Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

1909.
August 6.

WIJEWARDENE *v.* ABDUL HAMID *et al.*

D. C., Colombo, 26,015.

Fidei commissum—*Construction—Devise to a person and his descendants—Sufficiency of designation of substitutes—Roman-Dutch Law.*

A last will contained the following clause :—

" Whereas the title deed of the garden and house lying between the said two gardens has been passed in my name and mortgaged with the son-in-law of Mr. Andriesz for 800 rixdollars, I wish that Sella Umma, wife of my brother Cader Saibo, shall pay the debt and get the title deed passed in her name. The gift cannot be sold or mortgaged even for my debt, but I hereby direct that she and her descendants shall enjoy and possess the same."

Held, that the said clause created a valid *fidei commissum* in favour of the descendants of Sella Umma.

ACTIO rei vindicatio. The plaintiff alleged that one Sella Umma was the owner of the property in dispute; that she by deed No. 2,241 dated December 4, 1878, gifted the same to Muttachi Umma, who by deed No. 3,581, dated April 21, 1893, gifted the same to Peera Umma; that the said Peera Umma died in January, 1902, and administration was taken out to her estate, and the property sold by the administrator by public auction and purchased by the plaintiff under deed No. 1,828 dated August 28, 1906.

The first defendant denied that Sella Umma was the absolute owner of the property, and alleged that she held it subject to a *fidei commissum* in favour of her descendants, of whom the first defendant was one, and that her deed of gift in favour of Muttachi Umma and the subsequent deeds of gift were invalid and conveyed no title; the second and third defendants disclaimed title.

The title of Sella Umma to the property was derived under the last will dated May 10, 1838, of one Alpom Pokka Ahamado Pokka, who devised it in the following terms :—" Whereas the title deed of the garden and house lying between the said two gardens has been passed in my name and mortgaged with the son-in-law of Mr. Andriesz for 800 rixdollars, I wish that Sella Umma, wife of my brother Cader Saibo, shall pay the debt and get the title deed passed in her name. The gift cannot be sold or mortgaged even for my debt, but I hereby direct that she and her descendants shall enjoy and possess the same."

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The Acting District Judge (F. R. Dias, Esq.) dismissed the plaintiff's action, holding that Sella Umma took the property subject to a *fidei commissum*, and that her deed of gift in favour of Muttachi Umma and the subsequent deeds of gift were invalid and conveyed no title.

The plaintiff appealed.

Walter Pereira, K.C., S.-G. (*E. W. Jayewardene* with him), for the plaintiff, appellant.

Bawa (*F. M. de Saram* with him), for the first defendant, respondent.

Cur. adv. vult.

August 6, 1909. HUTCHINSON C.J.—

I agree with my brother Middleton that the ruling of the District Judge was right; that the devise in A. P. Ahamado Pokka's will contains an absolute prohibition against alienation of the land and a gift of it to Sella Umma and her descendants, and creates a *fidei commissum* in favour of her descendants.

A day or two after the hearing of the arguments on the appeal, the appellant's counsel informed us that the original will is filed in the case No. 5,523, D. C., Colombo (Testamentary), and suggested that we should send for it and have it compared with the translation which was put in evidence in the present case. In the present case the probate of the will is in evidence, and it is not suggested that it is not a correct copy of the original, nor is there any evidence that the translation which is in evidence contains any mistake. I think, therefore, that the appeal should be decided upon the evidence which we have, and that it should be dismissed.

MIDDLETON J.—

The plaintiff in this action sought to vindicate his claim to certain premises, No. 5 and No. 6, Ferry street, Colombo. The property originally belonged to one Sella Umma, who on December 4, 1878, conveyed No. 5 to her daughter Muttachi Umma and No. 6 to her daughter Peera Umma, who mortgaged both properties to plaintiff's husband in 1905. He died, and the Secretary of the Court being granted administration of his estate sold the houses by auction, and they were bought by the plaintiff. The first defendant claims by inheritance as the son of Peera Umma, the second and third defendants are lessees and disclaim title.

The first defendant's case is that the property in question was devised to Sella Umma under the last will and testament of Alpom Pokka Ahamado Pokka dated May 10, 1838, subject to *fidei commissum*. The terms of the will were in reference to this property: "Whereas the title deed of the garden and house lying between the said two gardens has been passed in my name and mortgaged

with the son-in-law of Mr. Andriesz for 800 rixdollars, I wish that Sella Umma, wife of my brother Cader Saibo, shall pay the debt and get the title deed passed in her name. The gift cannot be sold or mortgaged even for my debt, but I hereby direct that she and her descendants shall enjoy and possess the same."

The District Judge held in favour of the first defendant's contention, and dismissed the plaintiff's action against him. The plaintiff appealed, and it was contended for him, on the authority of *7 S. C. C. 135* and *2 N. L. R. 233*, (1) that the will did not create a *fidei commissum*, and (2) that if it did, the terms of the grant to Sella Umma under the will were inconsistent with the testator's right to impose a *fidei commissum*.

The definition of a *fidei commissum* in the *Censura Forensis*, 1, 3, 7, 1, involves a mandate to an institute to whom some property is given to give up the whole or part of it or something else to a substitute. To create it no special form is necessary, but its creation may be inferred from expressions used in the instrument creating it showing the intention of the maker to create it (*2 Burge 106*).

One mode by which it is declared in favour of a family is by prohibiting any alienation of the subject of the *fidei commissum* out of the family (*Burge, Vol. II., 112*). If the terms in which the prohibition is expressed admit of any doubt respecting its extent, such construction is to be made as will impose the least burthen on the heir and the least restraint on the freedom of alienation (*Burge, Vol. II., 113*). A prohibition against alienation will not create a *fidei commissum*, but is perfectly nugatory, unless the persons are designated in favour of whom the testator declares the prohibition. It is not sufficient that he names particular persons to whom he forbids the alienation to be made, unless he also designates some person to whom the estate shall pass in the event of its being alienated (*Burge, Vol. II., 113*).

In my opinion the construction of a grant to a man and his heirs as vesting the property in him absolutely, as Mr. Justice Lawrie says at page 135 of *7 S. C. C.*, is coloured by the learned Judge's knowledge of the Law of Real Property as it prevails in England. In Ceylon, as a man has also the power of appointing his heirs by will, such a grant would also be an absolute one. Strictly speaking, an heir is a person who succeeds by descent to an estate of inheritance, and if the word were construed strictly, the grant to a man and his heirs would restrict alienation to the heirs by descent, and would, I think, be a sufficient designation to create a *fidei commissum;* but Mr. Justice Lawrie (*7 S. C. C. 135*) states that many writers (he does not name them) on Roman-Dutch Law say it does not, I presume, on the ground that there is not a sufficient designation of the substitutes (*2 Burge 113; Voet, 36, 1, 27; Van der Linden, 136; Grotius, 153, section 11*, quoted by Lawrie J.).

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I should, however, support the decision in *7 S. C. C. 135* on the ground that the word "administrator" was introduced into the grant there. Is, then, a grant to a man and his descendants a sufficient designation of the substitute? Does it show an intention to tie up the properties, as Withers J. says in *2 N. L. R. 234*, for three or more generations? In that case I agree with that learned Judge that the terms of the grant did not warrant such an inference. In *9 S. C. C. 33* a Court of three Judges held that a grant of property "to A, her children, and their children in perpetuity, which shall not be sold, mortgaged, or gifted to any one," was a good *fidei commissum*. This is practically the same as a grant to A and her descendants, and here by the will the gift is not to be sold or mortgaged even for the testator's debt. I think *1 N. L. R. 311*, on which my brother Wendt relies in *7 N. L. R. 43*, is certainly in favour of the learned District Judge's finding based in *6 N. L. R. 344*. In *3 Balasingham 194* my brother Grenier and I apparently followed the ruling of Withers J. in 173, C. R., Batticaloa, 1,150.[1] In that case there was no prohibition against alienation, and we thought as Withers J. said (*ubi supra*) that there were no words of prohibition indicating that those to whom the gift first came should hand it over to those who came after. Also in *3 Balasingham 194* the property was given as dowry with a reservation in the donor of a life interest, which fact made Grenier J. think that it was an absolute gift. In *9 S. C. C. 33* it was held that a gift to U, her children, and their children in perpetuity, with an expressed restraint on alienation, created a *fidei commissum*. In *Paterson v. De Silva* (D. C., Colombo, 88,822) reported just below the above case, Clarence J. expressed some doubt as to the decision in *7 S. C. C. 135* (*ubi supra*). In the present case there is a distinct prohibition against alienation, and there is an implied institution of *fiduciarii* and substitution of *fidei commissarii*.

The word "descendants" is equivalent to children and children's children, and to my mind would indicate a devolution to the children *per capita*, and the grandchildren *per stirpes* at least to the fourth generation, according to the rules of intestate succession. As regards the second point raised by the learned Solicitor-General, the property was a conditional gift, and could only be accepted subject to the conditions intended to be imposed.

I would dismiss the appeal with costs.

Appeal dismissed.

[1] *S. C. Min., September 26, 1898.*