

1917.

[PRIVY COUNCIL.]

Present : Earl Loreburn, Viscount Haldane, Lord Sumner,
and Lord Parmoor.

DE LIVERA *et al.* v. ABEYASINGHE.

D. C. Galle, 11,672.

Fidei commissum — Construction of will — Improvements effected by purchaser from fiduciarius—Compensation.

A husband and wife, by their joint will dated August 25, 1860, devised the land in question to their three sons C, F, and G, subject to a life interest as to half in favour of the testator's wife, with the following provision: "When my three sons aforesaid become absolutely entitled, they and their posterity are at liberty to possess and enjoy the same for ever, but they and their heirs are respectively restricted from selling, mortgaging, or otherwise alienating the same, and the same I hereby entail as a *fidei commissum*."

There was also a provision that should any of the sons die without issue, their widows should possess the entailed property, with the same restrictions, in proportion to their respective shares, and that after their respective deaths the entailed property was to revert to the children of the testator upon the same restrictions.

C died leaving a daughter Mary, who had two children—the plaintiff's mother and Victor. Mary gifted her one-third to her son Victor, who transferred it to Kadiravel Chetty (appellant).

Held, that the will created a *fidei commissum*, which prevented Mary from disposing of the property to the prejudice of the plaintiffs.

The right to compensation for improvements of a purchaser from a *fiduciarius* considered.

THE facts are stated in the judgment of the Supreme Court reported in 18 N. L. R. 57.

May 15, 1917. Delivered by EARL LOREBURN:—

Their Lordships are of opinion that this will created a *fidei commissum*, which prevented Mary de Livera from disposing of this property, and also prevented both of her uncles and her son from doing so to the prejudice of the plaintiffs. It was admitted in argument that if there is a *fidei commissum* these parties could not alienate to the appellant, and it follows that the plaintiffs have made out their title.

The judgments appealed from are admirably clear, and dispense with any need for travelling over the ground again.

In regard to the claim for compensation, the claim of right by a trespasser to compensation for money he has expended in *impensae utiles* involves a wide principle. It does not seem to be necessary to scrutinize the various dicta of learned writers, none of which are

exhaustive, or to enter at all upon the law in South Africa, as to which no question arises in the present case. An abstract proposition that a person who is not acting *bona fide* can get compensation does not carry any one the whole length. Obviously, it must also be considered whether if the *mala fides* involves fraud, any compensation could possibly be recovered. Also it would be necessary to inquire what are *impensae utiles*, and whether the measure of compensation should be the enhanced market value. This does not arise for decision in the present case; nor is it necessary to enter upon the decision in *Pulle's Case* (1913, 16 N. L. R. 474).¹ Their Lordships think that the circumstances of the present case do not render it necessary to consider the principle of that decision.

In the facts of the present case the appellant was not acting *bona fide*. He knew the risk, he knew the facts, showing that he was a mere trespasser in what he did, and he knew that he was invading the rights of the heirs, and knew that Mary de Livera had no right to alienate, and knew he was altering the character of this property without the consent of the persons whose interest it was to preserve it, and without any authority from any one except the trustee whose duty it also was to preserve it. Their Lordships think, in such a case as this, it is quite impossible to suppose compensation would be payable; and they will humbly advise His Majesty that this appeal should be dismissed, with costs.

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 EARL
 LOREBURNE
 De Livera v.
 Abeyasinghe

Appeal dismissed.

