it, the joint will by necessary implication prohibited Christina from selling any portion of the property, save for the purpose of replacing dilapidated houses by new ones, and expressly required her either to invest the proceeds of the sale of old houses in the immediate purchase of new ones, or to deposit them in the Loan Board or otherwise invest them for the benefit of the *fidei commissarii*. It is quite true that the clause in the will by which the *fidei commissum* is constituted prohibits in terms "mortgaging" alone, but the subsequent provision that the property is to be possessed by the survivor and then by Antoinette, is to devolve thereafter on Antoinette's children and grandchildren, and is to revert to the spouses and the other heirs only in the event of Antoinette dying without issue, is wholly inconsistent with the theory that Christina possessed any general power of sale under the will. The case is, therefore, one of a *fiduciaria*, who has power to sell only under an exception from a general, although implied, prohibition of any sale of the property in question. Interpreting the will in that sense, I think that it would have been incumbent on Christina herself, if she had come forward to support any exercise by her of the power of sale conferred upon her by the will, to show both that she had exercised it duly, and that she had applied the proceeds in the manner prescribed by the will. There can be no doubt, both on the documentary and on the *vivâ voce* evidence, but that the power in question was not duly exercised. Christina's transfer in favour of Spalding itself recites that the sale was being effected partly at least for the purpose of repairing other houses. The District Judge came to the conclusion from a personal inspection by him, for the purposes of the trial, of the old walls and timber of the house, that the sale in 1899 on the alleged ground that it was in a decayed condition could not

have been necessary, and the evidence uncontradicted, and indeed unchallenged, in cross-examination of the second respondent that Christina had bought no property for his wife subsequent to the sale is sufficient to show that the proceeds were not dealt with by Christina in accordance with the provisions of the will. I quite agree with the appellants' counsel, and Mr. de Zoysa, counsel for the respondents, who argued their case very well indeed, admitted, that if Christina exercised the power of sale given to her by the will in good faith, it might not be possible to challenge the exercise of her discretion. But I think that the burden would have been upon her of showing that she had exercised a *bona fide* discretion in the matter, and for that purpose of proving that she had fulfilled the conditions prescribed by the will. If the respondents had only had Christina herself and the immediate purchaser from her to contend with in this action, their right to the judgment which they have obtained would be clear. It was held by the Privy Council in *S. A. Association v. Mostert* [1] that a surviving spouse has no right to revoke a mutual will (*a*) if the mutual will disposed of the joint property on the death of the survivor, that is to say, where the property is consolidated into one mass for the purpose of a joint disposition of it; and (*b*) if the survivor has accepted some benefit under the will. Both conditions exist in the present case. There was a clear massing of the property, and the evidence shows that Christina adiated the inheritance. It seems, however, that the rule above stated does not in such cases extend beyond the revocation of the mutual will, and that even where a mutual will is massed in the joint estate, and the survivor has adiated and accepted benefits under it, the survivor can alienate a half of the joint estate to a *bona fide* purchaser (*Haupt v. Van der Heever's Executor* [2]). Here, again, the onus of proving *bona fides* would, in my opinion, rest on the purchaser, and a *bona fide* purchaser would be one who had no knowledge or notice of the terms of the actual will. Mr. Edward Spalding was clearly not in that position. He was married to a granddaughter of Christina Baldersing, and lived in Christina's house, and knew all about her affairs. Moreover, the deed of transfer by Christina in his favour expressly referred him to the will, and disclosed on the face of it that the sale was not being effected in compliance with its provisions. Do the subsequent purchasers stand in a better position? An examination of the original deed of transfer would have given each of them notice of the fact that he derived his title from the survivor of two spouses who had executed a joint will, and also that the transfer itself was not justified by the terms of that will. Jane Anna Perera could have been under no misapprehension on the subject. She was Christina's daughter, and her husband Francis Perera had lived in Christina's house and had taken an even more active part than

[1] (1872) *Juta L. C., Part II., p. 107.* [2] (1888) *Juta L. C., Part II., p. 119.*

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Mr. Spalding himself in her affairs. The view of the District Judge is that Francis Perera and Spalding had set themselves to acquire all Christina's property. There is, however, nothing in the evidence to indicate that the later purchasers—George Horatio Don, Podi Nona Rupesinghe, and Sieneris Ranasinghe—and still less that the defendants-appellants, who are Moormen, had any actual notice of the limitations of Christina Baldersing's power of sale. It might, of course, be argued that they ought to be held to have been affected with constructive notice. But the evidence as to the circumstances under which they successively purchased the property and as to the manner in which it has been possessed is so scanty that I do not think it would be right that the appellants should be deprived of the entire benefit of their purchase on the material before us. The appellants ought, in my opinion, to have raised at the trial the contention that they, in any event, were purchasers *bona fide* for valuable consideration and without any notice of the infirmity of their title. No attention, however, would appear to have been paid by either side at the trial to this aspect of the case.

I would set aside the decree of the District Court, declare that the appellants, if they establish to the satisfaction of the District Judge that they were *bona fide* purchasers for valuable consideration and without actual or constructive notice of Christina Baldersing's breach of trust, are entitled to one-half share of the property conveyed by their deed of transfer No. 1,101 of February 15, 1909, and to nothing more, and send the case back for further inquiry and adjudication on the basis of that declaration. It will be open to either side to recall for further examination or cross-examination, as the case may be, any witness who has already been examined, and to adduce such further evidence as may be thought desirable. The inquiry must be limited, however, to the issue stated above, namely, whether the appellants are *bona fide* purchasers for value without notice. But evidence as to the manner in which the property has been possessed would be relevent to that issue. I would leave all costs, including the costs of the present appeal, in the discretion of the learned District Judge.

*Sent back.*