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## DASSANAIKE *v.* DASSANAIKE.

*D. C., Colombo, 22,190.*

Fidei commissum—*Operative clause*—" *Gift absolute and irrevocable*—" *Heirs, executors, administrators, and assigns* "—Habendum *clause*—" *Generation* "—*Warranty of title.*

A deed of gift executed by D and his wife contained the following operative clause: " We . . . . . have given, granted, assigned, and transferred, and set over, as we do hereby give, grant, assign, transfer and set over as a gift absolute and irrevocable unto the said L, his heirs, executors, administrators, and assigns the following. . . ."

The *habendum* was as follows:—" To have and to hold the said premises with their and every of their appurtenances unto the said L, his heirs, executors, administrators, and assigns for ever, subject nevertheless to the following conditions, that is to say, that he, the said L, and his generation shall possess the said lands for ever, but he or his heirs shall not sell, mortgage, or alienate the same in any manner whatsoever."

*Held*, that the deed did not create a valid *fidei commissum*.

WENDT, J.—The operative clause having made an unfettered grant of the property with express contemplation of alienation in the mention of assigns, the prohibition of alienation in the *habendum* is void as repugnant to the terms of the grant.

CASE stated by agreement of parties for the opinion of the Court.

The agreement was as follows:—

" (1) That Don Cornelis Abeyaratne Gunewardene Dassanaike, Mudaliyar, and his wife, Johanna Francina de Saram Lama Ettana, were the owners and proprietors of the following property, to wit:—All those fields called and known as Panwatte Muttetuwa Talgaha *alias* Maha Muttetuwa and Halgaha Muttetuwa, situated at Radawedanne in the Migaha pattu of the Siyane korale in the District of Colombo, within the jurisdiction of this Court, of the value of Rs. 2,000.

" (2) That by their deed No. 2,187, dated 18th June, 1858, the said Don Cornelis Abeyaratne Gunewardene Dassanaike and Johanna Francina de Saram donated the above-named land and other lands to their son Henricus Lucius Dassanaike in the following terms, to wit:—

' We have given, granted, assigned, transferred, and set over, and do hereby give, grant, transfer, and set over as a gift absolute and irrevocable unto the said Henricus Lucius Louis Dassanaike, his heirs, executors, administrators, and assigns the following lands, to wit. . . . . '

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'To have and to hold the said premises with their and every of their appurtenances unto the said Henricus Lucius Louis Dassanaike, his heirs, executors, administrators, and assigns for ever, subject nevertheless to the following conditions, that is to say, that the said Henricus Lucius Louis Dassanaike and his generations shall possess the said lands for ever, but he or his heirs shall not sell, mortgage, or alienate the same in any manner whatever.'

"(3) That the said Henricus Lucius Louis Dassanaike duly accepted the said donation.

"(4) That the said Henricus Lucius Louis Dassanaike possessed the said property as donee under the said deed of gift, and he departed this life leaving a last will and testament, whereof he appointed the parties of the first part hereto executors, and whereby he devised and bequeathed all his real or immovable property wheresoever situate, whether in possession, reversion, remainder, or expectancy, nothing excepted, unto his children and grandchildren in the said will named in the shares or proportions therein set forth, that is to say, the parties hereto, save and except the said William Henricus Dassanaike and Robert Alexander Dassanaike and the children of the said William Henricus Dassanaike and Robert Alexander Dassanaike.

"(5) That the said last will and testament was duly proved in the District Court of Colombo and probate thereof issued to the executors named therein, to wit, the parties of the first part in testamentary proceedings numbered 1,585.

"(6) That a question has arisen between the parties to this agreement whether the said property described in above clause passed under the will of the said Henricus Lucius Louis Dassanaike and became vested in the executors thereof as such, or whether under the deed of gift aforesaid a valid entail or *fidei commissum* was constituted in respect of the said property, and whether by operation of such entail or *fidei commissum* the said property became vested in the descendants of the said Henricus Lucius Louis Dassanaike, some of whom are the parties to this agreement, and the parties to this agreement, being desirous of submitting the said question for the decision of the District Court of Colombo, have entered into this agreement, and they agree that upon the finding of the said Court on the said question the said property either be taken possession of by the said executors for administration as belonging to the estate of the said Henricus Lucius Louis Dassanaike or be allowed to remain in the possession of his descendants on the footing and by operation of a valid entail or *fidei commissum* created by the said deed of gift.

And it is hereby further agreed that the said parties hereto shall be at liberty to appeal against the judgment pronounced by the Court upon the facts and questions stated in this agreement and submitted to the Court for its decision or against any decree framed and passed on the judgment so pronounced."

The learned District Judge (Mr. J. R. Weinman) delivered the following judgment:—

" Don Cornelius Dassanaike, Mudaliyar, and his wife, Francina de Saram Lama Ettana, were owners of certain lands situated in Radawadanne. By deed No. 2,187, dated 15th June, 1858, they donated these lands to Henricus in these terms: ' We have given, granted, assigned, transferred, and set over, and do hereby give, grant, assign, transfer, and set over as a gift absolute and irrevocable unto the said Henricus, his heirs, executors, administrators, and assigns the following lands.....to have and to hold the said premises.....unto the said Henricus, his, heirs, executors, administrators, and assigns for ever, subject nevertheless to the following conditions, that is to say, that he, the said Henricus..... and his generations shall possess the said lands for ever, but he or his heirs shall not sell, mortgage, or alienate the same in any manner whatever.'

" Henricus accepted the donation. He died leaving a last will, whereof he appointed two executors, and whereby he bequeathed ' all his real and immovable property to his children and grandchildren ' (excepting two) in certain proportion. Probate of the last will of Henricus was issued to the executors named therein by this Court. The question has now been submitted to the Court whether the property passed under the will of Henricus and became vested in the executors, or whether under the deed of gift a valid *fidei commissum* was created.

" But for the judgment of the Supreme Court reported in volumes II. and VI. of the *New Law Reports*, D. C., Galle, 6,242 (6 *N. L. R.* 344), I would hold that a valid *fidei commissum* was created. If we are to judge by intention, I have no doubt that it was the intention of the donor to impress a *fidei commissum* on the property. The Supreme Court (*per* Wendt, J., in *Ibangu Agen v. Abeyasekera*, D. C., Galle, 6,242, 6 *N. L. R.* 344), has laid it down that in construing a will the paramount question is, What was the intention of the testator? The point taken by Mr. Pereira, however, has been decided by the Supreme Court, and I am bound by its decisions. It is conceded that if it was declared that the property should pass over to the descendants the *fidei commissum* was a good one. It

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was contended that the words ' executors, administrators, and assigns ' are meaningless words taken over from English forms by notaries without the least understanding what they meant. But I find the same argument was pressed in the Appeal Court in the Colombo case above cited and repelled by that Court. There is no doubt that some of our deeds, especially those of early date, are a curious jumble of Roman-Dutch and English forms, but the Supreme Court has held that it is impossible to delete or ignore from deeds the words ' executors, administrators, and assigns.'

" I hold, therefore, that the gift did not create a valid *fidei commissum*.

" The costs of the proceedings in this matter will be paid out of the estate."

In appeal.

*Sampayo, K.C.*, for appellants.

*H. A. Jayewardene*, for respondents.

*Walter Pereira, K.C.*, for plaintiffs.

20th February, 1906. LAYARD, C.J.—

The only question raised in this appeal is whether the deed of gift No. 2,817, dated 10th June, 1858, created a *fidei commissum*.

The donor, in consideration of natural love and affection, transferred certain property situated in the gravets of Colombo to his son Henricus Lucius Louis Dassanaike, " his heirs, executors, administrators, and assigns " as a gift absolute and irrevocable. The *habendum* clause which determines the estate or interest granted by the deed begins by directing that the property is to be held by the donee, his heirs, executors, administrators, and assigns for ever, thus creating an absolute title in the donee without any reservation. After so doing it adds the following conditions: the donee " and his generations " are to possess the said property " for ever, but he or his heirs shall not sell, mortgage, or alienate same in any manner whatsoever." After the *habendum* clause comes covenants of the donor with his donee, his " heirs, executors, administrators, and assigns."

It is this almost unintelligible instrument we are asked to construe as creating a valid *fidei commissum*.

Appellant's counsel's argument amounts almost to this: in construing the document you must attach no importance to the words " heirs, executors, administrators, and assigns;" you must ignore them in fact, and you must confine yourselves to discovering what was the intention of the donor.

I do not think we ought to depart from our decision in *Ibangu Agen v. Abeyesekara*, D. C., Galle, 6,242 (6 *N. L. R.* 344). It is there clearly laid down that in construing a will the intention of the testator is of paramount importance. We, however, in unambiguous language point out that this Court will only give effect to the testator's intention and declare a *fidei commissum* to have been created by the testator when it is clear that the person to whom the property is in the first place given is not to have it absolutely, and if it is also clear from the terms of the will " who is to take after him and upon what event."

I presume we must apply the same tests to this deed of gift. There can be no doubt that if the words " subject nevertheless to the following conditions, that is to say, that the said Henricus Lucius Louis Dassanaike and his generations shall possess the said land for ever, but he or his heirs shall not sell, mortgage, or alienate the same in any manner whatsoever " did not appear in the deed, there was an absolute grant to the donee free of any limitation. Say we hold that the prohibition above set out is a sufficient designation of the *fidei commissum*, can we delete the words " executors, administrators, and assigns " from the deed ? They occur no less than five times in it. Moncreiff, J., appears to have asked himself a similar question in his judgment in *Aysa Umma v. Noordeen* (6 *N. L. R.* 173), confirmed in review 25th September, 1905 (8 *N. L. R.* 350), in respect of a deed of gift very similar to the one I am now trying to construe; his answer was, " It is impossible to ignore them." I agree with that answer, and think it is the only one that can be given to the question put by me above. Without ignoring those words, I feel that I cannot say that it is clear from the deed of gift that the donee was not to have the property absolutely. I further think that it is impossible for me to say, even if I hold that it was clear from the deed of gift that the donee was not to have it absolutely, that it is also clear who is to take after the donee. It was argued that the restriction on alienation was in favour of the donee's heirs by descent; that the words " generations " as used in the *habendum* clause ought to be interpreted as " descendants." It is said that the word used in Sinhalese to denote " generation " is open also to the interpretation " descendant." We are, however, now trying to interpret an English deed, and not the translation into English of a Sinhalese deed, and we must look to the English language for guidance, and not the Sinhalese.

I really do not know what was intended to be conveyed by the words " his generations " as they appear in the *habendum* clause. The word " generation " has several meanings: it means a single

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succession or natural descent, as the children of the same parents; hence it is applied to an age or period of time between one succession and the next; thus we say the third, the fourth, or the tenth generation. It also means the people living at the same time or period. It is sometimes used to denote a family or race, and again to denote progeny or offspring. Say we interpret it here to mean "descendants," then it would limit the word "heirs" to, I suppose heirs of the donees only, and the words in the passage that his heirs shall not sell, mortgage, or alienate the same will have to be restricted to such heirs as are descended from the donee. It may, however, be that his intention was to secure the property to his own family, and that the words were used in a larger sense and were intended to include the donee's heirs, who would have succeeded to the donee's estate had he died intestate not necessarily his descendants. I cannot say that the deed of gift even clearly discloses who is to take after the donee, and I do not know how to give effect to the donee's intention, of which I am absolutely ignorant.

The appeal must be dismissed with costs.

WENDT, J.—

We have to construe the deed of gift dated 18th June, 1858, whereby Dassanaike Mudaliyar and his wife donated a number of lands to their son Henricus Lucius Louis Dassanaike. The question is whether the donee took the absolute unfettered *dominium* in the lands (as respondents contend), or whether there was a *fidei commissum* created, whereby his children were substituted for him on his death (as the appellants submit). The deed is in the English language, and, save for the words in the *habendum* which create the difficulty, follows a form commonly employed by notaries in conveying property absolutely. It witnesses that the donors, for and in consideration of the natural love and affection which they have and bear unto their son, the donee, and other good causes and considerations then thereunto specially moving, have given, granted, assigned, transferred, and set over, as they do thereby give, grant, assign, transfer, and set over, as a gift absolute and irrevocable unto the donee, his heirs, executors, administrators, and assigns the following lands (which are there named and described), to have and to hold the said premises with their appurtenances unto the said donee, his heirs, executors, administrators, and assigns for ever, subject nevertheless to the following conditions, that is to say, that he, the said donee, and his generations shall possess the said lands for ever, but he or his heirs shall not sell, mortgage, or alienate the

same in any manner whatsoever. Then follows a covenant by the donors for themselves, their executors and administrators, with the donee, his heirs, executors, administrators, and assigns that the donors have good title and will further warrant and defend the premises to the donee, his heirs, executors, administrators, and assigns.

It is admitted that, up to the words in the *habendum* " that he the said Henricus Lucius Louis Dassanaike and his generations shall possess the said lands for ever," the deed conveys an unfettered *dominium*, but it is argued that those words, taken together with the later prohibition against alienation by the donee or his heirs, constitute a *fidei commissum* in favour of the donee's descendants. Upon a strict construction of the instrument, I am inclined to think that the *testatum* or operative clause having made an unfettered grant of the property with express contemplation of alienation in the mention of assigns, the prohibition of alienation in the *habendum* is void as repugnant to the terms of the grant. Furthermore, the donors after prohibiting alienation once more provide for the case of a valid alienation, and sanction it by covenanting to warrant and defend the title of the donee's assigns.

Appellant's counsel asked us, as the appellant asked in *Aysa Umma v. Noordeen* (6 *N. L. R.* 173), to discard altogether the words " executors, administrators, and assigns " and construe the deed as if they did not exist. This request was based on the assertion that those words " were a mere flourish of the notary's pen, and had nothing to do with the intentions of the donors." I think it is impossible so to ignore them. It cannot be said that they are meaningless; on the contrary, they are apt and proper words to use in connection with a grant " absolute and irrevocable," such as this professes to be. No doubt the final question in all cases like the present is, What was the intention of the person making the grant ? (*Voet*, 36, 1, 72); in the present case the only evidence before us of that intention is contained in the words of the deed, and in order to gather the donor's intention every word must, if possible, be given effect to. At the best, the deed must be admitted not to be consistent throughout; there is first an absolute grant, then a prohibition to alienate, and then again the sanction of alienation involved in the covenant to defend the title of assigns. It is well settled that in case of doubt the Court inclines against the restriction of the *dominium*. I therefore think our judgment ought to be for the respondents.

The cases of *Hormusjee v. Cassim* (2 *N. L. R.* 190) and *Aysa Umma v. Noordeen* are in point on the question I have dealt with. The

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latter case, which was affirmed by the Full Court in review on 25th September, 1905, is a stronger authority than the former, because there was express mention of the children and grandchildren of the donees, while in *Hormusjee v. Cassim* the persons in whose favour the prohibition against alienation was interposed were not ascertained.