1949 *Present:* **Wijeyewardene C.J. and Basnayake J.**

THINORIS DE SILVA, Appellant, *and* WEERASIRI *et al.*, Respondents

S. C. 363—D. C. Galle, 35,919

Will—Fidei commissum—*Testator's devise to two sons—"After their death" the property to pass to "their lawful children"—Time at which the property devolved on the fideicommissaries—Distributive interpretation of the word "their".*

A testator devised a land to his two sons A and P. The will imposed a prohibition against alienation and further provided: (1) "In the event of the death of either of my said two sons without lawful issue I do hereby direct that the survivor shall become entitled to the share of the one so dying", (2) "After their death their lawful children shall become entitled to the same absolutely".

A died unmarried and without children. It was contended that on A's death P became entitled not absolutely but, under a *fidei commissum*, only to a life interest in A's half share.

Held, (i) that on the death of either A or P the half share given to the person so dying would devolve absolutely on his lawful children;

(ii) that as A died without lawful children the half share devised to him went to his brother P absolutely.

APPEAL from an order of the District Court, Galle.

H. V. Perera, K.C., with *U. A. Jayasundera, K.C.*, and *Vernon Wijetunge*, for plaintiff appellant.

N. E. Weerasooria, K.C., with *H. A. Chandrasena* and *W. D. Gunasekera*, for the intervenients respondents.

Cur. adv. vult.

October 11, 1949. WIJEYEWARDENE C.J.—

One Don Frederick Weerasiri was the original owner of a land called Medawatte. By Last Will P1 he devised his property to his two sons, Ariyadasa and Piyatileke, subject to certain conditions. The Last Will was duly proved at his death. Subsequently Ariyadasa died unmarried and without children. By deed P2 of 1936 Piyatileke conveyed to the plaintiff the half share which, he alleged, devolved on him absolutely on the death of Ariyadasa. The intervenients, who are the widow and children of Piyatileke, contested the title of the plaintiff to this land on the ground that, on the death of Ariyadasa, Piyatileke became entitled to that share subject to a *fidei commissum* and that, therefore, Piyatileke could transfer to the plaintiff only his life interest in that half share. The present appeal is from the judgment of the District Judge upholding the contention of the intervenients.

The clauses of P1 which have to be considered are clauses 8, 9, 10 an 12.

By clause 8 the testator devised to Ariyadasa and Piyatileke his resi ing land Medawatte and several other lands. By clause 12 he provid that the devisees should have the right to enter into possession of these properties and take the income only after the death of his wido

Clause 9.—" In the event of the death of either of my said two so without lawful issue I do hereby direct that the survivor sh become entitled to the share of the one so dying."

Clause 10.—(*a*) " I hereby will and direct that my said two so shall only have the right to enjoy the rents, issues and pro derived from my residing land Medawatte and all the bui ings thereon devised to them by clause 8 of the Will."

(*b*) " They shall not sell, gift, mortgage or otherwise alienate encumber the same or lease the same for any period exceed two years at a time and "

(*c*) " After their death their lawful children shall become entit to the same absolutely."

I have divided clause 10 of the Will into paragraphs (*a*), (*b*) and for convenience of reference.

Now under clauses 8 and 12 Ariyadasa and Piyatileke would h become each entitled to an undivided half share of Medawatte sub to the life interest of the widow of the testator. Under these cla alone there would have been no right of survivorship (*vide* section the Wills Ordinance). Then we get clause 9 which says that on death of either Ariyadasa or Piyatileke without lawful issue the surv shall become entitled to the share of the one so dying. If this cl stood by itself the question would have arisen whether the Last created a *fidei commissum* in favour of the lawful issue. In other w if Ariyadasa had lawful issue and Ariyadasa transferred his shar a third party, could the rights of that third party have been defe by the lawful issue of Ariyadasa claiming that half share as fidei missaries on the death of Ariyadasa ? This is a matter on whic views of Grotius and Bynkershoek are opposed to the views of S and van Leeuwen (*Censura Forensis*) as adopted in *Steenkam Marais*[1]. The latter case is however criticised by A. J. McGreg volume 53 of the South African Law Journal (1936), page 265, a also in conflict with the view expressed by Lee in his *Introd to Roman-Dutch Law*, fourth edition, page 380. It is clause the Last Will that puts the matter beyond any doubt in this cas

I shall now proceed to examine clause 10 in detail. Paragra shows that Ariyadasa and Piyatileke could only take the income Medawatte " devised by clause 8 of the Will ". It will be note the words used in this paragraph are " devised by clause 8 of the and not " devised by clauses 8 and 9 of the Will ". This par shows that Ariyadasa and Piyatileke were each given only the i of the half share devised by clause 8 but the testator was silent i

[1] *(1908) 25 S.C. 438.*

sub-paragraph with regard to the extent of the interest in the half share that came to the survivor of Ariyadasa and Piyatileke under clause 9. The paragraph (*b*) prohibited Ariyadasa and Piyatileke from making certain alienations again in respect of what has been devised to them by clause 8 of the Will. These two paragraphs (*a*) and (*b*) taken by themselves would not have been sufficient to create a *fidei commissum* (*vide* section 3 of the Entail and Settlement Ordinance). It is paragraph (*c*) which indicates the fideicommissaries clearly. The question, however, arises as to the time at which the property devolves on these fideicommissaries. When do the lawful children referred to in paragraph (*c*) become entitled to their interests absolutely ? Suppose Ariyadasa died first leaving " lawful children " and Piyatileke died 40 years after, leaving " lawful children ". Have the " lawful children " of Ariyadasa to wait for forty years after the death of their father or do they come in immediately after the death of Ariyadasa ? The answer to that question will depend on the interpretation of the words " after their death " and " their lawful children " in paragraph (*c*). Do these words mean " after the death of both " and " the lawful children of both " or do they mean " after the death of each " and " the lawful children of each " ? Of course the question whether the word " their " is to be interpreted distributively depends to a large extent on the context. Considering that we are dealing here with a devise in favour of two sons and not in favour of a husband and wife and taking into consideration the provisions of clause 8 I think that the word " their " is used in this Will distributively (*vide Abeyeratne v. Jagaris* [1]).

After a consideration of the various clauses in the Last Will including those mentioned by me earlier I have reached the decision

(*a*) that the testator gave a half share of Medawatte to each of his two sons, Ariyadasa and Piyatileke, subject to a life interest in favour of his widow ;

(*b*) that the devisees, Ariyadasa and Piyatileke, had after the death of the widow, only a life interest in the half share so given to each ;

(*c*) that on the death of either Ariyadasa or Piyatileke the half share given to the person so dying would devolve absolutely on his lawful children ;

(*d*) that if Ariyadasa and Piyatileke died without lawful children the half share devised to the person so dying would go to his surviving brother absolutely.

I find, therefore, that the plaintiff is entitled to a half share of the land absolutely by virtue of the transfer P2.

I set aside the order of the District Judge and direct him to enter a partition decree in accordance with the above finding.

The intervenients-respondents will pay the plaintiff-appellant the costs of appeal and the costs of the proceedings in the District Court on October 8, 1947.

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

After I wrote the above judgment my attention was drawn by my brother Basnayake to *Rees v. Registrar of Deeds et. al*[1]. and *Ex parte Bosch*[2]. The reasoning in these cases appears to support the view expressed above.

BASNAYAKE J.—I agree.

Order set aside.

[IN THE PRIVY COUNCIL]

1950 *Present*: **Lord Normand, Lord Oaksey, Lord Reid, Sir John Beaumont and The Chief Justice of Canada (The Right Hon. T. Rinfret)**

THE KING *v.* SELVANAYAGAM

Privy Council Appeal No. 38 of 1947

S. C. 941—M. C. Kegalla, 12,301

Criminal trespass—Ingredients of offence—Meaning of "occupation"—Different from "possession"—Unlawful entry—Does not become criminal merely because a foreseen consequence of such entry is annoyance to occupant—Nature of relevant intention—Penal Code, ss. 427, 433.

R, the superintendent of an estate which had been recently purchased by the Crown, was instructed by the Assistant Government Agent to give notice to quit to all the labourers on the estate. In accordance with these instructions R gave due notice to the accused terminating his employment as from 31st May, 1946. On that date the accused declined to leave the two rooms of which he was in occupation in the lines on the estate. He claimed that he and his ancestors had been in occupation of the rooms for 70 years and for that reason he declined to quit, since he had no other house to live in. He claimed the right to stay on the estate since for generations he and his family had lived there. He was convicted under section 433 of the Penal Code with having committed criminal trespass by unlawfully remaining in the two rooms of the estate with intent to annoy R. The Magistrate found that R was at the material time in occupation of the whole of the estate and all the buildings thereon; that the accused had occupied the two line-rooms not as a tenant but as a servant and that when his employment ended by notice to quit his subsequent remaining on the estate was unlawful; and that the facts proved warranted the conclusion that the intention of the accused by remaining on the estate was to cause annoyance to R since that would be the natural consequence of his action.

Held, (i) that section 427 of the Penal Code deals with occupation, which is a matter of fact, and not with possession, which may be actual or constructive and may involve matters of law. The section has no application where the fact of occupation is constant, the only change being in its character, as where a tenant holds over after the expiration of his tenancy.

[1] *S. A. L. R. (1938) C. P. D., 459.*
[2] *S. A. L. R. (1943) C. P. D., 369.*