ANTHONISZ *v.* BARTON.

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D. C., Galle, 6,333.

Last will—Admissibility of will in evidence for want of registration—Ordinance No. 6 of 1866, s. 2—Creation of valid fidei commissum*—Words of prohibition against alienation—Occupation of house by agreement between heirs subject to tenor of will—Prescriptive possession.*

A last will is not a "deed" which is required to be registered under the Ordinance No. 6 of 1866, section 2.

The probate of a will produced at a trial to prove the existence and terms of the will does not come within the description given by section 2 of the Ordinance.

No set form of words is necessary for creating a *fidei commissum*. Prohibition of alienation out of the family coupled with a clear indication of the person to whom the property, in the event of alienation, is to go over, constitutes a good *fidei commissum* without formal words.

Where a will made by W appointed certain persons heirs of "my estate, provided always that they and their descendants shall not have the power of mortgaging or alienating the land and property," and directed that "in case any of the heirs or their descendants depart this life without issue, his or her share shall go to the surviving heirs of my body.

Held, that this was a devise not only to the nominated heirs of W but also to their descendants.

One of the nominated heirs of W left a daughter U, who married S B. In 1836 a house was given by the executors of W to S B to be possessed as the share of his wife, subject to the tenor and meaning of W's last will. S B possessed the house exclusively during his life, and died in 1860 leaving a last will which devised the house to his son H, who continued in exclusive possession till his death in 1894, leaving the house by will to his wife, the defendant, who held exclusive possession also at the time the present action was brought.

The children of J U, one of the nominated heirs of the original testator W, raised an action *rei vindicatio* against H's widow in 1901, claiming that upon the death of S B the house passed to them and the surviving descendants of the only other of W's nominated heirs.

Held, that S B was bound by the *fidei commissum* created by W; that upon the death of H the house possessed by them passed to the plaintiffs and the other existing descendants of the nominated heirs; that the possession of S B in right of his wife could not prescribe against her or his heirs; that S B's possession and that of his son H were not adverse to the title of the plaintiffs; and that the defendant's own possession, though adverse, was just short of ten years when the action was brought.

IN this case the plaintiffs sought to vindicate an undivided half share of a house in the Fort of Galle. Their claim was based upon the last will of one Mr. Wettensleger dated 28th May, 1830, whereby the testator, after making a devise in favour of his

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son Ursinus, bequeathed the residuary estate, including the house in question, in the manner set forth in the following provision:—

"I do hereby nominate, constitute, and appoint Johanna Maria, Johannes Euzibius, Margaretta Dorothea, Sara Lovia, and Jan Ursinus Wettensleger heirs of my estate, possessing and enjoying the same share and share alike, provided always and my will and desire is that they nor their descendants shall have the power of mortgaging, selling, or otherwise alienating the landed property or the houses and buildings constructed thereon which I may die possessed of, and that the same shall not be subject to their debts.

"Further, I will and desire that in case any of the heirs or their descendants shall happen to depart this life without issue, his or her share shall go to the surviving heirs of my body male or female or their lawful descendants."

Johanna Maria died in 1830 leaving a daughter Ursina, who married Samuel Barton. They died leaving a son James, who died without issue in 1894 leaving him surviving his wife, the defendant.

Johannes Euzibius left two children, who also died without issue.

Margaretta Dorothea and Jan Ursinus left descendants, and the plaintiffs were the heirs of M. Dorothea.

Sara Lovia left two children, who also died without issue.

In 1836 the house was given by the executors of Wettensleger to Samuel Barton according to an agreement entered into between the heirs of the estate, and since that time he and his son James had been in possession successively, and after them the defendant.

It was contended for the plaintiffs that on the death of James Barton in 1894 a moiety of the house vested in them in terms of the will.

The defendant argued that no valid *fidei commissum* was created by the will.

The District Judge held that, when James Barton died without issue to take possession of the property under the family arrangement, the descendants of Margaretta Dorothea and Jan Ursinus succeeded to the same as the only heirs then living of Wittensleger's body. Therefore he decreed that the plaintiffs were entitled to an undivided half share of the house.

The defendant, who was the widow of James Barton, appealed.

Dornhorst, K.C., *Sampayo, K.C.*, and *Van Langenberg*, for defendant, appellant.

Bawa and *Schneider*, for plaintiff, respondent.

Cur. adv. vult.

22nd May, 1903. LAYARD, C.J.— 1903. *May 22.*

In this case it is contended on behalf of the appellant-defendant that judgment should be entered in her favour on the following grounds:—

(1) That the will of Jan Martin Wettensleger dated 28th May, 1830. is not admissible in evidence.

(2) That the will contained no valid *fidei commissum* and no prohibition against alienation by will.

(3) That Samuel Barton, who it is alleged, devised the property to the deceased husband of the defendant, was not bound by the *fidei commissum*, if any, and therefore his son and his son's widow are not affected thereby.

It will be well first to dispose of the preliminary point as to the admissibility of the will in evidence.

I do not think a will is within the Ordinance No. 6 of 1866.

That Ordinance is to compel the registration of deeds and other instruments of title with a view to prevent false ones being set up.

Now, first wills are nowhere expressed to be instruments within this Odinance.

While specifically naming various instruments the Ordinance omits the mention of wills.

A will is clearly not a deed, as lawyers understand it.

For instance, powers of appointment by will are not exercisable by deed, or *vice versâ;* and, further, when one looks at the purpose of the Ordinance it does not seem that it was intended to include wills among instruments of title.

The object of registration is to prevent setting up forged instruments of title bearing old dates. Without registration this might be easily done in the case of deeds, but in the case of false wills of old dates there would be the fact that no probate had been applied for; and that would be a sufficient protection against forging instruments of this class of old dates, because, if a man brings a very old will into Court and sets it up, and it is shown that no one has ever applied for probate of it, it is hardly likely to be credited by the Court. Further, the earlier Ordinance No. 7 of 1840, which deals with the execution of deeds and wills, expressly distinguishes deeds from wills and codicils (see sections 2, 3, and 14). Bonser, C.J. (*2 N.L.R.240*), in the passage cited by appellant's counsel, does not say that a will is a deed; he says that a deed is an attested writing, not that all attested writings are deeds.

But it is not necessary to labour this point, because the contents of the will, so far as they bear on this case, are admitted, and it is only the construction that is in dispute.

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Next, as to the contention that there was no valid *fidei commissum*, I agree with the District Judge in thinking it untenable.

The words reciting it are faulty grammar, but no other meaning can be given to them than that they prohibit the heirs and their descendants from alienating.

No set form of words is necessary for creating a *fidei commissum*. Prohibition of alienation out of the family, coupled with a clear indication of the persons to whom the property in the event of alienation is to go over, constitutes a good *fidei commissum* without formal words. (*Vanderlinden, 2nd Edition, p. 62; Kotz's Van Leeuwen, vol. 1., p. 376; 2 Burge, 106.*) We have therefore the essentials of a valid *fidei commissum* (*Vansanden v. Mack, 1 N.L.R. 311*). I further agree with the District Judge that the point that devise by last will was not an alienation within the meaning of the prohibition amounts to nothing, for the will proceeds to say that "if any heir shall happen to depart this life"—it does not say intestate—"his or her share shall go to the surviving heirs," &c. Again, I take it to be clear that on the death of Johanna Maria her issue Ursina Arnoldina stepped into her shoes, and the other heirs got nothing by *jus accrescendi*, as that only was to arise where there was death without issue.

Samuel's possession was therefore in right of his wife, and in my view it was not material to cite the documents P 2 and P 3, for a man cannot by possessing in right of his wife prescribe against her or her heirs, and therefore the admission of these documents, supposing it to have been wrong, is not a ground for reversing the judgment, because, apart from the documents, there was no room for the contention that Samuel Barton was an adverse possessor. In respect of the contention that, even if the Bartons, Samuel and James, were bound by the *fidei commissum* with regard to property received in the direct line from the testator, they are not similarly restricted as regards the interest that accrued to one another from death of the two instituted heirs, who left no issue (in support of which counsel cited *Voet, 36, 1, 27;* and *Burge, vol. II., p. 114*), it is plain from the judgment of the Privy Council in *Tillekeratne v. Abeyesekera* (*2 N. L. R. 313*) that no person can become absolutely entitled to any property burdened with a *fidei commissum* so long as there exists either instituted or substituted heirs under the will; and here Samuel Barton had never any right under the will other than as husband of Ursina, and James inherited as *fidei commissarius*, being the issue of Ursina, herself the issue of the testator, and when James died childless there were alive the plaintiffs, issue of some of the instituted heirs and therefore heirs by the trms of the will,

and as " lawful descendants " of the instituted heir, Jan Ursinus, the plaintiffs were entitled to succeed by substitution on James Barton's death. I would dismiss the appeal with costs.

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We have in this case to construe the will, dated 28th May, 1830, of the Rev. Jan Martin Wettensleger, proponent of the Dutch Protestant Church at Galle. This will, after making a bequest to the church and devising to the testator's son Jan Ursinus a certain house, contained the following as the third and fourth clauses:—

" 3. And I do hereby nominate, constitute, and appoint Johanna Maria, Johannes Euzibius, Margaretta Dorothea, Sara Lovia, and Jan Ursinus Wettensleger heirs of my estate, possessing and enjoying the same share and share alike, provided always and my will and desire is that they nor their descendants shall have the power of mortgaging, selling, or otherwise alienating the landed property or the houses and buildings constructed thereon which I may die possessed of, and that the same shall not be subject to their debts.

" 4. Further, I will and desire that in case any of the said heirs or their descendants shall happen to depart this life without issue, his or her share shall go to the surviving heirs of my body male or female or their lawful descendants....."

The property in question in this action is a house in the Fort of Galle which was not specifically mentioned in the will, but passed to the heirs under the third clause.

The persons nominated as heirs were the children of the testator, and they all survived his death, which took place on 6th October, 1835, with the exception of Johanna Maria (who had died in February, 1830, survived by an only child Ursina, the wife of Samuel Barton) and Margaretta Dorothea, who had died in 1834 leaving issue as hereinafter mentioned. Probate was granted to the executors named in the will, viz., Johannes Euzibius and Jan Ursinus, and one Pieter Carolus Jansz.

On 17th October, 1836, a memorandum in writing was signed by Johannes and Jan Wettensleger, Samuel Barton, P. C. Jansz (the husband of Margaretta Dorothea), and H. W. Kemps, the husband of Sara Lovia. It recited that these signatories " had come to the following decided conclusion and settlement how and in what manner to be divided the immovable property belonging to the estate of the deceased," and recorded that the brothers Wettensleger were to receive for their share the gardens called Leeuw's Rust and part of the garden Zargand Hoop; Jansz and Kemps to

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receive the garden Endraght, and Samuel Barton to receive for his share, among other property, the house in question; "however subject to the tenor and meaning of the last will and testament of the testator afoersaid, and we are liable to pay individually every one their respective share to compute and liquidate all such debt as the estate may be indebted."

On 16th November, 1836, Samuel Barton, by a notarial deed, acknowledged to have received from the executors "in landed property to the value of £150 sterling, which appears more fully by the notarial act or declaratory this day executed in my favour, which said premises are subjected to the conditions and meanings of the said last will and testament as follows: provided always" [the words of the will were then quoted down to the words "heirs of my body male or female or their lawful descendants"]. The deed described the property received as being "the share competent to my wife, who is the granddaughter of the said testator." The "notarial act or declaratory" mentioned in this deed was not produced at the trial, but it is reasonable to infer that it comprised the property enumerated in the memorandum already mentioned.

Samuel Barton exclusively possessed the house in question during his life (the date of his wife Ursina's death is not ascertained) and died in 1860, leaving a last will, which, after giving a couple of pecuniary legacies, devised the residue of his property to his only son, Henry, James Barton, who similarly was in exclusive possession of the property till his death without issue in 1894. He left a last will devising all his estate to his wife, the defendant, who has ever since been in possession. It is admitted that the Bartons, father and son, and the defendant never paid rent for the house in which they in succession resided continuously from the year 1837.

Johannes Euzibius died in 1858, leaving two children who thereafter (date unascertained) died without issue. Similarly the two children of Sara Lovia, who died in 1857, died without issue (date unascertained). Margaretta Dorothea, who died in 1834, left four children, now dead, each of whom has decendants now alive, but not parties to the action. The plaintiffs are the four children of Jan Ursinus, who died in October, 1891. They brought the present action in August, 1901, and in it they claim that the will of their grandfather created a *fidei commissum* in favour of the testator's descendants, and that upon the death of Henry James Barton the house in question passed in equal shares to them and the surviving descendants of Margaretta Dorothea, as being the respective descendants of the only two

of the testator's nominated heirs who were represented by descendants then living. The learned Acting District Judge has decided in their favour, and the defendant has appealed.

The appellant first argued that the will of 1830 was not admissible in evidence, because it was not registered in manner required by Ordinance No. 6 of 1866. I fail to see what advantage the rejection of the will as a piece of documentary evidence would be to the appellant, as its contents so far as they bear upon the case have been set out in the plaint and admitted in the answer. But I am of opinion that the probate of a will produced at a trial to prove the existence and terms of the will does not come within the description given by section 2 of the Ordinance of "deeds, sannases, olas, and other instruments on which title to land or other immovable property is founded." It certainly is not within the mischief of the Ordinance, which was aimed against "false deeds, sannases, and olas purporting to bear old dates." The fact that the will was produced and filed in Court and duly proved, and has ever since remained there filed, is at least as good a guarantee against fraud as the production of it to a registrar under the Ordinance. Further, the will, being filed in Court, could not have been produced to the Registrar by any of the plaintiffs or any predecessor in title of theirs, and its non-registration was therefore due to a cause "utterly beyond their control" within the meaning of section 7.

The main contention of the appellant, however, was that the will did not create a valid *fidei commussum*. It was said that the devise was to the nominated heirs only, and that there was no devise to their descendants. But the third clause is something more than a devise of residuary estate under the English Law. It is an appointment of the persons named to be heirs of the testator, and I think it is impossible to read the 3rd and 4th clauses of the will without being convinced that the testator intended that his immovable property should after the death of his children pass to their descendants; for he forbids the children to mortgage, sell, or otherwise alienate the property, in order to ensure its passing to their descendants, and he contemplates the event of such descendants receiving the property, for he extends the prohibition to them as well.

No special form of words is necessary to create a *fidei commissum*, but effect is given to a *fidei commissum* if it can be collected from any expressions in the instrument that it was the testator's intention to create it. (*Juta's Vanderlinden, 2nd Edition, p. 62; Kotze's Van Leeuwen, vol. I., p. 376; 2 Burge, 106.*) The

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very prohibition to alienate suggests a *fidei commissum*, and it is clear that the persons in whose favour the prohibition was made were the descendants of the testator. Even without the indication, the mere prohibition imposed upon the heir is in certain cases deemed to have created a *fidei commissum* in favour of the testator's nearest relations. (*Van Leeuwen, loc. cit.*) The case of *Vansanden v. Mack* (*1 N. L. R. 311*), the authority of which there is no reason whatever to doubt, fully supports the opinion of the District Judge, who relies upon it. There the testatrix first declared that a certain house should not be sold or alienated, but be possessed by her children and their descendants, and then, proceeding to the institution of heirs, she appointed her children heirs to all her property equally to be divided and possessed amongst them; and it was held that a valid *fidei commissum* was created in favour of the descendants of the testatrix.

I am therefore of opinion that the will of Jan Martin Wettensleger created a valid *fidei commissum*.

The next point for consideration is the appellant's contention that, even granting that the Bartons were bound by the *fidei commissum* in respect of what they received in the direct line from the testator, they were not similarly restricted as regards the interests that accrued to one or the other of them from the descendants of the two instituted heirs whose children left no issue. For this contention *Voet* (*36, 1, 27*) was cited, with the opinion of *Burge, vol., II., p. 114.* But on this point we have the authority of the Privy Council decision in *Tillekeratne v. Abeyesekere* (*66 L. J. P. C. 55, 2 N. L. R. 313*). The will in question there created a *fidei commissum* of a moiety of the testator's whole estate in favour of three grandchildren and their descendants.

One of these three instituted heirs, John Paules, left an only daughter, who after her title vested died without issue and intestate. It was claimed by the daughter's administrator that the line of John Paules having become extinct in the person of his daughter, her share was unaffected by any substitution and therefore belonged to her in fee. Their Lordships were of opinion that this would be so if there had been three *fidei commissa*, each of one-third of the moiety, instead of one *fidei commissum* of the whole moiety. The latter being the case, it was decided that the daughter's heirs-at-law, not being in the direct line of descent from the testators, could have no right of succession to her "so long as any person was in existence who could show a title either as an institute or as a substitute under the provisions of the will." It was in fact considered that there was a cross-substitution of descendants, so that if at any time there existed

descendants of one of the grandchildren only, they would take the whole of the property. In this respect, the words of the will we are construing are much stronger than those of the will in *Tillekeratne v. Abeyesekere*. The fourth clause provides that on failure of any of the institutes or their descendants, his or her share shall go to the surviving institutes or their descendants, the intention being to keep the property in the line of the testator's descendants. There exists, therefore, in this case what Voet mentions at the end of the cited section 27 as a qualification of the principle upon which the appellants rely, viz., that the intention of the testator was otherwise. (See a useful note of this section in Mr. McGregor's excellent translation.)

It follows that upon the death of Henry James Barton the share in the estate possessed by him passed to the existing descendants of the other instituted heirs, who, I suppose, would take *per stirpes*, plaintiffs thus getting the half which they claim.

It follows that upon the death of Henry James Baron the share possession since 1837 was an adverse possession, undisturbed and uninterrupted for over thirty years, which, under section 14 of the Ordinance No. 22 of 1871, was conclusive proof of the defendant's title. But it is impossible to read the instruments executed by Samuel Barton in 1835 and 1836, before his possession began, without being convinced that he had then no intention of disputing the *fidei commissum*, and nothing that he did thereafter evinces or even suggests such an intention. True, he exclusively possessed the house in question and paid no rent for it, but that much he was entitled to do under the *fidei commissum* while his wife lived, and his possession thereafter may properly be attributed to the title of his son. He never attempted to alienate the property, and did not even mention it in his will. And so with Henry James Barton. The division in 1835 was purely for convenience of possession only. It would only bind the heirs who were parties to it, and so long as Samuel Barton and his descendants lived—their share being in no wise diminished, but rather increased by the failure of the other two lines of descendants —there would be no reason for disturbing the arrangement. It is only defendant's own possession, which was certainly adverse to those entitled under the *fidei commissum*, which can avail her, but that possession was just short of ten years' duration when this action was brought.

It was urged that prescription ought to avail defendant even in respect of such shares as plaintiff's father acquired from his brother and sister, whose issue failed. Perhaps it would have availed her if plaintiff's father were the plaintiff in this action—to the extent

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of entitling defendant to possess plaintiff's father's share during the latter's life. But the moment he died plaintiff's rights accrued under the *fidei commissum*, and defendant's adverse possession must begin afresh. It is perhaps unnecessary to point out that the proviso to section 14, on which defendant relies, deals with the disability of a person entitled to possession, not with the case of a person whose right to possession has not yet accrued. The case of the latter is dealt with in the proviso to section 3, which protects the plaintiffs.

I think the judgment of the learned Acting District Judge should be affirmed.