April 11, 1911

Present : Lascelles C.J. and Grenier J.

FERNANDO *et al.* *v.* SALGADO *et al.*

80—*D. C. Negombo*, 8,206.

Fidei commissum—*Property to go over to Crown in case of alienation.*

A joint will contained the following clauses :—

(1) We, the testators, do hereby ordain that the property inherited by the right of our parents and those acquired by us, which are more fully described hereunder, are to be devolved on the hereafter-mentioned seven children and others who shall be the heirs after our death, and that they are at liberty to possess severally as their shares of inheritance.

(2) After our death they shall take charge of their said respective properties, and they, their children, grandchildren, heirs, and representatives shall possess the same, but they shall not sell or alienate the properties in any manner, or cause the same to be subject to any mortgage or security ; should such an act be committed, the right of the person who sells or alienates the land, or causes the same to be subject to a mortgage or security, shall cease ; and it is ordained that the same shall go over to the Crown.

Held, that the will did not create a *fidei commissum*.

THE facts are set out in the judgment of Grenier J.

Vernon Grenier, for the plaintiffs, appellants.

H. A. Jayewardene, for the defendants, respondents.

Cur. adv. vult.

April 11, 1911. GRENIER J.—

Don Philip Constable and his wife Justina Lusena made a joint will on March 12, 1842, and the only question argued on this appeal was whether it created a *fidei commissum* in respect of the lands which are the subject of the action. The plaintiffs alleged that the testator and testatrix devised the lands to their son Maximiano Philips, who died intestate about thirty years ago, leaving an estate under the value of Rs. 1,000 ; that Maximiano left as his heirs his widow Agida Fernando and four children : (1) Gregoris, (2) Madelena, (3) Desideris, and (4) Elizabeth ; and that by an amicable arrangement between these four persons the lands in question were allotted to Elizabeth, whose children the plaintiffs are. Elizabeth left a

last will, which was proved in case No. 1,062 of the District Court of Negombo, and probate thereof was granted to the father of the plaintiffs. As their cause of action the plaintiffs alleged that the defendants, who were not entitled to any shares in the lands alleging that they had purchased the same under a writ, took forcible possession on November 10, 1909, to plaintiffs' damage of Rs. 500.

The defendants denied the ouster, but admitted the original source of title as having been in Don Philip Constable and his wife, as also the devolution of that title on the plaintiffs ; but they denied that there was any amicable arrangement by which the lands were allotted to Elizabeth, under whom plaintiffs claim, or that any valid *fidei commissum* was created by the will. The defendants alleged that under writ in case No. 7,271, D. C. Negombo, against the heirs of the four children of Maximiano, the lands were sold and purchased by the defendants, who obtained Fiscal's transfers for them—Nos. 6,108, 6,109, and 6,110, dated April 27, 1910.

At the trial two issues were framed : (1) Does the will of March 12, 1842, create a valid *fidei commissum* ? (2) If so, can the plaintiffs alone maintain this action ? The District Judge was of opinion that there was no *fidei commissum*, but his reasons do not seem to be sound, and I cannot adopt them. I think he made a mistake in holding that the *fidei commissary*, or the party to benefit, was the Crown, and that failing the Crown the lands were to go to the devisees, their children, grandchildren, heirs, and representatives. This is how I understand the judgment of the District Judge, as it is a very short one, and contains little or nothing in the shape of statements, arguments, and conclusions. But he has, I think, distinctly held that the several devises in the will were absolute ones, and that by the use of the words " heirs and representatives " the devisees were given power to will or transfer the property.

This makes it necessary that the will should be carefully and critically examined. I have read and re-read it, and I can only say that it is a very confused document, and it is difficult to say what was in the mind of the notary who drew it up. It is impossible at this distance of time to find out what the instructions were that the testator and testatrix gave him, but it is a well-known fact that, in dealing with property by last will, there is a determination generally shown by testators of the class to which the testator and testatrix in this case belong to impose conditions in the nature of a *fidei commissum*, so as to keep the property in the family. Now, in the second clause of this will I find these words : " We, the testators, do hereby ordain that the property inherited by the right of our parents and those acquired by us, which are more fully described hereunder, are to be devolved on the hereafter-mentioned seven children and others who shall be the heirs after our death, and that they are at liberty to possess severally as their shares of inheritance."

April 11, 1911

GRENIER J.

Fernando v. Salgado

Standing by itself, the clause contains words the meaning and intention of which are plain enough. The use of the words " who shall be the heirs after our death " and the words " are at liberty to possess severally as their shares of inheritance " indicates an intention on the part of the testator and testatrix to make an absolute devise to each of his seven children of separate and distinct lands or shares of lands. And this they proceed to do in the succeeding clauses. The will deals with no less than thirty-parcels of land, which are specifically left to each of the seven children, some of them getting three and some more. There are two devises to two adopted sons of the testator and testatrix. Immediately following on those dispositions is the clause by which it is said a *fidei commissum* was imposed : " In this manner, after our death they shall take charge of their said respective properties as we have ordained, and they, their children, grandchildren, heirs, and representatives shall possess the same, but they shall not sell or alienate the said properties in any manner, or cause the same to be subject to any mortgage or security ; should such an act be committed, the right of the person who sells or alienates the lands or land, or causes the same to be subject to any mortgage or security, shall cease ; and it is ordained that the same shall go over to the Crown." If this clause is strictly construed, then it follows that the testator and testatrix imposed seven independent and distinct *fidei commissa* on the lands dealt with by the will. Not only so, but they imposed two more *fidei commissa* on the lands devised to the two adopted sons, Juanis and Francisco. Could this have been their intention ? For, after all, in cases of this kind it is a question of intention. Or, was it their intention, by the insertion of a provision against alienation, the purport of which they failed to realize, to seek to secure their grandchildren and descendants in the succession, according to the ordinary rules of inheritance, of the several lands left to their seven children unfettered by any trust ? The strong inclination of my opinion is in favour of the latter proposition, and my reason is this. If either the testator or the notary had any the least knowledge of the law of *fidei commissum*, and their intention was to burden these properties with one or seven trusts, they would have inserted a clause prohibiting alienation absolutely. Here they appear to have contemplated and provided for alienation, which can only be explained on the hypothesis that they intended that the several devises should be absolute ones, and not in the nature of a devise to a fiduciary, who has a real but burdened right of property. The gift or disposition therefore in favour of the Crown, in case of alienation, appears to my mind to militate against the view that a *fidei commissum* was intended, because no alienation could affect the operation of a trust of this nature under the Roman-Dutch law, as the interests of four generations are bound up in it, and the *fidei commissum*, instead of running out its legal span, would come to

an abrupt termination. Perhaps it was intended that there should be a gift over to the Crown in case of alienation.

I am supported in the view I have taken of the clause in question, and of the will generally, by the conduct of the four children of Maximiano Philips. They appear to have made an amicable arrangement, on the plaintiffs' own showing, by which the three lands in question were allotted to one of them, Elizabeth, the mother of plaintiffs. What, then, became of the alleged *fidei commissum*, according to the terms of which these lands were to go to all the "children, grandchildren, heirs, and representatives" of Maximiano ? The children of Maximiano undoubtedly understood the will as containing an absolute devise to their father, and on that footing, in exchange presumably for other lands, three of them gave the lands in question to Elizabeth, to be possessed and enjoyed by her as her separate property. The two cases, (1) *Aysa Umma v. Noordeen*,[1] (2) same case (in review), referred to in the course of the argument, are distinguishable from the present case, in that the word "assign" is not present here. It is difficult to say what precise meaning was intended to be attached to the words in this will "heirs and representatives." It seems to be entirely out of place in the connection in which it is used, and was put in, I think, haphazard by the notary, who must have been impressed with the comprehensive meaning of the words and their sonorous sound.

In my opinion it is not possible to hold, for the reasons I have given, that the will under consideration created any *fidei commissum*, and it is a wholesome principle of the law relating to the subject, that in cases of doubt the Court should not put any burden upon the inheritance. I would dismiss the appeal with costs in both Courts.

LASCELLES C.J.—I agree.

Appeal dismissed.

[1](1902) *6 N. L. R. 173.*