

1922.

Present : De Sampayo and Schneider JJ.

AMARAWICKREME *v.* JAYASINGHE *et al.*

265—*D. C. Galle, 16,803.*

Fidei commissum—*Prohibition against alienation to any one else but heirs—Pre-emption.*

A joint will provided that (1) the survivor shall possess the properties ; (2) after the death of the survivor the properties beequally divided among the children ; and (3) if the children require to sell the property which they become entitled to from our estate, they shall sell the same to an heir of this estate for the then value, but it is prohibited to sell the same to any one else.

Held, that the will created no *fidei commissum*.

THIS was an action for the partition of the land called Parangiya-wattakebelle.

The plaintiff, alleging that the last will of Abaran and Christina created a *fidei commissum*, contended that the purchasers in

execution against Thepanis and Arnolis, two of the children of testators, got no title on their deeds, and that those shares devolved on the heirs of the said Thepanis and Arnolis, of whom the plaintiff-respondent is one.

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The appellants contended (a) that the will in question did not create a *fidei commissum*; (b) that the plaintiff was not entitled to the improvements he claimed. The District Judge held that the will in question created a *fidei commissum*.

Samarawickreme (with him *Soertsz*), for nineteenth, twentieth, and twenty-fourth defendants, appellants.

M. W. H. de Silva, for plaintiff-respondent.

February 27, 1922. DE SAMPAYC J.—

The question for decision is whether the joint will of Kudamadinage Abaran and his wife Punchihewage Bella Christina contains a valid *fidei commissum*. The testators had six children, Hendrick, Elias, Nicolas, Julius, Thepanis, and Arnolis. The testators by their will, which was dated November 8, 1857, after making certain gifts, provided as follows:—

- (6) The survivor of us two shall possess the remaining movable and immovable property, exclusive of the property gifted as aforesaid, during his or her lifetime, but it is prohibited from selling, mortgaging, or giving in gift.
- (8) After the death of us both, all the movable and immovable property to be equally divided among our six children (named).
- (9) If our said six children require to sell the immovable property which they become entitled to from our estate, they shall sell the same to an heir of this estate for the then value, but it is prohibited to sell the same to any one else.

It is this last provision that is said to create the *fidei commissum*. Of the said children, Hendick died, leaving four children, namely, the plaintiff, first defendant, and Daniel, and Francis. In execution against Daniel and Francis their interests in the land were sold and purchased by one Cornelis de Silva, and in execution against Thepanis and Arnolis their interests were sold and purchased in equal shares by the said Cornelis de Silva and one Johannes Abeyseena's administrators. By deed dated June 17, 1918, Cornelis de Silva sold his interests to the twentieth defendant, and the administrators of Johannes Abeyseena sold what they acquired at the execution sale to the nineteenth defendant. The share of Nicolas, the third son of the testators, was sold in execution in 1899 and purchased by one Abeysureiya, from whom that interest has passed to the twenty-fourth defendant. The claim of the nineteenth, twentieth, and

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twenty-fourth defendants is referred on the ground that the will of Abaran and his wife created a *fidei commissum* in favour of the family, and that the Fiscal's sales passed no title. On behalf of the plaintiff, the decision in *Robert v. Abeyewardene*¹ is relied on. That case is clearly distinguishable. The language of the present will is insufficient to create a *fidei commissum* in favour of the family of the testators, and clause 9 of the will contains a bare prohibition which has no legal effect, except, perhaps, to give to the nominated heirs a right of pre-emption if any of them should wish to sell his share.

I think the appeal should be allowed, with costs, and the case remitted to the District Court with directions to re-allot the shares on the footing that the said will did not create a valid *fidei commissum*.

SCHNEIDER J.—I agree.

Appeal allowed.

