1952 *Present :* **Gratiaen J. and Pulle J.**

ARCHBISHOP OF COLOMBO, Appellant, *and* DON ALEXANDER, Respondent

*S. C. 168.—D. C. Colombo, 4,483*L

*Fideicommissum by will—Multiplex fideicommissum—Perpetual succession—*Jus accrescendi*—Will—Subsequent codicil—Interpretation.*

Clause 21 of a last will of 1807 was in the following terms :—

" The testator bequeaths beforehand to his three children . . . . and likewise to the two children of the testator's deceased daughter . . . . (the property is here described) . . . . with the wish that not only must the said portion of the garden and the paddy field remain unsold in order that all his abovementioned children and grandchildren might enjoy the profits therefrom . . . . but also if one of the said children or grandchildren of the testator should happen to die without leaving lawful descendants behind, then his or her share must devolve to the testator's other children and grandchildren who are alive ".

Held, that even if the words created a fideicommissum, they provided for only one grade of fideicommissaries and did not create a multiplex fideicommissum.

Per GRATIAEN J.—The clause did not create a valid fideicommissum. The presumption in favour of direct as opposed to fideicommissary substitution was not rebutted by the language of the will.

Quaere : Where a will was admitted to probate together with subsequent codicils, is the absence of evidence of the contents of the codicils a bar to giving effect to a particular clause of the will in a later action ?

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *G. T. Samarawickreme* and *Vernon Wijetunge*, for the defendant appellant.

H. V. Perera, Q.C., with *C. Thiagalingam, Q.C.*, and *J. M. Jayamanne*, for the plaintiff respondent.

Cur. adv. vult.

March 24, 1952. GRATIAEN J.—

This is an appeal by the defendant, who is the Archbishop of Colombo, against a judgment of the Additional District Judge of Colombo declaring the plaintiff entitled to an undivided $\frac{1}{6}$ share of certain premises in Colombo hereafter described for convenience as "the Madampitiya property".

The plaintiff claimed undivided shares in the Madampitiya property as well as in certain other premises under a deed of purchase in his favour dated 3rd November, 1941. His claim against the defendant in respect of the other premises has been rejected by the learned trial Judge and does not arise for consideration on the present appeal.

Admittedly the defendant, and those under whom he claims, had continuously possessed the entirety of the Madampitiya property *ut dominus* for over half a century, and under normal circumstances the plaintiff's claim would for this reason be barred by the provisions of section 3 of the Prescription Ordinance. He seeks, however, to defeat this plea of prescription by tracing the legal title of his vendors to the provisions of clause 21 of the "last will and testament" P 1 dated 30th August, 1807, of a gentleman named Saviel Dias who thereby, in the plaintiff's submission, created in respect of the Madampitiya property "a valid fidei commisssum *in perpetual succession* binding on (the immediate devisees) *and their descendants to the fourth degree of succession*."

Mr. Weerasuriya concedes that if the plaintiff's legal title is in fact derived from clause 21 of the will P1 *and* if the provisions of clause 21 did create a valid fidei commissum which was effectual under the Roman-Dutch Law for four generations, the defendant's plea of prescription must fail by a very short period of time. Mr. H. V. Perera admits, on the other hand, that the plaintiff's claim is very clearly barred by prescription unless a multiplex fidei commissum such as his client contends for had been created by clause 21. It therefore follows that the present appeal must depend upon the applicability and the proper interpretation of clause 21 of the last will P1.

The defendant's position may be summarised as follows :—

(1) that P 1 does not represent *the complete testamentary instrument* in respect of which probate issued when Saviel Dias Pulle died in 1811, because P 1 *together with three subsequent codicils* had been admitted to probate in testamentary action No. 1,804 of this Court ; and that the plaintiff's failure to prove the contents of those codicils makes it impossible for a Court of law to decide

that Saviel Dias ' *final* testamentary disposition of the Madampitiya property was exclusively contained in the provisions of clause 21 of P1 ;

(2) that, *in any event*, clause 21 did not create a valid fidei commissum of any kind, and certainly not a mutliplex fidei commissum, effectual under the Roman-Dutch Law for four generations, such as is admittedly essential to combat the defendant's plea of prescription in these proceedings.

With regard to the first of these contentions, it is manifest, upon an examination of the proceedings in the testamentary proceedings of 1811 relating to Saviel Dias' estate (P9), that after the execution of P1 he had executed as many as three codicils two of which are now stated to be missing. The third codicil, written in the Dutch language, was produced at the present trial without a translation as part of plaintiff's case *for the limited purpose of identifying the earlier will P 1* by reference to certain markings on the documents concerned. In the result, the contents of the three codicils have not been proved even by secondary evidence.

In this state of the evidence, can it be said that the plaintiff has satisfactorily established that clause 21 of the last will P 1 represents the final testamentary disposition of Saviel Dias in respect of the Madampitiya property ? " When a man leaves not one but several testamentary writings, it is the aggregate or the nett result that constitutes his will, or, in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked or is inconsistent with a later testamentary writing, it is discarded. But all that survives this scrutiny forms part of the ultimate will or effective expression of his wishes about his estate ". *Douglas-Menzies v. Umphelby* [1].

It is important to bear in mind that this action is concerned with the investigation of title to immovable property and not with a preliminary application for probate in respect of an estate of which that property had formed a part. Had this been the original testamentary proceeding where the later codicils were proved to be missing at the time of application for probate on behalf of Saviel Dias' executors, it may well be that the Court would (in the absence of clear proof that the terms of P1 had been revoked or altered by a subsequent testamentary instrument) have been justified in admitting P1 alone and in its entirety to probate. *Hellier v. Hellier* [2]. For P1, at any rate at the time of its execution, did completely express the testamentary wishes of Saviel Dias, and the burden of proving that all or any of its provisions had been subsequently revoked by a missing will or codicil would therefore have been on the party who alleged " a difference of disposition ". *Cutto v. Gilbert* [3]. As Williams J. declared in *Dickinson v. Stidolp* [4], " a subsequent will (or codicil) is no revocation of a former one if the contents of the subsequent will (or codicil) are not known—the law is the same even if the later will expressly be found to be different from the former, *provided it be unknown in what the difference consists* ",

[1] *(1908) A.C.. 224.*
[2] *(1884) 9 P. D. 237.*
[3] *9 Moo. P. C. 131.*
[4] *11 C. B. (N. S.) 354.*

To my mind, however, the present problem stands on an entirely different footing. The stage of admitting the complete and final testamentary instrument of Saviel Dias to probate has long since passed, and all that we know is that probate had issued in 1811 on the basis that the testator's final wishes were expressed not in P1 alone but in four testamentary writings of which P1 forms only a part. As I understand the problem of interpretation which is now before us, our duty is to ascertain the comprehensive effect of the judicial order for probate entered in the testamentary proceedings in 1811, and I find it impossible, upon the evidence before me, to say one way or the other whether the terms of clause 21 of P1 were revoked, altered or left unaffected by the subsequent codicils which had also been admitted to probate as expressions of Saviel Dias' testamentary intentions.

As far as the present action is concerned, I take the view that the burden was on the plaintiff to prove that the Madampitiya property which formed part of Saviel Dias' estate had upon his death devolved on certain specified devisees subject to the conditions laid down in clause 21 of P1. *If we regard P1 and the subsequent codicils, read together, as a single testamentary instrument which had been admitted to probate* I do not see how the plaintiff could have succeeded except by proof, at least by secondary evidence, that the missing parts of the " aggregate or nett result " of the testamentary instruments admitted to probate did not alter the provisions of clause 21 which, in the present state of the evidence, only reveals an incomplete picture. In the absence of such proof, I cannot conclude that clause 21 *substantially expresses the final testamentary intentions of Saviel Dias as to the devolution of the Madampitiya property.* Vide *Sugden v. Lord St. Leonards* [1]. If this be so, the plaintiff's claim fails *ab initio*, but, should I be wrong in so deciding, I shall proceed to consider whether in any event the provisions of clause 21 can properly be construed as having created a multiplex *fidei commissum.*

Clause 21, on which the plaintiff relies, is in the following terms :—

> " The testator *bequeaths beforehand* to his three children Maria Dias, wife of Philippu Brito, Anthony Dias and Nicholas Dias and likewise to the two children of the testator's deceased daughter Louisa Dias, named Francisa Waniappu and Louisa Waniappu . . . . (the property is here described) . . . . *with the wish that not only must the said portion of the garden and the paddy field remain unsold in order that all his above-mentioned children and grandchildren might enjoy the profits therefrom*, to wit :—a quarter each by the three first-named ones and one quarter by the two last named ones or one eighth of the whole by each of the two, *but also if one of the said children or grandchildren of the testator should happen to die without leaving lawful descendants behind, then his or her share must devolve to the testator's other children and grandchildren who are alive* ".

The learned District Judge took the view that this clause created " a valid *fidei commissum* in favour of the lawful descendants of the devisees for the full term allowed by law, that is, for four generations ". Unfortunately, the grounds for this decision have not been fully elucidated,

[1] *1875–6, L.R. 1 P. D. 154.*

The main submissions on behalf of the plaintiff in support of the judgment under appeal were (*a*) that the testamentary direction that the property must " remain unsold " amounted in this context to a *real* (as opposed to a personal) *prohibition* against alienation, indicating an intention that the property should never pass out of the family of the immediate devisees and their lawful descendants ; and (*b*) that, in accordance with the principles laid down by the Privy Council in *Tillekeratne v. Abeysekera* [1], there was a single bequest to five persons of a property which was intended, not expressly but by necessary implication, to be burdened with a *fidei commissum* in favour of a successive series of their descendants.

It is convenient at the outset to examine the general principles upon which a Court of law should approach the question whether any particular will creates a *fidei commissum*, and if so, whether such *fidei commissum* operates as a recurring or multiplex *fidei commissum*. Upon a consideration of the authorities, the cardinal rules which govern every case are to the following effect :—

(1) the main duty of the Court is to ascertain the intention of the testator as expressed in the instrument, and " to this rule, all other canons of construction must give way ". *Voet 36–1–72 ; Gordon Bay's Estates v. Smuts et al.* [2]. (For this reason, " a decision as to the construction of one instrument is not of much assistance in construing another, the language of both not being the same ") ;

(2) in case of doubt or obscurity, that construction should be adopted which imposes the least burden on the instituted heir ; when, therefore, a person is instituted as heir, a clear expression of the testator's intention is required to deprive him of or diminish his rights as such heir, so that if other persons are mentioned in the instrument as heirs " *upon his death* ", the fair construction is that they are to be substituted as his heirs only if the instituted heir *predeceases* the testator. *Lint v. Zipp* [3]. In other words there is a recognised presumption in favour of direct and against fidei commissary substitution whenever there is a reasonable doubt as to the testator's intention. (This does not mean, of course, that mere difficulty in ascertaining such intention would necessarily create such a doubt. *Ex parte Zinn* [4].)

(3) even if the presumption in favour of direct substitution be removed by a clear expression of the testator's intention to that effect, the Court should incline to the view which imposes the least burden or restrictions on alienations on the fidei commissary substitute, because there is an additional presumption, in the absence of a clear intention to the contrary, against a multiplex fidei commissum created for the benefit of succeeding generations. *Nel v. Nel's Executors*, [5] ; *De Jager v. De Jager* [6] and *Brits v. Hopkinson* [7].

[1] *(1897) 2 N. L. R. 313.*
[2] *S. A. (1923) A. D. at page 165.*
[3] *(1876) Buch. 181.*
[4] *(1941) W. L. D. 7.*
[5] *8 S. C. 189.*
[6] *25 S. C. 703 at page 712.*
[7] *(1923) A. D. 492.*

I now proceed to examine the language of clause 21 in the light of these cardinal principles, and in doing so I am prepared to assume in favour of the plaintiff that the word " wish " which qualifies the bequest to the testator's three children and two grandchildren connotes in its context an imperative direction rather than a merely precatory exhortation. Moreover, the direction that the property should " remain unsold " does, in a sense, impose a *real* prohibition against alienation, but only for the purposes and to the extent indicated in clause 21. I find it impossible, however, to accept the further submission that these words either by themselves or in relation to the rest of the language afford convincing evidence of an underlying intention to conserve the property *perpetually* for the benefit of succeeding generations of the family concerned. *Nadarajah on Fideicommissum, page 104.* On the contrary, the primary object of the prohibition is expressly to ensure the enjoyment of the profits by the five persons named as devisees *and no one else.* Indeed, it is possible (although I need not so decide) that the direction against a sale of the property was addressed merely *to the executors* of the will requiring them to avoid, if possible, a sale in the course of administration *for the payment of debts* which would thereby frustrate the " pre-bequest ". For the disposition " beforehand " in clause 21 is a " pre-bequest " which takes priority over other dispositions. *Steyn on Wills 61.*

To pass on to the next submission urged on the plaintiff's behalf, I am quite unable to agree that the words of clause 21 provide scope for the operation of the *jus accrescendi* principle elucidated in *Tillekeratne v. Bastian* (*supra*). For in the joint will which was there interpreted " the bequest was not in the form of a disposition of a share of the whole to each of the institutes, but of *a gift of the whole to the institutes jointly, with benefit of successorship, and with substitution of their descendants* ". In the present case, by way of contrast, there is a clear disposition by the testator of a specific share to each of the named institutes, indicating very clearly *a separation of interests* which immediately raises a presumption against accrual. I find no indication in other parts of the will sufficient to negative this presumption—*vide* the authorities cited in *Nadarajah, p. 304* (*Note 20*).

There remain for consideration the words " but also if one of the said children or grandchildren should happen to die *without leaving lawful descendants* behind, then his or her share must devolve to the testator's other children and grandchildren ". This is the only passage in which express reference is made to " the lawful descendants " of the devisees. The interpretation relied on by the defendant is that these words merely provide for the *direct* substitution of an heir should any particular devisee *predecease* the testator—in which event the substituted heir would be *either* a " descendant " (if alive) of the first-named institute *or*, should no such " descendant " be available to be substituted, the other named institutes who are still alive. There is much to be said for this view. I appreciate that grammatically the words " should happen to die " are not necessarily limited in point of time, but the South African Courts, in construing similar words, have often applied the presumption in favour of direct as opposed to fideicommissary substitution. For instance, in *Lint v. Zipp* (*supra*) a testator nominated his son to be his " sole and

universal heir, *and on his death his lawful descendants by representation* ". De Villiers C.J. held that, upon the son being alive to accept the inheritance, his descendants could not thereafter claim the property by right of fideicommissary succession. *Voet 28–6–3 and 36–1–28.* In *Van Wyk's Trustee v. Van Wyk 13 S. C. 478* the will under consideration contained words very similar to the language of clause 21 with which we are now concerned. The testator directed that " in case one of the shareholders *should happen to die*, his *share* shall *devolve* upon his lawful heir ". The Court decided that " the wording was more appropriate to a *predecease* of the testator, or at the least doubtful ", and the presumption against fideicommissary substitution was accordingly applied. Similarly, it was decided in *ex parte Bosch* [1] that the presumption in favour of direct substitution can only be displaced by indications in the will " of so cogent a character as to leave no real doubt in the mind of the Court ". In other words, there must be " a sufficiently clear balance of probability in favour of fidei commissary substitution ". It seems to me that this is the proper approach to a problem where the language of a will is found to be capable of either construction—i.e., of direct or fideicommissary substitution. I therefore take the view that clause 21 did not create a valid fideicommissum, and that the testator intended the appropriate shares in the Madampitiya property to vest absolutely, and without further restrictions, in each institute (or his substitute, as the case may be). Putting the matter at its very lowest, I am unable to say that there is no real doubt upon the point, and the presumption in favour of direct substitution must therefore prevail. *Vide* also *Ex parte Kops and others* [2].

I desire to state in conclusion that, even if it be legitimate to interpret the words under consideration as creating a fidei commissum, the will unequivocally provides for *only one grade of fidei commissaries*. There is certainly no justification for holding that clause 21 creates " a recurring or multiplex fidei commissum, circulating as it were throughout the family ". As *Voet* points out (*36–1–28*), " it must not be readily assumed that the testator intended by means of several degrees of fideicommissary substitution to burden for all time those who were included in the family, and thus, contrary to the nature of ownership, to debar them of the right of making an unfettered disposition of the property they had acquired ". On this issue the case presents no difficulty to my mind, and there is really no need for resorting to the presumption against the creation of a multiplex fidei commissum. The will of Saviel Dias contains no words which are capable of the construction relied on by the plaintiff.

It was suggested by Mr. Perera in the course of the argument that some of the members of Saviel Dias' family had in the course of their dealings with each other acted upon the footing that clause 21 created a multiplex fidei commissum. I do not see how this circumstance can alter the true legal position. For the defendant and his predecessors have continuously enjoyed the property on the basis of full ownership unfettered by any restrictions.

[1] *(1943) C. P. D. 369.*

[2] *(1947) 1 S.A.L.R. 155.*

For the reasons which I have set out, I would allow the defendant's appeal and order that a decree be entered dismissing the plaintiff's action with costs both here and the court below. In the view which I have taken, the plaintiff's cross-appeal necessarily fails, and must be dismissed.

PULLE J.—I agree that the appeal succeeds and that the cross appeal must be dismissed. I am quite satisfied for the reasons given by my brother that clause 21 does not create a *fideicommissum* in perpetuity. I must confess that I was impressed by the argument that the absence of evidence of the contents of the codicils ought not to be a bar to giving effect to clause 21 which forms part of a testamentary writing duly admitted to probate. Is one justified in speculating that one or other of the codicils might have altered the clause in dispute ? If so, to what extent may one assume that the clause was affected ? It appears to me that the proper approach to the problem is to look for evidence raising a presumption of a partial or total revocation. If there be such evidence, the Court should refuse to give effect to the disposition relied on. I should, however, add that it is not necessary for deciding the present appeal to express a concluded opinion on this point.

Appeal allowed.