G.P.-S.918—1950-1—2,000. U.D.J. 219.

9/55

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
(Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

COMMISSIONER FOR INLAND REVENUE Appellant,

versus

ESTATE LATE C.S SINCLAIR Respondent.

Appellant's Attorney Neville M
Prokureur vir Appellant

Respondent's Attorney Goodrick P.
Prokureur vir Respondent

Appellant's Advocate R.E Cooker,
Advokaat vir Appellant & A.M Hofmeyr.

Respondent's Advocate H.C Nicholas.
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op Tuesday 10th May 1955

1.3.4.5.6.

Before: Centlivres, C.J., van Heerden, Odendaal,
Fagan, & Steyn, J.J.A.

(9.45 — 12.55.
2.15 — 3.30)

— C.A.V.

Judgment: Paragraph 3(iv) of order against which the appeal is brought should be struck out, — and appeal dismissed with costs.

Centlivres, C.J.
van Heerden, Odendaal,
Fagan & Steyn, J.J.A.
24 — 5 — 55.

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

THE COMMISSIONER FOR INLAND REVENUE
Appellant

and

THE ESTATE OF THE LATE CLARICE STELLA SMOLLAN
Respondent

Coram:- Centlivres, C.J., van den Heever, Hoexter, Fagan et Steyn, JJ.A.

Heard:- 10th May, 1955. Delivered:- 24/5/1955

VAN DEN HEEVER, J.A. JUDGMENT.

On the 19th January, 1945, the late Maurice Harris Smollan and Dudley Craig Carruthers executed a notarial deed of trust, the former figuring therein as "donor" and the latter as trustee. The subject matter of the settlement was a valuable block of shares in a private company which the donor donated and the trustee accepted in trust, the latter having wide powers of administration, alienation and reinvestment.

It is provided in the deed that for

2/ a period .....

a period ending on the date being ten years from the death of the donor the income derived from the capital fund shall accrue free from income tax to his wife, Clarice Stella Smellan, and a son and a daughter, one-half thereof going to the wife. Provision is made for the substitution of other beneficiaries in respect of the income should any or all of the beneficiaries die during the currency of that period.

Clause 4 (ii) of the deed provides:-

> "Upon the date being ten years from the date of the death of the donor, the capital fund shall pass to and devolve upon the beneficiaries then participating in the income and shall be distributed amongst them in the proportions in which they are then so participating in the income, and the Trust hereby created shall thereupon cease."

The only other provisions in the deed which require to be mentioned are these: (1) upon sequestration of the estate of any beneficiary,

> "the rights of the beneficiary to any portion of the capital or any income accrued thereto and not at the date of the sequestration paid to that beneficiary, shall be forfeited and shall devolve upon such persons who would be the beneficiaries of his/her portion of the income;"

and (2) no beneficiary shall have the right to cede, assign or transfer his rights or interests to or in the capital fund or the income, the trustee being empowered to treat such rights and interests as forfeited and having devolved upon other beneficiaries.

Thereafter on the 5th December, 1947, a fresh notarial deed was executed to which the donor, his wife and his two children (that is the donor and all the primary beneficiaries expressly mentioned in the firstmentioned deed) were parties. This second document purports to be a "deed of donation and deed of trust" amending its predecessor. The amendments appear from the following clause 4 which was substituted for the original clause of that number:-

"4(1)(a) For the period commencing from the date of the aforesaid deed and ending on the date being twenty-five years from the date of the death of the donor the income from time to time derived from the capital fund shall accrue to the beneficiaries hereinafter nominated, namely:-

(i) The said Clarice Stella Smollan the wife of the donor as to one-half thereof and upon her death

to her heirs appointed by her and in accordance with her last will and testament;

(ii) The said Neville Louis Smollan the son of the donor as to one-third thereof and upon his death in accordance with sub-paragraph (b) hereof;

(iii) The said Irma Jeanette Goldstein the daughter of the donor as to the remaining one-sixth thereof, and upon her death in accordance with sub-paragraph (b) hereof.

4. (1)(b) On the death of either the said Neville Louis Smollan and /or the said Irma Jeanette Goldstein their aforesaid share of the income shall devolve upon their children in equal shares but should either of them die leaving no children surviving him or her then his or her share of the income shall devolve upon and pass to the survivor of them, and upon the death of the survivor of them to his or her children in equal shares;

4(1)(c) Any income which by the terms of this clause may devolve upon any minor child, shall until the termination of the trust ~~xxx~~ as is hereinafter provided for, be reinvested by the trustee for the benefit of the minor pursuant to the provisions of this deed, provided, however, that the trustee shall be vested with the discretion to apply the whole or any portion of that income towards the maintenance and education of such minor child.

4. (11). Upon the date being twenty-five years from the date of the death of the donor the capital fund shall

5/ pass.....

pass to and be dealt with in the following manner, namely:

(a). One-half of the capital fund shall devolve upon and be paid to the said Clarice Stella Smollan but should she be then not alive, then to her heirs appointed by her and in accordance with her last will and testament;

(b). The remaining one-half shall devolve upon and be paid to the said Neville Louis Smollan and Irma Jeanette Goldstein in the aforesaid proportions of one-third and one-sixth respectively but should they or either of them be not then alive then to their children in the proportions in which their parents were participating in the income as aforesaid, that is to say, the children of the said Neville Louis Smollan in equal shares as to one-half, and the children of Irma Jeanette Goldstein in equal shares as to one-third, and in case either of them shall die leaving no children then surviving them their share of the capital fund shall devolve as provided for in paragraph 4 (1) (b) hereof.

4. (111) No grandchildren or great grandchildren shall receive his or her share of the capital fund until he or she shall attain the age of 25 years and until that age has been attained his or her share of the capital fund shall be administered for his or her benefit upon the terms set out in this deed.

4. (1V). Should upon the date when the capital fund shall become payable as set out in paragraph 4 (11)

6/ hereof .....

hereof there be no grandchildren or great grandchildren of the donor then alive the capital fund shall pass to and devolve upon and be paid out to the heirs of the said beneficiaries."

The donor died on the 3rd July, 1951, and his wife Clarice Stella Smollan, hereinafter called "the deceased", died on the 25th March, 1952, at the age of 61 years, leaving a will in which she bequeathed all her "interest and all moneys and assets which shall accrue to me from a Trust called the 'M. H. Smollan Trust' " to certain legatees. Her conception of her rights under the trust are irrelevant.

Thereafter a dispute arose between the executors in the estate of the deceased and the Commissioner for Inland Revenue as to the amount of death duties leviable upon the deceased's estate. The Commissioner maintained that, although the deceased did not live to enjoy the full benefits conferred on her in the trust deed, those rights nevertheless constituted a fiduciary interest in terms of Section 3 (4) (b) of Act 29 of 1922 (as amended), which was liable to duty on the full amount in terms of Section 5 (b) (i) and 12 (2) of that Act, and framed his notice of assessment on that basis. The contention of the executors

7/ appears.....

appears from the relief they sought and obtained in the Witwatersrand Local Division where Williamson, J., granted an order:

1. Setting aside the abovementioned notice of assessment;

2. Directing the Commissioner to determine afresh the dutiable amounts and the duty thereon in the deceased's estate;

3. Declaring that:

(i) the interest of the deceased in the capital of the trust fund was a usufructuary or other like interest only;

(ii) Estate duty is payable upon the cessation of such interest under Section 3 (4) (c) of the Death Duties Act, No. 29 of 1922;

(iii) The value of the property deemed to pass on the death of the deceased is to be determined under Section 5 (b) (iii) of the Act; and

(iv) Each of the heirs acquired a usufructuary or other like interest in the share of the capital fund.

Against that order the Commissioner now appeals by consent of parties direct to this Court.

I have some difficulty in understanding how the donor, if he divested himself of the capital fund in the first deed, could thereafter again dispose of it in the second. Similarly one can understand that beneficiaries

under a trust may waive or consent to the alteration of their own rights to a trust fund, but it is difficult to understand how they can effectively dispose of the contingent rights of others who may subsequently appear to be beneficiaries under the unamended trust deed. However, such contingent rights are as safe under the amended trust deed as they might have been under the original and can be enforced if and when they materialise. The interests of persons who may become beneficiaries in the future cannot in my opinion be prejudicially affected by the determination of this dispute. To my mind the legal relationship, as contemplated in the Death Duties Act, between the deceased and the trust fund was in no way affected by the second deed which purported to amend the first. We need not therefore concern ourselves with the validity of the amending deed vis-a-vis other potential beneficiaries. ~~The deceased acquiesced in and was a party to the amending deed, so that her rights at least are determined by it.~~

In Estate Kemp and Others v. Mc Donald's Trustee, (1915 A.D. p. 491, 499) Innes, C.J., remarked:

"The English law of trusts forms, of course, no portion of our jurisprudence ..... but it does not

follow that testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our law."

That observation must necessarily also be applicable to acts inter vivos. Unless there is something in the transaction creating the trust or in its execution which is contrary to our laws, conducive to immorality or in conflict with public policy, there is no reason why effect should not be given to it. But in order to do so the constituent act will have to be broken down to its essential elements in order to ascertain the legal incidents which, according to our law, attach to them. Moreover, in the present instance, that proceeding is rendered necessary by the Death Duties Act which presumably employs the terminology of Roman-Dutch Law.

In the original trust deed the donor agreed "to donate" and the trustee accepted the shares constituting the capital fund. That it was no true donation to the trustee was obvious, since it was not within the contemplation of either party that the trustee should thereby

~~be enriched. But etiam per interpositam personam donatio~~

10/ ~~consummari~~ be .....

be enriched even temporarily. An essential element of fideicommissum inter vivos is therefore lacking. But etiam per interpositam personam donatio consummari potest (D. 39.5.4.). At the same time we have a contract between two persons in which one stipulates a benefit for third persons. Difficulties arising from the requisite of acceptance by a third party need not exercise us, since the deceased has undoubtedly accepted. It only remains to ascertain upon analysis what was the subject matter of the donation and what legal relationship it created between the deceased and the trust fund.

I shall first discuss the original trust deed in relation to the deceased. The deed provides that upon a date being ten years from the death of the donor the capital fund "shall devolve" upon the beneficiaries then participating in the income. The language suggests accrual at that point of time to persons not ascertained at present but to be ascertained by the course of future events. It is therefore a conditional disposition and inconsistent with the notion of immediate vesting. The

donor's dispositions in regard to the income - enjoyment of which will determine the destination of the capital - only confirms this view. He provides that a half share of "the income from time to time derived from the capital fund shall accrue" to his wife (the deceased). In the event of her death during the currency of the ten years the income "which would have accrued" to her shall devolve upon the other beneficiaries. In the same way as a bequest of an annuity is regarded in our law as a series of separate conditional legacies, not transmissible in the estate of the annuitant save in so far as they have become due (D. 33. 1. 4 and 11), so the donor contemplated a series of accruals to his wife on condition of her survival. Nowhere in the deed is there a provision in regard to a gift over burthening the deceased; indeed there was no scope for a gift over since nothing accrued to her save the periodic accruals of income. But the corpus of the trust in the hands of the trustee was impressed with a liability of which the obverse was the deceased's right to half its fruits. Mr. Coaker rightly admitted that under the

original deed the deceased was a mere usufructuary.

It was contended, however, that the amended clause 4 of the deed conferred a fiduciary interest in the corpus on the deceased. Mr. Coaker could not point to any provision in the deed enjoining a gift over from the deceased but argued that such an intention on the part of the donor is to be implied in the amended deed.

In the amended deed the duration of the trust was extended by fifteen years. It is said that the parties could hardly have contemplated that the deceased would survive her husband by 25 years. I cannot regard this provision as an impossible condition. ~~(if one could so regard it, impossible conditions are not remitted in acts inter vivos.)~~

The amended deed makes no provision as to who should receive the income or portion of the capital in the event of the deceased dying intestate before the trust comes to an end. From this Mr. Coaker infers that it was intended that her vested ~~rights~~ "equitable rights" should devolve upon her heirs ab intestato. That argument assumes that there has been a vesting and is based on the further assumption that the parties to the

13/ amended .....

amended deed did not allow a casus omissus to appear in their dispositions. Moreover the parties may have known that the possibility of Mrs. Smollan dying without leaving a will was so remote that it could be left out of consideration. To my mind the absence of such a provision was clearly a casus omissus and cannot affect the plain meaning of the words used in the deed. During the existence of the trust there would have been no one to claim the income which would have accrued to Mrs. Smollan had she lived; "her share" would therefore swell the capital amount of the trust. It may be that at the termination of the trust its performance might have become impossible pro parte, rendering it necessary to reopen the donor's estate.

It is nothing new that a person's dispositions, testamentary or inter vivos, may leave the destination of property in pendenti for a long time. I see no profit in pursuing a hypothetical question.

The fact is that Mrs. Smollan died before the termination of the trust. The condition subject to which further amounts of income and a half share of

the capital would have accrued to her has failed. She died leaving a will. The condition subject to which the persons nominated by her would become the donor's beneficiaries has therefore been satisfied. But the mere fact that it is the dispositions of her will which determine who those beneficiaries are going to be cannot serve either to vest proprietary rights in her or to turn her interest into a fiduciary interest any more than the term in a contract of sale providing that the price be fixed by a third determinate person can make that person a party to the contract or give him a share in the benefits flowing from it.

Seeing therefore that the capital fund continues to be vested in the trustee and, as far as the deceased was concerned, was charged only with a liability to furnish the deceased with an income sounding in half its fruits, the natural conclusion must be that the deceased held merely a usufructuary interest therein.

Against this conclusion Mr. Coaker

invoked the provisions of clauses 12 and 13 of the trust deed. These, it was said, contemplated "rights to portion of the capital" inherent in the beneficiaries before the termination of the trust. I cannot agree. Clause 12 contemplates the forfeiture of claims under the trust even if it would subsequently appear that, but for insolvency, the benefit would have accrued to the beneficiary. That holds also in regard to clause 13. But for this condition there would have been nothing to prevent an optimist from taking cession of a beneficiary's contingent rights and the condition was conceived in the interest of the trust as well as of persons who would become beneficiaries. But it cannot be inferred from such a condition that rights are vested in the beneficiaries any more than a pactum de non cedendo in a service contract justifies the inference that future wages still to be earned are vested in the employee (Cf. Paiges v. Van Ryn Gold Mines Estates Ltd., 1920 A.D. p. 600, 615).

Paragraph 3 (iv) of the order made by the Court a quo is hardly relevant to the present

dispute; on appeal both parties consented to its deletion.

In my judgment, therefore, paragraph 3 (iv) of the order against which the appeal is brought is struck out by consent and the appeal is dismissed with costs.

D.V.S. Heever

Centlivres, C.J.
Hoexter, J.A.
Fagan, J.A.
Steyn, J.A.
} Concur.

IN THE SUPREME COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Date : 31st December, 1954.

In the matter between:

SMOLLAN'S ESTATE Applicants

and

COMMISSIONER FOR INLAND REVENUE Respondent.

J U D G M E N T.

WILLIAMSON, J. :

The applicants in this matter are the joint executors testamentary in the deceased estate of the late Clarice Stella Smollan. They are applying for a declaratory order against the respondent in respect of the estate duty payable under the provisions of Act 29 of 1922 as amended and also in regard to the payment of succession duty in a certain respect.

The deceased had been married to one Maurice Harris Smollen who had died on July the 3rd, 1951. The deceased herself died at the age of 61 on the 25th of March, 1952. During his lifetime the deceased's husband had executed, on January the 19th 1945, a certain notarial deed of trust. Thereafter, on December the 5th 1947, this trust deed was amended in terms of a further notarial deed. In terms of this deed the husband donated to a nominated trustee 500 shares in a certain company; the deed gave the trustee full power to deal with these shares, to realise them, to re-invest the proceeds and

to/...

to possess all necessary powers for managing the trust capital fund created. Clause 4 of the original deed provided that for a period ending 10 years from the date of the death of the husband, the donor, the income from time to time derived from the capital fund should be divided between his wife as to one-half, his son as to one-third and his daughter as to one-sixth. If during this period his wife should die or either of the other beneficiaries should die the income was to devolve upon the other beneficiaries or if a beneficiary left a surviving child or children, the share of the deceased beneficiary was to go to that descendant. If all the beneficiaries died before the expiry of the period of 10 years after the date of the death of the donor leaving no issue then the income was to be distributed amongst the heirs ab intestato of the donor. After the expiry of 10 years from the date of the death of the donor the capital of the fund was to be distributed amongst the beneficiaries in the proportions in which they were entitled to the income. The other clauses of the deed provided, inter alia, for the forfeiture of the interest of any beneficiary should the estate of such beneficiary be sequestrated and it also prohibited any cession or assignment of the rights of any beneficiary in the capital fund or in the income, subject again to a forfeiture penalty in the event of there being any attempt to cede or assign any such interest. The trust, in terms of clause 14 of the deed, was to continue "until such time as there has been distributed to all the beneficiaries entitled thereto the whole of the capital amount of the trust and the accumulated and undistributed income thereon".

JUDGMENT.

In terms of the amending notarial deed of 1947 a new clause 4 was substituted for the original clau In terms of this new clause it was provided that for a period ending 25 years from the date of the death of the donor and commencing from the date of the deed the income from the capital fund "shall accrue to the beneficiaries" previously named in the same proportions, but in regard to the half to be paid to the wife it was stipulated that it should be paid "upon her death to her heirs appointed by her and in accordance with her last will and testament". In regard to the other two beneficiaries provision was made for substitution of their issue in the event of the death of either of them or in the event of one dying with no issue then the share of the predeceased was to be paid to the survivor or his issue. It was then provided that upon the expiry of the 25 years from the date of the death of the donor the capital fund should be distributed in the following manner:

"(a) One half of the capital fund shall devolve upon and be paid to the said Clarice Stella Smollan but should she be then not alive then to her heirs appointed by her and in accordance with her last will".

In regard to the other half provision was made for payment to the two beneficiaries in the same proportions as that in which they were to receive income and with substitution of their issue as in the case of income. It was finally provided that if there were no grandchildren or great grandchildren alive at the date when the capital fund was distributable then the fund was to devolve upon and be paid to the heirs of the beneficiaries.

Before her death Mrs. Smollan executed a

will/....

will dated the 21st of May 1951. Clause 2(c) thereof read as follows : "I do hereby give and bequeath all my interest and all moneys and assets which shall accrue to me from a trust called the M.H. Smollan trust executed by my husband before the Notary Public Charles Lewis on the 19th day of January 1945 and as amended on the 19th day of December 1947 before the Notary Public Albert Lifton, to the following persons in the following shares, namely, (i) my sister-in-law, Mrs. Eva Joseph,.... $13\frac{1}{3}$ % of my interest in the said trust ..... (ii) $33\frac{1}{3}$% of my interest in the said trust in equal shares to Geoffrey Bernstein .....Sylvia Bernstein....and Rita Bernstein....in equal shares, and (iii) 20% of my interest in the said trust I hereby give and bequeath in equal shares to Lieba Smollan.... Victor Smollan....Lieba Glatt....Dr. Pearl Glatt...and Miriam Glatt; (iv) the remaining $33\frac{1}{3}$ % of my interest in the said trust I give and bequeath in equal shares to my grandchildren....".

The respondent has issued a notice of assessment for death duties in terms of Act 29 of 1922 upon the basis that estate duty is payable in respect of the interest of the deceased Mrs. Smollan in the trust fund as if that interest was a fiduciary interest. It is contended by the applicants on behalf of the estate that in fact her interest was only a usufructuary interest or other like interest which became property deemed to pass upon her death in terms of section 3(4)(c) of the Act as amended. In that event the value of the property deemed to pass fell to be assessed in terms of section 5(b)(iii). If the

respondent's contention were correct the value of the property deemed to pass would have to be assessed in terms of section 5(b)(i).

It is further contended on behalf of the applicants that each of the "heirs" appointed in terms of the will of the late Mrs. Smollan in respect of her interest in the trust fund acquired only usufructuary or other like interest in the shares of the capital fund. The applicants have in the present application applied in the first place for an order setting aside the respondent's notice of assessment in respect of estate duty and succession duty and for an order directing him to determine afresh the dutiable amounts and the duty payable. Further declaratory orders are prayed for giving effect to the contentions of the applicants referred to above.

The issue as to whether the late Mrs. Smollan held a fiduciary or usufructuary interest in the trust created by her husband falls to be determined upon the construction to be placed upon the terms of the trust deed. It is to be noted that in her will she does use phrases which would indicate a belief on her part that she had a right to bequeath her interest and to deal with that interest as if it was something in her estate. The manner in which she dealt with the trust interest is, however, irrelevant except to the extent to which it is necessary to determine whether or not she did actually exercise a power of appointment. It has been argued on behalf of the respondent that the trust deed, as amended, did not confer on her any power of appointment in the ordinary sense of that term as

it has been interpreted in a number of cases in our Courts. The appointment, it was argued, by her of persons to succeed to her interest in the trust fund was an appointment of her heirs who succeeded to her interest as her heirs and not as persons appointed by her to inherit some one else's property. In other words, it was contended that the heirs were beneficiaries under her will to her estate and not beneficiaries under the trust deed. In my view, after careful consideration of the argument advanced on behalf of the respondent, Mrs. Smollan held no power to deal with the trust interest which she enjoyed as property belonging to her. The trust deed, it seems to me, clearly vested the dominium in the trust property in the trustee for the duration of the trust. It further vested in the trustee for such period complete control of the trust property subject only to a duty to pay out income in terms of the deed. All that Mrs. Smollan enjoyed was a right to her share of income as specified in the deed to which right was added a "spes" that she may acquire the capital if she survived for a period ending 25 years after the date of the death of her husband - an unlikely eventuality in the particular circumstances. She also had a right to say who would succeed to her rights at her death. I do not think anything that appears in the deed indicates any intention on the part of the donor to give her any greater rights than this. Nowhere is there a direct immediate bequest to her of any share in the capital or corpus of the trust, but in fact in clear language it is provided that she has no such interest unless she survives the period of 25 years referred to. Reliance was placed by Mr. Coaker on behalf of the respondent for his sub-

of the original testator. In fact, as pointed out by Innes, C.J., at page 506, if Susanna had lived and still childless, had passed the child bearing age, she could upon the death of her mother have compelled the trustees to pay over the corpus to her because there were no fidei-commissary heirs to follow her. Mrs. Smollan's position on the other hand, in my view, much more closely resembled the position of the widow in the case of Robertson v. Robertson's Executor, (1914, A.D., 503), than the position of the daughter Susanna in Estate Kemp's case; reference may also be made to the position of the widow in the case of Van Niekerk v. van Niekerk's Estate, (1935, C.P.D., 359). I have come to the conclusion that it is unnecessary for me to decide whether any form of interest vested in Mrs. Smollan which was transmissible to her heirs because, in any event, I think that even if some such interest vested as vested in the daughter Susanna in Estate Kemp's case it would still not follow that that interest made her a fiduciary. It is to be noted that in Estate Kemp's case the Chief Justice seemed carefully to have refrained from ever saying that the daughter Susanna's interest was a fiduciary interest. It may have been an interest something analagous to that of a fiduciary but the position still was that she was a fidei-commissary and not a fiduciary, although it was held that on a true reading of the term of the relevant document in Estate Kemp's case she nevertheless acquired some form of vested transmissible interest.

The Act in terms of which the respondent claims that duty is assessable upon a certain basis provides in express language for property being deemed

to pass upon the death of a person when any "fiduciary interest held immediately prior to his death" ceases; see section 3(4)(b) of Act 29 of 1922, as amended. I agree with respect with what is stated by Roper, J., at page 706 of his concurring judgment in the case of Kershaw's Estate v. the Commissioner for Inland Revenue (1952(2) S.A.L.R., 700), that "when the Act speaks of a fiduciary interest it uses the expression with the meaning in which it is usually understood, namely, the interest of an heir or legatee who holds the bequeathed property as owner or has at least a vested interest in its corpus subject to its going to fidei-commissaries upon the happening of a certain condition". I do not think that Mrs. Smollan ever held the trust property as owner or that she had a vested interest in its corpus even if she did have some sort of vested interest in a contingent right to get the property or capital at the end of twenty-five years. The term "fiduciary interest" must be compared, as Roper, J., compared it, with the phrase used in sub-paragraph (c) of the same section. There the Legislature referred to "any usufructuary or other like interest". Sub-paragraph (b) does not refer to any interest like a fiduciary interest, it refers only to an actual fiduciary interest. Such an interest I do not think Mrs. Smollan possessed.

An alternative line of argument was raised by Mr. Coaker for his contention that Mrs. Smollan's interest was fiduciary. This was based upon the statement in Union Government v. Olivier, (1916, A.D., 89) quoted with approval by Curlewis, C.J., in Westminster Bank Limited N.O. & Others v. Zinn, N.O., (1938, A.D. 57 at 66) to the effect that "a power of appointment

can/....

can only be exercised in our law by way of a fidei-commissum". If there was a power appointment conferred upon Mrs. Smollan then that fact indicates or must be taken to indicate that she was a fiduciary inasmuch as only a fiduciary can exercise such a power. It was submitted on behalf of the applicants that this statement in the Westminster Bank case was obiter and alternatively it was argued that in any event the authorities relied upon, namely, Voet 36. 1. 39 in re. Myburgh 13 S.C. 218 and Stanley v. Botha's Executors 19 S.C. 48 do not support the proposition stated by Juta, A.J.A., in Olivier's case quoted in the Westminster Bank case. I find it unnecessary, in my view, to deal either with the question as to whether the remark in the Westminster Bank case was obiter or whether the authorities support the statement quoted; the possible reason why a power of appointment in our law can only be exercised by a fiduciary is that no one can make a will for another and, except in the case of a fiduciary, our law knows no powers upon which another person can appoint the heirs to the property of a deceased. This proposition and the relevant authorities are fairly fully discussed in the recent publication on the South African Law of Property, Family Relations and Succession by Lee and Honoré in paragraphs 729 to 739 of that work. The reason why I do not think it is necessary for me to investigate these two questions is because I think that in any event the rule, if there be such rule, that only a fiduciary can exercise a power of appointment is to be confined to the conferring of such a power by a will and has no application to a case where inter vivos a person has entirely divested himself