1951 *Present :* **Basnayake J. and Swan J.**

FRANCISCO, Appellant, *and* SWADESHI INDUSTRIAL WORKS, LTD., Respondent

S. C. 305—D. C. Colombo, 3,759/L

Fideicommissum—Deed of gift—Prohibition against sale and mortgage only—Effect of partial prohibition—effect of failure to designate beneficiary in case of violation of prohibition—Gift to A and his descendants and his heirs, executors, administrators and assigns and authorised persons—" Authorised persons "—Uncertainty of beneficiaries—Translation of a document into English—Not a function of the Court.

A deed of gift contained the following clause:—

" The said donee (A) and his descendants and his heirs, executors, administrators and assigns and authorised persons shall at all times subject to the rules and regulations of the Government be at liberty to transact the same among each of their co-heirs but shall not in any manner sell or mortgage any of the said lands with the intention of alinating the same and such acts are hereby cancelled."

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

(*a*) that the donee was prohibited only from selling or mortgaging the property and was, therefore, in law, free to donate the property or dispose of it by last will. In the circumstances there could be no *fidei-commissum*.

(*b*) that the deed did not contain a stipulation restoring the property to a third person in case the property was sold or pledged contrary to the prohibition therein.

(*c*) that the expression " authorised person " was vague and, therefore, there was no clear designation of the beneficiaries.

Held further, that whether a document in a language other than English has been correctly rendered into English is a question of fact. It is wrong for a judge, however well versed he may be in the language in which the document is written, to undertake its translation and adopt a version which neither party has placed before him.

APPEAL from a judgment of the District Court, Colombo.

E. S. Amerasinghe, with *J. W. Subasinghe*, for the plaintiff appellant.

N. E. Weerasooria, K.C., with *W. D. Gunasekera*, for the defendant respondent.

Cur. adv. vult.

February 27, 1951. BASNAYAKE J.—

The only question that arises for decision on this appeal is whether deed No. 867 dated May 16, 1856, attested by W. B. Fernando, Notary Public, creates a *fidei commissum*. By that deed one Jackovis Perera Appuhamy gave a gift of two portions of land called Millagahawatte and a field called Halpankotuwa to his brother Juan Adonis Perera in the following terms:—

" I, Wattege *alias* Kanugalawattege Jackovis Perera Appuhamy of Ekala in the Ragam Pattu of Alut Kuru Korale in consideration of the love and affection which I have and bear unto my brother Wattege *alias* Kanugalawattege Juan Agonis Perera Appuhamy of Kandana in the said Pattu with my free will and consent do hereby give grant and assign by way of gift unto the said Juan Agonis Perera Appuhamy, the following lands . . . . (here follows a description of the lands)

"And I the said Jackovis Perera Appuhamy shall be at liberty to possess the said lands from this date during my lifetime, but shall not sell or mortgage the same. And I do hereby declare that I or my heirs executors administrators and assigns shall not have any right or title hereafter against this gift.

"That after the possessions of the said premises by me the said Jackovis Perera Appuhamy and after my death the said donee Juan Agonis Perera Appuhamy and his descendants and his heirs executors administrators and assigns and authorised persons shall at all times subject to the rules and regulations of the Government be at liberty to transact the same among each of their co-heirs but shall not in any manner sell or mortgage any of the said lands with the intention of alienating the same and such acts are hereby cancelled.

"That all the right title and interest which I the said Jackovis Perera Appuhamy have held in and to the said premises shall after my death devolve on the said Juwan Agonis Perera Appuhamy under and by virtue of this deed of gift.".

The deed is in Sinhalese, and I have quoted from the translation produced by the appellant. The defendant also produced a translation, but there is no material difference between the two.

Learned counsel invited us very earnestly to read the original Sinhalese deed which the learned trial judge appears to have examined. He submitted that the word "pradanakota" therein had not been properly rendered in either translation. We refused to accede to learned counsel's invitation as we were of opinion that it was not our proper function to attempt to translate the Sinhalese document. English is the language of our Courts [1]. Whether a document in a language other than English has been correctly rendered into English is a question of fact. Where the parties are not agreed as to the true rendering into English of a document which is in a language other than English they should produce evidence through the testimony of experts versed in the language in which the document is written so that the Court may decide the dispute on the evidence before it. It is wrong for the judge however well versed he may be in the language in which the document is written to undertake its translation and adopt a version which neither party has placed before him [1]. The danger of such a course has been pointed out more than once by the Privy Council. It will be sufficient here to refer to two of its most recent decisions. In the case of *Sellamani Ammal v. Thillai Ammal* [2] the High Court formed the opinion that the official translation was incorrect without the aid of expert testimony and having corrected it based its findings of fact thereon. Lord Simonds delivering the judgment of the Privy Council observed in that case: "Their Lordships would once more express the view that it is not legitimate for the Court to depart from the official translation except upon expert evidence which the parties should have an opportunity of testing".

In the later case of *Rai Harendra Lal Roy Bahadur Estates, Ltd. v. Hem Chandra Naskar and another* [3], Sir John Beaumont stated: "Their

[1] *Cornelis v. Uluwitike, (1895) 1 N. L. R. 248.*
[2] *(1946) A. I. R. Privy Council 185 at 187.*
[3] *(1949) A. I. R. Privy Council 179.*

Lordships have laid it down in several cases that it is the duty of Courts in India to act upon the official translation of documents unless there is expert evidence which justifies the rejection of such translation. It may no doubt often happen that a Judge in India knows the vernacular in which a document is written, and he may be as well qualified as the official translator, or even better qualified, to render a correct translation of the document into English. The trouble, however, is that the Judge is not a witness, and the parties are not in a position to test the translation which he makes; whilst if the matter is taken in appeal to the Privy Council, the Board have no material upon which they can estimate the linguistic qualifications of the Judge ".

I shall now proceed to consider the submission of learned counsel that the deed in question constitutes a *fidei commissum*. Etymologically the expression *fidei commissum* signifies something entrusted to one's good faith, because originally the heir or executor was free either to comply with the testator's request or not as he thought fit. Afterwards the heirs or executors were compelled by law to execute such fiduciary bequests. According to Van Leeuwen [1] a *fidei commissum*, or inheritance over the hand (*ervenis over de hand*), otherwise, entailed or fastened inheritance, occurs where in the reliction of inheritance the heir is enjoined after a certain time, or after his death, to hand over the inheritance, either in whole or in part, to another. *Fidei commissa* can be imposed not only by will but also by an act *inter vivos* [2]. In the title on Donations, Voet [3] observes: " It has been said in the title *ad Senatusconsultum Trebellianum* (Voet 36.1.9) that donees can be burdened by the donor with a *fidei commissum*, and that the *fidei commissary* has an equitable action *in personam*, not *in rem*, and that in this respect *fidei commissa* attached to a donation differ from those bequeathed by last will ". In the earlier title [2] Voet says: " There is no doubt that *fidei commissa* can be imposed not only by will but also by an act *inter vivos*, if only a stipulation be attached to the donation providing for the restitution of the gift to a third party, so much so that the party to whom restitution has to be made has the *utilis actio personalis* (equitable action *in personam*) founded on equity, for the recovery of the object so held in trust. But no real action would lie; and in this respect *fidei commissa* constituted by act *inter vivos* differ in Roman Law from those constituted by last will. With us also it has become the accepted practice that *fidei commissa* can unquestionably be made by act *inter vivos*, especially in ante-nuptial contracts, and in such wise as to constitute a real charge on the property, provided the *fidei commissa* be duly registered ".

No particular words are necessary to create a *fidei commissum*. The language used must clearly express the intention of the testator or donor that the gift is not absolute to the donees and there must be an unambiguous indication of the persons to be benefited and when they are to benefit [4].

Where there is a doubt as to whether a *fidei commissum* has been constituted the construction should be preferred which will give the

[1] *Van Leeuwen's Roman Dutch Law, Kotze's translation, Book III, Chap. VIII, Section I.*
[2] *Voet, Book XXXVI, Title 1, Section 9, MacGregor's translation.*
[3] *Voet, Book XXXIX, Title 5, Section 43, Krause's translation.*
[4] *(1926) 27 N. L. R. 366, Salonchi v. Jayatu. Van Leeuwen's Censura Forensis, Book III, Chap. VII, Section 7.*

legatee, heir or donee the property unburdened [1]. Doubt as to whether a valid *fidei commissum* has been created includes such a doubt as to the identity of the beneficiaries as will prevent their ascertainment by a court of law [2].

Now when we turn to the deed we find that the donee and those taking after him are prohibited only from selling or mortgaging the property. A prohibition against alienation is under our law strictly construed and is not extended to modes of alienation other than those expressly mentioned in the instrument [3]. Voet says: " But in those cases where a simple prohibition against alienation is valid, according to what we have just stated, and has to be carried out, the prohibition is strictly interpreted, and not extended to modes of alienation other than those expressly mentioned by the testator. And so, although it be true that under the general prohibition of alienation even alienation by last will is forbidden, yet, if any one by last will should forbid the heir to sell or encumber the property left him, *no fidei commissum is constituted by such a disposition*, nor is the heir considered to be restrained from disposing of such property by last will, more especially if you bear in mind that disposition by last will are more favoured than those which come about through an act *inter vivos*. So that a prohibition contained in a will against any alienation by act *inter vivos* must not be extended to testamentary dispositions ".

On this same topic Sande [4] says: " And, therefore, we should construe neither contracts, nor last wills, nor enactments, nor statutes, in such a manner as, when a sale is prohibited, to say that every other form of alienation is also prohibited; unless it is perfectly clear that a sale is mentioned with regard not so much to the special mode of alienation, but rather to the transfer of dominium, an object which we have in view just as much in other forms of alienation as in a sale, for then the mention of a sale is considered to be made only for the sake of supplying an example . . . . Moreover, when a sale, a donation, and a pledge are prohibited, alienation by last will is considered to be permitted ".

The donee Adonis was therefore in law free to donate the property or dispose of it by last will. In those circumstances there can be no *fidei commissum*.

The deed is subject to a further infirmity. It does not contain a stipulation restoring the property to a third person in case the property is sold or pledged contrary to the prohibition therein [5]. The deed speaks of descendants, heirs, executors, administrators, assigns and authorised persons. What was to happen if Adonis himself violated the prohibition? To whom was the property to go? Was it to his descendants or heirs or his assigns or authorised persons? The instrument provides no answer to these questions.

There is a further difficulty in the way of the appellant. The instrument mentions "authorised persons " among the class of persons to be benefited but contains no clue as to its meaning. It is not an expression

[1] *Cruse v. Executors of Pretorius, (1879) 9 Buchanan 124.*
[2] *Sitti Kadija et al v. de Saram et al. (1946) 47 N. L. R. 171.*
[3] *Voet, Book XXXVI, Title 1, Section 27.*
[4] *Sande on Restraints—Webber's translation, pp. 184-185 and 187. Burge—Colonial and Foreign Laws, Vol. II, p. 114.*
[5] *Burge—Colonial and Foreign Laws, Vol. II, p. 113.*

the *meaning* of which is established, nor am I able to ascertain what class of persons the donor had in mind when he used it. He must therefore fail for the further reason that the donor has not designated clearly the persons whom he seeks to benefit, for, 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 or donor declares the prohibition [1].

If the donor meant to constitute a *fidei commissum* I am afraid the notary has effectively thwarted his intention. The instrument being a donation it must be construed according to the written word [2]. The intentions of donors and testators have been defeated by notaries not only today but also in times past, for Van Leeuwen says [3]: " Notaries frequently through long established custom make use of improper expressions and do not always use the right terms and words, and their want of skill furnishes a harvest to advocates, especially in respect of last wills, in which they insert very frequently, on account of their ignorance of Law, clauses taken from old fashioned forms of theirs, which they themselves do not understand, and which are clearly superfluous, and sometimes inconsistent with the intention of the testator ". Van Leeuwen even goes to the extent of quoting the disparaging observations of Carpovius, who says: " Notaries for the most part are like singers who by practice learn to sing well, but do not know the meaning of their song, like parrots which stand in the palaces of their owners and do not know what they are saying, and they wish to heal all diseases with one medicine. . . . . the brothers of ignorance, amongst whom for every one learned and skilful man to be found there are twenty-five unlearned ones, who have no knowledge of law ".

Clearly, the deed does not constitute a *fidei commissum*.

The appeal is dismissed with costs.

SWAN J.—I agree.

Appeal dismissed.