1897.
Jnuaary 15 and February 3.

LUSHINGTON *v.* SAMARASINGHE *et al.*

D. C., Matara, 1,263.

Fidei commissum—*Saleable interest—Contingent right.*

A joint will of a husband and wife contained the following clause :—" On the death of both of us, the donors, the above-" named seven donees, or their heirs, &c., shall possess the said " two lands thus gifted over, but shall not sell, gift, or mortgage " the same ; and on occasion of their necessity to lease the same, " they shall so lease among themselves, the above-named co-" owners, but not to any outsiders."

Held, that the words did not create a *fidei commissum*.

The interest of one of the said children was sold by the Fiscal before the death of one of the parents.

Held, that the sale was a good one, and that the purchaser at the Fiscal's sale was entitled to the share purchased by him.

THE facts appear in the judgments.

Dornhorst (*Sampayo* with him), for appellant.

Wendt, for respondent.

Cur. adv. vult.

3rd February, 1897. LAWRIE, J.—

Don Carolis was one of the seven children of Don Siman de Silva and his wife Nona Baba.

His parents by a joint deed gifted all their lands to the seven children ; the deed stated " that on the death of both of us, the " donors, the above-named seven donees, or their heirs, &c. (*sic*), " shall possess the said two lands thus gifted over, but shall not " sell, gift, or mortgage the same ; and on occasion of their necessity " to lease the same, they shall so lease among themselves, the above-" named co-owners, but not to any outsiders."

The father, Don Siman, died, but before the death of their mother Don Carolis got into debt, and on a decree against him one-seventh of the land was seized and sold by the Fiscal, and a conveyance was made in favour of Don Thepanis, the purchaser.

In the following year Government acquired part of the lands gifted for the Mátara railway, the price was deposited as subject to a *fidei commissum*, and for the purpose of having the rights of the claimant's interest a reference was made to the District Court. The District Judge held that all Don Carolis's right to the money in deposit had passed on to Don Thepanis by the Fiscal's conveyance.

Against this ruling the unsuccessful claimant has appealed.

I am of opinion that the deed does not create a *fidei commissum*. Each of the seven children take a seventh in fee, no trust is created in them for any one else ; the donors clearly expressed

1897. *January 15 and February 3.* LAWRIE, J.

their desire that the lands should not be sold or burdened by their children, but so far as I can see these children would not violate the wish of their parents, if at their deaths they by will leave their share of the lands as they please.

There is no mention of the person or class of persons who should take on the death of the seven children. If they took without undertaking a trust for the benefit of others, they took in fee.

The remaining question is whether Don Carolis's interest in the lands could be seized and sold by the Fiscal before he succeeded to possession on the death of his mother.

The Civil Procedure enacts that "an expectancy of succession "by survivorship or other merely contingent or possible right of "interest shall not be liable to seizure or sale."

Here the Fiscal professed to sell a seventh of the lands. Had the execution-debtor anything more than an "expectancy of "succession by survivorship" in that undivided one-seventh?

At first I was inclined to the opinion that the donee had no more than an expectancy of succession by survivorship. Unless he survive his mother he will get no benefit from the donation, and it seemed to me that the policy and the procedure of the law as to execution of decrees for debt was to confine execution to rights presently enjoyed by the debtor, and to discourage the dealing by heirs or their creditors with their expectancy of succession in the estates of their parents, &c.

However I find that the words "an expectancy of succession "by survivorship" have a well ascertained meaning in English Law. The right of this donee is that of a remainder man.

It is fixed English Law "that if there be no uncertainty in the "person or event upon which the remainder itself is limited, the "mere uncertainty whether it will ever take effect in possession "is not sufficient to give it the character of a contingent remain-"der."

"Thus" (continues Blackstone, from whom I am quoting) "in "the case of a lease to A for life, remainder to B for life, the limi-"tation of the remainder is to a person in being and ascertained, "and the event on which it is limited is certain, viz., the deter-"mination of A's life estate; it is therefore a vested, and not a "contingent remainder, and yet it may possibly never take effect "in possession, because B may die before A."

In another place Blackstone defines estates in possession as "those whereby a present interest passes to and resides in the "tenant not depending on any subsequent circumstance or con-"tingence."

1897.
January 15 and February 3.
LAWRIE. J.

On considering these and other authorities I am satisfied that the interest of the donee in this case was not an "expectancy of "succession by survivorship or other merely contingent or possible "right of interest." It was a present right which the donee had disposing power over, and which the Fiscal could seize and sell.

I am therefore content to affirm.

WITHERS, J.—

The question in dispute is whether the share of Don Carolis in this fund belongs to the purchaser at a Fiscal's sale of Don Carolis's interest in the land acquired by Government; in other words, was this share in the land property which the Fiscal could seize and sell? It was contended that this was not a saleable interest, and for two reasons: the document which created Carolis's interest made it also a trust which he could not alienate. Further, the document which created this trust was a will, so that at the date of the Fiscal's sale the share of Carolis was a mere expectancy. Now, by the 218th section of the Code, letter *k*, an expectancy of succession by survivorship or other merely contingent or possible right of interest is not liable to execution. If the document which created this interest were a will, the interest left under it would be purely contingent, but in my opinion this doctrine is a donation *inter vivos*, not a last will. It begins with the operative words, "We have gifted to our seven dear children the following parcels," and it concludes with these words: "We have signed and granted "this gift, so that any one of the seven donees who pleases may keep "it in his or her possession." Having described the parcels the possession of the premises is postponed to the death of the donors. This is a form of donation *inter vivos* which we have frequently recognized. It gives an immediate interest to each of the donees. There was nothing expectant or contingent about it.

Lastly, I do not consider that these premises were impressed with a true *fidei commissum*; there is no indication as to the future of the trust. No doubt the donors wished that their children should enjoy the premises, for there was a prohibition against alienation by any of the donees, and if necessity compelled a donee to lease he was to let it to the other donees, but there was no prohibition against the shares being disposed of by last will, and there are no words indicative of any person or persons to whom the property was to be preserved. On all these points I am against the appellant. I think the judgment should be affirmed.