Present: Lascelles C.J. and Pereira J.

1914.

LIVERA *et al.* *v.* GUNARATNA.

165—D. C. Galle, 11,673.

Fidei commissum—*Legacy subject to a* fidei commissum—*Legatee dying before testator—Legacy does not lapse.*

Where a testator devised a parcel of land "as a legacy" to his son C, prohibiting him from "selling, mortgaging, or otherwise disposing of the same, or from giving it as a legacy to any stranger or out of his lineage,"—

Held, that the disposition created a *fidei commissum* in respect of the property in the hands of C in favour of the "lineage" of the testator. On the death of C before the testator, M, who was the first in the lineage of the testator in the direct line of descent from C, was held entitled to the property.

Under the Roman-Dutch law a *fidei commissum* with which a legacy was burdened did not lapse by the death of the immediate legatee before the testator.

Per PEREIRA J.—In the rule of the Roman-Dutch law that a *fidei commissum* ended by the death of the fiduciary heir before the death of the testator, the term "heir" had reference to the "testamentary heir" of that law, in whom was vested, *inter alia*, the right, duties, and responsibilities of the executor of our time. The rule has no place where property is devised by a will of our time to a devisee subject to a *fidei commissum*, although the devisee be a person who would have been an heir in intestacy but for the will.

THE facts are set out in the judgement of Lascelles C.J.

E. W. Jayewardene (with him *Samarawickreme*), for the plaintiffs, appellants.—On the death of Cornelis the legacy lapsed, and his share fell into the residue. The share went to Frederick and George, subject to a *fidei commissum*, under clauses 21 and 23. Frederick and George died only in 1904 and 1906, and the defendant has not therefore gained a title by prescription.

If legacy lapsed, it did not go to Frederick and George as in intestacy. Even a specific bequest falls into the residue. *2 Simon's New Reports 129.* The residue was subject to a *fidei commissum* under the will.

The *fidei commissum* was binding at least for four generations. As Cornelis died during the lifetime of the testator, Mary succeeded to what would have been her father's share. She was only a fiduciary heir, and her children were not prejudiced by the possession of any one during Mary's lifetime. Mary held the property subject to the restrictions which were imposed on Cornelis. *Voet 36, 1, 69.* The prohibition against an alienation is a real prohibition, and not a personal prohibition. *MacGregor's Voet 67, 74.*

1914.

Livera v. Gunaratna

Counsel cited *Morice 307 ; 2 Burge 112, 115 ; Sande's Restraints on Alienation 218, 219 ; 2 Walter Pereira 447 ; 15 N. L. R. 323 ; 16 N. L. R. 6 ; 14 N. L. R. 493 ; at p. 469 ; 17 N. L. R. 129, 133 ; 3 A. C. R. 139; 7 N. L. R. 43, at p. 49; Jarman on Wills 1047.*

Bawa, K.C. (with him *Bartholomeusz*), for the defendant, respondent.—If the legacy lapsed on the death of Cornelis, it went by intestacy to Frederick and George, and it was not subject to *fidei commissum*. Prescription, therefore, ran from 1883 in favour of the defendant.

The prohibition against alienation is a personal prohibition binding on Cornelis, and did not bind Mary. *McGregor 71, Voet 36, 1, 27, 2 Burge 112.*

Counsel cited *2 Burge 109, 3 Nathan 1875, 3 Bal. 74, 15 N. L. R. 323.*

Jayewardene, in reply.

Cur. adv. vult.

July 17, 1914. LASCELLES C.J.—

This is an action in which the plaintiffs claim a field called Ambagahawilakumbura under the will of their great-grandfather Petrus Dias Abeysinghe. The case went to trial on a statement of admitted facts in the following terms :—

> "Admitted that Petrus Dias Abeysinghe was entitled to this property; that he died in December, 1881, leaving the last will in question ; admitted probate in D. C. Galle, 2,765, Testamentary. He had three children, Cornelis, Fredrick, and George. Cornelis predeceased Petrus, leaving a daughter—his wife having predeceased—Mary, married to Richard de Livera in 1881. Plaintiffs are their surviving children. Mary died in 1912, and Richard de Livera about eleven years ago. Frederick died about 1904, leaving a widow, and no issue. George died in 1906 unmarried, and without issue and without a will. Richard de Livera, by his attorney in 1883, purported to sell the property to defendant, and defendant has had possession since. Damages agreed upon at Rs. 80 per year."

The title of the defendant rests entirely on prescription, inasmuch as his deed from Richard de Livera passed no legal title to him. If, however, the property in the hands of Frederick, George, or Mary, or any one of them, was subject to a *fidei commissum*, no question of prescription would arise, as the period of prescription would not begin to run against the plaintiffs until the respective deaths of these *fiduciarii* in 1904, 1906, and 1912. (*Vide* section 3 of Ordinance No. 22 of 1871.)

It is therefore essential to the appellant's case to show that the property devolved on Mary as *fiduciarius* and not as absolute owner.

The question depends to some extent on the construction of the will of Petrus Dias Abeysinghe. The first twelve clauses of the will contain bequests of money, dwelling houses, and gardens in favour of charities or of servants and friends. Then comes the devise of Ambagahawilakumbura (the property in dispute) to Cornelis. It is in the following terms:—

> "I, the testator, give and bequeath as a legacy to my eldest son, Cornelis Jacob Dias Abeysinghe, Muhandiram of Galle Kachcheri, the field Ambagahawilakumbura, belonging to me, and situated in the village Akmimana."

Clauses 14 and 15 contain devises of fields to Frederick and George respectively. In these three clauses the devises are made in the same form. The devises are absolute, and unaccompanied by any restriction or condition.

Clauses 17, 18, and 19 contain the dispositions with regard to the property which the testator inherited from his parents, his maternal uncles and aunt, and from his first wife. The testator's widow was given half of the dwelling house Orphoowawatta, together with half of the garden Mawattewatta and certain fields, "to be possessed by her during the natural life in trust for my three sons hereinbefore named ....., and after the death of my said second wife the said legacy to revert to them free of all encumbrances."

By clause 20 the other half of the house and garden undisposed of by clause 19 was given and bequeathed to the three sons "to be possessed by them as hereinafter mentioned."

The nature of the interest of the three sons in the dwelling house and garden Orphoowawatta and the garden Mawattewatta is defined by clause 20, which is as follows:—

> "I, the testator, will and desire, when my three sons aforesaid become absolutely entitled to my dwelling house and garden Orphoowawatta surrounded by the wall and the garden Mawattewatta, that they and their posterity are at liberty to possess and enjoy the same for ever, but they and their heirs are respectively restricted from selling, mortgaging, or otherwise alienating the same, and the same I hereby entail as a *fidei commissum*."

Here we have a complete *fidei commissum* created as regards the house and garden, the intention being that the restraint on alienation should last for the full period allowed by law, that is, for four generations, the will having been made before the Ordinance No. 11 of 1876.

Clause 21 contains a residuary gift to the three sons in equal shares.

1914.

LASCELLES C.J.

Livera v Gunaratna

Clauses 22 and 23 are as follows:—

" 22. Should any of my said three sons die without issue, I will and desire that their widows who may survive them shall be at liberty to possess the entailed and all the other landed property which they may inherit from my estate with the restrictions hereinbefore set forth in proportion to their respective shares, and that after their respective deaths the same to revert to my children in their legitimate issue upon the like restrictions as hereinbefore entailed.

" 23. I, the testator, do hereby restrict my three sons from selling, mortgaging, or otherwise disposing of any landed property which they shall inherit from my estate or given to them by me as a legacy to any stranger or out of my lineage."

Thus, we find in the will two clauses creating *fidei commissa* of different degrees of stringency. Clause 20 deals with the testator's dwelling house and garden, with property, that is to say, which the testator was particularly anxious should remain in his family. With regard to this, there is a *fidei commissum* binding on the sons and their posterity for the full period allowed by law. It was clearly the wish of the testator that this property should be kept in the family for as long as possible.

Clause 23 creates a *fidei commissum* of a more limited character. The three sons are restricted from alienating " to a stranger or not of my lineage any landed property which they shall inherit from my estate or give (*sic*) to them by me as a legacy." The restriction is imposed on the sons, and does not extend to their children or descendants. It is in the nature of a personal inhibition. The institutes are personally charged with the duty of keeping the property in the family. *Fidei commissa* of this limited nature are recognized by the Roman-Dutch law (*vide Voet 36, 1, 27; Burge, 1st ed., vol. II., p. 112*).

The principal question is whether the share of Cornelis lapsed and fell into the residue. If this be the case, this share would be governed by clauses 21 and 23, and would go to George and Frederick subject to a *fidei commissum*. In this case the question of prescription would not arise.

The present case appears to be the simple one of the bequest of a legacy subject to a *fidei commissum*. It appears to be clear Roman-Dutch law that, in the event of the legatee dying before the testator, the legacy does not lapse (*Voet 36, 1, 69*). Then the question arises whether Mary took the legacy subject to the same *fidei commissum* as that which was imposed on her father. The answer to this question, I think, is supplied by the terms of the will. The *fidei commissum* was applicable only to the testator's three

sons, and not to any of his more remote descendants. I am therefore of opinion that the property in Mary's hands was not burdened with a *fidei commissum*, and there is nothing to prevent prescription running in favour of the defendant against Mary's children.

I would dismiss the appeal, with costs.

PEREIRA J.—

I agree to dismiss the appeal with costs. The first question in the case is whether, as regards the land in claim (Ambagahawilakumbura), the will of Dias Abeysinghe created a *fidei commissum* in favour of the heir or heirs of Cornelis Jacobus. The testator by his will bequeathed " as a legacy " to Cornelis Jacobus Ambagahawilakumbura, and prohibited him by selling, mortgaging, or otherwise disposing of the same, or from giving it as a legacy to any stranger or out of " his lineage ". (see paragraphs 13 and 23 of the will). This disposition, in my opinion, created a *fidei commissum* in respect of Ambagahawilakumbura in the hands of Cornelis Jacobus in favour of the " lineage " of the testator. Mary, the daughter of Cornelis Jacobus, was the first in the lineage of the testator in the direct line of descent from Cornelis Jacobus, and, therefore, she was the *fidei commissary* who would be entitled to the property on the death of Cornelis Jacobus.

The next question is whether by reason of the death of Cornelis Jacobus before the testator the *fidei commissum* lapsed, and the property fell back into the estate of the testator. Now, it is a general rule of the Roman-Dutch law that a *fidei commissum* ended by the death of the fiduciary heir before the death of the testator (see *Van der Linden, Maasdorp trans., 66);* but " heir " here must not be taken as a mere devisee under a will of our time. The reference is to the " testamentary heir or heirs " under the Roman-Dutch law, in whom was vested, in the first instance, the entirety of the property of the testator, and to whom was committed the power of carrying out his wishes and directions. In him was vested, *inter alia*, the rights, duties, and responsibilities of the executor of our time, and his presence was necessary to animate, so to say, testamentary dispositions. A devisee under a modern will, be he a total stranger to the testator or one who would but for the will be his heir according to intestate succession, is more in the position of a legatee under the Roman-Dutch law; and in the case of a *fidei commissum* with which a legacy is burdened, it does not lapse by the death of the immediate legatee before the testator (*Voet 36, 1, 69;* see *MacGregor's trans. 149*). In the present case there is no difficulty in determining as to what the exact status of Cornelis Jacobus is, because the devise to him is in the will (see paragraph 13) expressly called a legacy.

It has been argued that Mary took the property in question subject to the same *fidei commissum* as that to which it was subject

1914.

PEREIRA J.

Livera v. Gunaratna

in the hands of Cornelis, and Voet (*36, 1, 5*) has been cited in support of this contention. What Voet there says is: " When a father has burdened his children with a *fidei commissum*, and the children of the first degree die during their father's lifetime, and the grandchildren succeed to them by common substitution and become their grandfather's heirs, it is understood that they likewise take subject to the *fidei commissum*." The " common substitution " here spoken of by Voet is not the *fidei commissary* substitution, but what was commonly known as the *substitutio vulgaris* of the Roman-Dutch law, whereby a second heir was appointed to take the place of the first appointed heir if the first appointed heir by reason of his death before the testator or otherwise failed to be heir. The passage cited has no application whatever to the present case. For these reasons it is clear that the property in claim was not burdened with a *fidei commissum* in the hands of Mary, and there was nothing to prevent the defendant from availing himself of his prescriptive possession as against her children, the plaintiffs. Anyway the answer to the only issue tried should be in the negative.

Appeal dismissed.