Present : Bertram C.J. and Shaw J.

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PERERA *v.* PERERA.

172—D. C. Negombo, 12,548.

Fidei commissum—*Prohibition against alienation*—Fidei commissum residui—Fidei commissum, *with power to dispose of the property.*

It is not necessary that there should be a prohibition against alienation to constitute a *fidei commissum*. A *fidei commissum* might be so constituted as to take effect if the fiduciary died intestate, or without having made any deposition of the property during his lifetime.

A person by deed gifted his property to three of his children and "their heirs and assigns, as (*sic*, such as are) children and grandchildren, to be possessed or to be dealt with as they pleased, subject to the direction herein mentioned below." The deed provided, *inter alia*, that if one or two of the donees died without leaving a descendant, their shares should devolve on the survivor; and that if all three donees died without leaving any descendants, the property should pass to another branch of the family. There was no prohibition against alienation. The District Judge held that the deed did not effect a restraint upon alienation, but that it merely determined in what manner the property should devolve on the death of his three children, if it has not been alienated during their lifetime, or if it has not been disposed of by will before their deaths.

Held, that the deed created a valid *fidei commissum*, and that it was not open to the donees to alienate the property.

THE following is the deed which was construed in this case:—

No. 7,705.—Deed of Gift.

I, ———, do hereby declare and say:—

That after the Matrimonial Rights and Inheritance Ordinance of 1876 came into operation I married M, and through her four children were born to me, namely, Juliana, Ana, Stephen, and Joseph, which said four children and my said wife are now living.

That out of the said four children, my eldest daughter, Juliana, is a minor, though she has attained "age."

That the said Juliana took to herself, without my consent, a husband on or about November last, without getting married according to law, and she is living a life against morals and religion.

As I have sufficient reasons to believe that my wife, the said mother of the said Juliana, is in favour of the said Juliana, and is encouraging her to lead an immoral life, and as I consider that they do not deserve my

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pleasure and benefits, and if I do not make some arrangements and directions with regard to the properties now belonging to me, that they would do away with the said properties in improper ways, and for preventing my remaining three children from falling into vice in future, I am willing to grant and set over as a gift unto my said three children, Ana, Stephen, and Joseph aforesaid, the five portions of land more fully described herein below, subject to the following directions and arrangements, to be owned by them equally after my death, in consideration of the love and affection that I have and bear unto them.

Now know ye and these presents witness that I have hereby granted and set over unto the said Ana, Stephen, and Joseph, and their heirs and assigns, as children and grandchildren, the five portions of land more fully described herein below . . . . . to be possessed or to be dealt with as they please, subject to the direction mentioned herein below, to wit:—

[Lands described.]

The directions and arrangements above referred to:—

1. It is hereby ordained that after my death, or after I become incapable of making arrangements with regard to my property by reason of my becoming unsound in mind, or from the date of the happening of either of the said two things, this deed of gift shall be valid.

. . . . . .

3. And if I happen to die without revoking or altering the said deed, and if one or two of the said three donees happen to die without having a descendant after my death, the shares to which the deceased person or persons are entitled shall devolve on the survivor, but in that emergency, the above named, my daughter, Manamalakankanamalage Juliana Perera, and her mother, my wife Dona Madalena Silva, or their descendants, shall not be entitled to any part of the said property, notwithstanding any provision to the contrary in any Ordinance or common law now in operation relating to lands.

4. That if the said three donees happen to die without leaving descendants, the said property and the income that has been derived therefrom shall devolve on the four sons of the daughter of my sister, Juliana Perera, and on their descendants, or after the death of the herein-mentioned three donees, Ana, Stephen, and Joseph, without a descendant or descendants, the same shall devolve on the said Juliana Perera's four sons, the said Don Peter, Don Jokino, Don Romaldo, and Don Sylvestri.

5. That if the first donee, Ana, happen to enter into a marriage after my death, she should have a certificate from the said guardian to the effect that the said marriage is a suitable one as regards the caste and position in law, or his signature in the marriage register to the same effect, and if he were not living at the time of her marriage, or if he were not qualified to give consent according to law, or if he withheld his consent without a reasonable cause, then, on such occasion, a certificate from the then Missionary Apostolic in charge of this Mission of the Holy Roman Catholic religion to the effect that it is a suitable marriage, and if she happens to enter into a marriage with her own will and pleasure that will not suit the caste and position in life, the donation made by this deed will be totally void, and her share of the said property shall devolve on the other two donees and their descendants, and at that time

if only one of the said two donees is living, the said share shall wholly devolve on the survivor, and if both of them are not living, or if there be no descendants of theirs, then, as mentioned herein above, the said property shall devolve on the said Juliana Perera's four sons.

. . . . . .

Bawa, K.C. (with him *Samarawickrema* and *Croos-Dabrera*), for the appellants.

A. St. V. Jayawardene and *M. W. H. de Silva*, for the respondents.

Cur. adv. vult.

October 9, 1918. BERTRAM C.J.—

This is a case in which the Court is called upon to construe a deed which is said to create a *fidei commissum*. There is no actual necessity for the interpretation of this deed to be decided in this action. The action is a suit for the partition of certain lands, and whatever the intention of the deed may be, whether the lands are subject to a *fidei commissum* or not, they can be partitioned now, and the question as to whether there was a *fidei commissum* might be left to be determined subsequently. The parties have, however, joined issue on the subject in the Court below. The learned District Judge has considered the question, and has given a decision upon it, and he has embodied a reference to his judgment in the decree. I think it better, therefore, that this Court, before whom the question is brought on appeal, should express an opinion as to the matter contested in the Court below.

The question arises on a deed of gift. It appears that the donor had had trouble in his family. One of his daughters, Juliana Perera, was living with a man who was not her husband, and her father was incensed against her on that account, and against his wife for supporting the erring daughter. He was also anxious to provide some security against his other daughter being led into a similar course, and he, therefore, framed this deed. He declared that the properties in the deed should go to his daughter and her two brothers, and to such of their legal personal representatives as should be children and grandchildren, that is to say, to their direct descendants only. He gave them full disposition of the properties so conferred, subject to certain directions afterwards contained in the deed. These directions were that if any of the donees died after his death without leaving descendants, the shares of those donees should pass to the survivor, and that if all died without descendants, their shares should pass to another branch of his family; and he further provided that if his daughter married without obtaining a certificate, which is specified in the deed, to the effect that her marriage was a desirable marriage, the donation made by the deed to her should be totally void.

There are no express words in the deed restraining alienation. But it appears to be clear in law that express words of restraint are not necessary to constitute a *fidei commissum*. The authorities for

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that proposition are not very recent, and there is no express decision by this Court to that effect. But the principle is referred to in the late Mr. Justice Walter Pereira's *Laws of Ceylon, page 429*, where, after quoting Van Leeuwen and Van der Linden, he says on page 431: " Ordinarily, there need be no prohibition against alienation for the purpose of constituting a *fidei commissum*, although in the creation of *fidei commissum* in Ceylon such prohibitions are usually inserted. If I give my property to A subject to the condition that it is to become B's property after the death of A, I create a complete and effectual *fidei commissum*. " The passages he has cited from Van Leeuwen and Van der Linden entirely justifies his statement. Van der Linden says: " Sometimes a person is appointed heir under the condition that the property after his death shall pass to another. This is termed a *fidei commissum*." Further, in *Sande on Restraints upon Alienation, Part III.* (*1*), it is said that " a prohibition is implied when it results from an expressed *fidei commissum*. For whenever the testator burdens his heir or a legatee with a *fidei commissum*, the law deduces from the real intention of the testator that an implied prohibition is imposed by the *fidei commissum* upon the alienation of the property. An example of an implied restraint on alienation is given in *Voet 36, 1, 10*, where it is said: " In certain cases the testator, when dying, is considered to have tacitly constituted a *fidei commissum*, as, for instance, if the testator, in a case where several persons were appointed his heirs, provided that the property should devolve from one of his heirs to the others, it would seem that all the heirs take subject to a reciprocal *fidei commissum*. " That, then, is the ordinary legal principle which governs the situation.

The learned District Judge, however, has given a special interpretation to this deed in consequence of what seems to him to be the motive of the donor. He says that the motive of the donor is not so much to benefit the three children as to disinherit the particular daughter, and that his deed was inspired not so much by benevolence as by resentment. I think the District Judge has taken a somewhat too limited view of the motive of the donor. His desire was to disinherit his daughter, but it was also his desire to prevent his other children from being led astray by the example of their sister, and also a natural desire to benefit them as dutiful children. We may also presume, such being the natural result of the language, that he had a desire to benefit the grandchildren, whom he expressly mentioned in the deed. However, acting upon this view of the motive of the donor, the learned District Judge thought himself justified in giving to the words of the deed a narrower signification than would otherwise be imputed to them. He has considered it right to restrict the operations of the deed within limits which he thinks are sufficient to give effect to what the donor really had in mind, and he has, therefore, expressed the opinion that this deed

does not effect a restraint upon alienation, that it merely determines in what manner the property shall devolve on the death of his three children if it has not been alienated during their lifetime, or if it has not been disposed of by will before their deaths. He has so declared in his judgment, and it is against that declaration that the appeal is now brought.

Now, there is no local authority for this interpretation which the learned District Judge has given to the deed. Two cases, indeed, are cited, one the case of *Wirasinghe v. Rubeyat Umma*,[1] and the other the case of *Ferdinandus v. Fernando*,[2] which is referred to in *Wirasinghe v. Rubeyat Umma*.[1] Both these cases, however, deal with a very special class of circumstances. They were both cases of what is known as *fidei commissum residui*, that is to say, cases in which spouses make a joint will creating a *fidei commissum* after the death of both of them. The circumstances of these cases are of a peculiar nature. It is recognized that the survivors of the joint spouses, who have created such a *fidei commissum*, have a certain free power of disposition of the joint property during their lifetime. I do not think that these cases are any authority for such an interpretation as is put forward by the learned District Judge. There are, however, somewhat stronger authorities for the interpretation he has adopted in the Roman-Dutch text books. It is observed by *Burge, vol. IV., new edition, page 761*, referring to a form of *fidei commissum* which prevailed in the local laws of Amsterdam, what was known as a *simplex fidei commissum*, " that though this law did not prevail in any other part of Holland, yet a *fidei commissum* might be so worded that it took effect if the fiduciary died intestate, or without having made any disposition of the property comprised in it during his lifetime. This was, in effect, a limitation of the succession after the death of the fiduciary, if he did not himself dispose of it during his lifetime. "

The same class of *fidei commissum* is referred to in *Voet 23, 4, 66*, where he says that, if under an ante-nuptial settlement, the spouses make provision that after their deaths their property shall devolve upon their children in a particular way, as, for instance, if they prescribe that on the death of one of several brothers his share is to go to the brothers, or that after all the brothers died the property shall go to designated individuals, or shall devolve in some other way, yet, nevertheless, these words did not create a valid *fidei commissum*, but the children will have free power of disposition of the property so given to them both by deed and by last will, and the only effect of the settlement will be to determine the devolution of the property in the event of their dying intestate. Further, in *book 36, 1, 5*, Voet declares that it is a mistake to suppose that this principle only applies to ante-nuptial settlements and does not apply to wills, and that if appropriate words are used in wills the

[1] *(1913) 16 N. L. R. 369.*

[2] *(1902) 6 N. L. R. 328.*

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same result will follow, and quotes a case in which he and Gerard Noodt sat as arbitrators, and in which they held that the words in a certain will which he quotes only had the effect of defining the succession *ab intestato*, and did not prevent the children of the testator from disposing of the property by will.

It is clear, therefore, that the law of Holland recognized a *fidei commissum* of the nature here found by the District Judge and maintained by Mr. Jayawardene for the respondents, and if appropriate words are used for the purpose, I presume that such a *fidei commissum* will be recognised by the law of the Colony. I think, however, that there are very strong reasons against giving this interpretation to the bare words used in this case.

In the first place, if we were to do so, we should be introducing into the Colony, for the first time, a form of tenure of property which is wholly unfamiliar both here and in England, with whose legal system our own is bound up. I venture to say that it would be thought a contradiction in terms that any person should be conceived as having a life interest in a property, and at the same time as having a power to dispose by deed or by will of the whole *dominium*. It certainly would be thought most singular in England that a person could dispose of by deed or by will the whole title to property in which he had only a life estate. That form of tenure may exist in Holland in certain circumstances. But I think it would require much more definite words than we have in this case to induce us in any particular case to hold that it was intended in Ceylon.

In the second place, if the whole deed is examined, it shows most conclusively that the donor intended that his children should only have a limited interest in the property subject to a restraint upon alienation. In the first place, he does not merely give directions for the devolution of shares given to his children on their deaths. He indicates specifically in the operative words of the gift that he intends that the property shall descend to the direct descendants of these children. He does that by limiting the ordinary words of conveyancing, "heirs, executors, administrators, and assigns," to a specific class, namely, children and grandchildren. In the second place, he recites the fact that he is taking the measures which he talks of in the deed, partly to prevent his erring daughter and her mother from doing away with his property in an improper way, and partly also for preventing his remaining three children from falling into vice in the future. He appears to contemplate that he will preserve them in virtuous courses by giving them only a limited interest in the property, and by providing that it shall devolve on their deaths upon their lawful children. His directions would be rendered nugatory if his children could dispose of for money the property so left to them.

Finally, the provision he makes with regard to the marriage of his daughter seems to me to be conclusive. He declares that unless

she contracts a marriage which is approved of by the authority he mentions, the donation to her shall be wholly void. This seems to me quite inconsistent with the idea that his daughter should have a free power of disposing of the share given to her. She could at any time defeat her father's purpose by contracting an improper marriage, and by making away with the property before she so contracted a marriage.

Mr. Jayawardene has attempted to meet this point by saying that, even if, as he contends, she had a free power of disposing of the property, that free power of disposition would be subject to these words, and that she could only confer a title liable to be defeated if she contracted a marriage forbidden by the deed. I do not think that this is a possible or the natural construction of the words. If, as he contends, all the children have a free power of disposing of their intertests, that must mean an absolutely free power. The avoidance of the gift upon the daughter entering into an improper marriage implies to my mind that she must remain in possession of the property which is the subject of the gift. At any rate, it is far more consistent with that view. To my mind this provision clinches the question.

I am of opinion that the appeal should be allowed to this extent, that a declaration should be inserted in the judgment to the effect that the shares of the persons interested in the deed shall be subject to the *fidei commissum* and the restraint upon alienation created by the deed. The appellants are entitled to the costs of this contention in the Court below and of this appeal.

SHAW J.—

I agree. The grantor by his deed granted to three of his children and " their heirs and assigns, as children and grandchildren," or, as it has otherwise been translated, to " their inheriting custodians, such as children and grandchildren, descending from them, " the property in question. The habendum clause is " to be possessed or to be dealt with as they please subject to the directions mentioned herein below." One of these directions is that, if one or two of the donees die without leaving a descendant, their shares shall devolve on the survivor. There is another direction, which is, that if all three donees died without leaving any descendants, the property shall devolve on the four sons of a lady who is the daughter of the grantor's sister.

It appears to me that the provision as to the passing of the property in case of the death of either or all of the donees constitutes a *fidei commissum*, although there is no express clause in the document restraining the donees from alienating the property. That such a clause is unnecessary for the purpose of establishing a *fidei commissum* is clear from the authorities which my Lord has cited, and from the definition of a *fidei commissum in Censura Forensis*

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1, 3, 71, which is, that a *fidei commissum* is " a provision of one's last will by which a mandate is given to him to whom something is to come, to give the whole or a part of it up to another or to give something else." The direction in the present deed that the property is to be given up at the death of the donee to other people establishes a *fidei commissum* in favour of those other persons, although there is no express restriction upon the first donees parting with the property. The case of *Wirasinghe v. Rubeyat Umma* [1] shows that in certain cases, where, for instance, there is a joint will of parties giving a life interest to the surviving spouse in the joint property, and where appropriate words are used, it will be construed as a *fidei commissum residui*, and will not prevent the surviving spouse alienating the property during his or her lifetime, and in other *fidei commissa*, where appropriate words are used for the purpose, it is probable that a *fidei commissum residui* may be established in this Colony, even although such *fidei commissa* may be somewhat rare in the present state of things. The provisions in the document, which were under consideration in the case I have mentioned, and in the case reported in *6 New Law Reports, page 328*, referred to in the judgment in that case, are very different to those contained in the document now under consideration, and the document itself was a very different one and for effectuating a very different purpose. I am unable to take the view adopted by the learned District Judge, that the only object of the grantor in the present case was to disinherit one of his children. It is clear that his object was also to benefit the other children, and ultimately, if they left no descendants, to benefit certain nephews. The method by which this was effected was by a *fidei commissum*, which not only disinherited the offending daughter, but also benefited those who the grantor desired should be the subject of his bounty. To read the deed in the manner suggested by the District Judge and by the respondent in this case, would, in my opinion, largely defeat the admitted object of the grantor, namely, to prevent the daughter, who had offended him, and the wife of the grantor, who had supported that daughter in her conduct, from becoming possessed of any of his property, because, if this document is not to be read as constituting a *fidei commissum*, it would be within the power of the other children benefited by the deed to transfer their share or some part of their share in the property to the very child of the grantor who he was anxious should for ever be debarred from inheriting his property. The intention of the grantor is, in my opinion, clearly to establish a *fidei commissum*. I would, therefore, make the declaration which my Lord has suggested.

Varied.

[1] *(1913) 16 N. L. R. 369.*