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Present: Lascelles C.J. and De Sampayo A.J. 1912.

WEERESEKERA *v.* CARLINA *et al.*

96—D. C. Galle, 10,779.

Fidei commissum—*Property given to "descending generations"—Prohibition against sale or mortgage—May legatee transfer property by deed of donation?—Partition by* fiduciarii—*Rights of* fidei commissum *not affected.*

A last will contained the following clause:—"I do hereby direct that the legatees shall for ever possess the immovable property of my said estate throughout their descending generations, in any way, without selling or mortgaging the same."

Held, the clause created a *fidei commissum.*

LASCELLES C.J.—I cannot accede to the suggestion that the will which prohibited the sale or mortgage of the property by implication permitted it to be alienated by donation.

A decree for partition of a property subject to a *fidei commissum* does not destroy the *fidei commissum*, even where the rights of the *fidei commissarii* have not been expressly reserved.

THE facts are set out in the following judgment of the District Judge (F. J. Smith, Esq.):—

(1) This is a contested partition case for a small block of land, of only 24 perches in extent, called Radelgaha-addarasehoisgewatta, the contest centering round the question whether or not it is subject to a *fidei commissum* under an old will.

(2) On July 4, 1840, one Louis Perera, *ex*-Maha Vidane, and his consort Anohamy made a joint will before a notary, in which, after providing for the temple, they say they declare "the first dying of both to nominate and constitute the surviving to be his or her universal and general heir, and this of all their goods, movable and immovable.....legacies and inheritances, none excepted, which the first dying is to leave behind at decease, all the same to be possessed and inherited by the surviving as his or her own property without any molestation of any person or persons whomsoever." Survivor to be sole executor.

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"Lastly, the testator do declare that after the demise of both, after paying all debts, legacies, inheritances, and funeral expenses, the remainder to be inherited and possessed by the testator's only daughter Caroline, lawful wife of Don Samuel, and their issue; provided always our will and desire is that they nor their descendants shall have no power of mortgaging, selling, or otherwise alienating the landed property or the houses and buildings contained in our dwelling garden and that the same shall not be subject to their debts."

(3) The will was proved by the survivor Anohamy in the Testamentary Case 309 instituted in June, 1841—inventory filed in 1848, and final account in 1849 by her as executrix. The residing garden referred to is the one in question in this case (part of it).

(4) Subsequently, in February, 1855, apparently when suffering from an attack of smallpox, which led to her death, Anohamy made a subsequent will dealing with property "entitled to her by right of her husband under the will of 1840," and she made the following bequests *inter alia* :—

(vii.) To grandson Don Bastian de Silva half of all the movable and immovable property not previously devised, after paying debts.

(viii.) To Christian de Silva Weerasekera one-third of the remaining half.

(ix.) To grandson Don Adrian de Silva Weerasekera one-third of half. .....

(xi.) "I do hereby direct that the legatees should for ever possess the immovable property of my estate throughout their generations," in any way, without selling or mortgaging the same.

(5) Probate for Anohamy's will was applied for in D. C. case 1,012 instituted in 1855. Don Christian, though named as executor and a legatee, opposed the probate as guardian *ad litem* of his minor son (Don Adrian by Ano's daughter Caroline, whose second husband he was), as at the time of its alleged execution she was not of disposing mind, and also on the ground (in petition of appeal) that having made the joint will referred to above, been executrix under it, and accepted the benefit of it she could not make a different disposition of the property, which admittedly had been received from her husband; and was to descend to their daughter and issue under a *fidei commissum* created by the joint will.

(6) The Supreme Court in January, 1858, confirmed the District Judge's order declaring the will proved, adding that the right of the testatrix to make the will or to devise the property held by her cannot be affected by proof of the will, but must form the subject of a separate civil suit.

(7) Christian finally assumed duties as co-executor, and latterly as sole executor, and closed the estate in 1876.

(8) In 1878 Christian instituted a partition suit against the co-owners of the residing garden, and land was duly partitioned in May, 1880, he receiving lot B as one-sixth share. In that case his stepson Don Bastian was first defendant, whose only objection to the proceedings was the scheme of distribution proposed. (The Court was not informed that the land was subject to a *fidei commissum*.)

(9) In 1890 Christian gifted one-third of lot B to his son Teadoris, and when his estate was under administration in 1910 the present plaintiff alleged it was property subject to *fidei commissum*, and gave notice that he intended to take a separate action about it, and this partition case is apparently the result.

(10) To come now to the issues raised, I am of opinion that Anohamy, after signing the joint will, had no power to alienate the garden in question by will, being, as survivor, fiduciary heir to hold the property subject to a *fidei commissum* in favour of her daughter, and after her daughter's death (which the evidence clearly shows, I think, took place before her own) in favour of her issue by Don Samuel, *i.e.*, Don Bastian.

(11) The question, as we have seen, if her power to make the will was raised in the testamentary case by the executor Christian (Bastian's father-in-law) as representing his own minor son Adrian, Carlina having been married to Samuel in 1837, it may safely be assumed, I think, that Bastian was of age at the time of the Supreme Court judgment of 1858; yet neither Christian nor Bastian took the steps proposed to have the question decided in a separate action. Bastian was a beneficiary under Anohamy's will, and took the benefit under it, and was party to the partition case of 1878 for one of the devised properties, and got his share as heir under Anohamy's will, and must be deemed to have elected to abide by that will rather than claim the whole property as having been held in trust for himself. The point is not now raised by him, but in favour of a son of Christian by Carlina; but I am of opinion that no trust was created in the original will in favour of Christian's children, the words "their issue" referring only to Carlina and Samuel's; and Christian could by marriage get no part, *fidei commissum* property not entering into the community of property between husband and wife.

(12) I think all parties to the case are now estopped from disputing the validity of the will of 1855 (however incompetent Anohamy was to make it), which has been acted upon for over thirty years.

(13) We next come to the right under that will. After considering the authorities, I am of opinion that the bequest to Christian was subject to a valid *fidei commissum* in favour of his lineal descendants.

(14) This being so, the special lot of land apportioned to him in the partition case must be considered burdened by the *fidei commissum*, and he had no power to gift to any special son—at any rate anything more than his proportionate share—and that subject to the *fidei commissum*, so that it reverted to himself on the son's death issueless.

(15) The first plaintiff and first defendant now being the sole lineal descendants of Christian, who died some six years ago, I find them entitled to half each of the lot B, subject to the *fidei commissum*.

A. St. V. Jayewardene, for appellant.—The material words of the clause in question are not sufficient to create a *fidei commissum*. There is no clear indication of the persons to be benefited. The words "throughout their descending generations" are too vague. The party must be designated in a manner so as to admit of no doubt. And in cases of doubt it is the policy of Courts to declare the property free from the burden of *fidei commissum*. Further, the will only prohibits sale or mortgage; here the transfer was a deed of donation.

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A *fidei commissary* prohibition is strictly construed and restricted to modes of alienation expressly prohibited, unless general terms are used so as to include all kinds of alienations (*Grot. op. No. 32, p. 290*). Thus, where alienation *inter vivos* is prohibited, the right to leave by will is not prohibited. (*Voet, bk. XXXVI., lit. i., section 27; Sandes on Restraints against Alienation 135.*)

Even if there is a *fidei commissum*, the decree in the partition has wiped it out. To hold otherwise would be to take away from the final and conclusive effect given to partition decrees by the Ordinance. The object of the Ordinance is to settle disputes to title once for all, and it would be dangerous to create an exception of this sort, particularly because the remedy of an action for damages is always open to an aggrieved party. Such an exception would nullify the effect of section 9 of Ordinance No. 10 of 1863.

Cooray, for respondent.—The intention to impose a *fidei commissum* and the institution of the *fidei commissarius* is abundantly clear. The language employed is identical with that used in the will construed in *Ibanu Agen v. Abeyesekera.*[1] There the Supreme Court decided in favour of a *fidei commissum.*

The partition decree does not wipe out the *fidei commissum.* See *Babey Nona et al. v. Silva.*[2] It is impossible for *fidei commissarius* who may not be in existence to obtain any relief for damage done to their interests.

A. St. V. Jayewardene.—The judgment in *Babey Nona et al. v. Silva* [2] should be reconsidered, as it is in conflict with section 9 of the Partition Ordinance.

August 9, 1912. LASCELLES C.J.—

It is unnecessary to recapitulate the facts of this case, which are fully set out in the judgment of the learned District Judge. The appellants, whose claim is based on a deed of gift from Don Christian in favour of his son Mendis, attack the judgment partitioning the land B in equal shares between the plaintiff and the first defendant, on the ground (1) that the will of Anohamy did not create a *fidei commissum* in favour of her lineal descendants, and (2) that even if a *fidei commissum* were established, it was determined by the partition decree under which the lot B was awarded to Don Christian. With regard to the first point, the material words of the will are translated as follows:—

> " I do hereby direct that the legatees shall for ever possess the immovable property of my said estate throughout their descending generations, in any way, without selling or mortgaging the same."

[1] *(1903) 6 N. L. R. 344.*

[2] *(1906) 9 N. L. R. 251*

Mr. A. St. V. Jayewardene has referred us to most of the local decisions and to the passages in the text books which attempt to describe the language which, in a deed or will, is sufficient to create a *fidei commissum*, but it seems to me that in the case of *Ibanu Agen v. Abeyesekera*[1] we have an authority which is almost exactly in point. In that case, as here, the question arose with regard to a will, and not with regard to a deed, and the formula which in that case was held sufficient to create a *fidei commissum* closely resembles the language of the will now under consideration. It is also material that the will in that case, as here, was in the Sinhalese language.

Wendt J. laid down the principle of construction which is applicable in such cases as follows:—

> " In construing a will the paramount question is, What was the intention of the testator? And if it is clear that the person to whom the property is in the first place given is not to have it absolutely, if it is also clear who is to take after him, and upon what event, then the Court will give effect to the testator's intention."

Here, although the wishes of the testatrix to establish a *fidei commissum* in favour of the direct descendants were not expressed in technical language, there can be no question that it was intended that the devisees under the will should not take absolutely, but that on their respective deaths their shares should devolve on their direct descendants, and I think that, on the authority of the case to which I have referred, the District Judge was right in holding that Don Christian's shares were subject to a *fidei commissum*. I cannot accede to the suggestion that the will which prohibited the sale or mortgage of the property by implication permitted it to be alienated by donation. Such a construction would be contrary to the plainly expressed intention of the testator. Then comes the question, Whether the *fidei commissum* was destroyed by the partition of Don Christian's share? On this point we are bound by the decision in *Babey Nona et al. v. Silva*,[2] from which I see no reason to differ. I am of opinion that the appeal must be dismissed with costs.

DE SAMPAYO A.J.—I agree.

Appeal dismissed.

[1] *(1903) 6 N. L. R. 344.*

[2] *(1906) 9 N. L. R. 251.*