Present: Bertram C.J. and Schneider J. 1932.

APPUHAMY *v.* JAYASOORIYA.

319—D. C. Galle, 17,972.

Fidei commissum—*Last will—Devise to children and their heirs—Prohibition against alienation—Permission granted to one heir to give the property to another heir—Division of property among co-heirs by auction—Purchase of one property by one heir—Conveyance in his favour by all the other co-heirs—Is property subject to* fidei commissum?

By a last will made in 1859 the testatrix gave her property to her four children, subject to the following condition: "I do hereby direct that my said heirs and their heirs and executors should possess for ever all the immovable property, and that they are prohibited from selling, giving in gift, mortgaging, renting out, or giving otherwise any of these property to any other persons, and they are at liberty to give them in any way they choose to their co-heirs or their descending heirs or executors according to their own pleasure, or upon a proper valuation thereof." The children made a distribution of the property among themselves by holding an auction among themselves. The field in question was purchased by a son (Niculas), and a deed was executed in his favour by all the other interested parties.

Held, (*a*) that the will created a *fidei commissum* in favour of the children and descendants of the devisees; and (*b*) that the deed in favour of Niculas was subject to the conditions stated in the will, and that it was not one given in pursuance of the liberty contained in the concluding part of the above-quoted clause.

The last will in question was as follows:—

Testament.

No. 690.

I, Siribaddanage Sipila Hamine, widow of Catukurunde Mohottige Don Mathes de Silva Appuhami of Mipe, in the Talpe pattu of Galle District, am now decrepitude with age and sick, and consider it expedient to dispense my movable and immovable property according to my heart's desire. I have therefore moved by various considerations in my sound mind and understanding, neither instructed nor constrained by others, given directions in the manner following to draw out this last will and testament, to wit:—

I do hereby direct to be given on behalf of Buddha, and so forth, three gems in which I believe, five kurunies extent of the field Ambagahakanatiakumbura; bounded on the east by Ehalumulanemahakandia, on the south by Gallewittegodawatta and the remaining portion of Ambagahakanatiya, on the west by Divelkumbura, and on the north by Pinkumbura, situated at Mipe, and a piece of ground twenty yards

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breadth from the garden Girambagahakanattewatta; bounded on the east by Dombagahahenewatta, south by Gallawitigoda Pansalawatta, on the west by Divelkumbura, together with all the fruit trees growing therein, to the temple Gallawitigoda vihare at Mipe, to be possessed in common by priests resorting thereto from the four quarters according to Buddhism.

2. I do give and bequeath one-half of the soil and one-fourth part of the fruit trees of the garden Illeperuma-atchywatta, situated at Mipe, together with one-sixth part of the planter's share of the said garden entitled to me by right of purchase, to my sister's son Moodogamuwa Malwattege Don Andris who resides in the same garden.

3. I do hereby direct to be given unto my grand-daughter, the daughter of one of my sons, named Don David de Silva Mohotti Appuhami, now deceased, the sum of five pounds-sterling when she attained to the age of maturity.

4. I do hereby direct that all my movable and immovable property, excepting the bequests in the first, second, and third clauses aforesaid, to be equally entitled to my beloved children, Don Siman de Silva Mohotti Appuhamy, brother Don Niculas de Silva Mohotti Appuhamy of Mipe, sister Dona Mariyana Hamine of Wallawe, and Dona Gimara Hamy of Mipe.

5. I do hereby direct that my said heirs and their heirs and executors should possess for ever all the immovable property including gardens, fields, owiti grounds, and fruit trees bequeathed as per second and fourth clauses, excepting the lands offered as per first clause and money bequeathed upon the third clause of this last will, and that they are prohibited from selling, giving in gift, mortgaging, renting out, or giving otherwise any of those property to any other persons, and they are at liberty to give them in any way they choose to their co-heirs or their descending heirs or executors according to their own pleasure, or upon a proper valuation thereof.

6. I do hereby revoke all other testaments and codicils if there is any executed by me by this last will and testament.

7. I do hereby nominate and constitute my afore-mentioned sons, Don Siman de Silva Mohotti Appuhamy and Don Niculas de Silva Mohotti Appuhamy, as executors of my last will and testament.

8. I, the said Siribaddanage Sipila Hamine, have in my sound mind and understanding hereunto set my seals and signature with great pleasure, as the foregoing clauses contain my will and pleasure, and executed on May 17, 1859, at Mipe.

Signed, witnessed, and attested.

Soertsz, for defendant, appellant.

J. S. Jayawardene, for plaintiffs, respondents.

March 23, 1922. DE SAMPAYO J.—

This case involves the true construction to be placed upon an old will, and the effect to be given to a deed among the legatees under the will. The field which is the subject of this action belonged to one Sepila Hamine who made her will in the year 1859. By the second clause of that will, she gave a certain share

of a land to her nephew, Don Niculas, and by the fourth clause she gave all her other immovable property to her four children, Don Siman de Silva, Don Niculas de Silva, Dona Mariyana Hamine, and Dona Gimara Hamy. The fifth clause of the will contained certain conditions which have to be interpreted in connection with this appeal. The fifth clause of the will runs thus—

> "I do hereby direct that my said heirs and their heirs and executors should possess for ever all the immovable property including gardens, fields, owiti grounds, and fruit trees bequeathed as per second and fourth clauses, excepting the lands offered as per first clause and money bequeathed upon the third clause of this last will, and that they are prohibited from selling, giving in gift, mortgaging, renting out, or giving otherwise any of those property to any other persons, and they are at liberty to give them in any way they choose to their co-heirs or their descending heirs or executors according to their own pleasure, or upon a proper valuation thereof."

The first question is whether this clause creates a *fidei commissum*. It is contended on behalf of the appellant that it does not, on the ground that it does not sufficiently designate the person or persons who are to take after the immediate legatees, the children of the testatrix, but I think this clause read, as a whole, shows that the testatrix intended that after her children, their children and descendants should have the property. The testatrix died long years ago. Her will was proved in the year 1879, and in the year 1880 the beneficiaries under the will made a distribution of the property among themselves. For this purpose they appear to have adopted the course, which is not uncommon, of holding an auction amongst themselves. At the auction this field was purchased by Don Niculas, one of the sons of the testatrix, and all the rest of the parties interested, including the auctioneer, executed a deed in his favour, by which, after reciting their purpose and intention of distributing the estate amongst themselves, they renounced their rights to Don Niculas in respect of this field, and declared they authorized and empowered Don Niculas and his heirs, executors, and administrators "to be entitled to the said premises, to possess for ever, and to do whatever they like with the same." However imperfect the words of the deed may be as a matter of conveyance, it clearly was intended to effect a division of the various lands of the textatrix among the heirs, but such a deed would not, in my opinion, put an end to the *fidei commissum* originally created by the will, but in the hands of Don Niculas the land would be subject to the conditions mentioned in the will. It is contended, however, that this deed is one authorized by the concluding part of clause five of the will, by which the heirs

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were given liberty to give the property to their co-heirs or their descending heirs according to their pleasure. In my opinion the deed in question was not one given in pursuance of the liberty contained in this clause, nor is it a deed of the nature contemplated. It may, as I have said, be a distribution, and does not alter the rights of the parties under the original will. The importance of these questions is that the defendant claims a half share of the field under the following circumstances: In the year 1884, in execution against Don Niculas, a half share of the field would appear to have been sold and purchased by one Elias Jayasinghe, and since that year that half share would appear to have passed from hand to hand until it came to the defendant by virtue of a deed of gift in the year 1919 granted by Bastian Silva, the last holder. If the will in question created a *fidei commissum*, and if the effect of the deed among the heirs was such as I have ventured to describe it, then the execution sale and the subsequent transactions have no effect so as to deprive those claiming under the will of the rights intended for them. In view of the opinion I have expressed with regard to the nature of the will and the effect of the deed, these transactions on which the defendant relies are inoperative. There is a further question in the case, namely, whether, apart from all other questions, the plaintiffs, who are the children of Don Niculas, have not acquired a title by prescription. There is a body of evidence called on their behalf which the District Judge credited, and upon which he has expressed a very strong opinion that ever since the deed in favour of Don Niculas, he and his children always passed the land to the exclusion of the purchaser at the Fiscal's sale and those claiming under him. The plaintiffs are entitled to depend on this source of title apart from that derived under the will.

I, therefore, think the judgment of the District Judge in favour of the plaintiff is right, and this appeal should, therefore, be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.