1912.

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

SENEVIRATNE *v.* CANDAPPAPULLE *et al.*

139—D. C. Colombo, 32,388.

Last will—Fidei commissum—Jus accrescendi—*Construction of last will — General rules as to interpretation are unsafe guides — Intention of testator true criterion.*

The testators by their joint will bequeathed to their two sons, X and Y, the property in dispute, and made separate devises in favour of each of his five daughters. The will further contained a devise of one property in favour of all the five daughters, and a devise of another property to all the children. The will provided that the "properties shall not be sold ..... but that the same shall be only possessed and enjoyed by our said children, to whom they are respectively devised, during their lifetime, and after them by their children and grandchildren under the bond of *fidei commissum.*" ..... "And we jointly nominate all our seven children as heirs and heiresses to all the residue ....., and we desire that if any of our said children should die without lawful issue, the devise or inheritance of such of our children which he or she may become entitled to under the will shall revert to the surviving brothers and sisters." X died without issue. Y contended that the whole of the share of X vested on him by virtue of the *jus accrescendi.*

Held, (1) that the share of X did not devolve on Y alone, but on Y and his five sisters; (2) that the share of X did not vest on the surviving six children absolutely, but subject to the *fidei commissum.*

It is well settled that the general rules for the interpretation of wills are unsafe guides; and that the only true criterion is the intention of the testator to be gathered from the terms of the will and from the surrounding circumstances.

THE facts are set out in the judgment in full.

van Langenberg, K.C., S.-G., for the first defendant, appellant.

A. St. V. Jayewardene, for the second, third, fourth, and fifth defendants, appellants.

Bawa, K.C., for the plaintiff, respondent.

Cur. adv. vult.

July 18, 1912. LASCELLES C.J.—

This appeal turns on the construction of the joint will of Francis Candappa and his wife Lucia dated August 11, 1859. The question relates to a piece of land known as Putuwille and Gooroomootenne,

in which the plaintiff claims a 5-12ths share. The will, after providing that the survivor of the joint testators should remain in possession for his or her life, devised the property in dispute, together with other property, to the testators, two sons, Gabriel and Anthony, subject to a *fidei commissum*. It was admitted in argument (though the point was disputed in the District Court) that Gabriel died without a surviving child. The plaintiff contends that on Gabriel's death his half share devolved in equal shares on Gabriel's six surviving brothers and sisters, and that he has acquired by purchase the shares of five of Gabriel's sisters; he accordingly claims 5-12ths of the property. The defendants, who are the children of Anthony, put forward several grounds of defence; but that relied on at the appeal was that the devise to Gabriel and Anthony was the subject of a separate *fidei commissum*, and that on the death of Gabriel without issue his half share devolved by virtue of the *jus accrescendi* on Anthony.

The case of *Steenkamp v. De Villiers* [1] contains a clear exposition of the technical rules of the Roman-Dutch law with regard to the *jus accrescendi*. Applying these principles to the present case, and assuming that a separate *fidei commissum* was created with regard to the property in question, it is clear that in the clause of the will dealing with the property Anthony and Gabriel are joined *re et verbis*, so that in the absence of any indication of a contrary intention on the part of the testators the right of accrual is to be presumed.

But it is well settled that the general rules for the interpretation of wills are unsafe guides; and that the only true criterion is the intention of the testator to be gathered from the terms of the will and from the surrounding circumstances. (*Voet 36, 1, 72* cited in *Vansanden v. Mack.*[2])

The questions, then, for determination are whether the will creates a separate *fidei commissum* with regard to the property in dispute, and whether it contains such indications of the testators' intention as are sufficient to rebut the presumption in favour of the *jus accrescendi* as regards Gabriel's share.

The will, after the joint devise in favour of Gabriel and Anthony, contains separate devises of immovable property in favour of each of the testators' five daughters. It further contains a devise of certain property in the Lascoreen village in favour of all five daughters, and a devise of certain property at Kotahena to all the testators' children. This last devise is stated to be " to all our children in equal shares."

The *fidei commissum* is created by the following general clause:—

> " Provided always and we hereby will and desire that our said landed properties or any part thereof shall not be sold, mortgaged, or otherwise alienated at any time, but that the same shall be only possessed and enjoyed by our said

[1] *2 Juta's Leading Cases 202.*

[2] *(1895) 1 N. L. R. 311.*

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children, to whom they are respectively devised, during their lifetime, and after them by their children and grandchildren from generation to generation under the bond of *fidei commissum*, and all the rents, profits, revenue, and income of the said immovable properties cannot be attached, seized in execution, or sold for any debt or liability of our said children or of the husbands of our said daughters."

At the end of the will comes the clause on which the respondents rely to exclude the presumption of the right of accrual:—

"And we jointly nominate all our seven children as heirs and heiresses to all the residue and remainder of our joint property and estate, movable as well as immovable, in share and share alike, and we desire that if any of our said children should die without lawful issue, the devise or inheritance of such of our children which he or she may become entitled to under this will shall revert to the surviving brothers and sisters."

The questions at issue in this appeal turn mainly on the construction of this clause. The appellants contend that the clause applies only to the residuary estate, and the respondent that it applies generally to all the property disposed of by the will. In my opinion this clause must be construed as applying to all interests which any of the testators' children might take under the will. The expression "the devise or inheritance of such of our children which he or she may become entitled to under the will" is, in my opinion, far too general to be limited to the residuary devise.

Then follows the question whether the six 1-12th shares which on Gabriel's death devolved on his brother and on each of his five sisters were subject to the *fidei commissum*, or whether they were taken absolutely. If these shares were included in the *fidei commissum*, the plaintiff's interests will be limited to the life interest, if any, of his vendors.

On this point I find myself unable to agree with the opinion of the learned District Judge. The will, read as a whole, in my opinion evinces, an intention to include the entire estate in a single *fidei commissum*, with the benefit of survivorship amongst the instituted heirs. I find it difficult to believe that the testators intended that the share of any of the instituted heirs who might die childless should be withdrawn from the *fidei commissum*, for the object of the testators plainly was to keep the property in their family to the full extent allowed by law, and this intention would be defeated if the shares of heirs dying without children devolved absolutely on the other heirs.

The case of *Jobsz v. Jobsz* [1] is in many respects similar to the present one. In that case it was held that although the testatrix

[1] *3 A. C. R. 139.*

had divided her estate for the purposes of her will into four equal parts, yet the entire estate was to be regarded as the subject of one and the same *fidei commissum*, and that the shares of the children dying without issue went to the survivors, not absolutely, but burdened with the *fidei commissum*.

The *ratio decidendi* in that case was that the intention of the testatrix was to keep her property in her family as long as possible, and that nothing could have been further from her intention than to release the shares of children dying without issue from the *fidei commissum* and thereby to enable them to pass from her family. The reasoning on which this judgment was based appears to me to be applicable to the case now under consideration.

It would be repugnant to the plain intention of the testators to hold that on the death of Gabriel his share went absolutely and free from the *fidei commissum* to his brother and sisters. If there had been evidence that the shareholders had for a long time acquiesced in dealings with this share on the footing that Gabriel's brother and sisters took his share absolutely, I should have hesitated in disturbing such an arrangement, but I do not think the fact that, in the acquisition proceedings, the defendants claimed and obtained compensation on the footing that Gabriel's share was free from the *fidei commissum* should prevent us from giving effect to what appears to be the real intention of the testators.

I would, therefore, amend the decree by declaring that on the death of Gabriel Mendis his share in the property claimed in this action devolved in equal shares on his brother Anthony Nonis and his five sisters, subject to the *fidei commissum* created by the will of Francis Nonis Candappa and his wife Lucia, and that with regard to the five 1-12th shares, to which the plaintiff claims title respectively from Savaria, Antonia, Juliana, Maria, and Mariana, the plaintiff is entitled, subject to the terms of the *fidei commissum*, to the share of such of the above-named persons as are now living.

With regard to costs, the appellant has succeeded in obtaining a considerable modification of the judgment, and I would allow him half the costs of the appeal.

WOOD RENTON J.—I agree.

Varied.