1935 *Present :* **Akbar S.P.J. and Koch J.**

SABAPATHY *v.* MOHAMED YOOSOOF *et al.*

291—D. C. Colombo, 50,490.

*Mortgage action—Necessary parties—Section 6 (1) of Morgage Ordinance, No. 21 of 1927, not exhaustive—Person claiming adversely to mortgagor may be joined—*Fidei commissum *under Roman-Dutch law—Directions to executor to convey property to heirs—Use of the expression " trust "—English law of trusts not necessarily applicable—Development of the law of* fidei commissum.

Section 6 (1) of the Mortgage Ordinance does not preclude the mortgagee from joining any other person as defendant in a hypothecary action, who could have been made a party under the Roman-Dutch law so as to secure a binding decree against him.

A person in possession claiming adversely to the mortgagor may be so joined.

By last will dated December 12, 1872, a testator bequeathed his properties to three sets of heirs, his father, his wife, and his children subject to the condition that his heirs were to take their shares according to the Muslim law but that neither they nor their issues or heirs were to sell or mortgage or alienate the property but to hold them in trust for the grandchildren of his children and the grandchildren of his heirs and heiress.

[1] *1 C. W. R. 136.*
[2] *1 C. W. R. 170.*
[3] *24 N. L. R. 15.*
[4] *24 N. L. R. 17.*

The will further provided that they may receive the rents, income, and produce of the lands without encumbering them in any way and, after defraying the expenses for their maintenance, out of the surplus funds, lands should be purchased for the benefit and use of their children and grandchildren.

The will also provided for a division of the property after the death of the testator and the execution of deeds by the executor in favour of each heir containing the same conditions as are found in the will.

By deed dated February 18, 1878, the executor conveyed the property in dispute to one of the daughters of the testator, A. N., subject to the conditions of the will. The second defendant, the mortgagor, is the daughter of A. N., and the respondents are the grandchildren of A. N.

Held, that the will created a valid *fidei commissum* under the Roman-Dutch law.

Held, further (*per* Akbar S.P.J.) that the violation of the condition by the second defendant would have the effect of vesting the property in the fideicommissaries.

THE plaintiff sued the first and second defendants for the recovery of Rs. 15,000 and interest on two mortgage bonds.

The tenth to sixteenth respondents were joined in the action, as they claimed a beneficial interest in the mortgaged property, for the purpose of obtaining an effectual hypothecary decree binding on them. They claimed such interest by virtue of the last will of one Idroos Lebbe Marikar dated December 12, 1872, the terms of which are set out in the head-note.

The learned District Judge held that the tenth to sixteenth respondents were not necessary parties and dismissed the action as against them.

H. V. Perera (with him *D. W. Fernando* and *Chelvanayagam*), for plaintiff, appellant.—Two points arise for decision in this case. Firstly, are the tenth to sixteenth defendants properly made parties to this mortgage action, and secondly, are they owners of the property mortgaged by virtue of the last will No. 7,130 of December 12, 1872 ?

Section 6 (1) of the Mortgage Ordinance, No. 21 of 1927, does not exhaust the class of persons that may be sued in a hypothecary action. The expression " necessary parties " means that the parties enumerated thereunder cannot be left out in a properly constituted hypothecary action. It follows therefore that there may be others who may properly be made parties to a hypothecary action. The Ordinance itself is entitled " An Ordinance to amend and consolidate certain laws relating to mortgages ", we must therefore look to the Roman-Dutch law to ascertain who may be sued in a hypothecary action. Under the Roman-Dutch law a mortgagee could bring two actions : one against the mortgagor for the payment of the debt, and the other the hypothecary action or *actio serviana* to have the land mortgaged sold. (*Voet XX. 4, 1.*) The latter action may be prosecuted not only against the mortgagor but also against any third party in possession whether he is a *bona fide* or *mala fide* possessor. (*Voet XX. 4, 2.*) The expression " any third party in possession whether he is a *bona fide* or *mala fide* possessor " is wide enough to include any third party in possession whether he claims through the mortgagor or adversely against him. The tenth to sixteenth defendants, respondents in this case, are admittedly in possession of the land mortgaged and are

therefore properly made parties to this action even though they claim adversely to the mortagors. It was held in *Fonseka v. Pieris*[1] that a third party in possession claiming adversely to the mortgagor may be made a party to a hypothecary action. See also *Marikar v. Louis*[2] and *Marimuttu v. De Soysa*[3].

The English law of trusts was part of the law of Ceylon before the passing of the Trust Ordinance of 1917. The Trust Ordinance itself is entitled "An Ordinance to amend and consolidate the law relating to Trusts". There were Ordinances prior to the Ordinance of 1917, providing for the appointment of Trustees, &c. The view that the English law of trusts formed a part of our law is taken in a number of decisions of this Court. (*Ibrahim v. Oriental Banking Corporation*[4] and *Suppramaniam v. Erampakurukal*[5]". Therefore if a document purported to create a trust before 1917, it must be interpreted according to the principles of the English law of trusts. In South Africa where the English law of trusts formed no portion of the legal system, there the Courts have interpreted documents purporting to create trusts according to the principles of the Roman-Dutch law of *fidei commissa*. (*Estate of Kemp and others v. McDonald's Trustee*[6].) In Ceylon it is not necessary to resort to the Roman-Dutch law of *fidei commissa* to interpret a document purporting to create a trust. We have here a system of law where the English law of trusts and the Roman-Dutch law of *fidei commissa* exist side by side. The document before us creates in unmistakable language a trust in favour of the grandchildren of the children, heirs, and heiresses of the testator. There are two trusts: one in respect of the corpus and the other a trust to accumulate the surplus income. In this case Amsa Natchia is the trustee of both trusts and her grandchildren are the beneficiaries. Both trust offend the rule against perpetuities and are therefore void (*Mussoorie Bank Ltd. v. Raynor*[7]; *Underhill on Trust, 7th ed., p. 74*). Amsa Natchia therefore takes the property absolutely, and the plaintiff in this case is entitled to a hypothecary decree binding on the tenth to sixteenth defendants.

N. E. Weerasooria (with him *Keuneman* and *Nadarajah*), for tenth to sixteenth defendants, respondents.—Section 6 (1) of the Mortgage Ordinance deals with the necessary parties to a hypothecary action. Beyond the persons enumerated therein no other person can be made a party. A necessary party is one who claims an interest in the mortgage property to which the mortgage in suit has priority. A necessary party therefore must always be one who is claiming through the mortgagor. Section 6 (1) is not in conflict with the law as stated by Voet.

In *Book XX. 4, 2*, after stating that the action may be prosecuted against any third party in possession whether he is a *bona fide* or *mala fide* possessor Voet goes on to say, "For, as the *jus pignoris* is not annexed to the person but to the thing, the debtor cannot deprive the creditors of it by gift, bequest, sale, barter or any other kind of alienation." This clearly shows that when Vote spoke of a third party in possession he

[1] *7 N. L. R. 262.*
[2] *3 S. C. C. 99.*
[3] *8 S. C. C. 121.*
[4] *3 N. L. R. 148.*
[5] *23 N. L. R. 417.*
[6] *(1915) A. D. 491.*
[7] *(1882) 7 A. C. 321.*

had in mind only a party in possession who claimed through the mortgagor. This is the interpretation given by Pereira J. in *Silva v. Fernando*[1] to Voets' statement of the law in *Book XX. 4, 2.* The case reported in *7 N. L. R. 262* has been wrongly decided. The cases *in 3 S. C. C. 99* and *8 S. C. C. 121* are not in point on the question whether the mortgagee can sue a person in possession claiming adversely to the mortgagor, see *2 S. C. C. 20.* A mortgagee's right to have the property sold on the failure of the mortgagor to pay the debt is a right arising on the bond, a merely contractual right. The mortgagee can therefore only sue the parties to the contract and their privies in the mortgage action and not any third party in possession claiming adversely to the mortgagor.

This action should have been dismissed as against the tenth to sixteenth defendants on the first issue. On the averments in plaint the plaintiff is not entitled to proceed against these defendants. They have been made parties because they claimed a beneficial interest. The expression beneficial interest is far too vague and the averment that they claim a beneficial interest cannot be interpreted as an averment that they are in possession. Issue 1 should have been decided by reference to the plaint and the action dismissed as against these defendants.

H. V. Perera, in reply on the first point.—Voet does undoubtedly say that the debtor cannot deprive the creditor of the property mortgaged by gift, bequest, &c. (*Voet XX. 4, 2*), but this is in no way a limitation of his previous statement that the mortgagee can sue any third party whether *bona fide* or *mala fide* in possession. This statement by Voet may be due to the fact that the doctrine that a successor in title could claim no better title than the person through whom he claims, was not so clear then as it is now. Voet's meaning becomes clear when the whole of section 2 is read. He says that a mortgagee could even sue by a hypothecary action a person who has successfully litigated with the debtor in an action *rei vindicatio* respecting the proprietorship of a thing pledged provided of course the mortgage was anterior to the law suit between the debtor and the person litigating. See also the translator's note (*Berwick's Voet, p. 377*). Voet further says (*Book XX. 4, 7*), "For if he sues a third party, he is bound to prove that the thing was in the estate of the debtor at the time of the hypothec". If as argued by respondents' counsel the third party to be sued is one claiming through the mortgagor then there is no necessity for this statement of the law by Voet. A hypothec is defined as a factum whereby a *jus in re* is created in security of the debt due to the creditor, but in which the possession is not transferred to the creditor (*Voet bk. XX. 1, 1*). Maasdorp in vol. II., chapter II., classifies mortgages or hypothecs under *jura in rem,* a *jus in rem* being defined as a right to deal with a thing in any way whatsoever. That the *jus in rem* of the mortgagee, namely, his right to sell the property for nonpayment of his debt, may be exercised against whomsoever in possession is clear from other commentators besides Voet. See *Perezius on Justininan's Code, bk. IV., tit 10, para 12,* and *Noodt's Commentary on Pacts and Transactions, chapter XIII. Fonseka v. Peiris*[2] is directly in point. It is a considered judgment of this Court on Voet XX. 4, 2. The case

[1] *17 N. L. R. 15.*

[2] *7 N. L. R. 262.*

reported in *17 N. L. R. 15* refers to the rights of the possessor accruing to him through the mortgagor and therefore the remarks of Pereira J. in that case cannot be construed as being an opinion adverse to *Fonseka v. Peiris.*

The expression claim a beneficial interest is wide enough to include "possession". However this point has not been taken in the Court below and respondents' counsel cannot now in appeal raise it for the first time. If it was raised in the Lower Court the plaintiff would have had an opportunity of amending his plaint.

[AKBAR J.—As the decision of the first point goes to the root of the matter we will reserve it for our consideration. If we agree with appellants' by counsel that tenth to sixteenth defendants are rightly made parties we will give the respondents' counsel an opportunity to argue the second point.

The further argument was as follows:—

N. E. Weerasooria, for respondents.—The last will No. 7,130 creates a *fidei commissum.* The intention of the testator must be given effect to. The intention of the testator was to create a *fidei commissum* in favour of the grandchildren of Amsa Natchia and not a trust as argued by the counsel for the appellant. The English trust was not so familiar to the notary of 1872 as it is to-day. Although the word trust is used in the document it is clear that the testator intended to create a *fidei commissum* and not a trust. The devisees, their issues, and heirs are prohibited from alienating, and a prohibition against alienation is more appropriate to a *fidei commissum* than to a trust. The prohibition against alienation is not a nude prohibition. The persons in whose favour the prohibition is imposed are clearly designated, namely, the grandchildren of Amsa Natchia. The last will therefore creates a *fidei commissum* in favour of the tenth to sixteenth defendants and the plaintiff in this case cannot get a hypothecary decree binding as against them.

H. V. Perera, for appellants (in reply).—The *fidei commissum* was well know to the notaries of that period and if the testators' intention was to create a *fidei commissum,* the word *fidei commissum* would have been used. Not only is there an absence of the word *fidei commissum* in the document but words like "trust" and "for the use and benefit of" which are peculiar to the English law of trust are used. The intention of the testator was clearly to create a trust and not a *fidei commissum.* Prohibition against alienation is not repugnant to a trust. A trustee has a limited power of sale and mortgage and a testator who desires to keep the property intact can and must impose on him a prohibition against alienation. Our Courts have interpreted a prohibition against alienation where the persons for whose benefit the prohibition is imposed are clearly designated as being sufficient to create a *fidei commissum* but where the word trust has occurred it has never been interpreted to mean a *fidei commissum.* Further, from the very beginning there is a separation of the legal from the beneficial estate. Amsa Natchia had merely a legal estate with a limited right to take so much of the income as would be sufficient for the maintenance of herself and her family. This decision of the legal estate from the beneficial is inconsistent with a *fidei commissum.* Clearly the last will created a trust in favour of Amsa Natchia's grandchildren and this trust

as already stated offends the rule against perpetuities and is therefore void. The tenth to sixteenth defendants have no interest in this property under that will.

July 18, 1935. AKBAR S.P.J.—

The plaintiff-appellant sues in this mortgage action on two mortgage bonds for the recovery of Rs. 15,000 and interest from the first and second defendants, the mortgagors. The third to the ninth defendants were joined as they were secondary mortgagees, transferees, lessees, or persons who had entered into agreements to purchase from the mortgagors, and did not take any part in this appeal. The tenth to the sixteenth respondents who were represented by counsel at the hearing of this appeal were joined (as stated in the amended plaint) because they claimed "a beneficial interest in the mortgaged property" for the purpose of obtaining "an effectual hypothecary decree binding on them".

Five issues were framed in this case which are as follows:—

(1) Do the averments set out in the several paragraphs of the plaint disclose a cause of action against the tenth to sixteenth defendants?
(2) Do the bonds sued upon have priority to the interest of the tenth to the sixteenth defendants?
(3) If not, if issues 1 and 2 are answered in the negative, are defendants 10 to 16 entitled to be discharged from the action without prejudice to their rights in the land sought to be bound in this action?
(4) If issue 2 is answered in the affirmative, are 10 to 16 defendants owners of the said premises sought to be bound by virtue of last will No. 7,130 of December 12, 1872, and deed No. 241 of February 19, 1878?
(5) If so, can plaintiff ask for a hypothecary decree over the said premises?

Mr. Weerasooria who appeared for the respondents argued that he was entitled to a dismissal of plaintiff's action so far as the tenth to sixteenth defendants were concerned, because the plaint did not aver that they were in possession of the mortgaged property but only that they claimed a beneficial interest in it and because the District Judge had answered issue (1) in the negative. I cannot accept his contention for several reasons. The expression "claim a beneficial interest is wide enough to cover "possession" of the mortgaged property. If it did not, the respondents' counsel at the trial should have asked for a dismissal of the plaintiff's action. In such an event the trial Judge would under our procedure have allowed the plaintiff an opportunity to amend his plaint upon terms. But instead of respondents' counsel adopting this course, immediately after suggesting issue (1) he cited section 6, sub-section (1), of the Mortgage Ordinance of 1927, and framed the other issues 2 to 5, clearly indicating to Court that he based his case on two other grounds of law which have been argued at great length before us, viz., the point covered by issues (2) and (3) that the respondents were not necessary parties within the meaning of section 6 (1) of the Mortgage Ordinance and that they must be discharged from the action; and the point covered by issues (4) and (5)

that if section 6 (1) of the Mortgage Ordinance did not apply, the respondent claimed adversely to the mortgagors and not under them and therefore the plaintiff was not entitled to ask for a hypothecary decree as against them. The judgment shows that the District Judge has understood the issues more or less in this sense. After suggesting these issues respondents' counsel called the witness Haniffa and the eleventh defendant who on cross-examination admitted that he and his brothers and sisters (*i.e.*, 10th to 16th defendants-respondents) were in possession of the property and had been taking the rents from 1931. The reply of respondents' counsel as recorded also shows that he based his case not on issue (1) but on the other issues. In these circumstances, I do not think the respondents' counsel can at this appeal ask for a dismissal of plaintiff's action on issue (1) alone, as the necessary evidence has been elicited in cross-examination in the form of an admission from the respondents themselves indicating that the expression "beneficial interest" was meant to convey the meaning of possession.

I now pass on to the real issues of law which are of great importance to the legal profession which arise in this appeal and which have been fully discussed before us. The first question to be decided is, what is the exact meaning of the expression "necessary party" in section 6 (1) of Ordinance No. 21 of 1927? Does the expression mean that the persons enumerated are the only parties who can be sued in a hypothecary action or does it mean that they are the persons who cannot be left out in such an action and that others who could have been joined in a hypothecary action before the Ordinance was passed may still be joined in a hypothecary action brought after November 24, 1927? The Ordinance is entitled "An Ordinance to amend and consolidate certain laws relating to mortgages". It will, therefore, be necessary to ascertain what the Roman-Dutch law was on the points arising in this case. Voet defines a hypothec as a pactum whereby a *jus in re* is created in security of the debt due to the creditor, but in which the possession is not transferred to the creditor (*Book XX. 1, 1*). Maasdorp in vol. II., chapter II., classifies mortgages or hypothecs under *jura in rem*, a *jus in rem* being defined as a right to deal with a thing in any way whatsoever. In the case of a mortgage the *jus in rem* vested in the mortgagee is the right to sell the property mortgaged for non-payment of his debt.

Under the Roman-Dutch law the mortgagee could bring two actions: a personal action against the mortgagor for payment of his debt, and the *actio quasi serviana* or the hypothecary action to have the land sold (*Voet XX. 4, 1*).

In *XX. 4, 2*, Voet says as follows:—

"This action may be prosecuted not only against the debtor himself, and against a person who has mortgaged his property on behalf of a debtor, but also against any third party in possession, whether he is a *bona fide* or *mala fide* possessor; and also against one who has fraudulently ceased to possess. For, as the *jus pignoris* is not annexed to the person but to the thing, the debtor cannot deprive the creditor of it by gift, bequest, sale, barter or any other kind of alienation."

It is argued for the appellant that under the first portion of the above quotation a hypothecary action could be brought against a party in

possession even though he may claim adversely against the mortgagor as was done by the counsel for the respondent, in *Fonseka v. Peiris*[1]. Counsel for the respondent in this case argues on the contrary that the second portion of the above quotation showed that Voet was referring to a party in possession who claimed through the mortgagor. I cannot agree with this latter interpretation, for the reference to a *bona fide* possessor is wide enough to include a person in possession claiming adversely to the mortgagor. But the matter is settled beyond doubt when the whole of section 2 is read. For Voet then goes on to say that the mortgagee could even sue by a hypothecary action a person who had successfully litigated with the debtor in an action *rei vindicatio* respecting the proprietorship of a thing pledged, provided of course the mortgage was anterior to the law suit between the debtor and the person litigating. The translator in a note (*Berwick's Voet, p. 377*), says as follows :—" As put in the Digest "—" If a debtor has lost a suit in which he claimed the thing because he failed to prove that it was his the mortgage-creditor is nevertheless entitled to the benefit of the *actio serviana* (the " hypothecary action ") on proving that the thing was " *in bonis* (*debitoris*) " at the time of the mortgage (*XX. 1, 3*) ". This passage makes it clear that Voet was referring not only to a person in possession who may claim adversely to the mortgagor, but even to a person who had successfully vindicated his alleged title against the debtor in an action. Before, of course, a mortgagee can succeed in his hypothecary action against such a person, he had to prove the title of his mortgagor to the property mortgaged at the time of the mortgage, and this he was allowed to do even though his own mortgagor had lost his title as against the person in possession in an action between them to which the mortgagee was not a party. The same idea is to be found in section 7 when Voet says " For if he sues a third party, he is bound to prove that the thing was in the estate of the debtor at the time of the hypothec ". The reason why Voet added the second portion to the passage quoted by me above from the beginning of section 2 may be due, as Mr. Perera argues, to the fact that the doctrine that a successor in title could claim no better title than the person through whom he claims, was not so clear then as it is now, because under the Roman-Dutch system of law a mortgagor was still left with the title and possession of the property mortgaged. Mr. Perera has quoted two authorities from Perezius on Justinian's Code (*bk. IV., tit. 10, para 12*) and Noodt's *Commentary on Pacts and Transactions, chapter XIII.* The following are translations very kindly provided by Mr. Wickremanayake, Advocate : " A double action is available to me. One against the person of the contractor, the other a hypothecary action which is available against him who is in possession of the property or any body whomsoever who is keeping it back ". " Just as, therefore, when a pledge is given whether by cession or mancipatio the creditor can by the civil law recover it, as though he were owner, from anybody in possession ; so if the property is bound by a nude pact whether there has or has not been any delivery the creditor seems to have by the authority of the Edict, not indeed the dominium but a *jus in re* and the power of recovering the property pledged to him, by the *actio serviana* or the *actio quasi serviana* from anyone

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[1] *7 N. L. R. 262.*

whomsoever in possession. But since this action is available to the creditor against any sort of person in possession whether the creditor was put in possession or not, there appears, as far as this matter is concerned, no difference between a pledge and a hypothec except in the name, although in other respects there is a very great difference between the two as Marcianus has correctly stated".

This was the law in force in Ceylon till the Civil Procedure Code effected a change. By chapter XLVI. the mortgagee had to join all parties in possession with the mortgagor in one action (see *Punchi Kira v. Sangu*) [1]. That chapter also provided for notices to be issued by the mortgagee in a hypothecary action on all grantees, mortgagees, lessees, and other incumbrancers whose deeds shall be of date subsequent to that of the mortgage on which the action is brought. All such puisne incumbrancers could apply to be joined as defendants on the hypothecary action. If they did not apply to be so joined they were to be bound by the hypothecary decree.

The chapter further provided that these consequences were only to ensue if the deeds and addresses for service had been duly registered. Chapter XLVI. was in exact conformity with section 34 of the Civil Procedure Code for that section enacted that an obligation and a collateral security were to be deemed to be one cause of action. (See *Palaniappa v. Saminathan* [2].) The change made by the Civil Procedure Code in no way affected the Roman-Dutch law on the competency of the mortgagee to join any person in possession whether claiming adversely to the mortgagor or through him in the hypothecary action so as to get an effectual hypothecary decree to enforce the payment of his debt. If anything, the Civil Procedure Code made it clear that a hypothecary action was, what it always was and is now (see section 2 of Ordinance No. 21 of 1927), an action to enforce payment of a mortgage by a judicial sale of the mortgaged property. It is not as Mr. Weerasooria contended the combination of an action on a contract with an action in tort. It is a right to vindicate a *jus in rem* arising by contract. The case of *Fonseka v. Peiris* (*ubi supra*) is an authority directly in point.

The cases of *Ahamadu Lebbe Marikkar v. Luis* [3] and *Marimuttu v. de Soysa* [4] may not be in point (see *2 S. C. C., page 20*), on the question whether the mortgagee can sue a person in possession claiming adversely to the mortgagor, but the case of *Fonseka v. Peiris* (*supra*) is directly applicable here, and the remarks of Pereira J. in *Silva v. Fernando* [5] cannot be construed as being an opinion adverse to *Fonseka v. Peiris* (*supra*) as the former case referred to the rights of the possessor accruing to him through the mortgagor.

Ordinance No. 21 of 1927, in my opinion, created no change in the Roman-Dutch law on this point. It repealed the procedure in Chapter XLVI. indicated by me above and substituted a similar procedure with slight differences. By section 16 for instance in spite of section 34 a claim to all or any of the remedies of a mortgagee to enforce payment of the mortgage money may be joined to a claim in a hypothecary action or a separate action may be brought in respect of each remedy, subject to the deprivation of costs. But section 6 (1) did not restrict the hypothecary

[1] *4 N. L. R. 42.*
[2] *17 N. L. R. 56.*
[3] *3 S. C. C. 99.*
[4] *8 S. C. C. 121.*
[5] *17 N. L. R. 15.*

action only to the defendants mentioned in the sub-section. The expression "necessary party" was used to show the persons who (though "not necessary parties" to such an action) were nevertheless bound by the decree in such an action as if they had been parties to the action. Their rights were further defined in sub-sections (3) and (4). The use of the expression "necessary party" in section 6 (1) does not in my opinion preclude the mortgagee from joining any other person whom a mortgagee could join before the Ordinance was passed so as to get an effectual decree in the type of cases defined in section 2 as hypothecary actions. My opinion is strengthened by the words used in section 10 (2) (*a*). Under that sub-section the effect of a sale carried out in pursuance of a hypothecary decree is to pass title to the purchaser freed from the interests, mortgages, and rights of every party to the action; the sub-section does not use the expression "necessary party". The fact that in section 10 (2) (*b*) the draftsman mentions section 6 (2) and the terms in which section 7 has been drafted are further intrinsic corroboration of my interpretation. This being so the answers to issues (2) and (3) are in the negative.

The last questions to be decided are issues (4) and (5). By will dated December 12, 1872 (1D1) Idroos Lebbe Marikar bequeathed his properties to three sets of heirs, viz., his father, his wife, and his children, 5 sons and 2 daughters subject to certain conditions. The heirs are to take their shares according to the Muslim law, but they nor their issues or heirs are to sell, mortgage or alienate the properties but are to hold them in trust for the grandchildren of his children and the grandchildren of his heirs and heiresses. Then the will goes on to say as follows:—"Only that they may receive the rents, income, and produce of the said lands, &c., without encumbering them in any way or the same may be liable to be seized, attached, &c., and out of such income, &c., after defraying expense for their subsistence, and maintenance of their families, the rest shall be placed in a safe place by each of the party, and out of such surplus lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated, &c." The next clause in the will provided for a division of the properties after the death of the testator by a board of four arbitrators and the execution of deeds by the executor in favour of each heir containing the same conditions as in the will. The document is a will and in interpreting this will one must give full effect to the intention of the testator. Beyond the prohibition of alienation which sometimes occurs in *fidei commissa* there are no words in the will to show that the testator intended to create a *fidei commissum*. On the contrary the word "trust" is used. The English law of trusts was part of the law of Ceylon in 1872 (see *Ibrahim v. Oriental Banking Corporation*[1] and *Suppramaniam v. Erampakurukal*[2]). If the will created a trust the intention was that each heir was to hold the property in trust for his grandchildren, but the trustee was allowed to take so much of the profits, rents, &c., of the property without mortgaging or alienating it as may be necessary for the maintenance of his family and the surplus was to be accumulated to buy land "for the benefit and use of their children and grandchildren as hereinbefore stated". Each heir's share was to be

[1] *3 N. L. R. 148.*

[2] *23 N. L. R. 417.*

separated out and the conditions were to apply to each such share with reference to the particular heir to whom the share was allotted; this seems to be the intention of the testator, when one reads the clause referring to the division of the estate. This was done and by 1D2 dated February 19, 1878, the executor conveyed the property in dispute to one of the daughters Amsa Natchia subject to the conditions of the will. This deed recites the fact that the testator's father predeceased the testator. The second defendant, the mortgagor, is the daughter of Amsa Natchia and the respondents are the grandchildren of Amsa Natchia. If the will is regarded as creating a trust of each share, then the law is clear that Amsa Natchia was a trustee with a right to take part of the rents and profits for her maintenance (see definition of "trust" in section 3 of Ordinance No. 9 of 1917), and the beneficiaries were her grandchildren. The injunction to accumulate the surplus income and buy land would appear to be void for uncertainty for the reasons given in *Mussoorie Bank Ltd. v. Raynor*[1]. Anyhow we are not concerned here with the income but with the *corpus*. But if the beneficiaries are Amsa Natchia's grandchildren, the trust in favour of the grandchildren would be void as it offends the rule against perpetuities (see *Underhill on Trusts 7th ed., p. 74*).

It was pressed on us by counsel for the respondents that the intention of the testator was clearly to create a *fidei commissum* in favour of the grandchildren of Amsa Natchia. As I have said there are no direct words referring to a *fidei commissum* but the prohibition against alienation is more appropriate to a *fidei commissum* than to a trust, and it is significant that not only are the direct devisees prevented from alienating but also their issues and heirs. As expressed by the Supreme Court of South Africa in the case of *Estate Kemp et al. v. McDonald's Trustee*[2], it is the clearly expressed intention which has to be given effect to. In that case the will was drawn up in words appropriate to a trust and in spite of the fact that the English law of trusts formed no portion of the legal system of South Africa the words referring to the trusts were interpreted according to the Roman-Dutch law principles governing *fidei commissa*, with the object of giving effect to the clear intention of the testator. Innes C.J. quoted with approval the words of Burge (vol. II., p. 166), "Under the Civil Law and the law of Holland there are scarcely any dispositions of property, which even the caprice of its owner could suggest which might not be affected by substitutions *fidei comissa* and conditions".

In the same case Innes C.J. approved of the remarks of De Villiers C.J. in Strydom's case (*11 S. C., p. 430*), that "a *fidei commissum* may be so purely in the nature of what the English law terms a trust, as not to interfere with the vesting of the fideicommissary legatee's interest, even before the arrival of the time for the payment of the legacy". The Chief Justice after reviewing the Roman-Dutch authorities came to the conclusion that "it was quite possible under the Roman-Dutch law, to separate the legal ownership of property from the right to its beneficial enjoyment. And a testator could so formulate a fideicommissary bequest as to confer upon the remainderman vested rights transmissible to his

[1] *(1882) 7 A. C. 321.*

[2] *(1915) A. D. 491.*

heirs. The exact nature of such rights it is not necessary, for the purposes of this case, accurately to define. But where the *dominium* of the subject matter of the bequest is in the fiduciary, it would seem to follow that they could only be personal rights against the latter to enforce the discharge of the testamentary trust. But, even so, being vested rights they would pass to the heirs of the fideicommissary or could be claimed by his trustee in insolvency after his death. Before passing from this aspect of the matter, I would remark that where the mere legal ownership has been left to a fiduciary, and the right to the beneficial enjoyment of the bequest is held in abeyance by the interposition of a condition personal to the fideicommissary, then upon the happening of the condition, the bequest is purged, and the interest of the latter becomes as fully vested as if the *fidei commissum* had been originally 'pure'. This is best illustrated by an example. A testator leaves his estate to A for the sole use and benefit of his son B, the assets to be converted into money and interest thereon to be paid to B until he attains the age of 25, and then the capital to be transferred to him. That would be a *fidei commissum purum;* and B would have vested rights immediately on the death of the testator. But suppose the bequest had been to A for the use and benefit of B, if and in case the latter attained majority, in which case he to receive interest until the age of 25, and thereafter the capital ; and in the event of B's death during minority the capital to go to another son C. Such a *fidei commissum* would not be 'pure', but conditional ; and pending the majority of B, the right to use and enjoyment would be suspended ; for it would vest neither in B nor in C. The pure legal ownership would be in A, but there might be expressions in the will which deprived him of any right even to the interim profits. He would be a mere trustee for administration. But upon B attaining majority, the *fidei commissum* would be purged of its condition, his right to the enjoyment of the bequest would vest, and his legal position between the ages of 21 and 25 would be indistinguishable from that created by the first will ".

Keeping these principles in mind let me examine the terms of the will. The testator when he gave his instructions to the notary could only have expressed his intention to create certain rights. The choice of the words used in the will is the notary's and the notary must have used words to give expression to the testator's intention. It is this intention which has to be determined. To my mind the intention seems to be clear. Taking each devisee separately the testator forbids him and his heirs and issues from alienating the property and the property is to be held in trust for the grandchildren of the devisee. The prohibition against alienation shows that the *dominium* vested first in the devisee and then in his issues or heirs. The devisee and his heirs and issues are not only clothed with the bare *dominium* for administrative purposes as in the South African case, but they are given certain beneficial interests in the property devised, namely, the right to take so much of the income as may be necessary for the maintenance of their families. Then they are to accumulate the surplus (as in the South African case) and to buy land " for the benefit and use of the children and grandchildren " of the devisee. The word

"children" occurring here and the prohibition of the "issues and heirs" of the devisee earlier from alienating show that after the devisee's death, the property was to pass to his heirs and issues subject to the same condition as in the devisee's case, namely, the appropriation of so much of the rents as may be necessary for their maintenance. The heirs and issues are to hold the property till all the grandchildren of the devisee can be ascertained, when the property would vest in them.

This seems to me to be the clear intention of the testator and if effect can be given to it by applying the principles of the law of *fidei commissa* which is the law in Ceylon, I do not see any reason why a Court should not adopt that course in preference to the course of interpreting the will in terms of the English law of trusts, which though it is a part of the law of Ceylon, will have the effect of defeating the testator's intention. When the South African Court interpreted words appropriate to a trust in a will according to the Roman-Dutch law principles for the purpose of giving effect to the intention of the testator when the law of trusts formed no part of the South African jurisprudence, I can see nothing wrong in adopting a similar course here where both laws are in force.

Effect can be given to the intention of the testator here, for the law against perpetuities was not so drastic in the Roman-Dutch law as in the English law. Something similar to the English law was introduced in 1877 by Ordinance No. 11 of 1876, but in 1872 when the will was made it was the Roman-Dutch law which was applicable. (See *Lee's Roman-Dutch law, pp. 323 and 324.*) The Roman-Dutch law allowed a testator the right to tie up property for ever if he pleases or at any rate to the fourth generation. It will be noticed here that he only tied it up to the third generation. I cannot agree with Mr. Perera that the will created a trust and not a *fidei commissum.* In my opinion it created a *fidei commissum.* According to the South African case a fiduciary may only be given the legal title with no beneficial interest at all for administrative purposes. Here the fiduciary is given certain benefits, and what is more he is required to do certain acts, and that may be the reason why the word "trust" was used. If the will created one *fidei commissum,* there is an indication when the title is to vest in the fideicommissaries, *i.e.,* when they can all be ascertained. This date will be the death of the last of the children of the devisee, and until then I take it the *jus accrescendi* will apply among the children of the devisee.

But as I have already stated the *fidei commissa* were all separate owing to the testator's instructions to divide his estate among the heirs. The deed ID2 mentions the fact that the commission to divide the property was appointed by Order of Court on June 14, 1872. When the will has been interpreted in this sense by the heirs and given effect to by order of Court, this must be accepted as the correct solution by family arrangement and upheld. (See *Vansanden v. Mack*[1].) I have not therefore tried to interpret the will as creating one *fidei commissum.* As regards issues (4) and (5) all the grandchildren of Amsa Natchia including the respondents are the fidei-commissaries and will be ultimately entitled to the property. It appears

[1] *1 N. L. R. 311.*

from the evidence recorded that Amsa Natchia died about 16 or 17 years ago and that she had two daughters and a son. The second defendant is one of the daughters and had no more than a bare life-interest in the property with the liberty of taking only so much of the income as may be necessary for the maintenance of her family and by mortgaging the property to the plaintiff she violated the condition, that she was not to do so, by the will. This violation of the condition would in my opinion have the effect of vesting the title in the fidei commissaries or so much of them as can be ascertained at the time of the violation of the condition. (*See Lee's Roman-Dutch Law, 1st ed., p. 315; Voet XXXVI. 1, 27.*) The shares of these grandchildren of Amsa Natchia who can be then ascertained will be reduced if other grandchildren came into being after such date. Whether all the grandchildren can be ascertained now, cannot be decided as there is no evidence on the point. A complete answer cannot therefore be given to issue (4), but an answer can be given to issue (5). As the mortgage by the second defendant was in direct violation of the prohibition against alienation in the will, the second defendant had no title to mortgage to the plaintiff and therefore plaintiff cannot ask for a hypothecary decree in this case. It is not as if the prohibition against alienation was a nude or bare precept of the testator which has no binding force. The persons in whose favour or for whose advantage the prohibition was imposed are clearly designated, namely, the grandchildren of Amsa Natchia.

The appeal will therefore be dismissed with costs.

KOCH J.—

The facts are fully set out in my brother's judgment. The two points that arise in this appeal are (1) whether the tenth to sixteenth defendants (respondents) have been rightly joined in this action, and if so, (2) whether the terms of the will No. 7,150 of December 12, 1872, executed by one Isboe Lebbe Aydroos Lebbe Marikar created a *fidei commissum* whereunder legal rights have since passed to the tenth to sixteenth defendants (respondents).

I shall deal with the first point first. A decision on this issue will necessarily have to be based on the Roman-Dutch law, except in so far as it has been altered or modified by our new Mortgage Ordinance, No. 21 of 1927.

For the purposes of this decision we have to accept as a fact what has been established at the trial, namely, that these defendants are in possession of the mortgaged property independent of a derivative title from the mortgagors. It has been argued with much force by appellant's counsel that it is not necessary that the party in possession must necessarily be exercising that possession under a title derived from the mortgagors.

Voet, in *Book XX. 1, 1,* defines what a hypothec is. He says it is a contract whereby a *jus in re* is created in security of the debt due to the creditor but in which the possession is not transferred to him.

In *Book XX. 4, 1*, he refers to the precise nature of the action which it gives rise to. He calls it the *actio hypothecaria* alias *quasi serviana.* He describes it as an action *in rem* and defines the purpose, which is the right the creditor has "to follow up the hypothec bound to him when satisfaction is not made by the debtor or by those who are in possession of the subject mortgaged". He does not say by those who are in possession under the debtor or use words to that effect.

In *Book XX. 4, 1*, he says that this action may be prosecuted against any third party in possession whether he be a *bona fide* or a *mala fide* possessor and gives his reason that the right of hypothec is not annexed to the person but to *the thing.* He also says that the debtor cannot deprive the creditor of this right by gift, bequest, sale, or barter.

Mr. Weerasooria laid great stress on these last words and strenuously argued that the right to follow up was confined to the exercise of it as against persons only who were found to be in possession under a title derived from the mortgagor. This is a plausible argument but, in my opinion, unsound, for a careful study of the sections that follow will be convincing enough to indicate that the party in possession contemplated is any party whatsoever whether under a title derivative or independent of the mortgagor or on no title whatsoever.

Further down in this section (viz., 2), Voet observes that a party who has successfully litigated with the debtor in respect of the "*res*" hypothecated may be joined, provided that litigation took place subsequent to the date of the hypothec, and this whether this litigation was known or not to the creditor. Now, for the third party referred to to succeed in such litigation it must be appreciated that the title of the third party was adverse to that of the debtor.

Section 5 throws a deal of light on the point. Voet there refers to a cession of action in favour of *the party in possession* who pays the debt of the debtor. He makes it abundantly clear that the party paying may be "any possessor whatever" and these words to attract attention are in italics. He then proceeds to justify why it should be *any possessor whatever,* for, says he, "if you ask with Sandius how a person who is possessing without any right can presume to ask the benefit of cession which is a thing of right, I reply by the same titles as that by which a *mala fide* possessor of a thing when the owner vindicates its possession can recover from its true owner any necessary expenditure made by him on it during his possession". He further seeks to strengthen this justification by saying that "although an *unjust* possessor *acts with turpitude* in taking possession *without title or right* and *with the consciousness that it is another's property,* there is not any turpitude in paying to the creditor the debt for which the property is bound". This supports my previous conclusion that the party in possession contemplated may be there without any title whatsoever.

This being the Roman-Dutch law, I should wish, before I deal with the changes, if any, that have been introduced by our new Mortgage Ordinance, No. 21 of 1927, to make a passing remark or two as to the effect the Civil Procedure Code had on the situation.

Under section 34 of the Civil Procedure Code the personal and hypothecary claims had to be joined in one action or else the remedy omitted could not afterwards be sued for. Chapter XLVI. also made it necessary that the mortgagee entitled to bring the action should, on the issue of summons against the debtor-defendant, issue notice in writing to all grantees. mortgagees, lessees, and other incumbrancers whose deeds were subsequent in date to that of the bond sued on. This chapter further under certain conditions provided for the judgment being final. Besides laying down this procedure it did not in any way alter the Roman-Dutch law as it stood in regard to other parties in possession.

We now come to the Mortgage Ordinance, No. 21 of 1927. By section 16 (1) separate actions were permitted to be brought in respect of the personal and hypothecary claims, and in this respect section 34 of the Civil Procedure Code, so far as it applied to mortgages, was affected. Sections 640 to 649 of the Civil Procedure Code were repealed and provision was made in the new Ordinance to regulate the bringing of hypothecary actions. The all important section is No. 6, a section which by no means is easy to construe.

Sub-section (1) lays down that every person who has any mortgage on or interest in the mortgage property to which the mortgage in suit has priority, is a necessary party. Then follows a proviso that narrows this group by reason of the persons forming that group not having duly registered their documents of title. This proviso, carefully read in conjunction with sub-section (1), may rightly impute to the words " interest in " something more than the mere chance possession that a party may happen to have of the property mortgaged at the date of the hypothecary action. Applying therefore the entire section to the case of a party in possession under some title actual or imaginary underived from the mortgagor, I am of opinion that his case would fall outside.

What then would be his position? My opinion is that section 6 (1) was not meant to be exhaustive. It only concerned itself with a type of parties in possession and called them necessary parties. It left open the position of parties that did not conform to that type. When the case of such a party came to be considered, the common law would have to be invoked as this Ordinance was only intended " to amend and consolidate certain laws relating to mortgages ". If under that law (common law) such a party was necessary, he had to be joined, and if joined only, would he be bound by the hypothecary decree. It is my view that such a party, as are the tenth to sixteenth defendants in this case, has to be joined in order to obtain an effectual decree against him, and I have come to this conclusion without the aid of the decision of *Fonseka v. Peiris* [1], which I am glad to find supports my opinion.

The next point that arises is whether the terms and conditions of the last will and testament of Isboe Lebbe Aydroos Lebbe Marikar created a *fidei commissum,* and if so, whether legal rights thereunder have passed to the tenth to sixteenth defendants so as to prevent a decree being entered in favour of the plaintiff declaring that the premises mortgaged to the plaintiff are bound and executable under that decree against these defendants.

[1] *7 N. L. R. 262.*

Now, the date of this will is December 12, 1872, prior to the year when our Ordinance No. 11 of 1876 dealing with the law regulating the entail and settlement of immovable property came into operation. It would be sufficient therefore to consider whether under the Roman-Dutch law the will was such that under its terms the intention of the testator was to create a *fidei commissum* and whether under that law a *fidei commissum* had been created. It would be right to give effect to the intention of the testator, as the document we are asked to construe is a will and not a deed.

We listened with great interest to the learned arguments of counsel for the appellant on the law of trusts, so far as these were relevant to the consideration of this point, but it is not necessary for me to deal with the niceties of those arguments—particularly as they have been given specific consideration by my brother in his judgment—if in my opinion there is sufficient justification for holding that the language and terms of the will in question did either expressly or impliedly under the Roman-Dutch law create a *fidei commissum.*

This principle has been enunciated in *Vansanden v. Mack*[1]. Bonser C.J. there stated that no special words are necessary to create a *fidei commissum,* but effect is given to it if it can be collected from any expression in the instrument that it was the testator's intention to create. General rules, he observed, for the interpretation of wills are often unsafe guides. The only true criterion is the intention of the testator.

Wendt J. in *Ibanu Agen v. Abeysekara*[2], said, "In construing a will the paramount question is what was the intention of the testator. The intention may be gathered by necessary implication from the language of the will".

Lascelles C.J. in *Seneviratne v. Candappapulle*[3] laid down that "it was well settled that the general rules for the interpretation of wills are unsafe guides and the only true criterion is the intention of the testator".

Now, under the terms of this will the testator appointed as his devisees (1) his wife Assena Natchia, (2) his children Noordeen, Mohammadoe, Mohideen, Slema Lebbe, Abdul Rhyiman, Mohammadoe Usboo, Amsa Natchia, and Savia Umma, and (3) his father Uduma Lebbe Usboo Lebbe. It will be seen that this group comes under the category of three generations. He next provides that these were to take respectively according to shares that they would be entitled to according to the religion of the Safie Sect, to which he belonged.

He thereafter restricted their rights by laying down that neither they nor their issues nor heirs could sell, mortgage, or alienate any of the lands, &c., belonging to him at the time or which he may later acquire, but that such lands shall be held *in trust* for the grandchildren of his children and the grandchildren of his heirs and heiresses. This would mean that the beneficiaries would comprise members of the third generation, members of the first generation, and members of the second generation, respectively.

He next proceeds to state what he means by the expression "shall be held in trust", viz., that the devisees or their issues or heirs should

[1] *1 N. L. R. 311.* [2] *6 N. L. R. 344.*

[3] *16 N. L. R. 150.*

only receive the rents, income, and produce of the lands, &c., without in any way encumbering them or making them liable to be attached for their private debts, and that out of their shares of the collections after deducting sufficient for their subsistence and maintenance and that of their families the balance was to be funded and when opportunities arose other lands were to be purchased with these funds for the benefit and use of " their children and grandchildren ".

Now, here appears to creep in a slight error in describing the parties to be benefited thereby. Had the word " children " been left out and this group confined to the word " grandchildren ", consistency would have prevailed, but I do not attach importance to this slight mis-description as by the additional words " as hereinbefore stated " the testator meant to refer to the group previously referred to, which was described as " grandchildren of my children and grandchildren of my heirs and heiresses ".

The will further provided that after the death of the testator the heirs and heiresses, whom I have previously referred to as devisees, should with the assistance of the executor and three competent persons divide the movable and immovable properties of the estate, and that the devisees should be allotted separate and distinct properties according to their shares under the Safie law as the result of that division.. I think it can be safely inferred that it was the intention of the testator that when this was done, the directions he had set out were to apply to each of the properties so dealt with in the division with reference to the particular heir or heiress to whom that property was allotted. This division did duly take place and the executor by deed No. 241 of February 19, 1878, conveyed the premises mortgaged to Amsa Natchia, a daughter of the testator.

It remains therefore to consider whether the mortgaged premises were affected under the terms of the will by a *fidei commissum* as the result of which legal rights passed to the tenth to sixteenth defendants.

It will be noted that there do not appear to be express words defining the date or the event which would determine the tenure of the devisees or their issues or heirs, nor are there to be found words which expressly vest the property at some time or other in " the grandchildren of his children and the grandchildren of his heirs and heiresses ". On the other hand there are words that the lands shall be " held in trust " for these grandchildren by the devisees and their issues and heirs. It is this that has created the difficulty.

It is argued by Mr. Perera that the effect of these later words taken with the context is to create a trust whereby the legal title created in the devisees and their issues or heirs has not been arranged to pass to others. I do not attach the special significance to the words " held in trust " which Mr. Perera so ably argued we should do. At the time this will was executed (1872) very little of an English trust, so far as it was intended to affect the devolution of rights in lands of inhabitants of this Island, was known. What was very widely, on the other hand, known to them and often resorted to was " *fidei commissa* ", and when one of them intending to create a *fidei commissum* gave instructions to a notary,

he would express such intention in words which contained mere conditions and terms to which he intended the *fidei commissum* to be subject and would leave it to the notary to employ the necessary language. The notary without a keen appreciation of the incidents of an English trust would, when he did employ the word "trust," use it rather laxly to denote the qualified rights of a fiduciary.

We find Withers J. in *Tillekeratne v. Abeyesekere* [1] who had considerable experience as a practising lawyer before that date, using the word "trust" to mean a fiduciary's interest.

In 1902 in the case of *Jobsz v. Jobsz* [2] the terms of a will were considered with a view to ascertaining whether four different *fidei commissa* were created or one. The will itself, after stating that the half share of a property should be separated from the rest and divided into four equal portions among four children, went on to say that these four portions should be held by them "in trust" for their lawful children respectively and after their respective deaths should devolve on their lawful descendants. It was held that a *fidei commissum* was created, and rightly too. I am aware that there are special words of devolution in this case to support the finding, but I refer to it to point out that the words "in trust" were viewed by this Court as referring to a definition if the fiduciary rights. Grenier J., one of the Judges who himself had long practised at the bar, joined Middleton J. in holding that there were created not four *fidei commissa* "but only one trust", meaning one *fidei commissum.*

It will therefore be seen that in years prior to our Trusts Ordinance, No. 9 of 1917, the words "trust" and "*fidei commissum*" were treated as interchangeable terms.

In this state of things what I do consider as decisive of the point is the express forbidding by the testator that his heirs and heiresses (devisees) and their issues and heirs should sell, mortgage or alienate any of his lands, and this prohibition against alienation in conjunction with the surrounding injunctions would appear to vest the bare *dominium* in the devisees and their issues and heirs for merely administrative purposes, as pointed out in the South African case of *Estate Kemp et al. v. Mc Donald's Trustees.* [3]

We have therefore, to my mind, the clear intention on the part of the testator—although that intention may not have been in express words—to create a *fidei commissum* in favour of the grandchildren of Amsa Natchia, so far as this property is concerned, and these grandchildren being the members of the third generation in relation to the testator rule against perpetuities will not apply as under the Roman-Dutch law restrictions against alienations can extend up to the fourth generation.

The mortgaged property cannot therefore be deemed to be bound and executable against these defendants, and the plaintiff's action must be accordingly dismissed so far as these defendants are concerned.

It will follow that this appeal should be dismissed with costs.

Appeal dismissed.

[1] *(1894) 3 S. C. R. 76, at p. 80.*

[2] *6 N. L. R. 163.*

[3] *(1915) A. C., South African Law Reps. 491.*