Present : Wood Renton J. and Grenier J.

July 4, 1911

NUGARA *et al. v.* GONSAL.

173—*D. C. Colombo,* 31,408.

Fidei commissum—*Devise to son, "his heirs, executors, and administrators"—Prohibition against alienation.*

A last will contained the following clauses :—

Clause 4.—"It is my will and desire that the house and ground .....shall be inherited by my youngest son, A. Bartholomeusz, his heirs, executors, and administrators ; and that my said son should pay Facho, one of my servants, the sum of 10 shillings per month during his lifetime out of the rent of the said house."

Clause 8.—"It is my will and desire that my said six children nor any of them shall be at liberty at any time during their lifetime to mortgage, sell, or otherwise encumber the said property left to them under this my will."

Held, that the will created no *fidei commissum* in favour of the children of Andrew Bartholomeusz.

THE facts are fully stated in the judgment of the Acting Additional District Judge (E. W. Jayewardene, Esq.) :—

This is an action *rei vindicatio.* The plaintiffs allege that one Anna Silva, by her last will dated September 12, 1861, bequeathed her son, A. B. Nugara, the house No. 98, Maliban street, subject to a *fidei commissum.* The executor of Anna Silva, by deed No. 9 dated February 26, 1870, conveyed the premises to A. B. Nugara, who died on September 19, 1900, leaving four sons (the plaintiffs) and one daughter. The plaintiffs claim an undivided four-fifths. The defendant pleads that the last will of Anna Silva did not create a *fidei commissum* ; that A. B. Nugara mortgaged the property in dispute, and on a writ of execution it was sold in D. C. Colombo, No. 93,983, and bought by one Louis Gonsal, and Fiscal's transfer dated November 19, 1885, was issued to him. Louis Gonsal died in 1885, leaving his widow, the defendant, and six children. The question at issue is whether the last will of Anna Silva (Nugara) dated September 12, 1861, created a *fidei commissum* in favour of the issue of A. B. Nugara.

The 4th clause of the will provides that the property "shall be inherited by my youngest son Andrew Bartholomeusz (Nugara), his heirs, executors, and administrators ; and that my said son should pay Facho, one of my servants, the sum of 10 shillings per month during his lifetime out of the rent of the said house."

The 8th clause of the will provides : "It is my will and desire that my said six children nor any of them shall be at liberty at any time during their lifetime to mortgage, sell, or otherwise encumber the said property left to them under this my will."

Voet has stated the rule to be generally that the presumption is that *fidei commissum* has been tacitly constituted in accordance with what

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seems to have been the testator's desire, whenever such presumption is the necessary inference from the terms employed. (*Voet 36, 1, 10, McGregor's translation.*)

In *Santiagu Pillai v. Chinnappillai*[1] the provision that the land "shall be possessed and enjoyed only by A, her children and their children in perpetuity, but shall not be sold," &c., was held to create a valid *fidei commissum*. In *Paterson v. Silva*[2] the will directed that the children should not sell or mortgage the property, but should possess and leave the property to their heirs. Clarence J. had no doubt as to the testator's intention, and held that the word "heirs" meant those persons who would be entitled to inherit the property under the intestacy. In *Ibanu Agen v. Abeyesekera*[3] Wendt J. held that the intention of the testator is of paramount importance, and that where the intention to substitute another (or *fidei commissary*) for the first-named (or fiduciary) is expressed, or is to be gathered by necessary implication from the language of the will, a *fidei commissum* is constituted. Wendt J. seemed to agree with the dissenting judgment of Dias J. in *Tina v. Sadris*,[4] where Dias J. said: "The deed in favour of Andris is a deed of gift to Andris and his heirs, with a prohibition against alienation. It created a valid *fidei commissum*, which is good for four generations." In *Paterson v. Silva*[2] Clarence J. was not inclined to follow *Tina v. Sadris*.[4] In the present case it is clear that A. B. Nugara was not to take this property absolutely. During his lifetime he had to pay 10 shillings a month to the servant Facho "out of the rent of the said house." The testator could not have contemplated a sale of the house by A. B. Nugara; and by clause 8 he is expressly prohibited from mortgaging, selling, or otherwise encumbering the property. The question arises, Who are the persons intended to be benefited, and are they sufficiently designated? Clause 4 provides that this property is to be inherited by "A. B. Nugara, his heirs, executors, and administrators." I think that the word "heirs" sufficiently indicated the class intended to be benefited. The term would originally mean those who would inherit under an intestacy. In Ceylon the word "heirs" is often used to mean children. The words "executors and administrators" are often thoughtlessly used, and in this case the words "heirs, executors, and administrators" mean no more than the one word "heirs." In *Paterson v. Silva* Clarence J. commented on the risk run by testators by needlessly using technical terms not fully understood by them. *Fidei commissa* are arrangements by which a person seeks to control the destination of property after it has passed out of his possession, usually with the object of retaining it in his family. (*Morice's English and Roman-Dutch Law, p. 306, 1st ed.*)

It seems clear to my mind that the testatrix intended that this property should be possessed by A. B. Nugara, and after him by his children, without alienation or encumbrance. I would hold that the will created a valid *fidei commissum*. The plaintiffs are entitled to mesne profits for three years. Let judgment be entered for the plaintiffs as prayed for, with mesne profits at the rate of Rs. 50 a month (for three years) from September 13, 1907, till the plaintiffs are restored to possession, and costs of suit.

[1] (*1889*) *9 S. C. C. 33.*
[2] (*1889*) *9 S. C. C. 33.*
[3] (*1903*) *6 N. L. R. 344.*
[4] (*1885*) *7 S. C. C. 135.*

The defendant appealed.

Bawa, for the appellant.

Van Langenberg (with him *A. St. V. Jayewardene*), for the respondents.

Cur. adv. vult.

July 4, 1911. WOOD RENTON J.—

The material facts have been fully stated by my brother Grenier, and I propose merely to say a few words as to the authorities. The case of *Tina v. Sadris* [1] is a decision of three Judges, the Full Bench as it was then constituted. It is quite true, as Mr. van Langenberg pointed out in his argument in support of the judgment under appeal, that not only did Dias J. dissent in that case from the view of his colleagues Fleming A.C.J. and Lawrie J., but that while Fleming A.C.J. decided the case on one ground, which is entirely in favour of the present appellant, namely, that the use of the words " heirs and administrators " made it impossible to say that it was the clear intention of the donor to constitute a *fidei commissum*, Lawrie J. decided it on another, namely, that a deed in favour of A and his heirs, without specifying who is to take the property on the death of the first grantee, creates no *fidei commissum*, and that the case is not altered by the addition of a clause prohibiting the grantee and his heirs from selling and mortgaging. But Lawrie J. said nothing to indicate that he differed from the view of Fleming A.C.J., or that he thought that the addition of the words " executors and administrators " would have put the case for the heirs on stronger ground. In one or two later decisions, for example, *Ibanu Agen v. Abeysekera*,[2] the suggestion has been thrown out that the interpretation of the particular deed with which the Court had to deal in *Tina v. Sadris* would not be accepted now. There is no express decision to that effect, and although in such cases as *Aysa Umma v. Noordeen*[3] the word " assigns " is coupled with " executors and administrators," there is nothing to suggest that, even if the word " assigns " had not been there, the Court would have been prepared to strike out "executors and administrators " as surplusage, and in *Hormusjee v. Cassim*,[4] Bonser C.J. expressly said that the argument of the appellant's counsel that the words " heirs, executors, administrators, and assigns " in a deed of gift were merely words of description or designation of the person in whose favour the condition was provided, could not be sustained. I do not think that we have any right, although in such cases as these the soundness of the argument in favour of a *fidei commissum* is tested by the words " assigns," to assume that the words " executors and administrators " were not also to be taken account of. In the case of

[1] *(1885) 7 S. C. C. 135.*
[2] *(1903) 6 N. L. R. 344.*
[3] *(1902) 6 N. L. R. 173 and in review (1905) 8 N. L. R. 350.*
[4] *(1896) 2 N. L. R. 190.*

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Paterson v. Silva [1] Clarence J. said that if the question presented by *Tina v. Sadris* should arise again, he would be prepared to consider it anew. Clarence J. was not, however, a party to the decision in *Tina v. Sadris*, and the observation just referred to was purely *obiter dictum*. The decision in *Tina v. Sadris*, although pronounced in 1885, has never been directly dissented from. There can be little doubt but that it must have been followed by the profession in advising upon cases like the one before us. Under these circumstances, I do not think that we ought to depart from it now. I am not prepared to say that the terms of the will before us show a clear intention on the part of the testator to create a *fidei commissum*, and I do not think that the provision for the payment of an annuity to Facho out of the rents and profits of the property with which we are here concerned, whether it was to be paid during Facho's life or during that of the devisee alone, is sufficient to remove the uncertainty which exists on the face of the other provisions of the will as to the testator's intentions. I agree to the order proposed by my brother Grenier.

GRENIER J.—

There was no dispute in this case as to the facts, which I may state to be as follows. One Anna Nugara was the original owner of premises bearing assessment No. 98, situated in the Pettah of Colombo. Her husband, Francisco Nugara, had predeceased her at the time she made her last will, which bears date September 12, 1861. Anna Nugara, at the time of her death, had six children, the youngest of whom was Andrew Bartholomeusz, and it is only with the claim that is set up through him that we are concerned in this appeal. Andrew Bartholomeusz died on September 19, 1900, leaving four sons, who are the plaintiffs, and a daughter, on whose behalf, as far as I can see, no claim has been put forward. She was alleged in the plaint to be the wife of Percy Fernando of Colpetty. By the 4th clause of her will Anna Nugara devised the premises in question to Andrew Bartholomeusz in the following terms :

> It is my will and desire that the house and ground situated at Maliban street in the Pettah of Colombo, opposite the Roman Catholic Church, shall be inherited by my youngest son Andrew Bartholomeusz, his heirs, executors, and administrators ; and that my said son should pay Facho, one of my servants, the sum of 10 shillings per month during his lifetime out of the rent of the said house.

Anna Nugara's will was duly proved in testamentary case No. 2,622 of the District Court of Colombo, and by deed No. 9 dated February 26, 1870, the executors named in the will, as was the practice those days, conveyed the premises to Andrew Bartholomeusz. The conveyance by the executors showed that the premises

[1] *(1889) 9 S. C. C. 33.*

were not required for payment of the debts, if any, of the testatrix, as also, perhaps, that they considered the devise to be free and unfettered.

The plaintiffs, as four of the children of Andrew Bartholomuesz, have brought this action to vindicate their title to four-fifths of the premises in question, alleging as against the defendant that she has been, and still is, in the unlawful occupation and possession of the same. The date of entry by the defendant is not stated, but that, perhaps, is immaterial in the circumstances of this case. The defendant did not traverse the material facts relied upon by the plaintiffs, but she took an objection to their claim on legal grounds, which, if sustained, would result in the dismissal of their action.

Apparently, although the plaint did not say so in express terms, the plaintiffs relied on the 4th clause of this will as creating either a *fidei commissum* or as subjecting the premises simply to an usufruct, and on one or the other ground they asserted title to four-fifths as four of the children of Andrew Bartholomeusz. The defendant, however, made the matter quite clear, and precipitated the issue that was adopted at the trial, by alleging that the devise to Andrew Bartholomeusz was absolute in its terms and subject to no restriction or alienation. The defendant further alleged that Andrew Bartholomeusz entered into possession, and on July 29, 1884, effected a mortgage of a divided portion of the premises, and that on a writ of execution issued against the property of Andrew Bartholomeusz the mortgaged property was sold and bought by Louis Gonsal, who obtained a Fiscal's transfer for the same, bearing No. 2,554 dated November 19, 1885. The defendant is the widow of Louis Gonsal, and she claims the property as belonging to her and her six children.

In view of the averments, both in the plaint and the answer, it was inevitable that the only issue which would arise for adjudication would be the one agreed to at the trial, viz., " whether the last will of Anna Nugara dated September 18, 1861, created a *fidei commissum* in favour of the issue of Andrew Bartholomeusz." And this was the issue decided by the District Judge, but wrongly in my opinion, in favour of the plaintiffs. As I read the 4th clause of the will, either by itself or in connection with clause 8, it is very difficult, indeed, to say what the intention of the testatrix was. A *fidei commissum* should not be lightly imposed, and when the intention does not clearly appear, the inheritance should not be burdened with it. Apart from authority, to which I shall presently refer, I should certainly say that the terms of clauses 4 and 8 militate strongly against the view that the testatrix intended to tie up the property for four generations. If I could place myself in the position of the testatrix, I should say that the use of the words " shall be inherited by my youngest son Andrew Bartholomeusz, his heirs, executors, and administrators," could have conveyed to her mind

only one meaning, and that is, that her son was to take the property in the ordinary way, and that his children (by " heirs " I think was meant his own children, but not remoter descendants) were to take in the same way according to accepted rules regulating the devolution of property in this country. She evidently did not concern herself as to the ultimate destination of the property, as evidence by the use of the words " executor. and administrators." If the notary had thought of the word " assigns ," I have no doubt he would have inserted it. The testatrix was well acquainted with the peculiar duties performed by executors and administrators, for she had appointed three executors, and granted them " all such power and authority as are allowed in law, and specially those of assumption, restriction, and surrogation." I assume she knew that executors and administrators could sell property for the payment of debts, and in the due course of administration, and such being the case, I think she has no intention of imposing a *fidei commissum* as contended for by the respondents. The provisions of clause 8 cannot possibly be reconciled with those of clause 4, and cannot therefore be given effect to in the manner and to the extent suggested by the respondents. It is well known that people of the class to which the testatrix in this case belonged always display the greatest anxiety to keep immovable property in the family, whether they imposed a *fidei commissum* on it or not ; and the present case affords a very good illustration of what I have just said. Such words as are used in clause 8, in the absence of a clear intention to create a *fidei commissum* to be gathered from other relevant parts of the will, should, I think, be looked upon as mere words of caution, admonition and advice, rather than as containing an express prohibition against alienation.

There is, however, a still more serious difficulty which the respondents have to overcome to keep the judgment they have obtained in the Court below. Even assuming that Andrew Bartholomeusz can be regarded as the fiduciary to whom the property has been devised in trust, who are the *fidei commissaries* ? The will contains no provision whatever in respect of any class of persons to be benefited after the death of the fiduciary, unless they be the " heirs, executors, and administrators " of Andrew Bartholomeusz collectively. There can be no serious discussion on this point, because the position is obviously a hopeless one for the respondents, and was properly not advanced.

It was argued that as the testatrix desired that Andrew Bartholomeusz should pay Facho, one of the servants of the testatrix, the sum of 10 shillings per month during his lifetime out of the rent of the house, there was an intention shown by the testatrix to impose a *fidei commissum*. I find the District Judge has adopted this view, but to me it seems a very slender reed for the respondents to cling to in the extremity to which they have been reduced in this case,

Several local authorities were cited to us by both sides, but I think we are bound by the judgment of the Full Bench in the case of *Tina v. Sadris*,[1] although Dias J., one of the Judges, dissented from the rest of the Court. With much respect for that learned Judge, I think that the view taken by Fleming A.C.J., and unmistakably expressed by him as to the effect of the words " heirs and administrators," was correct. This view was practically adopted by Lawrie J., as he said nothing to show that his opinion on the point was not the same as that of Fleming A.C.J.

The case of *Tina v. Sadris* was never over-ruled, and, so far as I am aware, has always been considered a leading authority on the subject dealt by it. In the case of *Hormusjee v. Cassim*,[2] Bonser C.J., who sat with Lawrie J., clearly favoured, if not supported, the view taken in *Tina v. Sadris*, although no reference is made to it in his judgment ; but Lawrie J. made express reference in his judgment to *Tina v. Sadris*, and stated that he retained the opinion he expressed in that case.

For the reasons I have given I would set aside the judgment of the Court below, and dismiss the plaintiff's action with costs in both Courts.

Appeal allowed.