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1944 *Present:* **Keuneman and Cannon JJ.**

SHERIFF, Appellant, *and* YOOSUF, Respondent.

251—D. C. Ratnapura, 7,367.

Fidei commissum—*Legacy burdened with* fidei commissum—*Death of legatee before testator—Roman-Dutch law.*

Where a *fidei commissum* is imposed on a legacy, the *fidei commissum* does not lapse with the death of the legatee before the testator.

Livera v. Gunaratne (*17 N. L. R. 289*) followed.

PLAINTIFF sued the defendant, the executor of the last will of one Mohamed Haniffa to be declared entitled to a 6/20 share of an estate called Haniffa estate. Plaintiff alleged that by his last will Haniffa devised the estate to Sitti Suleha subject to a *fidei commissum*. Plaintiff stated that the said Sitti Suleha predeceased the testator and that the legacy lapsed. Plaintiff claimed as a brother and as one of the intestate heirs of Haniffa. The defendant denied that the legacy had lapsed by the death of Sitti Suleha before the testator. The learned District Judge held that Sitti Suleha predeceased the testator and that the legacy therefore lapsed.

H. V. Perera, K.C. (with him *S. A. Marikar*), for the defendant, appellant.—This appeal involves a question of law, namely, whether a *fidei commissum* created by will lapses when the fiduciary predeceases the testator. The *fidei commissum* in question in the present case is one attached to a particular property and not to a whole inheritance. The third exception mentioned in Voet 36.1.69 (Macgregor's Translation, p. 149) covers this case. Moreover, the Roman-Dutch law relating to testamentary heirs is not applicable in Ceylon because it has been superseded by the English Law governing executors and administrators. The decision in *Livera et al. v. Gunaratna* [1] is exactly in point. See also Steyn's *Law of Wills in S. Africa* (*1935 ed.*) *pp. 220; White v. Landsberg's Executors et al.* [2]; *Oosthuysen v. Oosthuysen*.[3]

N. Nadarajah, K.C. (with him *P. Navaratnarajah*), for the plaintiff, respondent.—It is clear law that a legacy lapses when the legatee dies prior to the testator—*Grotius' Introduction to Dutch Jurisprudence 2.24.29* (Herbert's Translation, p. 171); *Pereira's Laws of Ceylon* (*1913 ed.*) *p. 463*. A legacy burdened with a *fidei commissum* will also

[1] *(1914) 17 N. L. R. 289.* [2] *S. A. L. R. (1918) C. P. D. 211.*
[3] *(1868) Buchanan's Rep. 51 at 64.*

similarly lapse when the fiduciary dies before the testator—*Lee's Introduction to Roman-Dutch Law (3rd ed.) p. 381; Pereira's Laws of Ceylon, p. 454.*

Cur. adv. vult.

November 10, 1944. KEUNEMAN J.—

The plaintiff sued the defendant the executor of the last will of Bawa Lebbe Mohamed Haniffa to be declared entitled to a 6/20 share of an undivided 10 acres of Haniffa estate. Plaintiff alleged that by his last will which was duly proved in D. C. Colombo No. 9,682 (Testy.) Haniffa devised to Sitti Suleha the said undivided 10 acres subject to a *fidei commissum* in favour of certain persons. Plaintiff further stated that Sitti Suleha predeceased the testator and that the devise had lapsed, and that by reason of the lapse the said undivided 10 acres had devolved on the intestate heirs of Haniffa. Plaintiff said he was the brother of Haniffa and one of the intestate heirs and claimed a 6/20th share of the said undivided 10 acres.

The defendant in his answer admitted the devise to Sitti Suleha and the fact that Sitti Suleha predeceased the testator, but denied that there had been a lapse and also denied the further allegations of the plaintiff.

The last will of Haniffa, No. 400 of January 20, 1941 (P1), granted the said undivided 10 acres to Sitti Suleha to be possessed during her natural life and on her death the premises were to devolve on her lawful children but should she die leaving no children the said shares of the estate were to devolve on the lawful children of Hamsia. There is no evidence on the record as to whether Sitti Suleha left any children but there is evidence that Hamsia has a son about six years old.

The District Judge held that as Sitti Suleha predeceased the testator the *fidei commissum* lapsed and failed. He gave no reasons and cited no authorities for his decision.

Authorities have now been cited to us in appeal. Voet (26.1.69)— I cite from McGregor's Voet. p. 149—states " The *fidei commissum* must also perforce fail if the fiduciary dies before the testator, because at the very time when the *fidei commissum* should vest there is no one to make restitution thereof, no one who by adiating is bound to make delivery of the *fidei commissum*. For we may take it that what has been entrusted to the good faith of a person specially named as heir the testator was desirous of giving only in the event of his being heir ".

It is to be noted that this applies to a *fidei commissum* imposed upon the heir. Voet, however, has mentioned certain exceptions to the rule: (*a*) where the testator has added the direct common substitution to the *fidei commissary* substitution; (*b*) where the codicillary clause has been inserted in a will containing a universal *fidei commissum*; (c) the case of particular *fidei commissa* with which a legatee has been burdened.

On the other hand *Steyn* (Law of Wills in South Africa p. 221) states— " A *fidei commissum* does not fail by reason of the death of the fiduciary before the testator, nor because the fiduciary refuses to adiate. In such a case the *fidei commissary* heir or legatee will be entitled to the burdened property forthwith, unless payment is in terms of the will necessarily postponed, *e.g.*, where all the *fidei commissaries* cannot then be ascertained. "

This view is based upon the change in South African Law, *i.e.*, a change from the early Roman-Dutch law conception of the heir as the universal successor of the deceased to the legislative provisions whereby the estate of a deceased person became vested in an executor: see *White v. Landsberg's executors and others* [1]. In this case Searle J. comments on the reason given by Voet for his opinion: " The fiduciary was the heir and the heir represented the *persona* of the deceased; he took over the whole estate with all its assets and obligations. But the executor has now taken the place of the heir, with the modification that he is not personally liable in the same way the heir was. his duty being to distribute the estate according to the testator's expressed wishes. There may be fiduciary heirs in modern wills and executors as well, but neither is in the same position as the heir under the old system ". The learned Judge expressed the view that it was difficult to imagine that " the reason given by Voet in the passage . . . . could influence the mind of a modern testator, who appointed executors to carry out his will, in any manner at all."

After a careful examination of a number of authorities, Searle J. came to the conclusion that " the rule of law relied on by planitiff must be regarded as in effect abrogated by modern legislation with regard to estates ".

The point emphasized in this judgment is that the rule of law enunciated by Voet has application to a *fidei commissum* imposed upon the heir under Roman-Dutch law, and it is interesting to note that in the case in question the matter related to a *fidei commissum* imposed upon the residuary legatee, and it was argued that the position of a residuary legatee resembled in some particulars at any rate the position of the Roman-Dutch heir. In the case I am now dealing with, the position is much more closely akin to the third exception mentioned by Voet, viz., a particular *fidei commissum* with which the legatee has been burdened. Such a *fidei commissum*, in Voet's view, was not defeated by the death of the fiduciary before the testator.

The argument of Searle J., which I accept, applies with equal force in Ceylon, where the modern executor has replaced the older Roman-Dutch heir by virtue of legislation. There is in fact local authority for that—see *Livera v. Guneratne*,[2] where the passage in Voet was considered. Pereira J. there stated—

" The next question is whether by reason of the death of Cornelis Jacobus before the testator the *fidei commissum* lapsed and the property fell back into the estate of the testator. Now, it is a general rule of the Roman-Dutch law that a *fidei commissum* ended by the death of the fiduciary heir before the death of the testator . . . . but " heir " must not be taken as a mere devisee under a will of our time. The reference is to the ' testamentary heir or heirs ' under the Roman-Dutch law, in whom was vested in the first instance the entirety of the property of the testator, and to whom was committed the power of carrying out his wishes and directions. In him was vested *inter alia* the rights, duties and responsibilities of the executor of our time, and his presence

[1] *(1918) Cape Supreme Court Reports 211.*

[2] *17 N. L. R. 289.*

was necessary to animate, so to say, testamentary dispositions. A devisee under a modern will, be he a total stranger to the testator or one who would but for the will be his heir according to intestate succession, is more in the position of a legatee under the Roman-Dutch law, and in the case of a *fidei commissum* with which a legacy is burdened, it does not lapse by the death of the immediate legatee before the testator."

I accordingly hold that the plaintiff has failed to prove that the testamentary devise in question has failed or lapsed. It is unnecessary to consider the other matters raised in the issues.

The appeal is allowed, and the plaintiff's action dismissed with costs in both courts.

CANNON J.—I agree.

Appeal allowed.