1963 *Present:* Weerasooriya, S.P.J., and T. S. Fernando, J.

MOHIDEEN HADJIAR, Appellant, *and* GANESHAN *et al.*, Respondents

S. C. 422/60—D. C. Jaffna, 910/L

Donation—Minor—Capacity to accept a gift—Fideicommissum—Absence of conferment of rights on the fiduciarius to take income for himself—Validity of the fideicommissum—Fideicommissum in favour of a family—Construction—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58), s. 15.

(i) A minor who has sufficient understanding has the capacity to accept a gift.

A father donated certain lands to his son, who was a minor, and, two or three weeks later, handed over the deed of gift to the donee and told him to keep it. There was also evidence that after the death of the donor, which took place within six months of the execution of the donation, the donee, along with the executor appointed under the last will of the deceased, entered into possession of the lands dealt with in the deed of gift.

Held, that the donee, though a minor, had sufficient understanding to accept the donation and that the evidence was sufficient to establish acceptance by him of the donation.

(ii) A fideicommissum may be valid even though, under the deed creating it, the fiduciarius is not given any right to take the income for himself from the fideicommissary property, he merely holding the property and allowing the income to be taken by a third person.

(iii) An express prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a fideicommissum in favour of the members of the family. In such a case the persons to whom alienation is *not* prohibited (i.e., the members of the family) are to be regarded as impliedly designated by the testator or donor as beneficiaries of the prohibition.

A deed of gift executed by a father in favour of his two sons contained the following clause :—

> " I do hereby declare and enjoin that the donees shall not within a period of twenty-five years from the date of my death alienate the said lands by way of transfer, donation, dowry or by any other document, that they should allow the said lands to devolve on their children by way of mudusom and may only give the said lands to their children by way of donation or dowry, that they shall have no power to encumber the said lands by way of mortgage, otty or security or by any other document and that the said lands shall not be liable to be executable for any debts incurred by them."

Held, that the clause created a valid fideicommissum in favour of a family. Not only did it contain an express prohibition against alienation except to the children of the donees in the manner specified (by donation or dowry), but it also sufficiently indicated that the persons to be benefited by the prohibition were the same children. It contemplated that the children were to succeed to the property on the death of the donees within the period of twenty-five years specified in the clause.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *J. N. David*, for defendant-appellant.

S. Sharvananda, with *M. Shanmugalingam*, for plaintiffs-respondents.

Cur. adv. vult.

August 27, 1963. WEERASOORIYA, S.P.J.—

The 2nd and 4th plaintiffs-respondents are the daughters of one Kathiravelupillai, son of Murugesupillai. They have filed this action against the defendant-appellant for declaration of title to a half-share of the eastern half of certain premises situated in Main Street, Jaffna, for possession thereof, damages and costs.

The original owner of the premises was Murugesupillai, who by deed No. 21891 of the 3rd March, 1921, donated several properties including the premises in suit to Kathirvelupillai and his other son Kumaravelupillai. The deed is in Tamil. *Ex facie* there is no acceptance of the donation by the donees. Two English translations of the deed, marked P1 and D1, have been put in by the plaintiffs and the defendant respectively. D1 was produced as 1D19 in D. C. Jaffna No. L915 where the same questions of construction of deed No. 21891 arose as in the present case. Evidence of experts was led in that case as to the correct rendering of the deed, and was by agreement of parties adopted as evidence in the present case. After considering such evidence the trial Judge (who also heard case No. L915) held that as between P1 and D1, the former was the better translation. This finding was not canvassed at the hearing of the appeal before us.

The following clauses in P1 are material for the purposes of the appeal, and are marked A and B for easy reference :

(A) " I do hereby declare and enjoin that the donees shall not within a period of twenty-five years from the date of my death alienate the said lands by way of transfer, donation, dowry or by any other document, that they should allow the said lands to devolve on their children by way of mudusom and may only give the said lands to their children by way of donation or dowry, that they shall have no power to encumber the said lands by way of mortgage, otty or security or by any other document and that the said lands shall not be liable to be executable for any debts incurred by them. "

(B) " I do hereby nominate and appoint their grandfather Illanthalaivasingha Irunathamudaliyar Thillainather of Vannarponnai East and Saravanamuttu Ambalavanar of Vaddukkodai East after me and give them power to jointly and severally look after and manage the said properties and to utilise the produce and income thereof for the food, clothing and education of the said Kathiravelupillai and Kumaravelupilli and for their wives and children during the said period. "

After deed No. 21891 was executed, Kumaravelupillai, one of the two donees, died unmarried and without issue, leaving as his heir his father Murugesupillai in respect of a half-share of the lands dealt with in that deed. Murugesupillai died a few months later on the 27th August, 1921, having made a last will which was duly admitted to probate and under which the said half-share devolved on Kathiravelupillai. By deed D2 of 1931 Kathiravelupillai sold an undivided half-share out of the eastern half of the premises figuring in the present action to one Visuvanathar Ponnudurai. The devolution of the other half-share of the eastern half is as follows: Kathiravelupillai (who died in 1940) sold it in 1934 to Sinnathamby Vinasithamby on P5. Vinasithamby died leaving a last will under which his widow Thiyalmuttu was appointed executrix. Thiyalmuttu having obtained probate thereof sold that half-share on deed D3 of 1935 to Visuvanathar Ponnudurai, the transferee on D2 of the other half-share. Ponnudurai, by deed D4 of 1942, sold the entirety of the eastern half to the defendant. This action concerns only the half-share of the eastern half which the defendant claims on the chain of title represented by deeds No. 21891 and P5, D3 and D4.

The case went to trial on seven issues. The trial Judge found in favour of the 2nd and 4th plaintiffs on all of them and he entered judgment as prayed for with costs except in regard to damages, which were as agreed upon at the trial. From this judgment the defendant has filed the present appeal. The only findings of the trial Judge which Mr. Thiagalingam who appeared for the defendant, canvassed at the hearing of the appeal were on the issues whether deed No. 21891 created a fidei commissum (Issues Nos. 1 and 4) and whether the deed was invalid for want of acceptance (Issue No. 7).

The evidence of the plaintiffs' witness Suppiah is that Kathiravelupillai and Kumaravelupillai were minors when deed No. 21891 was executed and that two or three weeks after its execution Murugesupillai, who was suffering from a carbuncle, obtained the deed from the notary and, having summoned Kathirvelupillai before him, requested Suppiah to hand the deed to Kathirvelupillai and after the deed was handed over, Murugesupillai told Kathirvelupillai to keep it. The evidence of Suppiah was accepted by the trial Judge. While not disputing the sufficiency of this evidence to establish acceptance of the donation by Kathiravelupillai, had he been of full age, Mr. Thiagalingam contended that as a matter of law Kathiravelupillai was not competent to accept the donation because he was a minor at the time. For this proposition Mr. Thiagalingam relied on the case of *Wellappu v. Mudalihamy* [1]. A different view of the law relating to acceptance of a donation by a minor was, however, taken in *Nagalingam v. Thanabalasingham* [2]; where Canakeratne, J., stated in his judgment (with which Dias, J., agreed) that for the purpose of acceptance minors may be divided into two classes, viz., those who are o

[1] *(1903) 6 N. L. R. 233.* [2] *(1948) 50 N. L. R. 97.*

tender years, who may be termed children, and those who have sufficient intelligence. He then went on to make the following observations: " One who may be said to be a child is taken to lack all mental capacity or power to form a decision and so can enter into no transaction whatsoever, his guardian, whether natural or appointed, acts for him without consulting him, and with complete authority. Such a child can hardly accept a gift. One of the second class is deemed capable of thinking for himself, has *intellectus*, but since he is yet inexperienced and likely to act rashly, the necessary *auctoritas* of his guardian must generally be interposed to make the transaction absolutely binding. Such a minor, however, can take the benefit of a contract and thus he can himself accept a gift". An appeal filed to Her Majesty in Council in that case was allowed, but on other grounds, and the question whether a minor can himself accept a gift was left undecided by the Privy Council [1].

Mr. Thiagalingam also relied on a sentence in the judgment of Withers, J., in *Fernando et al. v. Cannangara et al.* [2] where, in considering whether a gift by a father in favour of his minor children could have been validly accepted by a nephew of the donor, the learned Judge said: " These children were one and all incompetent to accept the gift ". But, as the children themselves had not purported to accept the gift, this observation would appear to be at the most an *obiter dictum*. At any rate, it is doubtful whether Withers, J., intended to lay down, as an unqualified rule, that no minor, whatever his age, has the capacity to accept a gift.

Another case in which it was held that a minor who has sufficient understanding may himself accept a gift is *Babaihamy v. Marcinahamy et al.* [3]. With respect, I would follow that case as well as the case of *Nagalingam v. Thanabalasingham* (*supra*).

In the present case, although Kathiravelupillai is said to have been a minor at the time of the execution of deed No. 21891, his father Murugesupillai evidently considered that he was old enough to be entrusted with the deed. There is also evidence that after the death of Murugesupillai, which took place within six months of the execution of the deed, Kathiravelupillai along with the executor appointed under the last will of the deceased, entered into possession of the lands dealt with in that deed. It would seem, therefore, that Kathiravelupillai had sufficient understanding to accept the donation. Apart from this, it is to be noted that an essential link in the defendant's chain of title to the half-share in dispute is P5, executed on the footing that deed No. 21891 was a valid donation. Can the defendant, while taking advantage of deed No. 21891 for the purpose of her claim that she has title to that half-share, turn round and say that the same deed is invalid for want of acceptance when the claim of the 2nd and 4th plaintiffs is being considered? The equitable doctrine that a person cannot approbate and reprobate would appear to preclude the defendant from taking up such a position. As explained by Lord Eldon in *Ker v. Wauchope* [4] the meaning of this doctrine is that

[1] *(1952) 54 N. L. R. 121.*
[2] *(1897) 3 N. L. R. 6.*
[3] *(1908) 11 N. L. R. 232.*
[4] *1 Bligh 1, at 21.*

no person can accept and reject the same instrument. See also the observations of Viscount Maugham in his speech in the House of Lords in *Lissenden v. Bosch Ltd.*[1] I see no reason, therefore, to interfere with the finding of the trial Judge that deed No. 21891 is not invalid for want of acceptance.

There remains the question whether deed No. 21891 created a fidei-commissum. The interpretation of this deed was considered as far back as 1949 in S. C. No. 257/D. C. Jaffna Case No. 3233[2], when a bench of two Judges of this Court (Canekeratne and Gunasekara, JJ.) answered the question in the affirmative. No significant difference between P1 and the translation of deed No. 21891 filed in that case was brought to our notice by counsel for the appellant as a ground for taking a contrary view in regard to the same question in the present case. The following passage from the judgment of Canekeratne, J., in that case seems to meet the argument of Mr. Thiagalingam that clause B in P1 (which I have quoted earlier) is inconsistent with a fidei commissum : " But one point which has been emphasised is the fact that the management of the property is given for a number of years to another person. Usually a fidei commissum of the Roman Dutch Law vests the property in the fiduciary and on the happening of a certain event it is to devolve on a third person, the fiduciary having the legal right to take the income for himself. But it is also the law that a fidei commissum may be created in any way. It is only a question of the interpretation of the deed or will as the case may be. A fidei commissum may be created in such a way as to make the fiduciary something like an administrator's peg, or a mere holder of the title without having any right to the income, he merely holding the property and allowing the income to be taken by a third person ". In *Sinnepillaipody v. Muhamaduthamby*[3] it was held that there can be a fideicommissum without any conferment of rights on the fiduciarius to enjoy the fruits and profits of the fideicommissary property. In view of these authorities I do not think that the provisions of clause B in P1 can be regarded as inconsistent with a fideicommissum.

Clause A contains, *inter alia*, an express prohibition against alienation by an act *inter vivos* or by last will except to the children of the donees. Mr. Thiagalingam strenuously contended that inasmuch as there is no designation of the beneficiaries the prohibition is " nude " and therefore ineffective. But according to Voet 36-1-27 (Gane's Translation) " Forbidding alienation out of family is fideicommissum ", and he gives as an instance where a testator provides that the property " shall not go away from his line and from his blood ". In *Livera et al. v. Gunaratna*[4] a clause in a last will, which was in the following terms " I . . . . . do hereby restrict my three sons from selling, mortgaging or otherwise disposing of my landed property which they shall inherit from my estate . . . . . to any stranger or out of my lineage ", was held by a bench of two Judges of this Court (Lascelles, C.J., and Walter

[1] *(1940) A. C. 412 at 417.*
[2] *Supreme Court Minutes of 15th September, 1949.*
[3] *(1957) 58 N. L. R. 494.*
[4] *(1914) 17 N. L. R. 289.*

Pereira, J.) to create a fidei commissum in favour of the "lineage" of the testator. There is also the case of *Robert v. Abeyewardane et al.* [1] where de Sampayo, J., sitting alone, stated that a prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a fideicommissum in favour of members of the family. But Professor Nadaraja in his book on the Roman Dutch Law of Fideicommissa refers to several later cases which he seems to think are in conflict with the above mentioned two decisions. The later cases referred to by him are collected at page 129 of his book. They are decisions of two Judges of this Court. In some of them the judgments were delivered by de Sampayo, J., himself. In *Naina Lebbe v. Mavaikar et al.* [2] a gift by husband and wife to their three sons was subject to the condition that "if they like to alienate or encumber their share by any deed, such as mortgage or transfer, they shall do so between themselves and not with others". De Sampayo, J., thought that this condition had "no analogy to the well known form of fideicommissum which is created by prohibiting alienation out of the family". In *Cornelis et al. v. Wattuhamy* [3] the Court had to construe the following clause in a joint will in favour of the children of the testators: "..... if the aforesaid parties mortgage, lease out, transfer, gift out or give over in any way any lands of this estate to anyone other than an heir of this estate such grant shall be null and void and the property shall belong to the estate." Regarding this clause de Sampayo, J., stated: "(It) hardly creates a fideicommissum. I cannot quite see who are the persons who are to get the property in the event of alienation in breach of the condition. All that I can find is that the property should belong to the estate". In *Amarawickreme v. Jayasinghe et al.* [4] a bequest by husband and wife to their children provided that if the latter "required to sell the immovable property which they shall become entitled to from our estate, they shall sell the same to an heir of this estate for the then value but it is prohibited to sell the same to any one else". De Sampayo, J., stated that the case was clearly distinguishable from *Robert v. Abeyewardene et al.* (*supra*) and that the clause in question contained a bare prohibition which had no legal effect except, perhaps, to give the nominated heirs a right of pre-emption if any of them should wish to sell his share. It will be seen, therefore, that these three decisions were not considered by de Sampayo, J., as departing from the principle stated by him in *Robert v. Abeyewardane et al.* (*supra*).

In *Peiris v. Soysa et al.* [5] a grant of property was made absolutely in favour of four children of the donor's sister, with a direction that if it became necessary to sell or mortgage the property it should be done among the grantees and that it should not be sold or mortgaged to any "outsider". Ennis, J., who delivered the judgment in that case (with which Loos, A.J., agreed) expressed the view that it was not on all fours with the case of *Robert v. Abeyewardane et al.* (*supra*), in regard to

[1] *(1920) 22 N. L. R. 323.*
[2] *(1922) 23 N. L. R. 295.*
[3] *(1920) 22 N. L. R. 77.*
[4] *(1 22) 23 N. L. R. 462.*
[5] *(1920) 21 N. L. R. 446.*

which, however, he said that he found "some difficulty". The same Judge, in *Hadjiar v. Meyappa*[1], held (Porter, J., agreeing) that no fidei commissum was created by a provision in a last will giving to the testator's son, N, certain lands "subject to a fidei commissum, i.e., the said N can only take and enjoy during his lifetime the profit accruing from the said two lands, but that he or his heirs shall not sell or mortgage them, nor can they donate them as gift to any outsider, and that after the death of the said N the lands shall rest on his heirs and that these shall have no power to sell or mortgage them nor to donate them as gift to any outsider".

In *Kithiratne v. Salgado*[2] A, the donor, had gifted by deed a defined half share of a land to his daughter and two nephews and the other half share to B. It was provided that if B "required" to sell, mortgage, or dispose of in any way her share she should do so only to any one or more of the other three donees and not do any act whatsoever to enable an outsider to acquire "any proprietorship" over it and, further, that if B died without any such transfer of ownership her share was to be inherited by her adopted daughter, C, and if B and C were to die without any descendants the share was to devolve on the donor's daughter aforesaid. Macdonell, C.J., and Dalton, J., held in separate judgments, but not for quite the same reasons, that the deed did not create a fideicommissum in respect of the half share donated to B.

In so far as these cases would appear to be in conflict with the earlier cases of *Livera et al. v. Gunaratna* and *Robert v. Abeyewardane* (*supra*), Professor Nadaraja expresses the opinion (at page 128) that the correct legal position is (as stated by de Sampayo, J., in *Robert v. Abeyewardane et al.*) that a prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a fideicommissum in favour of the members of the family. Such, it would seem, was also the view of the Privy Council in the South African case of *Josef and Others v. Mulder and Others*[3], where husband and wife married in community transferred by deed to their son certain immovable property for valuable consideration, stipulating that the same "shall never be sold or parted with in favour of a stranger but shall permanently remain among legal heirs". The decision that the deed created a fidei commissum implies that the Privy Council considered that the legal heirs were sufficiently indicated (though not expressly) as the persons to be benefited by the prohibition.

The question whether clause A in P1 creates a fidei commissum or not is largely a matter of construction of the document. The principles applicable are not in doubt. A tacit fidei commissum, which is what we

[1] *(1922) 23 N. L. R. 333.* [2] *(1932) 34 N. L. R. 69.*
[3] *(1903) A. C. 190.*

are concerned with in the present case, arises where there is an express prohibition against alienation, coupled with a sufficient indication as to the person or persons to be benefited by the prohibition and as to the time at which their rights are to vest. In my opinion, where there is an express prohibition against alienation out of the family, the persons to whom alienation is *not* prohibited (i.e. the members of the family) are to be regarded as impliedly designated by the testator or donor as beneficiaries of the prohibition.

Not only does clause A in P1 contain an express prohibition against alienation except to the children of the donees in the manner specified (by donation or dowry), but it also sufficiently indicates that the persons to be benefited by the prohibition are the same children. Mr. Thiagalingam argued on the authority of *Pabilina v. Karunaratne et al.* [1] (a decision of three Judges) that, even so, there has been a failure of the intended fidei commissum as clause A is not clear as to when the children of the donees are to succeed to the property. The prohibition against alienation in that case was in the following terms : " We hereby covenant with the said . . . . that the said three donees or each of them can neither sell, mortgage nor alienate the portion of land and that their children can do whatever they please therewith ". Canekeratne, J., in a judgment with which Howard, C.J., and Windham, J., agreed, held that it was not clear whether the words used meant that the children were to succeed to the property if the donees acted contrary to the prohibition against alienation or in some other event. In the present case, however, the language used is far more specific, for clause A requires the donees to allow the lands to devolve on their children by way of *mudusam* (i.e. if the same had not already been given to them by way of donation or dowry). According to section 15 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58) property devolving on a person by descent at the death of his or her parent or of any other ancestor in the ascending line is called *mudusam* or patrimonial inheritance. I think that clause A contemplated that the children were to succeed to the property on the death of the donees within the period of twenty-five years specified in that clause.

For the foregoing reasons I would dismiss the appeal with costs.

T. S. FERNANDO, J.—I agree.

Appeal dismissed.

[1] *(1943) 50 N. L. R. 169.*