Present : Hutchinson C.J. and Van Langenberg J. *Feb. 17, 1911*

ABEYRATNA *v.* FERNANDO *et al.*

182—*D. C. Kalutara*, 4,170.

Fidei commissum—*Direction that the property devised "shall be the inheritance" of the devisee—Prohibition against alienation by sons and grandchildren.*

A testator by his will gave separate lands to his several sons, and directed that the lands so given to each son "shall be the inheritance" of that son. The will further provided as follows :—

> "As for the aforementioned lands, neither I, nor my five sons, nor the children of my five sons, that is to say, no individual of the said three generations, may sell, mortgage, or gift any of the same ; only the power to enjoy and develop the same is reserved to them."

Held, that the will created a *fidei commissum*, and that it did not confer on the children of the testator absolute title.

THE facts are set out in the judgments.

A. St. V. Jayewardene, for the appellant.

Bawa, for the respondent.

Cur. adv. vult.

[1] *(1885) 7 S. C. C. 135.*

[2] *(1896) 2 N. L. R. 190.*

Feb. 17, 1911

Abeyratna v. Fernando

HUTCHINSON C.J.—

This is a partition action. The parties agreed that lots B and C described in the pleadings formerly belonged to Davith Rodrigo, who by his will gave them to his son Hendrick, and that the Court should first decide the issue "whether the will of Davith created a valid *fidei commissum* in favour of the children of Hendrick, or did it confer on Hendrick an absolute title." The Court decided on that issue that the will created a valid *fidei commissum*. This is the plaintiff's appeal against that decision. The will, which is in Sinhalese, and is dated April 20, 1861, gives in several separate paragraphs specific lands to each of the testator's five sons, one of whom was Hendrick, directing that the lands so given to each son "shall be the inheritance" of that son. And in paragraph 12 the testator says: "As for the aforementioned lands, neither I, nor my five sons, nor the children of my five sons, that is to say, no individual of the said three generations, may sell, mortgage, or gift any of the same; only the power to enjoy and develop the same is reserved to them."

In my opinion the testator here expressed his intention that the land given to Hendrick should be his "inheritance," that is, should be the share of the testator's lands which should be allotted to Hendrick and his descendants, and that Hendrick should not have power to alienate it, but that after his death it should go to his children. I would therefore dismiss the appeal with costs.

VAN LANGENBERG A.J.—

This is an action for the partition of a land The contesting parties are the plaintiff, who is the appellant, and the ninth defendant. The property in question belonged to one Davith Rodrigo, who died leaving a will, whereby he devised this property to his son Hendrick. Hendrick seems to have sold the land, on the footing that he was entitled to the full *dominium*, and the plaintiff claims under him. The ninth defendant asserts that the devise to Hendrick was subject to a *fidei commissum* in favour of his children of whom the ninth defendant is one. Hendrick died some time before the action, and the ninth defendant claims to be entitled to one-fourth under the will of his grandfather.

The question is, Did the will create a *fidei commissum*? The Judge finds that it did, and the plaintiff has appealed. The clauses of the will that have to be considered are the 9th and 12th. The original was written in Sinhalese, and the translation submitted to Court ran as follows:—

> "9th.—One hundred yards from the border of the high road to the west, 48 yards from south to north, the trees thereon and the houses, with the exceptions of the house newly being erected on the border of the road,

shall be entitled to Hendrick Rodrigo, and a cart road from the high road of the northern boundary of the said garden Madangahawatta up to the seashore shall be opened in common.

12th.—The aforesaid land shall not be sold, mortgaged, nor granted in gift by me, David Rodrigo, or by my five children, or by their children, that is to say, by any one of the three generations, but the same may be possessed and improved."

The Judge thinks that clause 9 can be rendered more correctly thus : " I appoint that such and such lands shall become the inheritance of Hendrick Rodrigo " ; and clause 12 he translates : " As for the aforementioned lands, neither I, nor my five sons, nor the children of my five sons, that is to say, no individual of the said three generations, may sell, mortgage, nor gift away the same ; only the power to enjoy and develop the same is reserved to them."

The impression left on me when I first heard the will read was that it was the intention of the testator to benefit his grandchildren. Mr. Jayewardene argued, however, that the testator, while prohibiting alienation, failed to designate the person in whose favour the prohibition was made, and that therefore Hendrick acquired absolute title. Several judgments of this Court were cited to us where various wills were construed, but it was not suggested that in any one of those wills the words used were precisely similar to those found in the will under consideration. So that we have to consider the case apart from direct authority. As Bonser C.J. observed in *Vansanden v. Mack*,[1] " No special words are necessary to create a *fidei commissum*, but effect is given to it if it can be collected from any expression in the instrument that it was the testator's intention to create it."

I am of opinion that the combined effect of clause 9 and 12 is to create a *fidei commissum*. It seems to me that under clause 12 the testator contemplated the event of Hendrick's children receiving the property, for he prohibits them from alienating the same, and to my mind there is sufficient to show that the provision prohibiting Hendrick from alienating the property was made for their benefit. I would dismiss the appeal with costs.

Appeal dismissed.

[1] *(1895) 1 N. L. R. 311.*