1933 *Present:* **Dalton A.C.J. and Drieberg J.**

PATE *v.* PERERA *et al.*

180—D. C. Colombo, 2,464.

Fidei commissum—*Gift to a person with restriction against alienation*—Fidei commissum *in favour of children*—*Whether restriction is binding on children.*

Where a deed of gift contained the following clause:—"It is hereby directed that, after the death of the said J. S. (wife of the donor to whom a life-interest had been reserved) the said M. P., *i.e.*, the donee, shall be at liberty to possess the said land during his lifetime, but that he shall not sell, mortgage, gift or otherwise alienate the said land. If, however, he gets married and children are born from that union, these children and their descendants shall be at liberty to remain in undisturbed possession of the said land and to do whatever they like with it",—

Held, that the deed created a valid *fidei commissum* binding upon M. P., but that the restriction against alienation did not bind his children who acquired a free inheritance.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, for applicant, appellant.

Choksy, for third, fourth, and fifth respondents.

M. T. de S. Amarasekera, for sixth, seventh, eighth, and ninth respondents.

April 7, 1933. DALTON S.P.J.—

The appeal concerns the construction of a deed of gift. In 1872 one Don B. Ferdinando donated an allotment of land called Meeripennewatta to his nephew, Marthinu Perera, whom he was helping and bringing up. The third clause of the deed was in the following terms:—

> "It is hereby directed that after the death of the said Justina Silva (wife of donor to whom a life-interest had been reserved) the said Marthinu Perera shall be at liberty to possess the said land during his lifetime, but that he shall not sell, mortgage, gift or otherwise alienate the said land or anything appertaining thereto. If, however, he gets married and children are born from that union, these children and their descendants shall be at liberty to remain in undisturbed possession of the said land and to do whatever they like with it".

In the event of Marthinu dying without issue the property is to vest in the children of a sister of the donor, and in the event of their becoming so entitled "they can undisputedly possess the same . . . . and do whatever they please therewith". A similar provision is made in respect of children of the donor, should any be born to him after the date of the deed.

Marthinu, who died on July 23, 1929, at the age of 85, had two children, Appolonia and Thecla, who were both living at his death. In March, 1912, Marthinu and Appolonia mortagaged an undivided half of the land in question, which bond was subsequently put in suit. Decree for sale followed, and the interest was purchased by one Romanis Peiris, to whom it was conveyed in April, 1914. Ten days later Romanis Peiris sold and conveyed this interest to J. G. Fernando (deed A 3 of April 25, 1914). Five days later by deed A 1 of April 30, 1914, Marthinu and his other child Thecla conveyed the remaining undivided half of the land to J. G. Fernando. In December, 1914 (A 4) J. G. Fernando donated the whole land to his wife, and on June 8, 1916, they mortgaged it to the present appellant. That bond was put in suit, and on August 19, 1921, a decree was entered in favour of appellant for the sum of Rs. 40,000 and interest, and declaring various alloiments of land including the land in question here executable under the decree. That decree is still unsatisfied.

During this time the Crown acquired a portion of the land and deposited in Court the amount of compensation to be paid. That sum remained in Court during Marthinu's lifetime, the learned District Judge holding in 1917 there was *fidei commissum* in favour of his children. The appellant has, however, now applied that the sum be paid out to him. It is resisted by Appolonia, Thecla, and their children. The question for decision now is whether Appolonia and Thecla got absolute title on the death of Marthinu, or whether the deed of 1872 created a *fidei commissum* not only binding on Marthinu but also upon his children and their descendants for four generations.

The deed is a Sinhalese one, and there has been some argument as to what is the correct interpretation of the latter part of clause 3. The translation before the lower Court in D 1 is in the words " that generation of children and grandchildren can undisputedly possess the same . . . . and do whatever they please therewith ". With this translation the learned trial Judge does not appear to have been satisfied. Construing it himself, he says the deed provides that in the event of Marthinu contracting a marriage and having issue thereby, the land shall be possessed without dispute by his children and grandchildren from generation to generation, and they may do whatever they please. Under these circumstances a translation of the clause was obtained from the Sinhalese Interpretor Mudaliyar of this Court, which I have set out above. It is agreed by counsel before us that the word there interpreted as " descendants " means " grandchildren ", but Mr. Amarasekera argues from the way the words are used there is to be implied the idea of grandchildren and successive generations. Mr. Perera, on the other hand, argues that the deed mentions only the children of Marthinu and his grandchildren, the immediate descendants of the children. Under the circumstances here it seems to me to be immaterial which construction be adopted, for reading this clause as a whole, I am unable to find there any intention to create a *fidei commissum* binding on any person other than Marthinu.

The learned trial Judge has on his construction held that the donor intended to provide for a perpetual *fidei commissum* binding on Marthinu, his children, his grandchildren and their descendants. He points out

that there is no express restraint on alienation by the children and grandchildren, but he adds that no express provision against alienation is necessary, "as in this case the intention to create a *fidei commissum* is clear". I regret I am unable to agree with the learned Judge. That there is a clear intention expressed to create a *fidei commissum* binding on Marthinu I agree; he is in very definite terms restrained from alienating the land, and if he has children, it is to go to them. So far from this restraint being extended to his children, the donor expressly says they can do whatever they please with the land. They have in fact in this case disposed of it, as the donor gave them power to do. It seems to me the learned Judge, in construing the clause as expressing a wish or desire that the property shall go down in the family from generation to generation, has read into the words "children and grandchildren" or "grandchildren and their descendants" more than is expressed in them, putting upon them a construction which here they will not bear, and has also failed to consider the effect of the last words of the clause, which to my mind, clearly express his intention to place no restraint or limitation on Marthinu's children in respect of their complete ownership of the property.

The learned Judge would appear to have based his conclusion, as to the intention of the donor, on the use of the word "grandchildren" or "descendants", following the word "children". He states that if it was the intention of the donor to give an absolute title to Marthinu's children, there is no need for the mention of any subsequent generation. As Mr. Perera had pointed out, however, the *fidei commissaries being* here a class, they are only ascertainable at Marthinu's death. If then any of his children had died before him, and the donor had wished to benefit the children of such deceased children of Marthinu, he would do so, as has been done here, by adding to the class to be benefited those grandchildren, or on Mr. Amarasekera's construction of the words, even the children of any deceased grandchildren. Could he have expressed this intention in any more appropriate words than have been used here? I think not. I am unable to find in the words used in clause 3 or in any other part of the deed any intention to keep the property in the family from generation to generation. It is conceded that the subsequent clauses Nos. 6 and 4, which provide for the devolution of the property, in the event of the donor himself having children or in the event of Marthinu dying without issue and the children of the donor's sister then succeeding, show no such intention at all, for in both cases those children will take absolutely. The suggestion that the word "they" in the last line of clause 3 applies to "grandchildren" or "descendants" and not to children was tentatively put forward in the argument before us, but has very little to support it.

Of the cases cited to us, Mr. Amarasekera specially relies on *Udalgama v. Madawela*[1]. I had some doubt whether a *fidei commissum* such as was contended was created there, but on the appeal neither side was prepared to argue otherwise on that point. The language of the deed in

[1] *27 N. L. R. 27.*

that case, however, described as a "deed of paraveni", is to be distinguished from that used in the deed before us, and the property is to be held by the donees "from generation to generation as Sahendu paraveni". The description of the deed as a deed of paraveni implies, I understand, that the land the subject of the deed had been long possessed by the donor's family, and the donees are to hold it as "Sahendu paraveni" from generation to generation. Whether the donees who took after the death of the donor's wife having regard to the language used, were prohibited from disposing of the property as they wished was a question that was not argued, for it appears to have been conceded by counsel on both sides that they were so prohibited.

A case somewhat similar to the one before us is *Babahami and others v. Wickremesinha.*[1] The words used there after reference to the donees were "unto them, their heirs and successors for ever". The prohibition against alienation, was, however, confined to the immediate donees.

The answer to the question for decision here should, in my opinion, be that Appolonia and Thecla obtained title to the property in question of the death of Marthinu, and the deed D 1 created no *fidei commissum* binding on them. Their rights having been disposed of, as set out above, it is not contested that appellant is entitled to draw the sum in Court. The appeal must be allowed, and the application of the appellant, opposed by the respondents, must therefore be allowed, with costs in both Courts.

DRIEBERG J.—I agree.

Appeal allowed.