Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Cornelis Gideon de Jager and others v. *James Alexander Foster and others, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 4th May* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD GORELL.
LORD ROBSON.
SIR ARTHUR WILSON.

[DELIVERED BY LORD GORELL.]

This is an Appeal from a Judgment of the Supreme Court of the Colony of the Cape of Good Hope (sitting as a Court of Appeal) consisting of Lord De Villiers, C.J., and Laurence and Hopley, JJ., dated the 14th September 1909, dismissing with costs an Appeal from a Judgment of Buchanan, J., the Presiding Judge of the Circuit Court for the District of Oudtshoorn, in the said Colony, dated the 31st March 1909.

The action in the said Circuit Court was begun by summons on the 11th March 1909, and the questions in dispute depended upon the construction of a codicil to a certain mutual will. The said will was executed in the Dutch language on the 22nd September 1812, by one Carel Johannes De Jager, and his wife Susanna de Jager, to whom he was married in community

of property. The said codicil was executed on the 19th July 1822.

With regard to the will it is sufficient for present purposes to state that under it the first dying of the testators appointed the survivor as heir to the whole estate of the first dying, on condition that the survivor should be obliged to bring up the children in a proper manner until their majority, marriage, or other approved state, upon the happening of which event they were to be paid such amount as the survivor found to be due to them. They further declared that their farm named Buffel River, likewise their slaves, should after the death of the survivor be sold privately among their children collectively.

The testators on the 4th April 1820 executed a first codicil, and on the 19th July 1822 they executed the further codicil upon the construction of which the questions in dispute depend.

The further codicil, as translated in the annexure to the Writ of Summons, is in the following terms :—

" We, the undersigned testators of the above, our testa-
" ment and last will, having taken into consideration that it
" would be useful and necessary for our surviving children
" and grandchildren to add the following to this our
" testament :—

" We desire expressly and bequeath by these presents to
" our two children procreated in wedlock, named Gideon
" Carolus Johannes de Jager, and Johannes Stephanus de
" Jager, our dwelling place named the Buffel River, situate
" on the Oliphants River, under the district of George,
" together with a certain piece of ground situate on the
" lower side of the dwelling place before mentioned, and
" also adjacent thereto (now also surveyed), with this under-
" standing, however, that our two above-mentioned children
" may not sell the same, exchange, or pledge, or do anything
" of a similar nature, and that always this above-mentioned
" bequest of our dwelling place, together with the adjoining
" piece of quit rent land, shall remain in the first place for
" both of them, in the second place the eldest son of our
" grandchildren shall always have the same right thereto,
" and after the decease of their parents remain in possession

" thereof, with this understanding, however, that the other " heirs who may still be born shall enjoy equal share and " right thereto. Wishing and desiring, we, the testators. " this only to be our object not to let the before-mentioned " bequest fall into other hands but to be for the convenience " and benefit of our two children and grandchildren, so that " always the eldest son of our grandchildren has the privi- " lege. And since the place is provided with a strong and " flowing water and sufficient serviceable ground, the grand- " children can, in our opinion, if God grants His blessing, " earn their living thereon."

The testator and the testatrix died in the year 1825 without having executed any other will or codicil, leaving two sons, Gideon Carolus Johannes and Johannes Stephanus, and one grandchild, Carolus Johannes Petrus, son of the eldest son and born in 1821. Other grandchildren were born subsequently to the death of the testators. The children, grandchildren, and descendants are shown in a genealogical table in the Appellants' case.

The questions to be decided in this Appeal are whether the Judgment under Appeal should be affirmed or whether, as contended by the Appellants, the property bequeathed by the said codicil passed in proportionate shares to all the Appellants by virtue of their being either grandchildren or great grandchildren or heirs *ab intestato* of the said testators; or, in the alternative, whether it passed to the first Plaintiff, Cornelius Gideon de Jager, by virtue of his being the next brother of the said Carel Johannes Cornelius (senior) and therefore, on the latter's decease, the eldest grandson of the original testators. Both the Courts below decided against the Plaintiffs' claims.

During the last 35 years the further codicil of 1822 has been the subject of much litigation in the Cape Courts.

In 1875 Johannes Stephanus de Jager, the second son of the original testators, sued the executor and two sons of his elder brother

Gideon (who died in 1860) claiming that on the death of Gideon he became entitled, by virtue of the *jus accrescendi*, to the usufruct for life of the whole property bequeathed by the said codicil, with remainder over to the eldest living grandson of the original testators. The Supreme Court of the Cape decided against this contention and held that on the death of each son of the original testators his half of the said property went to his eldest son. The said Court also took the view that the following words used in the said codicil, that is to say, "other heirs who may still be born," were intended by the testators to apply to other children who might be born subsequently to them, the testators, and not to possible grandchildren or other remoter descendants.

In 1877 Carel Johannes Cornelius de Jager, the eldest son of Johannes Stephanus (who died in 1876), instituted an action to eject Carolus Johannes Petrus from the share of the farm which he, as eldest son of Gideon Carolus Johannes (the eldest son of the testators), in 1860 had inherited under the codicil. The action was based on a notarial deed of purchase and sale, and a decision was given in favour of the Defendant. The Plaintiff obtained leave to Appeal to this Board, but before that Appeal was prosecuted the parties entered into an agreement on the 5th August 1879, embodied in a consent paper in terms of which the Court, on the 7th August 1879, granted an order amending the previous Judgment to accord with the consent paper. The main alteration was that the Plaintiff agreed, instead of 3,000*l.*, to pay the sum of 7,500*l.* for that share of the farm of which he already held transfer.

In the year 1880 the said Carel Johannes Cornelius de Jager brought an action of ejectment against one Scheepers and others, who

were in occupation of a portion of the share of the said property which had been bequeathed to Gideon Carolus Johannes, claiming that he had become by purchase from Carolus Johannes Petrus (the son of the said Gideon) owner of his share of the said property. It was held by the Court that the Plaintiff was entitled to recover the land from the Defendants as having received transfer of it in 1877 by virtue of a purchase from the said Carolus, son of Gideon, of his share of the said property.

There was still further litigation in the year 1884, and an Appeal was brought in that case to this Board. (L. R. 11 A. C. 411.)

In that case the Plaintiffs were two younger children of the said Johannes Stephanus, the younger son of the original testators, who alleged that the Defendant, their eldest brother, had no right or title to the whole of their father's share in the said property, and they claimed to be themselves entitled, as grandchildren of the original testators, to an equal share with the Defendant and other grandchildren in the said property. The suit began in the Circuit Court of Oudtshoorn and went on appeal to the Cape Supreme Court. Both Courts decided against the Plaintiffs. Both Courts held that the following words in the said codicil, that is to say, "the "eldest son *of* our grandchildren" should be construed as meaning "the eldest son *among* our "grandchildren," in other words, the eldest son of each of the sons of the original testators. Both Courts affirmed the construction already put upon the words "with this understanding, how-"ever, that the other heirs who may still be born "shall have equal share therein and right "thereto," and held that "other heirs" had reference to other children who might subsequently be born to the original testators. In the Appeal of the Plaintiffs to the Judicial Committee

of the Privy Council it was held, affirming the Courts below, that the Defendant and Respondent, Carel Johannes Cornelis De Jager, as the eldest of his father's children, was entitled to the whole of his father's share in the said property. The question whether there was a *fidei commissum* or entail in favour of the Respondent's eldest son or in perpetuity was expressly left open by the Judicial Committee as well as by the Courts below. In argument for the Appellants on the present Appeal it was urged that in the case just stated the codicil was treated as having been made at a time when they had no grandson living, whereas in fact Carolus Johannes Petrus was born in the year preceding that in which the codicil was made.

In the year 1908 an action was brought in the Supreme Court of the Cape Colony by Nicholaas Johannes and his eldest son, Carolus Petrus Johannes, being respectively the great grandson and great great grandson of the original testators through their eldest son Gideon, against the executors (the present Respondents) of Carel Johannes Cornelius (senior), who died in 1903, claiming that Nicholaas Johannes was entitled by virtue of the *fidei commissum* imposed upon his grandfather, the said Gideon, to the half share of the said property left to his said grandfather, subject to a further *fidei commissum* in favour of his said son the second Plaintiff. An important question in this case was whether the Dutch word "kindskinderen" in the said codicil ought to be translated by the English word "grandchildren," or by the English word "descendants." It was held by Buchanan, J., who tried the case in the Divisional Court, that the Dutch word signified "grandchildren," and that consequently no rights devolved upon either of the Plaintiffs by virtue of the said *fidei commissum*, and he gave judgment for the

Defendants. An Appeal was taken at the full Supreme Court, sitting as a Court of Appeal, and was heard by De Villiers, C.J., Laurence and Maasdorp, JJ., who confirmed the judgment and dismissed the Appeal. The case in the Divisional Court is reported as *De Jager* v. *The Estate of De Jager* in 25 Cape Supreme Court Reports, page 703, and the Appeal is reported under the same title in 3 Buchanan's Appeal Cases, page 347, and 19 Cape Times Reports, page 81. From this judgment an Appeal to the Judicial Committee of the Privy Council was noted but has since lapsed for failure of prosecution.

These decisions appear to have established that the two sons of the original testators were joint fiduciary heirs in equal shares of the said property bequeathed, and that each of them was burdened with a *fidei commissum* in favour of his eldest son and no others, and that it was not intended by the said testators to burden the said shares in the hands of their grandsons with any further *fidei commissum*.

The question raised in this Appeal is whether the two grandsons of the original testators, viz., Carolus Johannes Petrus and Carel Johannes Cornelius (senior) became on their respective fathers' deaths, as the Respondents herein contend, the full and absolute owners of their respective shares of the said property, or whether on their deaths, as contended by the Appellants, the said shares were intended by the original testators to revert to and be divided in equal shares among all their grandchildren and other remoter heirs.

The six Plaintiffs in the action in which this Appeal has been brought are Cornelis Gideon and three sisters, being respectively the next brother and certain sisters of the said Carel Johannes Cornelius the eldest son of the testators' second son Johannes Stephanus. The fifth

Plaintiff, Cornelius Jacobus Hermanus Mostert, is the husband married in community of property to the late Anna Catharina Magdalena Mostert, who was born De Jager, and was the daughter of Petrus Jacobus Johannes, the second son of Gideon Carolus and therefore grandson of the original testators. The sixth Plaintiff is Nicholaas Johannes Petrus De Jager, the son of Carolus Johannes Petrus, the eldest son of the said Gideon, and therefore great grandson of the original testators. The Plaintiffs therefore consist of a grandson and three granddaughters of the original testators, the husband of a great granddaughter, and a great grandson.

By the amended Writ of Summons the Plaintiffs allege that upon the deaths of the two grandsons of the original testators, to wit, Carolus Johannes Petrus and Carel Johannes Cornelius (senior) all right and title enjoyed by the said two grandsons in the property bequeathed by the said codicil reverted to the heirs of the original testators, and that as such heirs, or claiming through such heirs, the Plaintiffs are entitled to claim as against the Respondents, the executors of the late Carel Johannes Cornelius (senior), shares in the said property in the proportions set forth in the said summons. They contend that according to the correct interpretation of the codicil, and in order to carry out the intention of the testators therein expressed, on the death of Carel Johannes Cornelis, the eldest son of Johannes Stephanus, and grandson of the original testator, the farm of Buffelsdrift ought to be divided up among all the grandchildren of the original testators, or their representatives, in such a proportion that the children of Gideon Carolus Johannes divide his half share equally, and the children of Johannes Stephanus divide his half share equally, the children of any

deceased child taking their deceased parent's share by representation.

An alternative claim is made on behalf of the first Plaintiff, Cornelis Gideon, that by the death of his elder brother he became the eldest surviving grandson, through his father Johannes Stephanus, of the original testators, and as such is entitled to the same right and share in the said property as was enjoyed by his father under the said codicil.

The broad contention of the Respondents (Defendants) is that upon a true construction of the said will and codicil, the said Carolus Johannes Petrus and Carel Johannes Cornelius (senior), the eldest grandsons of the original testators, became each entitled on the death of his father to the absolute ownership of a one-half share in the property bequeathed by the said codocil, free and unencumbered by any *fidei commissum*, and that by the aforesaid notarial deed of sale, to which the Plaintiff, Nicholaas Johannes, was a party, the said Carolus Johannes Petrus sold his share of the said property to his cousin the said Carol Johannes Cornelius (senior), and that thereafter in consequence of the legal proceedings in 1877–79 and the compromise sanctioned by the Court, the latter became the absolute owner of the said share, as well as of his own, and being the absolute owner of the said property had disposed of it by will as he was entitled to, and that they as his legal representatives were administering the estate in accordance with the provisions of the said will.

The case was heard by Buchanan, J., who on the 31st March 1909, gave judgment for the Defendants with costs. From this judment the Appellants (Plaintiffs) appealed to the Supreme Court of the Colony, and on the 14th September 1909, the Court dismissed the Appeal with costs.

The judgment of the Court was delivered by the Chief Justice, to whom the codicil had become familiar in consequence of being before him in some of the previous cases. He held that the Circuit Court in deciding that the two grandsons, upon taking the *fidei commissary* bequest became entitled to the land in full ownership, had given logical effect to the previous decisions in regard to the constructions of the codicil. He further held that the prohibition against alienation did not transform the interest conferred upon the grandsons into a bare usufructuary interest; and that the two eldest grandsons became legally entitled to the full ownership of the said property with power to alienate. He added that there was nothing in the said codicil to indicate that on the death of the grandsons the said property should revert to the heirs *ab intestato* of the testators, and he cited the decision of the Judicial Committee in *De Jager* v. *De Jager* (11 A.C., p. 411) as confirming this view.

The Judgment was concurred in by Laurence and Hopley, JJ.

The case appears to have been fully considered in the Courts below. It has been ably and fully argued before their Lordships, to whose attention all the facts as now presented have been drawn. Their Lordships do not think it necessary to say more than that they entertain the same opinion of the case as that expressed by the Chief Justice, and that the Appellants have failed to show any grounds for disturbing the judgment appealed from.

Their Lordships will therefore humbly advise His Majesty to dismiss the Appeal. The Appellants must pay the costs.

In the Privy Council.

CORNELIS GIDEON DE JAGER AND OTHERS

v.

JAMES ALEXANDER FOSTER AND OTHERS.

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