Present : Bertram C.J. and Jayewardene A.J.

1924.

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

106—D. C. Colombo, 10,034.

Fidei commissum—*Gift to daughter and son-in-law—After their death to their children—Death of daughter—Rights of children.*

Where by a deed of gift property was given to the daughter and the son-in-law of the donors, subject to the following condition :—

" That the said C. D. and M. F. or either of them, shall not sell, mortgage, or otherwise alienate or encumber the said premises . . . . but shall possess them and take and enjoy the rents, profits, and income thereof, during their natural life, and upon their death, the said premises shall devolve absolutely on their lawful children."

And where the daughter died, leaving her surviving her husband and a child.

Held, that the child acquired no right to the property, until the death of both her parents.

ACTION by the first plaintiff for the recovery of a sum of Rs. 10,000 being the value of a half-share of the rents and profits of certain lands and premises, which formed the subject matter of a deed of gift No. 2,905 dated December 16, 1889; by which Johanna Fernando and Francis Dias gifted them to their daughter Carlina Dias and her husband, the defendant. The material parts of the deed of gift are as follows :—

" Unto the said Carlina Dias and Martin Fernando their heirs, executors, administrators, and assigns for ever subject to a life rent or possessing interest in our favour, which we hereby expressly reserve to ourselves, and the survivor of us during the term of our and each of our natural life, and subject also to the following condition, that the said C. D. and M. F. shall not sell, mortgage, or otherwise alienate or encumber the said premises . . . . but they shall only possess the said premises and take and enjoy the rents, profits, and income thereof, during their natural life, and upon the death, the said premises and every part thereof shall devolve absolutely on their lawful children."

Carlina Dias died on January 18, 1897, leaving her surviving her husband the defendant, and her only child the first plaintiff. The plaintiff claimed that on the death of her mother she became entitled to a half-share of the rents and profits of the lands and premises. The learned District Judge held, that the plaintiff's right to possess did not vest till the death of the defendant.

C. S. Rajaratnam (with him *Chas. de Silva*), for plaintiff, appellant.

Samarawickreme (with him *Tisseverasinghe*), for defendant, respondent.

September 10, 1924. BERTRAM C.J.—

This case discloses a point of importance with regard to the interpretation of deeds of *fidei commissum.* The facts are very simple. Johanna Fernando and Francis Dias, husband and wife, by a fiduciary deed of gift transferred certain properties, subject to the reservation of a life interest in their favour, to their daughter Carlina Dias and her husband Martin Fernando, subject to a *fidei commissum* " on their death " in favour of their lawful children. There was thus a present gift to Carlina Dias and her husband subject only to an usufruct. As a matter of fact, Carlina Dias died on January 18, 1897, thus predeceasing her father, so that her interest under the deed never became an interest in possession. This circumstance, however, does not affect the problem we have to consider, bacause even before her death, she had a vested interest. The question is, what happened on her death ? Did her interest in the property devolve upon her husband, or did it either (*a*) by virtue of the terms of the deed devolve upon her sole child, the first plaintiff, or (*b*) did it pass by inheritance to that daughter either alone or in conjunction with her father Martin Fernando ?

The question is a question of the intention of the donors as expressed by the terms of the deed. Did they intend that their daughter Carlina Dias and her husband under the deed should take a joint interest in the property, with benefit of survivorship, and that it should pass to their children on the death of both of them ? Or did they intend that Carlina Dias and her husband should be entitled to the land in equal shares, and that on the death of either, the share of the deceased should go to the children, the children thus becoming entitled, not at once on the death of both parents, but by successive stages ? There is a third alternative : Did they intend that the children of the marriage should become entitled on the death of both the parents, but did they omit to provide for the circumstance, that one parent would necessarily die before the other ?

With regard to the first of these alternatives—it is clear that there could be no accrual to the husband under the *ius accrescendi*. To this there are two obstructions : In the first place, the interest of the parents had already vested, and consequently there could be no accrual. (See *Voet VII.* 2, 1, cited in *Usoof v. Rahimath.*[1]) In the second place, I think it must now be taken as settled that the *ius accrescendi* does not apply in the case of fidei-commissary deeds of gift. We have, therefore, to interpret the deed of gift, without the aid of this legal presumption.

[1] *(1918) 20 N. L. R. 233.*

We must, therefore, in the first instance interpret the expression "upon their death." *Primâ facie* this must mean upon the death of both parents. It is true that, where the context demands it, such an expression may be interpreted distributively. Thus in *S. C., 434—D. C. Chilaw, 7,164,* where property was left to two brothers and "after their death" to their children, we were able to interpret these words as meaning after their respective deaths. But there is no occasion for such a construction in the present instance. If then, the donors intended that their grandchildren should succeed only on the deaths of the parents of these grandchildren, did they intend the survivor of the two parents should enjoy the whole of the fiduciary interest? There are undoubtedly certain difficulties. In speaking of their own life interest the donors introduce express words of survivorship. It is reserved to "ourselves and the survivor of us during the term of our and each of our natural life." But in the words immediately following, which deal with the rights of the fiduciaries, there are no express words of survivorship. We are construing a deed of gift and not a will, and our method of construction must necessarily be stricter. But, there are, I think, certain slight but definite indications in the words of the document pointing to survivorship. The deed prohibits the spouses or "either of them" from alienating the properties or any of them, or any part thereof. They are to possess them and take and enjoy the rents, profits, and income thereof during their natural life. Such words seem hardly consistent with a share in the properties passing elsewhere on the death of either of the spouses. The properties are thought of as remaining intact, and as being enjoyed undividedly. This, moreover, is in accord with what would be the natural intention of the donors.

In the very nature of the case this must be so. If the donors intended that the property should pass to their grandchildren only after the death of both the parents of those grandchildren and this, we have seen, is the *primâ facie* meaning of their gift it is surely preposterous to say that because they have not introduced precise words of survivorship, half the property shall go to a grandchild on the death of one of that grandchild's parents. If the donors did not intend that the grandchild should enjoy the property until both her parents were dead, they cannot have intended that she shall enjoy a share in one-half of it on the death of one of her parents only.

If we do not so construe the document, we are reduced to the third alternative that the deed provides for a fiduciary interest, and for the continuation of the fiduciary interest during the life of both husband and wife, and that the fidei-commissaries are only to become entitled on the death of both husband and wife, but that no provision is made for the interval between the death of

[1] *(1924) 26 N. L. R. 181.*

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one spouse and the death of the other. The situation is just that very awkward and inconvenient situation which arose in the case of *Mijiet's Executors v. Ava* discussed in *Usoof v. Rahimath* (*supra*). Should this situation be accepted, we should then have to inquire whether this vacant interest would devolve upon the heirs of Carlina Dias (which was apparently the view taken in *Mijiet's Executors v. Ava* (*supra*)) or whether the interest in question would have to be considered as part of the estate of the deceased donors, and as passing by inheritance to the heirs of these donors. The result would, no doubt, be the same under either alternative. It would be an unnatural result, contrary to all local custom, and contrary to any reasonably supposed intention of the donors.

It is urged, however, that we are precluded from adopting what we consider to be the natural interpretation of the words by the artificial effect of section 20 of Ordinance No. 21 of 1844. This is a question which has been often discussed. I think, however, that it must be taken that it was authoritatively disposed of by the Privy Council in *Tillekeratne v. Abeyesekera.*[2] It is no longer possible to suggest that the Privy Council did not consider the effect of section 20 of Ordinance No. 21 of 1844. In a previous case I have given what seem to me sufficient reasons for holding that they must have considered that section, and that the reference to section 7 of that Ordinance in the judgment is due to a confusion. (See *Craib v. Loku Appu.*[3]) It must, I think, be taken that the Privy Council have declared that Ordinance, in so far as it relates to the matter of joint tenancy, is limited to cases in which the persons interested are full owners, and the property is not burdened with a *fidei commissum.* The reason of this limitation is, I think, clear. The object of the enactment was to get rid of the inconvenient principle of English law, which had intruded itself into our own system, that where there is unity of possession, interest, and title, the ownership is presumed to be joint tenancy, and not a tenancy in common. Such a tenure in the absence of express words was unknown to the Roman-Dutch law, and the object of the enactment was to eradicate this uncongenial conception. It was not intended to impose an artificial principle of interpretation upon the construction of family settlements.

I must, therefore, dismiss the appeal, with costs.

JAYEWARDENE A.J.—I agree.

Appeal dismissed.

[1] *14 S. C. R. 511.* [2] *(1897) 2 N. L. R. 313.*
[3] *(1918) 20 N. L. R. 462.*