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FERDINANDUS *v.* FERNANDO.

D. C., Colombo, 7,016.

Husband and wife—Joint will—Fidei commissum residui—*Power of surviving widow to alienate by deed of gift or will—Estoppel.*

M F and A S, husband and wife, made a joint will in 1860, wherein the 4th clause provided that "the survivor having done as he or she pleased with all our movable and immovable property, and having possessed the same, afterwards, on the death of both of us, it is our will that whatever remains shall be divided equally among our children."

In August, 1870, the spouses gifted certain property to their daughter Engeltina, who accepted the gift and stipulated that she would not "claim hereafter any inheritance out of the estate" of the donors.

M F died in December, 1870, leaving him surviving the widow of A S and twelve children.

A S, by deed of gift dated 8th October, 1894, granted three-fourths of the estate as it then stood to three of her sons, and by will of the same date the remaining fourth to another of her sons. The claims of the remaining eight children appeared to have been satisfied or extinguished before their mother's death in December, 1894.

Engeltina, claiming under the joint will of M F and A S to have a share of the lands dealt with by A S by the deed and will of 1894, sought to have a partition of those lands.

Held, (1) that Engeltina was estopped by the terms of her acceptance of the gift to her from claiming any inheritance out of the estate of her parents, and that her action for partition was not maintainable; (2) that the 4th clause of the will created a *fidei commissum residui* or a *fidei commissum* upon the residue of the estate which shall remain unspent at the death of the surviving spouse; (3) that when spouses by joint will vest their property in the survivor with power of alienation, subject to the restitution of the residue to their heirs of both spouses, the survivor need not find *cautio* or security for the restitution of at least the fourth part of the estate, but is at liberty to alienate the whole in his or her lifetime, but not by will; (4) that this power of alienation in the surviving spouse is only effectual in so far as the alienation is made in good faith and not exercised with a view to defrauding the substituted heirs; and (5) that whether Adriana's deed of donation of 8th October, 1894, in which she reserved to herself the enjoyment of the rents and profits, but not the power to revoke the deed, was to be treated as a testamentary disposition or not, her will of the same date was void, because a widow enjoying property with power of alienation, by virtue of the joint will of herself and her husband subject to a *fidei commissum residui*, cannot dispose of the residue by will.

IN this case, the original plaintiffs (Engeltina Fernando and her husband Marselis Ferdinandus) prayed that the Court do

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decree that theey and the defendants were entitled to certain shares of a certain property, and that the said property be partitioned among them. Both the plaintiffs having died, the administrator of their estate (Henry Ferdinandus) was substituted in their place.

The question for determination was, whether or not the original plaintiffs were in common ownership with the defendants of the lands sought to be partitioned.

It appeared that the parents of the original plaintiffs, Manuel Fernando and Adriana Swaris, made a joint will on the 31st December, 1860, the 4th clause of which ran as follows (as translated by the Additional District Judge, Mr. Felix Dias):—

"The survivor having done as he or she pleased with all our movable and immovable property, and having possessed the same, afterwards, on the death of both of us, it is our will that whatever remains shall be divided equally amongst our children."

Out of this clause of the will arose the following issues agreed to by the parties:—

(1) Had Adriana Swaris right, under the joint will of herself and her husband, to execute the deed No. 1,792, dated 8th October, 1894, in favour of the thirteenth, fourteenth, and fifteenth defendants, and id that deed vest any interest in the said defendants?

(2) Had Adriana Swaris the right to dispose of any of the property of the common setate by her will of 8th October, 1894, and did the devise by her of one-fourth of the land in claim to the tenth defendant vest any right in him?

(3) Are plaintiffs estopped from asserting any claim to the property now in question by reason of any of the recitals contained in deed No. 8,435 of the 13th August, 1870, in favour of the first original plaintiff Engeltina, the mother of the administrator?

The Additional District Judge held that, according to his translation of the clause in question, Adriana Swaris had the right to deal with the estate in any manner she pleased after the death of her husband, including a right to deal with it by will; and that therefore the donation to to the thirteenth, fourteenth, and fifteenth defendants and the devise by will to the tenth defendant were both good and valid.

Te held further that as in 1870 Engeltina, the first plaintiff, who was then married to the second plaintiff, had accepted a deed of gift from her parents, which contained an undertaking by her and her husband that they should not claim hereafter any inheritance out of the estate of her parents, the first plaintiff was estopped from coming forward as an heir of the estate. The Additional District Judge dismissed the plaintiffs' action.

The substituted plaintiff appealed.

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The case was argued on the 23rd and 24th February, 1903, before Moncreiff, J., and Middleton, J.

Peiris, for the appellant,—

The District Judge is in error in supposing that there is an estoppel. The first plaintiff no doubt renounced her right of inheritance to the estate, but her present claim is not as an heir to the estate, but as a devise under the will which began to operate from a date subsequent to the date of the deed. Looking at the terms of the will, the surviving testator had the right of enjoyment during life of the movable and immovable property of the common estate. The words of the 4th clause are: "Having possessed in any manner she pleases, what is left is to be equally divided among our children." This means that in the case of lands she could occupy or lease them, and whatever is left may be divided among the children. In D. C., Colombo, *56,846*, (*Vanderstraaten, p. 203*) a similar will was considered. The words there were : "The survivor can do whatever he or she pleases and possess all their property, movable or immovable. After the death of both of them all their property that may be remaining shall be divided equally among their four sons and two daughters." The Supreme Court held that the survivor had no right at all to alienate, as there were no words in the will expressly giving him such power. Therefore the deed of Adriana Swaris of 8th October, 1894, is bad. The words "possess in any manner she pleases" cannot possibly include a power to devise by last will, as the survivor seems to have done in the case of the tenth defendant. Supposing the survivor could alienate, the laws says there is a *fidei commissum residui* created here. Van Leeuwen's *Censura Forensis*, *3*, *7*, *15*, and *16*, and *Voet*, *36*, *1*, *54*. Where the fiduciary is requested to leave the residue to the heir, he can be called upon to give security for at least one-fourth of the residue. Burge says (*vol. II., p. 133*): " If a devise were made to a person in trust that what remained of the inheritance at the time of his death should be delivered to another, the devise would be required to give security that one-fourth should be remaining, but he might alinate the other three-fourths by any disposition *inter vivos*, although not by his will." Under the guise of the deed *inter vivos* Adriana Swaris attempted to alienate by what was virtually a will. There was no residue at all left. Where alienation is allowable it must be exercised resonably when necessary, and not wantonly. In the present case the survivor gives the property to four only of the twelve children, and there was no reason for it. *Van Leeuwen's Commentaries*, *Kotze's Translation*, *p.* 382. The case reported in *2* C. L. R. *52* is

distinguishable from the present case. There the operation of the deed was not deferred till after death. The power of revocation was expressly surrendered, and a deed which cannot be revoked is a disposition *inter vivos*. But here the deed of gift reserves the power of altering the condition and the power to revoke it. The present deed can thus operate only after death. The case in *2 C. L. R. 52* therefore does not apply.

Dornhorst, K.C. (with *Sampayo, K.C.*,) for respondents:—It does not matter whether the inheritance renounced by the first plaintiff accrued to her by the deed or by an intestacy. The intention of the parties was clearly in regard to the inheritance under the will. Acceptance by the fiduciaries is acceptance for himself and those coming after him (*2 Burge, 124*). The first plaintiff's renunciation therefore bound the children also (*Voet, 36, 1, 65.*) The case of *Vanderstraaten* turns upon a translation of certain Sinhalese words which had been made for the Judges of the Supreme Court, which are very unlike the words rendered by Mr. Felix Dias, the Additional District Judge. His translation is different to the one filed in D.C. 56,846. The authorities cited for appellant do not touch the case of a will between husband and wife. In such a case, the survivor need not leave a one-fourth nor give security for it. *2 Burge, 32; Voet, 36, 1, 56; Censura Forensis, Ford's Translation, p. 9; Grotius Opinions, 223.* The next point is whether the deed is an act *inter vivos*. It is. The words of the deed give title forthwith, but reserve the power of altering the condition. These words do not derogate the words of the grant. That it is not a will may be well inferred from the circumstance that no Court having testamentary jurisdiction will admit it to probate. Nor is the deed revocable. The power to revoke is not reserved. What is reserved is the power to alter the condition. It is therefore a gift immediate and outright upon conditions which may be changed. The case of Neina Mohamado in *2 C.L.R. 50* is exactly in point. Adriana Swaris was empowered to do what she liked. She chose four children out of twelve for her benefaction. It would have sufficed if she had chosen one single member of the family. The grant of property to four out of a class of twelve cannot be considered wasteful or wanton. The case reported in Vanderstraaten must be looked upon in the light of a pious opinion of the Supreme Court—first, because the Judges of those days were in the habit of writing their judgments before they heard counsel; and second, because the translation of the Sinhalese was inaccurate.

Peiris, in reply.

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Cur. adv. vult.

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7th May, 1903. MONCREIFF, J.—

This was a suit for partition. The Judge has dismissed it on the ground that the plaintiffs had no title to any portion of the property sought to be partitioned.

Engeltina, the first plaintiff, was the wife of the second plaintiff. Husband and wife are both dead, and are represented by the administrator of their estate. Engeltina was a daughter of Manuel Fernando and Adriana Swaris, who executed a joint will on the 31st December, 1860. Her four brothers, W. Johannes, John Henry, Martinus, and James Fernando, alone out of the twenty-one defendants answered and appeared. When Manuel Fernando died in 1870 he was survived by twelve children and his widow. There seems to be no doubt that the claims of all these children (if we except Engeltina and the four respondents) upon the estate of their parents were satisfied or extinguished before the death of their mother, in 1894.

We have two translations of the 4th clause of the joint will. The first, which is put forward by the appellant, runs thus:—"After the death of one of us the survivor can possess all the movable and immovable property belonging to us according to his or her pleasure, and whatever property remains after the death of both of us shall be equally divided among our children."

The Judge says that the following is a literal translation of the clause:—"The survivor having done as (he or she) pleased with all our movable and immovable property (and) having possessed (the same), afterwards, on the death of both of us, it is our will that whatever remains shall be divided equally amongst our children."

On the 13th August, 1870, the spouses executed a transfer of certain property to their daughter Engeltina in consideration of their natural love and affection for her, and Engeltina renounced all claims to inheritance out of their estate.

Manuel Fernando died in 1870. His widow died in 1894, having disposed of the whole of the property remaining, by deed of gift and by will, both dated the 8th October, 1894, in favour of her sons, the four respondents.

The respondents say that Engeltina is concluded by her renunciation. I was at first attracted by the argument that, although Engeltina renounced any claim to inheritance, and that at a time when the joint will had been executed and both parents were alive, yet the joint will not having been altered, and speaking from the death of the disposing spouses, it was impossible to say that the spouses had not changed their intention and determined

to give Engeltina her share of the inheritance in addition to the donation made in their lifetime.

The joint will of Manuel Fernando and Adriana Swaris was executed on 31st December, 1860; the deed of donation to Engeltina was executed on 13th August, 1870; Manuel Fernando died on 12th November, 1870. Therefore, both of the disposing spouses were alive on the 13th August, 1870. Engeltina signed with a cross, testifying that she did thereby thankfully accept the above gift; and the donation was made and accepted subject to the condition and restriction that Engeltina was not to "claim hereafter any inheritance out of the estate of us, the said Wattumullege Manuel Fernando and B. Adriana Swaris."

Property which passes by will falls within the scope of the word inheritance (*hæreditas*). Engeltina bound herself not to claim any inheritance which, according to the terms of a will (whether executed at, or to be executed after, the date of her renunciation), would pass to her out of the estate of her parents. I cannot accept the qualified meaning put upon the word "claim" by Mr. Peiris. Engeltina claimed the inheritance, whether she asked for it as due *ab intestato* or as left to her by will. To adopt the appellant's view of this question would be to admit, not only that Engeltina did not renounce her claim to what her parents had left her in their executed joint will, but that no renunciation in these terms could include inheritance by will. I see no reason for thinking that the donors and Engeltina spoke of inheritance in a restricted sense.

On this ground, therefore, I think that there was no cause of action. But, suppose Engeltina was not concluded, did the 4th clause of the joint will give Adriana Swaris, the surviving spouse, power to alienate, and did Adriana Swaris in fact alienate in her lifetime? I think there is little difference in effect, if any, between the translations of the 4th clause. The clause seems to me to create a *fidei commissum residui*, or a *fidei commissum* upon the residue which shall remain unspent at the death of the surviving spouse. In general, the *fiduciarius* must hand over one-fourth to the substituted heirs and give security (*cautio*) for its restitution; but it appears from *Voet* (*36, 1, 56*) that, where spouses by joint will vest their property in the survivor with power of alienation, subject to the restitution of the residue to the heirs of both spouses, the survivor is not called upon to find caution for the restitution of a fourth, and is at liberty to alienate the whole in his lifetime, but not by will. According to Van-Leeuwen (*Censura Forensis, pt. I., bk 3, chap. 7, 15 and 16*) this power of alienation in the surviving spouse is only effectual in so

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far as the alienation is made in good faith; it cannot be exercised with a view to defrauding the substituted heirs. *Voet* (*36, 1, 54*) says: *Factae per fiduciarium dolosae donationes, fidei commissi intervertendi ac fidei commissarii fraudandi causâ, probandae non sunt ..... Ut tamen in dubio animus intervertendi fidei commissi in fiduciario non praesumendus sit, sed probatio ex indiciis manifestis per eum, qui se fraudatum ait, fieri debeat.* But there is no such *probatio* here. On the contrary, it is said that all the substituted heirs, except the four respondents, were othewise provided for in their mother's lifetime.

Finally, it was urged that the deed of gift of 8th October, 1894, by Adriana Swaris to her sons John, Henry, Martinus, and James was a testamentary document and of no effect, because the *fiduciarius* could not dispose of the *residuum* of the property by will—that it was not an alienation sanctioned by the joint will of 1860. By the deed Adriana Swaris granted, assigned, transferred, set over, and assured " a fourth of the property to each of the grantees." She was to " take, receive, and enjoy " the rents, profits, &c., and to have the power of altering or modifying the conditions stated in the deed. Each grantee had power to " give or appoint " his share by last will or deed among his children or descendants according to stated terms. On the failure of his line, his share was to pass to the two brothers who were his co-grantees, or their descendants on stated terms.

The three grantees signified their acceptance by signing the deed.

A donation is a voluntary delivery to another without cause. By a donation *inter vivos* the donor divests himself gratuitously at the time and irrevocably of the subject of donation to another who accepts it. From the words used in the deed and the limited power of appointment, which the donees could exercise in the lifetime of the donor, it might be thought that Adriana Swaris divested herself of the property and delivered it to her sons. She reserved no power to revoke the deed. It was suggested that there was no delivery, because she reserved to herself the enjoyment of the rents and income. A donation, however, may be conditional, and I do not know that it is invalid because the donor stipulates for the enjoyment of the income during his life. Reference was made to two cases mentioned by Van Leeuwen (*Censura Forensis, pt. I., bk. III., chap. 8, 16*). One of these cases arose in connection with the will of Hugo Koedyk, in his lifetime Burgomaster of Leyden. Koedyk's wife instituted him heir to all her property, with full power of alienation, provided that half of the *residuum* at the time of his death should be enjoyed by her

relations. Koedyk, after his wife's death, made over to his maid servant by deed, in consideration of her faithful services, the full right in an obligation of 4,000 guilders, reserving the yearly income thereof to himself. The donation was held to be invalid, but, so far as I understand, on the ground that it was made in fraud of the heirs designated by the will of the wife. I cannot see how the deed of the 8th October, 1894, was in fraud of the substituted heirs. With the exception of the four respondents, they had all renounced on receiving compensation, and the four respondents set up the deed. For all I know, the deed may have been executed *mortis causa;* it is dated the 8th October, 1894, and Adriana Swaris died on the 2nd December, 1894, but there is no such allegation. I hesitate to say that it was a testamentary disposition.

The will of the 8th October, 1894, which left the remaining fourth of the property to W. Johannes Fernando, the tenth defendant, is, I imagine, void on the principle that a widow enjoying property with power of alienation by virtue of the joint will of her husband and herself, subject to a *fidei commissum residui*, cannot dispose of the residue by will. But, if the plaintiffs are excluded by Engeltina's renunciation, the matter does not concern them. I think that their action was rightly dismissed with costs, and that their appeal fails.

MIDDLETON, J.—

I have had the advantage of reading my brother's judgment, and shall not therefore refer to the facts of the case, which are there sufficiently set out.

The first question is whether the appellants on behalf of the children of Engeltina, by Engeltina's action in becoming a party to the deed of 13th August, 1870 (D 2), are now estopped from claiming any share in the joint estate of Manuel Fernando and Adrian Swaris, the father and mother of Engeltina. The joint will of these two persons, which was dated 31st December, 1860, would take effect first on the death of Manuel on the 12th November, 1870. The will disposed generally of " all the movable and immovable property belonging to them " at the time of the death of the first of them.

In my opinion, at the death of Manuel the property mentioned in D 2 had already been disposed of, and was not therefore subject to the will. The condition of its alienation as it affected Engeltina was that she should not " claim any inheritance " out of the estate of her father and mother. The meaning of the word " inheritance," according to counsel for the appellants, is restricted to a derivation *ab intestato*, and he argues that, therefore, the

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testators under the will intended that Engeltina should benefit thereunder as well as by the deed. The will, however, was in existence when the deed was executed, and remained unaltered, from which the inference may be drawn that the testators, as parties to the deed, thought and intended that the word " inheritance " had and should have the wider meaning given to it in Van Leeuwen (*Kotze's Translation, vol. II., p. 312*), or it seems to me that after the execution of the deed the will should have been altered.

In my opinion, the word " inheritance " would include not only property derived by intestacy, but also by will, a demand to be considered one of the persons entitled to the residue under a will cannot, it seems to me, be otherwise than a claim of inheritance out of the estate. Putting on one side, therefore, the meaning attributed by the learned counsel to the word " claim " as sophistical, I hold that the appellants are estopped by the deed of 13th August, 1870, from making any claim to any share in the residue of the estate of Manuel Fernando and Adriana Swaris. The fact that by the terms of D 2 the donors renounced the life interest hitherto reserved to them, seems to me also to dispose of the argument that D 2 would be invalid as it could only take effect as a will.

If, however, the heirs of Engeltina are not barred by the deed of 1870 (D 2), we have to consider what is the meaning of the words, the translation of which are in dispute in the will of 1860 (D 1).

Looking at the translation of the 4th clause of page 2, the correctness of which is contended for by the appellants, it seems to me that the words " whatever property remains " contemplate a possible disposition of part of that which was to be possessed according to pleasure. They would hardly, I think, operate to prevent the sale of a portion of the estate for the debts of the surviving testator upon the judgment of a competent Court. If their meaning extended to this, it would be difficult to say that it did not embrace a right to alienate at pleasure at any rate up to a certain extent.

These words inferring a power of disposition in favour of the co-testator or co-testatrix are, however, limited by the restriction as regards the residue for the benefit of the joint testator's children.

There is no prohibition against alienation, but there are persons designated on whom a contemplated residue is to devolve.

The intention of the co-testators was, therefore, in my opinion, that the survivor of them should enjoy the joint estate with all the powers of an absolute owner, save and except the right of testamentary disposition thereon; such powers to be exercised without wanton waste, giving away or spending. Van Leeuwen *Kotze's Translation, vol. I., p. 381.*

This is a form of *fidei commissum*, which is known I believe as *fidei commissum residui*, and is common in the case of husband and wife, the survivor of whom is not bound to make an inventory or account (Van Leeuwen, *id. vol. I., p. 386*), but according to the text of Van Leeuwen's *Censura Forensis*, translated into English (*chapter VII., bk. III., p. 94*), the power of alienation is limited to the discretion of a trustworthy person, who it has been decided is not permitted to alienate more than three-fourths.

As regards the translation of the 4th clause, I should be inclined to accept that laid down by the learned Judge in the District Court, considering his undoubted knowledge of his own language, and this unquestionably discloses a power of alienation in the surviving spouse, but, as I have said before, a right to alienate is, in my opinion, deducible from the wording of the translation put forward by the appellants themselves.

The decision of the Supreme Court in the case (D. C., Colombo, 56,846) relied on by counsel for the appellants and reported in *Vanderstraaten, p. 203*, was based on the ground that the will disclosed no express power to alienate, which theory, I presume, was derived from the presumed precise terms of the Sinhalese words used, but if the English words be taken after " fifthly " at p. 203, there is strong reason to suppose that the learned District Judge was right in his view of the case.

We then come to the question whether the conveyance by deed of gift of October 8, 1894, by Adriana to her sons John, Henry, Martinus, and James was of no effect, as in fact amounting to a testamentary disposition of the residue contrary to the intention of the *fidei commissum*.

In my opinion, there was a donation which it was intended by the parties should not take effect until after the death of Adriana. If this is so, it practically amounts to a testamentary disposition which would not be permissible.

My opinion is founded on the terms of the paragraph of the document No. 1,792, marked " first," where it is covenanted that Adriana is " to take, receive, and enjoy the rents, profits, and income of the premises " purporting to be assigned during her lifetime, and " to have the right," which is thereby expressly " reserved, of altering or modifying the conditions " therein " contained," and of " creating or imposing any further condition in respect of the premises gifted," or the rents, profit or income thereof, without assigning any reason therefor, and " that after her death the said premises hereby assigned shall devolve on the said John, Henry," &c.

The property purporting to be assigned is not to devolve till after the death of the donor, and the donor is to take the rents

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and profits during her life, and to have the power of imposing any conditions she chooses.

In my view, nothing but a tenancy at will was granted under this deed by Adriana to her three sons; the property was only to devolve on the death of the would-be donor, and this, I think, is an attempt to make a will by way of deed of gift.

Although I have the misfortune to disagree with my learned brother on this point in the case, I fully agree with him that the will of October 8, 1894, would be also void.

Taking, however, the view I do on the first part of the case, that the appellants are estopped by the deed of 1870 from making any claim on the residue of the estate of Adriana and Manuel, I think that their appeal should be dismissed with costs.