

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

1920.

CORNELIS *et al.* v. WATTUHAMY.

418—D. C. Tangalla, 1,754.

Fidei commissum—*Prohibition against alienation in favour of a person other than an heir.*

Under a joint will the land in question was devised by one A to his two sons B and C, subject to the following condition: That if the aforesaid parties mortgage, lease out, transfer, gift out, or give over in any other way any lands of this estate to any one other than an heir of this estate, such grant shall be null and void, and the property should belong to the estate.

Held, that the prohibition in the will was only against a voluntary alienation, and not against a sale in execution.

DIAS A.J.—The ruling that the last will created a valid *fidei commissum* cannot be supported.

THE last will was as follows :—

This last will or testament is made on this 15th day of April, 1894, purporting, to wit :—Whereas we, the two undersigned, Samarasing Arachchige Don Andris *alias* Loku Appuhamy of Talahaganwaduwa, in the Giruwa pattu of Tangalla district, and my lawful wife Denagama Kalu Achchige Kaweni Hamine, are old, and whereas the first named Don Andris *alias* Loku Appuhamy am laid up since a short time, this last will or testament is made with the consent of both of us when we two are in our sound mind as follows :—

3. That after the death of one of us, the survivor may be entitled to a half share of the movable and immovable property of this estate, the entire soil and plantations of the garden Danwatta, together with the tiled house of thirteen cubits standing thereon, and the field Badanagekumbura Pahalakebella, in extent three pelas of paddy.

4. That after the death of both of us, our three lawful children, Samarasing Arachchige Don Davith Appuhamy, brothers Samarasing Arachchige Don Niculas Appuhamy and Samarasing Arachchige Wattuhamy *alias* Balappuhamy may be equally entitled to the property allotted to the survivor.

5. That our two sons Samarasing Arachchige Don Niculas Appuhamy and Samarasing Arachchige Wattuhamy *alias* Balappuhamy may be entitled to two pelas extent of paddy from Badanagekumbura.

6. That our adopted daughter Samarasing Arachchige Kaluhamy, who is now married, may be entitled to one pela extent of paddy from Geegamagedeniya, situated at Kadigamuwa, and five kurunies extent of paddy from Bakmighakumbura.

7. That after the death of either of us, our three children Samarasing Arachchige Don Davith Appuhamy, brothers Samarasing Arachchige Don Niculas Appuhamy and Samarasing Arachchige Wattuhamy *alias* Balappuhamy, all residing at Talahaganwaduwa, may be equally entitled to the remaining property, excepting what we have already allotted to each of them.

1920.

*Cornelis v.
Wattuhamy*

8. That if the aforesaid parties mortgage, lease out, transfer, gift out, or give over in any other way any lands of this estate to any one other than an heir of this estate, such grant should be null and void, and the property should belong to the estate.

The District Judge, H. J. V. Ekanayake, Esq., made the following order on the question relevant to this report :—

In this will the testators, husband and wife, after making some specific bequests of lands to their children and others in paragraph 7, deal with the residue.

In paragraph 8 they will that if the aforesaid parties transfer or encumber in any way any lands of this estate except to an heir of this estate, such transfer and encumbrance should be null and void, and the property should become the property of the (budela) or estate.

The intention of the testators is clear, *i.e.*, to prevent the dispersion of the lands beyond the heirs, penalizing any attempt by causing the property attempted to be transferred into the residue, and to become the common property of the heirs.

The prohibition is, therefore, in favour of the heirs, and I hold that a valid *fidei commissum* has been created.

Therefore, the sale under the writ was invalid.

Arulanandan, for the appellant.

J. S. Jayawardene, for the respondent.

June 10, 1920. DE SAMPAYO J.—

The plaintiffs brought this action for a declaration of title to two pelas of the field called Badanagekumbura by virtue of a deed in their favour and also by prescriptive possession. They complained that they were interfered with in their possession by a claim on the part of the defendant, with the result that a certain paddy crop was sequestered by the Vidane Arachchi at his instance, and they asked the value of that crop from the defendant. It appears that these two pelas originally belonged to one Don Andris. He and his wife made a joint will by which they devised the two pelas to their two sons, Niculas and Wattuhamy, the defendant. These two pelas were seized in execution against the defendant, and was sold and purchased by one Balahamy, who obtained the Fiscal's transfer of June 14, 1901. Balahamy conveyed them to the plaintiffs by deed dated November 7, 1918. A point discussed at the trial was whether the last will by Don Andris and his wife created a valid *fidei commissum* so as to render the property incapable of a sale. The condition in the will which is relied on is clause 8, which is in these terms : "That if the aforesaid parties mortgage, lease out, transfer, gift out, or give over in any other way any lands of this estate to any one other than an heir of this estate, such grant shall be null and void, and the property should belong to the estate." The District Judge considered that this

1920.

DE SAMPAYO
J.Cornelis v
Wattuhamy

provision created a *fidei commissum*, and that the Fiscal's sale was, therefore, nugatory. He proceeded to decide the question of prescription, and held that issue against the plaintiffs. But as regards damages claimed, namely, the value of the crop, he held that the plaintiffs were entitled to that, and ordered the value of the crop to be paid by the defendant to the plaintiffs. But he gave no costs to either side. The defendant has appealed from the order as to costs on the ground that he is entitled to costs to be paid by the plaintiffs. Apart from any other question involved in the case, it seems to me that the success in the Court below was divided, and the question of costs ordinarily is at the discretion of the District Judge, and I do not think that a division of costs in this way is unreasonable in the circumstances of the case. But the plaintiffs have also given notice, under section 772 of the Civil Procedure Code, in respect of the judgment which did not give them a declaration of title. If they succeed in this cross appeal, clearly the defendant can no more maintain the argument that the order as to costs is wrong. Now, as regards the point of title, it seems to me that clause 8, which I have quoted, hardly creates a *fidei commissum*. I cannot quite see who are the persons who are to get the property in the event of alienation in breach of the condition. All that I can find is that the property should belong to the estate. However that may be, it is quite clear that, whatever interest the defendant had in the property passed on the Fiscal's transfer from him to the execution-purchaser, Balahamy, and is now vested in the plaintiffs. Therefore, the plaintiffs were entitled to a declaration of title as against the defendant. Moreover, if the question of *fidei commissum* is to be considered, it is quite clear that the prohibition in the will was as regards voluntary alienation. But a forced sale, like a sale by the Fiscal in execution, is not affected by the provision in question. For these reasons I would modify the judgment of the District Judge, declaring the plaintiffs entitled as against the defendant to the two pelas of the field Badanagekumbura. The plaintiffs are entitled to the costs of the day in the Court below and of this appeal.

DIAS A.J.—

The District Judge's ruling that the last will created a valid *fidei commissum* cannot be supported, and even if it did create such a *fidei commissum*, the compulsory sale by the Fiscal was sufficient to pass a valid title to the purchaser Balahamy. The plaintiffs are the purchasers from Balahamy, and, consequently, they are entitled to whatever rights this defendant had in the two pelas referred to. The plaintiffs were, therefore, entitled to a declaration of their right. I agree to the order proposed by my brother De Sampayo.

Varied.