1922.

Present : Ennis and Porter JJ.

FERNANDO *et al.* *v.* FERNANDO.

239—D. C. Negombo, 14,501.

Property gifted by parents to child subject to the life interest of both—Death of mother—Is father entitled to life interest over the entire property ?

Where a property was gifted by a father and mother to their child " subject to the life interest of us both donors."

Held, that on the death of the mother a half share of the property became the absolute property of the donee, and that the surviving parent was not entitled to take the life interest of the half share.

THE deed of gift in question was as follows:—

P. 1. DEED OF GIFT.

No. 819.

Know all men by these presents: We, Kurukulasuriya Weerasinghe Marceline Fernando and wife Kurukulasuriya Weerasinghe Charlotta Peries, both of Negombo, hereinafter called the donors, for and his consideration of the love and affection that we have at and towards Kurukulasuriya Weerasinghe Manuel Lazer Fernando and wife Kurukulasuriya Mary Polorens Jane Fernando, both of Negombo aforesaid, hereinafter called the donees, and for diverse other good causes, the following land more fully described here below, which is of the value of Rs. 3,000 of lawful money of Ceylon, to wit:—

The land called Weediyabodawatta *alias* Suriyagahawatta belonging to me, the first person out of us the donors, upon deed No. 1,153 dated October 5, 1907, of this land, of all the fruit trees, plantations, and of the buildings thereon, the western undivided half share, together with all and singular the rights, ways, easements, advantages, and appurtenances whatsoever thereto belonging, or in any wise appertaining, or usually held, occupied, used, or enjoyed therewith, or reputed or known as part or parcel thereof, and together with all our right, title, interest, and claim therein and thereto, and also together with all the title deeds and other writings relating thereto, are hereby given, granted, assigned, and set over, as an absolute gift which cannot be cancelled, unto the said donees and their heirs, &c.

And the said donees, Kurukulasuriya Weerasinghe Manuel Lazer Fernando and Kurukulasuriya Mary Polorens Jane Fernando, and their heirs, &c., are at liberty to possess the said property hereby donated with the estate rights thereof subject to the hereunder mentioned conditions and to the life interest of us, the said two donors, for ever.

That the said donees cannot sell, mortgage, exchange, or alienate the said property, or shall not lease out for over four years at a time, and still not give another lease before the expiration of a given lease, and that after their death, the same shall devolve on their lawful heirs, and they may do whatever at pleasure.

And we the said donors for ourselves and our heirs, &c., do hereby covenant, premise, and declare that we have good right and proper power according to law to donate the said property as aforesaid, that

the said property is not subject to any incumbrance, that we shall and will warrant and defend the same unto the said donees and to their aforewritten against any person or persons whomsoever and pay compensation.

And we the said donors have accepted the above gift with thanks and respect.

H. J. C. Pereira, K.C. (with him *M. W. H. de Silva*), for defendant, appellant.

H. V. Perera, for plaintiffs, respondents.

February 3, 1922. ENNIS J.—

This is an appeal from a decree declaring the plaintiffs entitled to the possession of a half share of certain land and buildings thereon. It appears that the plaintiffs are minor children suing by their next friend, and they sue their grandfather, claiming under a deed of gift dated November 9, 1909, made by their grandfather and grandmother to their father and mother subject to a *fidei commissum* in their favour. The grandmother died about 6 years ago, and their father also died. The deed of gift conveys the property "subject to the life interest of us both donors." The learned District Judge held in favour of the minor children that these words meant that on the death of the grandmother a half share of the property became the absolute property of the minors. It was contended on appeal that the intention of the donors was that on the death of one of them the survivor should take the profits of the property donated during his lifetime, and it was suggested that the terms of the document were wide enough to give effect to this intention, and that if they were not wide enough for the purpose that a grant or condition was implied. Gifts of a similar nature, it is said, are common in Ceylon, and our attention has been drawn to the gift which was the subject of the case of *Nona v. Appuhamy*.[1] In that gift there was an express condition that on the death of one of the donors the survivor should take and enjoy all the produce during the lifetime of the survivor. No such express provision is found in the deed in the present case, and in view of the terms of section 20 of Ordinance No. 21 of 1844, I find it difficult to hold that we can imply any such condition. The Ordinance expressly provides that where a person jointly holds land, they shall be deemed to hold in common, unless the instrument under which the property is jointly held expressly provides that the survivor shall become entitled to the whole estate on the decease of one of them. In the circumstances I am of opinion that the decree appealed from is right.

I would accordingly dismiss the appeal, with costs.

PORTER J.—I agree.

Appeal dismissed.

[1] *(1921) 21 N. L. R. 165.*