1935 *Present :* **Koch J and Soertsz A.J.**

SILVA *v.* SILVA.

416—D. C. Colombo, 839.

*Joint will—Property devised to survivor—All property in possession, reversion remainder or expectancy—*Fidei commissum *in favour of children—Right of survivor to deal with property acquired after the death of husband.*

Where a joint-will contained the following clause: "We do hereby give and devise to the survivor of us all our immovable property whether in possession, reversion, remainder or expectancy (nothing excepted) subject to the express condition that such survivor shall not sell, lease, mortgage or otherwise alienate or encumber such property, but shall only enjoy the rents, profits, and income thereof during his or her natural life and that after his or her death the said property shall devolve on our children absolutely ",—

Held, that the survivor had no disposing power over property acquired by her after the death of the husband.

THE plaintiff instituted this action against his wife to recover a sum of Rs. 2,027.79 alleged to be due to him as his half share of the rents and profits accruing from a property situated in Gasworks

street, Colombo, which the plaintiff alleged he owned in common with the defendant. The defendant sometime prior to the dates material to the suit executed a deed of gift in favour of the plaintiff, whereby she conveyed to him an undivided half share of the property. Thereafter the plaintiff executed a deed of lease in favour of the defendant in respect of the same property. Nothwithstanding the termination of the lease, the defendant remained in possession, appropriating the entirety of the rents and profits. There was no dispute as regards the rents and profits, but the defendant contended that, according to the terms of a joint will, she executed along with her former husband, she having contracted a marriage with the plaintiff forfeited her rights to the property, and consequently the deed of gift in favour of the plaintiff was ineffectual to pass title. The learned District Judge held that, inasmuch as the property dealt with under the deed of gift was acquired by her after the death of her former husband, the testator, the survivor's powers to deal with such property were unaffected by the terms of the joint will, and entered judgment for plaintiff. The defendant appeals.

N. E. Weerasooriya (with him *Ranawake* and *T. S. Fernando*), for the defendant, appellant.—The plaintiff at no time had possession. The document is a testamentary disposition; effect must be given to the testator's intentions. The appellant brought no property when she married the testator, the testator had considerable property; clearly he intended to provide for his children in the event of the appellant contracting a second marriage. By her marriage with the respondent she forfeited all rights. The testator clearly intended that she should forfeit not only her rights to his property, but to property she may acquire subsequently; *Wirasinha v .Rajapakse*[1] shows that a testator may deal with property in this manner. The words of the will are wide enough to cover the property dealt with by the defendant. There is evidence of adiation which the respondent has not rebutted.

Mackenzie Pereira, for respondent.—The plaintiff seeks to recover his share of the rents and profits, appropriated by the appellant. Our ownership cannot now be disputed. This is not an action for declaration of title to land. The appellant entered into possession of our half share as lessee. She cannot dispute our title, vide *Ameer Ali on Evidence,* p. 867. Section 115 of the Evidence Ordinance is quite clear. The deed of lease is pleaded and the appellant does not deny it. If the appellant wishes to dispute our title she must first surrender possession, and divest herself of the character of lessee. Vide *Ameer Ali on Evidence, p. 868, Muthuneyien v. Samaraya*[2], *Bilas Kunwar v. Ranjit Sinh*[3], *Ganapat Rai v. Multan*[4]. Apart from the question of estoppel, the appellant here is seeking to derogate from her own grant. The evidence shows that the testator's mother had a life interest in all the properties dealt with under the will; she died sometime after the testator, the appellant could not have taken any benefits under the will so long as the testator's mother was alive. Entering into possession

[1] *16 N. L. R. 356.*
[2] *28 Mad. 526.*
[3] *37 All. 557.*
[4] *38 All. 226.*

per se is an equivocal act, it is inssufficent to constitute adiation. The property conveyed to us accrued to the appellant long after the testator's death. It cannot be urged that the possibility of the survivor obtaining the present property could have been in the contemplation of the testators, at the execution of the will. The case of *Wirasinha v. Rajapakse* (*supra*) does not cover the facts of the present case; there the intention of the testator was quite clear. The dictum of Wood Renton J. is obiter, it cannot be claimed as an authority for the proposition, that a testator can in a joint will dispose of the property which the surviving spouse may acquire after the death of the testator: The words "nothing excepted" cannot help the appellant, as they refer to the class of property designated in the preceding words "reversion remainder or expectancy". They do not, for instance, cover property she may acquire by some accidental circumstance. The property dealt with cannot be designated as property in remainder reversion or expectancy.

Cur. adv. vult.

October 3, 1935. KOCH J.—

We think the appeal in this case should succeed.

The plaintiff sued the defendant for the recovery of a sum of Rs. 2,027.79 with interest on the footing that he was the owner of an undivided one-sixteenth share of certain premises situated in Dam street and Gasworks street. His position briefly was that he had acquired title to this one-sixteenth on a deed of gift from his wife who is the defendant, and that he thereafter leased this share under deed to the defendant, and that after the expiration of the lease the defendant "continued to collect the rents of the plaintiff's share together with those due on her share"—paragraph 3 of the plaint. The sum he claimed represented these collections from May 1, 1933, to March 1, 1934. The defendant denied the plaintiff's title to this share and consequently his right to sue.

There were three specific issues on which the District Judge has recorded that the parties went to trial. An issue of estoppel was suggested by the defendant's counsel but this was not allowed by the District Judge.

The learned District Judge in the course of his judgment observes *en passant* that no estoppel could arise. It is not necessary for us in appeal to say anything more regarding this point except that it would appear that the District Judge was right in his remark.

The entire appeal therefore rests on one point only, and that is whether the plaintiff has a status on which he can found his claim. This purely depends on the construction of paragraph 5 of the joint will D 13, filed in case No. 53,500 of the District Court of Colombo. The paragraph reads thus:—

> "We do hereby give and devise to the survivor of us all our immovable property whatsoever and wheresoever situate and whether in possession reversion remainder or expectancy (nothing excepted)

subject to the express condition that such survivor shall not sell, lease, mortgage or otherwise alienate or encumber any such property but shall only enjoy the rents, profits, and income thereof during his or her natural life and that after his or her death the said property shall devolve on our children absolutely in the following manner."

This being a will, full effect must be given to the intentions of the testator and testatrix.

Considering that the first husband of the defendant—one of the authors of the will—owned valuable properties at the date of the execution of the will and his wife the defendant had nothing, it would be reasonable to suppose that his intention was that if his wife gained benefit under his will in respect of those properties, she should in the event of her marrying a second time be deprived of not only her interests in his properties but also of any property that she may be invested with at any time in the future, even though acquired after his death. The one-sixteenth share conveyed to the plaintiff was half of a one-eighth share the defendant acquired after her first husband's death. Do the words in the will bear out this intention?

I think the words "whatsoever and wheresoever", "whether in possession, reversion, remainder or expectancy" were inserted in the will by the notary on instructions that the defendant should be deprived of whatever properties she held at the time of the second marriage. There are the additional words "nothing excepted" which lend point to the intention of the husband to deprive her of everything immovable she may acquire before a second marriage.

The case of *Wirasinha v. Rajapakse*[1] is referred to by the learned District Judge. It is true that Wood Renton J. there was of opinion that the intention of the testator was not to include the property acquired by the testatrix after the death of the testator. The learned Judge, however, came to that conclusion and disagreed with the District Judge because the language of that will hardly justified the District Judge's finding. The relevant terms of that will are recited in Wood Renton J.'s judgment, and it will be seen on comparison that the language in the will before us is much stronger and clearer as to the intentions of the testator. It must be noted that Wood Renton J. definitely states that the words appearing in that will were, to use his own words, "no doubt wide enough to cover property acquired by one spouse after the death of the other, and there is of course no reason in law why effect should not be given to such a provision in a will if we can really find it there". He, however, decided against the District Judge's view because he felt that on the whole, taking the passage which contained those words with the context, "the intention of the spouses was to deal merely with the property belonging to them at the time of marriage or acquired by either of them while the marriage subsisted".

I see nothing in the context of the will before us to detract in any way from the effect of paragraph 5.

[1] *16 N. L. R. 356.*

There is clear evidence of the defendant having stepped into possession of the properties of her husband after his death, and there is therefore the necessary adiation required by the Roman-Dutch law.

The judgment of the District Judge will be set aside and the plaintiff's action dismissed with costs. The appellant will have her costs of appeal.

SOERTSZ A.J.—I agree.

Appeal allowed.