[FULL BENCH.] *Feb. 24, 1911*

Present : Hutchinson C.J., Middleton J., and Van Langenberg A.J.

MOHAMAD BHAI *et al. v.* SILVA *et al.*

361—*D, C. Colombo*, 29,894.

Fidei commissum *by act* inter vivos—Fidei commissary *donees who die before the fiduciary transmit their expectation to heirs—The rule different in the case of last wills—Compensation for improvements made by vendor—Meaning of the term "children"—Whether it means "issue."*

Per HUTCHINSON C.J., MIDDLETON J., and VAN LANGENBERG A.J.—In the case of *fidei commissum* created by last will, if the *fidei commissary* dies before the fiduciary the latter takes the inheritance. But in the case of a *fidei commissum* created by act *inter vivos*, if the *fidei commissary* dies before the fiduciary, the former transmits the expectation of the *fidei commissum* to his heirs.

Per HUTCHINSON C.J. and MIDDLETON J.—A purchaser of land stands in the same position as his vendor in regard to any claim for compensation for improvements made by the vendor.

The question whether the term "children" in a deed means "issue" or "descendants" discussed.

THE facts of this case are fully stated in the judgment of Hutchinson C.J. as follows :—

"This is a partition action ; the appeal is by the defendants against a decree allotting two-sevenths of the land to the plaintiff ; and the appellants also contend that, even if those shares are rightly allotted to the plaintiffs, the first defendant is entitled to compensation for improvements.

"The case turns on the meaning of certain words in a deed dated December 10, 1863. By that deed the then owner of the land declares that in consideration of her love and affection for her son Francis Charles Perera, and of services rendered by him to her, she granted the land 'unto the said F. C. Perera, his heirs, &c., as a gift absolute and irrevocable and under and subject to the following conditions and restrictions..... to have and to hold the said premises ..... unto the said F. C. Perera subject to the following conditions and restrictions : that during my life I shall be at liberty to possess and enjoy the benefit of the said premises, and after my death it shall devolve on my said son F. C. Perera and his present wife Mary Ann Perera, and they shall only possess the same and maintain their children, but they shall neither sell, mortgage, or

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alienate, or in any way encumber the same, but hold during their lives under the bond of *fidei commissum*, and neither the rents and profits of the said premises shall in any way be considered liable to be held, seized, or sold for the debts of the said F. C. Perera or his wife, but after their death it shall devolve on their children for ever ; and if she survive him and contract a second marriage she shall not be entitled to the life interest of the said premises, but devolve the said premises on their said children immediately and forthwith,' and the donor thereby covenanted ' with the said F. C. Perera, his heirs, executors, and administrators,' that she had good title, and would warrant and defend the title of the premises thereby granted ' unto the said F. C. Perera, his heirs, and administrators.' And F. C. Perera thereby accepted the gifts ' for myself, my wife, and children, subject to the above conditions.'

" The donor and F. C. Perera and his wife are dead. F. C. Perera and his wife had seven children. Five of them survived their parents, and their shares are now vested in the first defendant. The other two died in the lifetime of their parents, leaving children, whose shares, if any, are now vested in the plaintiffs, and the first question is whether the children of those two were entitled to any share."

The learned District Judge (Allan Drieberg, Esq.) upheld the plaintiffs' contention that the term " children " in the deed meant " issue," and that the first defendant was not entitled to any compensation.

The defendant appealed.

The case was first argued before Hutchinson C.J. and Middleton J., who referred the question whether the plaintiffs are entitled to a two-sevenths share to a Full Court. The question as to compensation was not reserved for the consideration of the Full Bench.

Sampayo, K.C., for defendant, appellant.—The words of the deed should be taken in their natural sense. Unless there is some circumstance to compel us to do so, the term " children " must not be interpreted to include " grandchildren." See *Voet* 36, 1, 22 ; *Galliers v. Kycroft.*[1] The words, the property " shall devolve on the children *for ever* " only mean that the property shall be the absolute property of the children. Deeds are construed more strictly than wills ; as wills are informal documents the intention of the testator should be given greater effect to than in the case of a grantor of a deed. Deeds should be more strictly construed. *Prideaux, vol. I., p.* 218.

H. A. Jayewardene, for the respondents.—The term " children " includes " grandchildren." In the present case the *fidei commissum* was created by an act *inter vivos ;* Voet says (36, 1, 67 ; *McGregor*

[1] *(1898) 3 Bal. 74, at page 84.*

145) that in such a case the *fidei commissory* heir would transmit the expectation of the *fidei commissum* to his heirs, should he predecease the fiduciary heir. See also 2 *Burge* 122. The *fidei commissary* heirs need not have accepted the gift ; it is enough that the fiduciary heirs had accepted it. *Asiathummā v. Alimanchy.*[1] The term " children " has been used to mean " heirs *ab intestato.*" See *Van Leeuwen, p.* 245 (3, 6, 7). Counsel also cited *McGregor, p.* 48 (*section* 22) ; *Galliers v. Kycroft.*[2]

Sampayo, K.C., in reply.—Voet in 36, 1, 67, contemplates the case of a *fidei commissary* heir who has been specially named ; in the deed under consideration a class is designated. Counsel cited *Juta's Leading Cases* (*Wills*) 158 ; *Williams on Executors, vol. I., p.* 853.

Cur. adv. vult.

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His Lordship, after stating the facts, continued :—

The original of the deed has not been produced. Both parties relied on a copy certified by the Assistant Registrar-General on December 7, 1893, to be a true copy from the duplicate filed in the office. In the copy the grant is " unto the said F. C. Perera, his heirs, executors ," but the word " executors " is crossed out in ink. I do not think that for the purpose of this appeal we need require to see the original or the duplicate ; we must assume that the copy is a true copy, and that the word " executors " is similarly written and crossed out in the original, and that it was so written and crossed out before the deed was executed. The donor was a Sinhalese woman, the deed is in English, and very bad and slovenly English. It was duly attested by a notary.

The deed created a *fidei commissum,* and the defendants therefore contended that only those children could take who survived their parents, while the plaintiffs contended that the word " children " in the deed means " issue " or " descendants " and the learned District Judge upheld the latter contention. He thought that it was clear that in the direction that the *fiduciarii* should with the rents and profits " maintain their children," the donor could not have intended to exclude their orphaned grandchildren, and that therefore she could not have contemplated excluding them from the reversion.

I agree that it is very probable that she had no intention to exclude them. But I also think that she had no intention to include them ; she had no formed intention either way, because she never thought of the possibility of one of the children dying before the parents and leaving issue ; if she had thought of it or if the draftsman of the deed had suggested it to her, as he ought to have done, she would have provided for the contingency. She might have

[1] (*1905*) *1 A. C. R.* 53. [2] (*1898*) *3 Bal. 74, at page 84.*

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thought, as a plain man would think who was not learned in the Roman-Dutch law, that all the children would take, whether they survived the *fiduciarii*, or not, but if the possibility to which I have just referred had occurred to her, she would not have left the matter in doubt. And unfortunately she has only made a gift to "children." a word which in the mouth of an Englishman, unless he is using it in some such metaphorical sense as "child of sin" or "children of Israel," means sons and daughters, and does not include remote descendants.

But it has to be noted that this deed is the deed of a Sinhalese woman, and that it is in a language in which she was probably not very expert, and the man who prepared it for her was certainly in the same predicament. And in considering the intention of it we have to read the whole of it carefully, and to look at all the circumstances. She was making a provision for her son and his family; and her intention was expressed for her very clumsily by a man who, if one may judge from this deed, had only a dangerously little knowledge of law and of the English language. If she had told him that she wished to entail the property on her son and his wife and their descendants in perpetuity, I feel sure that he would not have written "children" only. And if none of the children had died before the parents, I do not think that it would have been suggested that the surviving children took only a life interest. The words "their children for ever" can I think have only one of two meanings: either "their children (*i.e.*, their sons and daughters) absolutely," or "their descendants in perpetuity." I cannot help thinking that the former is what the donor and the draftsman of the deed meant to say, and that that is the meaning of the deed.

But on the re-argument before the Full Court the respondents' counsel contended that the rule that a *fidei commissarius* has no transmissible interest if he dies before the *fiduciarius* applies only to *fidei commissa* created by will, and not to those created by an act *inter vivos*. *Voet* 36, 1, 67 says that in such cases the better view is that, in the event of the *fidei commissary* successors dying before the fulfilment of the condition, they transmit the expectation of the *fidei commissum* to their heirs; since (he says) it is clear that they to whom something is due under a contract, subject to a condition, are creditors during the pendency of the condition. This is not quite satisfactory—it is too artificial; the meaning given to the same words should be the same, whether the donor makes the gift in the form of a will or in that of a deed. But as I think that the rule as stated in the passage just quoted enables us to give effect to what the donor intended, I would follow it and hold that the children of F. C. Perera and his wife took a vested interest the moment the deed was executed, and that the heirs of any child who died during the lifetime of F. C. Perera and his wife became entitled to that child's share.

It was also argued for the respondents that the *conditio si sine liberis decesserint* should be implied. The District Judge refers to that contention, but does not adopt it, pointing out quite rightly that that rule applies only in a case of " substitution," that is, in a case where a parent has appointed children as heirs and has directed that on their death their shares shall go over to some one else. There is no such substitution here. The children who take (if " children " means children) would take absolutely with no gifts over on their death. In the case of *Galliers v. Kycroft*[1] the testator gave a life interest to his wife for the benefit of herself and her children, and directed that after her death the estate should be divided equally among his children or such of them as might be alive—that is, as the Court said, he instituted the children as heirs on the death of their mother and substituted the survivors for such of the children as might die before their mother. It was therefore a case of substitution, but of direct and not *fidei commissary* substitution ; the children were not *fiduciarii*. The Court quoted the rule as stated by the Supreme Court of Natal, that where a parent has appointed " children as heirs and directed that upon their death their share should go over, either to a stranger or to another child, then the going over or substitution is subject to the tacit condition implied by law," that the deceased child had no issue, and it approved that statement of the rule if confined to the case of *fidei commissary* substitution, *i.e.*, to the case where a trust is imposed on the child to restore the inheritance to some other person on its death. And the Court said : " The children are not requested to part with their inheritance after they have once entered on it, and consequently those who survived their mother took their inheritance free from any burthen. Those who died before their mother entered upon no inheritance and possessed nothing to restore." If William Galliers (a child who died, leaving issue, before the mother) had survived his mother " his inheritance would have belonged to him absolutely ; having died before her, he acquired nothing in respect of which a *fidei commissum* could be imposed on him." The Court also held that there was nothing in the will to justify them in giving to the word " children " the meaning of descendants, and that William having died before his mother, his issue took nothing under the will.

In the present case there is no such substitution as is required by the rule which is discussed in *Galliers v. Kycroft*, that is, no substitution of another person in case the children die, no place in which it would be possible to insert the words *si sine liberis decesserint*. There is a simple direction that after the parents' death the property shall devolve on their children, and to my mind, if a child predeceasing the parents had no vested interest, the only possible argument for the respondents is that children means descendants.

[1] *(P. C. 1899) 3 Bal. 74.*

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For the reasons, however, which I have given above, I would hold that the appeal against that part of the decree which allots two-sevenths of the land to the plaintiff should be dismissed. But the refusal of the first defendant's claim for compensation was wrong. The learned Judge says that the defendants' vendors had received the value of the improvements. But they had not received it from the plaintiffs. The first defendant had paid it to his vendors ; and if they were entitled to it, he was entitled to it. The case must therefore go back for assessment of the amount of compensation. Each party should pay their own costs of the appeal.

MIDDLETON J.—

This was a partition action in which the plaintiffs claimed two-sevenths of the property in question by purchase from the children of Clement Henry Perera and Marcellina Perera, who predeceased their parents, Francis Charles Perera and Mary Ann Perera, in the year 1899. The first defendant is the representative in interest of the other five children of Francis Charles Perera and his wife. By deed bearing date December 16, 1863, one Dona Sanchina donated the premises in question to her son Francis Charles Perera and his heirs as a gift absolute and irrevocable, subject to certain conditions and restrictions. Dona Sanchina reserved a life interest to herself, but after her death directed that the property should devolve on her son Francis Charles Perera and his present wife Mary Ann Perera, to maintain their children, without power of alienation or encumbrance under the bond of *fidei commissum*, but after their death it should devolve on their children for ever. There was also a provision in the deed that if Mary Ann Perera survived Francis and contracted a second marriage, she would not be entitled to the life interest of the said premises ; that it should devolve immediately and forthwith on their children. It is clear on the face of the deed that it creates a *fidei commissum* and imposes a restraint on alienation upon Francis Charles Perera and his wife, which did not extend to the children.

The question to be decided by the Court is whether the children of Clement Henry and Marcellina Perera, who predeceased their parents, had any vested interest in the property which their children as their heirs could convey to the plaintiffs.

The District Judge, in disposing of the case, held that the donor intended to benefit by the use of the word " children," not only the children of Francis and his wife, but also the children of those who predeceased them, and that therefore the children of Clement Henry and Marcellina became entitled to the shares which would have vested in their parents had they been living, and could therefore legally transfer such interest to the plaintiffs.

The defendants appealed and for them it was argued on the authority of the decision of *Galliers v. Kycroft*, reported in

3 *Balasingham, p.* 74 ; *Strydom v. Strydom's Trustee* ;[1] *vol. I., Prideaux on Conveyancing, p.* 218 ; *vol. I., Williams on Executors, p.* 853 ; *and notes to section* 67 *of bk.* 36, *tit.* 1, *of Voet translated by McGregor*, that the wording of the deed of gift would limit the devolution of the property to those children only of Francis Charles Perera and Mary Ann who survived them.

It is a rule of law, in the absence of clear provisions to the contrary, that where a *fidei commissary* dies before the fiduciary the latter takes the inheritance (*Van Dyk v. Van Dyk's Executor* [2]).

An exception to this rule is quoted by *Voet, bk.* 63, *tit.* 1, *section* 67, *p.* 145 (*McGregor's translation*) in the case of a *fidei commissum* constituted, not by last will, but by act *inter vivos*, as in the case under consideration, on the ground that they to whom something is due in terms of a contract subject to a condition are creditors pending the condition, contrary to the rule obtaining in legacies, and Voet goes on to say that this is the case with regard to dotal pacts if they have been so drawn up as to have the force of a contract, but not where they merely take the place of a last will or intestate succession.

The question appears to be whether, from the terms of the deed, there has been any vesting of the interest of the *fidei commissary*, and Villiers C.J. in *Strydom v. Strydom's Trustee* says 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 *fidei commissary's* legatees' interest even before the arrival of the time for the payment of the legacy. I agree with the learned District Judge that the use of the words " to Francis Charles Perera his heirs " signifies an intention to benefit the descendants of Francis Charles Perera beyond the first degree, and by the use of those words..... " and their children for ever " I would hold that there was a vesting of interest in all the children of Francis Charles Perera, transmissible by law of intestate succession to their children. The purpose expressed for maintaining their children, in my opinion, also fortifies the conclusion arrived at by the District Judge.

I would therefore support the judgment in this respect. As regards the question of compensation for improvements, I do not agree that the first defendant's claim for compensation for the alleged improvements made by the vendors has been met by their sale to him. He will stand in the same position as they did in regard to any claim for compensation that might have been sustainable by them as the successor in title of their right, title, and interest in the property. I agree in the order of the Chief Justice.

VAN LANGENBERG A.J.—

This is a partition action, the plaintiffs claiming to be entitled to two-sevenths share of the property sought to be partitioned. The

[1] *Juta's Leading Cases on Wills 158.* [2] *4 Juta 194.*

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defendants deny that the plaintiffs are entitled to any share, and claim the entirety of the premises. The property in question belonged to one Dona Sanchina, who by deed No. 3,466 dated December 10, 1863, gifted it to her son Francis Charles Perera subject to the following conditions :—

" That during my life, the said Wahalatantirige Dona Sanchina, I shall be at liberty to possess and enjoy the benefit of the said premises, but after my death it shall devolve on my said son Francis Charles Perera and his present wife Mary Ann Perera and they shall only possess the same and maintain their children, but they shall neither sell, mortgage, or alienate, or in any way encumber the same, but hold during their lives under the bond of *fidei commissum*, and neither the rents and profits of the said premises shall in any way be considered liable to be held, seized, or sold for the debts of the said Francis Charles Perera or his wife, but after their death it shall devolve on their children for ever ; and if she survive him and contract a second marriage, she shall not be entitled to the life interest of the said premises, but devolve the said premises on their said children immediately and forthwith."

Francis Perera died on March 12, 1902, and his wife Mary Ann on July 29, 1899. They had seven children, two of whom, Clement and Marcellina, predeceased their parents. The plaintiffs derived their title from these two children. The defendant says that the gift to Francis Charles Perera was subject to a *fidei commissum* in favour of his children, and that the property vested in the five children who were alive at his death. The plaintiffs contend (1) that the donor when using the word " children " intended to benefit Francis Charles Perera's children and their issue, and that, therefore, the word " children " must be interpreted to mean descendants ; and (2) that where a *fidei commissum* is created by an act *inter vivos* a *fidei commissarius* dying before the fulfilment of the condition transmits the expectation of the *fidei commissum* to his heirs. The case was argued on the footing that if either of these contentions be upheld, the plaintiffs must succeed. On the first point the District Judge held in favour of the plaintiffs.

I am unable to agree with him. According to *Voet* (*bk.* 36, *tit.* 1, *section* 22) the meaning of the term " children " when used in a document is a question of fact rather than of law. The intention of the donor in this case has to be gathered from a reading of the whole document. The reference in the deed to the maintenance of the children suggests to me that the donor did not contemplate the event of any one of the children predeceasing his or her parents.

In my opinion, we must give to the word " children " its ordinary meaning. As regards the second point, Mr. Jayewardene referred us to *Voet* (*bk.* 36, *tit.* 1, *section* 67). There Voet says :—

" But where the *fidei commissum* has been constituted, not by last will, but by act *inter vivos*, such a pact added to a donation *inter vivos*

or by a dotal pact, the better view is that in the event of the *fidei commissary* successors designated in the pact dying before the fulfilment of the condition, they transmit the expectation of the *fidei commissum* to their heirs ; since it is clear that they to whom something is due in terms of a contract (*ex contractu*) subject to a condition are creditors during the pendency of the condition—contrary to the rule obtaining in the case of legacies—and that he who made a stipulation subject to a condition transmits his expectations under the contract to his heirs if he die before the fulfilment of the condition." *McGregor's translation*, 1902, *p.* 145.

Mr. de Sampayo argued that Voet contemplated the case of a *fidei commissary* who was alive at the time the *fidei commissum* was created, and was expressly named ; whereas in the deed in question a class was designated. I was at first inclined to think that he was right. *Burge* (1*st ed.*, *vol. II.*, *p.* 122) citing Voet lays down the rules thus :—

" When the *fidei commissum* is created, not by will, but by act *inter vivos*, it seems that in the event of the death of the *fidei commissary* before the condition is performed or the event happens, his contingent interest is transmitted to his heirs, for the effect of the act *inter vivos* whether it be a donation or marriage contract, is to constitute him a creditor."

And *Nathan* (*Common Law of South Africa*, *vol.* 3, *section* 1904, *p.* 1922) referring to the same passages uses almost the same words. On further consideration, I think I must decide this point in favour of the respondents.

The question of compensation was not argued before me.

Sent back.