Present : The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Middleton.

MENDIS *v.* FERNANDO *et al.*

D. C., Colombo, 21,429.

Joint will—Legacy—Death of legatee before survivor—Construction—"After the death of both of us"—Usufructuary interest—Fiduciary interest—Intention.

If a bequest contains words of futurity, the question must be considered whether they were inserted for the purpose of postponing the vesting of the legacy, or of merely deferring the fulfilment of the legacy, as where the bequest to one person is made subject to a life-interest in favour of another. If such life-interest is merely a usufructuary one, the legacy vests in the legatee immediately on the death of the testator; if it be a fiduciary interest, the vesting of the legacy is postponed till after the death of the *fiduciarius*.

Where a joint will made by husband and wife contained the following clause: "The remaining half of the Kandy land is to be divided into three portions, and after the respective death of both of us two shares is to go to. . . . . , and ⅓ of the rest of the land to our adopted sons Elias Fernando and Andris Fernando," and where the testator died in 1855, the testatrix in 1899, and Andris in 1889—

Held, that the interest left to the survivor under the will was merely a usufructuary interest, and that the legacy vested in Andris immediately on the death of the testator, and that a sale by Andris of his interest before the death of the testatrix was valid.

INTERPLEADER suit brought by the executor of the joint last will and testament of Gabriel Fernando and his wife, Poloriana Mendis, to have the judgment of the Court on the construction of the following clause in the will: "The remaining half out of the Kandy land is to be divided into three portions, and *after the respective death*

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of both of us two shares is to go to ..... and one-sixth out of the rest of the land to our adopted sons Elias Fernando and Andris Fernando."

The testator died in 1855, the testatrix in 1899, and Andris in 1889. In 1872 Andris sold his interest to one Francisco Fernando, who was married to one Sarah Cooray. Francisco Fernando died in 1884, and Sarah Cooray, as his executrix, sold his interest in 1899 to the first defendant. The contest was between the first defendant and 2nd, 4th, 5th, 6th, and 7th defendants, who claimed the share that belonged to Andris as his heirs. The District Judge (F. R. Dias, Esq.) held in favour of the 1st defendant. The other defendants appealed.

H. J. C. Pereira, for the appellants, contended that the legacy did not vest in Andris till after the death of both the testator and the testatrix, and that at the time that Andris conveyed his interest, he had no interest whatever. He cited 9 *S. C. C.* 101 and *Grotius* 2, 22, 13. He also contended that the deed purporting to be signed by Andris was a forgery.

Schneider, for the respondent, cited Van Leeuwen's *Cens. For.* 3. 8. 29, 30; and Maasdorp's *Institutes of Cape Law*, vol. I. p. 176.

Cur. adv. vult.

12th April, 1906. LASCELLES A. C. J.—

The appellant in this appeal contends that the District Judge was wrong in holding that the deed No. 145, dated 23rd August, 1872, whereby Andris Fernando purported to sell his share in a house in Colombo street, Kandy, was a genuine instrument; he further contends that at the date of that instrument Andris Fernando had no vested interest in the property in question.

On the first point I am not prepared to differ from the conclusion at which the District Judge has arrived after a careful examination of the evidence. The second question turns upon the construction of the joint will of Gabriel Fernando and his wife Poloriana. The appellant contends that under this will Andris, who predeceased the surviving widow, took no vested interest. The respondent on the other hand contends that upon the death of the testator Andris took a vested interest subject to the usufructuary interest of the surviving widow. The law is clearly summarized at page 176 of Vol. I. of Maasdorp's *Institutes of Cape Law* as follows:—" If the bequest contains words of futurity, the question will be whether they were inserted for the purpose of postponing the vesting, or of merely deferring the fulfilment of the legacy, as where the bequest to one

person is made subject to a life-interest in favour of another. In such a case the further question arises whether the person is a usufructuary or a fiduciary legatee. In the former case the legacy, as a general rule, vests in the remainderman immediately upon the death of the testator, and in the latter the vesting is postponed till the death of the fiduciary legatee."

The intention of the joint testators seems to me to be clear. In clause 3 of the will the wishes of the joint testator with regard to certain land is thus expressed: " *after being possessed by the survivor of us* we have directed that the same be equally divided between the persons therein named.

In clause 4 the gift with regard to part of the house in Colombo street is similarly expressed: " *After being possessed by the survivor of us* we have directed that the same be equally divided into eight shares, as follows ".

In clause 5, which is the material clause, the gift is in these words: " The remaining half of the Kandy land is to be divided into three portions, and *after the respective death of both of us* two shares is to go to ..... and $\frac{1}{3}$ of the rest of the land to our adopted sons Elias Fernando and Andris Fernando."

It seems to me plain that the intention of the testators was that the legatees should take the property, subject to the usufruct of the surviving testator. There is nothing in the will which indicates the intention that only those legatees should take who might be living at the death of the surviving spouse.

We have been pressed with the decision of this Court in *Joachinoe v. Robertu* (1).

It is not necessary to consider the correctness of the decision, as the language of the will in that case differs considerably from that of the will now under consideration. In my judgment the decision of the District Judge was right on both points, and I would dismiss the appeal with costs.

MIDDLETON J.—I agree.

(1) (1890) 9 *S. C. C.* 101.