1957 *Present:* K. D. de Silva, J. and T. S. Fernando, J.

CLARICE FONSEKA and 5 others, Appellants, *and* WINIFRED PERERA and others, Respondents

S. C. 416—D. C. Negombo, 16,744

Fideicommissa—Fideicommissum binding four generations—Method of counting the generations—Construction of Deed.

Evidence—Child born in wedlock—Presumption of legitimacy—Rebuttal—Birth certificate—Entries made therein—Evidentiary value—Statement of deceased father denying legitimacy of child—Admissibility—Evidence Ordinance, ss. 32 (3), 32 (5), 112.

(i) As to the method of counting the four generations in a fideicommissum binding on four generations, it is not the first instituted or fiduciary heir, but the first fideicommissary heir, who constitutes the first degree, and consequently only the fifth fideicommissary heir is able to exercise his free discretion in regard to the fideicommissary property.

Siri Kantha v. Thiagarajah (1936) 37 N. L. R. 270, not followed.

In the year 1854 a person made a gift of certain property to his sister Louisa subject to the following condition : " the said sister of mine shall receive and enjoy the benefits thereof during her life-time in whatever other manner she pleases without conveying the same by way of gift, transfer, mortgage &c., and that after her death her two daughters Johana and Josephina shall be entitled to and enjoy the said premises in precisely the same manner as aforesaid and that they, their children, grandchildren and their line of descendants shall continue to enjoy the benefits thereof without any interruption. "

Held, that the deed created a valid fideicommissum binding on four generations.

(ii) The presumption arising under section 112 of the Evidence Ordinance of the legitimacy of a child born in lawful wedlock can be rebutted only by such evidence as excludes any reasonable doubt.

Entries were made by a man and a woman (A and B), in the birth register of a child, that they were unmarried and that they were the parents of the child. At the time when the entries were made, the lawful husband of the woman was C.

Held, that the entries in the birth register were not *per se* sufficient to rebut the presumption of the child's legitimacy.

(iii) A statement made by a person, who is dead, denying the legitimacy of his children would not be admissible under section 32 (5) of the Evidence Ordinance if it was made in an action in which he sought divorce from his wife on the ground of adultery.

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the 2nd, 3rd, 4th, 5th, 6th and 8th Defendants-Appellants.

N. E. Weerasooria, Q.C., with *G. T. Samerawickreme* and *Stanley Perera*, for the 1st Defendant-Respondent.

Cur. adv. vult.

November 29, 1957. K. D. DE SILVA, J.—

On a declaration being made and published under section 5 of the Land Acquisition Act No. 9 of 1950, that an allotment of land called Kekunagahalanda and Dawatagahalanda in extent 25 acres 3 roods and 13·3 perches was needed for a public purpose and was to be acquired under the said Act the Acquiring Officer held an inquiry at which the defendants appeared and set up conflicting claims to the property. The Acquiring Officer in terms of section 10 of the Act referred the dispute to the District Court, Negombo, for determination.

Admittedly, the allotment of land in question originally belonged to Balthazer de Zoysa Rajapakse who in the year 1854 gifted it together with other lands to his sister Louisa Maria Johana by deed No. 1208 (1D1) subject to the following condition "the said sister of mine shall receive and enjoy the benefits thereof during her life-time in whatever other manner she pleases without conveying the same by way of gift, transfer, mortgage &c., and that after her death her two daughters Johana Amelia Dorothy de Zoysa Seneviratne Siriwardene Hamine and Josephina Welhelmina Albertina de Zoysa Seneviratne Siriwardene Hamine shall be entitled to and enjoy the said premises in precisely the same manner as aforesaid and that they, their children, grandchildren and their line of descendants shall continue to enjoy the benefits thereof without any interruption."

Louisa the donee on 1D1 died leaving her two daughters Johana and Josephina and on the death of the former without issue the latter became entitled to her sister's share also. Josephina died leaving as her heirs two children Diana Rosamund Grace de Abrew Rajapakse (hereinafter referred to as Grace) and Letitia de Abrew Rajapakse. Grace who married John Gregory de Zoysa Wijegunaratne Siriwardene (hereinafter referred to as Gregory) on October 21, 1900—marriage certificate 1D4—had three children, viz., Simon Gunatilleke the 3rd defendant, Linton who died without issue and Diana Rosamund Pearl who died leaving her husband W. Peter Fonseka the 8th defendant and 4 children namely Clarice, Mary, Leslie and Clotilda the 2nd, 4th, 5th and 6th defendants respectively.

Letitia was married to T. John de Silva and they died leaving one child Maud the 7th defendant whose husband is C. W. Jayawardene. The 7th defendant and her husband have two children named Lidwin and Newton. The 3rd defendant too has a son. It is also relevant to mention that Grace died in the year 1924—death certificate 1D8—while her husband

Gregory died in 1933—death certificate 1D22. Simon the 3rd defendant Linton and Diana Rosamund Pearl the children of Grace were born in the years 1902, 1903 and 1905 respectively.

Winifred Perera the 1st defendant on deed 1D18 of 1950 purported to buy the entire land from the 7th defendant and her husband and their two children. Earlier, she had purchased a half share on deed 1D17 of 1944 from one W. S. Fernando who had bought certain undivided shares of this land on deeds 1D12, 1D13, 1D14, 1D15 and 1D16. The vendors on 1D12 and 1D13 were the 7th defendant, the 3rd defendant and the latter's sister Diana Rosamund Pearl while the vendor on 1D14, 1D15 and 1D16 was the 7th defendant. The 1st defendant also purchased 1/6th share on 1D26 of 1935 from the 3rd defendant.

The 1st defendant claimed the entire land both before the Acquiring Officer as well as in Court. In the statement of claim filed by her she took up the position that Grace died without legitimate issue and that her share devolved on her sister Letitia whose sole heir was her daughter the 7th defendant who then became entitled to the whole land. She also averred that she made the purchase on 1D26 from the 3rd defendant as a precautionary measure. The 7th defendant filed a statement supporting the claim of the 1st defendant and maintained that the children of Grace did not inherit any rights as they were illegitimate.

The 2nd, 3rd, 4th, 5th, 6th and 8th defendants maintained in their statement of claim that the half share of Grace devolved on her children and that the entirety of the land belonged to the 2nd, 3rd, 4th, 5th, 6th and 7th defendants subject to a fideicommissum which was binding on four generations.

The learned District Judge held that the deed 1D1 created a single fideicommissum binding on four generations and following the decision in *Siri Kantha et al. v. Thiagarajah*[1] he concluded that the children of the 7th defendant would get the property absolutely and unfettered by the fidei commissum. In regard to the half share of Grace he held that her children did not inherit any rights as they were her illegitimate issue by her paramour Patterson de Zoysa Gunatilleke. From this judgment the 2nd, 3rd, 4th, 5th, 6th and 8th defendants have appealed.

At the hearing of this appeal Mr. N. E. Weerasooria, Q.C., who appeared for the 1st defendant-respondent submitted that the fidei commissum contained in the deed D1 was binding only on Johana Amelia and Josephina the two daughters of the immediate donee on 1D1. Although he took up that position in appeal, it is clear from the judgment and the trial proceedings, that it was conceded by both sets of defendants that the deed created a valid fidei commissum binding on four generations; what they were not agreed upon was as to the method of counting the four generations. If Mr. Weerasooria's present contention that Josephina's children got the property free from the fidei commissum is right his other submission that Grace's half share did not devolve on her illegitimate children must fail because according to the general law of inheritance the illegitimate children inherit the property of their mother. It is only if the fidei commissum was binding on the children of Josephina

[1] *(1935) 37 N. L. R. 270.*

that their illegitimate children would not be entitled to claim rights in this land—*Kiriya v. Ukku* [1]. However the language in this deed is clear that the donor intended to create a valid fidei commissum in favour of Johana Amelia and Josephina and their descendants. Although it is only Louisa and her two daughters who are expressly prohibited from alienating the property yet the words that follow, namely, " and that they, their children, grandchildren and their line of descendants shall continue to enjoy the benefits thereof without any interruption ", clearly indicate that the donor intended to benefit the descendants of his sister Louisa from generation to generation. The phrase " without any interruption " in this context, necessarily, carries with it the prohibition against alienation expressly imposed earlier on Louisa and her two daughters. One must also bear in mind that the deed is drawn up in Sinhalese, a language which is rich enough, to express the same idea in many different ways. This same deed came up for consideration in *De Silva et al. v. Rodrigo* [2] before Fisher C.J. and Drieberg J. The 1st plaintiff in that case was the present 7th defendant while the 2nd and 3rd plaintiffs were the present 3rd defendant and his sister respectively and it was held there that this deed created a valid fidei commissum in favour of Louisa and her two daughters and descendants. Kekunagahalanda which is part of the land sought to be acquired was the subject matter of that action. In that case it was contended on behalf of the defendant, who had been in possession of the land for a very long period, that he had acquired a prescriptive title to the share of Johana Amelia who died without issue. In regard to that argument Drieberg J. observed, " This would be so if the deed created a separate fidei commissum in respect of Johana Amelia and Josephina. But in my opinion the intention of the donor was to impress one fidei commissum on both lands in favour of the descendants of these two. " In my view the deed D1 contains a fidei commissum which is binding on four generations. I would proceed to consider the method of counting the four generations after I have dealt with the question of the legitimacy of the children of Grace.

The birth certificates 1D23, 1D24 and 1D25 respectively show that the 3rd defendant was born on 14-4-02, Linton on 25-5-03 and Diana Rosamund Pearl on 23-12-05. In the year 1918 Gregory instituted D. C. Colombo Case No. 49,955 against his wife Grace praying for a dissolution of their marriage on the grounds of malicious desertion and adultery. A certified copy of this plaint has been produced in the case marked 1D19. In paragraph 3 of the plaint the plaintiff alleged that prior to the period material to that action his wife the defendant had without lawful or reasonable cause deserted him. The next paragraph which is of considerable importance reads :—" Subsequent to the said act of desertion the defendant lived in Colombo and elsewhere at numerous places difficult to particularize in the year 1917 leading an immoral life and behaved as a common prostitute and more than one illegitimate child is born to her. " No co-respondent was named in the action. There is no evidence as to whether the defendant filed an answer or not, but when the case came up for trial on February 7, 1919, the defendant was absent. On that

[1] *(1914) 17 N. L. R. 361.*

[2] *(1930) 32 N. L. R. 28.*

occasion the plaintiff gave evidence and the learned District Judge entered a decree nisi dissolving the marriage on the ground of adultery. This decree was made absolute on February 7, 1919—1D20. The evidence given by the plaintiff in that case has been produced marked 1D21, although objected to by the appellants' counsel. The 1st defendant also relied on the birth certificates 1D23, 1D24 and 1D25 to show that Grace's children were illegitimate. The only witness called by the 1st defendant is Jayawardene the husband of the 7th defendant but he does not say that the father of Grace's children is Patterson de Zoysa Goonetilleke nor does he refer to the entries in 1D23, 1D24 and 1D25.

That the 3rd defendant, Linton and Diana Rosamund Pearl were born to Grace during the continuance of her marriage with Gregory is admitted. In view of that fact, the appellants rely on the presumption which arises under section 112 of the Evidence Ordinance. That section reads :— " The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent. " The presumption which arises under this section is very strong indeed and the burden is on the 1st defendant to displace it by evidence which is cogent. That onus cannot be discharged by a mere balance of evidence. The question for decision is whether, on the evidence available, the Court is entitled to hold that the presumption arising under section 112 has been effectively rebutted.

In 1D 23, the birth certificate of the 3rd defendant, against the cage 6 " were the parents married " appears the word " no " and cage 4 meant for the insertion of the name and surname of the father remains blank. The informant is Patrick de Zoysa whose residence is given as 3, St. Sebastian Street. The birth has also taken place at the same address. It is in evidence that Patrick de Zoysa Goonetilleke is the brother of Patterson de Zoysa Goonetilleke. In the birth certificate 1D 24 of Linton the father's name is given as Patterson de Zoysa Goonetilleke and the informant is the father himself. Against cage 7 it is stated that the parents were not married. The birth register has been signed by P. de S. Goonetilleke and D. G. Rajapakse who presumably are the parents of the child. The birth has taken place at 3, St. Sebastian street which is also the address of the informant. In 1D 25 which is the birth certificate of Diana Rosamund Pearl the name of the father is given as Patterson de Zoysa Goonetilleke and it states that the parents are not married. The informant is the father and his address is give as 204, Dematagoda Road, where the birth also took place. This birth entry is also signed by P. de S. Goonetilleke and D. R. G. Rajapakse. The learned District Judge after taking into consideration the contents of these birth certificates and the evidence 1D 21 given by Gregory in the divorce action came to the conclusion that the children of Grace were illegitimate. He expressed his view as follows :—" These documents coupled with the evidence in the case indicating that Diana Rosamund Grace left her husband after six months of married life is convincing proof that Simon

the 3rd defendant, Linton his deceased brother and Rosamund Pearl are illegitimate children." It was contended by Mr. H. W. Jayawardene, Q.C., who appeared for the appellants that the learned District Judge was wrong in admitting the evidence of Gregory in the divorce action. Mr. Weerasooria argued that his evidence is admissible under section 32 (5) of the Evidence Ordinance. Mr. Jayawardene's contention is right in my view. Sub-section 5 of section 32 renders a statement of a relevant fact made by a deceased person itself a relevant fact—"when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised." Under this sub-section it is necessary that the statement sought to be proved must have been made before the controversy arose. The main reason for that requirement is that the person who made the statement is dead and therefore there is no opportunity to test it by cross-examination. A statement made in the hope of securing some advantage to the person making it would be devoid of any weight and would not be admissible under this provision. In other words the statement should have been made before the dispute arose. The evidence 1D21 given by Gregory would not answer to that description. That evidence was given by him in the hope of obtaining a divorce from his wife on the ground of adultery. If he was successful in adducing evidence that his wife had begotten illegitimate children during the relevant period it would have been an easy matter for him to obtain the decree for divorce. Therefore his evidence 1D21 which is to the effect that his wife had separated herself from him soon after the marriage and had lived with Goonetilleke in adultery and given birth to illegitimate children would not be admissible in this case. Once that evidence is taken away there is not much material available to rebut the presumption of legitimacy. Of course there is the admission of Grace contained in her petition dated January 22, 1919 (3D 3) filed in Entail case No. 621 that she "has been separated from her husband for nearly 15 years now and she is now about 40 years old." It is extremely doubtful whether that evidence is legally admissible but even assuming that it is admissible it is significant that what she said there was that she had been separated from her husband for "nearly 15 years". The phrase "nearly 15 years" may mean less than 15 years but not more. It is relevant to note that her youngest child was born on 23–12–05. It may well be that she cut herself completely away from her husband only after that child was born. Mr. Jayawardene submitted that the learned District Judge had wrongly taken into consideration certain entries appearing in the birth certificates 1D 23, 1D24 and 1D25. In *Silva v. Silva* [1] it was held that a birth certificate is *prima facie* evidence only of (1) date of birth (2) place of birth, and (3) the identity of the person registering the birth. But it was also stated in the same case that statements made by a father for the purposes of a birth certificate have a genealogical value under section 32 (5) of the Evidence Ordinance. As far as 1D23 is concerned, however, I do not think that it is of evidentiary

[1] (*1942*) *43 N. L. R. 572.*

value to prove any facts other than the date of birth, place of birth and the identity of the person registering the birth. But different considerations apply to 1D24 and 1D25. When the name of Patterson was entered in those two birth certificates as being that of the father that entry must have been made on the strength of an oral statement made by Patterson to that effect. Such a statement would be admissible at least under section 32 (3) as it would have exposed him to a suit for damages at the instance of Gregory. The entries on 1D24 and 1D25 based on statements made by Patterson and Grace would also I think be admissible under section 32 (5). The birth certificates 1D24 and 1D25 show that Patterson de Zoysa Goonetilleke regarded himself as the father of Linton and Diana Rosamund Pearl and that he got their births registered. They also prove that Grace acknowledged that Patterson was the father of those two children. But are those circumstances sufficient to establish that during the adulterous association of Grace and Patterson the lawful husband Gregory had no access to his wife or was impotent ? The burden of proving non-access or impotency is on the 1st defendant. In the case of *Kanapathipillai v. Parpathy* [1] their Lordships of the Privy Council while categorically stating that " access " did not mean the bare geographical possibility of the parties reaching each other during the relevant period proceeded to observe " Again, their Lordships are of the opinion that ' no access ' would be established in any case in which, on the evidence available, it was right to conclude that at no time during the period had there been ' personal access ' of husband and wife in the sense given to that phrase in the passage from Lord Eldon's judgment which has been quoted above. " In my view no evidence is available in this case on which it is possible to hold that Gregory had no " personal access " in the sense the phrase is used by Lord Eldon. The possibility that, during the period that Grace gave birth to her three children, her husband Gregory too was having sexual relations with her cannot be ruled out by any means. It may well be that with or without the knowledge of Patterson, Gregory was visiting his wife. If both Patterson and Gregory were having sexual relations with Grace during the relevant period Patterson might have mistakenly believed that he was the father of these two children. Grace too might have made the same mistake or she might not have told Patterson the truth for fear of displeasing him. It is true that Grace, Gregory, Patterson and Letitia are all dead and there is considerable difficulty in adducing oral evidence to show that the father of the three children in question was in fact Patterson. On the other hand, the appellants too are faced with the same difficulty. In the case of *Cotton v. Cotton and another* [2] it was held that where the legitimacy of a child born in lawful wedlock was in dispute, the husband alleging that he had no intercourse with the wife at the material time, the evidence to that effect must be such as to exclude any reasonable doubt. The Commissioner who tried that case stated " I am more than suspicious that this child is the child of the co-respondent. I think it probably is. But that does not seem to carry the matter far enough. The husband has to prove the matter beyond any reasonable doubt. " He

[1] *(1956) 57 N. L. R. 553.* [2] *1951, 2. A. E. R. 105.*

dismissed the plaintiff's action and his order was upheld in appeal although the Judges agreed with the observations of the Commissioner.

I have also noted that the 3rd defendant and his sister had adopted the surname of Patterson. Although that is a point which supports to a little extent the contention that Patterson is their father I am not prepared to attach much weight to it. The learned District Judge when holding that the children of Grace were illegitimate has failed to consider the significance of the presumption of legitimacy which arises from section 112. If he did so he might probably have arrived at a different finding. It is also very significant that the 7th defendant herself had earlier recognised that the rights of Grace in this land had devolved on her children. It is on that basis that she joined with the 3rd defendant and his sister in dealing with this land on deeds 1D12 and 1D13. On the same basis they instituted the action reported in *32 N. L. R. 28*. For the reasons given above I hold that the 3rd defendant and his sister Diana Rosamund Pearl are the legitimate children of Grace and her husband Gregory and that the half share of this land which belonged to Grace devolved on those two children subject to the fidei commissum contained in 1D1.

The learned District Judge rightly said that he was bound by the judgment of Koch J. in *Siri Kantha v. Thiagarajah* [1] in regard to the method of counting the four generations on whom the fidei commissum is binding. In that case, Koch J. took the view that the fetter of fidei commissum binds the devisees or the donees and the three generations following.

On the other hand, Professor Nadaraja (at page 133) of his treatise on Fideicommissa, quoting Voet (36-1-33), states :—" As to the method of counting the generations, in Holland and Friesland the general opinion of the Commentators has been accepted . . . . that it is not the first instituted or fiduciary heir who constitutes the first degree, and consequently only the fifth fideicommissary heir is able to exercise his free discretion in regard to the fideicommissary property ". The same method of counting the generations is indicated in Mr. Raj Chandra's work on Fidei Commissum and in Professor Lee's Introduction to Roman Dutch Law (5th edition, page 385). This same method is followed in South Africa. In *Ryklief's heirs v. Ryklief's executors* [2] De Villiers C.J. stated " It is a well established rule of construction that a fidei commissum should be confined to four generations, counting from the first fidei commissary heir to legatee, unless the testator had expressed a manifest intention to the contrary in the will. No authority is cited by Koch J. in support of the view expressed by him, and Mr. Weerasooria informed us that he was himself unable to refer us to any other decision or authority wherein a similar view as to the method of counting the four generations has been taken. With respect, I am unable to agree with the view taken by Koch J. in the case referred to above. In my opinion the correct method of counting the four generations has been set out by Voet in the passage quoted above. Therefore in the instant case the first generation is represented by Johana Amelia and Josephina and the

[1] *(1935) 37 N. L. R. 270.* [2] *1896 Supreme Court Reports 64.*

3rd generation by the 7th defendant, 3rd defendant and Diana Rosamund Pearl. The children of the 7th and 3rd defendants and Diana Rosamund Pearl would constitute the 4th generation and their children would take the property unfettered and absolutely.

I hold that the parties are entitled to the land in the following shares subject to the fidei commissum contained in 1D1 :—

2nd Defendant 1/16
3rd Defendant 1/4
4th Defendant 1/16
5th Defendant 1/16
6th Defendant 1/16
7th Defendant 1/2

I direct that the compensation payable for the acquisition of this land be deposited in the District Court, Negombo. That money would be subject to the fidei commissum created by the deed 1D1. The 1st defendant would be entitled to draw the interest of the shares of the money due to the 3rd defendant and the 7th defendant during their lifetime. On the death of the 7th defendant the 1st defendant would also be entitled to the interest on the share of the money due to Lidwin and Newton during their lifetime. The 1st defendant will pay the costs of reference.

Let decree be entered in terms of this judgment. Appeal is allowed with costs in both Courts.

T. S. FERNANDO, J.—I agree.

Appeal allowed.