1965 *Present :—* **H. N. G. Fernando, S.P.J., and T. S. Fernando, J.**

RAJAPAKSE ESTATES COMPANY LTD., Appellant, *and* N. DULSIN and 9 others, Respondents

S. C. 119/63 (Inty.) —D. C. Negombo, 325/P

Donation—Nude prohibition against alienation—Inoperative to create a fideicommissum—Effect of clause vesting property in the donees " and their heirs executors administrators and assigns."

Where a deed of gift contains a clause prohibiting the alienation of the gifted property by the donees, the prohibition against alienation is nude and inoperative to create a fideicommissum, unless the persons who are to take in the event of the breach of the prohibition are clearly designated.

A clause which vests property in the donees " and their heirs executors administrators and assigns " is merely a mode of vesting the full dominium in the donees themselves.

APPEAL from an order of the District Court, Negombo.

J. W. Subasinghe, for the 6th defendant-appellant.

T. B. Dissanayake, for the plaintiffs-respondents.

Cur. adv. vult.

September 2, 1965. H. N. G. FERNANDO, S.P.J.—

By a deed of gift No. 25795 of 1880 (P3), one Endoris Silva conveyed a one-third share of the land which is the subject of this action to the children, then born and unborn, of his son Marthelis, subject to a life-interest reserved for Marthelis and his wife. There was a clause in the deed prohibiting the alienation of the property by the donees, followed by the following provision :—

> "Therefore all the right title claim and interest of me the said donor and of my heirs executors administrators and assigns in and to the said four portions of land hereby gifted shall vest in the above-named three children of my said son and in the children that may be born to him in the future and their heirs executors administrators and assigns and they may after the death of the said Marthelis Silva and Sethan Silva Hamine possess the same, for which I have hereby granted and set over the same as a gift."

I cannot but express dismay at the fact that the District Judge, without any reference to authority, formed the opinion that (P3) created a fideicommissum. The prohibition against alienation, which was the only feature of the deed which could lead to that opinion, was nude, and inoperative to create a fideicommissum, unless the persons who were to take in the event of a breach of the prohibition were clearly designated. It has repeatedly been held in decisions of this Court, the most recent of which is that of Weerasooriya, J. in *Seneviratne v. Mendis*[1] that a clause which vests property in the donees "and their heirs executors administrators and assigns" is merely a mode of vesting the full dominium in the donees themselves. Even in cases where such a clause has wrongly been thought to be a sufficient designation of the persons to benefit in the event of a breach of a prohibition against alienation, there have usually been other circumstances which led to such mistaken findings. There is no such excuse for the finding in this instance.

The decree appealed from is set aside with costs in both Courts. The District Judge will enter a fresh decree on the basis that the deed (P3) did not create a fideicommissum.

T. S. FERNANDO, J.—I agree.

Decree set aside.

[1] *(1963) 65 N. L. R. 171.*