Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Duffill and another v. *Duffill, from the Supreme Court of the Colony of Natal; delivered the 7th July* 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

Charles Christian Duffill, deceased, made his will dated the 28th December 1895, and thereby, after giving a legacy of 200*l.* to his wife in the event of her surviving him, disposed of the residue of estate as follows:—

"I also bequeath to my two sons viz.—John "Henry Duffill and Charles Duffill after all my "legitimate debts and funeral expenses have "been paid and the two hundred pounds sterling "(200*l.*) to my wife (should she then be alive) "the whole of my property of any kind what-"soever to be divided equally between my "aforesaid two sons John Henry and Charles as "my executors shall deem fair and equitable.

"In the event of either of my two sons dying "before his brother without legitimate issue "then his share shall become the property of "his surviving brother but if there are any "legitimate children surviving their father then

27072. 100.—7/1903. [47]

" their father's share shall be invested in any " way my executors shall deem best. The " interest to be used for the education and main- " tenance of the said children until the youngest " attains the age of twenty-one years then the " residue to be equally divided."

The testator appointed as trustees and executors to his will John Henry Duffill, one of his sons, and one Edwin Almond.

The only question which has been argued on this Appeal is the proper construction of this will in accordance with the principles of Roman Dutch law as administered in Natal.

Two of the learned Judges in the Supreme Court have held that the substitutionary clause was intended to take effect only in the event of one of the sons dying in the testator's lifetime. The other Judge, Mr. Acting Justice Beaumont, held that the effect of the clause was to burden the share of the son who died first with a *fidei commissum*. By the Order of the Court dated the 30th September 1902 it was declared that the sons were entitled to the residue of the estate in equal shares (meaning that they were entitled absolutely), and the costs of both parties were given out of the estate.

It must be admitted that the words used by the testator will bear either construction, and also that the Court should be slow to impose a fetter on the alienation by the heir or legatee of his estate.

Their Lordships, however, think that the opinion of the dissenting Judge is more in accordance with the language used by the testator than the construction adopted by the majority. In the first place, the event on which the substitution is to take place of " either of my sons dying before " his brother " *primâ facie* means death at any time, and you would require to interpolate or imply words to confine it to death in the testator's

lifetime. And if the testator meant merely to provide for a lapse, the natural way of expressing such an intention would not be to speak of death of one before the other (which would be immaterial), but death in his (the testator's) lifetime, and you would expect the clause to go on to provide for a lapse of the whole estate by the deaths of both sons. Again, the words "his "share" and "become the property" are more appropriate to a share already acquired by the deceased son, and to a devolution or change in the property of that share, although, if the meaning were otherwise clear, the words might no doubt be interpreted as meaning the share to which the son would have become entitled if he had survived.

Their Lordships are not impressed by the difficulty which seems to have been felt by the learned Chief Justice that the testator had not disposed of the usufruct of the estate pending the happening of the event, nor do they agree that the vesting of the estate is postponed. The testator bequeaths the property (including the usufruct) to his two sons. Their Lordships hold that this bequest creates a vested interest in the sons, but one liable to be divested as to the share of the son first dying in favour of the objects named in the clause of substitution.

Their Lordships abstain from expressing any opinion as to the practical consequences of the construction which they have placed on the will, because that is a question of the law and practice of the Courts of Natal on which they have not heard argument. Probably as the property consists of freehold land, and the will will form part of the title, no difficulty will arise.

Their Lordships will, therefore, humbly advise His Majesty that the Order of the 30th September 1902 ought to be varied by adding to the declaration therein contained the words following

(that is to say): "but, subject to a *fidei commis-*
"*sum* in the events and in favour of the objects
"mentioned in the clause of substitution in the
"said will contained," and that with this amended declaration the cause ought to be remitted to the Court below for further consideration.

The Appellants, who are executors of the estate, will take their costs of the Appeal, to be taxed as between solicitor and client, out of the estate. The Respondent will bear his own costs of the Appeal.