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## IBANU AGEN *v.* ABEYASEKARA.

*D.C., Galle, 6,242.*

Fidei commissum—*Requirements of—Construction of last will*—Paramparáwa.

In construing a will, the intention of the testator is of paramount importance.

Where the intention to substitute for the fiduciary a *fidei commissary* is expressed, or may be gathered by necessary implication from the language of the will, a *fidei commissum* is constituted. No particular form of words is necessary to create it.

In cases of doubt the inclination of the Court is not to put any burden upon the inheritance.

If a fiduciary is prohibited from alienating the property devised, without it being made apparent what person or class of persons was to be benefited after the death of the fiduciary, the prohibition would be of no effect, and he would take the property absolutely.

Where A made a last will containing the words following:—

"I hereby direct that O and his posterity (*paramparáwa*) shall possess the following lands, &c. Except such possession, these lands or any part thereof shall not be sold, mortgaged, or made over in any other manner, or seized for his debt."

*Held*, that these words created a *fidei commissum*, and that *paramparáwa* meant lineal descendants of the testator.

THE plaintiff, as the executor of the last will and testament of Mohamad Baay Ibanu Agen, alleged that a land called Pattigalawatta was sold by one Daniel W. Obayasekara to the deceased testator in 1879; that the plaintiff in pursuance of a verbal lease put the sixth defendant in possession of the said land; that the sixth defendant paid rent till 1898; that in 1899 the first, second, fourth, and fifth defendants claiming title to it leased it to the third defendant; and that the third and the sixth defendants in collusion were in unlawful possession of it. He prayed for ejectment and damages.

It was argued at the trial that, of the several issues raised, the preliminary issue, whether by clause 4 of the codicil of the last will of Daniel Obayasekara a valid *fidei commissum* was created in favour of the children and grandchildren, should be tried first.

That clause was translated as follows by the Interpreter of the District Court:—"I hereby direct that the said Mr. Obayasekara, Proctor, and his posterity shall possess the following lands, viz., five-eighths parts of, &c.....Except such possession, these lands or any part thereof shall not be sold, mortgaged, or made over in any other manner, or seized for his debt".

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It was argued for the plaintiff that these words amounted to only a prohibition against alienation, and that there was no clear indication as to whom the devisee was to pass the property.

The Acting District Judge (Mr. James Peiris) held as follows:—

"The Sinhalese words are somewhat obscure. Literally the words may be read thus: 'It is hereby directed that the said Mr. Obayasekara, Proctor, and down to his descendants (or posterity), shall possess the said property.' Taking the clause as a whole, I think it is clear that the intention of the testatrix, who was the paternal aunt of Daniel, was that the property should be preserved in the family. It was argued by plaintiff's counsel that the said words were equivalent to the expression from "generation to generation," and *9 S. C. C. 33* was relied upon as showing that such words were not distinct enough to indicate that class of persons in whose favour the trust is created. In view of the decision in *Vansanden v. Mack* (*1 N. L. R. 311*) and other recent cases in which that case has been followed, I doubt whether the Supreme Court will now take the same view as Burnside, C.J., took in *Santiago Pillai v. Chenna Pillai*. In the case reported at the foot of the same page of the *S. C. C.* the words which were held to constitute a good *fidei commissum* were not so strong as the words used in the codicil in this case. It may, however, be contended that, on account of the use of the words 'his debts,' the prohibition against alienation only applies to Daniel, but I do not think that was the intention of the testatrix; even if it were, as the plaintiff claims under a purchase from Daniel himself, his title is a bad one. It could only enure during the lifetime of Daniel, who is now dead. I therefore find the first issue in favour of the defendants. Under the circumstances it is unnecessary to fix the case for the trial of the other issues. I dismiss plaintiff's case with costs."

The plaintiff appealed. The case was argued on 29th May, 1903.

*Bawa*, for plaintiff, appellant.

*Sampayo, K.C.*, and *Walter Pereira*, for defendant, respondent.

10th June, 1903. WENDT, J.—

The plaintiff, as the executor of one Mohamed Baay Ibanu Agen, who acquired the land in question by purchase from one Daniel Obayasekara on a deed of conveyance dated 8th July, 1879, seeks to vindicate it from the defendants. The first, second, and fourth defendants, who are three of the six children who survived the death of their father Daniel Obayasekara in August. 1890, claim to be entitled to an undivided half of the property, which they have leased to the third defendant. They say that Obayasekara held the land subject

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to a *fidei commissum* created by the codicil of his aunt Dona Clara Obayasekara, and could not therefore alienate the same, but that on his death his children succeeded to the property by substitution. The sole question argued before us was whether the learned Acting District Judge was right in holding that the codicil created a valid *fidei commissum*.

By her last will, dated 9th November, 1864, Dona Clara devised the land in question with others to Daniel Obayasekara (who was a proctor) and his brother Lambertus "to their absolute use and benefit in equal shares." This will was in the English language. The codicil, dated 6th July, 1872, was however in Sinhalese. By it the testatrix made several important alterations of the former will. By clause 1 she revoked the devise to her two nephews, and by clauses 3 and 4 she devised certain lands in severalty to Lambertus and Daniel respectively. The two clauses are couched in identical terms. Of the 4th clause, which is now in question, each party has presented its own translation. The following represents that made by the District Court Interpreter, as corrected by the Acting District Judge, himself a Sinhalese gentleman perfectly conversant with the language:—

"[I give] to the above-mentioned proctor [here follow the names of the lands]. It is hereby directed that the said Mr. Obayasekara, proctor, and down to his descendants (*Perakadoru mahatmayata saha ema paramparawa dakwa*) or posterity shall possess the said property. Except such possession, these lands or any part shall not be sold, mortgaged, made over in any other manner, nor seized for his debts."

In construing a will the paramount question is, what was the intention of the testator? And if it is clear that the person to whom the property is in the first place given is not to have it absolutely; if it is also clear who is to take after him, and upon what event, then the Court will give effect to the testator's intention. No particular form of words is necessary to create a *fidei commissum* (*Voet, 36, 1, 10*; Van Leeuwen, *Censura Forensis, pt. 1., lib. 3, chap. 7, section 7*). Where the intention to substitute another (or *fidei commissary*) for the first taker (or fiduciary) is expressed or is to be gathered by necessary implication from the language of the will, a *fidei commissum* is constituted. Where these requisites appear, it matters not that the language employed is open to criticism, and therefore too much weight ought not to be attached to decided cases in which the Courts, seeking to ascertain the testator's intention from variously worded wills and varying circumstances, have pronounced for or against the *fidei commissum*. One principle of construction, however, is generally

recognized, and that is that, where there is doubt, the inclination of the Court is against putting any burden upon the inheritance. (*Tina v. Sadris, 7 S.C.C. 135, per* Fleming, A.C.J., citing Van Lèeuwen's *Commentary, lib. 3, 8, 4: Kotze's Translation, vol. 1., p. 376*).

Looking, then, at the language of the will before us, it is plain that Daniel was not to take absolutely; he is to possess, and besides possessing he is not to sell, mortgage, or otherwise transfer the property—this is a prohibition of voluntary alienation by him—neither is the property to be attached for his debts, which is a prohibition against alienation *in invitum*. It is, however, settled that merely to prohibit a person to whom you have given property from alienating it would be of none effect, and he would take the property absolutely, unless the reason for the prohibition were apparent: that is to say, unless it appeared that your object was to preserve the property, so that on that person's death, or on the happening of any other condition which has been imposed, it shall pass to another person or class of persons whom you wished to benefit (*Voet, 36, 1, 27; Juta's Vanderlinden, Second Edition, p. 63*). In my opinion such a class is distinctly indicated in the direction that Daniel's descendants shall possess the property. The testatrix was the sister of Daniel's father, and her intention seems to have been to keep the property in the Obayasekara family. I understand that the term *paramparawa* in the connection in which it is used clearly conveys the idea of lineal descendants.

As to the cases cited at the argument, I doubt whether the interpretation in *Tina v. Sadris* would be accepted now in view of later decisions, and especially of *Vansanden v. Mack* (*1 N. L. R. 311*) and Dias, J., dissented from the opinion of the majority of the Judges. In *Hormusjee v. Cassim* (*2 N. L. R. 190*) the donor expressly contemplated alienation, for he gave the property to his own son and his "assigns," and the deed was one to which the Ordinance No. 11 of 1876 applied. In *Dias v. Kaithan* (*2 N. L. R. 233*) there was no restraint whatever on alienation.

For the reasons I have given I think the appeal should be dismissed.

LAYARD, C.J.—

I agree. The will appears to me to indicate to whom the property shall pass on Daniel's death, viz., to Daniel's descendants. It further contains an express provision against alienation either voluntary or *in invitum*. It is clearly laid down in the

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Roman-Dutch Law and in the later decisions of this Court that no special words are necessary to create *a fidei commissum*, but effect is given to a *fidei commissum* if it can be collected from any expressions in the will that it was the testator's intention to create it. The language used in the will leaves little doubt in my mind that it was the intention of the testatrix here to impress a *fidei commissum* on the property in the interests of Daniel and his descendants.

The appeal therefore will be dismissed with costs.