Present: Bertram C.J. and Jayewardene A.J. 1924

ABEYRATNA *v.* JAGARIS.

434—D. C. Chilaw, 7,164.

Fidei commissum—"*Heirs, executors, administrators, and assigns*"—*Gift to two persons subject to condition that after their death the property was to go to their children*—"*Their death*" *means* "*their death respectively.*"

By a deed S purported "to give, grant, assign, &c., unto E and O, their heirs, executors, administrators, and assigns as a gift absolute and irrevocable" . . . . a property subject to the condition that the said E and O "shall not sell, mortgage, or otherwise alienate the said premises . . . . and after their death the said premises shall go to, and be possessed by, their children as their absolute property."

Held, that the deed created a *fidei commissum*, and that on the death of either E or O his interests passed to his children.

The words "their death" ought to be construed as though they read "their death respectively," and the words "their children" as though they read "their respective children."

[1] *(1875) L. R. 10 C. P. 159.* [2] *(1896) 73 L. T. 624.*
[3] *(1916) 1 A. C. 175 (179).*

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THE facts are set out in the following judgment of the District Judge (N. M. Bharucha, Esq.):—

This is a partition suit. The land in question originally belonged to one Simon Moraes who by deed No. 4,755 dated February 22, 1895, gifted it to his newphew Elaris Moraes and Patrick Moraes (first defendant) subject to certain conditions. Ignoring the clause in the deed of gift prohibiting alienation, Elaris Moraes and Patrick Moraes each conveyed half share of the land to Venethithan Chetty on deeds No. 47 of 1911 (2 D 1) and No. 14 of 1910 (2 D 2). Venethithan Chetty conveyed the interest which he had acquired on deed (2 D 2) to Guruhamy Arachchi by deed No. 17 of September 15, 1910 (2 D 3). Guruhamy sold the said interest back to Venethithan Chetty by deed No. 2,986 of December 20, 1910 (2 D 5). Venethithan Chetty retransferred it to Guruhamy on deed No. 3,607 of October 21, 1911 (2 D 6). Venethithan and Guruhamy conveyed the entire land to the second defendant on deed No. 5,106 of January 16, 1912 (2 D 4).

2. Elaris Moraes died recently, leaving an only child, viz., the minor plaintiff, who claims a half share of the land in question, alleging that the deed of gift No. 4,755 (P 1) created a *fidei commissum* in favour of the children of Elaris Moraes and first defendant Patrick Moraes.

The learned Judge quoted the deed and continued:—

4. It was argued for the second defendant that in view of the operative and warranty clause in the deed of gift, an unfettered grant was made to the donees, and that, therefore, the restriction in the *habendum* clause was null and void. Plaintiff's counsel, on the other hand, submitted that the words "heirs, executors, administrators, and assigns" in the operative part vested in the fiduciaries the *plena proprietas* as a preliminary to imposing the *fidei commissum* upon the property. Apart from judicial authority, if I were to judge the case in the light of first principles, I have no doubt that the deed in question created a *fidei commissum*. There is a restriction against alienation together with a clear indication as to the persons who are to be benefited by the said restriction. The language used in the deed of gift is similar to that used in the deed which formed the subject matter of the case reported in *1 C. W. R. 25*, where it was held that a *fidei commissum* was created. The old cases relied on by the second defendant's counsel in support of his contention were cited in the case above referred to. Wood Renton C.J., in the course of his judgment in that case, states: "There is no doubt an old current of decisions of which *Suwaris Perera v. Christina Perera* [1] may be taken as the latest in favour of the argument against *fidei commissum*. But the more recent authorities (see *17 N. L. R. 129* and *18 N. L. R. 174*) laid down by the rule that the words 'heirs, executors, &c.,' in a deed alleged to create a *fidei commissum*, may be nothing more than the means of vesting in the fiduciary the *plena proprietas* as a preliminary to imposing a *fidei commissum* upon the property. I think that this principle is a sound one, and that some of the earlier decisions went too far in holding that the use of these words operated mechanically in favour of freedom of alienation." With these remarks, if I may venture to say so, I am in complete accord. I hold that the deed of gift creates a *fidei commissum* in favour of the children of Elaris Moraes and first defendant Patrick Moraes.

5. It was next submitted by the second defendant's counsel that the deed of gift was a joint grant in favour of Elaris and Patrick, and that on the death of Elaris, his half share accrued to Patrick, the survivor.

[1] *6 Leader 12.*

There is no special clause in the deed to justify this view. Nor can such a condition be implied because of section 20 of Ordinance No. 21 of 1844 (see also *24 N. L. R. 138*). In my opinion the minor plaintiff became the absolute owner of one-half on the death of his father Elaris.

6. As absolute owner of one-half, the minor plaintiff has status to maintain this partition suit. The action is properly constituted. There is no need to make the children of the first defendant parties to this suit.

7. There is no evidence to show that this is a *malâ fide* action brought by the next friend to have a disputed question of title settled.

8. Enter interlocutory decree declaring plaintiff entitled to half absolutely and second defendant to half subject to *fidei commissum* in favour of the children of the first defendant. The defendant to pay plaintiff costs of the trial. First defendant to bear all his costs personally—all other costs of the action and of partition to be borne *pro ratâ*.

. . . . . .

The deed in question was as follows:—

P 1. No. 4,755.

Know all men by these presents that I, Simon Moraes of Colpetty in Colombo, for and in consideration of the love and affection which I have and bear unto Elaris Moraes of Colpetty aforesaid (son of my brother Francis Moraes) and my adopted son Patrick Joseph Obrain Moraes, and for diverse other good causes and considerations, we hereunto specially moving do hereby give, grant, assign, transfer, set over, and assure unto the said Elaris Moraes and Patrick Joseph Obrain Moraes, their heirs, executors, administrators, and assigns as a gift absolute and irrevocable, subject to the conditions and restrictions hereinafter mentioned, all that lot marked C of the value of Rupees One thousand, being one-fourth part of all those two contiguous allotments of the land called Mirishenalanda, situate at Pambala and Walahena in Munnessaram pattu . . . . together with all deeds and writings relating thereto, and with all my right, title, interest, claim, and demand whatsoever in, to, upon, or out of the same, which said premises have been held and possessed by me under and by virtue of the said deed:

To have and to hold the said premises with all and singular the appurtenances thereunto belonging or used or enjoyed therewith, or known as part and parcel thereof, unto the said Elaris Moraes and Patrick Joseph Obrian Moraes, their heirs, executors, administrators and assigns for ever, subject, however, to the following conditions and restrictions, to wit: That the rents, profits, issues, and income of the said land and premises hereby gifted shall be taken, received, and enjoyed by my wife Manam Muhandiramge Justina Perera during her lifetime, and after her death the same shall go to, and be possessed by, the said Elaris Moraes and Patrick Obrain Moraes as their property, provided, however, that the said Elaris Moraes and Patrick Joseph Obrain Moraes shall not sell, mortgage, or otherwise alienate the said premises hereby gifted or any part thereof during their lives, and after their death the said premises shall go to, and be possessed by, their children as their absolute property. If the said Elaris Moraes and Patrick Joseph Obrain Moraes shall die without issue, then and in such case the said property hereby gifted shall go to, and be possessed by, my

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heirs as my former estate. And I do hereby for myself, my heirs, executors, and administrators covenant, promise, and agree to and with the said Elaris Moraes and Patrick Joseph Obrain Moraes, their heirs, executors, administrators, and assigns that the said premises hereby gifted and every part thereof are free from any incumbrance, and that I am my aforewritten shall and will at all times hereafter warrant and defend the same unto them and their aforewritten against any person or persons whomsoever:

And I, the said Manam Muhandiramge Justina Perera, do hereby thankfully accept the above gift for and on behalf of the said Elaris Moraes and Patrick Joseph Obrian Moraes made to them in the foregoing deed subject to the conditions therein expressed.

. . . . . .

H. J. C. Pereira, K.C. (with him *E. W. Jayewardene, K.C., Samarawickrame*, and *D. P. Fernando*), for the appellant.

Rodrigo (with him *R. C. Fonseka*), for the respondent.

July 4, 1924. BERTRAM C.J.—

This was a case which at first sight seemed to present issues of some complication, but as the case developed it was reduced to a very simple question. Mr. Pereira was unable to escape from the numerous authorities which determine the meaning of the phrase " their heirs, executors, administrators, and assigns " in documents which otherwise have an obvious *fidei commissum* intention. We need not, therefore, discuss that question. What we have to decide is the meaning of the following words: " After their death the said premises shall go to, and be possessed by, their children as their absolute property."

In the case with which we are dealing there is a *fidei commissum* in which certain property is granted to two brothers during their lifetime as fiduciaries, and on their death the property granted to them is to devolve upon their children. It is suggested that when the donor said: " after their death," he meant " after the death of both of them," and that so long as either of them was alive, no interest would accrue to their children.

This, on the face of it seems a very improbable intention to impute to the donor. But, as Mr. Samarawickreme truly says, what we have to look at is the intention he has expressed. Nevertheless, if there is an alternative interpretation which can justifiably give effect to what must have been his real intention, that intention is to be preferred.

In my opinion there is such an alternative interpretation. What is more, I consider it the more natural interpretation. The phrase " their death," in my opinion, ought to be construed as though it read " their death respectively," or " the death of the said Elaris Moraes and Patrick Joseph Obrain Moraes, respectively," and the phrase " their children " should be construed as though it read " their respective children."

Mr. Rodrigo has drawn our attention to the case of *Perera v. Silva*,[1] where the same interpretation was given to almost similar collection of words. Further, there is a South African case cited in the Law of Wills by Sir Henry Juta at page 143—*Mills v. Est. Van Beark*,[2] where the expression " after our death " was held to mean " after the death of each of the two spouses respectively," and not " after the death of both of them."

Mr. Samarawickreme suggests that by such an interpretation we are doing violence to the doctrine of *Tillekeratne v. Abeyesekera*.[3] I am unable to see that this is the case. I do not think that it can be plausibly suggested that the Privy Council in that case intended that, where property was left to fiduciaries, and after their death to their children, until both fiduciaries are exhausted no interest could accrue to successive generations. In this view of the case the judgment of the learned District Judge should be upheld, and the appeal dismissed, with costs.

JAYEWARDENE A.J.—I agree.

Appeal dismissed.