1914.

Present: Pereira J. and De Sampayo A.J.

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

232—D. C. Negombo, 9,596.

Adiation—Massing of joint estate of husband and wife does not constitute adiation—Interpretation of will—Usufruct.

The mere massing of the joint estate of husband and wife for the purposes of a joint will does not by itself constitute adiation of inheritance under the will by either spouse. To constitute adiation there must be a distinct acceptance of benefits under the will by one spouse after the death of the other.

Held, that the following words in a will: " These allotments have been bequeathed unto the youngest daughter Isabella to possess and to occupy the said three lands until her lifetime " vested in Isabella no more than a usufruct in the property.

THE facts appear from the judgment.

A. St. V. Jayewardene, for the defendants, appellants.

Bawa, K.C., for the plaintiffs, respondents.

Cur. adv. vult.

September 8, 1914. PEREIRA J.—

Two questions arise for decision in this case. The first is as to the nature of the devise of the lands in claim in the joint will of Paulu Fernando and Maria, the 6th defendant, and the second is whether there was an adiation by Maria of the inheritance under the will. As regards the first, it seems to me that the object of the testators was to create a *fidei commissum* of the property in claim in the hands of Bastian in favour of his male issue. Clearly, the bequest to Isabella was not a bequest of the property itself, but of its income. In other words, what was vested in Isabella was a mere usufruct. The words bearing on this point are: " These (allotments) have been bequeathed unto the youngest daughter Isabella to possess and to occupy the said three lands until her

lifetime," meaning obviously "during her lifetime." Had the bequest been a bare bequest without qualification, it would perhaps have been open to the contention that what was intended was a bequest or devise of the *corpus*, but the object of the bequest is expressly and plainly stated in the will, and that is, to possess and occupy. The right of property in the lands in claim—a right having many attributes other than possession and occupation—is not vested in Isabella.

As regards the next question, namely, that of adiation of the inheritance under the will by the 6th defendant, it has been said that there has been a massing of the estate, but as is laid down in Nathan's work on the *Common Law of South Africa* (*vol. III., p. 1845*) on the authority of a South African case, *Barry v. Kunhardt's Executors*,[1] the mere massing of the joint estate does not constitute adiation. There must be a distinct acceptance of benefits as well, and in order to bind the survivor there must be clear proof of some unequivocal act of adiation on the part of the survivor after the death of the other spouse, so as to debar the survivor from claiming what undoubtedly belongs to him or her as his or her absolute property at the time of the other spouse's death (*Nathan, vol. III., p. 1844*). In the present case, in my opinion, there is no evidence whatever of any act of adiation by the 6th defendant. The learned District Judge was apparently looking for some act on the part of the 6th defendant that was tantamount to a revocation of the will by her. What had to be established was a positive act of adiation, rather than an act that was tantamount to revocation of the will, and that had to be done by the plaintiffs. The facts proved, in my opinion, indicate repudiation rather than adiation by the 6th defendant of benefit under the joint will.

I would vary the decree and declare the plaintiffs entitled to only a half share of the allotments of land described in it, and reduce the damage awarded to the plaintiffs to Rs. 368, that is to say, a half of Rs. 400 plus a half of the further damage awarded until 5th September, 1914.

I think that each party should bear his own costs in both Courts.

DE SAMPAYO A.J.—I agree.

Varied.

[1] *2 S. C. 89.*