

1966 Present : Sansoni, C.J., T. S. Fernando, J., and Tambiah, J.

**THE ATTORNEY-GENERAL, Appellant, and MRS. JAYEWARDENE,
Respondent**

S. C. 128/64 (Inty.)-D. C. Colombo, 93/T

Estate Duty Ordinance (Cap. 241)-Sections 6 (b) and 10 (1)-" Property passing on the death of the deceased "- Life interest-Reverter of property to disponent- "No other interest is created by the said disposition"-Fideicommissum- Requirement of acceptance on behalf of the fideicommissaries-"Fideicommissum in favour of a family ".

On 26th February 1935 a daughter (the respondent to the present appeal) donated certain premises to her mother by deed PI which was in the form of a fideicommissum vesting the premises in the donee for life with a prohibition against alienation ; when the donee died, or if there was a breach of the prohibition against alienation, the premises were to revert to and vest in the donor or her children or her heirs. The deed was accepted by the donee, but there was no acceptance on behalf of the fideicommissaries.

When the donee died, estate duty was sought to be recovered from her estate in respect of the premises donated on deed Pi.

Held, that section 10 (1), and not section 6 (b), of the Estate Duty Ordinance was applicable and no estate duty was payable in terms of section 6 (b). Since the fideicommissum was not created in favour of the family of the donee, the absence of acceptance on behalf of the fideicommissaries rendered the fideicommissum invalid. Thus the condition that " no other interest is created by the said disposition " within the meaning of section 10(1) of the Estate Duty Ordinance was satisfied, even though the whole " disposition" could have been defeated and determined by a breach of the prohibition against alienation.

APPEAL from an order of the District Court, Colombo. Mervyn Fernando, Crown Counsel, for the Respondent-Appellant.

H. W. Jayewardene, Q.C., with C. Ranganathan, Q. C., N. R. M. Daluwatte and (Miss) Manouri de Silva, for the Petitioner-Respondent.

Cur. adv. vult.

March 31, 1966. **SANSONI, C.J.-**

This is an appeal by the Crown on a question of estate duty.

The Respondent to the appeal donated certain premises to her mother by deed PI dated 26th February 1935. The deed provided that the donee was to have and to hold the premises described " subject to the following conditions namely that the said donee shall not on any

account whatsoever sell, mortgage, gift, dispose of by will, or in any other manner alienate or encumber the said several premises or any of them or any portion thereof, but shall hold and possess the said several premises and enjoy the rents, profits, and income thereof during her life, and after her death the said several premises shall revert to and vest in me absolutely ; or if I be then not alive shall devolve and vest in my children and their lawful issue, the issue of a deceased child or children taking the share or shares to which his, her or their parents would have been entitled if living ; and that if there be no children or their lawful issue alive at the time, the same shall devolve on and vest in my heir absolutely ; and provided further that in the event of the said donee selling, mortgaging, gifting, or in other manner alienating the said several premises or any of them or any portion thereof, or in the event of her signing or executing any deed or writing for any of the purposes aforesaid, or in the event of the said several premises or any of them or any portion thereof being seized or sold in execution for any debt or default of the said donee, then, in any such case the benefit of the gift hereinbefore made to her shall absolutely cease and determine, and the said several premises shall devolve absolutely on the persons hereinbefore mentioned in the manner hereinbefore recited. "

The effect of the deed was to vest the premises in the donee for life with a prohibition against alienation ; when the donee died, the premises were to revert to and vest in the donor or her children or her heirs ; and the purpose of the prohibition against alienation was again to benefit the donor or her children or her heirs, since a breach of the prohibition was to result in a gift over to such persons.

The provisions of the Estate Duty Ordinance, Cap. 241, which have a bearing on this appeal are section 6 (6) and section 10. Duty is sought to be recovered from the estate of the deceased donee in respect of the premises donated on this deed. The Crown contends that it is liable to duty because under section 6 (b) property passing on the death of the deceased includes property in which the deceased had an interest ceasing on such death, to the extent to which a benefit accrues or arises by the cesser of such interest.

The respondent, however, pleads section 10 (1) in her favour. It reads:-

" Where by a disposition of any property an interest is conferred on any person other than the disponent for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponent or of any benefit to him by contract or otherwise, and the only benefit which the disponent retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person, the property shall not be deemed to pass by reason only of its reverter to the disponent in his lifetime. "

The question now is whether in the circumstances of this case the respondent has brought this deed within the terms of section 10 (1).

Mr. Fernando argued that a fidei commissum had been created by this deed in favour of the children and their lawful issue, or the heirs, of the donor ; and the creation of such a fidei commissum took the deed out of section 10 (1) which requires that there should be no other interest created apart from the interest conferred on the donee. He relied on *Attorney-General v. Glossop* [1 (1907) 1 KB.163.]. In that case property had been settled by a husband and wife upon trust to pay during their joint lives an annuity to the wife, and after their deaths to be held upon trust for the children of the marriage. It was decided that the interest given to the children of the marriage by the deed, although it was a contingent interest, took the deed out of the provisions of section 15 (1) of the Finance Act, 1896 which was in the same terms as section 10 (1) of the

Mr. Jayewardene rebutted this argument by pointing out that since this fidei commissum was not created in favour of the family of the donee, acceptance on behalf of the fidei commissaries was necessary to render the fidei commissum valid and effective so far as they were concerned. The deed showed acceptance only by the donee, and there was nothing on the face of it to show that there had been acceptance on behalf of the fidei commissaries. Consequently no valid fidei commissum had in fact been created, and thus the condition that " no other interest is created by the said disposition" within the meaning of section 10 (1) was satisfied. We hold that this argument is sound and must be upheld : see *Abeyawardene v. West* [1 (1957) 88 N.L.R. 313.]

Mr. Fernando's further submission, if his first point failed, was that the terms of the donation did not render it a disposition by which an interest was conferred on the donee " for the life of the (donee) or determinable on the (donee's) death. " He relied for this argument on the provision in the deed that if the donee alienated the premises the gift to her " shall absolutely cease and determine ". His submission was that a disposition which could be defeated by such an act on the part of the donee was not one which conferred an interest on the donee for her life, nor was such interest determinable on the donee's death.

Mr. Jayewardene's reply to this was that the interest conferred on the donee was for her life, and determinable on her death, even though the donee could by some act of his defeat the entire gift. He relied on the case of *Wiggins v. Watson* [3 (1934) A.C. 264.]. That case decided, if I may put it very briefly, that an annuity paid by a settlor to the trustees of the settlement in trust for the infant child of the settlor during the life of the infant, but subject to a power of revocation by the settlor, was not income payable " for any period less than the life " of the infant. It is true that what the Court had to construe there was a different statutory provision, viz. section 20 (1) (c) of the Finance Act, 1922, but the reasoning of the

decisions of the House of Lords and the Court of Appeal is helpful in deciding the appeal before us.

The point discussed there was whether or not the mere fact that there was a power of revocation contained in the deed meant that the disposition itself was for a period less than the life of the child. Lord Buck-master said in the course of his speech, " it appears to me that it is impossible to say that it is for a period less than the life of the child merely because there is a means by which the actual estate that is conferred may be terminated and cut short. The limitation is for the life of the child, subject to a power which enables the limitation itself to be set aside, but that does not prevent the limitation while it lasts and is not set aside being for the life of the child. " The same reasoning is to be found in the judgment of Slessor L.J. (1933) 1 K.B. 245 : "In my opinion the income is payable by virtue of the disposition for the life of the child. The disposition itself makes the income payable for the life of the child and not for a period less than the life of the child, and the fact that it remains within the power of the settlor to bring the whole disposition to an end by revocation does not seem to me to justify the assumption that the disposition itself is for a period less than the life of the child The settlor has reserved to himself the power to end the disposition, but that is an entirely different matter. The language of the sub-section might have provided for such a case, but it does not do so. "

If we apply this reasoning to the case before us, bearing in mind the terms of the deed of gift, it seems clear that by this deed an interest was conferred on the donee for the life of the donee or determinable on her death, and not for a period less than her life. The prohibition against alienation merely provided that the entire gift to her should end if she were to alienate the property. But that prohibition does not make the deed any the less a disposition which conferred on her an interest for her life or determinable on her death. To put it in another way, it may be

said that the interest conferred is for her life or determinable on her death even though the whole disposition can be defeated and determined by a breach of the prohibition. The character of the interest that was conferred by the disposition, so long as it stands, is not changed merely because the disposition itself can be terminated by her act.

For these reasons I would hold that the appeal fails and must be dismissed with costs.

T. S. FERNANDO, J.-I agree.

TAMBIAH, J.-I agree.

Appeal dismissed.

- End -