Present: Wood Renton C.J. and Ennis J. 1914.

LIVERA *et al. v.* ABEYESINGHE *et al.*

181 and 182—D. C. Galle, 11,672.

Fidei commissum — *Construction of will — Improvements effected by purchaser from* fiduciarius—*Right to compensation.*

A husband and wife, by their joint will dated August 25, 1860, devised the land in question to their three sons, C, F, and G, subject to a life interest as to half in favour of the testator's wife, with the following provision: "When my three sons aforesaid become absolutely entitled . . . . . , they and their posterity are at liberty to possess and enjoy the same for ever, but they and their heirs are respectively restricted from selling, mortgaging, or otherwise alienating the same, and the same I hereby entail as a *fidei commissum*." There was also a provision that should any of the sons die without issue, their widows should possess the entailed property, with the same restrictions, in proportion to their respective shares, and that after their respective deaths the entailed property was to revert to the children of the testator upon the same restrictions.

Held, that the joint will created a valid *fidei commissum* for the full period allowed by law.

A *mala fide* possessor is not entitled to compensation for useful improvements.

A purchaser from a fiduciary heir cannot claim compensation for useful improvements from the *fidei comissarii*.

THE facts are fully set out in the judgments.

Samarawickreme, for second defendant, appellant.

Bawa, K.C. (with him *E. W. Jayewardene*), for first defendant, respondent.

Bawa, K.C. (with him *E. W. Jayewardene*), for first defendant, appellant.

Samarawickreme, for second defendant, respondent.

Cur. adv. vult.

October 6, 1914. WOOD RENTON C.J.—

This is an action to partition a land called Orphoowewatta, and situated at Dangedara, in the District of Galle. The facts material to the issues involved in these appeals are as follows. The property belonged to Petrus Dias Abeyesinghe Siriwardene and his

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wife Arnoldina Angenete Tennekoon, who dealt with it in their joint will dated August 25, 1860. In this will the testator, after various legacies, proceeds to dispose of the movable and immovable property, which he had inherited from his parents, in these terms:—

18. I, the testator, give and bequeath to my second wife, Arnoldina Angenete Tennekoon, the testatrix, one-half of the houses and premises (in) which I now reside, called Orphoowewatta, surrounded by walls, within which the said premises stand, one-half of the garden Maawatewatta, the field Stoodurakumbure, and the adjoining field Oodeirewatta, situated at Akmimana, to be possessed by her during her natural life in trust for my three sons hereinbefore named, Cornelis Jacobis, Frederick, and George, and after the death of my said second wife the above legacy to revert to them free of all encumbrances.

19. I, the testator, give and bequeath the other half of my dwelling-house and garden Orphoowewatta, and the other half of the garden Maawatewatta, to my three sons hereinbefore named, to be possessed by them as hereinafter mentioned.

20. I, the testator, will and desire, when my three sons aforesaid become absolutely entitled to my dwelling-house and garden Orphoowewatta, surrounded by wall, and their posterity are at liberty to possess and enjoy the same for ever, but they and their heirs are respectively restricted from selling, mortgaging, or otherwise alienating the same, and the same I hereby entail as a *fidei commissum*.

21. I, the testator, also desire that the rest and residue of my movable and immovable property shall be equally divided between my three sons aforesaid upon a proper valuation, excepting the right and interest I have in the property of my second wife renounced and bequeathed as above.

22. Should any of my said three sons die without issue, I will and desire that their widows, who may survive them, shall be at liberty to possess the entailed and all the other landed property which they may inherit from my estate, with the restrictions hereinbefore set forth, in proportion to their respective shares, and that after their respective deaths the same to revert to my children in (*sic*) their legitimate issue upon the like restrictions as hereinbefore entailed.

23. I, the testator, do hereby restrict my three sons from selling, mortgaging, or otherwise disposing of any landed property which they shall inherit from my estate, or give to them by me as a legacy to any stranger out of any lineage.

The testator died in 1881, apparently predeceased by the testatrix. Of the three sons named in the will, Cornelis had died in 1880, leaving a daughter, Mary de Livera, the mother of the plaintiffs, and of a son, Victor, in addition to the plaintiffs; Frederick died about ten years ago, survived by his widow, the first defendant, who by virtue of clause 22 of the will has a life interest in a one-third share of the property; while George died unmarried after the decease of his two brothers. On August 26, 1903, during the lifetime of Frederick and George, Mary gifted her one-third share to her son Victor, who on the same day transferred it to the second

defendant, Kadiravael Chetty. By a third deed of even date Mary and Victor agreed to transfer to the second defendant the remaining two thirds share, after the death of Frederick and George, for the sum of Rs. 18,666, the agreement providing for the immediate part payment by the second defendant of Rs. 3,333 of the consideration. If the conveyance of the outstanding two-thirds share could not be obtained, this latter sum was to be repaid to the second defendant, together with the value of all improvements effected by him upon the property. The question raised in appeal No. 181 is whether the joint will did not create a *fidei commissum*, which would have the effect of preventing Mary from disposing of the property, and from conferring any power of disposition over it to her son, to the prejudice of the other heirs. The learned District Judge has answered this question in the affirmative, and I think that he is right.

The testator was dealing with ancestral property. He expressly purports in clause 20 to "entail it as a *fidei commissum*"; and his clear intention, in my opinion, was to do so for the full period allowed by the common law. The will was anterior in date to, and is not affected by the provisions of, the Entail and Settlement Ordinance, 1876 (No. 11 of 1876). The same construction—although a decision on the point was unnecessary—was put by the Supreme Court on the clauses of the will with which we are here concerned: in 165—D. C Galle, No. 11,673 (see *17 N. L. R. 289*). "Here," said Sir Alfred Lascelles C.J., "we have a complete *fidei commissum* created as regards the house and garden, the intention being that the restraint on alienation should last for the full period allowed by law, that is, for four generations, the will having been made before the Ordinance No. 11 of 1876." Mr. Samarawickreme for the second defendant, contended, in the first place, that the language of clauses 17-23 of the will was too vague to create a *fidei commissum*, that there was an inconsistency between the words "posterity" and "heirs" in clause 20, and that there was no clear indication of the persons beyond immediate heirs who were to be affected by the prohibition of alienation; in the second place, that even if there was a *fidei commissum*, clause 23 showed that it was confined to the testator's three sons; and in the last place, that in any event Mary became entitled, on the deaths of Frederick and George, to the entire land, subject to the life interest of the first defendant.

I have already dealt to some extent, by anticipation, with the first and second of these arguments. The intention of the testator is clear. He meant to keep the property in the family for as long a period as the law allowed as the term of a *fidei commissum*. Such variations of expression as we find in the use, in one place of the word "posterity," and in another of the word "heirs," are commonly to be met with in wills of this kind in this country, and are due to the desire of the draftsman sometimes to attain a suppos

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literary effect, sometimes to be as comprehensive as possible in defining the scope of the prohibition. The fact that clause 23 imposes a prohibition of alienation on the testator's three sons only cannot be regarded as confining the *fidei commissum* to them, in view of its unequivocal extension to their " heirs " and " posterity " by clause 20. The answer to Mr. Samarawickreme's last argument is that Mary was herself an heir, and on George's death took his one-third share, as she held that of Cornelis, burdened with the *fidei commissum*. *Perera v. Silva*,[1] to which Mr. Samarawickreme referred us, is clearly distinguishable from the present case. In *Perera v. Silva*[1] the property was to devolve on the issue of the legatees " without any restriction whatever. " Neither side addressed us on the issue as to estoppel. But the fact that in the last of the three deeds of August 26, 1908, Mary Victor, and the first defendant expressly recognized that there was an entail in favour of the two surviving sons, and agreed to procure the assent of the heirs to its being broken is, as the District Judge has said, in any event a piece of evidence that weighs heavily against them.

The questions involved in appeal No. 182 are: (1) Whether or not the first defendant has improved the property, and (2) if so, is he entitled to any, and what, compensation? The learned District Judge answers both questions in the affirmative, and fixes the compensation at Rs. 5,456.08. The first defendant, who is the respondent in appeal No. 182, abandoned at the argument a contention put forward in his own petition of appeal that the amount awarded to him was insufficient. We cannot, in my opinion, differ from the carefully worked out conclusion of the learned District Judge, based as it is on reliable evidence, as to either the fact or the value of the first defendant's improvements. The learned District Judge has, however, held that the first defendant was a *mala fide* possessor, that none of his improvements were *impensæ necessariæ*, that he is entitled to no compensation for *impensæ voluptuariæ*, but that, in spite of his *mala fides*, he has the right either to remove, or to receive compensation for, *impensæ utiles*, the category to which the improvements in respect of which compensation has been awarded belong. The decision of this Court in *The General Ceylon Tea Estates Co., Ltd., v. Pulle* [2] is an express authority binding upon us, that a *mala fide* possessor is not entitled to compensation for useful improvements, and the passage in Mr. Justice Pereira's *Laws of Ceylon* (*p. 452*), to which Mr. Samarawickreme referred us, does not show that a fiduciary heir, still less that a purchaser from such an heir, can claim compensation for such improvements as we have to do with in the present case. It deals only with money spent for the permanent preservation of buildings, or the restoration of those which have been burnt down or have fallen in.

I agree to the order proposed by my brother Ennis.

[1] (*1913*) *16 N. L. R. 474.*

[2] (*1907*) *9 N. L. R. 98.*

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This was an action for the partition of a land which passed under the joint will of one Petrus Dias Abeyesinghe Siriwardene and his wife to their three children, Cornelis, Frederick, and George, subject to a life interest as to half in favour of the testator's wife, with the following provision (clause 20): " When my three sons aforesaid become absolutely entitled . . . . . ., they and their posterity are at liberty to possess and enjoy the same for ever, but they and their heirs are respectively restricted from selling, mortgaging, or otherwise alienating the same, and the same I hereby entail as a *fidei commissum*. "

There was also a provision that should any of the sons die without issue, their widows should possess the entailed property, with the same restrictions, in proportion to their respective shares, and that after their respective deaths the entailed property was to revert to the children of the testator upon the same restrictions.

Cornelis died in 1880, before his father, leaving a daughter Mary. Mary had five children, the four plaintiffs and a son, Victor. In 1903 Mary gifted to Victor one-third share of the property, which Victor the same day transferred to the second defendant. Mary and Victor also entered into a further agreement (P 6) to transfer to the second defendant the remaining two-thirds upon the death of Frederick and George.

The second defendant entered into possession and proceeded to use the property as a building estate, expending considerable sums of money in so doing.

Frederick died leaving a widow, the first defendant, who granted a lease of her life interest in one-third of the property to the second defendant. George died unmarried.

Victor died before his mother. Mary died in 1912, and her remaining children then brought this action, claiming to be entitled to a life interest in two-thirds of the property and asking for partition.

The learned District Judge found in favour of the plaintiffs as regards title, and granted the second defendant compensation for improvements. The second defendant appeals against the finding that the plaintiffs are entitled to a life interest in two-thirds of the property, and the plaintiffs appeal against the award of compensation to the second defendant.

The first question for consideration is whether the joint will of Petrus and his wife created a valid *fidei commissum* for the full period allowed by law. In my opinion it does. The intention of the testator is clearly indicated if one considers all the terms of the will. The use of the word " absolutely " in clause 20 must be read in the light of the 18th clause, which gave a life interest in half the property to the wife of the testator. The provision of the life interest for the widows of the children who died without issue, the

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provision in the 23rd clause restraining the sons from alienating any of the landed property to strangers, the restriction on alienation in clause 20 imposed on the testators' children and their heirs, and the entail as a *fidei commissum* in the same clause show a clear intention to create a *fidei commissum* for the full period allowed by law. This view was also held by Lascelles C.J. in No. 165—D. C. Galle, No. 11,673.

As to the question raised in the plaintiffs' appeal, Mr. Walter Pereira in his book on *The Law relating to the Right to Compensation for Improvements* (*1909*) has summarized the law of Ceylon on the subject. A *mala fide* possessor has no right to compensation for improvements, unless the owners have expressed their consent to the improvements being effected, or have stood by and allowed them to be effected without notice (pp. 33-36, 45-47).

The agreement, P 6, between Mary and Victor on the one part and the second defendant on the other makes it clear that the second defendant was fully aware of the position. It recites the entail from Petrus. The parties of the first part agreed to secure the consent of the heirs of Mary to break the entail, and in case of their failure to obtain that consent, or " in case of any dispute on the part of the said heirs, who are the only persons entitled to the said premises, " the parties of the first part agreed to pay compensation for all improvements made and all buildings put up by the second defendant. The second defendant therefore knew that the erection of the buildings for which he seeks compensation would be an infringement of the rights of the heirs. The possession of the second defendant was therefore *mala fide*, and the rule laid down in the case of *The General Ceylon Tea Estates Company, Ltd., v. Pulle*, [1] which is binding on us, precludes the second defendant from recovering compensation from the plaintiffs.

I would dismiss the first appeal, and allow the second appeal with costs.

181—*Appeal dismissed.*
182—*Appeal allowed.*

[1] *(1907) 9 N. L. R. 98.*