ANNAMAL *v.* SAIBO LEBBE.

D. C., Batticaloa, 1,935.

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Last will—Action by fidei commissarii*—Power of fiduciary to alienate trust property—Sanction of the Court—Procedure under "The Entail and Settlement Ordinance, 1876."*

Where a person made his last will and provided as follows:—

"I direct that all my immovable property be managed and possessed upon trust by my said executors and trustees, and that from the nett produce thereof such of my sons as shall act as my executors and trustees shall enjoy two shares, and my other sons and daughters and their mother shall enjoy one share each for and during the term of their respective natural lives, provided that neither my said wife nor any of my said children shall be at liberty to encumber, sell, or in any other ways and means to alienate or dispose of my said immovable property, &c. And further, that the same shall be not liable for the debt already contracted by my said children or hereafter to be contracted by them or by their said mother, and provided also that neither the male nor female child or children of any of my said sons, nor the son or sons of any of my said daughters, shall be entitled to any share or shares, portion or portions, of the produce of the said immovable property or to the property itself .... and the several and respective heirs female of the body and bodies of my said daughters shall at the death of their respective mothers be entitled to, and I hereby appoint them sole and absolute heirs of, all my said immovable property," &c.,—

and some of the daughters of the testator mortgaged, with the approval of the District Court, one of the lands of the testator for the purpose of paying out of the loan the taxes due by the estate and the charges necessary for maintaining and improving the immovable property of the estate,—

Held, that the will created a *fidei commissum;* that the daughters could not mortgage any property even to pay taxes, without obtaining the sanction of the Court in the special manner provided by sections 4, 6, and 9 of "The Entail and Settlement Ordinance, 1876"; that the sale of the mortgaged property in execution was invalid; and that the plaintiffs, as *fidei commissarii*, were entitled to their share of the property in question.

THE plaint alleged that one Robert Kungiliyapodi Vanniya, who died in September, 1858, leaving him surviving his widow, four sons, and five daughters, made a last will bequeathing his movable property to his widow and children, and settling his immovable property on certain trustees for the benefit of his widow and children, upon certain terms and conditions; that the immovable properties devised in trust were, after the death of the testator, in possession of one of the executors and trustees named Kadiramapodi till his death in 1871; that thereafter his brother Alvapodi held the estate in trust till 1879; that upon his renouncing the trusteeship the four daughters of the testator undertook

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the trusteeship; that the first and second plaintiffs were the daughters of Valliammai, who was the second daughter of the testator; that upon the death of Valliammai in 1896 the first and second plaintiffs became, in terms of the last will of the testator, the lawful owners of an undivided one-fourth share of all the immovable property devised in trust; and that the defendant had been in unlawful possession from March, 1896, of one-fourth share of a certain house and ground situated in Puliantivu. The plaintiffs prayed that they be declared lawful owners of the said one-fourth share.

The defendant pleaded that he was justified in possessing the said share of the house and ground in question by virtue of a chain of title resting on the following documents: (1) a mortgage executed in favour of one Meidin Lebbe by the plaintiff's mother Valliammai and certain of her other daughters in 1879; (2) a deed of conveyance granted to the said Meidin Lebbe in 1882 by the Fiscal, who had seized and sold the said property upon a writ of execution issued by the District Court of Batticaloa in an action brought by Meidin Lebbe against Valliammai and the other grantors of the bond; (3) a deed of sale from Meidin Lebbe to Ahamadu Lebbe; and (4) a deed of donation from Ahamadu Lebbe to defendant.

The clauses of the last will upon which the plaintiffs relied as showing that a *fidei commissum* had been created in their favour as the testator's grand-daughters, and that Valliammai had no right to mortgage anything more than her life interest, were as follows:—

"I direct that all my immovable property be managed and possessed upon trust by my said executors and trustees, and that from the nett produce thereof such of my sons as shall act as my executors and trustees shall enjoy two shares, and my other sons and daughters and their mother shall enjoy one share each for and during the term of their respective natural lives, provided that neither my said wife nor any of my said children shall be at liberty to encumber, sell, or in any other ways and means to alienate or dispose of my said immovable property, &c. And further, that the same shall be not liable for the debt already contracted by my said children or hereafter to be contracted by them or by their said mother, and provided also that neither the male nor female child or children of any of my said sons, nor the son or sons of any of my said daughters, shall be entitled to any share or shares, portion or portions of the produce of the said immovable property or to the property itself.........and the several and respective heirs female of the body and bodies of my said daughters

shall at the death of their respective mothers be entitled to, and I hereby appoint them sole and absolute heirs of, all my said immovable property," &c.

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The District Judge upheld the contention of the plaintiffs, and entered judgment as prayed.

The defendant appealed.

The case came on for argument on the 23rd November, 1901, before Moncreiff, J., and Browne, A.J., who, after hearing the arguments of counsel, directed the case to be set down for re-hearing before three Judges.

It was re-heard on 18th July, 1902.

Dornhorst (with him *Wadsworth*), for appellant.

Walter Pereira (with him *Vanderwall*), for respondent.

The arguments of counsel appear in the judgment of Middleton, J.

Cur. adv. vult.

27th January, 1903. MONCREIFF, J.—

This case appears to me to be singularly free from doubt. Robert Vanniya died in 1858. By his will he directed that his widow and his sons and daughters should receive shares of his immovable property and certain cattle from his executors and trustees, who were to manage and possess the property on trust. It is unnecessary to refer to all the provisions of the will. It is sufficient for this case to say that the testator, having given the enjoyment of his property for life to certain persons, substituted as heirs the female heirs of his daughters, directing that " the female heirs of the body and bodies of my said daughters shall at the death of their respective mothers be entitled to, and I hereby appoint them sole and absolute heirs of, all my property."

One of the testator's daughters was named Valliammai. She died in 1896 leaving two daughters, the first and second plaintiffs; and the third plaintiff is the husband of the second. These two daughters upon the death of their mother became entitled, as substituted heirs, to one-fourth of the testator's property, because the testator had created a *fidei commissum*, in every respect valid, by which they were entitled to their share of property upon the death of their mother. They found, however, that their one-fourth share was in the hands of the defendant.

It appeared that in the year 1876 Daniel, one of the sons of the testator, borrowed sums of money from one Packeer Meidin Lebbe for the purpose of maintaining the estate. In 1879 Daniel

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retired from the management, and the mother and sisters, indeed all those immediately interested, executed, with the approval of the Judge an agreement by which they took over the management of the property, and undertook to pay to Packeer Meidin Lebbe the amount for which he had recovered judgment against Daniel. As security they mortgaged to Packeer Meidin Lebbe the property in question, which was ultimately sold at a Fiscals' sale in 1882, and in 1890 transferred to the defendant. Now, it is observable that, even if the mortgagors had any right to mortgage the property, they had no more than a life interest to dispose of; and that, although Valliammai, the mother of the two plaintiffs, joined in the mortgage, she is now dead, and any interest in the land which she could transfer is at an end.

The will itself forbade the alienation or the encumbrance of the property, and, even although it is true that a *fiduciarius* may encumber property for the purpose of maintaining it, by the terms of Ordinance No. 11 of 1876, section 4, in order to do so he requires the leave of the Court. The provision in question was simply an enactment of the existing law. The leave of the Court was not obtained, because, although the Judge sanctioned the agreement by which the mother and sisters of Daniel undertook to pay his debt, he did nothing to sanction the payment of the debt by means of an encumbrance on the property.

The defendant is in possession of land acquired from persons who had no authority whatever to dispose of it. In my opinion the District Judge was right. The plaintiffs are entitled to an undivided one-fourth of the property. I think the appeal should be dismissed with costs.

MIDDLETON, J.—

This was an action by two persons who alleged themselves to be *fidei commissarii* under the will of their grandfather Kungiliyapodi Vanniya, and the husband of one of them, against the defendant, who claimed by donation and upward through a chain of legal transfers to one Packeer Meidin Lebbe to one-fourth of a house at Batticaloa.

The facts were practically admitted, and they were that the Vanniya, by his will in 1858, purported to settle this, amongst certain other property, in *fidei commisso* upon the daughters of his daughters, appointing his four sons in succession as *fiduciarii* without power to encumber, sell, alienate, or dispose of.

It seems that in 1876 Alvapodi, the second son of the Vanniya, got into debt on a bond to Packeer Meidin Lebbe for money,

which, it was alleged, was spent in payment of taxes on, and in the management and improvement of, the trust property. Subsequently Packeer obtained a judgment against Alvapodi, and the document marked X was executed purporting to be an agreement to mortgage the property in question with certain other properties to Packeer by Valliammai, the mother of the first two plaintiffs, and seven others interested in the property. This was on the 3rd February, 1879. Judgment was afterwards recovered upon an action on this mortgage, and the property in question sold and conveyed by a Fiscals transfer to Packeer on the 26th June; thence it has devolved on the defendant. From an extract of a record in the District Court of Batticaloa (marked Y in these proceedings) it would seem that a document (marked Z), signed by Alvapodi was, in the presence of the other six signatories to X, placed before the Court, and a note was made " Ordered accordingly and case struck off."

The first two plaintiffs are the only daughters of Valliammai, who died in March, 1896, and who was one of the five daughters of the testator. The first question raised before us was whether the will of the testator created a *fidei commissum*; and, secondly, if so, whether the Court would read into the will an implied power of alienation. As I read that part of the will of the testator which is in question, it appears to be a bequest to his sons to hold in trust, without any power of alienation, the immovable property and buffaloes; the son actually managing the property to take a double share, the wife, other sons, and daughters to have one share each of the produce for life, excluding both children of sons and daughters' sons, with remainder to the daughters of his daughters, who on the death of their mother are to take *per stirpes* of the produce during the lives of their remaining aunts and uncles, and eventually as heirs *per stirpes* of the corpus.

This appears to be a mortis causa disposition by which the testator leaves his property to certain persons for life with an obligation to transfer it to certain other definite persons, and this I understand to be what is known as a *fidei commissum* or trust. it was not, however, very seriously contended that this was not a *fidei commissum*, but the point mainly relied on by counsel for the appellants was that the *fiduciarii* were entitled to alienate the trust property for the payment of taxes, and that the alienation in question had been carried out on this ground, as disclosed by document marked X, which is dated 1879; and we were referred *to Voet, lib. 36, tit. 1, p. 63*, which appears to recognize that the *fiduciarii* may mortgage the property for money borrowed by them for the purpose of discharging some public tax.

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It seems to me, however, that Ordinance No. 11 of 1876 was passed with a view exactly to meet such a case as this, and that the Ordinance was in force at the time the mortgage of 1879 was granted. By that Ordinance *fiduciarii* may apply to the Court for leave to alienate trust property, the alienation of which is prohibited or in any way restricted. It is true that some sort of application to the Court was made, but certainly not within the terms of the Ordinance. This Ordinance must, I think, have been a specific enactment of what was deemed to be the Roman-Dutch Law, *i.e.*, that the consent of the Court was necessary to the alienation of property the alienation of which was forbidden by the instrument creating the *fidei commissum* in connection with it. *Burge, vol. II., p. 129,* has it that " property the subject of a *fidei* " *commissum* cannot be alienated, except where it is permitted "by the author or by the law or by the parties interested in it. " In my view also the words " by authority of the Court " impliedly govern all the powers of alienation alluded to in *Voet, lib. 1, tit. 36, p. 63,* including the power to alienate for the payment of public taxes (*Burge, vol. II., p. 129*).

I think therefore that the *fiduciarii* could not be deemed to be mortgaging more than the life interest for which they were entitled, and that this and no more was what vested in the purchaser, inasmuch as without the leave of the Court no alienation of the corpus could take place under the Ordinance.

The right of action to the plaintiffs would only accrue to them on the death of their mother, which took place some four or five years ago, so that the possession of the defendants would be of no avail against them.

I think, therefore, that the judgment of the District Judge was right, and should be affirmed and this appeal dismissed with costs.

WENDT, J.—

It is clear to my mind that a valid *fidei commissum* was created by the will of 1858, by which, on the death of the testator's daughters, who were in the position of *fiduciarii*, the estate passed to their respective female issue *per stirpes*. It follows that the *fiduciarii* could not alienate more than the limited interest they had, unless by proper proceedings they broke the fetters of the *fidei commissum* altogether. Now " The Entail and Settlement Ordinance, 1876, " was in operation at the date of the mortgage of February, 1879, and it applied to all existing *fidei commissa*. Sections 4 to 9 prescribed the procedure to be followed, and section 6 expressly refers to notice to all persons interested in the *fidei commissum*. Certainly daughters already born of the testator's daughters were persons so interested, and they ought to have been made parties to and heard upon the application to the Court.

It does not appear that they were, and it is therefore impossible to agree that they were bound by the order of the Court, if order there was. The mortgagee and his successor in interest, the defendant, have themselves to blame for not having the proceedings duly instituted and the Court's order properly drawn up. They certainly had notice of the will, and knew they were dealing with persons having only a qualified interest in the property.

The appeal should be dismissed.