1940 *Present* : **Howard C.J. and Soertsz J.**

RAMANATHAN *v.* SALEEM *et al.*

200—D. C. Colombo, 969.

Fidei commissum—*Muslim last will—Attempt to create trust for the benefit of descendants—Failure of object—Words insufficient to create* fidei commissum—*Roman-Dutch law.*

Where a last will contained the following clauses :—(*a*) I do hereby will and desire that my wife . . . . , and my children . . . . and my father . . . . , who are the lawful heirs and heiresses of my estate, shall be entitled to and take their respective shares according to my religion and Shafie Sect . . . . but they nor their issues shall not sell, mortgage, or alienate any of the lands, houses, estates or gardens, belonging to me at present, or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children, or of my heirs and heiresses, only that they receive the rents, income and produce of the said lands . . . . and that out of such income, produce and rents, after defraying expenses for their subsistence and maintenance of their families, the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus, lands should be purchased by them for the benefit and use of their children and grandchildren . . . .

(*b*) I further desire and request that after my death the said heirs and heiresses or the major part of them shall appoint, with the executors, three competent and respectable persons of my class and get the movable and immovable properties of my estate divided and appropriated to each of the heirs and heiresses according to their respective shares and get deeds executed at the expense of my estate, in the name of each subject to the aforesaid conditions.

Held, that the intention of the testator was to create a trust for the benefit of his descendants and that his object was defeated because it offended against the rule against perpetuities.

Quaere whether the will creates a valid *fidei commissum.*

Sabapathy v. Yusoof (37 N.L.R. 70); *Saleem v. Mutturamen Chetty* (15 C. L. W. 115; *and Sinnan Chettiar v. Mohideen et al.* (41 N. L. R. 225) doubted.

THIS was an action for declaration of title to premises No. 706, Colpetty which formed part of the property of one I. L. I. L. Marikar, who made a last will dated December 12, 1872, the relevant

portions of which are stated in the judgment. On the death of the testator his last will was admitted to probate on May 29, 1876. On the death of the widow in 1906, the administrator conveyed the properties belonging to her husband's estate to her children in the proportions of two-eighth to the sons and one-eighth to the daughters. On the same day by P 2 the children effected a partition among themselves so as to take each certain properties in their entirety in lieu of their undivided shares. In consequence of this partition the property in this case fell to Ahmsa Natchia. She had three children: Ayesha Umma, Saheed and Magida Umma, the second defendant in the case. By deed P 229 Ahmsa Natchia conveyed this property to her son Saheed and she similarly conveyed other properties that she obtained under the will to Ayesha Umma and Magida.

In 1933, Saheed mortgaged the property with the plaintiff who put the bond in suit and purchased it on October 17, 1936, and obtained a conveyance in his favour.

The first defendant, who is a son of Ayesha Umma, claimed title to the land admitting that the plaintiff was entitled to only one-third share. The learned District Judge held that the will created a valid *fidei commissum* and that the plaintiff obtained title to a one-third which was all that Saheed was entitled to. In appeal two questions were argued, whether the will created a *fidei commissum* and whether Saheed had acquired a prescriptive title to the entirety of the premises.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam* and *N. Kumarasingham*), for plaintiff, appellant.—The questions that have to be decided in this case are:—

(1) Did the last will of I. L. I. L. Marikar No. 7130 of December 12, 1872, create a valid *fidei commissum* ?

(2) If it did, what share did Saheed get ?

(3) Has the plaintiff through his predecessor in title acquired prescriptive possession to the entire premises conveyed by P 29 ?

This will has been subjected to judicial interpretation in three cases. *Sabapathy v. Yusoof*[1]; *Saleem v. Mutturamen Chetty*[2]; and *Sinnan Chettiar v. Mohideen et al.*[3] On each occasion on very important points in the will a different interpretation has been placed; the two later decisions accepting as correct the decision in *Sabapathy v. Yusoof* that the will created a valid *fidei commissum*. This will does not create a *fidei commissum*. The testator may have intended to create a trust, but his intention has been defeated by his violating the rule against perpetuities. Apart from the prohibition against alienation which also occurs in some instruments creating trusts there is nothing in this will to show that the testator intended to create a *fidei commissum*. Mr. Justice Akbar was of that view. See *37 N. L. R.* at page 79. "Beyond the prohibition of alienation which sometimes occur in *fiedei commissa* there are no words in the will to show that the testator intended to create a *fidei*

[1] *37 N. L. R. 70.*

[2] *15 C. L. W. 115.*

[3] *15 C. L. W. 109.*

commissum. On the contrary the word "trust" is used. All that the testator intended was to preserve the estate in perpetuity for the benefit of his descendants. To ascertain whether the will created a valid *fidei commissum* the usual tests might be applied. Is there a clear indication of the beneficiaries? Are the beneficiaries the grandchildren of the devisees or are they firstly the children and after them the grandchildren ? On this there is already some conflict in the decisions of this Court. Is there any provision in the will which either expressly or by clear implication shows at what point of time the property is to vest in the fideicommissary heirs ? There is no such provision. On this again there is conflict between the decision. The whole position is unsatisfactory. This will affects title to property in Colombo worth many lakhs. A full Court should set at rest all this uncertainty caused by these recent decisions.

The plaintiff relies on the prescriptive possession of Saheed and his mother. In 1906 Counsel's opinion was obtained and parties came to an agreement and certain properties were conveyed absolutely on P 1 and P 2. Since then this property has been in the exclusive and adverse possession first of Assena Natchia and later Saheed who mortgaged this property to plaintiff-appellant. Similarly, other properties went to the other heirs. Appellant has established prescriptive title by adverse and exclusive possession for nearly forty years.

N. Nadarajah (with him *C. E. S. Perera*) , for the first defendant, respondent—The posssession of Saheed and his mother cannot be considered adverse to his sisters. They were co-owners and the principle of the decision in *Corea v. Iseris Appuhamy*[1] *would apply.* The evidence shows that Saheed was not in possession till 1928. Even after that he has shared the rent with his sisters. The respondents have placed sufficient evidence and the trial Judge has accepted that evidence and held against the plaintiff.

In *Cadija Umma v. Don Manis Appu*[2] the Privy Council has re-affirmed the view expressed in *Corea v. Jamis Appuhamy.* There is no reason why this Court should disturb the findings of fact by the trial Judge.

The will creates a valid *fidei commissum.* Every attempt made to question the correctness of the decision in *Sabapathy v. Yusoof* (*supra*) has failed. In three different cases the same interpretation has been placed on the will. Title to property should not be unsettled by conflicting decisions over the interpretation of the same will.

In *Saleem v. Mutturamen Chetty* and *Sinnan Chettiar v. Mohideen,* attempts were made to challenge the correctness of the view expressed by your Lordship's Court in *Sabapathy v. Yoosuf* but without success. It is submitted that these judgments are binding. Apart from the judgments, there can be little doubt that the testator intended to create a *fidei commissum.* The fact that a notary has not chosen the correct formula or set of words to give adequate expression to the intention of the testator cannot prevent the intention from being given effect to. Vide *Wijetunga v. Wijetunga.*[3]

[1] *15 N. L. R. 65.* [2] *13 C. L. W. 44.* [3] *15 N. L. R. 493.*

September 9, 1940. SOERTSZ J.—

This was an action for declaration of title to premises bearing assessment No. 706, Colpetty, which at one time bore No. 130, Colpetty. The plaintiff's case was that this and many other valuable properties in the city of Colombo, belonged to one I.L.I.L. Marikar, who made a last will dated December 12, 1872, in which he declared *inter alia* as follows :—

(*a*) "I do hereby will and desire that my wife . . . . and my children . . . . and my father . . . . , who are the lawful heirs and heiresses of my estate, shall be entitled to and take their respective shares according to my religion and Shafie Sect . . . . but they nor their issues or heirs shall not sell, mortgage, or alienate any of the lands, houses, estates or gardens belonging to me at present, or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children, or of my heirs and heiresses, only that they receive the rents, income and produce of the said lands . . . . without encumbering them in any way be liable (sic) to be seized, attached or taken for any of their debts and liabilities, and out of such income, produce and rents, after defraying expenses for their subsistence and maintenance of their families, the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus, lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated, but neither the executors herein named, or any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at time of their minority or lunacy.

(*b*) I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint, with the executors herein named, three competent and respectable persons of my class, and get the movable and immovable properties of my estate divided and appointed to each of the heirs and heiresses, according to their respective shares, and get deeds executed . . . . at the expense of my estate, in the name of each of them subject to the aforesaid, conditions".

The testator died, and his last will was admitted to probate on May 29, 1876, in D. C. Colombo, testamentary case No. 3,209.

Document P 4 shows that, in accordance with the desire expressed by the testator, there was a division and apportionment of the immovable property. Assena Natchia, the widow of the testator, died in 1906, and in that year, on the 24th of December, her administrator by deed P 1 conveyed the properties belonging to her estate as derived from her husband, to her children in the proportions of two-eights to each of the sons, and one-eighth to each of the daughters. On the same day by P 2, these children effected a partition among themselves so as to take, each, certain properties in their entirety, in lieu of their undivided shares of all the properties. In consequence of this partition, the property involved in this case, fell to Ahmsa Natchia. She had three children, Ayesha Umma, Saheed, and Magida Umma, the second defendant in this case. In her lifetime Ahmsa Natchia conveyed to these children all the properties that came to her directly under the will from her father's estate, as well as those that came to her through her mother, Assena Natchia.

By P 29, she conveyed in 1919, the property in this case to her son Saheed. Similarly she had, in 1910, by P 32, and in 1912 by P 31, conveyed other properties to Ayesha Umma and Magida Umma respectively.

In 1933, on P. 37, Saheed mortgaged this property with the plaintiff who put his bond in suit, and purchased the land at the sale held on October 12, 1936, on the hypothecary decree entered in his favour, and obtained conveyance P 5 dated November 15, 1936. By way of counter-movement, the first defendant, who is a son of Ayesha Umma, obtained a deed 1D 1 from his mother, by which she purported to convey to him *inter alia* all her right, title and interest in these premises. This deed was executed on the 13th of October, 1936, that is, the day after the sale to the plaintiff, on the hypothecary decree.

Armed with this deed, the first defendant resisted the plaintiff, when upon a writ of possession, he went to take over the premises he had purchased. This resistance appears to have been reported to Court, and at the inquiry held upon that report, the first defendant produced his deed 1D 1, and claimed a one-third share, admitting that the plaintiff was entitled to a one-third. The plaintiff, thereupon, instituted this action for declaration of title to the entirety of the premises No. 130, Colpetty, now No. 706, and claimed damages at Rs. 90 a month from the 11th of November, 1936, till he should be placed in possession.

In his answer the first defendant who had admitted plaintiff's title to a third, changed his position, and asserted that the plaintiff was entitled to a one-twenty-eighth on the footing that the plaintiff's mortgagor Saheed was one of the twenty-eight grandchildren of Assena Natchia.

His aunt, the second defendant, however, in her answer claimed that she was entitled to a one-third on the footing that she, the plaintiff's mortgagor Saheed, and the first defendant's mother and vendor Ayesha Umma were the three grandchildren of Assena Natchia who became entitled to this property, to the exclusion of the other grandchildren.

In view of this embarrassing conflict between his claim and that of his aunt, the first defendant, in the course of his evidence in this case, reverted to his original statement made in the course of the inquiry into the report of resistance on the part of the first defendant to the plaintiff's attempt to take possession of these premises, and admitted that the plaintiff's share was one-third. His answer was amended to that effect.

The principal questions that arose for the determination in this case were :—

(*a*) Whether the last will of I.L.I.L. Marikar created a *fidei commissum?*

(*b*) Whether, if it did, Saheed got any more than a third of these premises either on deed P 29 or by inheritance ?

(*c*) Whether Ahmsa Umma and/or Saheed had acquired a prescriptive title to the entire premises conveyed by P 29 ?

The learned trial Judge answered the first question in the affirmative, the third in the negative, and on the second question he held that the plaintiff had obtained title to a one-third which he found was all that Saheed was entitled to. He accordingly directed decree to be entered declaring plaintiff entitled to one-third of the premises and, by implication, in view of his answer to issue 6, to damages at Rs. 210 per annum. The

plaintiff was to pay the second defendant costs but the first defendant was to bear his own costs. In the decree, however, there is no direction in regard to damages. This is probably an oversight and I refer to it only in passing.

On the appeal before us the two questions debated were whether the will created a *fidei commissum*, and whether *fidei commissum* or no, Saheed had acquired a prescriptive title to the entire premises in dispute in this case.

This will of I.L.I.L. Marikar has had a remarkable history. It has already come up for consideration by this Court, on three separate occasions, and on each occasion, it has received a different interpretation on important points arising under it.

There was, first of all, the case of *Sabapathy v. Yusoof*[1]. One of the questions that arose in that case, was whether the will created a *fidei commissum*, and Akbar S.P.J. and Koch J. rejected the submission made on behalf of the appellant in that case that the testator had attempted to create a trust for the benefit of his descendants, but that the attempt had failed because it offended against the rule against perpetuities, and they held—

(*a*) that, in view of the distribution of properties that had taken place, the will created separate *fidei commissa* ;

(*b*) that the grandchildren of Ahmsa Natchia—it was her property that was involved in that case—were the fideicommissaries ;

(*c*) that so many of the fideicommissaries as were ascertainable at the time, became vested with title to the property in that case, when in violation of the prohibition against mortgaging, the second defendant in that case, a daughter of Ahmsa Natchia, mortgaged the property to the plaintiff in that case, but that the shares of these ascertainable fideicommissaries "would be reduced if other grandchildren came into being after such date".

The next case was that of *Saleem v. Mutturamen Chetty*[2], and the question was again raised whether there was a valid *fidei commissum*. Maartensz and Moseley JJ., who formed the Bench on that occasion, agreed with Akbar S. P. J. and Koch J., and held--

(*a*) that in the circumstances already indicated by me, the will created separate *fidei commissa* ;

(*b*) that the beneficiaries were the grandchildren of Ahmsa Natchia.

But they appear to have differed from the two earlier Judges in regard to the time of the vesting of title in the fideicommissaries, for they held—

(*c*) that in the absence of an express statement in the will as to "when the properties are to devolve on the fideicommissaries" the properties "must be deemed to pass on the death of the fiduciary heirs".

I would point out that in the case before Maartensz and Moseley JJ., too, there had been a mortgage by a daughter of Ahmsa Natchia in violation of the prohibition, but they paid no attention to that fact, and they held that the vesting took place on the death of the fiduciary heirs.

[1] *(1935) 37 N. L. R. 70.*

[2] *(1938) 15 C. L. W. 115.*

The third case was that of *Sinnan Chettiar v. Mohideen et al.*[1] Here too the question arose whether the will created a valid *fidei commissum*, and it came up before Moseley and Wijeyewardene JJ. The circumstances in which the questions arose in that case appear to be as follows:—Magida Umma, the third child of Ahmsa Natchia, sold the property in question in that case to the first defendant in that case, and to one Suppiah Chetty. The latter conveyed his interest to that first defendant. The plaintiff in that case who was a child of Magida Umma sued the first defendant, contending that the will created a *fidei commissum*, that the sale by his mother was in violation of the prohibition against alienation, and that on that violation, he became vested with title to a share of the land and that the first defendant got no title. The Bench held—

(*a*) that the will created a *fidei commissum* ;
(*b*) that the fideicommissaries were the children of Ahmsa Natchia and after them, the grandchildren ;
(*c*) " that the event on the happening of which the property devolves on each succeeding set of fideicommissary heirs, is the death of the immediate previous fiduciary heirs," and that, for that reason the plaintiff's action was premature.

It will be observed that Moseley J. appears to have changed the view he held in the earlier case, namely, that the fideicommissaries were the grandchildren of Ahmsa Natchia, and to have held that both the children and grandchildren were successive fideicommissaries.

In face of this difference of opinion it is, naturally, with great anxiety, that I address myself to the questions raised before us, and after very careful examination of the will, I regret to say that I find great difficulty in sharing the view that it created a *fidei commissum*.

This will is not free from ambiguity of language in several parts of it, but it is the function of legal interpretation to unravel the meaning of the testator as far as possible, " on known principles and established rules, not on loose conjectural supposition or by considering what a man may be imagined to do in the testator's circumstances ".

There are in the judgment of Akbar S.P.J., Koch and Maartensz JJ., and of my brother Wijeyewardene J. copious citations from local and South African cases and commentaries, to establish what are more or less axioms, that do not seem to stand in need of so much commendation, for instance, that " there are no particular words necessary for the creation of a *fidei commissum* ". " It matters not what words are used provided they express the legally valid intention of the testator who desires to create a *fidei commissum* ". " In a *fidei commissum* the only thing that is taken into account is the intention of the testator, and it is not only his verbally expressed intention that is looked to, but also that intention which is tacit and may be deduced from the words used as a necessary or manifest consequence ". Equally copious citations were possible for the proposition that *fidei commissa* are " odious " and that " the law is unfriendly to *fidei commissa* and will not lightly presume in their favour ".

[1] *(1939) 41 N. L. R. 225.*

Bearing these principles in mind, I have read and re-read this will and the only conclusion that I am able to reach is that the testator intended to create what might have been a good English Trust, but for the fact that it violated the rule against perpetuities. He appears to have desired that his properties should never go out of the hands of his descendants.

Akbar S.P.J. observes in the course of his judgment that at the date of his will, the English Law of Trusts was part of the law of Ceylon. That is so. But I think it must be conceded that *fidei commissa* as understood by the Roman-Dutch law were, at that date, much more familiar here than the English Trust. It was a moot question before our Entail and Settlement Ordinance was passed in 1876, whether a testator could tie up property indefinitely by way of *fidei commissum*. As pointed out by Professor Lee on page 384 of the 3rd edition of his *Introduction to Roman-Dutch Law*, the tendency was to discourage such attempts. He quotes *Voet* "now since there has been frequent mention of a perpetual *fidei commissum* in the preceding section ; it should be known that it has been generally held that where there is any doubt, such perpetuity only extends to the fourth generation". That, perhaps, was the difficulty that confronted this testator and his notary, and made them eschew a fideicommissary disposition, and led them to the less familiar English Trust, unmindful of the rule against perpetuities.

In my opinion, there is much significance in the fact that while we find in this will such a definite expression as "they shall be held in trust", there are not, as pointed out by Akbar S.P.J., "beyond the prohibition of alienation which sometimes occurs in *fidei commissa*", any words "in the will to show that the testator intended to create a *fidei commissum*". But the fact that there is a prohibition against alienation is not inconsistent with an intention to create a trust, for such a prohibition is not unknown in the case of trusts. It might have occurred to the testator, in this case, that such a prohibition was necessary or desirable to prevent the devisees from dealing with the properties on the pretext that such dealing had become necessary for the purpose of their subsistence, or for the maintenance of their families.

According to my reading of this will, I do not think that the correct interpretation is that the ultimate beneficiaries the testator had in view are the grandchildren of his children, and of his heirs and heiresses. He appears to have taken a very long view, and to have contemplated his remotest descendants, for while he devises his property to his wife, his children and his father, and prohibits them from alienating, encumbering, &c., and directs them to hold the properties devised, and such other properties as they may acquire out of the surplus income, for the use and benefit of their grandchildren, he goes on to impose similar injunctions on those grandchildren in turn for the use and benefit of their children and grandchildren, and so on. He says, "they (*i.e.*, the properties) shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses", not absolutely, but "only that they may receive the rents, income and produce". It seems quite clear that the antecedent of 'they' is "the grandchildren of the children and the grandchildren of the heires and heiresses", and not the original devisees as appears to have been assumed in the three earlier cases. This view is

supported by the fact that these grandchildren are, themselves, prohibited from "encumbering them (*i.e.*, the properties) in any way, or the same may be liable to be seized, attached or taken for any of their debts and liabilities, and out of such income, produce, and rents, after defraying expenses for their subsistence and maintenance of their families, the rest shall be placed or deposited in a safe place by each of the party (that is, according to my reading, the original devisees and the grandchildren of the children and the grandchildren of the heirs and heiresses) and out of such surplus, lands should be purchased by them (*i.e.*, by each of these parties) for the benefit and use of their children and grandchildren as hereinbefore stated". The meaning I attach to the last three words is that these remote descendants should, themselves, take "only that they may receive the rents, income", &c., and so all the generations of descendants are enjoined in the same way, in an unending cycle. That is how I understand the will, and according to this interpretation, the testator had in contemplation the benefit of such remote descendants that it, probably, led the notary to take the view that the testator's purpose could be achieved only by means of a trust. But unfortunately, this rule against perpetuities defeated that intention.

If we examine the language of the will to see if the intention of the testator to tie up his property can be given effect to on the footing of a *fidei commissum,* we encounter many difficulties that appear to me, insurmountable. There is an unequivocal prohibition against alienation but that is all there is to suggest a *fidei commissum.* There is no clear indication of the beneficiaries as is shown by the very fact that Akbar, Koch, and Maartensz JJ. and at one stage Moseley J. took the view that the beneficiaries were the grandchildren of the devisees, while Wijeyewardene and Moseley JJ. in a later case held that the beneficiaries were first, the children of the devisees, and after them, the grandchildren. For the reasons I have given, my own view is that the beneficiaries contemplated are all the generations of the testator's descendants. Again, there is no indication by express terms or by necessary or clear implication of the time at which the property is to vest in the different parties referred to in the will. In regard to this matter too, the Judges have taken different views. Akbar S.P.J. took the view "if the will created one *fidei commissum,* there is an indication when the title is to vest in the fideicommissaries that is when they can all be ascertained. The date will be the death of the last of the children of the devisee, and until then, I take it, the *jus accrescendi* will apply among the children of the devisee". This view means that a great deal has to be read into the will and I can see no warrant, at all, for such a course. But Akbar S.P.J. goes on to say :—

> "As I have already stated the *fidei commissa* were all separate owing to the testator's instructions to divide his estate among the heirs . . . . I have not, therefore, tried to interpret the will as creating one *fidei commissum.* As regards issues 4 and 5 all the grandchildren of Ahmsa Natchia . . . . are the fideicommissaries and will be ultimately entitled to the property. It appears from the evidence that Ahmsa Natchia died about 16 or 17 years ago and that she had two daughters and a son. The second defendant is one of the daughters

and had no more than a bare life interest in the property, with the liberty of taking only so much of the income as may be necessary for the maintenance of her family, and by mortgaging the property . . . . she violated the condition which would, in my opinion have the effect of vesting the title in the fideicommissaries, or so much of them as can be ascertained, at the time of the violation of the condition ".

In other words the interpretation is that if the will created one *fidei commissum* there was one time of vesting. If it created separate *fidei commissa,* there was another time of vesting, or rather several points of the time of vesting, for he goes on to add : " The shares of these grandchildren of Ahmsa Natchia who can be ascertained, will be reduced if other grandchildren come into being after such date ". If I may say so, with the greatest deference, this seems unsatisfactory. It makes the confusion in the will worse confounded.

On this point Maartensz J. observes as follows :—" The will does not expressly state when the properties are to devolve in the fideicommissaries. In the absence of such words it must be deemed to pass on the death of the fiduciary heirs ". I see no justification for so presuming, but even if one so presumes, here again the question arises, ' was there to be or was there not to be, operation of the principle of accrual among the fiduciary heirs ? ' Wijeyewardene J. seems to share the view of Maartensz J. although he expresses himself in a somewhat different manner. He says " the event on the happening of which the property devolves on each succeeding set of fideicommissary heirs is the death of the immediate previous fiduciary heirs who last entered into possession of the property ". It is not clear whether the death of each of the fiduciary heirs of the group or the death of the last of them, is to be the determining factor. Moreover, this view does not take notice of the fact that, according to the language used by the testator it is possible to infer that he intended that members of different generations who were in existence simultaneously were entitled to subsist on, and to be maintained out of the income.

In the case of *Sabapathy v. Yusoof* (*supra*) Akbar S.P.J. and Koch J. appear to have relied very much on the South African case of *Estate Kemp et. alv. MacDonald's Trustee* [1]. I have examined this case very carefully, but I fail to see that any assistance can be derived from it, on the question whether the will in this case created a *fidei commissum.* What was laid down in that case, as I understand it, is that in a case arising in South Africa at a time when the English law of Trusts was no part of South African jurisprudence, when the testator by his will expressed himself in phraseology appropriate to the settling of a trust as understood in the English law, South African Courts would give effect to the intention of the testator on the footing of a *fidei commissum,* if the language of the instrument, either expressly or by implication, was sufficient for constituting a *fidei commissum.* It must be borne in mind that, in that case, there was clear indication of the beneficiaries, and of the time at which an interest was to vest in them, and the question that arose for decision was whether in regard to one of the beneficiaries, there had been such a vesting of the interest as to make it transmissible to her heirs. This decision does not

[1] *(1915) A. D. 491 S. A. L. R.*

bear on the question we are now considering, namely, whether this will created a *fidei commissum*. Counsel for the appellant in that case, *Sabapathy v. Yusoof* (*supra*) appears to have relied on this decision in order to submit that the different beneficiaries under this will would at best, have a personal claim against parties violating the directions of the testator.

For these reasons, to mention only some, I find considerable difficulty in construing a *fidei commissum*, and I should have asked My Lord the Chief Justice to reserve the question for consideration by a Full Bench, if it had been necessary to do so.

But I do not think I shall be justified in taking that course for, in my opinion, the appeal before us is entitled to succeed on the other submission made to us, namely, that Saheed, the plaintiff's predecessor in title, had acquired a prescriptive title to this property. The evidence of Mr. J. A. Perera, Proctor, shows that deeds P 1 and P 2 conveyed the property absolutely to the parties concerned. This, he says, was done on the opinion obtained from Counsel on the question whether there was a *fidei commissum*. It is not material, on this point, whether that opinion was right or wrong. What matters is that in view of that opinion parties, by arrangement, possessed separate lands as their exclusive property and adversely, to one another. The evidence to establish that fact is overwhelming. Saheed, the plaintiff's predecessor in title, had to admit in the face of documents that confronted him, that just as his mother conveyed this property to him, so she had previously conveyed other properties to her two other children in 1910 and 1912 (P 13 and P 32). He had also to admit that the property conveyed by P 31 to his sister Magida, is now the property in the possession of a Chetty, and that "Ayesha Umma and her husband Yusoof (*i.e.*, the parents of the first defendant) exclusively possessed Myrtle Lodge". "Now Myrtle Lodge is in the possession of the first defendant and his brother and sister". He goes on to admit in examination-in-chief that these gifts by his mother to him and to his sisters were matters to which they were all parties. "I did not object. Neither did Ayesha nor Magida object . . . . All three of us got equal shares of the property on the occasion of our marriages . . . . My mother gifted all the properties to the three of us. She has only three children. When my mother died she left nothing".

There is also the fact that four years after his mother's death, Saheed had his name inserted in the Municipal assessment register, as the owner of the property in this case. (See P 15 to P 27.)

Moreover, in the year 1925, in an indenture entered into between himself and a neighbouring owner, he describes himself as "seized and possessed of or otherwise well and sufficiently entitled to" the premises in question in this case. In examination-in-chief, this man Saheed said that after his mother's death, and at the time his name was registered in the Municipal register, that is to say, somewhere in 1918-1919, the house was occupied by a tenant—"I believe a Municipal Inspector. I gave the house on rent to that gentleman". All this, in examination-in-chief when he was called by the plaintiff as his witness. It is obvious that his sympathies were with the first defendant, his nephew. It is easy to

visualize the witness holding himself in leash during the examination-in-chief restricted as he was to answering questions put to him. But, once cross-examination begins there is a transparent inclination on his part to whittle down, as much as possible, his evidence-in-chief. Under cross-examination, he admits that from 1918-1928 Ayesha Umma lived in this house in Colpetty. He does not say when it was that the Municipal Inspector who was his tenant in 1918-1919 made way for Ayesha Umma. The statement that Ayesha Umma lived in the house from 1918-1928 is opposed to the assertion in P 36, in the year 1925, that he (Saheed) was in occupation of this house for he describes himself as Saheed of No. 130, Colpetty road, Colombo". P 36 contradicts his evidence in cross-examination "I got into possession only in 1928".

His courage appears to increase as the cross-examination progresses. When the question is put to him: "When you got into possession in 1928, was any claim made by any of your sisters for any share in this house?" His answer is "Ayesha lived in the house and gave me a share of the income. Ayesha said she has a share and gave me a share. She gave Magida also a share. She was Paid Rs. 15, I was paid Rs. 15 every month". Neither Ayesha nor her husband nor any representative of Magida is called on this point. The unreal nature of this evidence is demonstrated by the fact that the first defendant himself says in the course of his evidence "my mother was in possession of these premises. Saheed collected the rent. Each of us was paid Rs. 25".

If further proof is required of the fact that each of the properties was possessed exclusively and adversely by Ayesha Umma's children on the footing of Ahmsa Natchia's conveyance to them, that proof emerges eloquently from the fact that the first defendant was in two minds whether he should claim a one-third or a one-twenty-eighth.

An attempt appears to have been made to support the evidence that Ayesha Umma was in occupation from 1918-1928, by means of document 1 D 2 which is the death certificate of Ayesha Umma. It is dated 1914. Saheed was the informant of the Registrar and he is described as "Oduma Lebbe Marikar Mohamadu Saheed, 111, New Moor street". From this document the inference is sought to be drawn that Ayesha Umma must have been in occupation of this Colpetty house from 1918 to 1928. This is an obvious *non sequitur*. It may well be that Saheed's residence is given in 1 D 2 as 111, New Moor street, either because at that time Saheed actually resided at 111, New Moor street, and had a tenant in his Colpetty house—in 1918, a Municipal Inspector was his tenant—or that Saheed's residence was assumed by the Registrar to be 111, New Moor street, because he came to give information of the death of his mother at that address.

For the first defendant much reliance was also placed on the fact that in P 43 of the year 1920 Ayesha Umma is described as of Colpetty, Colombo. To say the least, this is inconclusive. There were other properties of this estate situate in Colpetty, and there is nothing in the document to point to the fact that at that time, Ayesha Umma was in residence in this particular Colpetty property. As against P 43, there is document P 39 of the year 1926 in which Ayesha Umma is described as of "Layard's

Broadway in Colombo, a fact that contradicts Saheed's and the first defendant's evidence that Ayesha Umma lived in this house in Colpetty continuously from 1918-1928.

In regard to the deed of renunciation, on which the first defendant relied to prove that the properties gifted by Ayesha Natchia to her three children were not the exclusive property of the children to whom they were gifted, the recitals in the deed, make it quite clear that this deed must have been the result of the insistence by a cautious notary that there should be such a deed for the purpose of doubly assuring unto Ayesha Umma's husband Yusoof the title which Magida Umma had conveyed to him in regard to 34 and 35, Layard's Broadway. One of the recitals is "whereas by virtue of deed No. 84 dated March 22, 1912, ... executed by Ahmsa Natchia in favour of Magida Umma, the said . . . . Magida Umma has held and possessed and enjoyed the said properties as absolute owner thereof . . . . and whereas *for the confirming of the title* of the said . . . . Yusoof . . . . *it is deemed expedient* that the grantors should execute these presents," and in the conveyance clause the statement is "the grantors do and each of them doth confirm and release unto and renounce in favour of the and . . . . Yusoof . . . . all their right, title and interest *if any.*" It is this document that the learned District Judge thought militated against the plaintiff's case that Saheed had acquired a prescriptive title. In my opinion for the reason I have just given when I quoted the recitals and the clause of conveyance, this document has no such effect.

The evidence of Messrs. Jayasuriya and Goonesekere, Saheed's tenants, supports the fact that Saheed was the sole owner of the property and took all the rent, and that it was only after the sale in execution, to the plaintiff that his sister Ayesha and his nephew, the first defendant, collaborated in an attempt to detract as much as possible from the plaintiff's title. It is abundantly clear, on all the evidence in the case that from 1913 Saheed was in adverse and exclusive possession of this property and had acquired a prescriptive title to it.

Counsel for the respondent sought to repel this claim to a prescriptive title in Saheed, by means of the opinion given by the Privy Council in the case of *Corea v. Iseris Appuhamy* [1]. But that case does not help him at all. In that case an admitted co-owner, that is to say, a co-heir with his brothers and sisters, upon an intestacy, who had entered into possession of a land of the estate, and had been in exclusive possession of it for many years, sought to defeat his brothers and sisters. Their Lordships of the Privy Council delivered their opinion that his claim failed because his possession was referable to his co-ownership, and that no possession is adverse that can be referred to a lawful title. There was no overt act on his part from which to date an adverse possession. In a word, there was no ouster nor was there the equivalent of an ouster.

In the case before us, the position is altogether different. In 1906, the testator's children divided the properties among themselves, and thereafter they possessed the properties that were given to them, in lieu of their undivided shares in all the properties. One of them was Ahmsa

[1] *15 N. L. R. 65.*

Natchia, and she in 1910, 1912 and 1913 conveyed to her three children separate properties, and the evidence is overwhelming, as I have pointed out, that thereafter each child possessed his or her property adversely to the others. There was, therefore, in consequence of a common agreement among them, an ouster on the part of each child, of the other children in respect of the properties that each received so far back as 1910, 1912 and 1913. In regard to the property in this case Saheed's possession from 1913 has been exclusive and adverse, and the attempt now made to show that it was a possession for himself and his sisters is thoroughly dishonest.

For these reasons, I reach the conclusion that the plaintiff's predecessor in title, that is Saheed, had a prescriptive title to this property against his sisters, and that that title has passed on P 5 to the plaintiff, and prevails against the title set up by the first defendant, on deed 1 D 1 from his mother Ayesha, and by the second defendant as a co-heir with Saheed.

I set aside the judgment of the learned District Judge and enter judgment for the plaintiff as prayed for with costs here and below. Let decree be entered accordingly.

HOWARD C.J.—I agree.

Appeal allowed.