1929.

Present : Fisher C.J. and Garvin J.

CAROLIS *v.* SIMON *et al.*

216—D. C. Galle, 24,476.

Fidei commissum—*Bequest to children—Prohibition against alienation—Reversion to Crown on extinction of descendants.*

Where a last will contained the following clause :—" After the death of both of us, the movable and immovable property belonging to our estate should devolve equally on our nine children, and it is our emphatic command that beyond enjoying the same without any dispute, they shall not sell, mortgage, or otherwise alienate, or sell for any debt of theirs any of the immovable properties. Moreover it is hereby ordered that if at any time our line of descendants becomes extinct all lands and fields belonging to our estate shall be vested in the then Sovereign Lord of the Island.

Held, that the will created a valid *fidei commissum* in favour of the grandchildren and the remoter descendants, which under the Roman-Dutch law will be effectual for four generations.

THIS was a partition action in which the question in dispute depended upon the construction of the joint will of one Adrian and his wife Ketona. The relevant clause reads as follows :—

" Further after the death of both of us, the movable and immovable property belonging to our estate should devolve equally on our nine children, and it is firmly ordered that they should possess the same by division or in common without dispute, but should not sell, mortgage, or convey

in any way to anybody and should not be sold for any debt of theirs ; and further it is ordered if the generation of our children and grandchildren were to be ruined without descendants at any time the ruler of Ceylon should become entitled to the whole of our estate and become Crown property."

The learned District Judge held that the clause did not create a valid *fidei commissum*.

Croos da Brera (with *N. E. Weerasooria*), for appellant.—The language used clearly shows that the testator intended to create a *fidei commissum*. There is a prohibition against alienation followed by an indication of the persons to benefit. There is an intention to create a *fidei commissum* for the full period allowed by law and to keep the property in the family. Effect should be given to this intention. Unless all the descendants are bound by the prohibition the Crown cannot benefit. The judgment of Wendt J. in *Ibangu Agen v. Abeyasekera*[1] contains a clear exposition of the principles to be followed.

H. V. Perera, for respondent.—The prohibition against alienation binds only the children. The will does not prohibit alienation by grandchildren and other descendants. The fact that the Crown is to be the ultimate beneficiary does not necessarily suggest that the descendants are to hold the property subject to a *fidei commissum*. The condition upon which the Crown is to succeed is the failure of descendants. This is not by itself sufficient to induce a *fidei commissum*. A similar question was considered in *Steenkamp v. Marais and another*,[2] and it was held that where property was given to A subject to the condition that if he died without children it was to go to C, no *fidei commissum* resulted in favour of the children.

Croos da Brera, in reply, referred to *Mohammado Bhai v. Silva*[3] and *357—D. C., Galle, 23,160* (*S. C. Min. December 21, 1928*).

February 13, 1929. GARVIN J.—

The question raised by this appeal involves the interpretation of clause 7 of the joint last will and testament of Puinkara Mestrige *alias* Adrian and his wife Ketona. The document is in Sinhalese, and in the translation filed of record the clause in question is rendered as follows :—

" Further that after the death of both of us, the movable and immovable property belonging to our estate should devolve equally on our nine children, and it is firmly ordered that

[1] (*1903*) *6 N. L. R. 344.* [2] *25 S. C.* (*Cape*) *483.*
[3] (*1911*) *14 N. L. R. 193.*

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they should possess the same by division or in common without dispute, but should not sell, mortgage, or convey in any way to anybody and should not be sold for any debt of theirs, and further it is ordered that if the generation of our children and grandchildren were to be ruined without descendants at any time the ruler of Ceylon should become entitled to the whole of our estate and become Crown property."

The translation is manifestly inelegant and ungrammatical, but despite these disadvantages, it is at least clear that it was the intention of the testator that the property bequeathed to their children was not on any account to be alienated, and that in the event of his line of descendants becoming extinct at any time the estate was to vest in the Crown.

The Interpreter of this Court renders the clause as follows :—

"7. Further, after the death of both of us all the movable and immovable properties belonging to our estate shall devolve equally upon our nine children, and it is our emphatic command that beyond enjoying the same without any dispute either in shares or in common they shall not sell, mortgage, or otherwise alienate or sell for any debt of theirs any of the immovable properties. Moreover, it is hereby commanded that if at any time our line of decendants becomes extinct or disappears all lands and fields belonging to our estate shall be vested in the then Sovereign Lord of the Island of Ceylon."

The question is whether by the language of this clause the grandchildren and remoter descendants of the testators are admitted to a fidei commissary inheritance.

It is urged by counsel for the appellants that there is manifestly an intention on the part of the testators that their estate should devolve in succession upon the successive generations of their descendants. It is incontestable that the testator had in mind not only their children but their grandchildren and remoter descendants as well, and it is difficult to resist the contention that there is manifest an intention that their estate was to benefit not only their children and their grandchildren, but their remoter descendants as well.

If I understood the learned counsel for the respondent aright it was his contention that inasmuch as the language used by the testators did not expressly grant the estate to the children and the remoter descendants as well, and further as it does not lay the remoter descendants under an express prohibition against alienation it is not permissible to give effect to what might appear to be the intention of the testators unless such an intention is necessarily involved in and implied by the language used by them in creating the conditional

fidei commissum in favour of the Crown. He completed the argument by contending that the words " and further it is ordered that if the generation of our children and grandchildren were to be ruined without descendants at any time the ruler of Ceylon should become entitled to the whole of our estate and become Crown property " merely indicate the condition upon the fulfilment of which the Crown succeeds to the property, and do not necessarily disclose the intention that the property was to pass to the Crown from the last of the descendants.

A provision by a person that in the event of the line of his descendants becoming extinct at any time his property should pass to the Crown appears to me to indicate very strongly the desire that the property should pass from generation to generation and ultimately upon the death of the last of the descendants to the Crown. That this is the intention becomes more evident when it is remembered that the right of a *fidei commissarius* is to obtain restitution to the property from the fiduciarius immediately preceding him in the line marked out in the disposition or from his heir.

It is difficult to believe that the language of the testators was used with no other intention than that of appointing the condition upon which the property was to escheat to the Crown regardless of the circumstance that during the lives of successive generations of their descendants the property may by alienation have passed into the hands of strangers.

Counsel referred in the course of his argument to the case of *Steenkamp v. Marais and others.*[1] The case was that of a bequest in a joint will of a testator and his wife to their son C, which was qualified by the following words " in the event of C dying after their decease without children, the bequest should be void and devolve upon D." C had children and the substitution by the conditional *fidei commissum* did not take effect. It was contended that this was not for the reason that when there were children the condition of the *fidei commissum* failed, but because the testators intended that their grandchildren should take in succession to their son C to the exclusion of D.

This view is supported by Grotius, but after the consideration of other authorities the Judge came to the conclusion that the words " if he died without children " were merely a condition upon which the right of D depended and was not a disposition in favour of the grandchildren. But the case now under consideration differs considerably from the case of *Steenkamp v. Marais and others* (*supra*). It is clear that the testators had in contemplation not merely their children and grandchildren but their remoter descendants as well. The explanation given in the case of *Steenkamp v. Marais and others* (*supra*) viz., that the intention of the testator might well

[1] *25 S. C. Cases (Cape) 483.*

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have been that upon the birth of a child their father was to be freed from the fetter of *fidei commissum* and thus be placed in a position to dispose of the property if he so desired by bequest to his children or by permitting them to succeed *ab intestato*, is hardly sufficient to meet a case where the testator is shown to have contemplated not only his grandchildren but his remoter descendants as well. But a further circumstance which distinguishes this case is that the children are laid under an express prohibition against alienation. Having regard to the clause as a whole this prohibition is unnecessary and meaningless, if the sole purpose of the testator was to create a *fidei commissum* in favour of the Crown upon a condition which might conceivably remain unfulfilled for several generations and which according to the argument of the counsel for the respondent was capable of being fulfilled consistently with the right not only of the children but of the grandchildren and remoter descendants of the testator to alienate the property. What then was the purpose of this prohibition against alienation? It seems to me that it was to ensure the devolution of the property upon the descendants whom the testator had in contemplation and upon whose total extinction alone the property was to pass to the Crown.

In the case of a will the intention of the testator governs. The intention that their property should remain in their family and be enjoyed by their descendants has been sufficiently manifested by the testators and must be given effect to.

In my opinion this clause creates a *fidei commissum* in favour of the grandchildren and further descendants which under the Roman-Dutch law will be valid and effectual for four generations.

The judgment under appeal will be set aside and the case sent back for such further proceedings as may be necessary and for final determination.

The appellants will have their costs of appeal.

FISHER C.J.—

I have had the advantage of reading the judgment of my brother Garvin, with which I entirely agree. The intention of the testators to settle the property on their real descendants, as far as possible, is, in my opinion, clear beyond any doubt.

Appeal allowed.