1922.

Present: De Sampayo and Schneider JJ.

HETTIARATCHI *v.* SURIARATCHI *et al.*

327—D. C. Galle, 17,353.

Fidei commissum—*Last will—Devise of residue to six children—Provision that sale or mortgage should be effected only amongst the heirs of the estate.*

A testator by his last will gave the residue of his estate to his six children, and directed that whenever it "was required to subject the properties to any debt, mortgage, sale, gift, or any other alienation," the same should be done and effected only amongst the heirs of the estate, and should not be done and effected amongst outsiders."

Held, that the will did not create a *fidei commissum* in favour of the family.

IN this case the appellant sought to partition the land called Danauwepahalawila. The land admittedly belonged at one time to Don Juan Suriaratchi, who bequeathed the same, among other properties, by last will dated May 11, 1876, to six persons, one of whom was the thirteenth defendant-respondent Abraham, whose share one-sixth, the appellant claimed on P7. It was also admitted that one of the six persons who were legatees under the said will was one James Henry, and that on his death Abraham and the other heirs each inherited a further one-thirty-sixth share, which share also the appellant claimed on the same title as the one-sixth aforesaid, *i.e.*, on P 7.

In the course of the trial, the thirteenth to fifteenth defendants, respondents, raised the objection that the last will of 1876 (I [1]) created a *fidei commissum*, and that the legatees had no right to sell their shares out of the family, and that, therefore, the plaintiff-appellant had no title.

The District Judge (T. B. Russel, Esq.) upheld the objection, and dismissed the plaintiff-appellant's action, with costs.

The last will in question was as follows:—

No. 554.

WORSHIPPING THE TRIPLE GEMS

We, Don Juan de Silva Suriaratchi and wife Buddha Koralläge Cicilia Hamine, both of Baddegama, in Gangaboda pattu of Galle District, of whom I, the first-named, Don Juan de Silva Suriaratchi, am laid up since of late and of old age; after full and careful consideration, it behoves me that I should make and keep a settlement of all the movable and immovable properties belonging to me and to my wife; therefore, without any compulsion or threat of anyone, and of my own free will and pleasure, whilst being of sound mind and memory, with the

consent and approval of my said wife, witnesseth the purport of the last will and testament, as drawn hereinafter mentioned, to wit:—

. . . . . .

Thirdly.—I bequeath that out of my estate, properties of the value of Rs. 500, both movable and immovable, to be given as dowry to my daughter Suriaratchi Dona Cornelis Hamine at her marriage, should she marry after my death.

Fourthly.—That it is enacted that as what was due as dowry to my daughter, the late Suriaratchi Dona Madelena Hamine, on the occasion of her marriage with Don Deonis de Silva Weeragunaratne Sahabandu Appuhamy, had been given at that time, therefore nothing out of my estate shall devolve on to him.

. . . . . .

Seventhly.—That it is enacted that after my death, the administrators of my estate shall proceed on with cases No. 26,035, which I have instituted, and No. 36,760, of which I am the defendant of the District Court of Galle, if funds required by the sale of a land belonging to the estate; and that it is further enacted that this estate shall be subjected to all the legal expenses of the said two cases.

Eighthly.—That it is enacted that out of the proceeds of the estate, my servant Thoronchy Kapuge Balo shall be maintained by giving her food, clothing, &c., during her lifetime, and at her death the funeral expenses on her shall also be borne by the estate.

Ninthly.—That exclusive of the said bequeaths, all the remaining movable and immovable properties belonging to the estate shall, after the deaths of both of us, be held in equal shares by our six children, viz.:—Don Carolis de Silva Dissanayake Appuhamy's wife Suriaratchi Dona Gimara Hamine, Suriaratchi Don Nicholas Dias Appuhamy of Magedera in Talpe pattu of Galle, Suriaratchi Don Andreas Appuhamy of Babarenda in Wellaboda pattu of Matara, Suriaratchi Don Arnasel Dias Appuhamy of Baddegama in Gangaboda pattu of Galle, Suriaratchi Don Abraham Dias Appuhamy, and Suriaratchi Don James Henry Dias Appuhamy, both of Baddegama aforesaid.

Tenthly.—That should any one of the said heirs of the estate, who is unmarried at present, contract a marriage against the wish, and in disobedience to the surviving testator, such person or persons shall not be entitled to the said settled share of the estate, but shall only be entitled to one rupee out of the proceeds of the estate.

Eleventhly.—That it is hereby enacted that the said movable and immovable properties, which have been disposed of amongst the heirs of this estate in the manner aforesaid, when required to subject them to any debt, mortgage, sale, gift, or any other alienation, shall be done and affected only amongst the heirs of the estate, and shall not be done and affected amongst outsiders.

Samarawickreme, for plaintiff, appellant.

A. St. V. Jayawardena, K.C. (with him *Amarasekera*), for thirteenth and fourteenth defendants, respondents.

March 29, 1922. DE SAMPAYO J.—

The District Judge, relying on the decision in *Robert v. Abaywardena*,[1] has held that the last will of Don Juan de Silva Suriaratchi and his wife created a valid *fidei commissum*, and has

[1] *(1912) 15 N. L. R. 323.*

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DE SAMPAYO J.

Hettiaratchi v. Suriaratchi

dismissed the plaintiff's action. He is mistaken in thinking that " the facts of this case are on all fours with the facts " of the case referred to. They are distinctly different. By the ninth clause of the will in question, the testators gave the residue of their estate, movable and immovable, which included the land in suit, to their six children without any restriction. The tenth clause provided that if any of the children contracted a marriage against the wish of the surviving testator, he or she should not be entitled to the share intended for him or her, but should only be paid one rupee out of the estate. Then came the eleventh clause which is supposed to contain the *fidei commissum*. It was thereby declared that whenever it was " required to subject them (*i.e.*, the movable and immovable properties) to any debt, mortgage, sale, gift, or any other alienation," the same should " be done and effected only amongst the heirs of the estate, and should not be done and effected among outsiders." In my opinion the provision in the eleventh clause is insufficient to create a *fidei commissum* in favour of the family of the kind discussed in *Robert v. Abeywardena* (*supra*). By " the heirs of the estate " are meant the six legatees themselves, and a prohibition against alienation, except among themselves, cannot be interpreted as creating a *fidei commissum* in favour of their family. It is noticeable that the provision in question is not an integral part of the bequest to the children, but is disconnected from it. There is nothing to show that it was intended to keep the property in the family. On the other hand, alienation by the legatees was contemplated whenever they found it necessary, that is to say, whenever they wished to do so, and I do not think that the further direction, not to alienate to outsiders really altered the nature of the unconditional gift. It appears to amount only to a pious wish or advice, which can have no legal force any more than the thirteenth clause, by which the testators purported to deprive themselves of the power of revoking or altering the will without the consent of both of them. It is, I think, a *nudum præceptum*. In this connection it may be noted that the prohibition, such as it is, extends to movable as well as to immovable property. Moreover, it is imposed on the immediate legatees only, whereas the plaintiff's purchases, except in the case of Abraham, one of the six legatees against whom the plaintiff purchased certain shares in execution, were from remote parties. The dismissal of the plaintiff's action is in any case not justified.

I think this appeal should be allowed with costs, and the case sent back to be proceeded with on the footing that the will in question did not create a valid *fidei commissum*.

SCHNEIDER J.—I agree.

Appeal allowed.