

Present : De Sampayo A.J.

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ROBERT v. ABEYWARDANE *et al.*

92—C. R. Galle, 10,990.

Fidei commissum—Prohibition against alienation out of the family—Minor adiating inheritance.

A prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a *fidei commissum* in favour of the members of the family.

A last will contained the following clause: "They (the children) should not sell, mortgage, &c., the immovable property to strangers except the original heirs; nor could one or more people outside their circle be granted or obtain any rights."

Held, that the will created a *fidei commissum*; and a mortgage by a devisee to a person outside the family was held to be invalid.

A minor cannot adiate an inheritance, and is not liable to be sued for the debts of the ancestor.

THE facts are set out in the judgment.

Cooray, for appellants.—The clause in question creates a *fidei commissum*. Where the prohibition is against alienation out of the family the persons to be benefited need not be specifically described. The expression of an intention that the property should remain in the family is sufficient (*Voet 36, 1, 27*). Here the intention is abundantly clear that the property should remain in the original "heirs", and should not go to "strangers".

A minor cannot adiate an inheritance and be sued for the debts of his ancestors. *Pathman v. Kanapathipillai*.¹

A. St. V. Jayewardene, for the respondent.—The persons to be benefited must be clearly designated. The language employed created some doubt in the mind of the Commissioner, and in cases of doubt the Supreme Court has always declared in favour of a free inheritance.

Cooray, in reply.

Cur. adv. vult.

June 27, 1912. DE SAMPAYO A.J.—

The plaintiff sues on a mortgage bond dated May 31, 1910, by which one William Jayesuriya mortgaged to plaintiff a one-fourth share of a certain land to secure a sum of Rs. 75 and interest. The defendants are widow and child of the mortgagor. The main

¹ (1898) 1 Br. 118.

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question for decision is whether the mortgagor was absolutely entitled to the property mortgaged, or whether he had it subject to a *fidei commissum*. The entire property originally belonged to his parents, who by their last will dated February 7, 1873, devised it to their children, of whom the said William Jayesuriya was one. The will, which by the 12th clause gave the property to the children, contained a condition which, according to the translation filed in the case, ran as follows: "They (the children) should not sell, mortgage, or give in rent for a term of more than two years at a time the immovable property to strangers except to the original heirs, nor could one or more people outside their circle be granted or obtain any rights." I have had the original will sent for, and the Interpreter Mudaliyar of this Court has certified to the correctness of this translation. The learned Commissioner has held that the will created no *fidei commissum*. He says that there is a clear prohibition against alienation out of the family, but that there is no indication of the persons to whom the property in the event of alienation is to go over. Now, a prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a *fidei commissum* in favour of the members of the family. Illustrations of this kind of *fidei commissum* will be found in *Voet 36, 1, 27*, and 2 *Burge 112 and 113*. In *Joseph v. Mulder*¹ the words were, "The said grounds shall never be sold or parted with in favour of a stranger, but shall permanently remain among legal heirs," which the Privy Council construed as creating a *fidei commissum conditionale*. It seems to me that the words in the present will have the same effect, with this difference, that the prohibition, being personal and not real, extends only to the immediate devisees. See *Sande on Prohibitions, part 3, chapter 2*. The plaintiffs in *Joseph v. Mulder*¹ did not succeed, only because their action was held to be premature, as the prohibition was against a sale only, and the action merely sought a declaration that the mortgages in question were null and void, though the property had not been brought to a judicial sale or even a mortgage action instituted for that purpose. The prohibition in this case is against a mortgage as well, and as the defendants would not be able hereafter to raise the question if a decree for realization of the mortgage by sale of the property were entered, the defendants have rightly raised the question by way of defence. See also *Silva v. Philipps*.² In my opinion, the will created a *fidei commissum*, and the mortgage to a person outside the family, or, as the will puts it, "outside the circle," is invalid. The plaintiff's action, therefore, cannot be sustained so far as it seeks to realize the mortgaged property.

There is however the money claim, which of course, may be maintained against a proper representative of the deceased William Jayesuriya. The second defendant is a minor, and is joined as a

¹ (1903) A. C. 190; 3 Bal. 86.² (1908) 11 N. L. R. 154.

defendant on the footing of his being an heir; but a minor cannot adiate the inheritance, and is not liable to be sued for the debts of the ancestor. The first defendant is widow of the deceased, and there is evidence that she intermeddled with the property of the deceased's estate and so made herself an *executrix de son tort*. Judgment may therefore, go against her for the debt due by the deceased. I set aside the decree in this case and dismiss the action as against the second defendant, but judgment will be entered against the first defendant for the money as claimed, to be realized out of the property of the deceased in her hands other than those derived by him under the will of his parents.

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As the main question has been as to the validity of the mortgage, the plaintiff will pay the defendant's costs in both Courts.

Set aside.

