1932

Present : **Dalton J. and Jayewardene A.J.**

ISMAIL *v.* MARIKAR.

76—D. C. Colombo, 23,831.

Fidei commissum—*Devise to descendants—Meaning of word "descendant"—Not restricted to children—Joint will.*

Where a joint will contained the following clause: "The testators further declare that the house and gardens hereinbefore mentioned shall be possessed by the aforesaid sons and daughters under the bond of *fidei commissum,* that is to say, that the said properties should not be sold, mortgaged, or alienated, but, if any of them should happen to depart this life leaving no descendants, that the said bequest or bequests shall devolve and revert to the testator's aforesaid surviving sons and daughters subject to the same restrictions aforesaid".

Held, the will created a valid *fidei commissum* in favour of the descendants of the devisees up to the fourth generation.

The word "descendants" is not restricted to the children of the immediate devisees.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera (with him *Peter de Silva*), for 3rd defendant-appellant.

N. E. Weerasooria (with him *N. Nadarajah* and *Kariapper*), for respondent.

May 10, 1932. DALTON J.—

The question to be decided on this appeal is whether the District Judge was correct in holding that the joint will of the testator and his wife (P 3 dated September 21, 1845) created a real *fidei commissum,* or whether, if one was created at all, it was merely a single one, the prohibition being personal to the devisees and not binding their children.

The will, which is a notarial one, leaves in its various clauses certain properties each to individual children. We are concerned with the clause in which the property, the subject of this partition action, was devised to their daughter Margaret, and with a general clause, after the various legacies as they are termed have been dealt with, in the following terms :

> "The testators further declare and desire that the house and gardens hereinbefore mentioned shall be possessed by the aforesaid sons and daughters and their descendants under the bond of *fidei commissum,* that is to say, that the said properties should not be sold, mortgaged, or alienated, but, if any of them should happen to depart this life leaving no descendants, that the said bequest or bequests shall devolve and revert to the testators' aforesaid surviving sons and daughters subject to the same restrictions aforesaid . . . . "

For the appellant it has been urged that the word "descendants" refers to the children of the original devisees only and to no other class of persons. If it could be clearly inferred from the document that that was

the intention of the testator and testatrix, I presume this Court would give effect to it, in spite of the fact that one would be interpreting the word in a way different from its usual meaning. The word "descendants" may in its narrowest sense be used to denote "children" and "children" only, but the usual sense in which it is used implies descent in its successive steps, and I have not the least doubt that is the way in which the notary used it in this will. The intention was to retain the respective properties in the family for so long as the law allowed. If one examines an ordinary English dictionary, there is nothing to suggest that the word "descendant" is usually restricted to a class or person one step or degree from an ancestor. If one looks at the "Canons of Inheritance" in English law, the rules of descent of real property, one finds the term also used with the meaning I would give it here. In a local decision also (*Wijewardena v. Abdul Hamid* [1]), where a matter similar to the one before us was under consideration, the Court came to the same conclusion. In that case property was left to a devisee, alienation being prohibited, with a further direction that "she and her descendants shall and possess the same". It was held that the word "descendants" was equivalent to children and children's children at least to the fourth generation.

The language of the clause before us is to my mind much more explicit. The phrase "under the bond of *fidei commissum*" has been used by a notary. The mere use of the word "*fidei commissum*" of course would not be sufficient to carry out the intention of the maker of the will, if other necessary requirements are absent, but taking the whole clause as it stands, there is no doubt in my mind as to the intention of the parties or that they have effectively carried out that intention in their will. I am unable to give the clause the narrow construction for which appellant contends.

The question whether there is one *fidei commissum* or several *fidei commissa* in respect of the several properties has, I think, under the circumstances very little bearing on the question we have to decide. The property, the subject of this action, is subject to a *fidei commissum* as the defendants contend, and the judgment of the lower Court is correct. The appeal must therefore be dismissed with costs.

JAYEWARDENE A.J.—

The will in question in this case provided that the property dealt with "shall be possessed by the aforesaid sons and daughters and their descendants under the bond of *fidei commissum*, that is to say, that the said property should not be sold, mortgaged, or alienated", &c.

Vander Linden states the rule as to the creation of *fidei commissa* thus: a mere prohibition of alienation without saying in whose behalf it is prohibited is of no effect; but it is otherwise when the prohibition is to alienate out of the family *Juta's Trans. p. 61.* The mere use of the word *fidei commissum* creates no burden on the inheritance, a person or class must be sufficiently indicated by the will in whose favour the *fidei commissum* was created. *Drew v. Drew* [2]. A nude prohibition is void, there must be a gift over to a person or class (*Voet 36. 1. 27*). Prohibitions

[1] *12 N. L. R. 247.* [2] *(1876) 6 Buch. 203.*

which are not nude fall under two general classes, (1) personal and (2) real prohibitions. When a prohibition is imposed upon a person it applies only to the person prohibited and does not go beyond him. A prohibition is real when the testator has conceived the prohibition rather *in rem* than *in personam* and when it can be gathered from the words of the will that this was his intention. Such prohibition is a real burden which passes to all persons whatsoever to whom the thing prohibited from alienation comes. *Sande. de Proh. rerum alien 3. 2. 1-10.* There is a bequest to a family when the testator forbids the alienation of a thing out of the family or directs that it should not go out of his line of descent or out of his blood. Under family was included *genus, stirps, linea, parentela, domus* and the like. *Mcgregor's Voet on Fidei commissa, p. 67.*

In the present case the bequest is to the sons and daughters and their descendants under the bond of *fidei commissum,* and it was argued that the word "descendants" only applies to the children of the original devisees and no further. According to Van Leeuwen under the term "descendants" are included all descendants both male and female and their off-spring *ad infinitum.* "*Descendentium vocabulo in infinitum veniunt omnes tam masculi, quam feminae, et qui ex his progeniti sunt.*" *Censura Forensis 1. 3. 5. 7.*

In *Wijewardene v. Abdul Hamid*[1] the will provided that the property gifted could not be sold or mortgaged even for any debt, but that the donee and "her descendants shall enjoy and possess the same", and it was held that the word "descendants" is equivalent to children and children's children and that a *fidei commissum* was created binding up to the fourth generation.

The learned District Judge has arrived at a right conclusion and I would dismiss the appeal with costs.

Appeal dismissed.

[1] *12 N. L. R. 241.*