Present : De Sampayo and Dalton JJ. 1925.

UDALGAMA *v.* MADAWALA.

294—D. C. Kandy, 31,031.

Fidei commissum—*Gift to wife and two daughters—Joint* fidei commissum—Jus accrescendi.

Where a person gifted certain property to his wife and his two daughters "to be held by them from generation to generation," and where the deed further provided as follows :—

"That my wife shall improve the said lands and possess the same during her lifetime, but she shall have no right whatever to do anything else with the said lands.

"That after the death of me or after the death of my wife, the said lands shall be possessed by my said two daughters and their heirs and descendants uninterruptedly as a *Sahendu paraveni* property, and deal with the same according to will and pleasure."

Held, that the deed created a valid *fidei commissum* in favour of the two daughters and their descendants, the mother having only a life-interest in the property.

Held, further, that the whole land was subject to a joint *fidei commissum* in favour of the daughters, and that on the death of one daughter before the mother, her interest accrued to the surviving daughter.

APPEAL from a judgment of the District Judge of Kandy. Action for declaration of title to a half share of a field called Udadeniya, the original owner of which was one Punchirala. By deed No. 896 dated September 17, 1858, he gifted it to his wife, Kiri Menika, and his two daughters, Muttu Menika and Tikiri Menika. The deed then proceeded to provide as follows :—

"That my wife, the said Kiri Menika, shall improve the said lands and possess the same during her lifetime, but she shall have no right whatever to do anything else with the said lands.

"That after the death of me or after the death of the said Kiri Menika, the said lands shall be possessed by my said two daughters and their heirs and descendants uninterruptedly as *Sahendu paraveni* property, and deal with the same according to will and pleasure."

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The daughter, Tikiri Menika, predeceased Kiri Menika without issue, and Kiri Menika, on the footing that the deed gave one-third share to each donee, believed that she inherited Tikiri Menika's one-third share, and in 1876 gifted two-third shares to her two sons by another husband, from whom the defendant claimed the said shares. The plaintiff claimed a half share by purchase from Ukku Amma, the daughter of Muttu Menika. The District Judge gave judgment for the plaintiff for the half share claimed by him.

H. V. Perera, for defendant, appellant.

Drieberg, K.C. (with him *Vethevenam*), for plaintiff, respondent.

May 25, 1925. DE SAMPAYO J.—

In this case we have to consider the true construction of a certain old deed and determine whether it creates a *fidei commissum*, and who the beneficiaries are in the events which have taken place. One Punchirala was the owner of the field called Udadeniya. By deed No. 896 dated September 17, 1858, which, on the face of it, is described as " deed of *paraveni*," he gifted it to his wife, Kiri Menika, and his two daughters, Muttu Menika and Tikiri Menika, "to be held by them from generation to generation as *Sahendu paraveni*." The deed then enumerates the lands gifted, and proceeds to provide *inter alia* as follows :—

> " That my wife, the said Kiri Menika, shall improve the said lands and possess the same during her lifetime, but she shall have no right whatever to do anything else with the said lands.
>
> " That after the death of me or after the death of the said Kiri Menika, the said lands shall be possessed by my said two daughters and their heirs and descendants uninterruptedly as *Sahendu paraveni* property, and deal with the same according to will and pleasure."

The deed is not only of an old date, but is in the Sinhalese language, and I have quoted the above passages from the translation filed in the record. In my opinion the deed should not be construed in the point of view of the strict rules of conveyancing, but according to the intention of the grantor to be gathered from its substance. From the fact that the mother and the two daughters are named together in the words of grant, it has been argued that each of them took a one-third share of the lands. But the other parts of the deed must be taken into consideration. Not only is the deed called a " deed of *paraveni*," but the grantees are to hold the lands " from generation to generation as *Sahendu paraveni*." The intention of

the grantor is that the lands should remain in the family, and be held and possessed by the descendants of the grantor. Next it is noticeable that the wife, Kiri Menika, should during her lifetime possess not a share, but the entirety of the lands, and that the two daughters and their descendants are to possess the same after Kiri Menika. Further, Kiri Menika was prohibited from disposing of the lands, which after her death were to pass to the two daughters and their descendants. To my mind it is clear that the deed creates a valid *fidei commissum* in favour of the two daughters and their descendants, the mother, Kiri Menika, having only a life-interest in the property.

Notwithstanding the probable mistaken view of Kiri Menika as to her rights under the deed, I think that effect should be given to the plain intention of the grantor, Punchirala. The daughter, Tikiri Menika, predeceased Kiri Menika without issue, and Kiri Menika, on the footing that the deed gave one-third share to each donee, considered that she inherited Tikiri Menika's one-third share by *daru-urume*, and in 1876 gifted two-thirds share to Appuhamy and Kalu Banda, who were her sons by another husband. On the death of Appuhamy, Kalu Banda sold to one Peter Silva, and by certain other deeds the defendant claims that interest. As already indicated, Kiri Menika was under a misconception as regards her interest under the original deed from Punchirala. She inherited no share from her daughter, Tikiri Menika. The whole land was the subject of a *fidei commissum* in favour of Muttu Menika and Tikiri Menika jointly, and on the death of Tikiri Menika it must accrue to the survivor, Muttu Menika. There is some doubt as to whether Muttu Menika predeceased her mother, Kiri Menika, or not, but the question is not of material importance, because she left a daughter, Ukku Amma, who would, in any case, take the property as *fidei commissary* under the original settlement. In these circumstances, the defendant got nothing under the donees from Kiri Menika.

But Ukku Amma herself disposed of the land by certain deeds. In 1887 she sold half share to one Dingiri Banda who in his turn sold it to the Kalu Banda, already mentioned, so that the defendant may claim that share from this source of title. In 1922 Ukku Amma sold the remaining half share to the plaintiff. The District Judge accordingly gave judgment decreeing a half share to the plaintiff and the other half share to the defendant. In my opinion this judgment is right, and not liable to be disturbed. I ought to say that it was strongly pressed before us in appeal that as the existence of a *fidei commissum* was not pleaded, and no issue as to it was stated, the District Judge should not have considered it or based his decision thereon. I think the District Judge was right in construing the deed, and as he gave both parties an opportunity to discuss the matter, the proceedings cannot be objected to.

I would dismiss the appeal with costs.

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DALTON J.—

I have some doubt as to whether a *fidei commissum* is created by the deed of September 17, 1858, but neither side is now prepared to argue otherwise. They both appear to be satisfied with the trial Judge's decision on that point, so I will leave the matter there.

On the assumption that the finding on this point was correct, I agree that the appeal must be dismissed. I have only to add that even if no *fidei commissum* was created, the position and rights of the parties under the deed would not be such as are set out in the pleadings.

Appeal dismissed.