1912.

Present: Lascelles C.J. and Wood Renton J.

SELEMBRAM *et al. v.* PERUMAL *et al.*

242—D. C. Colombo, 32,611.

Fidei commissum—*Direction that property be possessed by heirs in perpetuity—"Heirs" sufficient designation of party to be benefited.*

A testator bequeathed a house to his sisters Anna and Maria subject to the condition "that they shall not sell, mortgage, or in any other manner alienate the said house and premises, but that the same shall be always held and possessed by them and their heirs in perpetuity under the bond of *fidei commissum*."

Held, that a valid *fidei commissum* in favour of the heirs *ab intestato* of Anna and Maria for the full period allowed by the law was created by the clause.

THE facts are set out in the judgment.

J. Grenier (with him *Drieberg*), for plaintiffs, appellants.

De Sampayo, K.C. (with him *Bawa, K.C., H. A. Jayewardene, E. W. Jayewardene*, and *A. St. V. Jayewardene*), for defendants, respondents.

Cur. adv. vult.

November 22, 1912. LASCELLES C.J.—

The question on which this appeal turns is whether a valid *fidei commissum* was created by the will of Gabriel Rodrigo Bastian Pulle, and if so, what was the extent of the *fidei commissum*, that is to say, did the *fidei commissum*, assuming one to have been created, determine on the deaths of Anna and Maria, or did it continue to operate in favour of the heirs of these persons for the full period of four generations? The material words in the will are the following:—

> "I give and devise unto my two sisters, Anna Rodrigo (widow of Philip Morais) and Maria Rodrigo, the house and premises in which I am now residing, together with all the appurtenances thereunto belonging, marked No. 54, situated in 4th Cross street in the Pettah of Colombo, upon this condition, however, that they shall not sell, mortgage, or in any other manner alienate the said house and premises, but that the same shall be always held and possessed by them and their heirs in perpetuity under the bond of *fidei commissum*; and as regards my said two sisters, it is my wish that they should live together amicably in the same house as they now do."

We have been referred, amongst other authorities, to the cases of *Tina v. Sadris*,[1] *Paterson v. Silva* [2] (in which the correctness of the decision of the majority of the Court in the former case was questioned by Clarence J.), *Lushington v. Samarasinghe*,[3] *Wijewardene v. Abdul Hamid*,[4] and *Nugara v. Gonsal*,[5] but in none of the cases do we find a concurrence of all the conditions which are present in the devise now under consideration, namely, (1) the usual prohibition against alienation, (2) the expressed intention of the testator that the subject-matter of the devise should be " held and possessed ..... under the bond of *fidei commissum*," and (3) the designation of the *fidei commissarii* as the " heirs in perpetuity " of the *fiduciarii* without the addition of any such words as " executors, administrators, and assigns."

It is well settled that no particular formula of words is required to create a *fidei commissum*, and that the true test is the intention of the testator as evinced by the language of the instrument. Here the express reference to the " bond of *fidei commissum* " places the intention of the testator beyond speculation. It is declared in express terms. It is true that there may be cases where the testator has made an express declaration of his intention to create a *fidei commissum*, but his intention has been held to be incapable of execution for want of sufficient designation of the persons or class in whose favour the *fidei commissum* was intended to take effect. The South African case of *Drew v. Executor of Drew* [6] is an example. There the testators purported to " entail and burden with *fidei commissum* the inheritances forthcoming to our aforesaid children under and by virtue of this will," but it was held that the children took the bequest absolutely, as the will contained no gift over or mention of the persons who were to take after the children.

In the present case, after the prohibition against alienation, the clause in the will proceeds, " but that the same shall be always held and possessed by them and their heirs in perpetuity under the bond of *fidei commissum*."

Do these words contain a sufficient indication of the class in whose favour the *fidei commissum* is created? The question is free from the difficulty which arises when the word " heirs " is followed by the words " executors and administrators " as in *Nugara v. Gonsal*,[5] or by the words " and administrators " as in *Tina v. Sadris*.[1]

We have to determine whether a devise, which satisfies all the other requirements of a *fidei commissum*, fails to operate as a *fidei commissum*, because the persons who are to take after the original institutes are designated " their heirs in perpetuity."

[1] *(1885) 7 S. C. C. 135.*
[2] *(1887) 9 S. C. C. 33.*
[3] *(1897) 2 N. L. R. 295.*
[4] *(1909) 12 N. L. R. 241.*
[5] *(1911) 14 N. L. R. 301.*
[6] *(1876) Buchanan's Reports 203.*

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In *Paterson v. Silva*[1] a very similar question was discussed and decided by Clarence J. The testator, by the third clause in the will, after prohibiting his children from alienating the property devised to them, declared that " they " (*i.e.*, the testator's children) " shall possess and leave same to their heirs." Clarence J. was of opinion that if that clause stood alone there could be no question but that the testator intended to create a *fidei commissum* for the benefit of the heirs of his respective children, " meaning by ' heirs ' those persons who may be their heirs in ordinary parlance, that is to say, those persons who would be entitled to inherit their property under an intestacy."

This decision is a clear authority for the construction which seems to me to accord with the natural meaning of the language employed by the testator, namely, that a *fidei commissum* was created in favour of the persons who, under the law of intestate succession, would be entitled to succeed to the property of the donees. The words " in perpetuity " plainly indicate the testator's intention that the *fidei commissum* should endure for the benefit of these persons for the full period allowed by law.

I do not consider that *Tina v. Sadris*[2] is an authority against this construction of the will, as the judgments of the majority of the Court, especially that of Fleming A.C.J., were considerably influenced by the fact that the prohibition against alienation extended to the heirs and administrators of the original donee.

For the above reasons, I am of opinion that the will of Gabriel Rodrigo Bastian Pulle created, with reference to the house in question, a valid *fidei commissum* for the full period allowed by law in favour of the persons who under the law of intestate succession would be entitled to succeed respectively to Anna and Maria.

This finding will necessitate a further inquiry on the issue of prescription in view of the proviso to section 3 of the Ordinance No. 22 of 1871.

The case must, therefore, be remitted to the District Judge for further inquiry, on the footing that the property is subject to a *fidei commissum* of the nature which I have indicated. The appellant is entitled to the costs of his appeal from the eighth and ninth defendants, and the other costs must be costs in the cause.

WOOD RENTON J.—

The material facts in this case are briefly these. The plaintiffs-appellants claim a declaration of title in themselves, and in the first, second, third, fourth, fifth, sixth, and seventh respondents, who having declined to be co-plaintiffs have been made defendants in the action, to a house and premises described in a schedule to the plaint, and the recovery of mesne profits and damages in lieu

[1] *(1887) 9 S. C. C. 33.*

[2] *(1885) 7 S. C. C. 135.*

of current rent and profits till ejectment from the eighth and ninth defendants-respondents, who are in possession of the property. The original owner of the property, Gabriel Rodrigo Bastian Pulle, by his last will No. 1,370 dated April 17, 1845, devised it to his sisters, Anna Rodrigo and Maria Rodrigo. The devise was made subject to the following conditions:—

> "They shall not sell, mortgage, or in any other manner alienate the said house and premises, but the same shall be always held and possessed by them and their heirs in perpetuity under the bond of *fidei commissum;* and as regards my said two sisters, it is my wish that they should live together amicably in the same house as they now do."

The appellants and the first to seventh defendants-respondents are the heirs of the devisees under this will. By deed No. 2,434 dated September 16, 1856, Anna and Maria Rodrigo gifted the property in question to the granddaughter of the former—Agitha Morais—on the occasion of her marriage in community to Domingu Silva Pulle, subject, however, to the condition imposed on the devisees under the will. The property was sold by the Fiscal in 1884 in execution against Domingu Silva Pulle, and has passed by various mesne conveyances to the eighth defendant-respondent, who has leased it to the ninth. Apart from the question of the effect of the condition above quoted in Bastian Pulle's will, the eighth defendant-respondent would admittedly have a prescriptive title to the property. An issue framed on this point at the trial has been answered by the learned District Judge in his favour. I do not think, however, that we can deal with that question on this appeal. Although the appellants' counsel admitted in argument at the trial that "the eighth defendant and his predecessors in title had been in possession *ut dominus* since 1884," he cannot have intended to concede thereby that that possession sufficed to extinguish all the interests arising under Bastian Pulle's will—a concession immediately fatal to the appellants' case and rendering any consideration of the meaning of the condition in the will superfluous. Nor do I think that we ought—as the respondents' counsel invited us—to take the allegations in the plaint and to try to see whether they afford material for upholding the finding of the learned District Judge on the issue of prescription. The only issues that we ought, in my opinion, to consider on this appeal are the first, second, and tenth. They have been framed as follows:—

> "(1) Was a valid *fidei commissum* created by the will No. 1,370 of April 17, 1845?
>
> "(2) Was a valid *fidei commissum* created by the gift deed No. 2,434 of September 16, 1896?

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" (10) Even if the will No. 1,370 created a valid *fidei commissum*, was the *fidei commissum* one in perpetuity or a *fidei commissum* which lapsed on the death of Anna and Maria Rodrigo? "

The District Judge answers issues (1) and (2) in the negative. On issue (10), he holds that, even if Bastian Pulle's will did create a *fidei commissum*, that *fidei commissum* lapsed on the death of Anna and Maria Rodrigo. On these findings, and the finding on the issue of prescription, the learned District Judge dismissed the appellants' action.

It is unnecessary to consider the finding on issue (2), since, in my opinion, issue (1) should be answered in the affirmative, and on issue (10) the decision should be that the *fidei commissum* created by the will was one in perpetuity so far as the law allows.

The view of the learned District Judge on issue (1) may be stated thus. The will does not indicate with sufficient clearness the persons in whose favour the prohibition of alienation is introduced. The case of *Tina v. Sadris* [1] shows that the word " heirs " is too vague to create a valid *fidei commissum*, even if coupled with a prohibition of alienation. The respondents' counsel pointed out in this connection that in a later paragraph in the will Bastian Pulle describes Maria Rodrigo as his " heiress," a term clearly meaning heiress by testamentary succession. The ruling in *Tina v. Sadris*,[1] that a deed in favour of A and his heirs, without specifying who is to take the property on the death of the first grantee, created no *fidei commissum* merely by reason of a prohibition of alienation having been inserted in the deed, was that of Lawrie J. alone. Fleming A.C.J. decided the case on the ground that the word " administrators," coupled with " heirs " in the grant, made it impossible to say that it was the clear intention of the donor to create a *fidei commissum*. Dias J. dissented, and held that a valid *fidei commissum* had been created. It is mainly in regard to the effect of such words in wills and grants, alleged to create *fidei commissa*, as " executors," " administrators," and " assigns," that *Tina v. Sadris* [1] has been supported by later decisions. (See *Nugara v. Gonsal* [2] and authorities there collected.) The trend of more recent authority, as the learned District Judge has himself shown, is against the *ratio decidendi* adopted by Lawrie J. (*Paterson v. Silva*,[3] *Wijewardene v. Abdul Hamid*.[4]) But the language of the condition that we have here to interpret differs so widely from the language of the condition in *Tina v. Sadris* [1] as to make the decision of Lawrie J. in that case inapplicable, even if it were more in accordance with the authorities than it is. The words " in perpetuity " and "under the bond of *fidei commissum* " leave no doubt in my mind that the testator intended to create a *fidei commissum*, and I think that he has used language sufficiently

[1] *(1885) 7 S. C. C. 135.*
[2] *(1911) 14 N. L. R. 801.*
[3] *(1887) 9 S. C. C. 33.*
[4] *(1909) 12 N. L. R. 241.*

apt for that purpose. The " heirs " indicated must be the heirs of the devisees *ab intestato*. In spite of the use of the term " heiress " in the will in the sense above indicated, the manifest intention of the testator that the property should be kept in the family shows that it was in favour of heirs *ab intestato* that the *fidei commissum* was created.

I come now to issue (10). The main point urged in favour of the contention that the *fidei commissum* lapsed on the deaths of Anna and Maria Rodrigo was that they alone are expressly prohibited from alienating the property. But the provisions that the property is to be " always held and possessed " by " the heirs " " in perpetuity " " under the bond of *fidei commissum* " appear to me to show that the prohibition was meant to affect the heirs also.

I would set aside the decree of the District Judge dismissing the appellants' action, declare that will No. 1,370 dated April 17, 1845, created a valid *fidei commissum* in favour of heirs *ab intestato* of Anna and Maria Rodrigo for the full period allowed by law, and send the case back for trial and adjudication on that basis on the other issues. The eighth and ninth defendants-respondents should pay to the appellants their costs of this appeal. All other costs should be costs in the cause.

Set aside.