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Present: Ennis J. and Shaw J.

MIRANDO *v.* COUDERT.

46—D. C. Negombo, 10,606.

Fidei commissum—*Donation in favour of donee, her heirs, executors, administrators, and assigns*—"*Under the bond of*.. fidei commissum"—*Application by donee to Court for power to sell* fidei commissum *property—Minor children not represented by guardian* ad litem—*Order of Court authorizing sale—Judgment* in rem.

A deed of gift contained the following clause:—"To have and to hold the said premises . . . . . unto her, the said I. M., her heirs, executors, administrators, and assigns, under the following conditions, to wit:—That the said I. M., her heirs, executors, administrators, and assigns, shall not sell, mortgage, give in rent more than two years at a time, exchange, or otherwise alienate the said premises and house, and shall only hold, possess, and enjoy the same, if necessary by giving in rent for a term not exceeding two years, and at the expiration of the said term of two years again giving in rent for a term not exceeding two years, and so on, successively for ever, by the said I. M. and her aforewritten, from generation to generation . . . . . under the bond of *fidei commissum;* and at the event that there shall be no heir of the said I. M. to inherit the said premises, then the same shall be devolved to the Roman Catholic Church."

Held, that the deed created a valid *fidei commissum* in favour of the heirs of I. M.

I. M. and her husband presented a petition to the District Court praying for an order, under Ordinance No. 11 of 1876, declaring the

[1] (*1898*) *L. R. 2 Ch. 680.*

prohibition in the deed of gift null and void, and authorizing the sale of the property to the defendant; and the appropriation of the proceeds by the petitioners. No separate guardian *ad litem* was appointed to represent the minor children. The Court entered decree practically in the terms of the application.

Held, that the purchaser at the sale ordered by the Court was not bound to look beyond the order of the Court, or to examine the proceedings, or challenge the discretion of the Court before he could safely purchase.

Per SHAW J.—A guardian *ad litem* should have been appointed to represent the infant children, whose interests were clearly adverse to their parents (the applicants), and the declaration that the prohibition was void and inoperative was wrong, and was not authorized by the Ordinance . . . . . The order for sale, however, is authorized by the Ordinance, and that order having been made, it is, in my opinion, in the nature of a judgment *in rem*, and valid as against all the world until it is set aside.

THE facts are set out in the judgment.

Bawa, K.C., for appellant.

Samarawickreme, for respondent.

Cur. adv. vult.

March 20, 1916. ENNIS J.—

The first question for consideration in this appeal is whether the document of November 10, 1869 (P 1), by which the land in dispute was gifted to Isabel Mirando, created a valid *fidei commissum* in favour of her heirs. The material paragraph in the deed runs:—"To have and to hold the said premises . . . . . unto her, the said Isabel Mirando, her heirs, executors, administrators, and assigns, under the following conditions, to wit:—That the said Isabel Mirando, her heirs, executors, administrators, and assigns, shall not sell, mortgage, give in rent more than two years at a time, exchange, or otherwise alienate the said premises and house, and shall only hold, possess and enjoy the same, if necessary by giving in rent for a term not exceeding two years, and at the expiration of the said term of two years again giving in rent for a term not exceeding two years, and so on, successively for ever, by the said Isabel Mirando and her aforewritten, from generation to generation . . . . . under the bond of *fidei commissum;* and at the event that there shall be no heir of the said Isabel Mirando to inherit the said premises, then the same shall be devolved to the Roman Catholic Church."

The words "for exer", "from generation to generation", "under the bond of *fidei commissum* ", and that the gift over, should there be no "heir to inherit", leave no doubt in my mind that the donee intended to create a *fidei commissum* in favour of Isabel Mirando's heirs and the church. The learned District Judge, however, held that the document P 1 created a *fidei commissum* in favour of the church, but not in favour of Isabel's descendants, and arrived at

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this conclusion on the authority of *Coudert v. Don Elias.*[1] That case is not, in my opinion, an authority for the proposition. In that case the heirs were extinct, and hence the gift overtook effect. Words used in the document in that case are very similar to the words used in P 1, and it was held that they created a valid *fidei commissum*. Clearly the persons to be benefited were the heirs, and on failure of heirs the church. In the present case I see no difficulty in the words " her aforewritten," for the immediate context, " from generation to generation," and the subsequent reference to failure of heirs to inherit, show conclusively that the heirs alone are meant to be designated. I would hold, then, that P 1 creates a valid *fidei commissum* in favour of Isabel's heirs.

The second question for consideration is, What is the effect of the decree in entail case No. 4 ? It appears that on September 6, 1888, Isabel Mirando and her husband presented a petition to the District Court of Negombo praying for an order, under Ordinance No. 11 of 1876, declaring the prohibition in the document P 1 null and void, and authorizing the sale of the property to the present defendant, and the appropriation of the proceeds by the petitioners. The Judge directed notice to issue to the parties interested, and after the hearing made order on October 23, 1888, disallowing the claim of one S. de Croos, and adding: " The heirs are children whose interests are best looked after by their parents . . . . . I think it proper and consistent, with a due regard to their interests, to authorize the sale. It is not easy, in view of the subsequent formal order, to say what this order meant. On the face of it, as it was made with a due regard to the interests of the children, it would seem to imply that the children had an interest under the *fidei commissum*, and that it was not necessary to further notice the children, as the Court accepted the parents as their guardians. The order did not contain any direction for the disposal of the proceeds of the sale. The formal order on this is dated October 30, 1888, and, after authorizing the sale, proceeds to declare the prohibition in the document P 1 null and void, and to direct the money realized to be paid to the applicants.

If the prohibition were null and void, then the children had no interest in the property. Further, the order to pay the proceeds to the applicants infers that they were absolutely entitled. The formal order, therefore, does not agree with the order of October 23, 1888. The deed of transfer was executed on October 24, 1888, and recites that the Court was satisfied that there was reason and cause to dissolve and set aside the entail, " if any there be ", created by the document of November 10, 1869.

The points now argued are (1) that the proceedings are bad, as there was a gift over to the church, and that by section 12 of the Ordinance the Court had no jurisdiction; and (2) that the heirs

[1] *(1914) 17 N. L. R. 129.*

were not properly noticed, and the order, if good, does not bind them. On the first of these points I am unable to agree with the finding of the Court below. Section 12 of Ordinance No. 11 of 1876 enacts: " Nothing in this Ordinance shall be held to apply to any immovable property held or possessed, or which may hereafter be held or possessed by, or to any grant, devise, or conveyance to or for the benefit of any . . . . . church. "

The property at the time of the entail case No. 4 was not possessed by the church, and the word " hereafter " refers to the date of the Ordinance, and not to the date of the entail action. Section 12, in my opinion, was not intended to prevent the use of the Ordinance, by persons taking under a *fidei commissum*, by the insertion of an ultimate gift over to the church or any of the other associations mentioned in the section, but to indicate that the Ordinance did not apply to persons who successively held in trust for such association.

On the second point I find some difficulty. The deed of 1888 was before the enactment of the present Procedure Code, which provides for the appointment of guardians *ad litem* to represent minors in legal proceedings. It has been strenuously urged, where the interests of the natural guardian and the minor were in conflict, the natural guardian could not under Roman-Dutch law represent the minor, and if he did the proceedings would be bad. The argument is one of some force, but I doubt if it would apply to proceedings under the Entail Ordinance, which was meant to entail restrictions on alienation, to provide for a sale of entailed property, and to secure the interests of reversioners by the substitution of other property. I am inclined to think that a purchaser at a sale ordered by the Court under the Ordinance would not be bound to look beyond the order of the Court, or to examine the proceedings, or challenge the discretion of the Court before he could safely purchase. Such a position might render the provisions of the Ordinance regarding sales nugatory, or seriously affect the value of the property. I need not consider the point further, as there is another which decides the matter. The Entail Ordinance only requires notice to be given to those " living " who are interested. In this case the plaintiff states in her plaint that she came of age " about 1910 ". If so, she was not alive in 1888. There is no evidence as to the date of her birth, and in the absence of it she has not established her case.

The proceeding by separate action seems, to me, to be irregular. I can see no reason why application should not have been made in the entail case under section 480 of the Civil Procedure Code. The record in that case indicates that the parents of the plaintiff intended to purchase other land with the proceeds of the sale. It may well be that this was done, and that a new order in that case could have been made for securing the interests of the reversioners without disturbing the purchaser at the sale.

I would dismiss the appeal with costs.

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By deed of gift, dated November 19, 1869, one Manuel Mirando gifted to his niece, Isabel Mirando, certain landed property, "To have and to hold the said premises and every one of their appurtenances unto her, the said Isabel Mirando, her heirs, executors, administrators, and assigns, under the following conditions, to wit:— That the said Isabel Mirando, her heirs, executors, administrators, and assigns, shall not sell, mortgage, give in rent more than two years at a time, exchange, nor otherwise alienate the said premises and house, but shall hold, possess, and enjoy the same, if necessary by giving in rent for a term not exceeding two years, and at the expiration of the said term of two years again giving in rent for a term not exceeding two years, and so on, successively for ever, by the said Isabel Mirando and her aforewritten, from generation to generation, subject to all Government impositions whatsoever, under the bond of *fidei commissum;* and at the event that there shall be no heir of the said Isabel Mirando to inherit the said premises, then the same shall be devolved to the Roman Catholic Church known and called Saint Mary's Church, of Grand street, in Negombo, and shall be the property of the said church."

The grantor died without having revoked the deed of gift, and in the year 1888 Isabel and her husband applied to the District Court of Negombo asking for an order, under provisions of the Entail and Settlement Ordinance, 1876, declaring the prohibition against alienation contained in the deed of gift to be null and void, and authorizing the sale of the premises, and the appropriation by the applicants of the proceeds of the sale to their use and benefit.

On October 30, 1888, the decree was made by the District Judge practically in the terms of the application, and the property was sold by the applicants to the Archbishop of Colombo, the predecessor in title of the respondent to this appeal. At the time of the application and decree Isabel Mirando had five infant children, but they were not separately represented in the proceedings in the District Court, the Judge saying in his order "the heirs are children whose interests are best looked after by their parents, the applicants. I think it proper and consistent, with a due regard to their interests, to authorize the sale."

Isabel Mirando died in 1901, and the appellant, one of her five children, who attained majority, it is said, "about the year 1910," commenced this action in July, 1915, claiming a declaration of title to a one-fifth share of the land, and for damages and mesne profits, on the footing that the deed of gift of 1869 created a *fidei commissum* in favour of the descendants of Isabel Mirando, and that the sale by her husband in 1888 under the authority of the District Court was invalid as against the children.

The District Judge has dismissed the action with costs, and from his decision the present appeal is brought.

In my opinion the deed of 1869 created a valid *fidei commissum* in favour of the descendants of Isabel Mirando. In considering whether a *fidei commissum* is created, one has to look at the document as a whole, and if the intention to create a *fidei commissum* is clear, effect should be given to it, even although the donor or testator may have used in the document expressions that are inconsistent with a *fidei commissum*. See *Wijetunga v. Wijetunga*.[1]

In the present case the restraint against alienation, coupled with the provision that it shall continue " from generation to generation ", the provision that the holding shall be " subject to all Government impositions under the bond of *fidei commissum* ", and the provision that the property shall go to the church " at the event that there shall be no heir of the said Isabel Mirando to inherit the said premises ", all seem to me to clearly point to the intention of the donor to benefit the descendants of Isabel Mirando and to create a *fidei commissum* in their favour.

The use of the words " executors, administrators, and assigns " in the *habendum* will not, of itself, prevent a *fidei commissum* being established, if the intention of the donor to create one otherwise sufficiently appears on the instrument. See *Coudert v. Don Elias*.[2]

The case of *Silva v. Silva*,[3] cited *contra* to this proposition, is no authority for the contention, as not only was the gift in that case to " heirs, executors, administrators, and assigns ", but there was no sufficient designation of the person ultimately to be benefited, and it was on the latter ground that the case was decided. I agree with the opinion expressed by Pereira J. in *Wijetunga v. Wijetunga* (*supra*), that if the intention of a donor or testator to create a *fidei commissum* is clear, as it appears to me to be in the present case, and the words used by the donor or testator can be given an interpretation that supports that intention, one should not embark on a voyage of discovery in search of a possible interpretation that defeats that intention.

The next question that arises is, what is the effect of the sale by Isabel Mirando and her husband authorized by the District Court in 1888 ?

That there were irregularities in obtaining the order, and that the decree was erroneous and in part unauthorized by the Ordinance under which it was made, I feel no doubt. A guardian *ad litem* should have been appointed to represent the infant children, whose interests were clearly adverse to their parents, the applicants, and the declaration that the prohibition against alienation contained in the deed of gift was void and inoperative was wrong, and was not authorized by the Ordinance, which is for the purpose of enabling the Court to authorize sales and other alienations when an entail exists. The order for sale, however, is authorized by the Ordinance, and, that order having been made, it is, in my opinion, in the nature

[1] *(1912) 15 N. L. R. 493.* [2] *(1914) 17 N. L. R. 129.*

[3] *(1914) 18 N. L. R. 174.*

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of a judgment *in rem*, and valid as against all the world until it is set aside. The distinction between orders of this nature which are binding on the whole world and those that are binding on the parties only is well defined by Mr. Justice Blackburn, delivering the opinion of the Judges of the Queen's Bench in *Castrique v. Imrie*,[1] where he says:—" We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither has jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing . . . . . But when the tribunal has jurisdiction to determine, not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interests of any particular party to it, be sold or transferred, the case is very different."

And at page 429, where he says:—" We apprehend the true principle to be that indicated in the last few words quoted from Story (*Conflict of Laws, section 592.*) We think the inquiry is, first whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the Court sits; and secondly, whether the Sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."

In the present case the District Court had jurisdiction under the Entail and Settlement Ordinance to direct the sale of the property, and not merely the interest of Isabel Mirando in it, and having done so, that sale is conclusive against the plaintiff and every one else until the decree is set aside.

It was contended that what judgments amount to judgments *in rem* in this Colony is set out in section 41 of the Evidence Ordinance, 1895. The provision contained in that section, however, is a provision of procedure as to evidence merely, and not substantive law, and proof of the existence of the order of the District Court is admissible under section 40.

I need not go into the question whether the plaintiff on taking proper steps could or could not get the decree of the District Court set aside, but so long as it stands the title to the property in dispute appears to me to be in the defendant.

I would dismiss the appeal, with costs.

Appeal dismissed.

[1] *L. R. 4 H. L. 414 at page 427.*