[In Review.] *July 18, 1910*

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

SAMARADIWAKARA *et al.* *v.* DE SARAM *et al.*

D. C., Colombo, 26,602.

Joint will—Fidei commissum—*Usufruct*—*Widow*—" *Lawful heir.*"

The joint will of James Alwis and his wife Florence, who were married in community of property, provided that, in the event of the testatrix surviving the testator, certain properties should vest in the testatrix, subject to the conditions, *inter alia*, that the testatrix should not have the power to sell or otherwise alienate the same, but should have a life interest therein. Upon the death of the survivor the property was to vest in Edwin Robert. Edwin Robert survived the testator, but predeceased the testatrix.

Held, that under the last will the *dominium* vested in the testatrix, subject to a *fidei commissum* in favour of Edwin Robert; and that as Edwin Robert predeceased the testatrix, the title vested absolutely in her.

The joint will further provided that with respect to certain specified properties that they should not be sold, or in anywise alienated or encumbered, but that they should devolve respectively on the " lawful heirs " of the devisees.

Held, that the widow of a devisee was a lawful heir by virtue of section 26 of Ordinance No. 15 of 1876.

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

Bawa (with him *Samarawickrame*), for appellants.

Van Langenberg, Acting S.-G. (with him *F. M. de Saram* and *A. St. V. Jayewardene*), for respondents.

Cur. adv. vult.

July 18, 1910. Hutchinson C.J.—

I have already in my judgment[1] given on March 16 last sufficiently stated my reasons for adopting the construction which I placed on this will, and I have heard no new arguments which have shaken me in my opinion. I think, therefore, that it is enough for me to say that in my opinion both these appeals should be dismissed with costs.

[1] *See 2 Cur. L. R. 104.*

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I do not propose to add anything further to what I have written already in these two cases. It is sufficient for me to say that I have not been convinced by the later arguments in review that I ought to change my opinion in either case. I think that both appeals in review should be dismissed with costs.

WOOD RENTON J.—

In my opinion the judgment of the Supreme Court in each of the appeals in this case should be affirmed with costs.

The litigation between the parties has arisen out of a joint will made by the late Mr. James Alwis, Advocate, and his wife, Florence Alwis, on April 27, 1878. Mr. Alwis died in July, 1878, survived by (1) his widow and joint testatrix, Florence Alwis; (2) one son, James Henry, by a first marriage; (3) another son, Edwin Robert, and three daughters, the first, third, and fifth defendants-respondents, by his second marriage. The second, fourth, and sixth defendants-respondents are respectively the husbands of the first, third, and fifth. Florence Alwis adiated her share under the joint will. On January 26, 1901, she made another will by herself, in which she confirms the joint will, and says that "it is in respect of the rest of my movable and immovable property not included" in the joint will; and the will of January 26, 1901, contains in fact no reference to the properties dealt with in that will and in claim in the present case. Both wills have been proved. The seventh defendant-respondent is the administrator, with the will annexed, of the joint estate of the deceased spouses. Edwin Robert died on June 16 leaving a widow, the first plaintiff-appellant, who is the wife of the second. In this action the appellants claim a declaration that the first plaintiff-appellant is entitled to an undivided one-half share of two properties at Kollupitiya known as the "Synagogue" and "Barandeniya Cottage." These properties belonged to the estate of the late James Alwis, and were disposed of by the joint will. The District Judge dismissed the appellants' action. The Supreme Court affirmed the judgment as regards "Barandeniya Cottage," but set it aside as regards the "Synagogue." Each side challenges the finding, adverse to itself, in review preparatory to an appeal to the Privy Council. The questions involved in the cross appeals depend on the construction of the joint will, which was made in English.

The material provisions in the joint will are these:—

"III.—In the event of the testator dying first, we give, devise, and bequeath to James Thomas Alwis the sum of Rs. 2,500, to be invested by our executors in the purchase of landed property, and by them conveyed to him and his heirs at the expense of our

estate, under the condition that he shall not mortgage or alienate the same in any manner whatsoever, but shall only have a life interest therein."

VI.—This clause is headed "*Ad interim* provision for children." After reciting the names of his children, and his desire to provide for them without any invidious distinction, but taking due account of the fact that he had received a large amount of property from his first wife, the mother of James Henry Alwis, the testator proceeds to make specific bequests of property, upon the attainment of twenty-five years of age or marriage, to (*a*) James Henry, (*b*) the first defendant-respondent, (*c*) Edwin Robert, (*d*) the third defendant-respondent, and (*e*) the fifth defendant-respondent.

Then comes clause VII. It is entitled "Provision for the testatrix if she survive the testator," and commences as follows:—

"It is our will and desire that all the movable property as above settled, and all the immovable property, until they shall be transferred as above directed, and the other following lands and houses, shall be vested in me, the testatrix, subject to the under-mentioned conditions."

A list of forty properties is given; No. 3 is the "-Synagogue," No. 4 is "Barandeniya Cottage." The clause then proceeds—

"We desire that our executors shall sell, as they may deem necessary, or as fit opportunities present themselves, but not otherwise, the above lands and premises from No. 17 . . . . to No. 40 . . . . . both inclusive, and that until such sale or sales the revenues, income, and profits of the said several premises shall be collected and paid to me, the testatrix, and, when any sale or sales shall be made, the moneys realized shall be funded, together with other incomings, until all the legacies hereby bequeathed could be paid. Our executors shall not sell the first sixteen lands and premises hereinbefore mentioned, nor shall I, the testatrix, have the power to sell or otherwise alienate the same or any of them, but I shall have a life interest therein." Out of any moneys raised by sales under the foregoing provisions, each of the testator's three daughters, the first, third and fifth defendants-respondents, is to receive "as soon as the said moneys are realized, or sooner if practicable," a sum of Rs. 10,000 for the purchase of a house, the right to which shall be "vested" in each of them. This clause has been construed by the Supreme Court in S. C. No. 402, D. C. F., Colombo, 26,601, as constituting not a trust, but only a power, for sale, and as vesting the properties (Nos. 17-40) in the testatrix subject to that power. No appeal has been taken from that decision.

Clause VIII. is entitled "Inheritance upon the death of both of us." It provides that, "upon the death of the survivor of us," certain specified properties shall "vest" in the testator's children

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respectively. In particular the " Synagogue " and " Barandeniya Cottage " are to " vest " in Edwin Robert.

Clause IX. is headed " Restrictions on the above inheritance." It directs that the " Synagogue " shall not be sold, or in anywise alienated or encumbered, but shall devolve on the " lawful heirs " of Edwin Robert; and " in the absence of any such lawful heirs, on the persons whom we institute heirs or his or her lawful heirs."

Clause X. institutes as heirs James Henry, Edwin Robert, the first defendant-respondent, the third, and the fifth.

Clause XI. appoints executors. Edwin Robert was one of them.

I may dispose at once the question raised by the cross appeal as to whether, assuming that there was a valid fidei commissary substitution created by clause IX. in favour of the " lawful heirs " of Edwin Robert, the first plaintiff-appellant, his widow, by virtue of section 26 of Ordinance No. 15 of 1876, came under that category. I think that she did, for the reasons which I have given in my judgment on the appeal (*Samaradiwakara v. De Saram* [1]). As the same Judges heard the appeal on that point as those before whom the case has come in review, Mr. van Langenberg, while reserving, of course, all his rights to press the appeal in the Privy Council, did not re-argue it fully before us. He urged, however, again that clause X. of the will itself showed that " lawful heirs " in clause IX. meant blood relations, and that any other interpretation of clause IX. would involve the conclusion that clause X. was redundant. The widow is, however, an " heir " of her husband under the statute " law " of the Colony. She may, therefore, properly be described as one of his " lawful heirs. " I do not think that the mere fact that the adoption of this construction of clause IX. obliged us, if it did oblige us, to hold that there was some redundancy in clause X. of this involved will would be sufficient to justify us in withholding from the widow the position conferred on her by the former clause. When the testator used the words " lawful heirs, " he must be taken, I think, to have meant heirs according to the law of intestate succession.

I proceed to deal with the other points involved in the case. The main question is whether, under the will, the " Synagogue " and " Barandeniya Cottage " became vested in Edwin Robert, subject to his mother's life interest, or whether, by reason of his death in her lifetime, the gift to him lapsed in his mother's favour.

It appears, on the face of the will itself, that the testator was an advocate of the Ceylon Bar. He " strongly recommends " to the eldest son (clause IV.) the study of the law " as the best means by which he can learn to be just to himself and others, and be informed of his rights and duties to others. " He speaks of his law library, and makes provision for its being sold, in the event of

[1] (*1910*) *2 Cur. L. R. 99.*

his eldest son not desiring to study the law. These are intrinsic circumstances. These are disclosed to us by the will itself, and, in spite of the argument to the contrary by Mr. Bawa, the appellants' counsel, I think that they entitle and require us to take account of the fact that it is the will of a Ceylon lawyer that we are dealing with. I do not agree with Mr. Bawa that our right and duty to do so are affected by the fact that the will is a joint one, and speaks with the voice of Florence Alwis as well as with that of her husband. In the case of a joint will by a lawyer and his wife, there can be little practical doubt as to which of them supplied, or regulated, the legal framework for the mutual dispositions. Moreover, here Mr. Alwis is dealing, in the main, with his own property, and speaks throughout the will as the predominant and controlling party. Putting ourselves, therefore, in the position of the testator, in the sense that I have just indicated, we have to consider the meaning and effect of the provisions summarized above. Mr. Bawa argued (1) that clause VI. in any event conferred immediate gifts on the devisees; (2) that the word "vest" in clause VII. did not necessarily import a gift of the *dominium;* (3) that the fact that clause VII. dealt with the specific devises created by clause VI. and also with properties Nos. 17–40, in which the testatrix clearly took only a temporary interest, and, while prohibiting her from selling or otherwise alienating properties Nos. 1–16, expressly declared that she should "have a life interest therein," showed that no transfer of the *dominium* to the testatrix was intended; (4) that this view was strengthened by the fact that clause VIII. deals particularly with "inheritance," and provides for the vesting of the properties specified in it in the testator's children; (5) that the prohibition of alienation imposed upon the testatrix in clause VII. was placed equally upon the executors, who could not be said to enjoy the *dominium*, and ought to be regarded not as a direction to, but merely as an undertaking by, her—an undertaking *ex abundante cautela* in order to emphasize the purely temporary character of her interest; and (6) generally that under Roman-Dutch Law a gift such as we have to do with here ought to be construed as conferring a usufruct, and not the *dominium*.

I think that there is much *primâ facie* intrinsic force in the appellants' argument as to the construction of the will, and it is scarcely necessary to observe that it was pressed upon us by Mr. Bawa with great strenuousness and ability. His Lordship the Chief Justice said, in dealing with the matter in appeal: "Reading the whole will as it might be read by a layman, without any knowledge of the technicalities of Roman-Dutch Law, I should have said that the intention was that the surviving widow should have only a life interest in these properties." In dealing (*Samaradiwakara v. De Saram;*[1] S. C. No. 402, D. C., F., Colombo, 26,601) with

[1] *(1910) 2 Cur. L. R. 104, 107.*

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the construction of clause X. of this very with I find that I expressed myself a similar opinion. The point was not, however, argued before me in that case. Now that I have had the advantage of hearing full argument upon it, I adopt the view of His Lordship the Chief Justice and my brother Middleton in regard to it.

I do not think that clause VI. did immediately vest the gifts contained in it in the devisees. The vesting of the gifts was postponed to the attainment of twenty-five years of age by, or the marriage of the devisees. No indication is given as to what was to happen to the property in the meantime, unless it vested in the testatrix under clause VII., as that clause itself in fact provides. It is no doubt true that the word " vest " does not in itself necessarily import a transfer of the *dominium*. Mr. Bawa referred us on that point to the case of *Westminster Corporation v. Johnson*.[1] (See *Stroud's Judicial Dictionary, s. v. " vest "*; and *Encyclopædia of the Laws of England, 2nd ed., tit. " Will," glossary, s. v. " Vested."*) The term has no precise equivalent in Roman-Dutch Law. On the other hand, it is clearly used in that sense in clause VIII. in describing the gift of the " Synagogue " and " Barandeniya Cottage " to Edwin Robert. Moreover, the term " vest " does not necessarily mean a transfer of the whole *dominium* (*Coverdale v. Charlton*[2]); and, under the Roman-Dutch Law of *fidei commissa*, a gift of the *dominium* subject to restrictions is quite familiar to us. The power of sale conferred on the executors by the latter part of clause VII. did not prevent the testatrix from acquiring, under the earlier part of the same clause, the " *dominium* " in these properties within the meaning of Roman-Dutch Law, until such time as that power should be exercised. Although clause VII. imposes a prohibition of alienation on the executors as well as on the testatrix, the fact that it is so imposed upon the testatrix is a circumstance to be considered in the construction of the will. In this Colony the words " life interest " are frequently used as including the *dominium*. I may refer, as an illustration of this fact, to the judgment of Clarence J. in *Joachinoe v. Robertu*.[3]

I have already dealt incidentally with some of the authorities cited in support of the appellants' case. A few others, however, remain to be touched upon.

Voet, in treating of usufruct, expresses himself as follows in regard to the effect that ought to be assigned to a prohibition of alienation:—

" *Adhæc si uxori vel alteri cuicunque datus sit usufructus rei, addita alienationis prohibitione, vel ædium usufructus sit legatus, addita clausula, si legatarius heredi promittat, se altius eas ædes non elaturum,*

[1] *(1904) 1 K. B. 26*
[2] *(1878) 48 L. J. Q. B. 128*
[3] *(1890) 9 S. C. C. 101.*

vel aliud quid, quod fervitutem continet, passurum, non alia, quam proprietatis plenæ legatæ, adeoque ususfrustus causalis dati, conjectura capi potest; cum talis adjectio alienation is prohibitæ in solum cadere possit proprietarium usufructuario satis ex jure communi alienare impedito; et servitutis impositio non per alium fieri poscit, quam per rei dominum, adeo ut ne socius quidem invito socio eandem rei possit communi imponere. Utroque certe in casu, adjectio facta continet dominici juris diminutionem; nam et alienationis prohibitio minuit liberum rei arbitrium jure communi dominis concessum, et servitutis imponendæ necessitas facit, ut minus plenum habeat dominium, qui servitutem imponit; ut accurate ratiocinatur Hugo Grotius. Privatio autem præsuppoint habitum, ut vulgo loguuntur, nec adimi potest jus dominii, vel diminui ei, qui illud non habet. Nec ludere verbis volnuisse testator præsumendus est, ser magis id dedisse quod clausula adjecta involvit ex sensu communi et juris necessitate argumento legum in præcedente quæstione allegatarum." (*Voet, 7, 1, 10.*)

I cannot agree with Mr. Bawa that the force of this passage is weakened by the language used by Voet in the latter part of the same section, in which he says in effect that such clauses are sometimes added merely through excess of caution. In the concluding paragraph of the section Voet reverts to his original position: "But these considerations," he says, "must not disturb us: since they seek for a certain principle and for a basis they found on what is still at issue: for they assume that it was the intention of the testator to leave nothing but the usufruct, from which they argue, whether forsooth he must be taken to have intended leaving anything but the usufruct. And in the same way it can easily be retorted that it would be, on the other hand, absurd that the right ownership should be denied to the legatee, contrary to the intention of the testator, which is sufficiently apparent—nay, must follow of necessity, from the provision against alienation . . . . . which only falls upon owners of property."

I do not think that in a case of this description any very great help is to be derived from judicial decisions based on the construction of wills. Mr. Bawa relied on the language used by Sir Henry de Villers in *Strydom v. Strydom's Trustees*,[1] cited in Morice's *English and Roman-Dutch Law, 2nd ed., p. 318*, and also in *Breda v. Master of Supreme Court*,[2] as authorities for the proposition that the fact that a prior interest is in the nature of *fidei commissum* is not conclusive proof that the tesator intended to postpone the vesting until the termination of such prior interest. This proposition may readily be accepted, but it is obvious from the language used by Sir Henry de Villiers that he was dealing only with the facts before him in the particular cases above referred to. The same observation applies to the other cases, both South African and local, on which

[1] *11 S. C. 425*

[2] *7 S. C. 360*

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Mr. Bawa relied. See, for example, *In re Zipp*,[1] where, by the way, the widow seems herself to have acquiessed in the view that she had only on usufruct, *Rahl v. De Jager*,[2] *Nugara v. Nugara*,[3] and *Endis v. Fernando*,[4] where it was expressly pointed out by the Supreme Court that if a bequest contains words of futurity, the question has to be considered in view of all circumstances of the case, whether they were inserted for the purpose of postponing the vesting of the legacy, or of merely deferring its fulfilment, as where the bequest to one person is made subject to a life interest in favour of another. In all these and similar cases the question arises, and has, to be answered in the light of the special circumstances, whether the person indicated is an usufructuary or a fiduciary legatee.

In the present case I think that the terms of clauses VII and VIII, of the will vested the *dominium* in the surviving widow, with a *fidei commissium* in favour of Edwin Robert; that clause IX, in the same way, created a *fidei commissum* as regards the " Synagogue " after the death of Edwin Robert, in favour of his " lawful heirs ", that on the death of Edwin Robert the " Synagogue " became subject in the hands of the textarix to a *fidei commissum* in favour of his lawful heirs; and that for the reasons already given the first plaintiff-apellant is one of those heirs.

On these grounds I would affirm the judgment of the Supreme Court in each of the appeals now before us with costs.

Affirmed.

[1] *(1878) Juta L. C. 126*
[2] *(1880) Juta L. C. 156*
[3] *(1893) 3 C. L. R. 35*
[4] *(1905) 9 N. L. R. 77*