Present: De Sampayo J. and Schneider A.J.

1918.

PINNWARDENE *v.* FERNANDO

302—D. C. Negombo, 12,409.

Fidei commissum—*Interpretation of will—Devise to children, grandchildren, heirs and representatives descending from them.*

By a joint will the testators devised their landed property to their seven children and three others severally, and provided as follows:—"In this manner, after our death, they shall take charge of their said respective properties as we have ordained, and they, their children, grandchildren, heirs, and representatives descending from them shall possess the same; but they shall not sell or alienate the said properties in any manner, or cause the same to be subject to any mortgage or security. Should such an act be committed, the right of the person who sells or alienates the lands or land . . . . . shall cease, and it is ordained that the same shall go over to the Crown."

Held, that the will created a valid *fidei commissum* in favour of the children, grandchildren, and remoter descendants of the devisees. *Fernando v. Salgado* [1] queried.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Croos-Dabrera*), for first defendant, appellant.—The presence of the words "heirs and representatives" in the clause indicating the beneficiaries is obnoxious to the validity of the *fidei commissum*. There is no clear designation of the parties to be benefited by the *fidei commissum*. The testators having in a previous clause made an unfettered grant of the property to the devisees cannot by a provision in a later clause limit the operation of that grant. Counsel cited *Tina v. Sadiris*[2] *Hormusjee v. Cassim*,[3] *Asya Umma v. Noordeen*,[4] and the decision of the Full Court in the same case reported in (*1905*) *8 N. L. R. 350*, *Dassanaike v. Dassanaike*,[5] *Silva v. Silva*.[6]

This same will has been the subject of the case of *Fernando v. Salgado*,[1] where it was held by the Supreme Court that it created a valid *fidei commissum*. This Judgment has been acted upon by the parties. The Court cannot now question the soundness of that judgment.

Samarawickreme, for respondent.—The clause creates a valid *fidei commissum*. The Court should look at the instrument as a whole, and if it could be gathered that the intention of the testator

[1] (*1911*) *14 N. L. R. 310.*
[2] (*1885*) *7 S. C. C. 135.*
[3] (*1896*) *2 N. L. R. 190.*
[4] (*1902*) *6 N. L. R. 173.*
[5] (*1906*) *8 N. L. R. 361.*
[6] (*1914*) *18 N. L. R. 174.*

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was to create a *fidei commissum*, the Court should give effect to such intention, in spite of the presence of words which may be apparently against the creation of a *fidei commissum*. The judgment reported in *14 N. L. R. 310* is not binding on the respondents. Counsel cited *Wijetunga v. Wijetunga*,[1] *Weerasekera v. Carlina*,[2] *Selembram v. Perumal*.[3]

Jayawardene, in reply.

Cur. adv. vult.

March 26, 1919. DE SAMPAYO J.—

The question for decision in this case is whether the joint will of Don Philippu and his wife Justina, dated March 12, 1842, creates a valid *fidei commissum*. The first defendant-appellant claims certain shares of the land called Diulgahawatta *alias* Kosgahawatta through mesne conveyances from Elizabeth, daughter of one of the children of the testators. The first added defendant is one of the three children of Elizabeth, and claims adversely to the first defendant under the *fidei commissum* which, she says, is created by the joint will. The testators devised their landed property to their seven children and three others severally, and provided as follows: "In this manner, after our death, they shall take charge of their said respective properties as we have ordained, and they, their children, grandchildren, heirs, and representatives shall possess the same, but they shall not sell or alienate the said properties in any manner, or cause the same to be subject to any mortgage or security. Should such an act be committed, the right of the person who sells or alienates the lands or land, or causes the same to be subject to any mortgage or security, shall cease, and it is ordained that the same shall go over to the Crown."

The contention on behalf of the first defendant-appellant is that by reason of the use of the words "heirs and representatives" in the condition which prohibits alienation, and provides that the property shall be possessed by "the children, grandchildren, heirs and representatives," there is no clear designation of the *fidei commissarius*, and that, therefore, no valid *fidei commissum* is created by the will. The appellant also relies upon the construction to that effect put upon this same will by this Court in *Fernando v. Salgado*.[4] I should myself feel bound to follow that decision as an authoritative interpretation of the will, but for one or two matters which appear to me to call for consideration of the effect of the will anew.

I have quoted the above passage from a translation which is filed in *Fernando v. Salgado*,[4] but which, I think, is not quite accurate. The judgment of this Court was based on that translation. I have looked into the original filed in the Testamentary case No. 1,444 of the District Court of Colombo, in which probate of the will was

[1] *(1912) 15 N. L. R. 493.*
[2] *(1912) 16 N. L. R. 1.*
[3] *(1912) 16 N. L. R. 6.*
[4] *(1911) 14 N. L. R. 310.*

granted on October 2, 1854. I find that the expression in the Sinhalese meaning " children, grandchildren, heirs, and representatives " is preceeded by the words *ohungen pewathena*, which means " descending from them." The whole expression thus is " the children, grandchildren, heirs, and representatives descending from them." The word " heirs " by itself presents no great difficulty. It is collocated with the words *daru munu puru urumakkara*, which may be translated " children and grandchildren and heirs who descend from them. " Moreover, I find that in another part of the same will, to which I shall refer presently, the word " heirs " is used to describe the children, and I may say that the use of that word as synonymous with " descendants," who are naturally the heirs of a man, is not uncommon among the Sinhalese. It is the other word " representatives " which is said to alter the whole aspect of the disposition. The Sinhalese expression is *balayalath ayavolun*, which literally means " those who have obtained authority," and which is sometimes used to convey the idea of " administrator." In the collocation in which it appears, however, I think it loses its significance. The District Judge has rightly pointed out that the trend of judicial opinion since the date of the decision in *Fernando v. Salgado* [1] is not to emphasize such technical phraseology as " heirs, executors, administrators, and assigns," whenever the instrument as a whole shows a clear intention to create a *fidei commissum*, and sufficient language is used to express it. I need only refer in this connection to *Dassanayaka v. Tillekeratna*,[2] in which the will was almost in similar terms to the will now in question. As regards the rule of construction, Show J. said in *Mirando v. Coudert* [3] that the document must be looked at as a whole, and that if the intention to create a *fidei commissum* was clear, effect should be given to it, though there might be in the document expressions inconsistent with a *fidei commissum*. This is in accordance with the principle enunciated in such English cases as *Arundell v. Arundell*,[4] where it is laid down that a Court of Equity looks to the general intent of a deed, and will give it such a construction as supports that general intent, although a particular expression in the deed may be inconsistent with it. This is so more especially in the case of wills. *In testamentis benignir interpretatio facienda est. In re Haggarth, Wickham v. Haggart* [5] it is stated that the intention is competent, not only to fix the sense of ambiguous words, but to control the sense even of clear words, and to supply the place of express words in cases of difficulty or ambiguity. In the present case there is no question as to the intention of the testators to create a *fidei commissum* in favour of the successive generations of their children, and

[1] *(1911) 14 N. L. R. 310.*
[2] *(1917) 20 N. L. R. 89.*
[3] *(1916) 19 N. L. R. 90.*
[4] *1 Myl. & K. 316.*
[5] *(1913) 2 Ch. 15.*

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I think that the word " representatives " may either be disregarded as meaningless, or be taken as a mere extension of the idea of succession conveyed by the previous words with which it is associated.

It will further be seen upon a perusal of the decision in *Fernando v. Salgado*[1] that Grenier J., who delivered the judgment of the Court, strongly emphasized the second clause of the will, which, in the translation above referred to, runs as follows: " We, the testators, do hereby ordain that the property inherited by the right of our parents and those acquired by us, which we more fully describe hereunder, are to be devolved on the hereinafter-mentioned seven children and others who shall be the heirs after our death, and that they are at liberty to possess severally as their shares of inheritance."

The learned Judge comments on this, and says: " Standing by itself the clause contains words the meaning and intentions of which are plain enough. The use of the words ' who shall be the heirs after our death,' and the words ' are at liberty to possess severally as their shares of inheritance,' indicates an intention on the part of the testator and testatrix to make an absolute devise to each of his seven children of separate and distinct lands or shares of land." Now the translation is inaccurate, especially in the very expressions on which the learned Judge relies. The words translated as " who shall be the heirs after our death " are *ape maranayen pasu eta urumakkarayowe sitina*, the true sense of which is " who are the persons to succeed to our property after our death." They are in no way intended to constitute the seven children as heirs under the will, nor is it attached, as the translation makes it appear, to the other beneficiaries in the will who are not the children of the testator. The last word *sitina* signifies the children's present status as would be heirs, and, in my view, the whole expression is only descriptive of the children as those who naturally will succeed to their parents. The other expression " are at liberty to possess severally as their shares of inheritance " purports to be a translation of *urumakota bukthi vindina*. There is nothing here corresponding to " as their shares of inheritance." The sense of the word is " to possess by way of inheritance," which, I think, is innocuous. The whole passage may be roughly translated as follows: " We direct that the properties, as well inherited by us from our parents as acquired by us, which are hereunder specified, having devolved as inheritance on our seven children, who are the heirs to succeed to us after our death, and on the other persons named below, shall be possessed by them in the manner hereinafter provided."

I do not think that the clause contains an absolute devise of the property to the children. On the contrary, it appears to me to provide that they shall possess the property in the manner hereafter stated, that is to say, subject to the condition and restrictions

[1] *(1911) 14 N. L. R. 310.*

subsequently stated in the will. In view of the faulty translation which the learned Judges in *Fernando v. Salgado* [1] had before them, and of the liberal and, if I may say so, proper rule of construction adopted in the current of later decisions, I think we are free to construe the will ourselves. In my opinion the will creates a valid *fidei commissum* in favour of the children, grandchildren, and remoter decendants of the devisees, and the judgment appealed from is therefore right.

I would dismiss the appeal, with costs.

SCHNEIDER A.J.—I agree.

Appeal dismissed.