1923.

Present: Schneider and Garvin JJ.

RODRIGO *et al. v.* PERERA.

298—D. C. Chlaw, 6,794.

Fidei commissum—*Donees to sell, mortgage, donate, or exchange amongst themselves only*—Fidei commissum conditionale—*Pre-emption—Sale by* fiduciarius—*Is sale invalid?*

A deed of gift gave the property to seven persons subject to the following conditions:—

(A) "The donees are authorized to sell, mortgage, donate, or exchange amongst themselves, and shall not do so between any others, and they are at liberty to lease over the said property to any one they choose at any period."

(B) "Therefore, the said seven donees, their heirs, executors, administrators, and assigns are empowered by these presents to possess the said . . . . subject to the above conditions, for ever, and deal with it according to pleasure."

Held, that the deed did not create a *fidei commissum*.

Passage (A) confers upon the donees a right to sell, mortgage, or exchange among themselves, and forbids their dealing with the

property in any one of those ways with others than the donees. The effect of those words is to give the donees right of pre-emption, but the words do not create a *fidei commissum*.

Where a *fiduciarius* by deed purports to transfer absolute *dominium* the transfer is not invalid, but it operates only to the extent of passing such interest as he is entitled to.

THE facts are set out in the judgment.

The deed of gift was as follows:—

P 2.

Deed of Gift No. 171.

On this 27th day of March, 1912.

Know all men by these presents:

I, Thelesinghe Arachchige Palis Perera of Marawila, Mudukatuwa, in Meda palata of Pitigal korale, do hereby declare and say:

That I, the aforesaid Palis Perera, am entitled to and possessed of, under and by virtue of deed No. 15,046 dated May 27, 1898, attested by L. P. Silva, Notary Public, for the district of Chilaw, a divided half share containing 49 marked coconut trees and 7 jak trees of an undivided half share, save and except the soil of all that land called Ehetugahawatta, which is bounded on the north . . . . containing in extent about 200 coconut trees, situated at Marawila, Mudukatuwa, in Meda palata of Pitigal korale, in Chilaw District, having valued for a sum of Rs. 500 in Ceylon currency, is hereby donated over unto my cousin, Warnakulasuriya Jokinu Fernando, of Bibiladeniya, in Katugampola korale of Katugampola hatpattu, and to my brothers (named), for and on account of love and affection I bear towards them and of diverse good causes and for their future welfare as an irrevocable gift under any pretence whatever, and that the donees are authorized to sell, mortgage, donate, or exchange among themselves, and shall not do so between any others, and they are at liberty to lease over the said property to any one they choose at any period, and this is subjected to a lease of two years and six months upon the deed of lease bearing No. 170 written and attested by the hereunder attesting notary.

Therefore, the said seven donees, their heirs, executors, administrators, and assigns are empowered by these presents to possess the said 49 coconut trees and 7 jak trees from this day forward, subject to the above conditions, for ever, and deal with it according to pleasure.

Whereas I do further declare that I have not done any act or thing so that this gift may become null and void, and that I have full right to donate the said property in manner herein set forth, and also promise to settle any dispute if arise in respect of this and pay any damages consequent thereon, and that I bind to procure any documents or writings for more fully confirming this gift when requested by the donees at their cost and expense, for which I bind myself, my heirs, &c., by these presents.

Whereas we the seven donees have thankfully received this gift from the donor, Thelesinghe Arachchige Palis Perera.

Samarawickreme (with him *H. V. Perera*), for plaintiffs, appellants.

H. J. C. Pereira, K.C. (with him *Croos-Da Brera*), for defendant, respondent.

1923. February 16, 1923. SCHNEIDER J.—

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The dispute between the parties to this action arose upon the construction of the deed of gift marked P2 dated March 27, 1912. Admittedly the defendant was entitled to a number of coconut trees and jak trees as the planter's interest in the land. By the deed P2, he conveyed by way of gift a certain number of these trees to the second plaintiff and six others. Those six others, by the deeds marked P8 and P9 in 1918 and 1920, conveyed all their rights to the first plaintiff. Subsequent to the execution of P2, the defendant created a mortgage over the remainder of his interest in these trees in favour of the first plaintiff by the document marked P10. The first plaintiff sued upon that bond, and when the interest mortgaged was sold in execution, he became the purchaser and obtained a Fiscal's transfer by the document marked P11. If, therefore, the documents P2, P11, and P10 are to be given their face effect, the first plaintiff and the second plaintiff are entitled to the trees and the possession of them. In his defence the defendant pleaded that the deed of gift, P2, created a *fidei commissum*, and that, therefore, the transfers by P8 and P9 were invalid and ineffectual to pass any interest whatever. He also pleased that subsequent to the creation of the mortgage by P10 he had transferred the interest mortgaged by the document D2 to two persons, but that these persons were not made parties to the mortgage action, and that they are, therefore, not bound by the mortgage decree, and that those parties were in possession of the trees which had been mortgaged. He contended, therefore, that the Fiscal's transfer, P11, conveyed no title to the first plaintiff which could be sustained against those persons. This was the defence set up in his answer and at the framing of the issues upon which the case went to trial, but in giving evidence the defendant said that he was in possession of the trees which had been mortgaged to those two persons to whom he had transferred those trees. The learned District Judge dismissed the plaintiffs' action for two reasons. He held, first, that the document P2 created a valid *fidei commissum*, and next, that the Fiscal's transfer, P11, did not bind the two persons under whom the defendant said he was in possession. On appeal Mr. Pereira sought to sustain the judgment of the learned District Judge by the argument (1) that a *fidei commissum conditionale* was created by the condition in the deed which prohibited the sale by the donees except amongst themselves, and (2) that the next clause in the deed, which speaks of the possession by the donees, their executors, administrators, and assigns, had created a *fidei commissum*. I should have mentioned earlier that the defendant had also pleaded the decrees in two cases, namely, Nos. 5,227 and 5,281 of the District Court of Chilaw, as *res judicata*. I will dispose of this defence first. It seems to me that there is no material whatever upon which it can be pleaded that the judgments in these

cases are *res judicata*. In fact I am entirely at a loss to understand this plea. In regard to the argument as to the construction of P2, the donor by that deed conveyed the trees in question to the seven persons mentioned already, who are said to be, six of them his brothers and sisters and one a cousin. The material parts of the conditions under which this gift was made are the following :—

(A) " The donees are authorized to sell, mortgage, donate, or exchange amongst themselves, and shall not do so between any others, and they are at liberty to lease over the said property to any one they choose at any period."

(B) " Therefore, the said seven donees, their heirs, executors, administrators, and assigns are empowered by these presents to possess the said 49 coconut trees and 7 jak trees from this day forward, subject to the above conditions, for ever, and deal with it according to pleasure."

In regard to the argument that the portion of the deed, P2, marked (A) created a *fidei commissum*, I find myself unable to accept that contention. The existence of the words " executors, administrators, and assigns," in my opinion, renders it impossible to say that this passage creates a valid *fidei commissum*. The words in this passage bring this case within the principle of the case which was decided by my brother and myself a few days ago (*Boteju v. Fernando*).[1] All the reasons which we gave in our judgment in that case for holding that the instrument failed to create a *fidei commissum* are fully applicable to the facts of this case. I would, therefore, hold that there was no *fidei commissum* created by this passage in P2.

There then remains to be considered Mr. Pereira's argument that the passage (A) created a *fidei commissum conditionale*. He cited to us the case of *Robert v. Abeywardane*.[2] He contended that the words which were interpreted in that case are in all material respects the same as the words in passage (A). I am unable to agree with this statement. The words which were interpreted in that case were contained in a last will, and were to the following effect :—

" They (the children) should not sell, mortgage, &c., the immovable property to strangers except the original heirs, nor could one or more people outside their circle be granted or obtain any rights."

It was held by De Sampayo J. that those words created a *fidei commissum* within the family. In so deciding he followed what has been held in several cases with regard to the language by which such a *fidei commissum* could be created, but there is one *dictum*

[1] *(1923) 24 N. L. R. 293.*

[2] *(1912) 15 N. L. R. 323.*

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which Mr. Pereira relies on in support of his argument that P8 and P9 were invalid, and therefore the first plaintiff derived no rights under these deeds. The passage is this :—

> "In my opinion, the will created a *fidei commissum*, and the mortgage to a person outside the family, or, as the will puts it, 'outside the circle,' is invalid."

I cannot regard that passage as meaning any more than that the instrument there referred to was invalid only to the extent to which it purported to transfer rights which the transferor did not have. It is well-settled law that the *fiduciarius* may by deed purport to transfer absolute *dominium*, but that such a transfer is not invalid, but operates only to the extent of passing such interest as he is entitled to. Then the case of *Joseph v. Mulder* [1] was cited by Mr. Pereira to support his contention that a *fidei commissum conditionale* had been created. Now, the instrument construed in that case was a will by parents devising certain landed property to their children subject to the condition that they were not to sell, but that the property shall remain permanently among their legal heirs. I do not see how it is possible to apply the words of that case to the passage which we are called upon to construe in this deed. It seems to me that we must give the words in passage (A) their plain meaning. It confers upon the donees a right to sell, mortgage, or exchange among themselves, and forbids their dealing with the property in any one of those ways with others than the donees. The effect of those words is to give the donees a right of pre-emption. I am unable to conceive how these words could be said to create a *fidei commissum*. It is no argument in this case to say that because a right of pre-emption was reserved for the donees that therefore the plaintiff derived no title under P8 and P9, because by these deeds six of the donees transferred their rights to the plaintiff, and therefore they are not entitled to resist any claim which may be made by the first plaintiff. The only other person who might have resisted the first plaintiff's claim under that deed is the second plaintiff. By the very fact that he is a plaintiff, it is manifest that his intention is not to dispute the first plaintiff's rights under those deeds.

I would, therefore, hold that deeds P8 and P9 purported to pass the interest of the six transferors under those deeds.

There then remains the question as to the effect of the Fiscal's transfer, P11. I do not think that the defendant's contention that P11 did not pass title to the first plaintiff should be sustained, because, as he contends, the two persons to whom he had transferred the property were not made parties to that action. There is material on the record to show that the transfer in favour of these two persons was subject to the mortgage created in favour

[1] *(1903) A. C. 190 ; 3 Bal. 86.*

of the first plaintiff. In view of the fact that it is possible that these two persons may still try the question of title as between themselves and the first plaintiff, I will not express any opinion as regards their right, but it seems to me that it does not lie in the mouth of the defendant to plead the rights of those two persons. It was no part of his defence. It was only a passage in his evidence which disclosed the fact when he said he was in possession on their behalf. Any judgment given in this case will not bind those parties, and it will be still open to them if they are entitled to rights in this property as against the first plaintiff to claim those rights.

I would, therefore, set aside the judgment appealed from and give judgment for the plaintiffs as prayed for, with costs, in both Courts, and also give the plaintiffs damages as agreed upon.

GARVIN J.—I agree.

Set aside.