

*Present:* The Hon. Sir Joseph T. Hutchinson, Chief Justice,  
and Mr. Justice Wood Renton.

1908.  
June 4.

JUANIS APPUHAMY *et al.* v. JUAN SILVA *et al.*

*D. C. Kalutara, 3,439.*

*Fidei Commissum—Prohibition against alienation—" Outsider "—Pre-  
scription—Waiver—Civil Procedura Code, s. 44.*

A joint last will made by husband and wife contained the following clause:—

" That the income derived at present from the said lands or the right of possession thereof is hereby reserved for the maintenance, expenses, and enjoyment during the lifetime of the survivor out of us, the two persons, to be dealt according to pleasure, and after our, the said two persons' demise, each female and male and their children and grandchildren from generation to generation shall possess the said lands and plantations for ever as stipulated aforesaid; but any land or a portion of land or any tree thereon which is not exempted in the said paragraphs shall not be sold, gifted, given in dowry, or mortgaged, or do any act to alienate to an outsider at any time by any person who is not exempted herein; and it was further ordained that all persons who shall act against these stipulations shall be deprived of the inheritance of their shares or anything belonging to them from this estate."

*Held*, that the above clause created a valid *fidei commissum*, and that the term "outsider" meant all persons other than the beneficiaries, and included even blood relations.

*Held*, also, that it is competent for a party to waive a claim by prescription.

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**A** PPEAL from a judgment of the District Judge of Kalutara (P. E. Rieris, Esq.).

The facts sufficiently appear in the judgment.

*A. St. V. Jayewardene*, for the defendants, appellants.

*Sampayo, K.C.*, for the plaintiffs, respondents.

*Cur. adv. vult.*

June 4, 1908. HUTCHINSON C.J.—

The decision of this case depends on the meaning and effect to be given to a clause in a will. Malawara Arachchige Don Elias Appuhamy and his wife, by their joint will dated December 28, 1855, apportioned in the first ten paragraphs of the will separate lands and houses and trees to each of their ten children, and then in the 11th paragraph declare that after the death of both the testators "each female and male and their children and grandchildren from generation to generation shall possess the said lands and plantations for ever as stipulated aforesaid; but any land or a portion of land or any tree thereon which is not exempted in the said (first ten) paragraphs shall not be sold, gifted, given in dowry, or mortgaged, or do any act to alienate to an outsider at any time by any person who is not exempted herein; and it was further ordained that all persons who shall act against these stipulations shall be deprived of the inheritance of their shares or anything belonging to them from this estate." And in the next paragraph the residue of the testator's estate is distributed amongst the ten children. The reference in paragraph 11 to property "which is not exempted" and to persons "not exempted" appears to be to some provisions in some of the first ten paragraphs by which the eldest son has certain property "to be dealt with by him according to pleasure," and a childless daughter is allowed to give her share to two of her brothers. The will is in Sinhalese; the above extract is from the translation which is put in evidence in the case.

One of the children was Madalena, wife of Don Bastian Appuhamy; to her, in the 6th paragraph of the will, the land in dispute in this action was "apportioned." Both the testators died many years ago, and the will was duly proved. Their daughter Madalena survived her husband and then died; and the plaintiffs claim that on her death they and the 4th to the 8th defendants became entitled, as her children and grandchildren, to the land in dispute, relying on the *fidei commissum* created in their favour by the 11th paragraph of the will. They say that the first three defendants are in unlawful possession of it, and they ask for a declaration of their title and for possession, and for damages as against the first three defendants.

The first three defendants denied that the will created a *fidei commissum*. They said that Don Bastian, who married Madalena in community of property, by deed of July 27, 1872, sold and transferred the land to Don J. Ranasinghe and Galhenege Don Johannis, who in 1875 sold and transferred it to Mathew de Silva, who in 1905 sold and transferred it to the first and second defendants; that they (the third defendant being the husband of the second) thus became the owners of it, and that they had planted and improved it. They further said that, assuming that a *fidei commissum* was created, "it only operates as a restriction against alienation beyond blood relations," and that the transfer to Ranasinghe and Galhenege was therefore valid conveyance, because, I presume, they were blood relations. And lastly, they set up a claim by prescription. And they asked that, if the Court should hold that the will created a *fidei commissum*, the plaintiffs might be ordered to pay them compensation for their improvements.

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Two issues were tried first: (1) Does the will create a *fidei commissum*? (2) If so, does it absolutely prohibit alienation, or does it admit of alienation to parties related as the transferees of Don Bastian were? The other issues related to the claim of the first three defendants for compensation. The proctor of the first three defendants waived the claim by prescription.

Evidence was given that Ranasinghe (one of the transferees from Don Bastian) had married a sister of Madalena, and that the other transferee of 1872 is a nephew of Madalena.

The District Judge gave judgment declaring the plaintiffs entitled to a share in the land and to damages, and that "the defendants" are entitled to compensation, to be afterwards ascertained. He said that he had held in a previous case, and he still held, that this will created a *fidei commissum*; and that, even assuming that alienation among the *fidei commissarii* was permissible, that would not help the defendants (that is, the first three defendants), who are not, and whose vendor was not, of that class. The first three defendants appeal against that judgment.

I am of opinion that the will created a *fidei commissum* in favour of the "children and grandchildren from generation to generation" of Madalena; that the prohibition against alienation adds nothing to the *fidei commissum*; that the attempted alienation by Madalena's husband could have no effect on the rights of her children and grandchildren, whatever effect (if any) it might have on her own life interest or on her rights to the other benefits given to her by the will. I also think that the word "outsiders" means persons other than the beneficiaries, that is, in the case of the land apportioned to Madalena, the descendants of Madalena. No rights as against Madalena's descendants were acquired by the sale of 1872.

The appellant's counsel argued that if the sale of 1872 was a breach of the prohibition against alienation, the effect of it was to

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 HUTOBINSON appellants have acquired a prescriptive title by possession since  
 C.J. 1872. This might be an arguable point if an issue on it had been  
 raised. But there is no evidence or admission as to the period of the  
 appellant's possession; they expressly waived any claim by pre-  
 scription when the issues were settled in the District Court, and they  
 ought not to be allowed to set it up now. Their counsel contended  
 that a claim by prescription cannot be waived. I have no doubt that  
 it can. When one party says that he does not rely on a claim by  
 prescription, the other party adduces no evidence to rebut such a  
 claim and therefore the Court must treat the claim as not proved.  
 And even if it had not been waived, there is no evidence here to  
 support it.

I would dismiss the appeal with costs.

WOOD RENTON J.—

I concur. On the question of the construction of the will I have nothing to add. But I desire to say something as to the waiver of a claim by prescription. Mr. Jayewardene contended that, although there was an express waiver of any claim on this ground at the trial, it was not binding on him here, inasmuch as section 44 of the Civil Procedure Code enacts that "if the cause of action arose beyond the period ordinarily allowed by any law for instituting the action, the plaintiff must show the ground on which such exemption is claimed." This section, says Mr. Jayewardene, enacts substantive law, and its provisions cannot be waived (*cf. Mutiah Chetty v. Maricar*<sup>1</sup>). I do not think that section 44 of the Civil Procedure Code—whether its provisions can or cannot be waived—has any application here. It contemplates cases in which the bare recital of the facts in the plaintiff suffices to disclose a *prima facie* bar by prescription. In the present case, as Mr. Jayewardene was constrained to admit, it is only by taking together the plaintiff, the answer, and evidence adduced for a totally different purpose at the trial that the possible existence of any such bar can be evolved. Section 44 does not apply to a case of that kind. There is nothing in that section, or in any other law of which I am aware, to prevent a litigant from waiving a claim by prescription set up by himself.

*Appeal dismissed.*

<sup>1</sup> (1907) 10 N. L. R. 206; 11 N. L. R. 50.