1932 *Present :* **Macdonell C.J. and Dalton J.**

KIRTHIRATNE *v.* SALGADO.

260—D. C. Kegalla, 8,225.

Fidei commissum—*Deed of gift to four donees—Prohibition against alienation to outsider—Sale permitted to other donees—Indication of persons to be benefited—Pre-emption—Prescription.*

In 1907 A gifted a half share (southern) of a certain land to his daughter and two nephews and the northern half to B. It was further provided in the deed as follows: "Therefore the said four donees . . . . their heirs, and the heirs' executors, administrators, and assigns of each of them shall, subject to my life interest, possess and own the same with all the right, title, and interest therein belonging to me. Nevertheless, I hereby ordain that if the said B required to sell, mortgage, or dispose of the said property in any manner, she shall do so only to the said three persons (viz., the other donees) or to any one or several of them, but she shall not do any act whatsoever to enable any outsider to acquire any proprietorship over the said property, and further, if the said B died without any such transfer of ownership, the same shall be inherited by C, whom she has adopted, and if the said B and C were to die without any descendants, the said property shall devolve on my said daughter."

B transferred her half share in 1911 to the predecessor in title of the defendants.

Thereafter she transferred in 1922 the same share to one of the three other donees, from whom the plaintiff claimed.

Held, that the defendants had the superior title and that the deed did not create a valid *fidei commissum* in respect of the northern half share in favour of the three other donees.

THIS was an action for declaration of title to the half share of a land, which was gifted to one Punchi Ukku by deed No. 1,579 of April 27, 1907. The donor gifted the other half share by the same deed to his daughter and two nephews. The material parts of the deed of gift are given in the headnote.

Punchi Ukku by deed No. 16,031 of April 26, 1911, transferred her half share to one Aponsu from whom the defendants derived title. Thereafter by deed No. 6,471 of May 22, 1922, she transferred the same half share to one of the other donees from whom the plaintiff claimed. The learned District Judge held that the deed did not create a valid *fidei commissum* and that the defendants had prescribed against the plaintiff.

H. V. Perera (with him *E. B. Wickramanayake*), for plaintiff, appellant.—A mere prohibition against alienation is not *ipso jure* void although if there is no one to benefit by it, it becomes valueless. Such a prohibition is consistent with and compatible with full ownership. The effect of such a prohibition is to prevent the passing of title by the person on whom the prohibition is laid (*Sande, Part IV., chapter II., section 3*). A transferee in breach of such a prohibition gets the enjoyment of the property, not because he gets title but because there is no one to challenge his enjoyment except his own transferor against whom he can set up an estoppel. If there is someone in whom the legal title subsequently vests he can come in and challenge the alienation as soon as his rights

accrue. In the present case the transfer to Aponsu was in breach of the prohibition and therefore passed no title. The subsequent transfer two one of the permitted transferees under the deed passed title and he could claim the property as soon as his rights accrued.

[MACDONELL C.J.—Are you not barred by prescription?]

No. This is not a mere prohibition against alienation to anyone except the co-grantees. The documents creates a valid *fidei commissum*. The fidei commissaries consist of the three grantees and Baby but not all of them. A choice is given to the fiduciary. Either she gives to one of the three grantees or if not it goes to Baby. Such a *fidei commissum* is not uncommon under the Roman-Dutch law. If she breaks the condition there is no immediate forfeiture. There is no divesting of title immediately in favour of a third party. The transferee gets an interest limited in time till the beneficiary's rights accrue. All that the Roman-Dutch law requires for a valid *fidei commissum* is that there should be some person or class of persons for whose benefit the prohibition is imposed. There is no limit to the point of time at which the fideicommissary's rights accrue. When they accrue he can immediately claim his rights from the person holding on the unauthorized transfer.

[MACDONEL C.J.—The gift is to Punchi Ukku, her heirs, executors administrators and *assigns* "so that they could do anything they like with it".]

The use of the word "assigns" does not negative a *fidei commissum* which is otherwise created by appropriate words (*20 N. L. R. 449*; *26 N. L. R. 181*). For a *fidei commissum* there must be a valid grant with full power to the grantee, thereafter a trust is imposed. A fiduciary interest is the interest of a true owner—not a limited interest. The words "so that they could do anything they like with it" merely give full dominium which is necessary in all fideicommissary grants. If the other elements of a *fidei commissum* are present the wideness of the language used in giving dominium to the fiduciary do not in any way retract from a *fidei commissum* which is otherwise validly created (*Coudert v. Don Elias* [1]).

Navaratnam, for defendant, respondent.—The argument is of merely academic interest and does not apply to the facts of this case. The plaint says nothing about the original deed creating fideicommissary rights. The effect of D 2 is to wipe out even the usufruct reserved by D 1. D 1 conveys complete dominium. The word "assigns" in the cases cited were used in the operative clause. Later there was express prohibition against alienation and clear designation of the persons in whose interest that prohibition was made. See *Tina v. Sadris* [2]; *Hormusjee v. Cassim* [3]; *Aysa Umma v. Noordeen* [4]; *Nugara v. Gonsal* [5]; *Silva v. Silva* [6]. In these cases the word "assigns" has been used and *Tina v. Sadris* (*supra*) has been consistently followed. Words cannot be lightly brushed aside. They must be given some meaning and must be considered. The words prohibiting alienation recognize

[1] *17 N. L. R. 129 at 132.*
[2] *7 S. C. C. 135.*
[3] *2 N. L. R. 190.*
[4] *8 N. L. R. 350.*
[5] *14 N. L. R. 301.*
[6] *18 N. L. R. 174.*

the right of Punchi Ukku to sell the property. The words give to the first three donees a right of pre-emption and nothing more. They would if they get any right get it purely on a deed of sale by virtue of a contract. They do not on the happening of a certain event become *ipso facto* fidei-commissary heirs. The prohibition is only the expression of a wish. In the event of a breach of the prohibition we are not told what is to happen or who is to benefit. Therefore by reason of the Entail and Settlement Ordinance the prohibition is bad and a transfer in breach of the prohibition gives good title. The three donees will have a personal action against Punchi Ukku for a breach of the condition. In any event where there is a breach of a prohibition against alienation the rights of the fideicommissary accrue immediately and this action is barred by prescription (*Sande, Part III., chapter IV., section II*). Counsel also cited *Robert v. Abeywardene* [1]; *Naina Lebbe v. Marikar* [2]; *Boteju v. Fernando* [3]; *Salonchi v. Jayatu* [4]; *Burge 769 (new ed.)*; *Juta's Law of Wills 113*).

Wikramanayake, in reply.—A distinction must be drawn between cases in which the prohibition creates the *fidei commissum* and those in which the prohibition is merely incidental to a *fidei commissum* otherwise validly created. In the latter case the fideicommissary's rights do not vest in him on a breach of the prohibition. He must wait until the happening of the condition which under the instrument will give him his rights (*Sande, Part III., chapter IV., section 12*). In this case no rights accrue till some definite act by Punchi Ukku whereby she selects the fideicommissary. She could either transfer to the permitted donees or refrain from doing so and at her death leave it to Baby. She made her choice when she transferred to one of the donees and his rights vested in him only at that moment. No prescription can run against a fideicommissary until the accrual of his rights (*Abdul Cader v. Haliba Umma* [5]).

September 5, 1932. MACDONELL C.J.—

This was an appeal from the District Court, Kegalla, by the plaintiff-appellant against a decision of that Court to the effect that a certain deed of gift (No. 1,579 of April 27, 1907) did not create a *fidei commissum* and that the defendant-respondents had prescribed against the plaintiff-appellant.

The document was a deed of gift of certain lands to (1) donor's daughter Salleha Umma, (2) his nephew Ibrahim Lebbe, and (3) his nephew Cadersa Lebbe, of the southern half of certain land, and also of gift of the northern half of the same land to the woman Punchi Ukku. The deed in dispute runs as follows:—"Therefore the said four donees, Sinne Lebbe Marikar Salleha Umma, Ibrahim Lebbe Mohammedu Lebbe, Cadersa Lebbe Mohammedu Sameem, and Hewapedige Punchi Ukku, their heirs and the heirs' executors, administrators, and assigns of each of them shall, subject to my life-interest, possess and own the same with all the right,

[1] *15 N. L. R. 323.*
[2] *2 N. L. R. 295.*
[3] *24 N. L. R. 293.*
[4] *27 N. L. R. 366.*
[5] *28 N. L. R. 92.*

title, and interest therein and thereto belonging to me and can do anything they like therewith. Nevertheless, I hereby ordain that if the said Hewapedige Punchi Ukku required to sell, mortgage, or to dispose of the said property in any manner she shall do so only to the said three persons or to any of them or to several of them, but she shall not do any act whatsoever to enable any outsider to acquire any proprietorship over the said property and further, if the said Punchi Ukku died without any such transference of ownership the same shall be inherited by Baby whom she has adopted and if the said Punchi Ukku and Baby were to die without any descendants the said property shall devolve on my said daughter Sinne Lebbe Marikar Salleha Umma or her heirs." The donor subsequently by deed No. 671 of September 28, 1910, released to Punchi Ukku the life interest he had reserved to himself by the deed No. 1,579.

The facts in connection with this document are as follows. Punchi Ukku on April 26, 1911, by deed No. 16,031 transferred her northern half share to one Aponsu under whom the defendant-respondents claim, and thereafter the same Punchi Ukku transferred her same northern half share on May 23, 1922, by deed No. 6,471, to Ibrahim Lebbe, donee No. 2 on the deed of gift No. 1,579, who transferred to Cadersa Lebbe, donee No. 3 on deed No. 1,579, who retransferred to Ibrahim Lebbe, donee No. 2, who sold in 1926 to the present plaintiff-appellant. The learned District Judge held that the deed of gift No. 1,579. did not create a *fidei commissum*, and on the one issue raised before him by the parties at the trial, namely, prescription, held that defendants, successors in title of Aponsu who obtained the land from Punchi Ukku in 1911, had prescribed against plaintiff, successor in title to Ibrahim Lebbe, donee No. 2 on deed No. 1,579, who only obtained the land in 1922.

It is necessary to analyse the portion of the deed No. 1,579 which has been quoted *in extenso* above. It is an absolute gift to donees No. 1, 2, and 3 of the southern half of the land and, subject to the words that follow, an absolute gift to Punchi Ukku of the northern half of the land. (It may be taken that before the events in this case the donor had died and that therefore his life interest does not come in question.) The important words are these:—" Nevertheless I hereby ordain that if the said Hewapedige Punchi Ukku required to sell, mortgage, or to dispose of the said property in any manner she shall do so only to the said three persons or to any of them or to several of them, but she shall not do any act whatsoever to enable any outsider to acquire any proprietorship over the said property." The effect of these words is this. If Punchi Ukku wishes to alienate the land she must do so only to one or more of the three donees. But the three donees are not any one of them fettered in any way as to what they may do with Punchi Ukku's share once Punchi Ukku has transferred it to one or more of them. Nothing is said restricting in the slightest degree their power to alienate to others than themselves Punchi Ukku's share once they or any one or more of them have acquired it. It is therefore a personal restraint, a single one, and not a real prohibition, not one, that is, affecting the land since it does not recur, is not what is called *multiplex*. See per Schneider J.

in *Naina Lebbe v. Marikar*[1]. Nothing is said as to what is to happen supposing Punchi Ukku in contravention of the prohibition sells to an "outsider", *i.e.*, to someone other than the three donees. In the absence of any such words, and repeating that the three donees are at perfect liberty to alienate to whom they please Punchi Ukku's share when once it has been transferred to them or one or two of them, I do not think that on the authorities this disposition can be said to create a *fidei commissum* but that it simply gives to the three donees the right of pre-emption. See *Peiris v. Soysa*[2] and *Naina Lebbe v. Marikar* (*supra*). See also *Burge IV., Part I., p. 770, 1914 edition.* "A prohibition against alienation will not create a *fidei commissum* but is perfectly nugatory unless the persons are designated in favour of whom the testator declares the prohibition . . . . It is not sufficient that he names particular persons to whom he prohibits the alienation to be made"—in this case persons "outside" the three donees—"unless he also designates some person to whom the estate shall pass in the event of its being alienated", but this deed No. 1,579 omits to do so.

If this be simply a right of pre-emption given to the three donees, then the facts are that they have lain by for 11 years after Punchi Ukku transferred to Aponsu, defendants' predecessor in title, and their claim is prescribed as the learned Judge holds.

Let us, however, suppose that this disposition does create a *fidei commissum.* The *fidei commissarii* then would be the three donees. It was argued to us that this was a case of *fidei commissum* with a discretion left to Punchi Ukku which of the three fideicommissary heirs to select, one or more, and that no rights vested in these three fidei commissary heirs or in any one of them until Punchi Ukku makes a deed of gift in favour of one or more of these three, or dies. Punchi Ukku, it may be stated, is still alive, so the further disposition purporting to say what is to happen to the property after her death, does not arise. Now this argument that no rights accrue to any one of the three donees until Punchi Ukku has executed a conveyance in favour of one or more of them and that consequently time did not begin to run against them in 1911, the date that Punchi Ukku transferred to Aponsu, seems to be contrary to the passage in *Sande on Restraints upon Alienation, Part III., chapter IV.*, which was cited to us in argument. The important sections in that chapter are 11 and 12 and it seems to me clear that if this disposition is capable of being construed as a *fidei commissum* it has to be governed by section 11 quoted below, and that the right of the three donees as *fidei commissarii,* would accrue the moment Punchi Ukku transferred to Aponsu in 1911.

> "*Section 11.*—The third effect follows from those already mentioned, and is that from an alienation made contrary to the testator's prohibition, an implied *fidei commissum* is induced in favour of those in whose interests the prohibition was made; so that they can bring an action and sue on the *fidei commissum* during the lifetime of the person who so alienates without waiting for his death.

[1] *22 N. L. R. 302.* [2] *21 N. L. R. 441.*

"*Section 12.*—And in this respect a *fidei commissum* arising from an express prohibition against alienation differs from an express *fidei commissum* which is conditional and postponed to a certain time (from which an implied prohibition results), in that the property subject to this *fidei commissum* cannot meanwhile be alienated, nor is an action on the *fidei commissum* given before the condition is fulfilled or the time arrives; for then at last the alienation is rescinded, and is considered as not having been made."

It was argued to us however that the case is really governed by section 12, but I do not see how that can be. Granting that this is an express *fidei commissum,* I cannot see that it is "postponed to a certain time", the only "time" that the rights of the *fidei commissarii* can be said to be postponed to is the "time" when Punchi Ukku transfers to someone other than the three donees. And how can there be question of an "implied prohibition" here? The prohibition is quite express, as far as it goes. The words are, "she shall not do any act whatsoever to enable any outsider to acquire any proprietorship over the said property"; but if she does, surely the persons damnified by her act, the three donees, must have the power then and there to come forward and claim the property which she has attempted to alienate to Aponsu—assuming of course that they are *fidei commissarii.* I am afraid I cannot agree with the argument that the rights of these three donees did not accrue until Punchi Ukku conveyed to one of them in 1922. Their rights, if they are fidei commissary rights, accrued, it seems to me, when in 1911 Punchi Ukku in derogation of those rights purported to convey to Aponsu, defendants' predecessor in title.

This question has been considered on the assumption that the words under consideration create a *fidei commissum* in favour of one or more of the three donees. But on the authorities I am quite satisfied that these words do not create a *fidei commissum* but at most give a right of pre-emption to the three donees. They did not exercise that right, they stood by and did nothing when Punchi Ukku conveyed to Aponsu, and any right that they may have had is now prescribed.

The further disposition in this deed of gift No. 1,579, namely, what is to happen to the property if Punchi Ukku dies without having transferred it, hardly arises for consideration, but I would wish to point out this. The contingency of Punchi Ukku and Baby both dying without descendants is provided for. But what if Baby dies without descendants, and Punchi Ukku dies leaving descendants? This contingency is not provided for and apparently in such a case Punchi Ukku's representatives, testamentary or intestate, would take the land unfettered to the exclusion of Salleha Umma, donee No. 1. Where you get a deed of gift so loosely drawn you would, I apprehend, need clear evidence of an intention to create a *fidei commissum* before you could conclude that a *fidei commissum* had in fact been created.

For the foregoing reasons I am of opinion that this appeal must be dismissed with costs.

DALTON J.—

The facts are fully set out in the judgment of the lower Court. The case depends upon the construction to be given to the deed of gift (D 1) of April 27, 1907. The learned trial Judge has held that the deed creates no valid *fidei commissum* in respect of the land set out in the plaint. From that decision the plaintiff appeals.

By the deed the donor R. M. Sinna Lebbe donated the southern half of the land Bolagamayagewatta to three persons, his daughter Salleha Umma, his sister's son Mohammadu Lebbe, and his brother's son Mohammadu Sameem, and the northern half to Punchi Ukku who, according to the deed, was staying in his house and working there. The deed then continues—

> "Therefore the said four donees . . . . their heirs, and the heirs' executors, administrators, and assigns of each of them shall, subject to my life interest, possess and own the same with all the right, title, and interest therein and thereto belonging to me, and can do anything they like therewith; nevertheless I hereby ordain that, if the said Hewapedige Punchi Ukku required to sell, mortgage, or to dispose of the said property in any manner, she shall do so only to the said three persons or to any of them or to several of them but she shall not do any act whatsoever to enable any outsider to acquire any proprietorship over the said property, and further if the said Punchi Ukku died without any such transference of ownership the same shall be inherited by Baby whom she has adopted, and if the said Punchi Ukku and Baby were to dies without any descendants the said property shall devolve on my said daughter S. L. M. Salleha Umma or her heirs."

In a subsequent conveyance of 1919 (D2) the donor conveyed his life interest that he had reserved over the whole land to Punchi Ukku, together with other properties.

It is contended for the appellant that the deed created a valid *fidei commissum* in respect of the portion donated to Punchi Ukku in favour of the other three donees, that she had conveyed the property in question in 1911 to Aponsu, the predecessor in title of the substituted defendants, respondents, in breach of the conditions laid down, and that as against the subsequent grantee Mohammadu Lebbe and his successors in title. Aponsu obtained no rights of any kind. It was contended for appellant that the conveyance to Aponsu was void and passed no title, the dominium thereafter being still vested in Punchi Ukku. As against her alone was it open to Aponsu by pleading estoppel to resist any action taken in respect of the property, if she contested his claim.

The deed in most clear and explicit terms in its first portion donates the respective portions mentioned to the four donees absolutely. This is made still clearer in the first half of the second portion of the deed, which I have set out above in full. They, their heirs, executors, administrators, and assigns are to own and possess the same with every right therein belonging to the donor, subject to his life interest, and they can do everything they like with it. Up to this point there is not the least doubt or ambiguity in the deed.

The donor then states that if Punchi Ukku wishes to sell, mortgage, or dispose of the property, she shall do so only to the other three donees. The object is stated to be to prevent any outsider acquiring the property, but to whom the word "outsider" can apply is very far from plain. It cannot show any intention to keep the property in the donor's family, since neither Punchi Ukku nor her adopted daughter Baby is a member of the family. They are both Sinhalese, whilst the donor and the other three donees are Muslims. What is to happen in the event of Punchi Ukku failing to observe this alleged condition against alienation to anyone but the other three donees is not stated, but the deed continues that if she dies without "any such transference of ownership", the property is to be inherited by Baby. It then goes on to provide that If Punchi Ukku and Baby die without any descendants, the property is to devolve on Salleha Umma or her heirs. There is no definite provision that the property is ever to go the descendants of Punchi Ukku, although they are mentioned in the last proviso, but this matter is immaterial here except to further accentuate the unsatisfactory nature of the wording of the deed and the difficulty of ascertaining the intentions of the donor from the deed itself. The principles that should guide the Court in ascertaining the intention of the donor in such a case as this are succinctly set out by Schneider, J. in *Boteju v. Fernando*[3] to which case I again refer later. If that intention is not clear, the presumption is against a *fidei commissum.* That rule of Roman-Dutch law has been consistently applied by our Courts, and the reason for it is clearly set out by Branch C.J. in *Salonchi v. Jayatu.*

There cannot be the least doubt or ambiguity respecting the first portion of the deed, as I have already pointed out. It vests the full dominium in the two portions in the respective donees in explicit terms and without any restriction, save for the donor's life interest. On the use of the words "heirs, executors, administrators, and assigns" in such cases as these Mr. Perera has referred us to several decided cases for the purpose of showing that too much emphasis should not be laid upon the particular form of words used, if the intention of the grantor or testator be otherwise clearly expressed. He urges that the use of the word in the first instance vesting absolute dominium in the fiduciary is by no means repugnant to the creation of a *fidei commissum.* The terms of the deed in the case of *Coudert v. Don Elias*[2], upon which he specially relies, are different from those in the case before us, but the law as laid down there is applicable here. Applying that law to the deed before us, can one say here that the first portion of the deed vesting absolute title in the four donees is merely a preliminary to burdening half of the property with a *fidei commissum?* (*Gunaratne v. Perera.*[4]) On this aspect of the case, taking the deed as a whole and applying the question put to himself by Pereira J. in *Coudert v. Don Elias* (*supra*), whether the words used sufficiently indicate a clear intention to burden the *plena proprietas,* the answer, it seems to me, must be in the negative.

[1] *24 N. L. R. 293.*
[2] *27 N. L. R. 366.*
[3] *17 N. L. R. 129.*
[4] *1 C. W. R. 24.*

There is in my opinion another aspect of the case, which precludes the appellant from establishing that a *fidei commissum* is created by this deed. It is essential that the will or deed must clearly provide for or point out the person or class to whom the property is to go over. Assuming for the purpose of argument, on this aspect of the case, that there is here shown an intention to create a *fidei commissum* by imposing a restriction on alienation, to whom is the property to go in the event of a breach of that provision; who are the fideicommissaries designated? The deed, it seems to me, is silent on this point. It was urged for the appellant that in the event contemplated the other three donees were the fideicommissaries, but I can find no support for that argument in the deed itself. What is to happen on a breach of this restriction, or in whose favour this condition of the *fidei commissum* it is sought to establish is made, the deed does not state, nor can, so far as I see, any clear intention on the part of the donor be inferred from the language used.

The law on this matter is clear. A mere prohibition of alienation does not create a *fidei commissum,* unless the deed designates the persons in whose favour the prohibition is declared and to whom the estate shall pass in the event of its being alienated (*Tina v. Sadris*[1]). The deed would seem to provide (although even this is not absolutely clear) that on the death of Punchi Ukku without disposing of the property to any of the other three donees the property goes to Baby her adopted daughter; this, however, will not help the plaintiff whose claim is made through Mohammadu Lebbe, for in such an event the other three donees could not on any construction of the deed be the fideicommissaries.

It has been suggested that the interpretation of the particular deed with which the Court had to deal in *Tina v. Sadris* (*supra*) has not been accepted in later decisions (*Ibanu Agen v. Abeyasekera*[2]), but I do not think it has ever been suggested that the law which is in effect incorporated in section 3 of the Entail and Settlement Ordinance, 1876, was in any way questioned. Later decisions to which I refer make that quite clear. Even on the terms of the particular deed, Wood Renton J. in *Nugara v. Gonsal*[3] held that *Tina v. Sadris* (*supra*) should be followed. In *Silva v. Silva*[4] Lascelles C.J. referred to *Tina v. Sadris* (*supra*) as being a leading case on the subject and pointed to the undesirability of seeking to collect from any ambiguous expressions in the document the donor's intention as to the persons to be ultimately benefited. In *Salonchi v. Jayathu* (*ubi supra*) the law is again set out, reference being made to *Tina v. Sadris* (*supra*) and also to the authorities upon which that decision is based set out in *Burge Vol. II., p. 113.*

In *Craib v. Loku Appu*[5] Ennis J. held that to hold that a *fidei commissum* is created it must clearly appear—

(*a*) that the gift is not absolute to the donees;
(*b*) who are the persons to be benefitted; and
(*c*) when they are to benefit.

[1] *7 S. C. C. 135.*
[2] *6 N. L. R. 344.*
[3] *14 N. L. R. 301.*
[4] *18 N. L. R. 174.*
[5] *20 N. L. R. 449.*

He re-states the principle that the document is to be construed so as to be least burdensome to the donees, in case of doubt there is a presumption against incumbrance, and that it is not possible to disregard any word in the document. If the document does not make it clear who is to benefit and when, it is not open to the Court to supply the deficiency, and the deed must be construed as an absolute gift to each of the donees.

In *Peris v. Soysa*[1] there was a prohibition in the deed that the donees should not sell or mortgage the property to any other but themselves. The deed did not specify what was to happen in the event of a sale or mortgage to an outsider. No persons who were to be benefitted were clearly designated, and the prohibition was held to be a naked prohibition and of no force or effect. In *Hettiaratchi v. Suriaratchi*[2] a testator gave the residue of his estate to his six children, and in the last clause (which the learned Judge pointed out was not an integral part of the bequest) provided that it should not be alienated except among the heirs. The heirs were the six children themselves. There was nothing to show there was any intention apart from this to keep the property in the family, and De Sampayo J. held the provision to be a *nudum praeceptum*, the further direction not to alienate to outsiders not altering the nature of the unconditional gift.

In *Boteju v. Fernando*[3] the deed was a deed of gift to F. with the usual prohibition against alienation, save to one of his brothers. It then went on to provide, subject to a life interest of the donors, that after F's death the property be possessed by his heirs, executors, administrators, and assigns for ever, or to do whatever else they liked with it. The Court (Schneider and Garvin JJ.) held the deed did not create a valid *fidei commissum*, and there was nothing in the language used which indicated any desire on the part of the donors by the prohibition against alienation to benefit any person unless it be the donee himself, or any class of persons. In *Rodrigo v. Perera*[4] the same two learned Judges had a deed of gift in almost similar terms before them. They held no *fidei commissum* was created by the clause in the deed which spoke of possession by the donees, their executors, administrators or assigns, nor was there any *fidei commissum conditional*, as was urged, created by the condition which prohibited the sale by the donees except among themselves.

Applying the law followed in those cases, in the absence of any clear designation of the persons in whose favour the prohibition is declared and to whom the estate shall pass in the event of alienation contrary to the restriction, the plaintiff must fail.

A further matter was argued before the Court, respondents urging that if, in fact, there was here a valid *fidei commissum*, and Punchi Ukku was a fiduciary, her interest in the *fidei commissum* terminated immediately on the breach of her of the condition against alienation outside the other three donees, and therefore her subsequent deed in 1922, through which plaintiff traced his claim, was valueless and conveyed nothing. In view of my previous conclusions, it is not necessary for me to go into

[1] *21 N. L. R. 446.*
[2] *24 N. L. R. 140.*
[3] *24 N. L. R. 293.*
[4] *24 N. L. R. 420.*

this question, or the further question whether or not the right of the three other donees were merely rights of pre-emption.

For the reasons given the appeal must fail, and must be dismissed with costs.

Appeal dismissed.