Present: Mr. Justice Wendt and Mr. Justice Grenier.

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FONSEKA *et al. v.* BABUNONA.

D. C., Galle, 8,533.

Joint will—Usufruct—Dominium—Fidei commissum—*Rights of survivor—Power of alienation.*

A joint last will made by husband and wife contained the following clauses:—

"3.—We do hereby direct that after the death of either of us, the survivor of us may only possess the produce of our estate as such survivor may please, and we do hereby prohibit the survivor of us, after the death of either of us, from in any manner alienating according to the survivor's sole will the movable and immovable property belonging to our estate.

"4.—We do hereby direct that after the death of both of us, should there remain unspent any movable and immovable property, the same should be divided into two equal halves, one-half to go to the heirs by blood of Gampolage Adirian Fonseka, and the remaining half to the heirs by blood of Christina Andra Waas."

Held, that under the above provisions the survivor had only a usufruct in the property, and had no power to alienate any part of it.

APPEAL from a judgment of the District Judge of Galle (K. W. B. McLeod, Esq.). The judgment was as follows:—

"Adirian Fonseka and his wife Christina de Waas, married in community of property, executed their joint will on May 7, 1869, the 3rd and 4th clauses of which are as follows:—

"'3.—We do hereby direct that after the death of either of us, the survivor of us may only possess the produce of our estate as such survivor may please, and we do hereby prohibit the survivor of us, after the death of either of us, from in any manner alienating according to the survivor's sole will the movable and immovable property belonging to our estate.

"'4.—We do hereby direct that after the death of both of us, should there remain unspent any movable and immovable property, the same should be divided into two equal halves, one-half to go to the heirs by blood of Gampolage Adirian Fonseka, and the remaining half to the heirs by blood of Christina Andra Waas.'

"The will appointed as executors the survivor and Liyanage Mathes (husband of sixth plaintiff). Adirian died on May 8, 1869, and the will was duly proved and probate taken by Christina and Mathes on June 24, 1869, in D. C., Galle, Testamentary, 2,285.

"The executors and Aberan (brother of Adirian and father of first to fifth plaintiffs) sold the premises in question to Juan Appu

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and Punchi Sinno (minor children of Mathes) by deed 1,527 of November 11, 1872. The executors had applied for leave to Court in the testamentary case 2,285 for leave to sell it 'to pay off the debts appearing in the account as due to Mr. Keegel.' The order of Court was 'Allowed if there be no other heir, whether major or minor.' Thereupon Aberan signed his consent to the executors' motion as 'heir of the testator.'

"This was in October, 1872. I do not find any further order of the Court. I suppose it was taken for granted that the conditional order cited above became an absolute authority on Aberan signifying his consent, and the sale of November 11 was held by authority of the Court order.

"Punchi Sinno sold his half to Juan by deed 11,020 of September 29, 1891. Juan thus became entitled to the whole. Juan sold it to Arnolis by deed 21,873 of September 6, 1899. Arnolis died intestate, and defendant, his widow, is the administratrix of his estate (D. C., Galle, Testamentary, 3,653). She obtained the leave of Court, and the premises were sold by public auction to Juwanis Appu.

"Christina died on February 14, 1907, and plaintiffs claim half of the premises as next of kin to Adirian, contending that the clauses recited above constituted a *fidei commissum*, and therefore the deeds of transfer are all invalid as against them.

"The matter was argued at some length before me, but I think, on the translation of the will made by the Interpreter of this Court, and placed in evidence for the plaintiffs (Doc. P 1), that clearly there was no *fidei commissum* other than one of the residue remaining at the death of the survivor.

"If section 3 alone is considered, there is a clear prohibition of alienation in any way, but section 4 is equally distinct in saying the division after the death of the survivor is to be of whatever 'remains unspent,' whether movable or immovable property. It is settled law that *fidei commissa* must be strictly construed, and here there is no clear and certain expression of any intention to make more than a *fidei commissum* of the residue.

"Mr. C. E. de Vos puts in evidence (Doc. P 2) an application made by Christina in 1903, to sell certain other property belonging to the common estate. But that application was the result, of course, of the opinion of her legal adviser, that it was desirable to get formal sanction of Court, probably to avoid any possible litigation hereafter, and it cannot be allowed to affect my mind when I have to decide what in truth is the proper meaning of the will.

"As I am unable to construe sections 3 and 4 of the will as establishing beyond all doubt a *fidei commissum* of anything more than the residue, I do not go into the other points argued before me. I dismiss plaintiffs' case with costs."

The plaintiffs appealed.

Bawa, for the plaintiffs, appellants.

A. St. V. Jayewardene, for the defendant, respondent.

Cur. adv. vult.

October 23, 1908. WENDT J.—

This is an action to vindicate a half share of a boutique in the Galle bazaar, and it has been dismissed in accordance with the finding of the District Judge upon an issue of law framed at the trial in the following terms, viz.:—Did the joint will of Adirian Fonseka and Christina create a valid *fidei commissum* in favour of the plaintiffs? The learned District Judge answered this question in the negative, and thereupon considered it unnecessary to deal with any other issue. The answer to the question formulated in the issue has to be sought within the four corners of the will. That was an instrument couched in the Sinhalese language, and two different translations of the material parts of it were before the District Court. The one made by the Secretary of the Court and adopted by the District Judge renders the 3rd and 4th clauses as follows:—

"3rd.—We do hereby direct that after the death of either of us, the survivor of us may only possess the produce of our estate as such survivor may please, and we do hereby prohibit the survivor of us, after the death of either of us, from in any manner alienating according to the survivor's sole will the movable and immovable property belonging to our estate.

"4th.—We do hereby direct that after the death of both of us, should there remain unspent any movable and immovable property, the same should be divided into two equal halves, one-half to go to the heirs by blood of Gampolage Adirian Fonseka, and the remaining half to the heirs by blood of Christina Andra Waas."

With the aid of the Interpreter of our own Court we have secured a more faithful rendering, which I shall presently quote, but first I will say that clause 1 directs that the debts of the two testators should be paid out of their common estate, and clause 2 gives a legacy of £3 to a certain Buddhist temple, then come clauses 3 and 4, which our Interpreter renders as follows:—

"3.—After one of us two has died, except that the survivor may possess as he pleases the produce derived from our estate, we have prohibited the person who may survive after the death of one of us from making any disposition whatever according to his single will of the movable and immovable property belonging to our estate.

"4.—After the death of us both, if there be any movable or immovable property which has remained over after providing our

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maintenance, one just half of all that may be divided and taken by the heirs in blood of Gampolage Adirian Fonseka, and the remaining half by the heirs in blood of Christina Andra Waas."

The contention for the plaintiffs was that the surviving spouse had only a usufruct in the massed estate with no power whatever of alienation; while the defendant, who claimed under a conveyance executed by the testatrix, who had been the survivor, submitted that the combined effect of the 3rd and 4th clauses was that she was at liberty to alienate any part of the estate, and that the devise in the 4th clause was intended to operate on so much only of the common estate as was left undisposed of by the survivor of the two spouses. Having had the assistance of most able argument on both sides by counsel well acquainted with the Sinhalese language, the meaning of the will appears to me to be clear. Clause 3 is the only clause which directly gives the surviving testator any interest. It does not appoint him heir of the precedent testator, and does not devise to him the dominium of any property of the estate, but expressly limits his interest to the possession of the produce or income, and, as if further to emphasize the limitation, expressly prohibits him from alienating the movable and immovable property in any manner whatsoever. The reference to the survivor's single will does not, in my opinion, imply that, if he acted with the advice or concurrence of an executor or an heir, his alienation of the property would be valid. Clause 4 contains the ultimate devise by which the estate is to be divided in equal moities by the heirs of either testator. The words in this clause which are said to imply a power of alienation not given by clause 3 have, in my opinion, a very different effect. They serve rather to emphasize the limitation to a mere possessory interest. The words are "if there be any movable or immovable property which has remained over after providing our maintenance" (literally, after eating and drinking). If it be considered that the terms of clause 4 beyond doubt imply the power of alienation, still that implication may stand side by side with the denial of any larger right to the surviving spouse than the right to possess. For the testators may, in using the language embodied in clause 4, have remembered the injunction in clause 1 as to the payment of debts, which might involve the necessity of realizing some of the property, or they might have contemplated a prolonged joint life before the will became operative.

This question of the right of the surviving spouse to alienate was, as I understand it, the question which issue No. 1 was intended to propound, although it is framed as if there could not be an effective prohibition without a *fidei commissum*. That is a wrong view of the law. In fact, according to my reading of clause 3, the express prohibition was mere surplusage, inserted perhaps *ex abundanti cautelâ*. The fundamental distinction between *fidei commissum* and usufruct ought always to be borne in mind. In the former the

dominium and the right of possession are both given to A, subject to the condition that after the specified time (usually his lifetime) the property shall pass to B, who until A's death takes no vested interest. In the case of usufruct, the dominium is given to B at once, while the right of possession for life (usufruct) is given to A. As I read the present will, it is a case of usufruct and not *fidei commissum*.

The dismissal of the action will be set aside, and the case sent back for the determination of the other issues between the parties. The plaintiff will have the costs of appeal and of the hearing in the Court below; other costs will be costs in the cause.

I would point out to the District Judge that as the record stands it does not appear that any issues have been framed; there are only suggestions by the plaintiffs' proctor, and counter-suggestions by the defendant's proctor.

GRENIER J.—

I agree. I think it is a clear rendering of sections 3 and 4 of the will that the intention of the testator and testatrix was that the survivor was to have only a life interest in the property, and not the dominium and the power of alienation.

Appeal allowed; case remitted.