

[PRIVY COUNCIL.]

1910.

Present : Lord MacNaghten, Lord Shaw, Lord Mersey, and
Lord Robson.

FERNANDO v. GUNATILLEKE.

D. C. Colombo, 29,620

Gift subject to condition that donee should not sell or mortgage—Sale by donor and donee to third party—Mortgage by donee without consent of donor—Life-interest—Fidei commissum.

By a deed of 1882 Maria gifted her land to Palis, his heirs, &c., subject to the following conditions:—

- (1) The said Maria shall have the right of possessing and enjoying the rents, income, &c., until Palis shall have arrived at the age of twenty-five years.
- (2) After the said Palis shall have arrived at the age of twenty-five years, if I, the said Maria, shall be living, then Palis shall not be at liberty to sell, mortgage, or alienate the said lands and premises during my lifetime, but shall only possess and enjoy the rents, income, and produce thereof.

Palis attained the age of twenty-five years in 1891, and died without issue in 1896.

Palis, with the consent of Maria, sold the premises to plaintiff by a deed¹ dated December 5, 1893, to which both Palis and Maria were parties.

On October 23, 1893, Palis mortgaged his interest to W. The defendant claimed the property by virtue of a Fiscal's sale, held in execution of a mortgage decree obtained against Palis.

In a possessory action by plaintiff against defendant—

Held, that plaintiff was entitled to succeed.

"It does not appear to be a reasonable view that a deed in the terms of that of 1882 did not fully reserve, in the circumstances stated, the life-interest of Maria, nor do they entertain any doubt that the consent, concurrence, and ratification of that lady by the deed of December 5, 1893, was completely given and is effective in law."

The deed of October 23, 1893, was granted in excess and violation of the rights of Palis.

THE facts are set out in the following judgment of the Supreme Court:—

July 12, 1910. WOOD RENTON J.—

The plaintiff-appellant sues the defendant-respondent in this action for a declaration that he is entitled to the possession of

¹ See judgment of Privy Council for terms of the deed.

1910. premises Nos. 240 and 240A in Kollupitiya, Colombo. It is admitted
 WOOD that the property originally belonged to one Maria Felsingar, and
 RENTON J. that she, by deed No. 860 dated September 23, 1882, gifted it to her
Fernando v. son, Palis Swaris, subject to the following terms and conditions:—
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That the said donor, Maria Felsingar, shall have the right of possess-
 ing and enjoying the rents, income, produce, and issues of the said lands
 and premises until the said Swaridge Palis Swaris shall have arrived
 (sic) the age of twenty-five years, and that after the said Swaridge Palis
 Swaris shall have arrived the said age of twenty-five years, if the said
 donor shall be then living, then the said Swaridge Palis Swaris shall not
 be at liberty to sell, mortgage, or alienate the said lands and premises
 during his lifetime, but shall only possess and enjoy the rents, income,
 and produce thereof; but if she, the said Maria Felsingar, shall die before
 the said Swaridge Palis Swaris shall have arrived to the said age of
 twenty-five years, then he, the said Swaridge Palis Swaris, shall only
 possess and enjoy the rents, produce, and income of the said lands and
 premises, but shall not be at liberty to sell, mortgage, or alienate the
 same until he shall have arrived the said age of twenty-five years, and
 that if the said Swaridge Palis Swaris should die without lawful issues,
 then the said lands and premises shall devolve and go to his two brothers,
 Swaridge Stephen Swaris and Swaridge Nicholas Swaris, or to their
 lawful issue.

The appellant alleges that Palis Swaris and Maria Felsingar, by
 deed No. 8,841 dated December 5, 1893, conveyed all their interest
 in the premises which formed the subject of this action to him.
 Palis attained majority in 1891, and died intestate and without
 issue in 1896. The defendant-respondent claims the premises by
 virtue of a Fiscal's sale, held in execution of a mortgage decree
 obtained against Palis in District Court, Colombo, No. 7,260. At
 this sale, he says, the premises were purchased by his testator, who
 obtained a Fiscal's transfer on July 24, 1903. The case went to
 trial on the following issues:—

- (1) Was Palis Swaris, after attaining the age of twenty-five years, and his mother being then alive, entitled to a life-interest only in the property, or was he entitled to rights of ownership which were capable of alienation?
- (2) Was the interest of the plaintiff in the premises acquired by the defendant as stated in the 8th paragraph of the answer?
- (3) Did the plaintiff by deed No. 884 acquire a right to possess the premises during the life of Maria?
- (4) If so, is the plaintiff estopped by the sale under the decree in D. C. Colombo, 7,260, from questioning the defendant's claim to complete title to the premises?
- (5) What is the value of the possession of the premises since July, 1908 (the date at which the respondent alleges that his testator was ousted by the appellant)?

The learned District Judge held that Maria Felsing^r did not, by the deed of December 5, 1893, transfer her rights, whatever they were, to the appellant. He held, however, that when Palis attained the age of twenty-five years he acquired the power to pass title to the premises, free from any rights of possession or ownership acquired after his death; that the deed of gift did not create a valid *fidei commissum*, and did not give Maria a life-interest on the death of Palis without issue. On these findings, he held that the appellant got nothing more by his deed of December 5, 1893, than what had already passed to the defendant's testator under his Fiscal's conveyance. On the 2nd and 4th issues, however, he held that the appellant's interest had not been sold under the mortgage decree, and that he could not be estopped by the sale under the decree in D. C. Colombo, 7,260, from questioning the respondent's title as regards anything but the subject of the sale; that is to say, Palis's interest at the date of the mortgage. He left the question of the assessment of the value of the possession of the premises undetermined as rendered unnecessary by his decision, and dismissed the appellant's action with costs.

The mortgage bond on which decree was passed in D. C. Colombo, 7,260, was dated October 23, 1893, and was prior, therefore, in point of time to the alleged transfer by Maria Felsing^r, of her interest, whatever it was, under the appellant's deed.

I am unable to agree with the learned District Judge that the deed of December 5, 1893, did not effect the transfer of Maria Felsing^r's interest to the appellant. It is true that the deed contains no direct words of conveyance on the part of Maria Felsing^r, and that it is Palis himself who sells and conveys. But Maria was made a party to the deed. She herself covenants "in consideration of the premises aforesaid," that is to say, of Palis's agreement to sell, and of the payment of the price to him by the appellant, that she consents and approves of the sale, and gives and grants power and license to her son to dispose of the property absolutely, and "doth ratify and confirm the same, freed and discharged from all her claims whatsoever therein and thereto, and from all restrictions, conditions, and reservations, whatsoever, anything in the deed No. 860 dated September 23, 1882, to the contrary notwithstanding."

After careful consideration, I am unable to construe this deed in any other sense than as a transfer, for her part, by Maria Felsing^r in favour of the appellant of all her interest, whatever it might be, in the property sold.

On the question as to the interest taken by Maria Felsing^r in the property, I adopt the view of Mr. Justice Wendt in the connected case of 163—D. C. Colombo, No. 20,345, which does not seem to have been brought under the notice of the learned District Judge. In the present case, I think that the deed No. 860 of September 23, 1882, reserved a life-interest to Maria Felsing^r on the death of Palis

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Swaris without issue. I agree with the learned District Judge that the appellant is not estopped by his having been made a party to the action in D.C. Colombo, 7,260, or by the decree in that action, from questioning the respondent's title as regards anything, except what formed the subject of the actual sale, namely, Palis's interest at the date of the mortgage. The mortgage was prior to the transfer by Maria Felsingher and Palis to the appellant. I do not think that the language of the decree itself or the terms of the Fiscal's conveyance can affect the plaintiff's legal position on that point. I would set aside the decree of the District Court, dismissing the appellant's action, and direct judgment to be entered for the plaintiff-appellant, declaring him entitled to the possession of the premises described in the plaint during the lifetime of Maria Felsingher, and, if necessary, the ejectment of the respondent therefrom, and the restoration of the appellant forthwith thereto.

The appellant is entitled to the costs of the action and the appeal.

GRENIER J.—

The crucial question in this case was, as suggested by appellant's counsel, whether Maria Felsingher's interests in the property in question passed under the deed executed by herself and her son Palis Swaris in favour of the plaintiff dated December 5, 1893. I was first inclined to think that as there were no express words of conveyance in it those interests were not conveyed, but, as the argument proceeded, it appeared clear to my mind, that after the execution of the deed Maria Felsingher had no further interests which could be made the subject of transfer or conveyance. It is difficult to construe the terms and conditions of the deed of gift No. 860 dated September 23, 1882, as the language employed is somewhat obscure and involved, but the intention, as far as I can gather it from the whole deed, was to reserve a life-interest to Maria Felsingher in the event of Palis Swaris dying issueless. It seems to me that the notary himself was doubtful as to what Maria Felsingher's interests were at the date of the execution of the deed in favour of plaintiff, whether she had a life-interest in active operation at the time, or contingent at the death of Palis Swaris without issue. He apparently decided that it was the latter; and as Palis Swaris had undoubtedly the *dominium*, and was entitled to deal with the property, the notary refrained from using words of conveyance which would imply the former, and made use of language ratifying and confirming the absolute disposal of the property by her son, and "freeing and discharging it from all her claims, and from all restrictions, conditions, and reservations, anything in the deed No. 860 dated September 23, 1882, to the contrary notwithstanding." I understand these words to mean that Maria Felsingher abandoned and surrendered in favour of her son Palis all her interests, whatever

they may be, in the property, and that the plaintiff took under the deed, not only the *dominium*, but Maria Felsingers life-interest present and future. Clearly Maria Felsingers cannot claim any life-interest now; and if that interest is not vested in plaintiff; I do not know in whom it can possibly be.

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I agree entirely with the judgment of my brother on all the points discussed in it. I would set aside the decree of the District Court as proposed by him.

The defendant appealed to the Privy Council.

Dornhorst, K.C., and *Sproule*, for the appellant.

Atherley-Jones, K.C., and *Horace Miller*, for the respondent.

February 21, 1912. Delivered by LORD SHAW—

This is an appeal from a decision of the Supreme Court of the Island of Ceylon dated July 12, 1910. This decision, pronounced by Wood Renton and Grenier JJ., reverses a judgment of the Acting Judge of the District Court of Colombo dated December 20, 1909.

In their Lordships' opinion some difficulty was created in the course of the case by failure to observe what is the true nature of the suit. It is a possessory suit for a declaration that the plaintiff is entitled to the possession of certain premises in Kollupitiya, within the municipal boundary of Colombo. What follows in the prayer of the plaint is consequent upon this possessory declaration, namely, that the defendant's claim to these premises should be declared groundless, and that, if the defendant be in possession, he should be ejected. Their Lordships think that the true view of the nature of the action was, however, kept fully before the Supreme Court, and that the conclusions thereupon, and of the rights of parties with reference thereto, have been correctly reached in the judgment appealed from.

The plaintiff (respondent) claims possession by virtue of a deed dated December 7, 1893, executed in his favour by Swarisge Palis Swaris of the first part and Maria Felsingers, mother of Palis, and now wife of the plaintiff, of the third part.

The question in this case is whether the plaintiff (respondent) by that deed acquired a title to possession of the premises sufficient to exclude the title set up by the appellant. This question depends upon another, namely, what is the scope and effect of the title under which the premises were held by Palis and his mother at the date of the conveyance granted to the plaintiff by them in December, 1893? That title is a deed of gift dated September 23, 1882, being the deed under which the said property was held at the date of the subsequent transactions. By that deed of gift Maria Felsingers bore to "give, grant, assign, transfer, and set over unto the said Swarisge Palis Swaris, his heirs, executors, administrators, and assigns, as a gift absolute and irrevocable, under and subject to the conditions and

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reservations hereinafter mentioned," the property. These conditions and reservations, however, were of a radical character, namely, "to have and to hold, subject, however, to the following conditions and reservations, that I, the said Maria Felsing, shall have the right of possessing and enjoying the rents, income, &c., until the said Swaridge Palis Swaris shall have arrived at the age of twenty-five years." This event happened. The conditions then proceed: "and that, after the said Swaridge Palis Swaris shall have arrived at the age of twenty-five years, if I, the said Maria Felsing, shall be living, then the said Swaridge Palis Swaris shall not be at liberty to sell, mortgage, or alienate the said lands and premises during my lifetime, but shall only possess and enjoy the rents, income, and produce thereof." The event here contemplated also happened, and, so far as possessory rights are concerned, these clauses quoted appear to cover the facts which have emerged. No ulterior rights are brought into this case, and the sole question is the possession of the property in 1893, the title standing, as it did, under the deed of 1882. Has there been a sufficient transfer of that right of possession by the later deed? In their Lordships' opinion, agreeing with that of the Court of Appeal, there has.

It may be explained that Palis attained the age of twenty-five years in 1891. He died unmarried and without issue in 1896. In 1893 accordingly the position plainly was that that clause of the deed above cited applied, which declares that Palis was entitled to a life-rent and enjoyment of the premises, but should not be at liberty to sell, mortgage, or alienate them. Under the deed of December 5, 1893, which was registered on the 7th of that month, it is narrated that "whereas the said Swaridge Palis Swaris attained his age of twenty-five years in the year 1891, and since then he is in possession of the said premises, taking the rents, profits, and income thereof; and whereas he hath agreed and concluded, with the consent and approval of his donor, the said Maria Felsing, testified by her being a party hereto and joining in executing these presents, to sell and convey the said premises unto" the respondent. A conveyance follows: "And the deed further witnesseth that the said Maria Felsing, for and in consideration of the premises aforesaid, doth hereby consent and approve and give and grant liberty, power, and license unto her son, the said Swaridge Palis Swaris, to sell, convey, assign, and assure unto the said Daniel John Fernando and his aforewritten absolutely the premises aforesaid and every part thereof, and both ratify and confirm the same, freed and discharged from all her claims whatsoever therein and thereto, and from all restrictions, conditions, and reservations whatsoever, anything in the said deed" of 1882 to the contrary "notwithstanding."

The learned Judges of the Supreme Court, adopting the view of Mr. Justice Wendt in a connected case, held that Maria Felsing's interest in the property passed under this deed. Mr. Justice Wood

Renton observes: " After careful consideration, I am unable to construe this deed in any other sense than as a transfer for her part by Maria Felsing in favour of the appellant (the respondent in this appeal, Mr. Fernando) of all her interest, whatever it might be, in the property sold." Their Lordships are of the same opinion. It does not appear to them to be a reasonable view that a deed in the terms of that of 1882 did not fully reserve in the circumstances stated the life-interest of Maria Felsing, nor do they entertain any doubt that the consent, concurrence, and ratification of that lady by the deed of December 5, 1893, was competently given and is effective in law. This being so, the case made by the appellant on the point appears to fail.

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The appellant, however, founds upon a deed dated about six weeks prior to that of December, 1893, namely, the deed of October 23 of that year. By the deed of October 23, Palis bound himself within twelve calendar months to sell, in respect of an arrangement for loan, to one Francis Perera Wanigaratne, " free from all encumbrance whatsoever, the aforesaid premises." Wanigaratne bound himself within the same twelve months to purchase and take the conveyance, and Palis bound himself before execution to " release the said premises from all present and now existing encumbrances and alienations." As already explained, at the date of this deed Palis had reached the age of twenty-five, and he was expressly precluded by the only deed under which he had any rights in the property, namely, that of 1882, from being " at liberty to sell, mortgage, or alienate the said lands " during the lifetime of Maria Felsing. The deed of October 23 was accordingly granted in excess and violation of his rights. Their Lordships think that it, accordingly, or anything had or done under it, cannot stand in the way of the rights effectively granted to the respondent under the deed of December 15, 1893. They will humbly advise His Majesty that the appeal should be dismissed with costs

Judgment of the Supreme Court affirmed..