Present: Porter and Schneider JJ.

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GUNAWARDENE *v.* VISVANATHAN.

102—D. C. Galle, 19,023.

Fidei commissum—*Usufruct—Property left to wife subject to condition that she shall not sell, &c., but only hold and possess the same—Civil procedure Code, s. 218—Seizure of interest of* fidei commissarius.

The words of a last will were as follows: "I give and devise all my immovable property unto my wife, subject, however, to the condition that she shall not sell, mortgage, or encumber, or in any wise alienate the same, *but that she shall only hold and possess the same during her lifetime*, and after her death the same shall devolve in equal shares on my two children, H and S."

Held, that the will created a *fidei commissum*, and not a mere usufruct in favour of the testator's wife, and that during her lifetime the interests of H cannot be seized in execution.

THIS was an action under section 247 of the Civil Procedure Code for a declaration that a half share of the house in question was not liable to be sold under the writ of execution issued in D. C., Colombo, 687/1920, at the instance of the defendant against the plaintiff's son, Paulus Hector.

The house belonged to the plaintiff's late husband, K. Sinno Appu, and he dealt with it by his last will (see below).

The plaintiff's case was that by the last will the house was given to her subject to a *fidei commissum* in favour of Paulus Hector and his brother. The defendant's case was that the last will did not create a *fidei commissum*, but that the plaintiff obtained on it only a usufruct. The District Judge dismissed plaintiff's case.

The last will was as follows :—

A. (P 1). No. 353.

This is the last will and testament of Kiri Kankanange Singho Appu de Silva of Patabendimulla in Ambalangoda in the Wellaboda pattu of Galle District.

I do hereby revoke, cancel, and annul all last wills and testaments and writings of testamentary nature, if any, heretofore made by me.

I give and devise all my immovable property of what kind or nature soever wherever found or situate in possession or expectancy in remainder or reversion unto my lawful wife, Andrawas Patabendi Josie de Vas Gunawardene Haminey, subject, however, to the condition that she shall not sell, mortgage, encumber, or in any wise alienate the same, but that she shall only hold and possess the same during her lifetime, and after her death the same shall devolve in equal shares on my two children, Paulus Hector Lionel de Silva and Lionel Shelton de Silva.

I bequeath all my money and all other movable property unto my wife, the said Andrawas Patabendi Josie de Vas Gunawardene Haminey, for her absolute use and benefit.

I do hereby nominate, constitute, and appoint my wife, the said Andrawas Patabendi Josie de Vas Gunawardene Haminey, as the executor of this last will and testament.

In witness whereof, I, the said Kiri Kankanange Singho Appu de Silva, have set my hand to two of the same tenor and date as these presents at Patabendimulla in Ambalangoda on this Twelfth day of February, One thousand Nine hundred and Sixteen.

Witnesses: Signed and attested.

Samarawickreme (with him *M. W. H. de Silva*), for appellant.

E. W. Jayawardene (with him *H. V. Perera*), for respondent.

November 7, 1922. PORTER J.—

This was an action under section 247 of the Civil Procedure Code for a declaration that a half share of a house is not liable to be sold under the writ of execution issued in D. C., Colombo, 687/1920, at the instance of the defendant against the plaintiff's son, Paulus Hector. The house belonged to the late husband of the plaintiff, who dealt with it by his will. The plaintiff's case was that by her husband's last will the house was given to her, subject to a *fidei commissum* in favour of Paulus Hector and his brother. The defendant's case was that the last will did not create a *fidei commissum*, but that by it the plaintiff obtained only a usufruct. The learned Judge has dismissed the plaintiff's action with costs.

The words of the will are as follows:—

" I give and devise all my immovable property of what kind or nature soever wherever found or situate in possession or expectancy in remainder or reversion unto my lawful wife, Andrawas Patabendi Josie de Vas Gunawardene Haminey, subject, however, to the condition that she shall not sell, mortgage, or encumber, or in any wise alienate the same, but that she shall only hold and possess the same during her lifetime, and after her death the same shall devolve in equal shares on my two children, Paulus Hector Lionel de Silva and Lionel Shelton de Silva."

These words, in my opinion, create a valid *fidei commissum* in the clearest words. Mr. Jayawardene, for the respondent, has referred us to the following cases:—*Mendis v. Fernando* [1]; *Samaradiwakara v. De Saram* [2] (a Privy Council Appeal); *Weerasinghe v. Gunatilake*.[3]

The words of this will, the subject-matter of this action, I think clearly vest the *dominium* of the house in question in the plaintiff. There is a presumption that where property is bequeathed to a

[1] *(1906) 9 N. L. R. 77.* [2] *(1911) 14 N. L. R. 321.* [3] *(1910) 14 N. L. R. 35.*

person with a prohibition against alienation, the intention is presumed to be to confer on him full ownership. As there can be no question of a person who is not the owner of property alienating it, the presumption according to Voet is that where a testator prohibits a legatee from alienating property bequeathed, the intention is to make him owner. It has been argued by Mr. Jayawardene for the respondent that this is only a presumption which may be rebutted if there are other indications of a different intention on the testator's part, and he argues that the words " only hold and possess during her lifetime " show such contrary intention on the part of the testator. The words differ in the several cases cited to us, but in no one of them have the words "hold and possess" been held to convey only a usufruct.

I am therefore of the opinion, as I have already said, that the will in dispute creates a *fidei commissum.*

It has been further argued that even if the will creates a *fidei commissum* the interest of Paulus Hector was liable to seizure. I cannot agree with the contention, as by section 218 (*k*) of the Civil Procedure Code the interest of Paulus Hector is merely a contingent, and not a vested, interest, and so not liable to seizure. I would allow this appeal and set aside the decree, and enter judgment for the plaintiff, with costs both here and in the Court below.

SCHNEIDER J.—

This appeal was argued at very great length for the defendant, respondent, but the point involved was the construction of a simple last will expressed in very appropriate legal language. The facts are these: The plaintiff's deceased husband made the will in question in February, 1916. It was drawn and attested by a notary public. The part of the will which has to be construed is the following: " I give and devise all my immovable property of what kind or nature soever wherever found or situate in possession or expectancy in remainder or reversion unto my lawful wife, Andrawas Patabendi Josie de Vas Gunawardene Haminey, subject, however, to the condition that she shall not sell, mortgage, encumber, or in any wise alienate the same, but that she shall only hold and possess the same during her lifetime, and after her death the same shall devolve in equal shares on my two children, Paulus Hector Lionel de Silva and Lionel Shelton de Silva." But I will quote the very next clause also " I bequeath all my money and all other movable property unto my wife, the said Andrawas Patabendi Josie de Vas Gunawardene Haminey, for her absolute use and benefit."

One of the lands devised was seized by the defendant in execution of a writ against Paulus Hector. The plaintiff claimed the same but her claim was disallowed. She then instituted this action under the provisions of section 247 of the Civil Procedure Code to have it declared that the land was not liable to be sold in execution.

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The parties agreed that there was but one issue, viz. : Did the will create a *fidei commissum*, or is the plaintiff's interest only a bare usufruct. The learned District Judge held against her, and she has appealed. I find no difficulty whatever in construing the will to mean that the testator devised his immovable property to his widow, subject to a *fidei commissum* in favour of his two sons who were to take upon her death. A legacy of land to A subject to the condition that upon his death the land shall devolve upon B is the simplest form of *fidei commissum* known to our law. The *dominium* and possession both vest in A subject to the devolution of title upon his death. I said the will in question was not only simple, but seemed to me to be expressed in appropriate legal language.

The notary appreciated and followed the well-recognized distinction in conveyancing that " devise " is the appropriate verb for a legacy of immovable property and " bequeath " for that of movables. These terms our conveyancers have borrowed from the English law, which is well summed up in the *Encyclopædia of the Laws of England* (*Vol. XIV., pp. 714 and 715*). " It is still true that ' devise ' and ' bequeath ' may be used promiscuously, and that if a testator ' devise ' goods they will pass, and so he may ' bequeath ' lands or houses ; that is to say, where the property dealt with is clear, the intention will not be defeated because the wrong verb is used (*V. Whicker v. Hume,* [1] *Gyett v. Williams,* [2] *Barrington v. Liddell* [3]). But when the subject of the gift is expressed ambiguously, the meaning will be aided by the verb. Thus, where a testator ' gave, devised, and bequeathed ' everything to A for life, and after her death ' gave, devised, and bequeathed, ' the whole of his effects which might be then remaining to B, it was held that the realty passed (*Phillips v. Beal,* [4] *Hall v. Hall,* [5] *Sv. Camfield v. Gilbert* [6]). And, on the other hand, where the testator ' gave, bequeathed, and disposed of ' all his residuary estate, effects, and property—words large enough to comprise realty—yet there it was held that the realty did not pass, and in arriving at that conclusion the Court (*inter alia*) strongly relied on the absence of the word ' devise ' from the operative words (*Coard v. Holderness* [7]). "

It cannot be denied that the words " I give and devise all my immovable property " operate to pass every interest in that property—*dominium* as well as possession, unless there are other words in the will limiting or restricting the interest so passed. I can find no such words. The learned District Judge appears to be of opinion

[1] *(1852) 14 Beav. 518 ; 51 E. R. 381 ; 1 De G., M & G 506 ; 42 E. R. 649 ; 21 L. J. Ch. 406.*

[2] *(1862) 2 John & H. 436 ; 70 E. R. 1,126.*

[3] *2 De G., M & G 500 ; 42 E. R. 958.*

[4] *(1858) 25 Beav. 25.*

[5] *(1892) 1 Ch. 361 ; 61 L. J. Ch. 289.*

[6] *(1893) 3 East, 516 ; 7 R. R. 892.*

[7] *(1855) 24 L. J. Ch. 388 ; 20 Beav. 147 ; 52 E. R. 559 ; V. v. Jarm. 692n.*

that the language used by the testator would have been clearer if he intended to create a *fidei commissum.* I am unable to conceive any other language in which that intention could have been expressed more clearly than it has been in this will. He thinks that " all the testator wanted was that his wife should possess during her lifetime and his children thereafter." Surely such a conclusion is not only not justified by the language in which the intention of the testator is disclosed, but is in direct opposition to the plain meaning of that language. He says that reading the will as a layman, the intention was that the widow should have " only a life interest." There is no doubt that even a lawyer would admit that the widow's interest was intended to be a " life interest." But what is meant by that term? It is a " life interest " in that the duration of the interest is the span of her life—but the question is what is the nature of that life interest—is it a usufruct so that the possession alone passed to her while the *dominium* had passed to the testator's children, or did *dominium* and possession both pass to her, subject to a reversion in favour of those children. He thought the word " only " was of importance in the construction of documents of the nature of this will. But how does the use of that word in this will operate to indicate that the creation of a *fidei commissum* was not intended. The words of devise " I give and devise " having operated to pass the *dominium* and possession, the testator proceeds to place a limitation by prohibiting alienation and indicating the duration of her interest, and he names beneficiaries in whose favour that prohibition is created. We have, therefore, all the essential elements of a *fidei commissum.* A transfer of the *dominium* and possession—and a direction that the property shall pass over to named beneficiaries upon the happening of a future event. The words " only hold and possess " cannot be regarded as in any manner limiting the devise of the property subject to the prohibition against alienation. They mean that she is to " hold," that is, have the *dominium* and possession " during her lifetime." Even if the word " hold " had been omitted, I would still have held that the will created a *fidei commissum*, but the use of that word puts the matter beyond any doubt, and to my mind any argument whatever. Take the words which follow these words immediately " and after her death the same." Logically and grammatically " the same " means the immovable property—not its possession. The two children, therefore, are to acquire their title only after " her death." Till that event happens the language unmistakably indicates that the widow is vested with both the *dominium* and the possession of the property.

It appears to have been argued in the lower Court, and it is very strenuously pressed on appeal that the language of this will is identical with or very similar to the language of the will construed

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by the Privy Council in the case of *Samaradiwakara et al. v. De Saram et al.* as reported in *14 N. L. R. 321*. This argument is based upon a misconception of facts. The provisions of that will are to be found more fully, as that case is reported in *13 N. L. R. 353* and in *2 C. L. R. 104*. There is no similarity in the two documents. Here we have a direct devise to the widow. In that there was no such devise. There, under the head of " Provisions for the widow," it was said she was to stand " vested " with certain property until a distribution as provided in the will took place upon her death. In the same clause she declared that she would have a " life interest " in those properties. The whole of the argument that the widow in that case acquired title to the properties subject to a *fidei commissum* was based upon the use of the word " vested." The Privy Council in its judgment concedes that there would be much force in this argument if the word had been used in its strictly technical sense, but that in their opinion the word had been employed in a loose sense as indicating the time when the enjoyment of the property was to commence (*dies venit*). I am therefore of opinon that there is nothing common in the language of two wills.

In support of the same contention Mr. Jayawardene cited the following cases:—*Mendis v. Fernando* (*supra*), *Fonseka v. Babu Nona*,[1] and *Weerasinghe v. Gunatilake* (*supra*). None of these cases help him. Their language is widely different to the language employed in the will under consideration. The word " possess " was employed in all these cases to indicate the interest conveyed. *Fonseka v. Babu Nona* (*supra*) was decided by Wendt J. He gives as his reason for holding that only a usufruct passed the fact that there are no words of the devise of the *dominium*, but only words expressly limiting the interest to a bare right of possession.

Mr. Jayawardene raised the contention that assuming the interest of Paulus Hector to be that of a *fidei commissarius*, it was an interest which may even at this date be seized and sold. He argued that it was a " spes " and could be the subject-matter of a sale. This argument is not sound. It is the provisions of section 218 of the Civil Procedure Code which must be considered. Under those provisions " a merely contingent interest " is not liable to seizure and sale. That the interest is a merely contingent one is apparent from the reasons to be found in *Mohammed Bhey v. Lebbe Maricar*.[2]

I agree with the order directed by my brother.

Set aside.

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[1] *(1908) 2 S. C. D. 27.*

[2] *(1912) 15 N. L. R. 466.*