1963 *Present :* Herat, J., and Abeyesundere, J.

RASAMMAH (widow of S. Nagalingam), Appellant, and GOVINDAR MANAR and wife, Respondents

S. C. 407 of 1960—D. C. Point Pedro, 6267/ L

Fideicommissa—Donation by an ascendant to a descendant—Condition therein that if donee dies issueless the gifted property should pass over to a third party—Is a fideicommissum in favour of donee's children implied?—"Implied fideicommissum".

The mere fact that A, an ascendant, donates property to a descendant B upon condition that if B dies issueless the property is to vest in C does not imply a fideicommissum in favour of B's issue in the event of B dying leaving issue. In such a case, if B dies after transferring the property to a third party, neither B's issue nor C would be entitled to the property.

A condition precedent to the creation of a fideicommissum is that the gift over to the fideicommissaries should take place irrespective of the will or fancy of the fiduciary. An expression of a wish or desire of the donor, leaving it to the good sense of the donee to give the property to the donee's children, is not sufficient to indicate a condition that the property should go to them. Even an implied fideicommissum is merely one where the intention of the grantor is construed out of the language used and from the circumstances of the case.

APPEAL from a judgment of the District Court, Point Pedro.

H. W. Jayewardene, Q.C., with *S. Sharvananda* and *L. C. Seneviratne*, for defendant-appellant.

C. Ranganathan, for plaintiffs-respondents.

July 4, 1963. HERAT, J.—

By deed of gift P1 of 1915 Muthalithamby donated the land in dispute to his daughter Tharumiammah who was married to one Nadarajah. Tharumiammah and Nadarajah executed D1 of 1915 by which they conveyed the land in question in exchange for another land to one Saddanathar. Saddanathar by deed D2 of 1915 transferred the land in suit to Thambiah who by D4 of 1919 transferred the land in question to Nadarajah the husband of Tharumiammah. The land was sold in execution of mortgage decree against Nadarajah and was purchased by Supramaniam who had deed D5 of 1920 executed conveying title to the land in his favour. Supramaniam by D6 of 1933 gifted the land to Chellammah and she by D7 of 1938 transferred the land to Nagalingam who by D8 of 1938 gifted the land to his wife Rasammah the defendant-appellant. Tharumiammah died on 31.12.1949 leaving a child the second plaintiff-respondent whose husband is the first plaintiff-respondent. The deed of gift P1 among other terms contains the following provisions :—

> "That if she (Tharumiammah) happens to die issueless leaving behind these properties, the same shall devolve on her husband, the said Suppar Nadarajah and his brothers Suppar Saddanathar and Suppar Thambiah in equal shares."

The plaintiffs-respondents' case is that the terms of the deed P1 created a fidei commissum binding Tharumiammah in respect of the said property in favour of her children and that therefore upon Tharumiammah's death in 1949 the property devolved under the said fidei commissum on the second plaintiff-respondent who was the only child of Tharumiammah. The plaintiffs brought this action for declaration of title and ejectment of the defendant-appellant and obtained a decree in their favour and from that decree the defendant has now appealed.

The sole question which in our opinion we have to decide is whether P1 creates a fidei commissum in favour of Tharumiammah's children. The question has long been discussed in the Roman Dutch Law whether under the following circumstances a fidei commissum is deemed by the law to exist. Those circumstances are these : A, an ancestor, by last will or by deed *inter vivos* conveys property to a descendant B and states that if B dies without issue that property is to pass over to C. Now if B dies leaving issue, then certainly the property will not go over to C. But the question is posed, what is then to happen to the property ? Does B die the absolute owner of the property and does it pass, if he dies intestate, to his intestate heirs, or if he dies testate, to his testamentary heirs ? On the other hand, does the law imply or read into the language of the instrument an intention on the part of the testator A or donor A to create a fidei commissum in favour of B's children ? In other words the effect of B dying leaving issue is, not only to prevent C getting the property but also to vest the property in B's issue as fidei commissaries under a fidei commissum binding upon B in favour of B's issue. The writers on the

Roman Dutch Law took different views on this question. Sometimes even the same writer took different views in different works of his. But so far as we are concerned, we need only look to the trend of decided authority both in South Africa as well as in Ceylon. So far as South Africa is concerned, the matter was set at rest in the case of *Steenkamp v. Marais* [1], where it was held that the mere fact that an ascendant by his instrument (we use the neutral word instrument to include both last wills and deeds *inter vivos*) conveys property to a descendant B upon condition that if B dies issueless the property is to vest in C does not imply a fidei commissum in favour of B's issue in the event of B dying leaving issue. The judgment of C. G. Maasdorp, J. who delivered the judgment in that case shows that if the instrument contains other provisions indicating some intention that it was resolute and an absolute condition laid down by the grantor that the property should ultimately go to the issue of the immediate devisee or donee a different construction may be arrived at. This judgment in *Steenkamp v. Marais* has been consistently followed in South Africa both with regard to testamentary instruments as well as documents *inter vivos* although eminent scholars like Professor R. W. Lee and Mr. A. J. McGregor, a retired Judge of the Orange Free State, Provincial Division, have taken views contrary to the views taken in that line of cases.

As regards Ceylon we have the case of *de Silva v. Rangohamy* [2], which is a case of a last will no doubt but it is a case of a document where the grantor is an ancestor devising property to a descendant and laying down the conditions that on the descendant's death issueless the property is to devolve on a third party. This Court after considering the authorities in South Africa and the earlier decided cases in Ceylon as well as the views of the writers we have referred to above, decided to follow the view taken in *Steenkamp v. Marais* which held that no fidei commissum could be inferred in favour of the issue. Mr. Adv. Ranganathan for the plaintiffs-respondents has argued that there are indications in P1 showing intention on the part of the donor to benefit the children of Tharumiammah. He points out to the fact that Tharumiammah was prohibited from alienating by deed but permitted to gift by way of donation or dowry deed the property in question to her children. He says that these two elements can be construed as showing that the provision that on Tharumiammah's death issueless the property was to go over to the three persons indicated, indicates an intention to benefit the children. There are two answers to this argument. First is that pointed out by my brother Mr. Justice Abeyesundere. He points out that the prohibition against alienation is only by deed. P1 being a deed *inter vivos* must be strictly construed. Accordingly there was no prohibition upon Tharumiammah conveying the property by her last will to whomsover she chose. If this too had been prohibited, we agree there would have been much for saying that there was evidence of intention on the part of the donor to lay down that the property was

[1] *25 S. C. 483.* [2] *(1961) 62 N. L. R. 553.*

ultimately to devolve on Tharumiammah's issue. That being not the case, one cannot come to the conclusion contended for by Mr. Ranganathan. The other answer to Mr. Ranganathan's argument is that the provisions providing for Tharumiammah being able to gift the property as a donation or dowry to her children on her part shows that it was the wish, or even one may say, desire of the donor that the children of Tharumiammah should benefit. One cannot say that the language employed by the donor is sufficient to indicate the condition laid down by the donor that the property should go to the issue. On the other hand at most, the language expresses a wish or desire on the donor's part leaving it to the good sense of the donee to gift the property or donate the property to the issue in question. Thus the vital element of a fidei commissum is lacking, namely, that the going over or gift over is irrespective of the will or fancy of the fiduciary. This is so even in what is called an implied fidei commissum. For an implied fidei commissum is merely one where the intention of the grantor is construed out of the language used and from the circumstances of the case.

We therefore come to the conclusion that P1 does not create any fidei commissum and that the title has validly passed to the defendant-appellant. We therefore allow the defendant-appellant's appeal and set aside the decree of the Court of first instance, and we dismiss the plaintiffs-respondents' action. The defendant-appellant will be entitled to costs in the Court of first instance and also the costs of the appeal.

BEYESUNDERE, J.—I agree.

Appeal allowed.