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Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Grenier.

1908.
November 10.

SENANAYEKE *et al.* *v.* DISSANAYEKE *et al.*

D. C., Kandy, 18,482.

Fidei commissum—*Deed of gift—Acceptance—Prescription.*

Where a person by deed of gift donated a property to his two children on condition that "they and their children and grandchildren from generation to generation can from this day henceforth possess only the said land, but they cannot sell or mortgage the same".....

Held, that the deed of gift created a valid *fidei commissum*.

Held, also, that it is not essential that the acceptance of a deed of gift should appear on the face of it, but that such acceptance may be inferred from circumstances.

Possession by the donee of the property donated leads to the inevitable inference that the deed of donation was accepted.

APPEAL from a judgment of the District Judge of Kandy (F. R. Dias, Esq.) dismissing the plaintiff's action. The facts fully appear in the judgment.

H. Jayewardene, for the plaintiffs, appellants.

A. Drieberg, for the defendants, respondents.

Cur. adv. vult.

November 10, 1908. HUTCHINSON C.J.—

The plaintiffs asked for a declaration of their title to an undivided half of a house and premises in Kandy, and for possession, and for damages for being deprived of possession. The title on which they relied was under a deed of May 31, 1862, by which David Jayetilleke "made over" the property to his two children, Leisa and Kachchi, "in the manner hereinafter mentioned, that is to

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say: it is determined that the said two children, Leisa and Kachchi, their children and grandchildren, from generation to generation, can from this day henceforth possess only the said land, but they cannot sell or mortgage the same; and that D. Ukku Menika, the mother of the said two children, can during her lifetime possess the said land." That is the only material part of the deed; it is in Sinhalese, and the translation above given is not questioned, except that the words translated "I have made over" the District Judge says would be more correctly translated "I hereby make them owners of."

There is no evidence as to the date of Ukku Menika's death. Kachchi died on July 5, 1901. The plaintiffs are the children of Kachchi; and their case is that the deed created a *fidei commissum* in their favour. Under a writ of execution against Kachchi and her husband the interest of Kachchi in the property was sold in 1874; and by deed dated March 18, 1874, the Fiscal conveyed to the purchaser "all the right, title, and interest" of the husband and wife in and to the property. The purchaser entered into possession in 1874, and remained in possession until his death, when the property was sold by his administrator to the first defendant, who afterwards conveyed it to the second defendant, who is his wife. Since the sale in 1874 the defendants and their predecessors in title under that sale have been continuously in possession. The defendants allege that the deed of 1862 created no *fidei commissum*, and that the interest of Kachchi which they acquired was the absolute ownership of one-half of the property.

The only issues settled which are now material were:—

(1) Did the deed of 1862 create a *fidei commissum* in favour of the children and descendants of Kachchi?

(5) Is the deed void for non-acceptance?

David Jayatilleke deposed to his execution of the deed in favour of Ukku Menika and their two children; he said that Ukku Menika was not his wife; that the children were illegitimate; and that he "dropped her after providing for her and the two children."

The District Judge held that there was no *fidei commissum*. He thought that there was an absolute gift to Leisa and Kachchi, with a proviso against alienation by them, which must be treated as surplusage; and that the words referring to possession by their descendants only indicate how the property is to devolve, if the parties die without alienating their shares. In my opinion the deed gives only a life interest to Leisa and Kachchi, with a *fidei commissum* in favour of their children and grandchildren. There is no absolute gift to them, but only a gift to them "in the manner hereinafter mentioned," that is to say, that, subject to the life interest of Ukku Menika, they and their children and grandchildren from generation to generation are to possess it.

The District Judge also thought that there had been no acceptance of the gift. The deed does not state that the gift was accepted; but that is not essential. It is an inevitable inference from the facts which are above stated that Kachchi was in possession, with the consent of the grantor, at the date of the sale of her interest; and thereafter the purchaser of her interest possessed it during the rest of her life. It is the natural conclusion from the evidence that Ukku Menika, with the consent of the grantor, accepted the gift for herself and her children. The District Court finding that there was no *fidei commissum*, and that, even if there was a *fidei commissum*, there was no acceptance of the gift on behalf of Kachchi's children, dismissed the action. I think that both findings were wrong.

The only other point argued was that the defendants had acquired a prescriptive title. But, as the District Judge rightly said, if the plaintiffs' rights did not accrue until the death of their mother in 1901, no prescriptive title was acquired against them by possession since that date.

In my opinion, therefore, the decree of the District Court should be set aside and judgment entered for the plaintiffs, declaring them to an undivided half of the property, and for possession of that half, and for Rs. 270 damages, which is the amount agreed on by counsel on both sides, and Rs. 7·50 further damages from the date of action to the date of restoration of possession, and for the costs of the action and of the appeal.

GRENIER A.J.—Agreed.

Appeal allowed.