1961 *Present :* **Sansoni, J. and H. N. G. Fernando, J.**

V. T. DE SILVA and another, Appellants, *and* P. K. RANGOHAMY and others, Respondents

S. C. 543—D. C. Matara, 21,360

Fideicommissa—Bequest to children— Si sine liberis decesserit *clause—Gift-over to Crown if all the devisees should die issueless—Inference of intention to create fideicommissum in favour of the grandchildren of the testator.*

Where a last will bequeaths property to the children of the testator, the presence therein of a *si sine liberis decesserit* clause—e.g., " provided however that on the death of any one of them leaving no issue, his or her share shall devolve on the survivor or survivors and their children "—does not *per se* create a tacit fideicommissum in favour of the grandchildren of the testator. In such a case it cannot be contended that when the children referred to in a *si sine liberis decesserit* clause are descendants of the testator, then the clause itself, without more, is an indication of intention to include such children as successors.

A last will bequeathed specified lands or shares in lands to the testator's daughter, P—, and illegitimate son, S—, and bequeathed the residue to the legitimate son, G—. It contained the following clause :—

" I give devise bequeath all my residuary property of what kind or nature so ever movable as well as immovable wherever found or situate unto my eldest son Lahanda Purage Geeris de Silva his heirs executors administrators and assigns all of which said property thus bequeathed and devised unto my aforesaid children shall be vested in them and the share of Geeris being subject to the payment of my funeral and testamentary expenses provided however that on the death of any one of them leaving no issue his or her share shall devolve on the survivor or survivors and their children irrespective of the fact that the said Saudias is not a legitimate son of mine. Therefore if he should die without issue possessed of the legacy hereby left to him the same shall devolve on my two legitimate children and their heirs executors administrators and assigns. All the said three children dying issueless this estate shall vest in the Government of Ceylon and half of the same shall be expended for the advancement of the Buddhist religion if the Government so desires. "

" And any kind of property either movable or immovable that I may happen to acquire hereafter shall devolve on my said three children Saudias, Geeris and Paraneinahamy in equal shares. "

Held, that the will did not create a fideicommissum in favour of the grandchildren of the testator.

2—J. N. R 17020—2,533 (5/61)

APPEAL from a judgment of the District Court, Matara.

H. W. Jayewardene, Q.C., with *S. D. Jayasundera*, for plaintiffs-appellants.

N. E. Weerasooria, Q.C., with *E. B. Wikramanayake, Q.C.*, and *E. R. S. R. Coomaraswamy*, for defendants-respondents.

Cur. adv. vult.

January 23, 1961. H. N. G. FERNANDO, J.—

The land to which the plaintiffs claim title admittedly belonged to one Lahandapurage Lewis who left a Last Will dated 24th January 1924, probate of which was granted in 1931. The plaintiffs' claim is based on the Final decree dated 19th October 1938 entered in a Partition action in which the existence of the Last Will was not disclosed. The land was allotted by that decree to Geeris, a son of the testator Lewis; reciting his partition title Geeris transferred the land to his wife Rangohamy, who in turn sold the land to the plaintiffs by deed No. 6532 of 4th July 1947. Among the many somewhat difficult matters agitated at the trial were (*a*) whether Geeris had obtained title to this land under Lewis' Last Will or else by an earlier oral or written grant, (*b*) whether because of the Partition decree the plaintiffs' rights are unaffected by any conditions in the Last Will, and (*c*) whether the terms of the Last Will are ineffective against the plaintiffs for want of due registration. It is fortunately unnecessary to consider the correctness of the Judge's answers to those questions for they arise only if the Judge's basic finding is correct, namely that the Last Will created a fideicommissum in favour of some of the defendents who are the children of Geeris. That finding being in my opinion erroneous, it suffices to state reasons for the opinion which I have formed.

The Last Will bequeathed specified lands or shares in lands to the testator's daughter and illegitimate son and bequeathed the residue to the legitimate son, Geeris. On the basis that the property now in dispute comprised part of the residue bequeathed to Geeris, the defendants contended that it was subject to a fideicommissum in terms of the Last Will, and passed upon the death of Geeris to his children the 4th and 7th defendants. The clause relevant for present purposes reads as follows :—

> " I give devise bequeath all my residuary property of what kind or nature so ever movable as well as immovable wherever found or situate unto my eldest son Lahanda Purage Geeris de Silva his heirs executors administrators and assigns all of which said property both movable and immovable thus bequeathed and devised unto my aforesaid children shall be vested in them and the share of Geeris being subject to the payment of my funeral and testamentary

expenses provided however that on the death of any one of them leaving no issue his or her share shall devolve on the survivor or survivors and their children irrespective of the fact that the said Saudias is not a legitimate son of mine. Therefore if he should die without issue possessed of the legacy hereby left to him the same shall devolve on my two legitimate children and their heirs executors administrators and assigns. All the said three children dying issueless this estate shall vest in the Government of Ceylon and half of the same shall be expended for the advancement of the Buddhist religion if the Government so desires. "

" And any kind of property either movable or immovable that I may happen to acquire hereafter shall devolve on my said three children Saudias, Geeris and Paraneinahamy in equal shares. "

The opinion of the trial Judge and the argument of counsel for the respondents were founded on the views expressed in Chapter 5 of Professor Nadaraja's " *The Roman Dutch Law of Fideicommissa* " and the authorities there cited, to the effect that in certain circumstances " a tacit fideicommissum impliedly arises in favour of the children of a person who has been laid under an express fideicommissum in favour of somebody else ". This implication, it is stated, arises when the condition of the express fideicommissum is if the fiduciary should die without children, and when the gift-over to the designated fideicommissary fails because the fiduciary does leave children surviving him. In such a case, if there are indications that there was an intention to include the children in the succession, then a fideicommissum should be implied in their favour.

Thus far, the proposition is in accord with the basic principle that effect must be given to the intentions of the author of an instrument and that an intention to create a fideicommissum can be manifested in other modes than that of expressly substituting the favoured class of successors. But the view taken by Professor Nadaraja goes further ; it is briefly, that when the children referred to in a *si sine liberis decesserit* clause are descendants of the author, then the clause itself, without more, is an indication of intention to include such children as successors. The diversity of opinion on this question has been referred to by Sande thus : " There is among jurists no question more debated than this ; it is a question very celebrated, very difficult and almost unanswerable ". The conflicting opinions of the text-writers are referred to and examined in an interesting study by Mr. (formerly Justice) MacGregor in the *South African Law Journal* (*Vol. 53 p. 265*). Put briefly, the conclusion reached in this study is that, when the author of a disposition provides for a fideicommissary substitution after the lifetime of the devisee or donee upon the condition that the fiduciary dies without children, the disposition evidences *pietas* in favour of the children if they be descendants of the testator ; it is urged on that ground that from this same motive of *pietas* the ascendant must be presumed to have intended a fideicommissary substitution of the descendant children, if any.

I certainly agree that this conclusion and the opinions on which it is based are quite reasonable and were worthy of acceptance by the Courts in Ceylon and South Africa when the law relating to fideicommissa was being considered and settled in the earlier judgments. But the fact that they did not gain such acceptance cannot now be ignored. The contrary view was upheld by Maasdorp, J. in *Steenkamp v. Marais* [1] in 1908 and was followed in South Africa in subsequent decisions, two of which are of later date than the MacGregor article. (Cf. 1935 C. P. D. 30; 1939 C. P. D. 144; 1945 C. P. D. 67; and also *Engelbrecht N. O. v. Engelbrecht en Andere* 1958 (3) S. A. L. R. 571, at 574, kindly translated into English by Mr. Advocate Herat.) It was also upheld in the Ceylon case of *Asiathumma v. Alimanchy* [2] in 1905, although the disposition there considered was one *inter vivos*. This Court has had in a long line of cases to examine numerous instruments which were claimed to have created fideicommissa on the ground that they manifested the requisite intention or indications that such intention was present. But it is significant that in no case after that last mentioned has the *sine liberis decesserit* clause been invoked in Ceylon in support of the proposition now contended for. The clause being not an uncommon one, the fact that it has not been so invoked very nearly convinces me that the profession and the conveyancer and indirectly the authors of such instruments, have not regarded the clause as effective to burden property in favour of descendants. To construe the clause differently now would be to alter what the Courts should regard as settled law; in other words, if, as I think, only its plain meaning, and not its indirect implication of benefit to the descendants, has been regarded as effective, the Courts should not at this stage regard the clause as having an effect which hitherto it was not expected to have.

Moreover, the reasoning that, because the survival of children of the devisee will exclude the designated substitute, an intention to call such children to the succession should be presumed, is not entirely convincing. Succession is of course the direct and highest benefit which an ascendant can intend for his descendants; but the intention might well be that some indirect and lesser or even uncertain benefit might accrue to the children, *though not under or by virtue of the disposition*. Might not the ascendant merely have had the confidence that the devisee will transfer or bequeath the property to such of his children as he may choose? If, on the other hand, it becomes very nearly certain that some or all of the children will survive the devisee, and that therefore the gift-over to the designated fideicommissaries will fail, the devisee may be able to sell the property. But it would not necessarily follow that the children will receive no benefit: the sale proceeds might well be utilized by the devisee to educate or dower his children or in business investments which may ultimately yield more profits to the children than could have been gained from the original property. A settlor's intention cannot be safely ascertained by arbitrary rules, and with respect it seems to be that the rule of construction now contended for would be to

[1] *25 S. C. 483.* [2] *(1905) 1 A. C. R. 53.*

some extent arbitrary, if it were now to be adopted by our Courts. Let me take the case of a Will in which the testator bequeaths his property in equal shares to his three sons, to two of them absolutely but to the third son with a gift-over to that son's children. True it is that the *pietas* in favour of grandchildren by the third son is demonstrated in the instrument. But would it be proper to say of the testator that he entertains no *pietas* in favour of his descendants by the other two sons ? I can best answer this question by reference to a Will executed in circumstances which were within my personal knowledge. X had a large family and several legitimate grandchildren of whom her favourites were the sons of A ; her errant son B was unmarried, but had illegitimate children. X in her Last Will devised property absolutely to A, but the devise to her son B was subject to gift-over in favour of B's illegitimate children. X herself would have been much pained if, because of this distinction in her Will, she had been accused of a lack of *pietas* in favour of A's sons, her favourites. Such distinctions are often made, and they are often referable not to an intention to discriminate as between grandchildren, but to fear of improvidence on the part of some devisees and the absence of that fear in regard to the others. In the same way the demonstration of *pietas* by means of a *si sine liberis decesserit* does not to my mind raise the necessary inference of an intention to call the descendant children to the succession.

Having regard to these considerations, the omission of an ascendant to provide for a gift-over to his grandchildren might well be explained as evidence of his faith in the good sense and *pietas* of the devisee in the event of his having children. At a stage when the law of this country on the subject of the creation of fidecommissa appears to be fairly well settled and understood through a series of judgments, a Court cannot properly assume that an ascendant entertained a fear that his son would be improvident, except in a case where the ascendant has manifested that fear in his disposition in some terms recognised by the settled law as being effective to avoid the risk of improvidence.

For these reasons, I am not disposed, by holding that a *si sine liberis decesserit* clause *per se* imports a gift-over in favour of the children if they be the author's descendants, to disturb titles to land which have in all probability been regarded as sound.

It remains for me to consider whether there are, in the Last Will now under consideration, indications which, taken together with the *si sine liberis decesserit* clause, manifest an intention to make a gift-over to the grandchildren of the testator. Counsel for the respondents has in this connection relied strongly on a clause in the Will that if all the three children of the testator die issueless the estate will vest in the Government of Ceylon. The existence of this clause certainly distinguishes the present Will from that which was construed in the South African case of *Steenkamp v. Marais* (*supra*), in like manner as the Last Will construed by Garvin, J. in *Carolis v. Simon* [1] was distinguishable from the *Steenkamp*

[1] *(1929) 30 N. L. R. 266.*

Will. But the existence of a similar clause in favour of the Crown was not the decisive ground upon which the Will in *Carolis v. Simon* was held to create a fideicommissum in favour of the testator's descendants. That Will expressly declared that the devisees, the children of the testator *shall not mortgage or convey the property in any way to anybody*, and that " if at any time the generation of our children and grandchildren were to be ruined without descendants the property should pass to the ruler of Ceylon. " Garvin, J. thought that the prohibition against alienation was meaningless unless the testator intended that the property should remain in the family and be enjoyed by their descendants. The *apparent* defect in the Will was that, although there was a prohibition against alienation by the devisees, there was neither an express designation of the persons to benefit upon the breach of the prohibition, nor an express prohibition binding those who might take after the devisees. This apparent defect was cured by the fact that the testators showed that they had in mind, not only their grandchildren but also their remoter descendants, and created a fideicommissum in favour of the Government only if the line of descendants should become extinct. The decision in *Carolis v. Simon* was thus only an illustration of a tacit fideicommissum created by means of a prohibition against alienation coupled with a sufficient designation of the persons in whose favour the prohibition is imposed. The Will in that case is distinguishable from that which we are construing, for there is not in the latter any prohibition against alienation, nor any mention of any remoter descendants of the testator. I do not find in it any indications of the testator's desire that the property devised must remain vested in his descendants.

There are on the other hand, counter-indications to which I will briefly refer. The devises to Lewis' three children are in each case, to " X, his heirs, executors, administrators and assigns ". Does not this import an absolute gift to X, subject only to the condition that if X were to die issueless the property will pass to the other two devisees ? If the condition of the gift-over is not fulfilled, will not the absolute title remain in X, his heirs, executors, administrators and assigns ? Similarly, the express provision for the event of the illegitimate child dying issueless is that his share " shall devolve on my two legitimate children, their heirs executors administrators and assigns " ; the fact that this gift-over is absolute and not intended for the benefit of the grandchildren of the testator is some indication that no such benefit was intended in the original devises.

The action by the plaintiffs for declaration of title, ejectment and damages must therefore succeed, and the record will be returned to the District Court for entry of decree accordingly. As there is no finding upon the disputed question of damages, evidence as to damages will be taken *de novo* in the District Court and the amount of damages assessed. The defendants will pay to the plaintiffs the costs of action and of appeal.

SANSONI, J.—I agree.

Appeal allowed.