IN THE COURT OF APPEAL

DOMINICA

Civil Appeal No. 3 of 1970

Between: HAKIM E. F. GORDON Plaintiff/Appellant

and

CHRISTIANIE BURKE Defendant/Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice Gordon
The Honourable Mr. Justice P. Cecil Lewis

F.E. Degazon for Plaintiff/Appellant
K.H.C. Alleyne Q.C., with B. Alleyne for Defendant/Respondent

1970, October 20, 21, Nov. 30

JUDGMENT

GORDON, J.A.

At the hearing of an application by summons in Chambers by the plaintiff/appellant for a declaration that he is one of the reversionary owners of the fee simple absolute of certain lands included in an Indenture of Trust, it was agreed by the parties that the issue be confined to the question of whether the respondent had a right to convey as beneficial owner, property which was the subject-matter of a trust. The learned trial judge having decided that the respondent was entitled to do so, the appellant now appeals from that decision.

The notice of appeal was served on the solicitor for two other persons, namely - (i) Castaways Developments Limited, and (ii) Castaways Hotel Limited, but counsel at the Bar agreed that the only real respondent to this appeal is Christianie Burke.

The facts revealed by the affidavit evidence in the matter are as follows:-

By an Indenture of Trust (hereinafter referred to as "the trust instrument") executed on the 18th March, 1913, George James Christian, a Barrister-at-Law, created a trust in which he named the following persons as likely beneficiaries:

/Francis Thomas

Francis Thomas Burke, his two children Margery and Christianie Burke and their lawful children, and Peter Charles Christian, Clara Christian, Maud Christian and their lawful children.

Under the trust instrument the legal estate in the Mero Estate and the Cassada Estate was conveyed to Thomas Howard Shillingford as trustee, his heirs or executors to the uses following:-

"1. The Trustee, his heirs, or executors shall remain in possession of the said lands, hereditaments, and premises during the life-time of Francis Thomas Burke, or until the said Margery Burke and Christianie Burke shall attain their majority (or marry) or whichever event, the death of the said Francis Thomas Burke, or the majority or marriage of the said Margery Burke and Christianie Burke shall happen later.

2. The said Trustee shall manage, superintend the management, or lease the said Estates or Plantation, whichever he may deem expedient and shall in no case be liable for impeachment for waste.

3. From the rent or net profits of the said hereditaments, the said Trustee shall pay and satisfy the amount which by Bond he the said George James Christian and the said Trustee have bound themselves to pay to the said Francis Thomas Burke; and from any balance which may remain, shall at his discretion pay the whole or such part thereof for the maintenance and personal support or benefit of Margery Burke and Christianie Burke until they shall attain the age of 21 years (twenty-one) or marry.

4. Should either the said Margery Burke or Christianie Burke die under the age of 21 years or without having married and leaving lawful issue, the whole of the lands, hereditaments, and premises shall be held in trust for the survivor.

5. Should the said Margery Burke and Christianie Burke die without attaining the age of 21 years (twenty-one) or without having married and without having left lawful issue, then the said Trustee shall hold the said lands, hereditaments, and premises in trust for Peter Charles Christian, Clara Christian, and Maud Christian until they shall attain the age of 21 (twenty-one) years or, being girls, attain that age or marry, with power at his discretion to pay any part of the rents and profits of the said hereditaments and premises for the maintenance and personal support and benefit of the said Peter Charles Christian, Clara Christian, and Maud Christian.

/6. Should either

6. Should either the said Peter Charles Christian, Clara Christian, or Maud Christian die without attaining the age of 21 (twenty-one) years or marrying and leaving lawful issue, then the whole of the said lands, hereditaments, and premises shall be held in trust for the survivor or survivors of them.

7. Should the said Peter Charles Christian, Clara Christian, and Maud Christian all die without attaining the age of 21 (twenty-one) years or marrying and leaving lawful issue, then the whole of the lands, hereditaments, and premises shall be held by the Trustee, his heirs, or executors in trust for the said George James Christian or as he shall, by Deed or Will appoint."

The following facts relating to persons named in the instrument were accepted by the court below:

Francis Thomas Burke died on the 17th June, 1913.

Margery Burke who was born on 24th February 1902 died in 1919 without lawful issue.

Christianie Burke - the respondent in this case - was born on the 19th January 1906. She is unmarried and had been in possession of the trust property since she became 21 years.

Thomas Howard Shillingford died in 1917 (according to a statement by counsel) without having named anyone as his successor to administer the trust. The record does not disclose who his executors were.

Maud Christian and Peter Christian both died without issue.

Clara Gordon, née Christian, died in 1964 leaving lawful issue of whom the appellant is one.

By a conveyance dated the 29th May, 1952, the respondent as beneficial owner in fee simple sold approximately 179 acres of the Mero Estate to Lionel Edwin Pinard for £1,200.

In the course of his judgment dismissing the application the learned trial judge stated thus:

"In my view, the two conditions set out in Clause 4 of the trust deed of attaining majority and of marriage and leaving lawful issue, are in the alternative; and Margery Burke, having died without having attained her majority, unmarried and without issue, the right to possession of the Trustee lapsed when the survivor, Christianie Burke, attained her majority in 1927.

/I am further

> I am further of the view that Christianie Burke then became the sole cestui-que trust with full beneficial interest and was entitled to have the hereditaments conveyed to her and, in turn, entitled to dispose of the same."

By leave of the Court the grounds of appeal filed by the appellant were amended and the appeal was argued on the following grounds:

"(a) the decision of the learned trial judge be set aside; and that it be declared that:-

(b) the learned trial judge erred and was wrong in law in holding that merely by the attainment of her majority in 1927.......'Christianie Burke then became the sole cestui-que-trust with full beneficial interest and was entitled to have the hereditaments conveyed to her and, in turn, entitled to dispose of the same', notwithstanding the conditions as to marriage and issue in paragraphs 4, 5, 6 and 7 of the said Trusts."

It was conceded by counsel for the respondent for purposes of this appeal only that the appellant has a right to move the Court.

Counsel for the appellant urged on this Court, firstly, that the absence of technical words of limitation from the trust instrument precluded the respondent from taking the fee simple in the trust property on her having attained the age of 21 years, as was contended by her when she purported as beneficial owner to sell the Mero estate to Edwin Lionel Pinard for £1,200 (see conveyance by Christianie Burke to Edwin Lionel Pinard of 29th May 1952); secondly, that on a proper interpretation of paragraph 4 as modified by paragraph 5 and subsequent paragraphs of the trust instrument, the respondent on attaining her 21st birthday without marrying and having lawful issue, took either an estate in tail or a life interest; thirdly, that by virtue of the conveyance the respondent was estopped from denying that she sold as beneficial owner and consequently could not at this stage avail herself of the terms of the Settled Estates Ordinance, (Cap. 221) Laws of Dominica.

Counsel for the respondent urged that because -

(a) the attitude of the courts was to presume in favour of divesting, particularly in a case such as this where the clear intention of the settlor was to convey the legal estate to the respondent on her attaining the age of 21 years; and

/(b) the provision

(b) the provision whereby the respondent was entitled on attaining her majority to call upon the trustee to convey the legal estate to her, rendered the trust an executory one and such as to fall within the category of cases to which the courts were inclined to lend a liberal interpretation in order to give effect to the intention of the settlor.

The peculiar circumstances of the instant case, he submitted, rendered it a fitting one for the Court to read "and" for the word "or" in paragraph 4 of the trust instrument.

In inviting the Court to adopt such a course, counsel further urged that by doing so absurdities in the trust instrument (e.g. no legal estate in the trust property could vest in anyone,) would be avoided, and the trust brought to a satisfactory end.

Because of the Real Property Ordinance (Cap. 219) Laws of Dominica which came into force in 1873 and the fact that the Dominica Legislature never adopted the Conveyancing Act (U.K.) 1881, the operative law in relation to conveyances by deed in Dominica is to be found in (a) the Real Property Ordinance (Cap. 219) Laws of Dominica, and (b) in the Common Law of England as it was prior to 1881 when the Conveyancing Act (U.K.) 1881 came into force there.

The requirements for creating certain legal estates are indicated by section 16 of the Real Property Act (Cap. 219) Laws of Dominica which reads as follows:

> "No estate of fee tail shall be created, after the passing of this Ordinance, by any deed, or by any will or other instrument, otherwise than by an express limitation to a person and the heirs of his body, or the heirs, male or female, of his body, as the case may be."

as also by the following excerpt from Megarry and Wade, 3rd Edition, p. 51 -

> "The rule at common law was that a freehold estate of inheritance could be created in a conveyance inter vivos (i.e. a transfer of land between living persons) only by a phrase which included the word "heirs". In no other way could a fee simple or fee tail be created."

It is also noteworthy that by section 29 of the Wills Ordinance (Cap. 215) Laws of Dominica (in force since 1872) which reads -

/"Where any real

> "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

adequate provision is there made whereby a devise of a fee simple estate may pass such an estate without the use of words of limitation.

From the fact that this provision has been specially created in respect of wills only, it therefore follows that in order to effectively pass the legal estate in real property by a deed, technical words of limitation must necessarily be used.

It is settled law that the fundamental rule of interpretation of deeds as instruments is that:- to interpret a deed the expressed intentions of the parties must be discovered, and in support of this contention the following among other excerpts are cited in Norton on Deeds, 2nd Edition at p. 53:

> "I adopt the observation of Alexander C.B. in Colmore v. Tyndall 1828 Younge & J 605 at p. 622 that this Court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself. If the court sees an intention clearly and distinctly established by it, it has no difficulty in carrying that into effect; subject of course to any rules of law that may be applicable to it, but only qualified to that extent."

- Sir J. Romilly M.R. in Beaumont v. Marquis of Salisbury (1854) Beav. 196 at p. 206 - and

> "........in construing instructions you must have regard, not for the presumed intention of the parties, but for the meaning of the words which they have used."

per Brett L.J. Ex p. Chick Re Meredith (1879) Ch. D. 731 at p.739.

The effect of the above dicta as I see it, is that while the Courts wherever possible will give full effect to the intention of a donor or settlor as indicated in the deed, that intention must be qualified by the legal effect and meaning of the words actually used in the document.

Adverting to the trust instrument it is there clearly indicated that in consideration of the love and affection which George James Christian had for Margery Burke, Christianie Burke, Peter Charles Christian, Clara Christian and Maud Christian he settled the hereditaments on them in turn on the

/conditions

conditions set out in paragraphs 1 - 7 of the trust instrument (supra).

Paragraph 4 provides that in the event of either one or other of the two sisters not attaining the age of 21 or not marrying and having lawful issue, the whole of the hereditaments and premises shall be held in trust for the survivor. Margery Burke having died under the age of 21 years and being unmarried, it followed that the property continued to be held in trust for the survivor Christianie, and by virtue of paragraph 1 the trustee was to remain in possession until Christianie attained the age of 21 years.

The question then arises as to what interest did Christianie Burke acquire on her becoming 21 years. Counsel for the respondent contends that she acquired the fee simple and was entitled to have it conveyed to her, while counsel for the appellant contends that she could only acquire an estate in tail or a life interest.

An examination of the instrument reveals that while paragraph 4 provides what should happen in the event of either Margery or Christianie dying under 21, unmarried and without lawful issue, paragraph 5 goes on to provide what should happen in the event of both Margery and Christianie dying under 21 years or without having married and without having left lawful issue, in which case the trust property is to be held in trust for Peter, Clara and Maud Christian until they in turn attain the age of 21 years or marry.

Having regard to the provisions of paragraph 5, it would appear that the intention behind paragraph 4 is that in the event of one of the two Burkes dying, as in fact occurred, then the hereditaments would be held by the trustee in trust for the survivor of the two sisters, in this case Christianie. It follows on this that the most that Christianie could have had on her attaining the age of 21 years was a life interest, and the fact that she entered into possession of the trust property ever since she was 21 years and that the trustee in whom the legal estate was vested had died without having conveyed the legal estate to any other person as trustee, made no difference to the interest which the respondent held. On her death, should she not have married and had lawful issue, then in accordance with paragraph 5, the hereditaments which comprise the trust must remain in trust for Peter Charles Christian Clara Christian and Maud Christian until they attain the age

/of 21 years

of 21 years, or until the girls marry and have lawful issue.

Paragraph 6, like paragraph 4, then provides what should happen in the event of the death of either of those beneficiaries there named, and paragraph 7 what should happen if all should die.

It is to be observed that in paragraphs 4 and 6 whenever the word "survivor" appears it is not followed by any technical words of limitation, and that in paragraph 7 which provides for the final reversion of the fee simple in the trust property to the settlor, while there is a similar absence of words of limitation, provision is there made for the settlor to further appoint by deed or will.

In Re Bostock's Settlement (1921) 2 Ch. D. 469, by an indenture dated 1886, W. Bostock conveyed the equitable interest in freehold lands to trustees "in trust for the child or children of the said W. Bostock now born or hereafter to be born who shall attain the age of 21 years.........and if there be no such child then in trust to the right heirs of the said W. Bostock." The Court of Appeal held that though the conveyance showed a clear intention to give the children absolute interests, words of limitation were as necessary in a conveyance of an equitable estate as they were in a conveyance of a legal estate, and the children only took life interests.

Counsel for the respondent sought to distinguish the ratio dicidendi in this case, which in effect was - that where strict legal conveyancing language had been used, in a deed creating a trust those words must be given their legal meaning-from the principle which he urged that in executory trusts where no words of limitation were used, provided the intention of the donor was clear, the Courts paid greater regard to that intention than to the technical words used in the limitation.

In Halsbury's 3rd Edition, Vol. 38, pp. 822, executed and executory trusts are classified thus -

> "A trust is executed in the technical sense where the terms of the trust are designated by the instrument or declaration creating it, even though the creator directs a settlement to be executed embodying the designated provisions. A trust is executory in the technical sense where the instrument or declaration by which it is created directs the subsequent execution of an instrument defining the trust and does not itself define with absolute precision the terms of that instrument."

/The effect of

The effect of the latter trust is, as Lord Cairns said in Sackville Trust v. Viscount Holmesdale (1870) L.R. 4 H.L. 543 at 571:

> "one which is to be executed by the preparation of a complete and formal settlement, carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention indicated by the testatrix".

In the instant case the fact that the terms of the trust have been finally declared by the settlor in such a complete manner that no instrument is required to define the limitations to which he intends to subject his property, in my view makes the instrument an executed trust and therefore not subject to the arguments urged by counsel for the respondent as being applicable to executory trusts. In this connection support for this view is to be found in the following statement of Sargant J. in Re Monckton's Settlement (1913) 2 Ch. D. at p. 642, cited with approval by Warrington L.J. in Re Bostock's Settlement (supra) at p. 135:

> "In the case of an executed document as distinguished from an executory document the rule is fairly well settled that the same words of limitation are necessary to convey an equitable estate in fee simple as would have been necessary if the conveyance had been one of a legal estate in fee simple. Equity follows the law in that respect."

Paragraph 5 of the trust instrument clearly indicates that it was not the intention of the settlor that the respondent should take a fee simple if she did not marry and have lawful issue. The dictum of Jessel M.R. in Smith v. Lucas (1881) 18 Ch. D. 531 at p. 542 - "One must consider the meaning of the words used, not what one may guess to be the intention of the parties:" is in point, and in my view defeats the argument of counsel for the appellant in relation to the intention of the settlor in the instant case.

The argument of counsel for the appellant that the respondent would be entitled to a fee tail is also defeated by the absence of any words of limitation as called for by section 16 of the Real Property Ordinance (Cap. 219) Laws of Dominica, following on the word 'survivor' in paragraph 4 of the trust instrument.

The fact that the amending effect of the Conveyancing Act (U.K.) 1881 and the Real Property Act (U.K.) 1925 on the real property law in the United Kingdom, does not apply in Dominica, coupled with the provisions of the Real Property Ordinance (Cap. ~~129~~ 219) of the Laws of Dominica, lead me to the conclusion

/that in

that in the instant case the effect of the absence of words of limitation which included the word "heirs", after the word "survivor" in paragraph 4 of the trust instrument, is that only a life interest passed to the respondent on her attaining the age of 21 years.

In the light of the above I am of the view that the appellant never had a beneficial interest amounting to a fee simple estate, to sell, as she purported to do.

It is however to be noted that in the Settled Estates Ordinance (Cap. 221), Laws of Dominica, provision is there made for the holder of a life interest to sell the settled land and the conditions under which such a sale can properly be effected. As the relief sought in the amended grounds of appeal does not involve this question, and as all parties who ought to be joined for the determination of the question of the disputed conveyance, including the purchaser therein, are not before the Court, I would not give any opinion on this question.

I would therefore declare -

(1) that Christianie Burke was entitled under the Indenture of 18th March, 1913, to an estate for life only in the hereditaments therein settled, and

(2) that the said Christianie Burke at the date of the said Indenture of Conveyance by herself to Edwin Lionel Pinard was seized as cestui-que-trust of an estate for life in the said hereditaments and not of an estate in fee simple and was accordingly not entitled to sell the said hereditaments as absolute owner thereof in fee simple.

For the above reasons I would allow the appeal with costs here and in the court below.

(K. L. Gordon)
Justice of Appeal

LEWIS, C.J.

I agree.

(Allen Lewis)
Chief Justice

CECIL LEWIS, J.A.

An indenture made the 18th day of March, 1913, between Francis Thomas Burke of the first part, George James Christian of the second part and Thomas Howard Shillingford of the third part had a two-fold purpose. It gave effect to an agreement between Francis Thomas Burke and George James Christian, a barrister-at-law, for the sale by Burke to Christian of certain hereditaments and it also contained a settlement by the said George James Christian of the said hereditaments on certain trusts (to be hereinafter mentioned) with Thomas Howard Shillingford as the trustee of the settlement.

The hereditaments in question were the Mero Estate and the Cassada Garden Estate in Dominica (hereinafter referred to as "the hereditaments".)

The indenture having recited that "in consideration of the love and affection which the said George James Christian bears for Margery Burke and Christianie Burke, Peter Charles Christian, Clara Christian and Maud Christian, the said George James Christian is desirous of settling the said estates in the manner hereinafter expressed, and the said Thomas Howard Shillingford (hereinafter called the Trustee) hath at his request agreed to accept the conveyances to himself of the abovementioned hereditaments and to be the Trustee of the said intended settlement" went on to record that in pursuance of the said agreement between Francis Thomas Burke and George James Christian and for the consideration therein mentioned, "the said Francis Thomas Burke at the request of the said George James Christian doth hereby grant to the said Thomas Howard Shillingford his heirs or executors all that estate or plantation known as the Mero Estate ....and also all that estate known as Cassada Garden Estate............"to hold the messuage land and hereditaments and all other premises hereby granted unto the said Trustee, his heirs or executors to the uses following:-

1. The Trustee, his heirs, or executors shall remain in possession of the said lands, hereditaments, and premises during the lifetime of Francis Thomas Burke, or until the said Margery Burke and Christianie Burke shall attain their majority (or marry) or whichever event, the death of the said Francis Thomas Burke, or the majority or marriage of the said Margery Burke and Christianie Burke shall happen later.
2. The said Trustee shall manage, superintend the management, or lease the said Estates or Plantation, whichever he may deem expedient and shall in no case be liable for impeachment for waste.

/3. From the

3. From the rent or net profits of the said hereditaments, the said Trustee shall pay and satisfy the amount which by Bond he the said George James Christian and the said Trustee have bound themselves to pay to the said Francis Thomas Burke; and from any balance which may remain, shall at his discretion pay the whole or such part thereof for the maintenance and personal support or benefit of Margery Burke and Christianie Burke until they shall attain the age of 21 years (twenty-one) or marry.

4. Should either the said Margery Burke or Christianie Burke die under the age of 21 years or without having married and leaving lawful issue, the whole of the lands, hereditaments, and premises shall be held in trust for the survivor.

5. Should the said Margery Burke and Christianie Burke die without attaining the age of 21 years (twenty-one) or without having married and without having left lawful issue, then the said Trustee shall hold the said lands, hereditaments, and premises in trust for Peter Charles Christian, Clara Christian, and Maud Christian until they shall attain the age of 21 (twenty-one) years or, being girls, attain that age or marry, with power at his discretion to pay any part of the rents and profits of the said hereditaments and premises for the maintenance and personal support and benefit of the said Peter Charles Christian, Clara Christian, and Maud Christian.

6. Should either the said Peter Charles Christian, Clara Christian, or Maud Christian die without attaining the age of 21 (twenty-one) years or marrying and leaving lawful issue, then the whole of the said lands, hereditaments, and premises shall be held in trust for the survivor or survivors of them.

7. Should the said Peter Charles Christian, Clara Christian, and Maud Christian all die without attaining the age of 21 (twenty-one) years or marrying and leaving lawful issue, then the whole of the lands, hereditaments, and premises shall be held by the Trustee, his heirs, or executors in trust for the said George James Christian or as he shall, by Deed or Will, appoint."

In Megarry & Wade's The Law of Real Property, 3rd Edition, the following statement dealing with the requirements of the common law for the use of words of limitation in order to create a fee simple occurs at page 51:

> "The rule at common law was that a freehold estate of inheritance could be created in a conveyance inter vivos (i.e. a transfer of land between living persons) only by a phrase which included the word "heirs". In no other way could a fee simple or fee tail be created. Any attempted grant of a freehold estate in other terms (as "to A" or "to A in fee simple") gave A merely a life estate...........It is important to note that no other word would do in place of "heirs": "relatives", "issue", "descendants", "assigns", "for ever", "in fee simple", "in tail" and so on were all ineffective. "Heirs" was the sacred word of limitation, and had a magic which no other word possessed".

/In this case

In this case it will be observed that the settlor used the appropriate word necessary at common law for creating a fee simple estate which estate was vested in the trustee upon the trusts hereinbefore mentioned. Strict conveyancing language with a definite legal meaning having been used in this instance, it must be assumed that the language in the other parts of the indenture was intended to bear a similarly strict legal meaning.

In regard to the first paragraph of the settlement the following facts are agreed:

(a) Francis Thomas Burke died on June 17, 1913; (b) Margery Burke who was born on February 24, 1902, died in 1919. She thus did not attain her majority. She was unmarried at her death and left no lawful issue; (c) Christianie Burke who was born on January 19, 1906, is still alive but is unmarried and without lawful issue. It is also common ground that when Christianie Burke attained her majority in 1927 she was, under the terms of this paragraph, entitled to physical possession of the hereditaments as against the trustee.

By paragraph 4 of the settlement it is provided that if "either the said Margery Burke or Christianie Burke die under the age of 21 years or without having married and leaving lawful issue, the whole of the lands, hereditaments and premises shall be held in trust for the survivor." In the events which have happened, Christianie Burke, the respondent herein, was the survivor and the hereditaments were accordingly held in trust for her. The important question which arises in this appeal is what estate did the respondent take?

The respondent by an indenture dated May 29, 1952, purported as beneficial owner to sell the fee simple in the Mero Estate to Edwin Lionel Pinard for £1,200.

The appellant issued a summons dated April 10, 1969, in which he asked for certain relief including, inter alia, a declaration that he is one of the reversionary owners of the fee simple absolute of the hereditaments, thereby indirectly questioning the respondent's right to sell the fee simple in the Mero Estate as she purported to do as aforesaid. At the hearing of the summons the sole issue on which the Court's ruling was desired was agreed between the parties and the trial judge recorded this agreement in his judgment as follows:

> "it was accepted that the entire issue revolved around the question as to whether the" respondent "had the right to convey the land in question on 29th May, 1952, by conveyance recorded in Book of Deeds V, No. 7, Folios 154-156 to Edwin Lionel Pinard."

/It is not

It is not disputed that the appellant is the lawful son of Clara Gordon (née Christian), one of the persons mentioned in paragraphs 5-7 of the settlement. She died in 1964 leaving lawful issue, but as her death took place before she obtained a vested interest in the hereditaments there was nothing to pass to her heirs by way of succession. Accordingly, the appellant could have no claim to the hereditaments as one of her heirs. In the circumstances, the Court raised the question as to his locus standi in this matter. Counsel for the respondent conceded that for the purposes of this appeal only, the appellant had the right to move the Court for the determination of the question whether or not the respondent had the right to convey the fee simple in the Mero Estate as she purported to do.

The trial judge decided this question in the respondent's favour. He said:

> "In my view, the two conditions set out in Clause 4 of the trust deed of attaining majority and of marriage and leaving lawful issue, are in the alternative; and Margery Burke, having died without having attained her majority unmarried and without issue the right to possession of the trustee lapsed when the survivor, Christianie Burke, attained her majority in 1927.
> I am further of the view that Christianie Burke then became the sole cestui que trust with full beneficial interest and was entitled to have the hereditaments conveyed to her and, in turn, entitled to dispose of the same."

Counsel for the appellant before this Court submitted that the fee simple did not pass to the respondent under paragraph 4 of the settlement but that only a life interest, or an estate tail passed to her. He said he preferred to contend that an estate tail passed because it is a greater estate than a life estate and if she had had children then her children could have succeeded thereto. The alternative submission that an estate tail passed to the respondent is untenable by reason of the provisions of section 16 of the Real Property Ordinance, Cap. 219 (Dominica) which Ordinance came into force on August 4, 1873. This section reads as follows:

> "No estate of fee tail shall be created, after the passing of this Ordinance, by any deed, or by any will or other instrument, otherwise than by an express limitation to a person and the heirs of his body, or the heirs, male or female, of his body, as the case may be."

It will be seen that there is no express limitation to the heirs of the body of the survivor under paragraph 4 of the trust instrument and accordingly an estate of fee tail was not

/created under

created under this paragraph. Counsel for the appellant will therefore have to rely on his first submission that a life interest only passed to the respondent and he said that this was so because of the absence of the words of limitation "and her heirs" after the word "survivor" at the end of the fourth paragraph of the settlement which were the words required at common law to create a fee simple estate. This common law rule is still in effect in Dominica.

A statement of Warrington L.J. in In Re Bostock's Settlement (1921) 2 Ch. 469 is here directly in point. He said at p. 484 (ibid):

> "According to technical rules a limitation to A and his heirs to the use of or in trust for B confers on B a legal estate for life only."

This is exactly the situation here. There has been a limitation to the trustee and his heirs (and in the events which have happened) to the use of or in trust for the respondent under paragraph 4 of the settlement. Thus, the respondent would take an estate for life only.

Counsel for the respondent however challenged this conclusion on the ground that the trusts in this case are executory, and therefore, he said, the duty of the Court is to construe the settlement in order to ascertain the intention of the settlor; in which case the absence of words of limitation is irrelevant. He submitted that the trust under paragraph 4 was executory because on the assumption that the respondent was entitled on attaining her majority to call upon the trustee to convey the legal fee simple to her, this meant that there was something left to be done by the trustee to perfect the trust. Even if the respondent were entitled to a conveyance of the fee simple on attaining her majority (which in my view was not so) the necessity for such a conveyance by the trustee would not by itself be a sufficient ground for regarding the trust as executory. The reason why this is so is fully explained in a passage from Lord St. Leonard's judgment in Egerton v. Earl Brownlow & ors. (1843-1860) All E.R. Reprint 970. In this passage the learned judge in differentiating between executed and executory trusts said at pp. 1000 and 1001 (ibid):

> ".........all trusts are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is something always to be done. But that is not the sense which a court of equity puts upon the term "executory trust". A court of equity considers an executory trust, as distinguished from a

/trust executing

> trust executing itself, and distinguishes the two in this manner: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention, that you have nothing to do but to take that which he has given to you, and to convert them into legal estates."

If one applies this test to the circumstances of this case, it will readily be seen that the trust under paragraph 4 of the settlement is an executed one. The nature of the trust is such that the respondent becomes entitled to her interest in the hereditaments merely by fulfilling the conditions of the trust. Her entitlement arises by operation of law and is so to speak an automatic process requiring no action by anyone to make it effective. Neither the assistance of the Court nor of the trustee is necessary to complete the limitation to the respondent in this case for the trust is expressed in terms which are in themselves final, and in such circumstances all that the Court can do is to construe it according to the import of the words used. I therefore reject the submission that the trust under paragraph 4 is executory and hold that it is, in the language of Lord St. Leonard's, "a trust executing itself".

For the reasons given above, I am of the opinion that the appellant's contention that the respondent took a life interest only is correct. She therefore could not sell the fee simple in the Mero Estate as she purported to do under the deed of indenture dated May 29, 1952.

The respondent was however a tenant for life of the settlement under the Settled Estates Ordinance, Cap. 221 (Dominica) and in this capacity she could have sold the hereditaments pursuant to the power of sale conferred on a tenant for life by this Ordinance, but she did not purport to sell in this capacity. The question of the validity of the sale by the respondent does not arise in this appeal and therefore I express no opinion thereon.

I agree with the order proposed by Mr. Justice Gordon and would accordingly allow the appeal with costs here and in the court below.

(P. Cecil Lewis)
Justice of Appeal