VANSANDEN *et al. v.* MACK *et al.*

1895.
October 9 and 15.

D. C., Colombo, 2,976.

Last will, construction of—"The children of the testatrix and their descendants" —Fidei commissum—Tenancy in common—Ordinance No. 21 of 1844, § 20—intention of testatrix—Family arrangement.

Per BONSER, C.J.—No special words are necessary to create a *fidei commissum*, but effect is given to it if it can be collected from any expressions in the instrument that it was the testator's intention to create it.

General rules for the interpretation of wills are often unsafe guides. The only true criterion is the intention of the testator, to be gathered from the will and the circumstances of the case.

Per BROWNE, A.J.—The expression "my children and their descendants'" differs in nowise from "my children and my descendants."

Per WITHERS, J.—A direction in a last will that the children and their descendants should not sell or alienate the property devised is in itself a creation of a *fidei commissum*, and the children appointed heirs for the residue of the estate took such property subject to the *fidei commissum*.

If a thing is to be preserved intact and disintegrated for the benefit of coming generations, then the tenants for the time being, while the seal of the *fidei commissum* is still upon that thing, with possibility of succeeding beneficiaries, must be considered as tenants to whom the rule of *jus accrescendi* is applicable, in order to serve the express purpose for which the *fidei commissum* was created, and the operation of the Ordinance No. 21 of 1844, section 20, will be suspended till either there is no possibility of succession or till the term fixed for *fidei commissum* has expired.

Per CURIAM.—Whatever may have been the intention of the testator as to the creation of a *fidei commissum*, where the will has been construed by the parties as if the testator had impressed a *fidei commissum* on the property, and such construction has formed the basis of family arrangements for a long period, it should not be disturbed.

THE plaintiffs, as the surviving descendants of one Petronella Evekenel, prayed for a declaration of title to a certain house and grounds, upon the averment that she had devised the property by her last will to her sons Johannes and Isaac by her first husband Beckkenhoff and to her daughter Sarolomina by her second husband François, on the condition that they should not sell or alienate the same, but that it should be possessed by them and their descendants. Plaintiffs contended that as Johannes and Sarolomina had died without issue, they were entitled to the whole property as the children of Isaac Beckkenhoff.

They alleged further that in 1865 Anjou, the husband of Sarolomina, having claimed the entire premises, they and Frederick Beckkenhoff, as the children of Isaac Beckkenhoff, instituted the suit No. 45,398 in the District Court of Colombo against the said Anjou and obtained a decree in their favour in

1895.

October 9 and 15.

1867, which declared them entitled to an undivided one-half of the premises ; that thereafter the plaintiffs therein and Sarolomina possessed the same jointly ; that Frederick Beckkenhoff died unmarried and intestate in 1882, from which date the 1st and 2nd plaintiffs possessed an undivided half and Sarolomina the remaining half ; that Sarolomina died childless in 1892 leaving a last will made conjointly with her second husband Anjou, whereby they appointed the first and second defendants their executors ; and that these defendants claiming title to the entire property, had ousted them from their share of possession.

The defendants denied that any *fidei commissum* was created under the will of Evekenel, or that upon Sarolomina's death without issue the whole property devolved on the plaintiffs, or that the decree in suit No. 45,398 bound Sarolomina. They further pleaded that Evekenel had no right to dispose of by her last will more than a half share of the premises ; that the other half belonged to Sarolomina by right of inheritance from her father François, who died intestate after marrying Evekenel ; that only a half share of the premises passed to the devisees under the will ; that Sarolomina, one of the three devisees, was entitled to one-third of the half or one-sixth of the whole ; that she was further entitled to an additional one-twelfth by inheritance from her brother Johannes ; that all the shares aggregated nine-twelfths or three-fourths of the entire house ; that Sarolomina and her second husband Anjou left a last will by which they devised the residue of their estate (including the three-fourths share in question) to certain persons who were entitled to the same ; that the first and second defendants were executors appointed under that will ; and that the third defendant was their tenant.

In the event of the Court holding adversely to this view, defendants contended that Sarolomina was entitled to at least an absolute half of the said premises.

The Acting District Judge (Mr. J. Grenier) gave judgment for plaintiffs as prayed.

The defendants appealed.

Dornhorst (with *Sampayo*), for defendant appellant.

Peiris (with *Van Langenberg* and *Bawa*), for plaintiffs respondent.

Cur. adv. vult.

15th October, 1895. BONSER, C.J.—

This case arises on the will, made in 1825, of a Dutch lady who died in 1829.

At the date of her will she was possessed of a house in Colombo and was twice a widow. By her first husband she had living two children, Johannes and Isaac; and by her second husband one child, Sarolomina, who afterwards married one Anjou.

The testatrix, by her will, which was drawn by an illiterate Dutch notary, after giving some trifling gifts of jewellery and furniture to her daughter, proceeded as follows :—

"The testatrix further declares that her house No. 5, situated and "lying in Land street in the Pettah of Colombo, shall not sell "or alienate, but be possessed by her children and their descen-"dants." Proceeding to the institution of heirs, she declares to "nominate and institute her children, Johannes Simons and Isaac "Augustinus Beckkenhoff, procreated by her first marriage with Mr. "Christian Beckkenhoff, and Sarolomina Welhelmina François, by "her second marriage with Mr. Engelbert Otho William François, "to all the residue and remainder property whatsoever which she "shall leave behind, equally to be divided and possessed amongst "them without any molestation of any person whatsoever."

It appears that Johannes died in 1849 childless, but leaving a will, by which he demised all his property to his widow, who claimed to be entitled to one-third of the said house. This claim was resisted by the surviving brother and sister, but ultimately the claim, and a suit which had been instituted in the District Court of Colombo, were compromised by an agreement, whereby Isaac and Sarolomina granted to the widow the usufruct of a portion of the premises during her life, with a proviso that on her death it was to revert to them and their heirs and descendants.

In 1865 Isaac died, and the respondents are his children. Shortly after his death litigation ensued between the respondents and Sarolomina and her husband, which resulted in a decree being made, by consent, giving each party a half share in the house. It will be seen that on both these occasions the existence of a *fidei commissum* rendering the house inalienable was successfully asserted. Moreover, Sarolomina's husband afterwards became insolvent, and in his schedule of assets included the life rent, belonging to his wife, of one moiety of the said house, thus recognizing the *fidei commissum*.

In 1892 Sarolomina died a widow, without issue, leaving a will, which did not mention this property; and the appellants, her executors, entered into possession of the house, excluding the respondent from any share therein. Now, however, they limit

1895. October 9 and 15.

BONSER, C.J.

their claim to a moiety. They claim Sarolomina's one-third and one-half of Johannes's one-third.

The respondents, on the other hand, claim the entirety of the premises, as being the only extant members of the class—"the "descendants of the children of the testatrix."

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 instrument that it was the testator's intention to create it. (*2 Burge, 106.*)

That the prohibition against alienation created a *fidei commissum* is not disputed by Mr. Dornhorst, who argued the case for the appellants, but, as I understood him, he contends that the will created three independent *fidei commissa*, each of an undivided one-third share of the house in favour of each child and his descendants; that when Johannes died without issue his share passed by his will to his widow, who, in ignorance of her rights, abandoned her share to Isaac and Sarolomina; and that now Saralomina is dead without issue, her one-third share, together with the one-half of Johannes's share, forms part of her estate, and passed to the appellants.

In my opinion this is not in accordance with the intention of the testatrix. Although the will is very badly expressed, yet I think that it sufficiently appears that the testatrix intended the house to be enjoyed as a whole by her three children and their descendants as long as the law allowed, that is, for four generations.

In these cases general rules are often unsafe guides, and the only true criterion is the intention of the testator to be gathered from the will and the circumstances. *Praesertim cum voluntas fideicommittentis potissimum spectari debeat, ac observari: sic ut generales illæ de fideicommissorum interpretatione regulæ sæpe quidem usum inveniant, sed et sæpe fallaces sint (Voet, XXXVI., 1, 72).*

The interpretation put upon the will by Mr. Dornhorst would destroy what I consider to have been the intention of the testatrix, that the property should be enjoyed by her children and their descendants as long as the rules of law permitted; for in this case the result would be that at the end of the first generation only one-third of the property would have been possessed by the descendants of the testatrix's children.

We were referred to a case in *3 S. C. R. 158, Tillakaratne v. Abeyesekara*, but that case is distinguishable from the present case. There a division of the property was contemplated by the testatrix, for she expressly directed it to be divided; here the testatrix dealt with the house as an integral unit.

1896.
October 9 and 15.
BONNER, C.J.

In the view I take of this case, Ordinance No. 21 of 1844 does not apply, nor is there any question of *jus accrescendi*. The statement in *Voet. XXXVI., 1, 29, ad fin* ("*fidei commissi petitio competit omnibus, qui ex familia æque propinqui sunt, aut ex repræsentatione pro æque propinquis habentur exclusis illis, qui remotiores sunt*") would seem to be applicable to the present case, if we substitute for family the phrase "the descendants of the children "of the testatrix."

But whether this construction be the true one or not, it has been acted upon for now nearly seventy years; it has formed the basis of family arrangements and compromises; and ought not, at this distance of time, to be disturbed.

The appeal will be dismissed with costs.

WITHERS, J.

WITHERS, J.—

This is a clumsily expressed will in regard to that portion of it which refers to the property in dispute.

What was the intention of the testatrix in regard to the disposition of the premises, and has that intention been given effect to in the will?

I think there can be little doubt that it was the intention of the testatrix to impress a *fidei commissum* on the property, in the interest of the three children and their descendants, for such time as the law might allow to be possessed by them, and no others.

The direction that the children and their descendants should not sell or alienate it, in itself created a *fidei commissum*, and in my opinion the children appointed heirs for the residue of the testator's estate took that property subject to the *fidei commissum*.

I further think that the property was to be kept as an indivisible trust.

But, whatever may have been the intention of the testatrix, it has been so clearly construed and acted upon by the parties interested for so long a time, that we cannot possibly disturb the arrangement.

It was clearly understood by the late Sarolomina and Isaac that the survivor should hold the entire premises for the purposes of the trust. This involved the operation of the *jus accrescendi*, whether that was or was not intended by the testatrix, and the plaintiff's descendants are clearly entitled to hold the entire premises for themselves and in trust for their descendants, if any, after them.

1895.
October 9 and 15.

WITHERS, J.

It was strenuously contended, however, by Mr. Dornhorst, that the tenure of the premises by Isaac and Sarolomina should be governed by the provisions of the Ordinance No. 21 of 1844, and he claimed a declaration that they were tenants in common of the premises in equal undivided shares. Even if that Ordinance has a retrospective operation, I do not think it applies to this case in the existing circumstances.

If one thing is to be preserved intact and disintegrated for the benefit of coming persons, then the tenants for the time being, while the seal of the *fidei commissum* is still upon that thing, with possibility of succeeding beneficiaries, must be considered as tenants to whom the rule of *jus accrescendi* is applicable, in order to serve the express purpose for which the *fidei commissum* was created, and the operation of the Ordinance will be suspended till either there is no possibility of succession, or till the term fixed for the *fidei commissum* has expired.

In this case, for instance, if the three children appointed fidei commissaries and fiduciaries for their children were presently alive, and had reached an age beyond all possibility of issue, or if Isaac and Sarolomina were the two surviving descendants in the fifth generation, then, in the absence of an express provision by the testatrix, that the three children in the first case or the surviving children in the fifth generation in the second case would hold the property as joint tenants with benefit of survivorship, the Ordinance, if retrospective, would operate to make the tenure one in equal undivided shares.

It is the constitution of the *fidei commissum* in this case which differentiates it from *Tillakaratne v. Abeyesekara* in *3 S. C. R. 77, 158.*

I still think that the Ordinance would apply (even when the term of the *fidei commissum* was subsisting) in all doubtful cases, so that a tenure would be deemed to be one in common for the benefit of each tenant's descendant, and not a joint tenure with a *jus accrescendi* to the survivors or survivor.

The appeal therefore, in my opinion, fails, and should be dismissed with costs.

BROWNE, A.J.

BROWNE, A. J.

I have had the advantage of reading the draft judgments of my Lord the Chief Justice and my brother.

Concurring entirely in their views as to the creation of a valid *fidei commissum* and in their affirmance of the decree, I would add only the suggestion that were the provisions of section 20 of Ordinance No. 21 of 1844 applicable to this will of earlier date than

1895.
October 9 and 15.
BROWNE, A.J.

the enactment, the creation of a *fidei commissum* such as this, in favour of a family, should be regarded as an express provision that the survivor should become entitled even to the extent (wherein I venture to differ from my brother) that the benefit of survivorship would enure to the very last taker of the fourth generation.

As regards the intention of this testatrix, I regard her words, "my children and their descendants," as differing in nowise from "my children and my descendants."

In the absence of any intention of division of the estate, in the fact of its concerning only the one family house, and in its greater simplicity of provisions, however ungrammatically or ignorantly expressed, I regard this case as even a clearer indication of intention to create a *fidei commissum* in favour of the testatrix's family, than the case wherein our judgment is reported in *3 S. C. R. 158.*