1932 *Present:* **Garvin S.P.J. and Lyall Grant J.**

SANGARAMORTHY *et al. v.* CANDAPPA *et al.*

429-433—D. C. Colombo, 20,984.

Mutual will—Spouses married in community of property—Massing of whole estate—Life interest of survivor—Gifts to children—Vesting of inheritance—Dominium in survivor—Sale of property against survivor for default in payment of rates—Interest of defaulter—Municipal Councils Ordinance, No. 17 of 1865, ss. 83 and 85.

A certificate of sale issued under section 85 of the Municipal Councils Ordinance, No. 17 of 1865, passed to the purchaser at the sale nothing more than the title of the defaulter.

What the Council is authorized to seize and sell is the property of the person who is " the proprietor " for the time being.

Where under a mutual will of spouses, married in community of property, each spouse, with the consent of the other, dealt with the common estate, subject to the life interest of the survivor, the survivor remains vested with the dominium to half the common estate, notwithstanding the fact that first dying spouse has, with his consent, executed a will by which he bequeathed the whole.

When the survivor takes some benefit in the half share of the first dying spouse, his right to revoke the will so far as it relates to his half share is at an end and he is bound to permit the will to take effect.

The legatees then become vested with the corresponding right to compel the survivor to observe the will and its terms by specific performance or other appropriate action.

But the act of the survivor in taking benefit under the will does not of itself pass the dominium in his half share to those to whom it has been bequeathed.

THIS was a partition action in which the plaintiffs asked for a declaration that they and certain of the defendants were entitled to the entirety of the corpus in specified shares, subject to a *fidei commissum* created by the joint will, dated July 31, 1860, of one Candappa and his wife, Lucia. The testator died shortly after the making of the will and probate was granted to Lucia on June 16, 1862. In 1875 these premises were seized and sold for non-payment of rates. A certificate dated March 5, 1875, in the prescribed form, under section 85 of the Municipal Councils Ordinance, No. 17 of 1865, was issued to Don Jusey, the purchaser. The added defendants intervened and claimed to be entitled in various interests in severalty which exhausted the whole corpus, alleging that their respective titles flowed from Don Jusey. The learned District Judge held that plaintiff and certain of the defendants were entitled together to half the land, and certain of the added defendants to the other half. From this judgment the added defendants entered appeals Nos. 432, 433, 430, 429, and plaintiffs appeal, No. 431. All the appeals were argued together.

Croos Da Brera, for seventh added defendant, appellant in No. 429, and for respondent in all others.—In an action in 1877 the widow Lucia sued Amaris for declaration of title. Lucia represented her husband's estate and Amaris was our predecessor. The action was dismissed and the

decree is, therefore, *res judicata*. The property was sold for non-payment of taxes by the estate. The certificate of sale therefore gave absolute title to the purchaser and the *fidei commissum* was wiped out. The rates were a charge on the property, and under the Municipal Councils Ordinance, No. 17 of 1865, what was sold was the property itself and not the interest of any particular person. The land has been dividedly possessed for over 30 years and the parties have made considerable improvements. A partition action is therefore not appropriate. Plaintiffs' proper remedy is an action *rei vindicatio* in respect of each block. The present action is an abuse of the Partition Ordinance and has saddled the parties with unnecessary and heavy costs.

De Zoysa, K.C. (with him *Rajapakse*), for sixth added defendant, appellant in No. 430 and respondent in all others.—Certificate of Municipality under Ordinance No. 17 of 1865 vested absolute title in the purchaser, Don Jusey. Therefore the added defendants are entitled to the entirety of the corpus.

Gratiaen, for fourth defendant, appellant in No. 433 and respondent in all others.—" Property of the proprietor of the premises " means the very premises themselves. " Property " has no reference to title. What Don Jusey bought was the title of the estate of Candappa. " Proprietor " has the same meaning as " owner " in Ordinance No. 17 of 1865.

E. G. P. Jayatileke (with him *Navaratnam*), for third added defendant, appellant in No. 432 and respondent in all others.

H. V. Perera (with him *N. E. Weerasooria* and *Nadarajah*), for plaintiff, appellant in No. 431 and respondent in all others.—As to *res judicata*, fideicommissary is not a privy of the fiduciary. Therefore the judgment in the previous action by Lucia does not bind the fideicommissaries. *Usoof v. Rahimath et al.* [1]. Moreover, before the Civil Procedure Code, if there was no adjudication on the merits, the plea of *res judicata* would not avail.

The certificate of sale issued by the Municipal Council under section 85 of Ordinance No. 17 of 1865 passes to the purchaser nothing more than the title of the defaulter.

Where two persons jointly make a joint disposition, as here, each person purporting to deal with the whole of the property, subject to a usufruct to the survivor, joint will does not operate twice. No dominium passes to survivor who has only a usufruct. Each gives the whole, and on the death of the first dying, nothing is left for the survivor to give. Rights of Lucia in her property were taken away before her death. Giving of property to children takes effect on death of the first dying as a giving of the entire estate of both spouses and the instrument takes effect if the survivor takes a benefit on death of the first dying (*Lee, Roman-Dutch Law, p. 353*). In *Rosenberg's case 1911 A. D. 69* each party gave away his or her particular share.

Counsel cited *Oosthuyser v. Oosthuyser.*[2] *Samaradiwakara v. de Saram* [3] is directly in point. Dominium in whole property vests in legatees, subject to a life interest in favour of the survivor.

[1] *20 N. L. R. 225 at 240.*
[2] *(1868) Buch. 51.*
[3] *(1911) 14 N. L. R. 321.*

Croos Da Brera, in reply.—There is no massing or consolidation of estates. In reality there are two separate wills in one document. The presumption is that each party intended to deal with his or her half share. There has been on adiation as required by law (*3 Nathan 1845: Fernando v. Perera* [1].) The will of the widow spoke only on her death and has not been admitted to probate (section 8 of Ordinance No. 7 of 1840; *Dias v. Livera* [2]; *Charles Hamy v. Jane Nona* [3]: *Pedris v. Fernanndo* [4]; *Kapurala v. Manikhamy* [5]: *14 Halsbury 160*; *(1897) Probate 7*). Until her death the dominium vested in the widow. A purchaser from her therefore got good title (*Geddes v. Apothecaries Co.*[6]; *Mendis v. Mohideen* [7]; *Rabot v. Neina Marikar* [8]; *Rosenberg case (supra)*; *Receiver of Revenue, Pretoria v. Hancke* [9]; *Walter Pereira 405*). The probate of the will has not been registered and the *fidei commissum* is therefore defeated. The widow's title to half the estate was not taken away from her. The husband had no right to deal with it, not even with consent (section 1 of Ordinance No. 21 of 1844).

Gratiaen, in reply.—Where ultimate beneficiaries under a mutual will obtain dominium on the death of both, presumption is that each testator deals with his or her half share (*Juta Leading Cases II., p. 114*).

Dominium remains in the survivor (*Maas I. (1920) 150*). There can be no contractual relationship between a husband and wife married in community of such a nature as to give the husband with the consent of the wife the right purport to convey by testament all her property.

No real rights are conveyed to the legatees, until some act of adiation is performed by the survivor (*Dennyssen v. Mostert* [10]).

Rajapakse, in reply, cited *Juta Leading Cases II., 120-121*. Unless it is clear that a mutual will is a joint will, it must be read as two wills, each spouse dealing with his or her share of the property (*Juta Leading Cases II., 107-115*).

H. V. Perera, in reply.—All the authorities are agreed that when one by will disposes of another's property with his consent, there is an effective disposition. It necessarily means that title passes to the devisee.

March 25, 1932. GARVIN S.P.J.—

This was a proceeding under the Partition Ordinance. The land in respect of which the action was brought is depicted in the plan No. 1,218 dated March 7, 1928, made by S. Ratnam, Licensed Surveyor, and filed of record, marked letter Z I. The plaintiffs claimed a declaration that they and certain of the defendants are entitled to the entire corpus in certain specified shares, subject to a *fidei commissum*, which they contend was created by the will of Francisco Nonis Candappa and his wife Lucia. The added defendants intervened in the action and claiming to be entitled to various interests in severalty which exhausted the whole corpus, prayed that the plaintiffs' action be dismissed.

[1] *(1914) 18 N. L. R. 150.*
[2] *(1879) L. R. 5 App. C. 123.*
[3] *(1912) 15 N. L. R. 481.*
[4] *(1919) 21 N. L. R. 91.*
[5] *(1919) 7 C. W. R. 101.*
[6] *(1901) 2 Browne 10.*
[7] *(1902) 5 N. L. R. 317.*
[8] *(1913) 16 N. L. R. 99.*
[9] *(1915) A. D. 76.*
[10] *(1872) 4 P. C. 236.*

The learned District Judge held that the plaintiffs and certain of the defendants were entitled together to one-half of the land and certain of the added defendants to the other half, and on this basis entered a decree declaring those whom he held to be entitled to shares entitled to the whole land in certain specific proportions.

He has also declared certain of the added defendants entitled by adverse possession to the fiduciary interests of certain of those who would but for such prescriptive possession have been entitled to the enjoyment of certain fractional interests in the corpus for life.

From this judgment five appeals have been entered. The appeals numbered 432, 433, 430, and 429 were entered by the third, fourth, sixth, and seventh added defendants respectively and appeal No. 431 by the plaintiffs.

The contest is between the plaintiffs and defendants on the one side and the added defendants on the other. But all the contestants trace their respective titles back to Francisco Nonis Candappa and his wife Lucia, who were married in community of property, and were admittedly once entitled to the entirety of the land to which this action relates. On July 31, 1860; these spouses made a joint last will. The testator died shortly after and, on June 16, 1862, probate was granted to the surviving testatrix as executrix of the last will. In the inventory of the estate of the deceased the executrix showed " three adjoining pieces of ground in Contanchina "; it was admitted at the hearing of this appeal that this is the land with which we are concerned in this action. It is to be noted that she entered the whole of this land and not a half share in the inventory and, since she has also entered the whole of several other lands and not half shares of them, it is evident that she administered the whole of their common estate and treated the whole as affected by the disposition on the death of her husband.

By this last will the spouses reserved certain rights in the entirety of the common property to the survivor and made various bequests including a bequest of the " three allotment of land in Cotanchina " to their seven children. All these bequests were affected by a clause in the will which the plaintiffs contend created a *fidei commissum* operating from generation to generation in terms of which they alleged that the interests they claim have now vested in them, still burdened with the same *fidei commissum*.

The added defendants denied that the premises were burdened with such a *fidei commissum*. The learned District Judge upheld the plaintiffs' contention; and in none of the argument addressed to us on behalf of the added defendants-appellants were we invited to hold that he was wrong. It is sufficient, therefore, to say that clause 11 of the last will clearly and unambiguously impresses every disposition of landed property made by the will with a *fidei commissum* from generation to generation which, under our law, binds the land for four generations. The plaintiffs would, therefore, seem to have established the various steps in the devolution of title from the admitted original owners to them and the defendants.

In the year 1875, about 13 or 14 years after the death of Francisco Candappa, these premises were seized and sold for non-payment of rates, and were purchased at the sale by Don Jusey, in whose favour a certificate,

bearing No. 3 and dated March 5, 1875, was issued. The respective titles upon which the different added defendants claim flow from Don Jusey and they contend that the certificate issued to him as the purchaser at the sale for non-payment of rates gave him an absolute and indefeasible title to these premises, freed from the *fidei commissum* created by the last will of Francisco Candappa and his wife. The matter under consideration is governed by the Municipal Councils Ordinance, No. 17 of 1865. Section 85 of that Ordinance authorizes the Chairman to issue to a purchaser at a sale for non-payment a certificate in a prescribed form which, it says, " shall be sufficient to vest the property in the purchaser any law or custom to the contrary notwithstanding ".

The question for consideration is whether the language of this section of itself or read in the light of the other sections relating to the levying and recovery of rates justifies the contention that whenever premises in respect of which rates are due, are sold a good and conclusive title free from encumbrances and from every charge or burden in the nature of *fidei commissum* vests in the purchaser upon the issue of a certificate under the hand of the Chairman. Section 53 authorizes the Council to make and assess upon the annual value of all lands, tenements, houses, and buildings, a rate which is not to exceed the cost of maintenance of the police and which is not to be less than 2 shillings in respect of any house, building, land, or tenement. The Council is further authorized by section 54 to levy lighting and water rates, such rates to be assessed as prescribed in the Ordinance or by by-law to be made thereunder. Section 71 imposes the liability to pay the lighting and water rates on the occupier by whom the rate assessed under section 53 is to be paid is not explicitly stated and must be gathered from the provisions relating to the recovery of rates and taxes. Section 82, the material section, is as follows:—

> " If the amount of any rate assessed or tax imposed under this Ordinance shall not be paid into the office of the treasurer of the Municipality within such time as the Council shall direct, a warrant signed by the Chairman shall be issued to some collector or other officer of the Municipality named therein, directing him to levy the same, and the cost of recovery, by seizure and sale of all and singular the property of the proprietor, or of any joint proprietor, of the premises on account of which such rate or tax is due, and of all movable property, to whomsoever the same may belong, which may be found in or upon any such premises; and the said warrant shall be in the form marked D in the schedule hereunto annexed."

The opening words of the section indicate that the method of recovery is applicable to rates as well as taxes though the rest of the section would seem to indicate that its provisions are only applicable to rates. It is clear at all events that rates may be recovered by the seizure and sale of the " property of the proprietor or any joint proprietor of the premises on account of which such rate or tax is due, and of all movable property to whomsoever the same may belong which may be found in or upon any such premises ".

The concluding words relating to movable property must presumably be read subject to the provisions of section 64 which prohibit the sale of movables found upon such premises for the recovery of any arrears of

taxes beyond two quarters, unless such movable property shall belong to the owner or joint owner of the said premises or to any person who shall have been the occupier thereof at the time when such arrears became due. Although the Ordinance places the liability for payment of the lighting and water rate on the occupier, the Council is empowered in the event of non-payment to seize and sell the property both movable and immovable of the proprietor of the premises in respect of which the rate is due.

It would seem therefore that the ultimate liability for the payment of rates rests on the " proprietor " of the premises in respect of which the rate is payable and that what the Council may seize and sell is the movable and immovable property of the " proprietor " and the movables found on the premises, to whomsoever it may belong, up to a maximum amount not exceeding two quarters' arrears.

On behalf of the added defendants-appellants it was urged the " proprietor " meant " owner " as defined in section 3 of the Ordinance, and in support of this contention the case of *Darley Butler v. John Fernando* [1] was cited. After a consideration of the corresponding provisions of the Municipal Councils Ordinance, No. 7 of 1887, which are substantially the same as those of the Ordinance No. 17 of 1865, Hutchinson C.J. held that the person liable to pay the rates was the " proprietor " of the premises during the period in respect of which the rates were due and expressed the opinion that the word " proprietor " meant the same thing as " owner ". Now the term " owner " as defined in both these Ordinances is a term of wide significance. It means " the person for the time being receiving the rent of the land or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such land or premises were let to a tenant ". There are indications in the Ordinance that the term " proprietor " in section 83 was not perhaps intended to mean anything other than a person who would come within the definition of " owner ", in particular section 64 which prohibits the seizure of movables for arrears in excess of two quarters' rates " unless such movable property shall belong to the owner or joint owner of the said house premises. . . . " It may be that, inasmuch as these are rates assessed on the annual value, it was the intention of the legislature that they should be made recoverable by seizure and sale of the property of the person who for the time being received the rents and profits or would have received the same if they had been let to a tenant, though it is also possible that the change of phraseology was deliberate and made with the intention of limiting the liability to the person or persons entitled, during the period in respect of which the rates were due, to the enjoyment of the rents of the premises. But whatever meaning be attached to the word proprietor, it is quite clear that what the Council is authorized to seize and sell is the property of the person who is the " proprietor " for the time being. It is evident that in the Court below it was the case for the added defendants that Lucia as the person for the time being in enjoyment of the rents of the premises was the " proprietor " within the meaning of the section, and this was the impression left on my mind as their respective cases were presented in appeal. At a later stage,

[1] *2 Leader Law Rep. p. 1.*

however, as counsel for the plaintiffs-appellants developed his argument that Lucia had only a usufruct in the whole we were informed that it was denied that she had adiated the inheritance and on being specifically asked the question we were informed that counsel did not admit that she was the person who for the time being took the rents of the premises. At a later stage, however, counsel for the fourth added defendant drew our attention to certain entries at pages 182-3 of the record and accepted the position that it was Lucia who collected the rents. This was acquiesced in by counsel for the seventh added defendant. The counsel for the sixth added defendant alone expressed his inability to make any admission.

There is, however, ample indication both in the position taken up by the other added defendants and in the whole course of the proceedings in the Court below that all the added defendants proceeded upon the footing that Lucia was the " proprietor " for the time being and there is ample evidence in her plaint in case No. 72,428 marked 4 AD 1 that she was.

If Lucia was not the " proprietor " there is no evidence who was and the case of the added defendants must in my view of the law fail. But I am satisfied that Lucia was at the time the " proprietor " of the premises. If so, it is only so far as and to the extent to which these premises were her property that they were liable to seizure and sale.

The added defendants maintain that at the date of the sale Lucia was vested with title to a half share and enjoyed a life interest in the other half. Despite this, they contend that what passed at the sale was an absolute title to the whole of the premises. There is nothing in any of the other provisions of the Ordinance to support this contention. It rests, therefore, entirely upon the language of section 85, which is as follows:—

> " If land or other immovable property be sold under the warrant, a certificate in substantially the form marked E in the schedule hereunto annexed, signed by the Chairman, shall be sufficient to vest the property in the purchaser, any law or custom to the contrary notwithstanding. Such certificate shall be liable to the stamp duty fixed on conveyances of immovable property, and to any registration or other charges authorized by law, such duty and charges being payable by the purchaser. "

No sale of land or other immovable property in Ceylon is of any force or avail in law, unless the same be in writing signed by the party making the same in the presence of a licensed notary public and two witnesses and unless the writing be attested by the notary and the two witnesses—*vide* Ordinance No. 7 of 1840. Under the Common Law there must also be delivery to complete the transfer of title; under the law as it obtains to-day delivery of the deed is sufficient for the purpose.

The words " any law or custom to the contrary " in section 85 clearly have reference to the above and what the section says is that when a sale for rates relates to land or immovable property the certificate of the Chairman shall be sufficient to vest the subject of the sale without a

notarially attested writing or conveyance. And it is to be noted that the requirements as to stamp duty and charges in respect of registration are insisted upon and made payable by the purchaser.

But it was urged that the words " shall be sufficient to vest the property " imply that the purchaser is to be vested with a title which is perfect, absolute, and conclusive and which prevails over and indeed extinguishes every other adverse right, title, estate, or claim to the premises. If such were the intention of the legislature, it has certainly not expressed it, and in the absence of language, which clearly and unambiguously discloses such an intention, there can be no justification for imputing to the legislature an intention to give to the purchaser anything more than the title of the defaulter. The word " property " in the expression " vest the property " must be read with reference to what may be sold and presumably was sold, *i.e.*, the property of the defaulter, which means the land or premises in so far as the defaulter has an interest therein. The certificate vests in the purchaser the title of the defaulter. It performs the same functions as a notarially attested writing and delivery by the seller in the case of a private sale.

When the legislature intends that a sale shall have the effect of giving to the purchaser a better title to property than that of the person against whom it is sold, it says so. Under the provisions of the Paddy Cultivation Ordinance, No. 21 of 1867, the certificate issued to a purchaser at a sale for non-payment of money due vests " absolute right and title to and interest in the land sold, in the purchaser free from all encumbrances ". Further examples are to be found in the Municipal Councils Ordinance, No. 6 of 1910, by which a certificate to a purchaser is declared to be sufficient to vest the property in the purchaser " *free from all encumbrances* ", *vide* section 143, and in the case of a sale for default of payment of rates when the purchaser is the Council the certificate " vests the property sold *absolutely* in the Council *free from all encumbrances* "; and such certificate is made receivable in every Court of justice as " Conclusive evidence of the title of the Council to such lands or immovable property ", *vide* section 146. So also a purchaser at a sale held in pursuance of a decree for sale entered in a proceeding under the Partition Ordinance obtains a title " *good and conclusive against all persons whomsoever* . . . . ", *vide* section 9 of Ordinance No. 10 of 1863.

Language identical with that which appears in section 85 of the Municipal Councils Ordinance of 1865 and with which we are concerned in this case is to be found in the Police Ordinance, No. 16 of 1865, section 48, and existed in the Paddy Tax and Labour Commutation Ordinance, No. 5 of 1866, section 9. In *Seniveratne Ranhami Mohandiram et al. v. Karavita Koralalaya Mudianse et al.*,[1] a bench of two Judges held that a certificate of sale granted pursuant to Ordinance No. 5 of 1866, section 9, vests in the purchaser nothing more than the interest of the defaulter *valeat quantum* rejecting the contention that the words " shall be sufficient to vest the property in the purchaser " gave the purchaser an indefeasible title against the whole world.

The case of *Sivacolundu v. Noormaliya*[2] is of interest for the reason that the contention that a *fidei commissum* was wiped out by a sale for

[1] *3 S. C. C. 103.* [2] *(1921) 22 N. L. R. 427.*

non-payment of rates under the Municipal Councils Ordinance, No. 6 of 1910, was based, not on the words " shall be sufficient to vest the property ", but on the words " free from all encumbrances ". It was not even suggested that the first-quoted words were sufficient of themselves to give the purchaser a title free of the *fidei commissum* which burdened the premises.

The certificate of sale issued under section 85 of the Municipal Councils Ordinance, No. 17 of 1865, passed to the purchaser at the sale for non-payment of rates nothing more nor other than the title of the defaulter. Lucia being the defaulter, what passed to the purchaser Jusey was her right, title, and interest. In the view most favourable to the added defendants Lucia's interests cannot amount to more than title to a half share with a life interest in the remaining half. But the plaintiffs contend that her only interest in the premises was an estate for life and terminated with her death. The determination of this issue involves a consideration of a branch of law of exceptional difficulty and complexity which will be made later. It is more convenient at this stage to deal with the point that the plaintiffs and defendants are estopped by a judgment entered in D. C. Colombo No. 72,428 in the year 1877. That action was brought by Lucia, who based her claim on the joint last will of her husband and herself in terms of which she pleaded that the premises at Kotahena were " devised to their children with possession to the survivor of them ". She alleged that upon the death of Francisco in the year 1860 she obtained probate of their joint last will, entered into possession of these premises among others, and continued in possession until the defendant, one H. A. Fernando, a successor in title of the Don Jusey, who was the purchaser at the sale for non-payment of taxes earlier referred to, took wrongful possession of the premises. The prayer was that she be restored to and quieted in possession of the premises.

The defendant H. A. Fernando relied on the title obtained by Don Jusey which was ultimately passed to him. In her replication Lucia impeached the sale by the Municipal Council on various grounds. No evidence appears to have been recorded and there is no adjudication as to what if any interest passed to Don Jusey at the sale nor whether that sale had been regularly held. The plaintiff's action was dismissed on the ground that the action should have been brought against the Municipal Council. This proceeding and the judgment were long anterior to the Civil Procedure Code and section 207, upon which our law of *res adjudicata* is based, is not therefore applicable to the case. The copies of the proceedings in that case filed of record show that there was no adjudication at all on the question of title and in the absence of such adjudication the plea of *res adjudicata* cannot succeeded. All that Lucia claimed in the action was a usufructuary interest and the dismissal of her claim to possession even if it does, having regard to the ground upon which it was dismissed, bar any further claim by her, does not bar those who claim the estate at her death. For these take under the last will and not from or through Lucia. If therefore Lucia's interest was merely that of a usufructuary or fiduciary, the plea of *res adjudicata* is not available against those who take the estate in succession under the last

will and the *fidei commissum* thereby created—*vide Usoof v. Rahimath et al.*[1] If on the other hand Lucia, despite the last will and her adoption of it, still remained vested with title to a half share of the property of the community, her title to that half share passed under the sale for recovery of rates and has vested in Don Jusey and his successors in title—the remaining half share bequeathed to the children charged with the *fidei commissum* passing under and in terms thereof to the fideicommissaries whether Lucia's interests therein were those of a fiduciary or of a usufructuary.

The provisions of the joint last will of Francisco Candappa and his wife Lucia material to the decision of this question are as follows:—

"We jointly will and desire that the survivor of us shall remain in possession of all our common property and estate movable as well as immovable and enjoy the rents, interest, revenue, and income thereof until his or her death, without being interfered with by our children, but the survivor shall not however sell, mortgage, or otherwise alienate any of the said movable or immovable property belonging to our common estate.

"We jointly give and devise unto our children the immovable property hereafter mentioned to take effect after the death of both of us, that is to say:

"To our sons . . . . ."

All the bequests which follow are charged with a *fidei commissum* which binds the property for four generations. In a general residuary clause the spouses nominate and appoint their seven children heirs and heiresses of the residue and remainder of their joint property, share and share alike, and state that it is their desire that, if any of the said children dies without lawful issue, "the devise or inheritance of such of their children which he or she may become entitled to under this will shall revert to the surviving brothers and sisters". The will thus disposes of the whole of the property of the community. To the survivor is given an interest for life in the whole, portions of the property of the community are then specifically bequeathed to the children individually, other portions to certain of their children in groups and again others to all the children and finally what is undisposed of by the specific bequests is given to them all share and share alike. The survivor is appointed executor or executrix as the case may be of "this our will".

The event which the spouses had in contemplation was the death of the first dying of them and the consequent disruption of their common estate, for each has declared his will and desire that on the happening of that event the survivor was to have a life interest in the whole with the reversion to the children. Whether the interest left to the survivor is usufructuary or fiduciary is often a difficult question. The prohibition against alienation of itself might indicate that the interest is fiduciary. But the opening words on the other hand state that what each spouse is to have is possession of the common estate and enjoyment of the entirety of the rents and profits proceeding therefrom and the prohibition against alienation in the context appears to have been used to emphasize this.

[1] *(1918) 20 N. L. R. 225, at p. 240.*

No title to the half share of the first dying is given to the survivor and to that extent at least this clause cannot be construed as passing any greater interest than that of a usufructuary. Since both halves are dealt with as one whole the form of words employed must have been intended to give to the survivor a usufruct extending to the whole of the common estate, and nothing more.

Moreover, there are also indications that the bequests to the children were to vest in them immediately on the death of the first dying though they were not to take effect in possession until the death of the survivor. The carefully drawn dispositions in favour of the children burdened with a *fidei commissum* from generation to generation and which exhaust the whole estate is followed by a clause by which the survivor is appointed the " executor or executrix of this our will and guardian of the persons and administrator of the property of our minor children ". It is a fair though perhaps not a necessary inference that by the property of the minor children was meant the property which they would get under this will on the death of the first dying. And in the appointment of the executor the will is treated as one and as the will of each of them to become operative on the death of the first dying.

Lucia's plaint in D. C. Colombo No. 72,428, filed over 16 years after the death of her husband, shows that she herself regarded the bequests in favour of the children to have vested title in them on the death of the first dying subject to the reservation to her of a usufruct in and over the whole of the common estate.

There can, I think, be no doubt as to the intention of the spouses and that their intention has been carried out by each with the consent and authority of the other making dispositions extending to and exhausting the whole estate to become effective on the death of the first dying.

On the death of Francisco in 1860 his widow Lucia took out probate of this will. She showed the whole of the estate in the inventory filed by her as executrix. In 1877 when she filed the action No. 72,428 she definitely adopted the last will and based on it her claim to a usufruct in the whole estate and averred that on the death of her husband in 1860 she " entered into possession " of these premises among others and " continued in possession " till 1876 when she was ousted by the defendant. It is quite clear from the judgment as well as from the statement made on behalf of the fourth added defendant—*vide* pages 92A and 92B of the record—that it was an accepted fact that Lucia collected the rent of these premises.

There is therefore ample evidence that Lucia affirmed the will of her deceased husband which disposed of the entirety of the property of what was once their common estate and took benefit thereunder.

Whether a spouse who has consented to the disposition of her property as in this case can withdraw her consent and repudiate the disposition after the death of the testator is a point upon which certain passages in the Roman-Dutch law at least suggest a doubt. But whatever difference of opinion there may be on that point there can be no question that once the survivor has affirmed the will and taken benefit thereunder he must permit the will to have its full effect—*vide Dennyssen v. Mostert*,[1] where it

[1] *(1872) L. R. 4 P. C. 236.*

was said that the conditions of massing and acceptance of some benefit by the survivor " appear to apply as much to a will made by one spouse with the authority of the other as to a mutual will in the strict sense ". It is a well established principle that when a testator makes a bequest to a legatee A and also a bequest of that legatee's property to another B, then legatee A must choose—if he accepts the bequest made by the testator—he must allow his property to pass to B to whom it is bequeathed. But under the Roman-Dutch law a person may by testament bequeath the property of another " if he permit it "; the person who permits his property to be so disposed of cannot again revoke it—*Kotze Van Leeuwen Chapter 11, section 1, p. 313.* It does not appear ever to have been definitely raised or settled whether in such a case the person who gave such consent can after the death of the testator withdraw his consent and refuse to deliver the property. In the case before us each spouse has consented to the other disposing of the whole of the property of the community. If Van Leeuwen is right then it would seem that the will is not revocable after the death of the first dying. The Privy Council has, however, expressed a different view and we are bound to hold that the power to repudiate and revoke the disposition so far as it relates to the survivor's half exists until he has affirmed the disposition by taking under it a benefit to which he would not be entitled but for the will. Even this condition has been satisfied in the case before us. The survivor has affirmed the will to which she consented and has taken benefit under it, and that will made with her consent disposes of the whole of the common estate. It distributed the property between the children of the marriage reserving to her a usufruct in the whole. The question we have to answer is whether despite this will and its adiation by the survivor Lucia she remained vested with the dominium in her half share notwithstanding that the testator with her consent had disposed of the property leaving her only a usufruct in the whole.

The main contention was that the surviving spouse could not by will divest herself during her lifetime of her dominium in her half share of the property of the community and pass it to another. A mutual will, even where there has been a massing of property for the purpose of a joint disposition after the death of the survivor, is ordinarily divisible into two wills by which each spouse disposes of his or her half in pursuance of a common testamentary intention. The acceptance of some benefit by the survivor to which he would not be entitled but for the will of the first dying deprives him of the power of revoking the will as to his half, but his half passes under his will and not under the will of the first dying.

The case, however, is different where the spouse with the consent of the other disposes of the whole of the common estate, for the first dying dies testate upon the property of the other with his consent whether express or implied. The bequest is that of the first dying and the legatee becomes entitled to the bequest under and by virtue of the will of the first dying and not under any testamentary disposition of the survivor where the survivor has adiated or taken some benefit under the will. Transfer and delivery are not the only means by which title to property passes under our law. It passes by operation of law as in the case of a marriage in community when each spouse is without either transfer or

delivery divested of a half share of the property heretofore owned by him and vested with a title to a half share of the property of the other spouse. Notwithstanding that both in the deeds and in the registers of deeds property may stand in the name of one of the spouses, it belongs to both of them in equal shares and upon the subsequent death of one of them, the survivor remains the owner of a half share. A purchaser of the entire property buys at his risk and the fact that he is a *bona fide* purchaser for value avails nothing. A bequest by last will of the testator's property passes title (dominium) to the property. Since under the Roman-Dutch law a person may by will make a bequest of the property of another with his permission or consent, is there any insuperable objection to the theory that the property passes under the bequest and that the legatee is vested with a real right in the property? Van Leeuwen apparently sees none. (*Vide Cens. For. 1. 3. 11. 7.*) " When the one gives the other permission to dispose of his property by testament or to leave it by *fidei commissum* and allows this will to be confirmed by the death of the disposing spouse, the ownership of the thing bequeathed or left by *fidei commissum* passes to the legatee or fideicommissary provided the inheritance has been adiated. Nor does this produce merely a personal action available for the recovery of the legacy against the heir or other possessor of the property of the inheritance, but also actual ownership and true property right. "

This is such a will. Each spouse has expressed the wish that at the death of the first dying the survivor is to have a usufruct in the whole in exchange for his half share, and gives the dominium to the children. Possession is, of course, deferred till the death of the survivor. Each has with the consent of the other disposed of the other's half share as well. When at the death of the first dying the will is brought into operation it disposes of the whole of the common estate and there is nothing left upon which the will of the survivor can operate. Inasmuch as it is a disposition by the first dying of the whole estate with the consent of the other spouse the rule laid down by Van Leeuwen applies, and, if his is a correct statement of the law, a right of property in the legacy vests in the legatee.

In most joint wills of spouses a common testamentary intention is manifested, but that intention is carried into effect by simultaneous dispositions by each spouse of his half share. Whatever the form of the will of the spouses, if it can be read as a disposition by each of his half share and not of the whole by each with the consent of the other, then upon the death of the first dying the will operates as a disposition of his half. In such cases where the survivor takes a benefit at the death of the first dying to which he would not be entitled but for the will he may not thereafter revoke his own will. Nevertheless the disposition so far as it relates to the survivor's half is the subject of his will and no rights in that half are transmitted till his death.

Such joint wills are clearly distinguishable from wills by which each spouse disposes of the whole or a part of the property of the survivor. When dealing with such wills Maasdorp in his *Institutes of Cape Law, Volume 1, pp. 135 and 136 (1903 Edition)* says the survivor " by the ordinary testamentary principle of election, by accepting benefits under the will, becomes bound to allow his property to pass as the will of the

first dying directs. Nay, more, this property, to the extent to which it is disposed by the will of the first dying, has ceased to be his property and becomes burdened with a *fidei commissum* in terms of that will. In one word, though the survivor is not prohibited from revoking his own part of the mutual will, he cannot revoke or alter the will of the first dying with respect to his (the survivor's) property, because it has in fact ceased to be the survivor's property ". Among the judgments relied on is that of Connor J. in *Oosthuysen v. Oosthuysen* [1].

But thereafter the trend of judicial decisions of which *Haupt v. Van der Heever's Executors, Juta's Leading Cases, Part II., p. 112,* is a typical instance, was in favour of the view that in respect of the half share of the survivor the legatee had only a *jus in personam* and not a *jus in re.*

These conflicting views were considered and settled so far as the South African Courts are concerned in *Rosenberg v. Dry's Executors* [2], that the rights of legatees under a mutual will disposing of joint property subject to a usufruct in favour of the survivor differed in respect of the two shares thus bequeathed—that as regards the half share of the first dying the legatee acquired real rights but that the dominium of the other half share remains in the survivor, the rights of the legatee being merely a personal right to compel him to observe the terms of the will of the first dying.

In the later case of *Receiver of Revenue, Pretoria v. Hanck* [3], there are indications in the judgments of two of the Judges that they were not perhaps altogether satisfied with the law as laid down in *Rosenberg v. Dry's Executors (supra);* they were however bound by that decision which was a judgment of the full bench.

Solomon J. in the course of his judgment draws attention to an amendment of the law which was passed after that decision indicating " that the legislature has elected not to adopt the law as laid down in *Rosenberg v. Dry's Executors (supra)* but has accepted the simpler view that the two halves of the joint estate shall be placed upon exactly the same footing ".

In the case of *Rosenberg v. Dry's Executors (supra)* the nature and extent of the rights said to be rights *in personam* and not *in re* were not very clearly defined. But in the later case of *Receiver of Revenue v. Hancke (supra)* all the Judges were agreed that the legatees were entitled to demand the transfer of the dominium and that the survivor was bound to give effect to the will by passing transfer subject to the reservation of his life interest.

It would seem, therefore, that the law as determined by judicial decision in South Africa and until the legislature thought fit to intervene was that the survivor of two spouses who had taken benefit in the half share of the first dying under a mutual will by which each disposed of the whole subject to a usufruct in the survivor remained nevertheless vested with the dominium in her half share but bound to transfer it subject to the reservation of a usufruct to the legatee or legatees.

Our own reports do not contain many cases in which the position of the survivor of spouses married in community who has taken benefit under the will of the first dying has been very fully considered. The earliest

[1] *(1868) Buchanan's Reports 66.*
[2] *(1911) S. A. L. R. 679.*
[3] *(1915) S. A. L. R. 76.*

case to which we have been referred is *D. C. Kalutara No. 23,882, 1869—1871, Vanderstraaten's Reports p. 96.* The husband made a will by which he purported to deal with the whole of the property of the community giving to his wife a life interest in the whole of a part of the estate. It was held that the wife having made her election to take under the will neither she " nor any one else in her name " can set up her common law right to a moiety of the joint estate. The contest arose between a creditor who having obtained judgment against the widow caused certain property to be seized in execution and the administrator of the estate of the deceased testator who was also a legatee.

The next case noticed in the course of the argument was that of *Mendis v. Mohideen* [1]. By their joint will the spouses who were married in community of property granted to the survivor the whole estate providing that, after the death of the survivor, it was to devolve upon certain persons. The widow leased a house for 8 years and died while there were 5 years more to run. The executor apparently ignoring the lease sued the defendant who was the tenant of the lessee " for use and occupation ". This Court referred with approval to the decision of the Cape Courts holding that the dominium as to a half share remained in the survivor and that he was able to pass a title to a *bona fide* purchaser. The case was sent back for the determination of certain questions of fact.

The only other case in which the point under consideration was dealt with specifically was that of *Robot v. Neina Marikar* [2]. This Court followed the law as stated in *Haupt v. Van der Heever's Executors (supra)* that in such cases the will gave the legatees not a real right in the property but only a personal right against the survivor.

The two latter cases are not of much assistance. There is no discussion of the Roman-Dutch law on the subject. The decision merely follows and adopts the law as stated in *Haupt v. Van der Heever's Executors (supra).*

In the earlier case reported in *Vanderstraaten's Reports* the judgment proceeds upon the principle of election and the view expressed is that where a person is proved to have elected he and " any one else in his name " will be estopped from setting up his common law title to a half of the estate. In effect the Court held that the claims based on the will were superior to those of the creditor of the survivor. It does not, however, go the length of holding that upon election the survivor is divested of his title to his half or that the dominium in that half passed to the legatees under the bequest.

There are passages not only in the writings of Van Leeuwen but in Voet and Peccius which indicate that in their view there can be no revocation by the surviving spouse after the death of the other spouse of a will by which each with the consent of the other disposed of the common estate. But there are other passages in the writings of these and other authorities in which emphasis is laid generally on the subsistence of the power of revocation after the death of one of the spouses and until adiation by the survivor.

[1] *(1902) 5 N. L. R. 317.* [2] *(1913) 16 N. L. R. 99.*

The special case of the disposition by one spouse of the property of the other with his consent does not appear to have been fully discussed or considered on principle or with reference to the circumstance that the effect of admitting the right of the survivor to revoke such a disposition involves the proposition that he may revoke the will of the first dying so far as it relates to his (the survivor's) share of the property and thereby sometimes bring about the intestacy or partial intestacy of the first dying.

Had it been the law that such a will is confirmed and is irrevocable upon the death of the first dying there would appear to be no obstacle to the view that a disposition of property will at the death of the first dying pass the dominium both in the half share of the first dying and in the half of the survivor since the first dying would then die testate upon the whole of the common property with the consent of the other.

But after an examination of the original authorities the Privy Council in *Denyssen v. Mostert* (*supra*) decided that the right of the surviving spouse to revoke or repudiate such a joint disposition so far as it relates to his half is not lost on the death of the first dying and continues till he has accepted some benefit under the will. It must, therefore, be taken to be settled law that it is the act of the survivor after the death of the first dying spouse which binds him to permit the will to have its effect. Whether that results from the application of the principle of election or from a contractual or *quasi*-contractual relationship with the legatees into which the survivor is brought when he adiates or accepts benefits under the will of the first dying, the situation in which the survivor is left is that he may not revoke the last will so far as it relates to his half share and must permit it to have its effect. The corresponding right which vests in the legatees is to insist on the survivor complying with the will and claiming specific performance. But this is a right *in personam* and not a right *in re* since the disposition does not become effective as to the survivor's half on the death of the first dying, even in a case in which the disposition has been made with the consent of the other and it is the act of the survivor in taking benefit under the will which binds him to permit it take effect on his half share as well. There is no principle upon which it is possible to say that the dominium which under the law as it appears to me to be settled by *Denyssen v. Mostert* (*supra*) resided till then in the survivor passed automatically to the legatees upon the act of the survivor in taking benefits under the will.

It was urged that *Samaradiwakara v. De Saram*[1] was an authority for the proposition that under such a disposition the right of the legatee was a right *in re*. But the judgment of the Privy Council shows that the real point for decision was whether a son who predeceased the surviving spouse took a vested interest in a disposition extending to her half share transmissible to his heirs and that involved the interpretation of the joint will. The widow died after adiation and without dealing with her half share by act *inter vivos* and the question arose between an intestate heir of the deceased son and the executor of the estate of the widow. It is not possible to say with certainty that had the Privy Council been called upon to determine the exact nature of the interest which vested in the

[1] *(1911) 14 N. L. R. 321.*

legatee it would have been held that it was the dominium and not merely the right to call for the dominium.

I feel bound by the weight of authority to hold that even in the case of a mutual will of spouses married in community by which each spouse with the consent of the other deals with the whole of the common estate each spouse has the power to revoke the will so far as it relates to his half at any time till the death of the first dying and that the survivor retains the power to repudiate or revoke the will so far as it relates to his half share so long as he does not take some benefit in the half share of the first dying. The survivor therefore remains vested with dominium to half of the common estate and every part of it notwithstanding that the first dying has with his consent executed and left a last will by which he bequeathed the whole. When and if the survivor takes some benefit in the half share of the first dying under the joint will his right to revoke the will so far as it relates to his half share is at an end and he is bound to permit the will to take effect. The legatees and devisees then become vested with the corresponding right to compel the survivor to observe the will and its terms by specific performance or other appropriate action. But the act of the survivor in adiating or taking benefit under the will in the share of the first dying does not of itself pass the dominium in his half share to those to whom it has been bequeathed.

Lucia therefore was vested with the dominium in a half share of these premises at the time they were sold for her default in paying the rates due in respect of them. There is no reason to suppose no evidence from which it can be inferred, and not even a suggestion that the purchaser had knowledge of the contents of this will or that his purchase was not *bon fide*. The sale was therefore effective to pass title to the purchaser as to a half share.

The judgment of the District Judge will stand affirmed. All the appeals to this Court from the judgment of the Court below will be dismissed with costs.

LYALL GRANT J.—

The question of law which seems to present the greatest difficulty in this case is whether Lucia having adiated to the usufruct or to the fiduciary ownership of the whole joint estate was able to retain, and effectively to dispose of, the dominium of half that estate so as to defeat the rights of the *fidei commissarii* under the will to that half.

That she should be able to do so seems contrary not only to well known doctrines which appear in different systems of law but to fundamental principles of justice.

I agree with my brother, however, that the authorities, both Ceylonese and South African, which were put before us have the effect that even adiation to the husband's property does not divest the widow of the dominium of her separate estate.

I agree therefore to the judgment proposed by my brother, that the appeals should be dismissed.

Appeals dismissed.