1929

Present : Fisher C.J. and Garvin J.

JAMES *v.* DANIEL *et al.*

239—D. C. Galle, 24,356.

Fidei commissum—*Devolution on heirs according to law—Designation of persons to be benefited—Construction of deed.*

Where a deed of gift of property to five brothers contained a prohibition against alienation and provided as follows :—

" If one of them should die before marriage his share shall devolve on the other surviving brothers equally, and after their death, the said premises shall devolve on their proper heirs according to law."—

Held, that the deed created a valid *fidei commissum* and that it contained a sufficient designation of the beneficiaries for the purpose. The words " after their death " should be construed as meaning after their deaths respectively.

APPEAL from a judgment of the District Judge of Galle.

N. E. Weerasooria (with *Wijeuardene*), for plaintiff and fourth defendant, appellants.

H. V. Perera, for sixth and seventh defendants, respondent.

June 29, 1929. GARVIN J.— 1929.

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The only question which was argued at the hearing of this appeal was whether a valid *fidei commissum* under which the plaintiff takes benefit was created by the deed P1. It is a deed of gift. The donor granted ¾ of the premises described therein to the five sons of one Thoronis de Silva Abeysundere and the remaining ¼ to one Juwanis, stating in respect of the ¾ share which was gifted to the five brothers that they were to possess it equally. He vested the premises in the five brothers subject to a prohibition against alienation providing also as follows :—"If one of them should die before marriage his share shall devolve on the other surviving brothers equally, and after their death the said premises shall devolve on their proper heirs according to law." The learned District Judge held that no *fidei commissum* had been created, giving as his reason that the expression " proper heirs according to law " was not a sufficient designation of the beneficiaries. Counsel for the respondents, however, preferred to support the judgment upon a different ground. He contended that the shares of these beneficiaries were charged with a *fidei commissum* and that in the event of the death of any one of them unmarried that share vested in the remaining donees in equal shares : he further argued that the only other condition upon which the share, vested in each of such donees, passed to the ultimate beneficiaries by virtue of the provisions in this deed, was the death of all of them. In other words, that the share which vested in any one of the donees, if it did not by reason of his death unmarried pass to the remaining donees, remains a part of his estate or in the enjoyment of the assignee, if any, and does not pass to the ultimate beneficiary till the death of the last of the donees. That condition, he argues, has not as yet been fulfilled inasmuch as one of the original donees is still alive.

The question is by no means free of all difficulty and we labour under the disadvantage that our decision must turn upon the translation of a deed drawn in the Sinhalese language. The words " after their death " may, no doubt, mean " after the death of all of them." If the case of *Fernando v. Fernando* [1] appears to support that contention, the case of *Abeyeratne v. Jagaris* [2] is even more strongly in support of the contention of counsel for the plaintiff that the words " after their death " should be construed as though they read " after their deaths respectively " and that the concluding words " their proper heirs" should be construed as though they read " their proper heirs respectively,"

A study of these two judgments shows only too clearly that where the intention of the donor is not clearly expressed in the language used by him in a part of the deed, his intention must be gathered from a consideration, not of any particular form of words in any

[1] *27 N. L. R. 321.* [2] *26 N. L. R. 181.*

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particular part of the deed, but from a consideration of the deed as a whole. Upon such a consideration it may be found necessary to give a different meaning to what is substantially the same set of words according as it appears in one document or another.

It appeared at the argument to be common ground that the donor in this case intended to vest each of the five donees of the ¾ granted to them with an equal share even as he had definitely vested the remaining ¼ in Juwanis. Having provided for the special case of donees dying unmarried, he provided generally for what was to happen on the death of the donees. In the case of Juwanis, the donee of the other ¼ share, similar provision is made for the case of his death unmarried. Excepting the special case of the death of a donee unmarried, there appears to be little doubt, that, as in the case of Juwanis upon whose death the property was to pass to his heirs, so also it was the intention of the donor in regard to these five donees that upon the death of any one of them his share was to pass to his proper legal heirs. This intention might, of course, have been made clearer. The language of the translation is ambiguous; but it is at least capable of the interpretation which I think it should be given. I can see no reason to suppose that it was the intention of the testator that the share which was vested in one of the donees should not immediately upon his death pass to his heirs, but should remain part of his estate or in the enjoyment of his assignee and only pass to his heirs upon the death of the last of the original donees.

The appeal is entitled to succeed, and in this view the plaintiff's right to a share in this land must be admitted. The judgment under appeal must be set aside, and the case sent back for trial and determination upon this footing. The plaintiff-appellant is entitled to his costs of this appeal and of the contests in the Court below.

FISHER C.J.—I agree.

Appeal allowed.