JAYEWARDENE *et al. v.* JAYEWARDENE *et al.*

1905. *October 31.*

D. C., Colombo, 19,839.

Fidei commissum *in favour of two children of the testator and their descendants—How the order of succession is to be regulated—Enjoyment of half share by descendants of each institute—Nature of the* fidei commissum*—How long it would endure—Joint interest.*

A and B, husband and wife, by their will devised certain property to their children, S and H, subject to a *fidei commissum* which they expressed as follows: "That our children or all the children and grandchildren who may descend from S and H shall hold possession of the same, but they shall neither sell, mortgage, nor give the same as gifts, and when there be no descendants from these two, one-half of the said land shall be left for charity, and the other half shall devolve on the eminent Government." In the way of possessing the property, each of the institutes (S and H) enjoyed half its rents and profits, and the children of each of them divided equally among themselves the half enjoyed by their parent. One of the three children of S, who thus was in the enjoyment of a sixth share, married L, daughter of H, and died leaving a daughter E, who succeeded to the enjoyment of the sixth share. E died leaving L (her mother) as her only heir.

Held by Wendt, *J.*, and Grenier, *A.J.* (Layard, *C.J. dis.*), that in the devolution of the right to enjoy the sixth share of E the rule of intestate succession was not to be followed, and the sixth share of E did not therefore pass to her mother (L), though a descendant of one of the institutes, but to the remaining descendants of S.

Per WENDT, J.—There are no words indicating a desire that the property should be divided between the two children first instituted. It is, on the contrary, devised to both jointly, the result being that, so long as any descendant of either was alive, the *fidei commissum* could not fail.

Per LAYARD, C.J.—The entire land settled upon the institutes is made the subject of one *fidei commissum*, and the bequest is not in the form of a disposition of one-half of the whole to each of the institutes, but a gift of the whole to the two institutes jointly with benefit of survivorship and with substitution of their descendants; and the testator and testatrix not having settled a definite order of succession, the order of succession *ab intestato* should govern so long as the heir-at-law is in the direct line of descent from one or other of the institutes, and the share in dispute therefore passed to L.

THE facts of the case are as stated above. The District Judge held that the share of E passed not to L (mother and sole heiress of E), but to the other descendants of S. The tenth defendant, *i.e.*, L, appealed.

Walter Pereira, K.C. (*E. W. Perera* with him), for appellant.—The Roman-Dutch Law that is applicable to a case like this is clear. It is that where the testator has indicated no particular

1905. October 31.

order of succession, the devolution is to follow the ordinary rule of succession *ab intestato*. If this rule is to be disregarded there will be no principle or consistent rule of succession to be followed. The respondents also would seem to apply the rule of intestate succession while limiting the succession in respect of each half share to the descendants of each of the original institutes. If, for instance, a descendant of S died without issue, it would, he supposed, be said by respondents that his share would go to his collateral or ascendant heirs, provided such heirs answered to the description of descendants of S. That would be following the rule of intestate succession. The question then is, Why should succession to a separate share of the property be limited to any one of the two institutes and his descendants? The bequest is one of the whole property to the two institutes jointly, and not of a half to each. He cited *Voet, 36. 1. 30,* and *Censura Forensis, 1. 3. 7. 11* and *20.*

Sampayo, K.C., for respondents.—The authorities cited apply only to the particular cases mentioned in them. Voet, for instance, deals with a *fidei commissum* left to the family of the testator by him, and the *Censura* in section 11 cited also speaks of such a *fidei commissum*. Section 20 refers to a case in which a testator has called his heirs to the inheritance in general terms. In the present case the devise was to two individuals by name, and it is clear that the intention was to regard the descendants of S and H as two distinct classes, each being entitled to enjoy a half of the property devised.

Pereira, K.C., in reply.—*Voet* and section 11 of the chapter of the *Censura* cited no doubt refer to a *fidei commissum* to the family, but the rule as to intestate succession is laid down as a rule applicable to such a case, it being a *general rule* applicable to all cases where no particular order of succession is indicated. Section 20 of the *Censura* makes matters quite clear. There, the author is dealing *inter alia* with *fidei commissa* in favour of children or sons and their heirs and in favour of brothers and their children (see section 19), and it is laid down, as a general rule, that when the testator does not arrange a definite order of succession, he is considered as leaving this to be settled by the rules of intestate succession.

Cur. adv. vult.

31st October, 1905. WENDT, J.—

The facts necessary to the decision of this appeal are fully set forth in the judgment of the District Judge, and I need not therefore recapitulate them. The last will upon which the

question arises expressly declares that the property in question "shall be considered as *fidei commissum*." This is followed by a direction that the testator's children and the children and grandchildren descending from the testator's two children (naming them) shall hold possession of the same, with express prohibition of alienation or encumbrance; and the ultimate destination of the property "when there be no descendants of these two" is provided for. The property is therefore devised to the two children with substitution of their descendants, and parties are agreed that just as each of the original devisees (the fiduciaries) enjoyed a moiety of the property during his or her life, so the moiety of each has rightly devolved on his or her respective descendants. Emilia Sophia, one of the grandchildren of the testator's daughter, Soovinita, having died without issue, the question arises as to the destination of the one-sixth share with which she was admittedly vested. Is it to go to her mother, the tenth defendant and appellant, who, although her sole heir *ab intestato*, is not a descendant of Soovinita, but of her brother Hendrick; or is it to go to the surviving descendants of Soovinita, viz., the plaintiff and the first nine defendants? The contention for the respondents is that so long as descendants of Soovinita exist no interest in the moiety which she enjoyed can pass to a person who is not descended from her. There are no words indicating a desire that the property should be divided between the two children first instituted. It is, on the contrary, devised to both jointly, the result being that so long as any descendant of either was alive the *fidei commissum* would not fail. The appellant accordingly admits that in the event of her dying without surviving issue the moiety, which she now has, derived from the institute Hendrick, would pass over to the surviving descendants of the other institute, Soovinita, and could not be treated as her absolute property as upon a failure of *fidei commissaries*. The contention for the appellant is that upon the death of each fiduciary his share devolves on his heirs *ab intestato*, provided they are descendants of the creator of the *fidei commissum*, this proviso being, it is said, imposed by the last will. The last will, however, does not mention descendants of the testators, but descendants of their two children, the institutes, and, as admitted, a moiety descended in the line of each institute, the *ab intestato* heir suggested by the appellant will have to show descent from the institute whose moiety contributed the share in question. The appellant does not satisfy that requirement. I have carefully considered the passages of *Voet* (*ad Pand., 36, 1, 30*) and *Van Leeuwen* (*Cen. For., bk. 3, chapter 7, sections 11-20*) which the

1905. October 31. WENDT, J.

learned counsel for the appellant relied upon as establishing his contention, and I think they do not apply to the present case. *Voet* in sections 27, 28, 29 and 30, of the title referred to is dealing with a *fidei commissum* "left to the family," either in those very words or by means of a prohibition of alienation out of the family, and thereupon discusses such questions as who would be considered as "in the family;" whether the *fidei commissum* would be satisfied by a single act of restitution to the family or would require to be repeated by the persons to whom such restitution was made; the right of a fiduciary to make a selection among the individuals of the indicated class of *fidei commissaries*, &c. In section 30 the author says:—"If it be asked who must be considered the next of kin in the family in the matter of such a *graduale* or perpetual *fidei commissum*, the answer would seem to be that the order of succession *ab intestato* ought to govern; for it has been held by most authorities that *fidei commissa* left to the family follow the analogy of succession *ab intestato*, and are governed by the rules and principles pertaining thereto, whenever the testator has failed to designate a certain order in the family. So much so that the right of representation is admitted in such *fidei commissary* succession in the same lines and grades as those in which legitimate succession allows it in conformity with the different customs and usages of different countries." I quote from *McGregor's Translations*, *p. 81*. This only means, I take it, that if a testator declares, "I give all my lands to my family and desire that they shall ever remain unalienated in the family," then on his death the lands will pass to this *ab intestato* heirs. If he has left two children, they will each take one-half. If there be also three grandchildren (the issue of a deceased child) they will take each one-ninth (all three together taking their parents' one-third "by representation") and the children one-third each. So with the citation from the *Censura*. Section 10 deals with the inefficacy of a mere prohibition against alienation, and adds: "But if the testator have also stated the ground of the prohibition or his reason for it, as for instance if he have said that he forbids the alienation of the property in order that it may be preserved and remain in the family; by reason of this, the prohibition itself is regarded as confirmed so that it is valid, and a *fidei commissum* is created and (it is rendered) certain that the family is to be called to succeed to this thing in question by virtue of a *fidei commissum*." Section 11 then proceeds: "Now when a *fidei commissum* of this kind has been imposed in which the testator has made known his desire that his property shall not be alienated away from his family or blood relations, and has not expressly

called his next relations to the succession, but has only expressed his desire that the property shall not devolve on any one not related to him, without giving any definite order or rule of succession, the nearest relations of the last possessor, who are also related to the testator, succeed as on intestacy, and it is not nearness of relationship to the testator, who has imposed the burden, but proximity to the last possessor, on whom the burden has been imposed, that is taken into account; since the testator is regarded as having merely effected by this provision, and as having only had for his object in it, the prevention of the transmission of succession of his property at any time to people not related to him, and hence, since he has shown no anxiety as to the order and mode of succession, he is considered as having left this to be settled by the Common Law." I quote from p. 93 of *Foord's Translation*. Section 2 deals, as *Voet* does, with the "right of representation." The principles thus laid down by the commentators have no application to the present case because the testators have not called "the family" generally to their inheritance. It is given specifically to two individuals (their being the whole *ab intestato* heirs is an accident) and to their children and grandchildren. But even assuming that the descendants intended are descendants of the testators and not of the institutes, I think the appellant is still excluded, for those descendants, in the case of the moiety given to Soovinita, must surely in the first instance be looked for in Soovinita's line; failing these, it may go over to those in Hendrick's line. For these reasons I think that the appellant's claim fails and that the appeal should be dismissed with costs.

GRENIER, J.—The facts in this case are all admitted, and the only point for determination is one which depends upon the construction to be placed on the last will of the original owners of the land in question. The portion of the will in regard to the meaning of which the parties are not in agreement runs as follows:—"We do hereby direct that our dwelling garden shall be considered as *fidei commissum* from and after our death, and that our children, or all the children who may descend from our children, Soovinita and Hendrick, shall only possess the same, but shall neither sell, mortgage, nor give away the same by way of gift, and when there be no descendants from these two persons one-half of the said property shall go for charity and the other half devolve on the eminent Government." Now it seems plain to me that the testator and testatrix in imposing a *fidei commissum* on the property intended that the property should be considered as

1905. *October 31.* GRENIER, J.

divided into two parts, and that one-half should be possessed by the descendants in the direct line of succession of Soovinita and the other half by those of Don Hendrick. This intention was made clearer by the latter part of the clause I have quoted from the will, that in the event of there being no descendants of Soovinita and Don Hendrick " one-half of the property shall go for charity and the other half shall devolve on the eminent Government." The *fidei commissarii* were by the terms of the will to possess the property, and I take this to mean that so long as there were descendants of Soovinita and Don Hendrick it was to be possessed by them in two equal shares. It was only in the event of there being no descendants on both sides, which for some reason or other the testator and testatrix thought might probably occur, that the Government and the poor generally were to benefit to the extent of half each. I think I would be doing violence to the language of the will and putting a construction on it which would defeat the intention of the testator and testatrix, if I were to hold that they showed no indication as to the order and mode of succession, as contended for by the learned counsel for the appellants. To my mind it is beyond question that the testator and testatrix in burdening the property with a *fidei commissum* intended to benefit the descendants of Soovinita and Don Hendrick, regarding them as two distinct classes, and that it was never their intention to make the ordinary law of intestate succession apply in such a way as to deprive the members of either class of any part of the half share which otherwise would belong to and remain with that class. Certainly they never contemplated the case which has now arisen in consequence of Soovinita's son, Lewis, marrying Don Hendrick's daughter and having issue. In my opinion nothing could have been further from their intention than that such a marriage and its consequences should affect the right to the possession of the entirety of a half share which they had expressly given to Soovinita and Don Hendrick and his and her descendants respectively. It is not as if Hendrick has no children, although he has no grandchildren. The tenth defendant, as the only child of Hendrick, is entitled to the possession of a half of the property in question and nothing more, the possession of the other half being rightly with the grandchildren of Soovinita. No question of the *Jus accrescendi* will arise until the death of Louisa, provided she does not marry again or have children. The District Judge has, I think, on the whole, taken a correct view of the questions involved in this case, and I would dismiss the appeal with costs.

LAYARDS, C. J.—

1905. *October* 31.

Gabriel and his wife were the owners of the land a share whereof is claimed by the plaintiff in this case. They devised the land to their two children, Soovinita and Hendrick, in the following terms:—"We do hereby direct that our dwelling garden .....shall be considered as *fidei commissum* or entailed from and after our deaths; that our children or all the children and grandchildren, &c., who may descend from Pantiage Dona Soovinita Dabere Hamine and Pantiage Don Hendrick Dabere shall hold possession of the same, but they shall neither sell, mortgage, nor give the same as gifts, and when there are no descendants from these two one-half of the said land shall be left for charity, and the other half thereof shall devolve on the eminent Government." It is admitted by the parties to this appeal that these words created a valid *fidei commissum* in favour of the two institutes and their descendants.

According to the terms of the will the entire land settled upon the two institutes is made the subject of one *fidei commissum*. (*Tillekeratne v. Abeysekere*, Privy Council Judgment, *2 N. L. R. 313*.) The bequest is not in the form of a disposition of one-half of the whole to each of the institutes, but a gift of the whole to the two institutes jointly, with benefit of survivorship and with substitution of their descendants (*Tillekeratne v. Abeysekera*). The testator and testatrix have not settled a definite order of succession, and the question to be decided is what rule, in view of the facts hereinafter stated, is to govern the succession to the property. In 1853 Soovinita died leaving three children, viz., Henry, Justina, and Louis; and Hendrick died in 1859 leaving Louisa, the tenth defendant, his only child. The grandchild Henry died in 1881 leaving three children, viz., the plaintiff, the first defendant, and Samuel, who died in 1898 leaving two children, the second and third defendants. Justina, Soovinita's child, died in 1896 leaving six children, the fourth to ninth defendants. Louis, Soovinita's son, married his first cousin, Louisa, the tenth defendant, and he died in 1861 leaving surviving him his only child of that union, Emelia Sophia, who died unmarried and intestate in 1881, leaving her mother as her sole heiress.

Louis, it is admitted, became entitled to one-sixth of the property on his mother's death, and on Louis's death his daughter Emelia succeeded to that share subject to the *fidei commissum* created by the will. The question now at issue between the parties is as to who should succeed to Emelia's one-sixth. The appellant contends that Emelia's mother and sole heiress is entitled to it, while the plaintiff contends that it passes to the

1905. October 31.

LAYARD, C.J.

remaining descendants of Soovinita, viz., the plaintiff and the first to ninth defendants. It is clear that the respondent's contention would be correct if the bequest had been in the form of a disposition of half share of the whole to each of the institutes; but, as I pointed out above, it was a gift of the whole to the institutes jointly, with benefit of survivorship and with substitution of their descendants (see *Tillekeratne v. Abeysekere*). The testator not having arranged a definite order of succession, I gather from the passages cited by appellant's counsel, to which I shall presently refer, that the order of succession *ab intestato* should govern so long as the heir-at-law is in the direct line of descent from one or other of the institutes, and that the share in dispute will pass to Emelia's mother, she being in such direct line of descent, as well as being a substitute under the provisions of the will. *Van Leeuwen* in the *Censura Forensis, bk. 3, chapter 7, section 20,* thus lays it down:—"The opinion is generally received and is undoubtedly correct if the testator have called his heirs (to the inheritance) in general terms and have not expressly summoned the nearest of them or have simply expressed his desire that the goods are not to devolve on any one not related to him, because when the testator does not arrange a definite order of succession, he is considered as leaving this to be settled by the Common Law, according to which *fidei commissaries* succeed according to the order and rules of intestate succession." It is under these rules that Emelia succeeded to the one-sixth share, and I think the same rules must prescribe to whom it passes from her, provided always that her heir-at-law is in the direct line of descent from one of the institutes, which is the case here.

Voet, bk. 36 tit. 1, 30, dealing with the question as to who is to be considered the next of kin in the family in the matter of *graduale* and perpetual *fidei commissum,* says: "The answer would seem to be that the order of succession *ab intestato* ought to govern," and goes on to point out that it has been held by most authorities that *fidei commissa* left to the family follow the analogy of succession *ab intestato,* and are governed by the rules and principles appertaining thereto whenever the testator has failed to designate a certain order in the family."

It has been pointed out that the commentators are dealing with the case in which the testator has called "his family" generally to the inheritance. What has happened in this case? The testator and testatrix have called "their children or all the children and grandchildren," &c., who may descend from their two only children, Soovinita and Hendrick. Surely this is calling their family generally to the inheritance. They do not allude to

any one but their children and their descendants. The institutes were their only children, and the object clearly was to call their family generally to the inheritance. It is remarkable that counsel for the respondent was unable to adduce any authority from the commentators to support his contention. To uphold the respondent's contention it will be necessary to hold that a moiety descended in the line of each institute, and that the *ab intestato* heir suggested by the appellant must be descended from the institute whose moiety contributed the share in question. As I said earlier in this judgment, I cannot so hold in view of the decision of my Lords of the Privy Council in *Tillekeratne v. Abeysekere*. There, the property was divided into two and the institutes of one-half share consisted of the three grandchildren of the testator and testatrix, and the property was to be inherited " according to custom " by them and " their descendants." Their lordships stated that they had little " difficulty in coming to the conclusion that according to the terms of the will the entire moiety settled upon the grandchildren is made the subject of one and the same *fidei commissum*. The bequest is not in the form of a disposition of one-third share of the whole to each of the institutes, but the gift of the whole to the three institutes jointly, with benefit of survivorship and with substitution of their descendants. Following the terms of the gift, the substitution must be read as referring to the whole estate settled upon the institutes as a class. " I cannot distinguish this case from the one dealt with by the Privy Council, and am bound to follow the ruling in that case.

If we follow Van Leeuwen and Voet, then we have certain rules and principles to guide us; otherwise we take upon ourselves the responsibility of designating a certain order of succession to the institutes which the testator and testatrix advisedly omitted to do, being quite satisfied to leave the property to the two institutes jointly with benefit of survivorship and with substitution of their descendants. We cannot convert the bequest into a disposition of one-half share of the whole to each of the institutes from a gift of the whole to the two institutes jointly. The object of the testator and testatrix was to keep the property in the family and the succession to the descendants of the institutes. Louisa is Emelia's heir *ab intestato*, and she is the heir substitute of the institute Hendrick, and being a descendant of one of the institutes cannot, in my opinion, be deprived of her right as such heir *ab intestato* to succeed to Emelia's share. I think the judgment of the District Judge is wrong and must be set aside and the plaintiff's action be dismissed.