16/84

Case Number:263/82

WHN

HELEN VILMA BRAUN ..... Appellant

and

BASIL EDWARD JOHN BLANN

and

FREDERICK CHRISTIAN GEORGE BOTHA .. 1st Respondents

and

THE MASTER OF THE SUPREME COURT ..... 2nd Respondent

JOUBERT, JA.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HELEN VILMA BRAUN ..... Appellant

and

BASIL EDWARD JOHN BLANN

and

FREDERICK CHRISTIAN GEORGE BOTHA ..... 1st Respondents

and

THE MASTER OF THE SUPREME COURT ..... 2nd Respondent

Coram: RABIE, C.J. et JOUBERT, VILJOEN, VAN HEERDEN, JJ.A., et GROSSKOPF, A. J. A.

Date of hearing: 22 November 1983

Date of delivery: 22 March 1984

J U D G M E N T

JOUBERT, J.A.:

/This ...

This is an appeal against the judgment of O'DONOVAN, J., in the Witwatersrand Local Division dismissing the application of the present appellant, Helen Vilma Braun (to whom I shall also refer as "Helen"), one of the beneficiaries under the will of the late Annie Mary Botha, born Holley, (the "testatrix"), for an order declaring that clause 4 of the said will is invalid and that the residue of her estate is to devolve as on intestacy.

The testatrix who died on 4 March 1981 was survived, inter alios, by (i) Helen, her only daughter, (ii) her only son Frederick Christian George Botha (to whom I shall refer as "Frederick") and

(iii) certain grandchildren. It is not necessary for purposes of this judgment to mention the names of her grandchildren and her other relatives. In clause 2 of her will the testatrix nominated Frederick and Basil Edward John Blann as her executors and administrators. In clause 3 she bequeathed certain pre-legacies. In clause 4 she purported to create a trust in respect of the residue of her estate. Clause 4 of her will is in these terms :

> "I give, devise and bequeath the whole of the rest, residue and remainder of my Estate, whether movable or immovable

/and .....

and wheresoever situate, and whether the same be in possession, reversion, remainder, expectancy or contingency, unto and in favour of my Administrators, to be held by them in trust for the following intents and purposes, and upon the following terms and conditions:-

(a) My Administrators shall have the widest and most unrestricted powers of investment and reinvestment of the capital (which expression when used in this Will shall include any income added to the capital), including the power to mortgage, pledge, hypothecate or otherwise encumber any asset forming part of the capital.

(b) My Administrators shall apply such portion as they deem fit of the net income accruing from the capital held in trust in such proportions as they shall from time to time determine for the benefit and advantage of one, more or all of :

(i) Frederick;

(ii) Helen;

(iii) FAITH BOTHA (born Fisher), the present wife of Frederick for so long as she is married to him, or during her widowhood, before re=marriage, if she shall survive him and the marriage between them shall not have been dissolved at the date of his death;

(iv) The lawful issue of Frederick;

(v) The lawful issue of Helen;

and shall add such portion of the net income as is not so applied to the capital held in trust.

(c) The trust herein created shall terminate:-

(i) As to one-half of the then capital on the death of the first dying of Frederick or Helen or on 31 December 1984, whichever event shall be the later;

(ii) As to the capital still held in trust after the application of the provisions of sub-Clause (c)(i)

/of .....

of this Clause on the death of the last dying of Frederick or Helen or on 31 December 1984, whichever event shall be the later; provided that my Administrators shall be empowered, notwithstanding the aforegoing, to postpone the termination of the trust in whole or in part for such period and on such conditions as they may determine.

(d) On the determination of the trust as to the one-half referred to in sub-Clause (c)(i) of this Clause and as to the complete trust as provided in sub-Clause (c)(ii) of this Clause, or on any postponed termination in terms of the proviso to sub-Clause (c) of this Clause, the capital concerned shall be paid to one, more or all of the persons referred to in sub-Clauses (b)(iv) and (v) of this Clause in such proportions as my Administrators shall determine <u>provided that if any of the said persons be deceased leaving lawful</u>

> issue surviving him or her my Administra=
> tors shall be empowered to apply such
> portion of the capital as they determine
> to the creation of a trust for such
> lawful issue for such period and subject
> to such terms and conditions and under
> the control of such Trustees as my
> Administrators shall determine."

(My underlining). I shall herein= after refer to the underlined words as the "proviso to clause 4(d)".

The appellant's application was opposed in the Court a quo by Frederick and the said Blann in their capacities as executors testamentary. They are the present first respondents. The Master who has been joined nominally is the present second respondent.

/No .....

No relief is claimed against him.

At the hearing of the appeal this Court appointed Miss Kuper to act as curatrix ad litem to the unborn grandchildren and great-grandchildren of the testatrix. Her report was filed early in January 1984 with the Registrar of this Court.

It is common cause that the testatrix intended to create a discretionary trust in clause 4 by conferring on her administrators as trustees, among other things, a power of appointment to select the income and capital beneficiaries of the trust from a designated group of persons. The appellant in her founding

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affidavit challenged the validity of the trust on the ground that the conferment of discretionary powers of appointment on the administrators was invalid and unenforceable in law. The gist of the argument on behalf of the appellant is that a discretionary trust of the nature contained in clause 4 is invalid since our law does not allow the conferment of such discretionary powers on trustees who have no beneficial interests in the property in question.

Roman law required a testator to execute his will personally. This was implicit in the rules

/of .....

of Roman law which prescribed the formalities for the execution of the various forms of acknowledged wills.

It was a fundamental principle of Roman law that a testator could not validly delegate his will-making power to a third party. In his Conclusiones Practicabiles, pars 3 conclusio 2 nr 37, Berlichius (1586-1638) stated the obvious with reference to Roman law, viz. that a will could not be validly executed by an agent or a representative : Sed testamentum per procuratorem fieri non potest, D 28.5.32, D 35.1.52. The Roman jurists included in the delegation of will-making power those instances where a testator in his will made the

/nomination .....

nomination of his heir directly dependent on the will, approval or discretion (arbitrium) of a third party. Instances of such nominations which were considered to be invalid were, e.g. Quos Titius voluerit (Those whom Titius has so willed) in D 28.5.32 pr., Si Titius voluerit, Sempronius heres esto (Let Sempronius be heir to me if Titius has so willed) in D 28.5.69(68). Similarly, the bequest of a legacy was void if it was made directly dependent on the will, approval or discretion (arbitrium)of a third party, e.g. Si Maevius voluerit, Titio decem do (I give ten aurei to Titius if Maevius should consent) in D 35.1.52. The non-

/delegation .....

delegation of will-making power was discussed by medieval jurists as well as jurists of the 16th and 17th centuries. See the gloss on "pendere" ad D 28.5.32; Bartolus (1313-1357) ad D 28.5.32 et 69(68); Franciscus Connanus (1508-1551), Commentariorum Juris Civilis lib X cap.6 nr 3; Duarenus (1509-1559) ad D 28.7 cap.4; Franciscus Mantica (1534-1614), De Conjecturis Ultimarum Voluntatum, lib. 4 tit. 3 nr. 12 et 14, lib. 6 tit. 14 nr. 3; Donellus (1527-1591), De Jure Civili,lib. 8 cap. 15 nr. 2 et 3; Fachineus, Controversiarum Juris, lib. 12 cap. 25; Perezius (1583-1672) ad Cod 6.24 nr. 7; Peregrinus († 1616), Tractatus de fideicommissis,

/art. ....

art. 33 nrs. 52 et 70; Brunneman (1608-1672) ad D 28.5.32 nr 1; Müller, Promptuarium Juris Novum, vol. 5 s.v. Heredis Institutio, nr. 15. Roman-Dutch law has adopted the Roman principle of non-delegation of will-making power, as appears from Vinnius (1588 - 1657) ad Inst. 2.14.9. pr., Huber (1636-1694) ad D 28.5.11, Voet (1647-1713) 28.5.29 et 30.1.36, Van der Keessel (1738-1816) Dictata ad Inst. 2.14.17 nr. 1. I may add here, in parenthesis, that it was only during the second half of the 19th century that the English Courts started their judicial condemnation of delegation of will-making power although powers of appointment

/had .....

had been in use for centuries, as appears from the article entitled "Delegation of Will-Making Power" by D. M. Gordon in vol. 69 (1953) Law Quarterly Review p 334-346.

There is, however, an important exception to the rule against the delegation of will-making power. According to Roman law it was not necessary that a testator himself should appoint his fideicommissaries. He could leave to his fiduciary heir or legatee the task of determining the fideicommissaries by conferring on him a potestas vel facultas eligendi (a power of appointment or selection) to select in his

/discretion .....

discretion the fideicommissary or fideicommissaries from a specified class of persons (certum genus personarum) designated as a group by the testator. The persons selected by the exercise of the power of appointment in the will of the fiduciary became the fideicommissaries under the will of the testator. In Roman law this power of appointment could be created only by way of a fideicommissum. In regard to this power of appoint= ment consult Smit v Du Toit en Andere, 1981(3) SA 1249 (A) at pp 1260 A-C, 1261 H and the authorities there cited to which the following may be added :

/Antonius .....

Antonius Merenda (1578-1655), Controversiarum Juris lib. XI cap. 38 nrs. 12 et 13, Peregrinus, op.cit., art. 33 nr 57, Brunneman ad D 28.5.32 nr 1, ad D 28.5.68. This power of appointment became part and parcel of Roman-Dutch law as appears from Voet 36.1. 29, Sande, A Treatise upon Restraints upon the Alienation of Things (translated by Webber) part 3 chap. 6 nr 28, part. 3 chap. 5 nr 7, 1 Hollandsche Consultatien c.165 (vierde questie).

Mention should also be made of another exception to the rule against the delegation of will-making power which originated in medieval law. By way

/of .....

of explanation I must point out that Justinian sanctioned the institution of the poor (pauperes) as heirs and conferred in certain instances on the local bishops the control over such bequests (Cod. 1.3.48(49), Nov. 131 c 11). This state of affairs apparently continued into the Middle Ages. In 1202 Innocent III (pope from 1198 to 1216) issued a papal decretal on benevolence to the bishop of Auxerre, France, which has been included in the Quinque Libri Decretalium Gregori IX, 1234 (c 13 X 3.26). The decretal provides as follows:

/Altissiodorensi .....

> Altissiodorensi Episcopo
> Quum tibi de benignitate. In secunda vero quaestione dicimus, quod qui extremam voluntatem in alterius dispositionem committit non videtur decedere intestatus.

The German translation by Schilling and Sintenis reads thus :

> Auf deine zweite Frage geben Wir den Bescheid, dass man von Dem, welcher die Verfügung über seinen Nachlass von dem Ausspruche eines Anderen abhängig macht, keinesweges sagen kan, er sei ohne letzten Willen mit Tode abgegangen.

The medieval commentators and canonists construed this decretal to apply to bequests for charitable purposes (piae causae) and to confer on the testamentary executor

/(commissarius) .....

(commissarius) a discretionary power to appoint or select the recipients of the testator's bounty from the local poor as a group of persons. See Rolandinus Bononiensis (also known as Rolandinus de Romanciis who died in 1284), Tractatus de Testamentis et Ultimis Voluntatibus,rubrica 46 nr 3 (published in vol 8 part 1 of Tractatus Universi Juris, 1584); Bartolus ad D 30 64 nr 1, ad Cod 1.2.1 nr 64; Baldus ad D 28.5.32 nrs 2 et 3. See also jurists of the 16th and 17th centuries such as : Covarruvias (1512-1577) Opera Omnia, tom. 1, de Testamentis, cap. 13 nr 14, which is a commentary on c 13 X 3.26, Julius Clarus

/(1525- .....

(1525-1575) Opera Omnia, lib. 3 §§ Testamentum, quaestio 6 nr. 5, Johannes Harpprecht (1560-1639) ad Inst. 2.14, Perezius (1583-1672) ad Cod. 6.24 nr. 8, Peregrinus, op.cit, art. 33 nr 66, Brunneman ad D 28.5.32 nr 2, ad D 28.5.68, Strykius (1640-1710) ad D 28.5.11. By way of elucidation it should be stressed that the executor was unknown to the Romans. Every valid Roman will had to contain the institution of an heir (Inst. 2.20.34) and it was the function of the latter to execute the terms of the will. The generally accepted view would seem to be that the testamentary executor originated circa the latter half

/of .....

of the 12th century. Compare Goffin, The Testamentary Executor in England and Elsewhere, 1901, pp 32-33, 37; Pitlo, De Ontwikkeling der Executele, 1941, p.86-87; De Blécourt - Fischer, Kort Begrip van het Oud-Vaderlands Burgelijk Recht, 6th ed., p 375.

After the Reformation in Holland deacons (Kerkmeesters) or institutions that had as their object the payment of alms to the poor took charge of bequests to the poor. Consult Voet 28.5.4, Van Leeuwen C.F. 1.3.83, Groenewegen ad Cod. 1.2.26. I could not find in the Roman-Dutch authorities any reference to the power of appointment which Canon law bestowed on an executor testamentary in connection with bequests to the poor.

/The .....

The trust was unknown to Roman-Dutch law (Coertze in his doctoral thesis Die Trust in die Romeins-Hollandse Reg, 1948, at p 54). It was also unknown to Roman law. Uses and trusts were introduced into England shortly after the Norman Conquest. The trust was developed by the English Court of Chancery from the Germanic Salman or Treuhand institution rather than from the Roman fideicommissum or other juridical insti= tutions of Roman law. Prof. Keeton in his Law of Trusts, 8th ed., at p 14, pointed out that :

/"The ....

> "The view current in the early part of the nineteenth century, before the rise of the modern school of legal historians, was that the English use was the counterpart of the Roman usus usufructus or of the fideicommissum, but this theory may now be regarded as finally exploded, more especially since Maitland has demonstrated that the term itself is derived not from ad usus, but from ad opus."

See also Prof. Scott, The Law of Trusts, 2nd ed., vol. 1 §§ 1.9. Admittedly, many of the functions which the fideicommissum, either by itself or in conjunction with other devices of the Roman law, performed could have been performed by the trust had the latter been known to the Romans, but the fact remains that historically

/and .....

and jurisprudentially the fideicommissum and the trust are separate and distinct legal institutions, each of them having its own set of legal rules. The fideicommissum has a long and intricate history which cannot be traced and analysed in a judgment. Broad outlines of its history are traced and some of its essential characteristics are mentioned by Prof. Beinart in his instructive article, Fideicommissum and Modus, in 1968 Acta Juridica p 157-219, although his opinion that the fideicommissum no longer merits a separate name is rather novel and certainly challengeable.

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The trust of English law forms an integral part of all common law legal systems, including American law. In its strictly technical sense the trust is a legal institution sui generis. In South Africa which has a civil law legal system the trust was introduced in practice during the 19th century by usage without the intervention of the legislature but the English law of trusts with its dichotomy of legal and equitable ownership (or "dual ownership" according to the American law of trusts) was not received into our law. The English

/conception .....

conception of an equitable ownership distinct from, but co-existing with, the legal ownership is foreign to our law. Our courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law. See Crookes N.O. and Another v. Watson and Others, 1956 (1) SA 277 (AD) at p 297 E-F and Coertze, op.cit., at p 133:

> "Die wasdom en ontwikkeling van die Treuhandidee in ons Reg het plaasge= vind onder die invloed van die Engelse Reg. Die Engelse terme trust en trustee is geadopteer maar nie die Engelse Trustreg nie. 'n Eie Trustreg is deur ons regspraktyk en deur ons howe ontwikkel; maar dis nog ver van voltooi."

/The .....

The trustee is the owner of the trust property for purposes of administration of the trust but qua trustee he has no beneficial interest therein. Should the trust fail or come to an end he does not as a result acquire a personal interest in the trust property. On his death the trust property does not devolve on his heirs. In a private trust, i.e. a trust not for an impersonal purpose, the beneficial interests appertain to the trust beneficiaries, either as income beneficiaries or as capital beneficiaries. Consult e.g. C I R & Others v. Sive's Estate, 1955(1) SA 249 (AD) at p 261 A-B,

/the .....

the Crookes case, supra, at p 305 per STEYN, J.A. :

"It is merely pro forma, and by way of more or less technical legal abstraction that he is recognised as the holder of the dominium, denuded of all benefit to himself", and C I R v. MacNeillie's Estate, 1961(3) SA 833 (AD) at p 840 G-H per STEYN C.J. : "It is trite law that the assets and liabilities in a trust vest in the trustee".

Relying on the judgment of INNES C.J. in Estate Kemp & Others v. McDonald's Trustee, 1915 AD 491 Miss Kuper submitted in her report that our common

/law .....

law powers of appointment should be extended to trustees since there was no difference in principle between a fideicommissum in terms of which a fiduciary received a personal benefit and one in which he did not. It is now necessary to refer to the said judgment of INNES, C.J.

In Estate Kemp's case (supra) this Court for the first time had occasion to construe a testa= mentary trust. The will in question created a trust in respect of the residue of the testator's estate for the benefit of a series of successive generations.

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As regards the will in question INNES C.J. at p 498

drew attention to the following aspects:

> "This is a will drawn by an English lawyer and expressed in English legal phraseology: but the testator, both at the date of execution and at the date of his death was domiciled in the Cape Colony; and his dispositions must be interpreted in the light of our own law. The outstanding feature of the document and the one which gives rise to the main difficulties surrounding the present enquiry is the direct bequest to persons who are not intended by the testator to have any enjoyment of the subject matter, but are directed to possess and administer it on behalf of successive sets of beneficiaries. Not only is the sole administration given to the parties, but the bequest carries with it, the legal ownership. And the

/question ....

question arises whether by our law an intermediate beneficiary, whose interest in the property is itself limited, can under such circumstances acquire herein a vested right trans= missible to his heirs and, therefore, amenable to the claims of his creditors after his death."

He also made the following observations at p 499 :

"The English law of trusts forms, of course, no portion of our jurisprudence: nor as pointed out by the learned JUDGE-PRESIDENT in his able reasons have our Courts adopted it; but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our own law.

The trustees, to whom the estate is directly bequeathed, are vested with the legal ownership in the assets.

/That .....

That is clear; but it is also clear that the testator never intended that they should have any beneficial interest; they were instituted not to enjoy but to administer the property. And their designation in its English meaning denotes persons entrusted (as owners or otherwise) with the control of property with which they are bound to deal for the benefit of others. In that sense the word is familiar in our own practice; trustees under ante= nuptial contract, for debenture-holders, and for public purposes are well known, and the term is also used in connection with testamentary dispositions. The duties of such a trustee are administra= tive, and he corresponds no doubt in many respects to our administrator; but a testamentary trust is in the phraseology of our law a fidei-commissum and a testamentary trustee may be regarded as covered by the term fiduciary. In

/modern .....

> modern practice 'fiduciary' is most frequently used to denote an heir or legatee who holds the bequeathed property as owner and for his own benefit subject to its passing to fidei-commissaries upon the happening of a certain condition. But it does not follow that the element of personal benefit on the part of the first holder is essential to the constitution of a fidei-commissum, or to the character of a fiduciary. It was an element which (as distinct from the statutory right of deduction) was frequently absent in the testamentary trusts (sic) of the Civil Law."
> (My underlining).

INNES, C.J. then considered three general propositions. Proposition (a) was that a testamentary fideicommissum could be so constituted as forthwith to confer upon

/the .....

the fideicommissary vested rights transmissible to his heirs. In support of this proposition he relied upon the fideicommissum purum which, according to him, was recognised by Roman-Dutch law.

I interpose here to comment on the fideicommissum purum which originated in Roman law. As regards the vesting of rights under it dies cedit and dies venit occurred simultaneously (D 36.2.5.1., D 50.16.213). The fideicommissary accordingly on the death of the testator immediately acquired a

/vested .....

vested transmissible right against the fiduciary that the latter should hand to him the bequest. If the fideicommissary died before having received the bequest the latter was to be handed to his heirs. The rights of the fideicommissary and the fiduciary were not successive but co-extensive and simultaneous. The fiduciary also acquired a vested right to the bequest on the death of the testator but his right was transitory since he was under an immediate and continuous duty to hand the bequest

/to .....

to the *fideicommissary*. The *fiduciary* was a mere conduit pipe (nudus minister) without any beneficial interest in the bequest. It was, however, to be expected that the importance of the fideicommissum purum would increasingly decline in Holland as the practice of appointing executors in wills became more common. It is therefore not surprising that circa the year 1800 Van der Keessel mentioned in his Dictata ad

/Gr .....

Gr. 2.20.7 that the application of the

fideicommissum purum had become extremely rare: "Sed raro apud nos fideicommissa pure relinquuntur ----"

This state of affairs was confirmed by the researches conducted by Prof. H.F.W.D. Fischer as appears from Appendix 2 to the Manual of South African Trust Law, 1953, by Percival Frere-Smith. It is, in my opinion, unfortunate that INNES C.J. availed himself of a rather obscure form of the fideicommissum in Roman-Dutch law as authority in support of his proposition (a).

/See .....

See also the criticism expressed by Nadaraja, The Roman-Dutch Law of Fideicommissa, 1949, at pp 235,237.

In my opinion one should rather seek support for proposition (a) in the fideicommissum sub certo die, e.g. a bequest to A for 10 years and then to B. At the death of the testator dies cedit and dies venit coincide immediately for the fiduciary in whom the legal ownership and the beneficial enjoyment of the bequest vest subject to a gift over which is to take effect at a specified future date (dies certus). The fideicommissary acquires immediately on the death of the testator a vested right in the bequest (dies

/cedit).....

cedit) which is transmissible to his heirs should he predecease the specified date. Dies venit, however, occurs on the specified date when the fideicommissary becomes entitled to claim delivery of the bequest. It is therefore the fideicommissary's right to claim and enjoy the bequest which is postponed until the specified date when the gift over is to take effect. Prior to the specified date it is an instance of dies cedit sed nondum venit. See D 50.16.213, D 33. 2.21 et 26, D 36.2.5 pr., Cod. 6.51.1c, Inst 2.23.2, Donellus, op.cit., lib 8 cap 28 nr 9, Brunneman

/ad .....

ad Cod 36.2.5, Van Leeuwen C.F. 1.3.8.30, Voet 36.1.13 et 36.2.2, Van der Linden 1.9.9, Van der Keessel, Dictata ad Inst. 2.20.23.

Proposition (b) was that a testamentary fideicommissum could also be so constituted as to separate the legal ownership from the beneficial enjoyment of the bequest, vesting the legal ownership in the fiduciary and a right to the beneficial enjoyment in the fideicommissary. In support of this proposition he relied upon D 36.2.26.1 which reads as follows:

/(Papinianus).....

(Papinianus). Cum ab heredibus alumno centum dari voluisset testator et eam pecuniam ad alium transferri, ut in annum vicensimum quintum trientes usuras eius summae perciperet alumnus ac post eam aetatem sortem ipsam : intra vicensimum quintum annum eo defuncto transmissum ad heredem pueri fideicommissum respondi : nam certam aetatem sorti solvendae praestitutam videri, non pure fideicommisso relicto condicionem insertam. Cum autem fideicommissum ab eo peti non posset, penes quem voluit pecuniam collocari, propter haec verba 'eamque alumno meo post aetatem supra scriptam curabis reddere' fideicommissum ab heredibus petendum, qui pecuniam dari stipulari debuerunt : sed fideiussores ab eo non petendos, cuius fidem sequi defunctus maluit.

(A testator willed that a hundred aurei be paid by his heirs to his foster-son and that the said sum of money be handed to a third party (alius), so that his foster-son could receive the interest thereon at the rate of four per cent per annum until he reached his twenty-fifth year when he was to receive the capital. When the foster-son died before having reached his twenty-fifth year, I advised that the bequest was transmissible to his heir. For it appears that in the unconditional bequest the attainment of a certain age by the foster-son had been inserted as a term, and not as a condition, for the payment of the bequest to him.

/Since .....

Since the heir of the foster-son cannot claim the bequest from the third party with whom the testator had willed that the money should be deposited, he should, on account of the following words in the will 'You will take charge of the payment of the money . to my foster-son after he reaches the aforementioned age', claim it from the heirs of the testator who ought to have stipulated for the repayment of the money . by the third party. The heirs of the testator could not, however, have demanded the furnishing of sureties by the third party in whom the testator reposed his confidence).

/The .....

The text of D 36.2.26. 1 is attributed to Papinian, one of the greatest of Roman jurists, who was killed in 212 A.D. The medieval glossators have made a great contribution towards the elucidation of the text. Their glosses on particular words of the text are the following:

1. "transferri" repeti voluisset, scilicet hoc modo, ut in annum.

2. "ab eo" depositario per alumnum, vel per heredes defuncti. Rog(erius) quia nondum compleverat aetatem.

3. "collocari" i.deponi, & dic voluit, scilicet etiam defunctus per heredes.

4. "curabis" tu depositarius reddere Accursius.

/5. "ab .....

5. "ab heredibus" i. alumnus petat ab herede, non a depositario, & hoc completa aetate. Vel si decessit ante tempus completum, petet heres eius : ut Cod. eodem l ex his & heres petet a depositario actione in rem, si extat pecunia, vel per actionem depositi, vel ex stipulatu, si intercessit stipulatio, quae per heredes potuit peti : non satisdatio, ut subiicit & argumen. Cod 1.4.27 & secundum hoc videtur quod executor testamenti non tenetur, ut hic : sicut nec agit, ut supra tit. j l. Lucius §§ j 2. Vel dic, alumnus vel eius heres petet ab heredibus testatoris actione ex testamento : Vel dic ab heredibus, scilicet alumni petendum a depositario, sed tunc qua actione ? Respondeo ex stipulatu, si alumnus fuit stipulatus a depositario : vel utili rei vindicatione si extat pecunia :

/vel .....

vel utili depositi, si ea lege fuit deposita, ut alumno detur, ut Cod 3.42.8 & semper dic, completa aetate. Nam si testator voluit sic D 17.1.5 & D 16.3.1.6. Sed contra D 16.3.1.46 ubi deponens potest poenitere, & repetere ante diem. Sed hic non erat simplex depositarius. Nam & commodum medii temporis poterat habere.

6. "dari" ab illo depositario.

7. "petendos" ab heredibus.

It is clear from their glosses that the third party (alius) was regarded as a depositarius with whom the heirs of the testator entered into a contract of deposit (depositum), or with whom they stipulated for

/the .....

the investment of the bequest, the periodical annual payment of the 4 per cent interest thereon and the eventual repayment of the bequest to them when the foster-son became 25 years of age. The contractual arrangement, whether flowing from depositum or stipulatio, was between the heirs of the testator and the third party (alius). Because the Romans had no executors it was the function of heirs to pay bequests (legacies) to the legatees. The foster-son on attaining the age of 25 years could use the actio ex testamento to claim the bequest from the heirs of the testator.

/If .....

If he died before having reached the age of 25 years his heir was entitled to claim the bequest from the heirs of the testator by means of the actio ex testamento. The inference is inescapable that the glossators must have regarded dies cedit as occurring on the death of the testator when the foster-son acquired a vested right to the bequest which was transmissible to his heir. But the right of the foster-son to claim payment of the bequest from the heirs of the testator was postponed until his attainment of the specified age of 25 years (dies certus) when dies venit occurred. This

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construction of the question of vesting is also in accordance with the views which the glossator Vivianus Tuscus (second half of the 13th century) expressed in his Casus ad D 36.2.26.1. By way of illustration of the text he referred to the testator as Titius, to his heirs as Petrus and Seius, and to the depositarius as Gaius. The relevant portion of his Casus is as follows:

> Si viveret, non peti posset idem fideicommissum ab Gaio, penes quem voluit testator pecuniam sive dicta centum collocari. Non potest peti dico per heredem alumni, vel heredes testatoris,

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& hoc evenit propter dicta verbis testatoris, eamque alumno meo post aetatem superscriptam curabis reddere etc. quasi dicat non ante, & quamvis ante dictum tempus fideicommissum non possit peti a dicto Gaio depositario, tamen completo dicto tempore poterit heres alumni petere ab heredibus testatoris idem fideicommissum : qui heredes testatoris debuerunt stipulari a Gaio depositario eo tempore quo deposuerunt apud eum dictam pecuniam, dari sibi heredibus testatoris etiam alumno vel heredibus eius dictam pecuniam adveniente XXV ann. quamvis fideiussores ab eo depositario super hoc non potuerunt petere, cuius fidem defunctus testator voluit sequi : & heredes testatoris potuerunt petere a depositario praedicto. Heres ergo alumni petet ab heredibus testatoris, & heredes testatoris petent a depositario.

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In D 36.2.26.1 it is stated that the bequest was left pure. If it was in fact a bequest purum then dies cedit and dies venit would have occurred on the death of the testator (D 36.2.5.1, D 50.16.213). The foster-son would accordingly have been entitled forthwith to claim payment of the bequest from the heirs of the testator but that would have been contrary to the provisions of the will as construed by Papinian and the glossators. What the foster-son was entitled to claim annually from the heirs of the testator after the death of

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the testator was the periodical payment of the interest on the capital until he attained the age of 25 years. As regards the rights of the foster-son in the capital the bequest was in diem i.e. sub certo die so that dies cedit occurred on the death of the testator and dies venit when the foster-son reached the age of 25 years (dies certus). The foster-son therefore acquired on the death of the testator a vested right in the capital of the bequest which was transmissible to his heir if he died before attaining the age of 25 years. The right of the foster-son to claim from the heirs of the testator

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payment of the capital was postponed (dilatio) until he attained the specified age of 25 years. See D 50.16. 213, D 36.2.5.1, Josephus Fernandez de Retes, Praefactio ad D de verborum obligationibus, Pars 2 Tractatus 3, Principium Primum nr. 10 (published in Meerman's Novus Thesaurus Juris Civilis & Canonici, vol 7, 1753, p 442). Bartolus, the great commentator, was correct when he stated ad D 36.2. 26.1 nr 1 :

Tempus causa aetatis adiectum causa legatarii diem non conditionem inducit.

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Was the bequest which Papinian considered in D 36.2.26.1 a fideicommissum as stated in the text ? The mere fact that the word fideicommissum was employed in the text is equivocal since Justinian by a sweeping enactment in 531 AD equated legacies to fideicommissa (Cod 6.43.2.1, Inst. 2.20.3, D 30,1: per omnia ex aequata sunt legata fideicommissis). Moreover, the compilers of the Digest made alterations in the texts of the jurists which were reproduced in it but they were not always consistent in effecting their alterations so that it is now often difficult to

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say where such alterations were made. See Beinart, op. cit., p 162, Van Oven, Leerboek van Romeinsch Privaatrecht, 2nd ed., p 554. A fideicommissum requires a fiduciary heir or legatee as well as a fideicommissary. The only bequest which the testator made of the 100 aurei was in favour of his foster-son. There was no bequest thereof in favour of his heirs or of the alius. The only acceptable conclusion is that the testator made a direct bequest by means of a legacy (legatum) in favour of his foster-son as legatee. See Cujacius, Commentaria in lib. IX Responsorum Papiniani ad l.26.1,

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in his Opera Omnia, vol 4 1722, p 1243-1244, Van Leeuwen C.F. 1.3.8.35, Bartholomaeus Chesius, De Differentiis Juris, cap 24 nr. 4 (published by Heineccius, Jurisprudentia Romana et Attica, vol 2, 1739, p 686).

In my opinion INNES C. J. (at p 502) mis=translated and misconstrued the passage in D 36.2.26.1 as having created a fideicommissum purum in respect of which the alius was the fiduciary "being apparently a mere administrator" while the foster-son was the fideicommissary. With great respect, the true

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construction is that a *legatum sub certo die*, a species of the *legatum in diem*, was coupled with a *depositum*. There was no *fideicommissum* with a fiduciary and a fideicommissary. D 36.2.26. 1 is accordingly no authority for proposition (b).

In Roman-Dutch law it is possible to couple a *fideicommissum* with *bewind* (*administratio*) by appointing a *bewindhebber* / *bewindvoerder* (*administrator*) to administer the fideicommissary property. The legal ownership of the latter, however, does not vest in the *bewindvoerder* who has mere control over *res aliena* for

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purposes of administration. See Van der Ploeg's doctoral thesis, Testamentair Bewind, 1945, p 12-20, Prof. H.F.W.D. Fischer's article, Trust, Fiducia, Bewind (Administration), Stichting (Foundation), in 1957 T.H.R -H.R. p 25-39. A fideicommissum coupled with bewind is obviously no authority in support of proposition (b). I am unable to find any authority in Roman-Dutch law to substantiate proposition (b).

It is not necessary to consider proposition (c) which INNES C.J. formulated at p 500 since it flowed from proposition (b) as he himself admitted (p 501 in fin.).

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I now turn to consider those dicta by INNES C.J. in which he identified a fideicommissum with a trust and equated a fiduciary to a trustee, as appears from the underlined words in his judgment supra. It is worthy of mention that in an appeal from a decision of the Supreme Court of Ceylon concerning the construction of a will the Privy Council in Abdul Hameed Sitti Kadija & Another v De Saram & Others, 1946 AC 208 at p 216-217 decided as follows:

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"In the opinion of their Lordships the leading clauses of this will are typical of a fidei= commissum, and are inconsistent with the structure of an English trust. The main differences between fideicommissa and English trusts are correctly set out, in the opinion of their Lordships, in Professor R.W. Lee's Introduction to Roman-Dutch Law (3rd ed.1931) at p 372, namely,' (1) the distinction between the legal estate and the equitable estate is the essence of the trust; the idea is foreign to the fideicommissum. (2) In the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive; in the fideicommissum the ownership of the fideicommissary begins when the ownership of the fiduciary ends. In the trust, the interest of the beneficiary, though described as an equitable ownership, is properly 'jus neque in re neque ad rem', against the bona fide alienee of the legal estate it is paralysed and ineffectual; in

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the fideicommissum the fideicommissary, once his interest has vested, has a right which the fiduciary cannot destroy or burden by alienation or by charge'."

In Estate Watkins-Pitchford & Others v C.I.R., 1955(2) SA 437 (AD) the following instructive remarks were made by VAN DEN HEEVER J.A. at p 460 B-D:

"Argument was addressed to us on the basis that the trustees were the fiduciaries. Our Courts have adopted this habit of speech (i.e. calling trustees without beneficial interest fiduciaries) first with hesitation and then with greater assurance. (Compare Estate Kemp and Others v McDonald's Trustee 1915 AD 491 at pp 419,517 with In re Estate Grayson 1937 AD 96). In the former case it was said that the mere circumstance that the testator did not intend to confer any personal benefit

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upon his trustees does not prevent their being treated legally or technically as fiduciary heirs. With great respect, I think that proposition requires reconsidera= tion. The legal position of such an 'administrative peg' has nothing in common with that of a fiduciary - - - - - - - - -"

SCHREINER J.A. adopted a similar approach in Greenberg & Others, v Estate Greenberg, 1955(3) SA (AD) at p 368 G :

"It is, of course, perfectly clear that our law has not absorbed the English law of trusts, but there seems to be no advantage in continuing to call a trust a fideicommissum and a trustee 'a fiduciary in the nature of an administrative peg' or 'a fiduciary under a fideicommissum purum' or the like."

I fully agree with the following views expressed by

/K.W. .....

K. W. Ryan in his unpublished doctoral thesis,

The Reception of the Trust in the Civil Law, Cambridge,

1959, at p 225-226 :

> "The question is : Can trusts take effect as fideicommissa in the civil law ? The objections to any attempt to subsume the trust under the rules of the fideicommissum are immediately obvious. The true analogy with the relation of fiduciary and fidei= commissary is that of tenant for life and remainderman, not that of trustee and bene= ficiary. A fideicommissum involves a succession of interests, not the concurrent interests of the trustee and beneficiary. The fiduciary is a limited beneficial owner, who may become the sole beneficial owner; the trustee is not a beneficial owner at all."

And also at p 232 :

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"It is submitted that any attempt to identify the trust with the fideicommissum can only lead to confusion. The two insti= tutions as they exist at the present day are quite distinct, and complementary rather than either identical or conflicting. The fideicommissum is a form of settlement. The trust, as such, does not involve a succession of interests though successive interests may be created out of the equitable estate. The essence of the trust is the separation of titular from beneficial rights over property. Those beneficial rights may be enjoyed by one person, or by persons in succession. The fideicommissum is concerned with the relations of those successively entitled, not with the relations of the titular and beneficial owner. The attempt made in South Africa to subsume trusts under the law of fidei= commissum and to equate the division between the concurrent interests of trustee and beneficiary with that between the successive interests of instituted heir and substituted heir, is therefore inadmissible."

I am of the view that it is both historically and jurisprudentially wrong to identify the trust with the fideicommissum and to equate a trustee to a fiduciary. In order to avoid confusion these legal concepts should technically be applied correctly. It is regrettable that Scott in his translation of the Corpus Juris Civilis and Gane in his translation of Voet consistently refer to fideicommissa as trusts. An unwary reader of the translations could, without having recourse to the Latin texts, easily gather the impression that trusts were known to Roman law and to Voet.

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In the light of the aforegoing I find the said submission of Miss Kuper untenable in so far as it is based on the allegation that there was no difference in principle between a fideicommissum in terms of which a fiduciary received a personal benefit and one in which he did not.

I now turn to consider whether or not our common law powers of appointment should be extended to trustees as contended for on behalf of the First Respondents. I have already shown supra how medieval Canon law extended these powers to an executor, who

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has no beneficial interest in the assets of the testator, in regard to bequests ad pias causas. In practice our Courts, without having recourse to the English law relating to charitable trusts, do recognize the validity of granting powers of appointment to trustees for charitable purposes. See e.g. Standard Bank of South Africa Ltd. N.O. v Betts Brown & Others, 1958(3) SA 713 (N). Covarruvias, loc.cit., points out that parents desiring to benefit their sons or grandsons often execute their wills in the following manner, viz.

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"I want to confer a benefit on one of my sons whom my wife selects" (Melioro unum ex filiis meis, quem mea uxor elegerit). There is no indication that the wife on whom the power of appointment was conferred received any personal benefit under the will of her husband. Covarruvias states that Lex 31 of the Leges Tauri approved of such practice. According to Du Cange, Glossarium Mediae et Infimae Latinitatis, vol 5, 1885, s.v. Lex, Leges Tauri was the name of a collection of Spanish statutory laws. It is interesting to note that in 2 Observationes Tumultuariae 1066 reference was made to Lex 32 of

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the Leges Tauri when the Hooge Raad dealt with problems arising from the will of a testator who had been domiciled in Madrid at the time of his death.

It is one of the functions of our law to keep pace with the requirements of changing conditions in our society. To recognize the validity of conferring our common law powers of appointment on trustees to select income and/or capital beneficiaries from a designated group of persons . would be a salutary development of our law of trusts and would

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not be in conflict with the principles of our law.

The approach of our Courts is to apply the principles of our law to the development of our law of trusts. I am accordingly of the opinion that the contention of the First Respondents is sound, viz. that this Court should in principle recognize the validity of the conferment of our common law powers of appointment on trustees for the purpose of selecting income and/or capital beneficiaries from a group of persons designated by testators. I refrain, however, from having regard to the technicalities and complexities of English case

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law which draws a distinction between a power of appointment as such and a power given under a trust, as appears from the article, The Most Hallowed Principle - Certainty of Beneficiaries of Trusts and Powers of Appointment, by C. T. Emery in vol 98 (1982) Law Quarterly Review p 551-586.

With regard to the contents of clause 4 of her will the testatrix in clause 4 (b) thereof conferred on her administrators a power to appoint in their discretion the income beneficiaries from a group of persons designated by her. This power of appointment

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is therefore valid. Likewise clause 4 (d) of her will conferred on her administrators a valid power to appoint in their discretion the capital beneficiaries from a group of persons specified by her. The proviso to clause 4 (d) of her will is, however, on an entirely different footing inasmuch as the testatrix purported to empower her administrators in the contingen= cy provided for to create a new trust for her great-grandchildren while she left the appointment of the trustees of such trust and the vital terms of such trust as regards determination of payment of income

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and/or capital entirely to the discretion of her administrators. In my opinion this amounts to a delegation of will-making power which exceeds the scope of a mere power of appointment of income and/or capital beneficiaries from a specified group of persons. It is in substance a delegation of will-making power to her administrators to create a new trust which the testatrix should have exercised herself. It therefore follows that the proviso to clause 4(d) is invalid.

In the result the appeal must fail. As regards the costs of the appeal I must stress the fact

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that the invalidity of the proviso to clause 4(d) of the will does not amount to partial success on the part of the appellant. The latter seeks an order declaring that the residue of the estate of the testatrix is to devolve as on intestacy because the provisions of clause 4 of the will are invalid. The invalidity of the proviso to clause 4(d) has no effect whatsoever on the validity of the testamentary trust in respect of the residue of the estate of the testatrix because it is clearly severable from the remaining provisions of clause 4.

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The following orders are granted :

1. The appeal is dismissed with costs. Such costs are to include the costs of the curatrix ad litem as well as the costs incurred by the employment of two counsel by the First Respondents. If such costs cannot be recovered from the appellant they are to be paid out of the estate of the testatrix.

2. The order of the Court a quo is amended by the insertion of the following order :

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"The proviso to clause 4(d) of the will

of the testatrix is declared to be invalid."

C. P. JOUBERT, J.A.

RABIE, C.J.
VILJOEN, J.A.
VAN HEERDEN, J.A. concur.
GROSSKOPF, A.J.A.