1951 *Present :* **Gunasekara J. and Swan J.**

MRS. NOOR MOHIDEEN *et al.*, Appellants, *and* HADOOD SADOON *et al.*, Respondents

S. C. 309—D. C. Colombo, 5,706

Fideicommissum—Succeeding generations—Joint and single fideicommissa—Devolution of shares—Time of gift over.

Where a last will operating from 1876 conveyed property to certain fiduciaries, burdened with an obligation in favour of their descendants in succeeding generations—

Held, that the intention of such an instrument must be taken to be that, so long as any of the beneficiaries who are to be substituted in place of the fiduciaries are in existence, the whole property must be considered as burdened with an obligation in their favour. In such a case, the property which a fiduciary holds passes on his death to his children as a joint fideicommissum and not as separate fideicommissa. In the case of a single fideicommissum, if any one line of the descendants is exhausted, the interest of that line shifts to the other lines.

APPEAL from a judgment of the District Court, Colombo.

E. B Wikramanayake, K.C., with *S. A. Marikar* and *Shamsudeen Mohamed*, for the 15th, 16th, 17th and 20th defendants appellants.

H. W. Tambiah, with *P. Somatilakam*, for 1st to 7th plaintiffs respondents.

M. H. A. Azeez, with *M. H. M. Naina Marikar*, for the 27th defendant respondent.

Cur. adv. vult.

September 6, 1951. GUNASEKARA J.—

This is an action for a sale of co-owned property under the Partition Ordinance (Cap. 56). The shares to which the co-owners are respectively entitled depend on the construction of a *fidei commissum* to which the property was subject. The 15th, 16th, 17th and 20th defendants appeal against the construction adopted by the District Judge.

The original owner of the property was Idroos Lebbe Marikar, who died in 1876 leaving a last will dated the 12th December, 1872. In accordance with the terms of this will the estate was distributed among the heirs subject to the following conditions contained in the will:

> " I do hereby will and desire my wife Assena Natchia, daughter of Seka Marikar, and my children Mohamado Noordeen, Mohamado Mohideen, Slama Lebbe, Abdul Ryhiman, Mohamado Usboe, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate, shall be entitled to and take their respective shares according to my religion and Shaffe sect to which I belong, but they nor their issues or heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities, and out of such income produce and rents after defraying expenses for their subsistence and maintenance of their families, the rest shall be placed or deposited 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, but neither the executors herein named or any court of justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy.
>
> I further desire and request the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the movable and immovable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

In this distribution the property that is the subject of the present suit was conveyed by the executor to one of the testator's daughters, Safia Umma, by a deed dated the 14th September, 1888. She died leaving eleven children all of whom have since died. Two of Safia Umma's children died issueless and each of the others, four sons and five daughters, left surviving children who are all parties to the present action. The seven plaintiffs are the children of one of Safia Umma's sons, Mohamed Sadoon, and the appellants are four of the six children of a daughter, Ummal Vojeeda. The learned District Judge held that each of Safia Umma's four sons succeeded to a 2/13 share and each of her five daughters to a 1/13 share (each son taking twice as much as each daughter, in accordance with the Muslim law), and that the children of each son became entitled among themselves to a 2/13 share and the children of each daughter to a 1/13 share. It is contended for the appellants that the different groups of Safia Umma's grandchildren are not restricted in this manner each to a share devolving on the parent of the group, but all the grandsons get equal shares and the grand-daughters equal shares (subject to the rule that males take twice as much as females.)

The construction of this will was considered by a Bench of five Judges of this Court in *de Saram vs. Kadijar* [1], which was the fifth case in which that question was considered, and the majority (Howard C.J., Soertsz J. and Hearne J.) held that the will did not create a valid *fidei commissum*. On appeal [2] the Judicial Committee of the Privy Council, agreeing with the view taken by the other two Judges (Keuneman and Wijeyewardene JJ.) held that it did, and that the testator intended to create a separate *fidei commissum* in the case of each devisee.

It is contended on behalf of the appellants that the fidei commissaries in each case were the devisee's grandchildren only and that upon the devisee's death the interest that passed to the children was a usufructuary and not a fiduciary interest. In support of this contention Mr. Wikramanayake cited the judgments of Akbar J. and Maartensz J. in *Sabapathy vs. Yoosoof* [3] and *Saleem vs. Mutturamen Chettiar* [4] respectively (which are two of the cases in which this will was construed). It does not appear to be necessary, however, to discuss the *dicta* on which he relied, for a view taken by Keuneman and Wijeyewardene JJ. in *de Saram vs. Kadijar* [1] that in each case the beneficiaries included the children of the devisees appears to have been approved by the Privy Council. Keuneman J. held that " the testator devised the immovable property to the devisees burdened with a *fidei commissum* in favour of their children and grandchildren in successive generations " and that " the *fidei commissum* was to become operative on death in each case "; and Wijeyewardene J. held that the " heirs " of the devisee (Abdul Hamid in that case) were the devisee's children and that the property was held by them " as separate *fidei commissa*," each " getting the share to which he was entitled under the rules of the Muslim Law of intestate succession ". The judgment of the Privy Council [2], having referred to the leading clause of the will as making clear that there is an attempt to constitute *fidei commissa*, quotes the next two clauses as indicating who are the fiduciaries and who

[1] *(1944) 45 N. L. R. 265.*
[2] *(1946) 47 N. L. R. 171.*
[3] *(1935) 37 N. L. R. 70.*
[4] *(1938) 15 C. L. W. 115.*

are the fidei commissaries. It proceeds to state that their Lordships are of opinion that the words " they nor their heirs " in the clause prohibiting alienation cover two generations, namely, the devisees and their heirs and that in the next clause the beneficiaries " relate to the third generation in the case of all the devisees, the testator's wife as well as his children ". As regards the succeeding clause as to the rents, income and produce of the immovable property, " their Lordships are of opinion that it is not legally binding on the fiduciaries, to whom alone it relates ", and as regards the construction of that clause " that it applies to the devisees and their heirs, who are referred to in the clause which prohibits alienation ". It thus appears that in the view taken by the Privy Council the devisees and their children are the persons who are referred to in the clause which prohibits alienation, and are the fiduciaries; and therefore the children of Safia Umma would be beneficiaries and not usufructuaries. (They would also be among the beneficiaries for the reason that they are grandchildren of the testator's wife). The Privy Council held further that " it is clear on the whole terms of the will that each of the fiduciaries was only to take an interest in his share during his life ".

The learned District Judge has formulated the main question that arose for his decision as follows:

> " Safia Umma had eleven children and the question to be decided is whether the 1/11th share which each of those children inherited on her death was subject to a separate *fidei commissum* or whether the entire property was subject to one *fidei commissum* in favour of the grandchildren of Safia Umma."

He has based his decision partly upon a view that upon Safia Umma's death her share passed to her heirs as separate *fidei commissa*, and he cites in support of it the dictum of Wijeyewardene J. to which I have referred. It is contended for the appellants that the view taken by the learned District Judge is erroneous and that the dictum on which he relies is *obiter*.

The question that was considered in *de Saram vs. Kadijar* was whether the testator's intention was to create an English trust or a *fidei commissum*. There did not arise for decision in that case the question whether the share held by the devisee (Abdul Hamid) passed to his heirs as a joint *fidei commissum* or as separate *fidei commissa*. It appears to have been referred to in the argument, however, and Wijeyewardene J. observed in his judgment that " this is a question that arises in most cases where the devolution of property burdened with a *fidei commissum* has to be considered ", but that " the fact that such a question arises and has to be considered does not throw any doubt on the existence of a valid *fidei commissum* as the appellants' counsel attempted to argue ". He went on to express his own view and added that any difference of opinion on this question cannot involve in doubt the intention of the testator to create a valid *fidei commissum*. His opinion that " the property was held as separate *fidei commissa* by the ' heirs ' of Abdul Hamid " appears to me to be an *obiter dictum*.

The reasons for this opinion do not appear from the judgment, but I appreciate that it is nevertheless an opinion that is entitled to the greatest respect and it is therefore with diffidence that I venture to take a different view. In my opinion the property that Safia Umma held as a fiduciary passed on her death to her children as a joint *fidei commissum* and not as separate *fidei commissa*. The result of a series of cases, beginning with *Tillekeratne vs. Abeysekara* [1], where the question of construction that is involved was discussed, is summarised by Bertram C.J. in *Usoof vs. Rahimath* [2] as follows:

> " That while in each case the question must be a question of the intention of the testator or donor, as the case may be, to be determined by the construction of the particular instrument, yet when an instrument conveys property to a fiduciary or fiduciaries, burdened with an obligation in favour of their descendants in succeeding generations, the intention of the instrument must be taken to be that, so long as any of the beneficiaries who are to be substituted in place of the fiduciaries are in existence, the whole property must be considered as burdened with an obligation in their favour. "

In the present case the instruments that conveyed the property to Safia Umma conveyed it to her as fiduciary burdened with an obligation in favour of her descendants in succeeding generations, namely, her children and grandchildren. There appears to be no reason for departing from the rule that the intention of the instrument must be taken to be that so long as any of the beneficiaries who are to be substituted in place of the fiduciaries are in existence the *whole property* must be considered as burdened with an obligation in their favour.

One of the results of this interpretation would be that upon the death of each of Safia Umma's children who left no issue there were substituted as fiduciaries their surviving brothers and sisters and the issue of any deceased brothers or sisters. " If it is determined that the intention was to create a single *fidei commissum*, this of itself involves the conclusion that upon any one line of the descendants being exhausted, the interest of that line shifts to the other lines. It involves the possibility that the interest of one brother or sister, who dies without issue, may shift to one of the other brothers or sisters or their issue, if they still survive. " *Per* Bertram C. J. in *Carlinahamy vs. Juanis.* [3] If, on the other hand, the property is taken to have passed to Safia Umma's children as separate *fidei commissa*, then clearly the shares of the two children who died without issue would devolve on their heirs free of the *fidei commissum* that burdened each share separately. The learned District Judge holds that this result did not follow, but that " those shares devolved on the surviving brothers and sisters " by operation of the *jus accrescendi*. There could be no operation of the *jus accrescendi*, however, for it " has no application when the shares of the objects of the liberality have once vested ". *Usoof vs. Rahimath.* [4] The reason why the shares of the children dying without issue devolved on their surviving brothers and sisters is that the property was subject to a single *fidei commissum*.

[1] *(1897) 2 N. L. R. 313.*
[2] *(1918) 20 N. L. R. 225.*
[3] *(1924) 26 N. L. R. 129, at 136.*
[4] *(1918) 20 N. L. R. 225, at 233.*

Usoof vs. Rahimath (*supra*) was, like the present case, an action for a sale under the Partition Ordinance. The property in question had been held by one Candoo Umma subject to a *fidei commissum* in favour of her children and successive generations of descendants. She died leaving four children—Rahimath Umma, Abdul Cader, Ahamed and Mariam. Of these, Abdul Cader died leaving three children, and Ahamed and Mariam died leaving no issue. It was held that the property passed to Candoo Umma's four children as a single *fidei commissum* and that consequently the interests of Ahamed and Mariam were burdened with a *fidei commissum* in favour of Abdul Cader's children (who were allotted each a one-sixth share of the property) and Rahimath Umma (whose transferee was allotted her life-interest in a half share). Having held that the property was subject to a single *fidei commissum*, Bertram C.J. said (*ibid.* at pp 229-230):

> " On this construction, so long as any of the objects of that bounty continue to exist, no one can acquire an unrestricted right to any part of the property. The interest of Ahamed and Mariam could not devolve upon their father, Mohamadu Usoof, but the rights they had in the property were burdened with an obligation in favour of their brother Abdul Cader, and their sister Rahimath Umma, and any children that might have been or might be born to that brother and sister. "

In the present case, upon the view that there was a single *fidei commissum*, the time of the giftover was the death of the last of Safia Umma's children. It seems to me that in the meantime the fiduciary interest of each of those who died earlier devolved on his or her issue (as in the case of Abdul Cader in *Usoof vs. Rahimath*) or if there were no issue then on the surviving brothers and sisters taking *per stripes*. " It is a question not of accrual between individuals but of accrual between lines. It is a question of the construction of a particular document, and the question is whether on the true construction of the document, the maker intended that, on the failure of one line, its interests should accrue to the others. " *Per* Bertram C.J. in *Carlinahamy vs. Juanis* [1]. In accordance with the construction that that was the intention of the testator, I hold that although the property did not pass to Safia Umma's children as separate *fidei commissa* there was a separation of the interests of the different lines of her descendants and that upon the final vesting of the property in her grandchildren it was distributed among them *per stirpes*. I would therefore dismiss the appeal with costs.

SWAN J.—I entirely agree and have nothing to add.

Appeal dismissed.

[1] *(1924) 26 N. L. R. 129, at 140.*