

1945

*Present: Wijeyewardene and Cannon JJ.*

WILLIAM PERERA, Appellant, and THERESIA PERERA,  
*et al.*, Respondents.

340—D. C., Colombo, 1,872.

*Partition—Fidei commissum—Property subject to a fidei commissum in favour of three persons—Transfer by fiduciary and two of the fideicommissaries of their interests in two-third shares of the property—Construction of deed—Right of transferee to bring partition action.*

Certain property had been gifted, by deed P5 of 1886, to the 1st defendant, subject to a *fidei commissum* in favour of her three children, namely, D. E. and the 2nd defendant.

(1863) 2 H. & C. 508.

Deed P8 which was executed in 1939 by D, E and the 2nd defendant contained the following clause: "We, D . . . and . . . E . . . and . . . T [the 1st defendant] . . . (hereinafter, sometimes referred to as the vendor) in consideration of the sum of . . . paid by . . . W [the plaintiff] have granted . . . unto W . . . the premises fully described in the Schedule hereunder written together with the life-interest of the said . . . T . . . mentioned in deed No. 2,505 [P5] . . . and together with all and singular the rights, ways, easements, advantages, servitudes and appurtenances whatsoever to the said premises belonging or in any wise appertaining . . . and together with all the estate right title interest, . . . of the said vendor into upon or out of the said premises . . . the Schedule referred to in the clause gave a description of "two-third parts or shares" of the property.

The plaintiff, claiming to be entitled to undivided two-third shares of the property absolutely under the deed P8, instituted action for the sale of the property under the Partition Ordinance.

Held, that deed P8 did not convey to the plaintiff the entirety of the life-interest of the 1st defendant and the plaintiff was, therefore entitled to bring a partition action.

**A** PPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C., (with him Ivor Misso), for the plaintiff, appellant.  
E. G. Wikramanayake, for the 3rd to 7th and 16th defendants, respondents.

(Cur. adv. vult.)

September 14, 1945. WJYEWARDENE J.—

This is an action for the sale of a property under Ordinance No. 10 of 1863.

According to the plaintiff the original owner was one Gooneratne who gifted the property by deed P5 of 1886 to Theresia, the first defendant, subject to a *fidei commissum* in favour of her children. Theresia was married to Clement Perera who died leaving him surviving his widow and three children, Dolly, Elsie and the second defendant. The plaintiff claimed to be entitled to undivided two-third shares of the property absolutely under a deed, P8 of 1939, executed by Dolly and her husband, Elsie and Theresia. He alleged that the second defendant was the owner of the remaining one-third share subject to a life-interest in favour of Theresia, the first defendant.

The respondents denied that Gooneratne was the original owner of the land and claimed certain interests in the land, tracing title from a different source.

The respondents contended at the trial that, even if Gooneratne was the original owner, the plaintiff could not maintain this action, as the deed P8 purported to convey to the plaintiff the life-interest of Theresia in respect of the entire property (vide *Kuda Etana v. Ran Etana et al.*<sup>1</sup>). The District Judge upheld that contention and dismissed the plaintiff's action with costs.

The relevant parts of the deed P8 which have to be considered on this appeal read as follows:—

"We Dolly . . . and . . . George, wife and husband,  
. . . Elsie . . . and . . . Theresia . . . (hereinafter,

<sup>1</sup> (1912) 15 N. L. R. 154.

sometimes referred to as the vendor) in consideration of the sum of . . . . paid by . . . . William have granted . . . . unto William . . . . the premises fully described in the Schedule hereunder written together with the life-interest of the said . . . . Theresia . . . . mentioned in deed No. 2,505 . . . . and together with all and singular the rights, ways, easements, advantages, servitudes and appurtenances whatsoever to the said premises belonging or in any wise appertaining . . . . and together will all the estate right title interest, . . . . of the said vendor into upon or out of the said premises . . . .

William mentioned in the above clause is the plaintiff and the deed No. 2,505 is the deed marked P5. The Schedule referred to in that clause gives a description of "two-third parts or shares" of the property.

No if the contention of the respondent is correct, Dolly and Elsie conveyed their interest in two-third shares and Theresia conveyed her interest in the entire property. In that case the notary should have "annexed" to the deed another schedule giving a description of the entire property or "embodied" a description of the entire property in the deed itself [*vide* The Notaries Ordinance, section 30, sub-section (16) (a)]. The omission of the notary to do so militates against the interpretation put forward by the respondents unless, of course, one is prepared to concede that the notary may have committed a breach of an important rule laid down in the Notaries Ordinance.

It is not disputed and it cannot be disputed that Dolly and Elsie sold their interests in the two-third shares described in the deed as "the premises fully described in the schedule hereunder written". These words are followed immediately afterwards by the words "together with the life-interest of the said . . . Theresia . . . mentioned in deed 2,505". Those words do not refer in express terms to the property the life-interest in which is conveyed by Theresia. I think the natural and reasonable interpretation of that passage is that Theresia was dealing therein with her life-interest in the property referred to immediately before, namely, "the premises fully described in the schedule hereunder written". It is argued that the words "mentioned in deed 2,505" indicate that what Theresia conveyed was the entire life-interest to which she was entitled under P5. Such an interpretation cannot be accepted without ignoring some of the other passages in the deed. Now the deed conveys to the vendee "the rights, ways, easements . . . to the said premises". What are the "premises" referred to in that passage? Are they not "the premises fully described in the schedule hereunder written" referred to earlier, namely, the two-third shares? If the contention of the respondents is accepted, the word "premises" in "the rights, ways, easements . . . to the said premises" . . . have two meanings, namely, two-third shares of the property in connection with the transfer by Dolly and Elsie and the entire property in connection with the transfer by Theresia. The same difficulty would arise in the next passage "together with all the right title interest . . . of the said vendor into upon . . . said premises". It will be remembered that "vendor" according to the deed refers to all the vendors. I

cannot believe that the notary used the word "premises" on each occasion in two senses. The notary must have used it in one sense and therefore it must have been used to mean "the premises described in the schedule". I think the words "mentioned in deed 2,505" have been used merely to indicate that the life-interest conveyed is the life-interest in the premises, namely, the two-third-share, created by P5.

I hold, therefore, that P8 did not convey to the plaintiff the entirety of the life-interest of Theresia.

I allow the appeal and send the case back for trial in due course. The plaintiff is entitled to the costs here and the costs in the District Court occasioned by the argument with regard to the interpretation of P8.

CANNON J.—I agree.

*Appeal allowed.*

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