1934 *Present:* **Dalton J. and Maartensz A.J.**

SELVADURAI *v.* TAMBIAH *et al.*

143—D. C. Jaffna, 1,283.

Fideicommissary gift—Dowry gift subject to condition—Children to be given shares when they come of age—Intention of donors.

Where, by a deed of gift, property was donated to S as dowry subject to the condition that, "if she, the dowry grantee, has issue she shall cause the properties to reach them when they come of age",—

Held, that the intention of the grantors, as expressed in the deed, was that the share of each child shall vest in that child on his or her attainment of majority.

THIS was an action for declaration of title to land. By deed dated November 21, 1871, three persons, the grand parents and the mother of one Seethevipillai, granted certain lands to her subject to the condition that the mother was to enjoy one-fourth share of the produce of the lands. It then provided that if Seethevipillai had issue "she shall cause the properties to reach them when they come of age". The question was whether under the latter provision a share passed to each child of Seethevipillai on that child attaining majority or only on the youngest child reaching that age.

The learned District Judge dismissed the plaintiff's action, holding that the property did not pass from Seethevipillai until all her children had attained majority.

H. V. Perera (with him *E. B. Wikramanayake* and *Aluvihare*), for plaintiff, appellant.—The point of vesting is when each child comes of age, not when the last child comes of age. The word "come" clearly indicates that. The childhen do not all come of age together. Each child comes of age when it attains the age of twenty-one. There are as many *fidei commissa* as there are children. The words of the deed

must be given effect to. It is not for the Judge to disregard that intention because of imaginary practical difficulties. Such practical difficulties are possible but rare. They are provided for by Voet when he deals with *fidei commissa* in favour of a class. (*Voet 36, 1, 32—Macgregor's translation, p. 88.*) Those who take the property at the time the condition is fulfilled take it subject to the condition that part should be restored to those who may be subsequently born.

Weerasooria (with him *Subramaniam*), for defendants, respondents.—The deed must be given the meaning it bears. The words "when they come of age" mean when they all come of age. It does not say "when they respectively come of age". The intention of the donors was to give their daughter a number of lands to be regarded as one estate to be given to their grandchildren as a whole not piecemeal. The income of the property would be necessary for the mother to bring up the other children. When all the children come of age then the property is to be divided. If their intention had been otherwise the direction would have been that the *share* should be given and not the *property*. (*Macgregor 157—Voet 36, 2, 21.*) Even if, on the appellants' interpretation, the adjustments could be made, the *dominium* would be in suspense.

Cur. adv. vult.

June 8, 1934. DALTON J.—

The question arising on this appeal is as to the construction of the deed D 1. By this deed, dated November 21, 1871, three persons, the grandfather, grandmother, and mother of the grantee, purported to grant certain lands to Seethevipillai as dowry, subject to certain conditions. During her lifetime the mother of Seethevipillai was to take and enjoy one-fourth share of the produce of the lands. It was then provided that "if she, the dowry grantee, has issue, she shall cause the properties to reach them when they come of age".

The principal question for decision is whether by this latter provision a share passed to each child of Seethevipillai on that child attaining majority, or only on the last and youngest child reaching that age.

The evidence shows that Seethevipillai had five children, who were all living when she died in 1927. The youngest of these five children is the fourth defendant, who is married to the third defendant, her husband. It is conceded that she was born in 1900. It is further admitted that all the other children attained their majority ten years prior to 1930. Plaintiffs and their predecessors in title have been in uninterrupted and undisturbed possession of the land in dispute since the year 1888, until they were ousted by defendants in October, 1930. This action was instituted on September 19, 1931.

The first, second, and fourth defendants are three of the children of Seethevipillai. If they acquired rights under the deed D 1 at the time each came of age, then, so far as the first and second defendants are concerned, the plaintiffs have prescribed against them. The fourth defendant having come of age in 1921, plaintiffs concede they cannot succeed against her, and give her a one-fifth share in the land described in the plaint.

The learned trial Judge has dismissed plaintiffs' action, holding that the property dealt with in deed D 1 was not to pass from Seethevipillai until all her children had attained majority. Mr. Weerasooria for the defendants (respondents to the appeal) supports this conclusion, although he concedes he does not adopt the reasoning by which the trial Judge has reached it. I regret I am unable to agree with the conclusion.

The meaning of the clause I have set out above that impressed itself upon me on the first reading of the deed was that each child was to have its share on that child attaining his or her majority. Subsequent readings of the deed have only strengthened the first impression formed, and nothing I have heard in argument has weakened it.

The learned trial Judge has approached the question in another way. He has not, it seems to me, tried to ascertain the intention of the parties to the deed from the language used, but he looks for what he calls a rational and practical interpretation that will give rise to the least number of difficulties. He has rather approached the matter as if the grantors in 1871 were in possession of the knowledge of the facts of which the learned Judge was in possession over sixty years later. As a matter of fact none of the difficulties visualized by the learned trial Judge arose in this family, but even if they had, and had children been born to Seethevipillai after her first child attained his or her majority, Mr. Weerasooria, I think, conceded that the law was adequate to provide for necessary adjustments to be made so that the provisions of the deed should be carried into effect. (See *Voet XXXVI., tit. 1, 32.*) No difficulty arises from the fact that this is a *fidei commissum* created by deed and not by will.

I have come to the conclusion then that the learned Judge's construction of the deed is wrong. The words "when they come of age" as used here mean when each one of them comes of age. In that event the plaintiffs have prescribed as against the first and second defendants, who attained majority more than ten years before the ouster of the plaintiffs. Adverse possession by the plaintiffs and their predecessors in title for a period of ten years prior to the date of ouster is admitted.

I can find nothing of any real substance in the deed to support the argument that, if each child was entitled to a share on attaining majority, Seethevipillai had to execute a deed or go through some formality for the purpose of vesting that share in each child. This argument was raised somewhat tentatively at the close of the appeal, in the event of it being found that the trial Judge's construction of the deed was wrong. The intention of the grantors as expressed in the deed, so it seems to me, is that the share of each child shall vest in that child on his or her attainment of twenty-one years.

The appeal must therefore be allowed, and the plaintiffs are entitled to the order asked for in respect of 4/5 of the land described in the plaint. No issue was framed, although evidence was led, as to damages. Nothing was said to us on this subject in the argument on appeal, and I gathered that the plaintiffs would be satisfied with a declaration in respect of 4/5 of the land only. They will also be entitled to an order that the first and

second defendants be ejected from the land, and to their costs against these two defendants in the lower Court and in this Court. As between the third and fourth defendants and the plaintiffs, the order made by the trial Judge in respect of costs in the lower Court will stand. In this Court they are entitled to their costs of appeal as against the appellants (plaintiffs).

MAARTENSZ A.J.—I agree.

Appeal allowed.