not necessarily follow that D1 and D2 bear the genuine signature of the Secretary. At least there is a reasonable doubt on that point. Therefore the main—if not the only ground—upon which the learned District Judge differentiated the cases of D1 and D2 from the facts relating to the cheque D3 fails to the ground. The finding of the District Judge in regard to D1 and D2, that they bear the genuine signatures of the Secretary and the Chairman, cannot, therefore, be supported on the evidence when fairly considered. In the absence of any estoppel which precludes the plaintiff from alleging that D1 and D2 are forgeries, the finding of the learned Judge on this part of the case cannot in my view be justified on the evidence, and must be set aside.

With regard to the cheque D3 for Rs. 20,000, I agree with the findings of the District Judge and they must be affirmed.

The decree entered in the case will therefore be varied as follows: The defendants must pay to the plaintiff Council the sum of Rs. 27,000 with legal interest thereon from November 2, 1945, till payment in full.

On the question of costs, these should as a rule follow the event. In this case, however, the conduct of the plaintiff Council has been so negligent, that I feel that each party should be ordered to bear their own costs both here and below.

WINDHAM J.—I agree.

Decree varied.

1949 *Present:* **Nagalingam and Windham JJ.**

LEWIS APPU, Appellant, *and* PERERA, Respondent

S. C. 453—D. C. Colombo, 3,794

Fidei commissum—Deed of gift—Prohibition against sale or mortgage only—Effect of partial prohibition—Gift to D and her descending children, grand-children, heirs, executors, administrators and assigns—Certainty of beneficiaries—Time of vesting.

By deed of gift P1 certain property was gifted to D in the following terms:—

"All of which (the premises) I the said H in consideration of the help that is being rendered to me do hereby give and grant by way of gift to D. And therefore I do hereby declare that I have given and granted unto the said D and her children and grand-children who are her descendants, heirs, executors, administrators and assigns, the full power to possess and enjoy the said premises subject to the payments, if any, to the Government. And I also declare that the said property shall only be possessed and enjoyed as aforesaid but the same shall not be sold or mortgaged."

Held, that the deed did not create a *fideicommissum* for the reasons—

(*a*) that the prohibition against alienation was only partial and the inference was that the acts which were not prohibited were permitted.

(*b*) that there was no clear designation of the beneficiaries nor the time of vesting.

APPEAL from a judgment of the District Judge, Colombo.

E. B. Wikramanayake, K.C., with *H. A. Koattegoda*, for second defendant appellant.

C. E. Jayewardene, for plaintiff respondent.

Cur. adv. vult.

March 29, 1949. NAGALINGAM J.—

This is an action for the partition of an allotment of land called Millagahawatta depicted in the plan filed of record. Admittedly the land belonged to one Christina Hamy who by deed P1 of 1849 gifted to one Dotchihamy subject to certain conditions which, according to the second defendant appellant and the plaintiff respondent, created a valid *fideicommissum* while, according to the third defendant respondent, they were inoperative to subject the land to any such burden.

On appeal the third defendant respondent was not represented. The point of contest between the second defendant appellant and the plaintiff respondent centres round the question whether the words " children and grand-children " in the clause said to designate the *fideicommissarii* include an illegitimate child or grand-child. It is common ground that Dotchihamy had an only child, Davith Appu who had two children, Mangohamy and Mohottiappu. Mangohamy had a child, Seetiappu, who according to the second defendant appellant was an illegitimate child but according to the plaintiff respondent was not. The learned Judge has taken the view that Seetiappu was an illegitimate child and on the facts established it is difficult to say that the finding on this point is erroneous. Seetiappu married the first defendant by whom he had a daughter, Caroline, who was married to the plaintiff. It is conceded that Caroline's interests have, in the events that have happened, vested in the plaintiff. Mohottiappu had an only child, Louis, the second defendant. The third defendant is the purchaser of certain interests from the first defendant.

Before the contest raised by the plaintiff and the second respondent can be considered, it must first be ascertained whether in fact the deed P1 creates a *fideicommissum*, for if it does not, the problem raised by the plaintiff and the second defendant will not arise. The learned District Judge has held that the deed creates a valid *fideicommissum* extending to four generations.

The first question, therefore, that arises for consideration is whether the deed P1 creates a valid *fideicommissum*. Before a *fideicommissum* can be said to have effectual operation, it must be shown, firstly, that the donee or legatee has not been empowered or permitted to make any valid disposition of the property, secondly, that some event or condition

is indicated or provided on the happening or performance of which the property is to vest in the *fideicommissarii* and thirdly, a clear indication of the *fideicommissarii*. It is usual to state the first requirement set out above in a slightly different form by formulating that the property must be shown to have been vested not absolutely in the donee or legatee. For the purposes of the present case and having regard to the terms of the deed P1, I have deemed it necessary to state the proposition in the way I have done in order to emphasise the point that although the property may not have vested absolutely for all purposes in the donee or legatee, nevertheless, the title conveyed to the donee or legatee may be such that within the limitations imposed it would be permissible for the donee or legatee to deal lawfully with the property, and to dispose of it, by a valid conveyance which cannot be said to have been in any way discountenanced by the conditions subject to which the gift was made.

The material parts of the deed P1 are—

A. All of which (the premises preceded by described) I the said Nahallage Dona Jacobi Christina Hamine in consideration of the help that is being rendered to me do hereby give and grant by way of gift unto Nahaliage Dochihamy of Mahara aforesaid.

B. And therefore I do hereby declare that I have given and granted unto the said Nahallage Dochihamy and her children and grand-children who are her descendants, heirs, executors, administrators and assigns the full power to possess and enjoy the said portion of Millagahawatta within the boundaries aforesaid subject to the payments if any to the Government.

C. And I also declare that the said property shall only be possessed and enjoyed as aforesaid but the same shall not be sold or mortgaged.

Passage C set out above, it will be noticed, prohibits only a sale or mortgage but does not prevent certainly a gift or a devise by Last Will, and it is doubtful whether an exchange falls within the prohibition. A gift or devise, therefore, by the donee, Dotchihamy, would appear to be valid, and in such an eventuality the *fideicommissum* intended to be created would be completely frustrated. But it may be said that the reference not only in the passage C but also in passage B set out above to not only the donee but her children and grand-children possessing and enjoying the premises must necessarily imply that every form of alienation was intended to be prohibited, for otherwise, the children would never acquire the right to possess and enjoy the land, but this would be a method of approaching the construction of a clause by reference to the result and would have the effect of incorporating into the clause words not to be found therein. But this is not the case of a Last Will where such liberties may sometimes be taken with the language of a testator. This is a deed of gift *inter vivos* and it is not permissible to enlarge the scope of the words used in order to arrive at the intention. A deed must be strictly construed and where the donor has taken pains

to prohibit only a sale or a mortgage it would be doing violence to the ordinary rules of interpretation of a deed to hold that the donor intended to prohibit a gift or devise. A little reflection will, however, show that there may have been very good reasons which actuated her for not prohibiting a gift. Particularly in this country where dowries are provided for daughters, a donor may have thought it not merely unobjectionable but definitely advantageous that the donee should have the right to gift the land to one or more of her daughters. It is therefore not possible to uphold the contention that merely because the donee and the intended *fideicommissarii* are merely enjoined to possess and enjoy the land, therefore a gift or devise is also prohibited.

It is, however, true to say that a prohibition against alienation is not necessary to create a valid *fideicommissum* provided, however, the beneficiaries are designated with certainty and the condition upon which the beneficiaries are to take is also clearly indicated or where the *fideicommissum* is in favour of the family of the donor or testator. In this case, had the clause constituting the prohibition not been enacted this principle may have been given effect to, but where there is a partial prohibition the effect of that partial prohibition is sufficient to repel any contention that may otherwise rightly be based upon the total absence of a restrictive clause and leads to the inevitable inference that such acts as are not prohibited were permitted. As the donee, therefore, has not been prevented from gifting the property to anyone she chooses to or devising the property to a legatee, a valid *fideicommissum* cannot be created and the donee must be held to have taken the property absolutely and that the devolution on her death was according to ordinary rules of succession *ab intestato*.

It is also a matter of very great doubt as to who the *fideicommissarii* are whom the donor had in mind when she intended to create a *fideicommissum*, of which intention, however, there can be little doubt. Can passage B be regarded as the clause which designates the persons to be benefited, for there is no other clause from which assistance can be derived ? I rather think that passage B was intended to amplify and has the effect of performing the same function as passage A and that is to vest the title in the donee with a view to burdening the property with a *fideicommissum*. Passage B, according to the translation made by the learned District Judge, runs as follows :—

> " Therefore I declare that subject to the dues payable to the Government in respect of the said portion of Millagahawatta bounded as hereinbefore mentioned I have hereby assigned the right to possess the said land to Nahallage Dotchi Hamy and her descending children, grandchildren, heirs, executors, administrators and assigns, &c."

This passage cannot be said to have as its objective the indication of any persons to be benefited, for even as translated by the District Judge the passage merely says that the donor has assigned the right to possess the property to Dotchihamy, her children, grand-children, heirs, executors, administrators and assigns. There is no indication here that apart from conveying the right to possess to certain specified persons any idea of benefiting anyone of them at the expense of any other of them can be

gathered. But even assuming for the purpose of argument that this passage B indicates the *fideicommissarii*, it is not possible to take the view that the *fideicommissarii* are designated with sufficient clarity, for the beneficiaries must be deemed to be not only the children and grandchildren of Dotchihamy but also her heirs, executors, administrators and assigns.

It may be said that the *fideicommissum* was intended to be created in favour of the members of the family of the donor, by reason of the express reference to her "descending children and grandchildren." But the collocation of the words "heirs, executors, administrators, and assigns" with the words "children and grandchildren" in the clause designating the *fideicommissarii*, completely negatives this contention. See *Silva v. Silva* [1].

Nor is there anything in the passage which assists one in determining the point of time at which any class of beneficiaries is to be benefited. Had words such as "in perpetuity" or "under the bond of *fideicommissum*" or "from generation to generation" been used, then it may have been possible to contend that the death of the persons in each class commencing with the death of the donee was the event contemplated by the instrument. But here there is an absence of reference to any event or condition upon which the property is to vest in any of the classes of beneficiaries. Assuming that the children are to be the first *fideicommissarii* when is the property to vest in them? Is it on the death of the donee? No words such as "after the death of the donee the children are to possess or are to be vested with the property" are to be found in the document. Or, are the children to become vested with the property in the event of the donee selling or mortgaging the property contrary to the conditions imposed? It seems to me, therefore, from a consideration of these various matters to be tolerably clear that the deed P1 cannot be said to have created a valid *fideicommissum*.

This disposes of the question raised on the appeal. But even assuming that there was a valid *fideicommissum*, it is difficult to see that the *fideicommissum* extended to four generations. The only inference from a reading of the passage B is that the persons, if any, in whose favour the *fideicommissum*, if at all, was intended to be created were (1) Dotchihamy's children, and (2) her grand-children. But there is no indication whatsoever that the property was to be fettered in the hands of the grand-children, for the benefit of anyone else. See *Samaranayake v. Seneviratne* [2]. The grand-children, Mangohamy and Mohottihamy, therefore, took the property absolutely. On Mangohamy's death Seetiappu though illegitimate would have been entitled to succeed to her share as the mother makes no bastard. In either view, whether it be considered that there was a valid *fideicommissum* or not, on Seetiappu's death his widow became entitled to half his interests and Caroline to the remaining half. The deed 3D2, therefore, from the first defendant would be operative to convey the interests of the first defendant. Caroline's interests have vested in the plaintiff. It is needless to observe that the second defendant became entitled to his half share absolutely.

[1] *(1914) 18 N. L. R. 174.* [2] *(1947) 48 N. L. R. 505.*

Decree will therefore be entered allotting to each of the plaintiff and the third defendant a ¼ share of the land and to the second defendant a ½ share. The order of the District Judge with regard to improvements and plantation will stand, subject to the modification that the third defendant will be allotted the building marked No. 1 on Lot A, and the order directing the third defendant to remove the said buildings will be deleted.

I see no reason to interfere with the order for costs made by the learned District Judge. The second defendant appellant will pay the costs of appeal to the plaintiff respondent.

WINDHAM J.—I agree.

Appeal dismissed.

1949 *Present :* **Wijeyewardene C.J.**

MOHAMED *et al.*, Appellants, *and* SAHUL HAMEED, Respondent

S. C. 257—C. R. Kandy 2,569

Landlord and tenant—Partnership—Contract of tenancy between partners—Action for rent and ejectment—Not maintainable.

One partner, as landlord, cannot sue the other partners, as tenants, for rent and ejectment in respect of premises where the business of the partnership is carried on.

APPEAL from a judgment of the Commissioner of Requests, Kandy.

H. W. Tambiah, for defendants appellants.

H. V. Perera, K.C., with *C. E. S. Perera* and *M. A. M. Hussein*, for plaintiff respondent.

Cur. adv. vult.

June 6, 1949. WIJEYEWARDENE C.J.—

This is an action for rent and ejectment filed by the plaintiff against the defendants.

The question that has to be decided is whether the plaintiff can maintain this action as he and the defendants are partners. In view of that question it is necessary to set out the following paragraphs in the plaint :—

Para 2 : "The plaintiff and the defendant are persons carrying on business under the name, style and firm of M. K. A. Mohamed Mutalib at premises No. 132, Colombo Street, Kandy . . . .".

Para 3 : "The plaintiff let to the said partners premises No. 132, of Colombo Street, Kandy, at a monthly rent of Rs. 60".

Para 4 : "The defendants wrongfully and acting in concert refused and failed to pay plaintiff such rent as from October 1, 1946, and there is now due to the plaintiff as arrears of rent up to February 28, 1947, the sum of Rs. 300".