1944 *Present:* **Keuneman J.**

SAIBO, Appellant, *and* JAYAWARDENA, Respondent.

80—C. R. Tangalla, 17,002.

Last Will—Property left to granddaughter and her husband—On death of one, the property to vest in survivor and children—Devolution of property—Repugnancy of subsequent clause.

Where the last will by which a testator devised property to his granddaughter Eliza and her husband provided as follows:—

(*a*) In case the said two persons be blessed with children, and while such childen are alive, both or one of them should die . . . . the same should devolve on any one of the said two persons that may be living and their children . . . .

(*b*) As the devolving according to the above devises of the movable and immovable property belonging to me is to occur after the demise of Eliza, none of my property, is to be alienated by Eliza or her husband or any other person.

Held, that the intention of the testator was that on the death of Eliza or her husband the property should vest in the survivor and the children.

Held, further, that the direction in clause (*b*) did not over-ride the clear words of clause (*a*).

APPEAL from a judgment of the Commissioner of Requests, Tangalla.

E. B. Wikremanayake for defendant, appellant.

C. E. S. Perera (with him *J. A. Obeysekera*) *for* plaintiffs, respondents.

Cur. adv. vult.

July 17, 1944. KEUNEMAN J.—

The principal points argued in this appeal relate to the construction of the last will P8, and to prescription. Dona Johana Ekanayake died leaving a last will (P8) by which the property in question in this case was

devised to her granddaughter Eliza and her husband David Obeysekera Mudaliyar. After making provision for the case of Eliza having no children,—we are not concerned with these provisions,—the last will continued, " That in case the said two persons (viz., Eliza and her husband) . . . . be blessed with children, and while such children are living both or one of them should die . . . . the same should devolve on any one of the said two persons that may be living and their children ".

David Obeysekera died about 1899, and Eliza in 1933. There were children of the marriage.

There has been earlier litigation concerning this last will. In C. R. Tangalla, 16,183 (see P 1 to P 5) the heirs of Sampoe, a child of Eliza who had predeceased her, sued the defendants, and the present plaintiffs were also added as defendants. The Commissioner held in the case that Sampoe having predeceased his mother had lost his rights under the *fidei commissum*. In appeal this finding was not supported, but Soertsz J. dismissed the appeal on another ground. He stated—" The will states quite clearly that on the death of Eliza or her husband David Obeyesekera the property (is to) *vest* in the survivor of them and their children. " Soertsz J. held that the defendants who had been in exclusive possession since 1899 had prescribed for the property.

In the present case too it appears that Eliza by D 1 of 1899 purported to sell this property among others to the defendants with authority of court for defraying the expenses of David Obeysekera's testamentary case. Since that date the defendants have been in exclusive possession of this property.

It was argued that the C. R. case is *res judicata*. I do not agree with this contention. There was no issue raised between the present plaintiffs and the present defendants in that case, and the present plaintiffs were only joined to give them notice of the action because they were also co-owners, and they took no part in the proceedings.

The case, however, is of importance because it contains a decision as to the meaning of the last will, which I should ordinarily be disposed to follow. Counsel for the respondents, however, argues that Soertsz J. has not taken into account a further clause in the last will P 8: This clause states " that as the devolving, according to the above devises, of the movable and immovable property belonging to me is to occur after the demise of Eliza, none of the property is to be alienated by Eliza or her husband or any other person ".

I may say that I do not agree that there is in this clause an imperative direction that the property should only devolve on the death of Eliza. It should be noted that the words relied upon are only added as an explanation of the direction against alienation. I do not think there is an intention to over-ride the clear words occurring earlier. The explanation is not accurate, or rather is not complete. Had there been any imperative force in the words relied upon, a repugnancy would have arisen in the will, but I do not think the words were intended as an imperative direction.

If the interests of the *fidei commissarii*, viz.—Eliza and her children—vested in 1899, there can be no question but that the defendants have acquired a title by prescription.

I allow the appeal and set aside the judgment of the Commissioner with costs, and dismiss the plaintiffs' action with costs.

Appeal allowed.