Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Samaradiwakara and another v. *de Saram and others*; *and of de Saram and others* v. *Samaradiwakara and another, from the Supreme Court of Ceylon; delivered the* 21*st July* 1911.

PRESENT AT THE HEARING:

LORD SHAW.
LORD MERSEY.
LORD DE VILLIERS.
LORD ROBSON.

[DELIVERED BY LORD DE VILLIERS.]

The main question to be decided in this Appeal is whether on his death, which took place in 1882, Edwin Alwis had acquired such an interest in certain bequests made to him by the joint will of his parents as was capable of being and was transmitted to his heirs. The will was made on 27th April 1878 by James and Florence Alwis, who were married in community of property. It contained several clauses under distinct headings. By the 6th clause under the heading "*Ad interim* provision for the children," bequests of moveable and immoveable property were made to several of the testators' children upon their respectively marrying or attaining the age of 25 years. By the 7th clause, under the heading "Provision for the testatrix if she "survive the testator," the testators declare, "It "is our will and desire that all the above "moveable property as above settled, and all

" the immoveable property until they shall be " transferred as above directed, and the other " following lands and houses, shall be vested in " me the testatrix subject to the under- " mentioned conditions." Then follows a list of such lands and houses, the third on the list being the synagogue in Colpetty, and the fourth being Barandeniya cottage in Colpetty. The testators then direct as follows :—" Our executors " shall not sell or otherwise alienate the first " sixteen lands and premises hereinbefore men- " tioned [including the synagogue and cottage] " nor shall I the testatrix have the power to " sell or otherwise alienate the same or any " of them, but I shall have a life interest " therein." Under the 8th heading " Inheritance " upon the death of both of us " the testators gave the following among other directions : " The synagague and Barandeniya cottage in " Colpetty to vest in Edwin." By the 9th clause, under the heading, " Restrictions on the above " inheritance," the testators direct that certain of the premises including the synagague " shall not " be sold, or in anywise alienated or encumbered, " but shall devolve respectively on the lawful heirs " of the above-named devisees : in the absence " of any such lawful heirs on the persons whom " we institute heirs or his or her lawful heirs." The 10th clause contains an institution of heirs of whom Edwin is one. The testator died in 1878, and the testatrix in 1907. After the death of the testatrix the first Plaintiff, as the surviving spouse of Edwin, instituted an action in the District Court of Colombo, assisted by her second husband, the second Plaintiff, to have it declared that, as heir *ab intestato* of her deceased husband she was entitled to undivided half shares in the synagogue and the cottage. The District Court held that Edwin, on his death, transmitted no rights under either bequest to his heirs, and

accordingly dismissed the Plaintiffs' action. On Appeal the Supreme Court of Ceylon upheld the Judgment of the District Court as to the cottage, but declared that the first Plaintiff was entitled to a half share of the synagogue, with damages at a rate agreed upon by the parties. The present Appeal is brought by the Plaintiffs as to the cottage, and there is a Cross Appeal by the Defendants, who represent the estate of the testatrix, as to the synagogue.

No question arises in this case as to whether or not the provisions of the joint will were binding on the testatrix after her husband's death. They had been married in community of property, and it would have been quite competent for her, on her husband's death, to repudiate the will so far as it affected her half share of the joint estate. It is common cause, however, that she elected to take benefits under the will and to abide by its provisions. After adiation on her part she could not deprive any of the beneficiaries of rights accruing to them under the will even in her lifetime. By the 6th clause, for instance, of the will some of the children were to receive money and estates on their respectively attaining their twenty-fifth year. The testatrix could clearly not have prevented these bequests from taking full effect upon any of the children attaining that age during her lifetime. The ground upon which the Supreme Court decided against the Plaintiffs on their claim for the cottage was not that the testatrix was unable by will to confer rights to take effect during her lifetime, but that, according to the legal construction of the will, no such rights had been conferred on Edwin. The learned Chief Justice, in his carefully considered reasons, says: "The will can hardly be said to "use any technical terms of Roman-Dutch law, "it institutes and appoints heirs to the residuary

" estate but it also appoints executors ; it says on " the one hand that the widow shall not alienate " the property, words which are meaningless if " she has only a life interest, and on the other " hand it says that she is only to have a life " interest, and those words are unnecessary if " the intention that she should have the *dominium* " subject to a *fidei commissum* is sufficiently " expressed. Reading the whole will as it might " be read by a layman without any knowledge of " the technicalities of Roman-Dutch law, I should " have said that the intention was that the sur- " viving widow should have only a life interest " in those properties." Thus far their Lordships entirely agree with the Chief Justice, but he then proceeds thus: " I cannot get " over the facts that the Roman-Dutch law as to " *fidei commissa* is in force in Ceylon, and that the " testator was a Ceylon lawyer, and that the terms " of Clauses 7 and 8 of the will appeared to vest " the *dominium* in the surviving widow with a *fidei* " *commissum* in favour of Edwin Robert, and that " Clause 9 in the same way creates a *fidei com-* " *missum* as to one of the houses, after the death " of Edwin, in favour of his heirs." The Chief Justice does not quote the authority which forces him to this conclusion, but it is clear from the reasons of Mr. Justice Wood-Renton that the Supreme Court was mainly influenced by a passage in Voet's Commentaries (7. 1. 10) to the effect that where a usufruct is bequeathed to a person with a prohibition against alienation the intention should be presumed to be to confer on him full ownership. As there can be no question of a person who is not the owner of property alienating it, the presumption, according to Voet, is that where a testator prohibits a legatee from alienating property bequeathed, the intention is to make him the owner. It is not, however, more than a presumption, and

there is nothing in the passage to show that the presumption must prevail if there are other indications of a different intention on the testator's part. In the present case the testators took pains to emphasize the limited nature of the interest intended to be conferred on the surviving widow. It is true that the will does not say that she shall have "only" a life interest, but the Judges in the Court below were constrained to come to the conclusion that this is what was meant. If the word "only" had been used there would have been no doubt that a bare usufruct and not *dominium* was intended to be conferred on the testatrix. The fact that it was not used should not, in their Lordships' opinion, be allowed to frustrate the real intention of the testators. It does not appear that the surviving widow ever claimed the *dominium* even after the death of Edwin. When she came to make her separate will she treated all the properties bequeathed by the joint will as no longer belonging to her, and disposed only of such assets as were not included in the bequests given by the joint will. She may, of course, have been ignorant of her rights, but if there be any doubts as to the intention of both testators her conduct, after the death of her husband and of her son Edwin, cannot be entirely ignored.

As a further reason for holding that ownership and not usufruct was intended to be conferred on the testatrix it has been urged before their Lordships that the use of the word "vested" in the 7th clause, and the word "vest" in the 8th clause, is inconsistent with any intention to confer a vested interest on Edwin before his mother's death. If the words were used in their strictly technical sense there would be much force in this contention, but they seem to have been used in a somewhat loose sense, as indicating the time when the enjoy-

ment of the properties, whether temporary or permanent, was to have its commencement. The learned Chief Justice laid stress on the fact that the testator was a Ceylon lawyer, but under the Roman-Dutch system the word "vest" would not have the same definite and intelligible meaning as it would have either in England or in Scotland. Even under the English law the word would not necessarily import the transfer of ownership, for, as was said by Willes, J., in *Hinde* v. *Charlton* (L.R. 2 C.P. 104): "there is "a whole series of authorities in which words "which in terms vested the freehold in persons "appointed to perform some public duties, such "as canal companies and boards of health, have "been held satisfied by giving to such persons "the control over the soil which was necessary "to the carrying out the objects of the Act "without giving them the freehold." In *Stracey* v. *Nelson* (12 M. & W. 535) it was provided by an Act that certain lands should be vested in the Commissioners of Sewers, but the Court held that only the control over the land and not the freehold passed to them. From the Scotch cases cited in M'Laren's Laws of Wills and Succession (2, page 805) it would appear that in Scotland also the use of the word "vesting" is not conclusive that it was used in its strictly legal sense. Among the cases cited is Croom's case (22 D., page 49) where it was said that the appointment of an express clause of vesting is "a very doubtful remedy" for the inconvenience that sometimes arises from the difficulty of determining vesting upon legal principles. The phrase used in Roman-Dutch law to indicate that a thing has begun to be owing, the right to which is therefore transmissible, is "*dies cessit*" as distinguished from "*dies venit*," when the time for enjoyment has arrived, and the thing can be claimed (*see* Voet 36. 2. 1.). Where

the condition of a bequest is that the legatee shall survive a person having a life interest in the thing bequeathed, no transmissible interest accrues to such legatee unless the condition of survivorship is fulfilled. Their Lordships are unable to concur in the view that the use by the testators of the word "vesting" indicates an intention to impose such a condition on the bequest made by them to their son Edwin. It so happens that he left no children to whom any part of his interest could be transmitted, but the testators had no reason, during their joint life-time, to suppose that he would die childless. If he had died after his wife, leaving children by her, it would have been difficult to infer from the use of the word "vest" that the children were intended to be excluded in the event of his dying before his mother. The circumstance, however, that his wife survived him and thus became one of his heirs should not be allowed to affect the construction of the will.

As to the heading of the 8th clause of the will: "Inheritance upon the death of both of us," upon which great stress was laid in the arguments before their Lordships, it does not carry the matter much further. It indicates that the devolution of the inheritance after the death of both the testators is dealt with in that clause, but it cannot be construed as meaning that no transmissible interest should be acquired by the heirs mentioned in the clause until after the death of both the testators.

Nor is the case for the Defendants assisted by the 9th clause of the will, which directs that the synagogue "shall not be sold or in any wise "alienated or encumbered, but shall devolve "respectively on the lawful heirs of the above-"named devisees." The only difference between the bequest of the synagogue and the bequest of the cottage, is that in the case of the former, Edwin

would be restrained, after coming into possession, from alienating the synagogue, whereas in the case of the cottage no such restriction is placed upon his rights of ownership. It was rightly held by the Supreme Court that the effect of such restraint would be to impose a *fidei commissum* on him in regard to the synagogue in favour of his heirs *ab intestato*, but it does not follow that such heirs acquired no rights in respect of the cottage. He is referred to as one of the devisees, and if he was a devisee of the synagogue he was also a devisee of the cottage, the right to which he could transmit to his heirs. The Supreme Court, reversing the Judgment of the District Court in this respect, held that the heirs of Edwin are entitled under the 9th clause of the will to claim the synagogue, but the Judgment of the District Court as to the cottage was upheld. In the opinion of their Lordships, however, the rights of Edwin's heirs to the cottage are not affected by the difference between the directions as to the synagogue and the directions as to the cottage. If Edwin had come into possession of the synagogue he would not have been entitled to alienate it, but in regard to neither property was there any intention to do more than postpone the operation of the bequest.

In this view of the case it is unnecessary to express any opinion as to what the decision would have been if it had been found that the effect of the will was to create a *fidei commissum*, and not to confer a bare usufruct on the surviving testatrix. Their Lordships would, however, make this observation, that, although there is a presumption, in the case of a *fidei commissum*, that a testator intended the fidei commissary legatee to have no transmissible rights unless he survives the fiduciary legatee, such presumption would have to yield to other clear indications in the will of an intention to the contrary.

The question still remains whether the first Plaintiff, as the surviving spouse of Edwin, is entitled to any share in the properties bequeathed to him. Under the Roman-Dutch law she would not have been one of his heirs *ab intestato*, but the 26th section of the Ceylon Ordinance 15 of 1876 enacts that "when any "person shall die intestate as to any of his or "her property, leaving a spouse surviving, the "surviving spouse shall inherit one half of the "property of such person." It is clear from the 25th and subsequent sections that the object of that portion of the Ordinance was to regulate the course of intestate succession, and to fix the shares to which the heirs *ab intestato* should be respectively entitled. It was said by the Judge of the District Court that a person cannot be the widow of two persons at one and the same time, but the first Plaintiff claims to be an heir of her first husband, not as being his widow, but as being his surviving spouse, and she remains such surviving spouse whether she has re-married or not. Her rights as one of his heirs accrued at the time of his death, and, as the Ordinance does not make it a condition that the surviving spouse should not re-marry, she is not prevented when the time for the postponed enjoyment has arrived—*dies venit*—from asserting her right as one of his heirs *ab intestato*. Their Lordships will therefore humbly advise His Majesty that the Appeal against the Judgment, so far as it affects the cottage in Colpetty, Colombo, should be allowed, that the Defendants' Cross-Appeal should be dismissed, and that the first Plaintiff should be declared entitled to an undivided half share of the cottage as well as of the synagogue, and to damages at the rate agreed upon by the parties. The costs of the Appeal, and the costs in the Courts below, will be borne by the Defendants.

In the Privy Council.

SAMARADIWAKARA AND ANOTHER

v.

DE SARAM AND OTHERS;

AND

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DELIVERED BY LORD DE VILLIERS.

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