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Present : Branch C.J., Dalton J., and Maartensz A.J.

SALONCHI *et al. v.* JAYATU.

155—D. C. Negombo, 16,544.

Fidei commissum—*Deed of gift—Descending heirs and authorized persons—Designation of persons to be benefited—Ordinance No. 11 of 1876, s. 3.*

Where a deed of gift was expressed in the following terms :— " This land is hereby granted as a gift to, and is put in possession of, Setu, a daughter of mine . . . . Therefore the aforesaid gifted land is hereby put in possession and proprietorship of, and is given over with power only to be possessed undisturbed, subject to the regulations of Government, without selling, mortgaging, or otherwise alienating, or leasing the same for a period of exceeding five years by the said Setu and all her descending heirs and authorized persons."

Held, that the deed did not create a valid *fidei commissum* as there was no clear designation of the persons in whose favour the prohibition against alienation was made.

CASE reserved for argument before a Bench of three Judges.

The land in dispute was gifted by the owner Simia to his daughter Setu by deed No. 2,787 dated August 7, 1882, the material portions of which are given in the headnote. Setu, by deed

[1] *(1875) Ram. (1872–1876) 130.* [2] *(1905) Modder's Kandyan Law, p. 603.*

No. 19.658 dated December 23, 1911, leased the land to the first defendant and one Udias Appu for a period of twenty-five years. In 1919 on a writ issued against Setu the land was sold and purchased by the first defendant and Udias Appu.

The plaintiffs, who are the children and grandchildren of Setu, alleged that the deed of gift No. 2,787 created a *fidei commissum* and that the first defendant's right to possession under the lease and by virtue of the sale in execution terminated on the death of Setu. The learned District Judge held that the deed created a valid *fidei commissum*.

The defendant appealed.

Garvin, for defendant, appellant.—The first portion of the deed by its words created an absolute gift. If it was only Setu and her descending heirs, then they are named, described, or designated as required by section 3 of Ordinance No. 11 of 1876, and the deed will be a vaild *fidei commissum*. To Setu, her descending heirs and authorized persons enlarge the class, and there is no definite designation of the persons to benefit. Thus in *Tina v. Sadiris* [1] A and the heirs and administrators, it was held that a grant to a man and his heirs was a grant to the man; *Hormusjee v. Cassim* [2] "assigns." taken to be anybody in the world. In the case of *Wijetunga v. Wijetunga* [3] where after A's death, A's heirs, executors, and administrators were to benefit, the deed was held to create valid *fidei commissum*. This case was considered in *Silva et al. v. Silva et al.* [4] and the Court was unwilling to construe in favour of a *fidei commissum*.

The later judgments have not considered the effect of section 3 of Ordinance No. 11 of 1876.[5] If there is doubt the construction is in favour of free inheritance. Counsel also cited *Burge's Colonial Law. Vol. II., p. 113; Van der Linden's Trans, p. 136.*

De Zoysa, for plaintiffs, respondent.—*Pinnwardene v. Fernando* [6] is the case nearest this. Children, grandchildren, their heirs and representatives descending from them were the words, and representatives were held to mean heirs repeated again. The language need not be considered strictly so long as there is sufficient language in the document to show the intention of the donor. The trend of the recent decisions is to give effect to the intention of the donor, if that can be gathered. Thus in *Dassanayake v. Tillekeratne* [7] bequest to children, their heirs and assigns was held to be a *fidei commissum* in favour of the

[1] *(1885) 7 S. C. C. 135.*
[2] *(1898) 2 N. L. R. 190.*
[3] *(1912) 15 N. L. R. 493.*
[4] *(1914) 18 N. L. R. 174.*
[5] *Van Leeuwen R. D. L. 376.*
[6] *(1919) 21 N. L. R. 65.*
[7] *(1917) 20 N. L. R. 89.*

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surviving children of testator. It is enough if the first class of donees is sufficiently designated even if the second is not ascertainable, *vide The Government Agent, Central Province v. Silva.*[1]

Counsel cited *Coudert v. Don-Elias,*[2] *Weerasekere v. Carlina.*[3]

Garvin, in reply.—In *Government Agent, Central Province v. Silva* (*supra*) the *fidei commissum* is an alternate *fidei commissum*. Intention is immaterial if the language in which it is expressed is not clear. The deed must be looked at from the point of view of a possible purchaser who may pay a large price.

Counsel also cited *MacGregor's Voet., p. 11.*

March 10, 1926. BRANCH C.J.—

This case was reserved under section 41 of the Courts Ordinance, 1889, for argument before three Judges. The learned District Judge held that the deed P1 hereinafter referred to, created a valid *fidei commissum* in favour of the heirs of Setu, and the appeal is from that decision. Simia, the grantor, his wife Pulingi, their daughter Setu, and her husband Kekula are all dead. The plaintiffs-respondents are the children and grandchildren of Setu. If their claim that P1 creates a valid *fidei commissum* fails then it is agreed that they are only entitled to an undivided moiety of the land in dispute, and to possession of that moiety on the expiration of the lease, being document No. 19,658 dated December 23, 1911, D1, given by Setu and her husband. The defendant-appellant would in the circumstances be entitled to the other undivided moiety and to possession of the whole land under the lease referred to, subject always to the rights of Jayasinghe Aratchige Udias Appuhamy, who is not a party to this appeal, but is a person named in the said lease and in Fiscal's Transfer No. 7,782 of March 24, 1919.

The deed P1 was executed on August 7, 1882. It is in Sinhalese, and the material parts are as follows :—

> " . . . . this land . . . . is hereby granted as a gift to, and is put in possession of, Horatalpedige Setu of Assanawatta, a daughter of mine, owing to the affection, love, and regard that I bear towards her, and owing to diverse other duties which draw my heart unto her. Then I, Singhalapedige Kekula, the husband of the said Setu, accept this gift, with thanks, by signing this. Therefore the aforesaid gifted land is hereby put in possession and proprietorship of, and is given over with power only to be possessed undisturbed, subject to the regulations of Government, without selling, mortgaging, or otherwise alienating or leasing the same for a period of

[1] *(1922) 24 N. L. R. 62.* [2] *(1914) 17 N. L. R. 129.*
[3] *(1912) 16 N. L. R. 1.*

exceeding five years by the said Setu and all her descending heirs and authorized persons. Further I, the grantor, bind myself on my own behalf and on behalf of my heirs and others to the effect that it shall not be possible either for me or for anybody whomsoever, such as heirs descending from me or authorized persons to assert any title or raise any dispute, beyond possessing (the property) during the lives of myself, the grantor, and of (my) wife . . . . "

In the lower Court the word " balakara " now translated as " authorized persons " was taken to mean representatives. " Authorized persons " is now accepted as the correct translation, and the argument on appeal has been confined to the question whether the words " and authorized persons " after the words " alienating or leasing the same for a period of exceeding five years by the said Setu and all her descending heirs " bring the case within the meaning of the latter part of section 3 of Ordinance No. 11 of 1876. In other words, whether the prohibition against alienation is null and void on the ground that it does not name, describe, or designate the person or persons in whose favour or for whose benefit the prohibition is provided. Section 3 is as follows :—

" Any such prohibition, restriction, or condition against alienation as aforesaid shall be null and void so far as it prohibits or restricts alienation for a longer period than that limited in the preceding section. But where the will, deed, or instrument in which any prohibition, restriction, or condition against alienation is contained does not name, describe, or designate the person or persons in whose favour or for whose benefit such prohibition, restriction, or condition is provided, such prohibition, restriction, or condition shall be absolutely null and void."

The preceding section runs as follows :—

" No prohibition, restriction, or condition against the alienation of any immovable property declared by or contained in any will, deed, or other instrument, which shall be executed after the proclamation of this Ordinance, shall be effectual to prevent the alienation of such property for a longer period than the lives of persons who are in existence or *in ventre sa mere* at the time when such will, deed, or instrument is executed, and are named, described, or designated in such will, deed, or instrument, and the life of the survivor of such persons."

Counsel for the appellant argues that while " descending heirs " only would be reasonably clear and would, he concedes, establish a valid *fidei commissum*, the addition of the words " and authorized

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persons " renders it impossible to say that there has been a clear indication of the persons in whose favour the prohibition is provided and that as free inheritance is favoured, and there is a presumption against restriction and no speculation as to the meaning of " authorized persons " is permissible, no valid *fidei commissum* can be said to be created. Counsel for the respondent argues that the strictness of the old rule has gradually abated and that the local cases subsequent to 1912 are, generally speaking, much more liberal in their interpretation of the description or designation sufficient to satisfy the requirements of section 3 of Ordinance No. 11 of 1876. He suggests that " authorized persons " means " those who get authority as descending heirs " or " representatives of descending heirs " and that failing the adoption of one or other of those meanings the words should be treated as meaningless or as synonymous with " descending heirs." The intention to create a *fidei commissum* is, he contends, clear, and that being so the particularity of the words " descending heirs " as distinct from " collateral heirs " should not be destroyed by the addition of the words " and authorized persons."

A number of Ceylon cases were cited on either side, but they all proceed on different wording, and I derive little assistance from them in the application of the principles involved. In *Pinnwardene v. Fernando* (*supra*), for instance, which Counsel for the respondents thinks is nearest to the present case, the construction of a will was involved and the decision proceeded it would appear very largely on the principle that a very benevolent view indeed in support of the supposed intention of the testator is permissible when the creation of a *fidei commissum* is in question. My view would be that even if *fidei commissa* created by acts *inter vivos* are more strictly construed than *fidei commissa* created by testament (see *Holl. Cons., Vol., III., Pt. II., No. 3*), yet this does not permit a Court to relax its vigilance in the construction of words introducing a *fidei commissum* in wills. If those words admit of doubt, they should be construed as excluding rather than including the *fidei commissum*. In other respects, however, *Pinnwardene v. Fernando* (*supra*) is distinguishable, and no useful purpose would, I think, be served by examining the words there used.

As regards South African cases, see *Cruse v. Executors of Pretorius*[1] where De Villiers C.J. said : " Where it is a matter of doubt whether a *fidei commissum* has been imposed or not, that construction should rather be adopted, which will give the legatee or heir the property unburdened." Cloete J., in *Du Plessis v. Smallberger*[2] said : " We are bound to give the most narrow and strict interpretation to words introducing such *fidei commissa*. That these by our laws are held to be odious ; and wherever the words admit of the slightest doubt they are to be construed

[1] *(1879) Buch. at p. 124.*

[2] *3 Searle 385.*

pro herede, so as to leave him the free and unfettered possession of the inheritance he acquires from his parents." In *Drew v. Drew's Executors*[1] the testator bequeathed the property to the children "entailed and burdened with *fidei commissum*" and it was held that as no person or class was sufficiently pointed out by the will in whose favour the *fidei commissum* was created, the children were entitled to their inheritance absolutely and unencumbered. In *Van der Linden Institutes of Holland at page 63*, the following occurs :—

> "It is immaterial in what terms the *fidei commissum* is created, provided that the person to whom the property is to go over is clearly pointed out. A simple restraint on alienation without declaring in whose favour it is made has no obligatory force; but a restraint, for example, on the alienation of the property out of the family is valid."

Burge, Vol. III., page 113, puts the position thus :

> "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. (*Sande de Prohib. Alien. 3 (i). 3 and 4; Van Leeuwen Cens For. 3. 7. 10; Voet lib. 36 tit. 1 n. 27.* It is not sufficient that he names particular persons to whom he prohibits the alienation to be made unless he also designates some person to whom the estate shall pass in the event of its being alienated."

Doubt must not in a case like the present be confused with difficulty, but I find it impossible to say with any certainty what the donor meant when in the deed before us he used the words "descending heirs and authorized persons." It may be that in telling the notary of his wishes he mentioned Setu and her descending heirs only, and that the notary thought "balakara," a useful addition, without having any very clear idea himself as to what the word would mean. The difficulties of the case are not decreased by the second use of the words "and authorized persons."

The prohibition in P1 is, in my view, null and void for want of a proper description or designation of the persons in whose favour or for whose benefit the prohibition is provided.

There are certain other aspects of the case which have not been argued and with which it is unnecessary to deal in view of the conclusion above arrived at. I desire to guard myself too by saying that I am not expressing any opinion as to whether P1 would have created a valid *fidei commissum* if the words "and authorized persons" had not appeared therein and, if necessary, I should have wanted to hear argument as to whether in other

[1] *(1876) Buch. 203.*

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respects a valid *fidei commissum* can be said to have been created. The safest and best course is to make no attempt to declare the law at large, and to abstain from comment on cases which are useful only as regards the application of a principle to their particular facts. Any attempt to deal otherwise with this case would involve a treatise being written on a subject, with respect to which Ordinance No. 11 of 1876 appears to have raised more doubts in certain directions than it has solved, and such a treatise would be entirely without authority, as unnecessary for the purposes of this case.

Apparently the primary object of sections 2 and 3 of Ordinance No. 11 of 1876 was to prevent property being rendered inalienable by will or deed for the four generations allowed by the Roman-Dutch law. The restrictions on alienation so allowed were found to be prejudicial both to individuals and the community, and the law in Ceylon was brought in this respect into conformity with English ideas on the subject. The legislation of 1876 does not end there, however, and I reserve for discussion in a proper case the question whether the latter part of section 3 of the Ordinance is merely declaratory of existing Roman-Dutch law or formulates a somewhat different rule. See *Hormusjee v. Cassim* (*supra*) and compare with it such cases as *Silva v. Silva* (*supra*) and *Naina Lebbe v. Marikkar.*[1] It is unnecessary to enter into this discussion here as I have no doubt that the prohibition now in question is null and void.

The appeal should, I think, be allowed, and the resulting order made in the terms set out at the commencement of this judgment. The appellant to have the costs of this appeal, and his costs in the Court below.

DALTON J.—

This matter was reserved for argument before a Bench of three Judges. The issue in the action out of which this appeal arises was in the following terms:—

> " Does deed No. 2,787 of August 7, 1882, create a valid *fidei commissum* in favour of the heirs of Setu ? "

By that deed (the material parts of which I set out later) Horatalpedige Simia, subject to certain conditions, purported to donate a property named Kahatagahawatta to his daughter Setu. Setu was married to her husband Kekula in community of property, and in 1911 she, by deed No. 19,658, leased to the defendant the land in dispute for a period of twenty-five years. Further, in 1919, the defendant obtained a transfer of a moiety of the property from the Fiscal, it having been sold by the latter under a writ of execution in an action against Setu, and purchased by defendant and another. Setu, it is agreed, died about 1923,

[1] *(1921) 22 N. L. R. 295.*

leaving eight children. These children or their heirs are the plaintiffs in the action. It is to be gathered from what was stated in the District Court that Kekula is dead, but when he died does not appear. On the appeal it was agreed by Counsel that the answer to the issue I have set out would decide the case. The learned trial Judge answered it in the affirmative, and it is from that decision that defendant appeals.

The deed in question, although drawn by a notary, is a peculiar one. It is in Sinhalese, and there has been considerable difficulty in obtaining a translation, which both sides will agree is correct, but after at least five translations had been made the matter was finally settled. The material parts of the finally accepted translation are as I set them out.

After detailing the boundaries and description of the land the deed states—

> "This land . . . . . is hereby granted as a gift to, and is put in possession of, Horatalpedige Setu of Assanawatta, a daughter of mine, owing to the affection, love, and regard that I bear towards her, and owing to diverse other duties which draw my heart unto her. Then I, Sinhalapedige Kekula, the husband of the said Setu, accept this gift, with thanks, by signing this."

The deed continues—

> "Therefore, the aforesaid gifted land is hereby put in possession and proprietorship of, and is given over with power only to be possessed undisturbed, subject to the regulations of Government, without selling, mortgaging, or otherwise alienating or leasing the same for a period of exceeding five years by the said Setu, and all her descending heirs and authorized persons."

The grantor retains on behalf of himself and his wife a life interest in the property, but binds himself—

> "On my own behalf and on behalf of my heirs and others to the effect that it shall not be possible either for me or for anybody whomsoever, such as heirs descending from me or authorized persons to assert any title or raise any dispute."

In the course of the arguments addressed to this Court numerous local decisions have been referred to, but in none of them have the terms made use of here been used. It was hardly to be expected. There is no dispute as to the law which is to be applied, but there is some suggestion on behalf of the respondents that in the later local decisions the Courts have tended towards what I think is called a more benevolent or liberal view than was previously adopted against the heir, if it can possibly be supported by any

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reference to the presumed intention of the donor or testator. This argument was not confined to cases arising out of wills, but it would seem to be an attempt to qualify the rule of law that where there is any doubt as to the intention of the testator the construction must be adopted, which will give the property to the heir, legatee, or donee, as the case may be, free from *fidei commissum*.

In this case the document is a deed. As in Roman-Dutch law *fidei commissa* were created by will being usually termed testamentary trusts, hence the numerous references in the authorities to the intention of the testator and the application of the rule, "in testaments the wish of the testator is the governing factor." (Gaill, cited in *Estate Kemp and others v. McDonald's Trustee.*[1]) But whether they could be created by donation *inter vivos* is most doubtful. (*Burge, Vol. IV., Pt. I., p. 763.*) However that may be, there is no doubt as to the law in Ceylon on the point to-day. In *Saibo and others v. The Oriental Bank Corporation*[2] Berwick D.J. says, in the course of the judgment which was affirmed by the Full Bench—

> "It cannot be denied that in the ordinary course of development of our Colonial law to overtake the circumstances of modern life, what Warnkoenig calls the 'amplification of these *rationae vitae*,' express trusts *inter vivos* are now as much part of the legal system of Ceylon as of England, though unknown in the practice of the old Civil law . . . . "

Further development, it is of interest to note, has taken place in South Africa, as is shown by the learned judgments of the Court of Appeal in *Estate Kemp and others v. McDonald's Trustee* (*supra*) to which I have already referred, although it has been enacted in Ceylon (Trusts Ordinance, 1917) that a trust under that Ordinance does not include a *fidei commissum*.

In interpreting this deed, therefore, it seems to me that especially in view of that development of the law, one must bear in mind that any special rules of construction that are applicable to wills alone cannot be brought in ; indeed, it might appear questionable if there is any room for the application of such rules as something additional to the rules in force for determining the existence of a *fidei commissum* as laid down by Voet and other Roman-Dutch authorities, although it is pointed out in *Lee's Introduction to Roman Dutch Law, p. 341*, citing *Hollandsche Consultation, Vol. III., Pt. II., No. 3*, that according to the law in Holland *fidei commissa* created by act *inter vivos* were even more strictly construed than *fidei commissa* created by testament. On that point alone there is ground for the argument that some of the local cases cited can be differentiated. There is further also the difference in the words used in all the cases cited.

[1] *(1915) A. D. at p. 500.*

[2] *3 N. L. R. 148.*

This case, as it has been presented to this Court, depends on the application of the rule that " where there is a prohibition against alienation a person or persons must be designated as those who shall take where the prohibition is wrongfully disregarded and the property is sought to be alienated in opposition to the terms of such prohibition." In the first part of the deed it is set out that the gift is to Setu *simpliciter*, and it is accepted on her behalf by her husband, but I think the reasonable construction of the next sentence is that the land was put in possession and proprietorship of, and was given over with power only to be possessed by Setu and all her descending heirs and authorized persons, subject to the restriction on alienation. In other words it does not seem possible to me to read the words as purporting to make a donation to Setu alone, to be possessed by her undisturbed, and then adding a restriction against alienation by others.

On that construction, and taking the words as used in the deed, can it be said that the person or persons are designated as those who shall take if the prohibition is disregarded ?

> " The designation need not be by name specially provided the person to whom the property is to go over is clear." (*Pereira, Laws of Ceylon, p. 433.*)

The prohibition however is nugatory unless the persons are designated in favour of whom the prohibition is declared. (*Burge, Vol. IV., Pt. I., p. 770.*) This is enacted in the law of the Colony in section 3, Ordinance No. 11 of 1876. By section 2 of that Ordinance it is provided that no prohibition against the alienation of immovable property shall be effectual to prevent or restrict the alienation of such property for a longer period than the lives of persons who are in existence or *en ventre sa mere* at the time the prohibition is made " and are named, described, or designated " in the will or deed.

Section 3 is as follows :—

> " Any such prohibition, restriction, or condition against the alienation as aforesaid shall be null and void so far as it prohibits or restricts alienation for a longer period than that limited in the preceding section. But where the will, deed, or instrument in which any prohibition, restriction, or condition against alienation is contained does not name, describe, or designate the person or persons in whose favour or for whose benefit such prohibition, restriction, or condition is provided, such prohibition, restriction, or condition shall be absolutely null and void."

As Bonser C.J. points out in *Hormusjee v. Cassim* (*supra*) no words can be plainer than these. The first part of the section provides that the prohibition is null and void beyond a fixed limit, but it goes on to enact that it is absolutely null and void unless the

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person or persons, in whose favour it is provided are named, described, or designated. If that is not done the words must be struck out of the deed.

At first reading it seems to me that the words " all her descending heirs and authorized persons," who, it is argued are the persons in whose favour the prohibition against alienation by Setu is provided, are most vague and indefinite, and that impression was forced upon me not by reference to the words alone, but to the whole document. What persons can be said to be named, described, or designated in the term " authorized persons "? May collateral heirs be included, or any such class of persons coming within the terms executors, administrators, representatives, or assigns ? I take these terms because most of them at any rate have been used in the cases cited to us. The argument on behalf of the respondents is that they merely repeat the words " descending heirs " and so are mere surplusage, or otherwise they mean " persons authorized by the heirs," for example, by power of attorney. That some such interpretation must be placed upon the words, it is argued, necessarily follows from the intention of the donor to be gathered from the whole document to tie up the property in his family. That intention, however, from the words used, I am unable to gather. In support of this argument Mr. De Zoysa lays stress upon the decision in *Pinnwardene v. Fernando* (*supra.*) That case arose out of the construction of a will. The persons purported to be designated there were " the children, grandchildren, heirs, and representatives descending from them." It was argued that the presence of the words " heirs and representatives " in the clause indicating the beneficiaries was obnoxious to the validity of the *fidei commissum.* A question arose as to the correct interpretation of the will which was a Sinhalese document, and De Sampayo J., after examining the language came to the conclusion that the expression used should be interpreted " the children, grandchildren, heirs, and representatives descending from them." The word " representative " on this interpretation he held, may be taken as a mere extension of the idea of succession conveyed by the previous words with which it is associated. If that cannot be done he would hold that it may be disregarded as meaningless. It is quite clear, however, that special stress was laid by the learned Judge upon the maxim *in testamentis benignia interpretatio facienda est,* while assistance was also found in the principles respecting the construction of deed as laid down by Courts of Equity in England. Even if the latter principles may be properly applied here or in such a case as this, I am quite satisfied this case may be clearly distinguished on the facts.

Another case which has been relied upon is *Wijetunga, v. Wijetunga* (*supra*) the case of a deed where property was gifted to A subject to the provision *inter alia* that A shall not sell, lease, or mortgage the

property, and that after A's death A's "heirs, executors, and administrators shall hold and possess the property or deal with it as they please." It was held that the deed created a *fidei commissum*, the intention of the donor not having been defeated by the use of the words "executors and administrators." The argument which appears to have been approved of by the Court is set out in the judgment as follows :—

> "What the deed means is that, alternatively, that is to say, in default of heirs the property is to vest in executors or administrators. In default of heirs A, as fiduciarius, would, of course, be absolute owner of the subject of the *fidei commissum*, and a disposition by him of the same by will would then have full effect, and thus the use of the words 'executors' and 'administrators' (the latter implying administrators *cum testamento annexo*) could be explained away without doing violence to the language employed, and in a manner that gives effect to the obvious intention of the grantor to create a *fidei commissum*."

I must admit, although possibly with some hesitation in view of the authority attaching to the name of the learned Judge who delivered the judgment, I should have some difficulty in following this decision, were the facts in this case now before us on all fours. It is of interest also to note that Lascelles C.J. who agreed with the decision of Pereira J. in *Wijetunga v. Wijetunga* (*supra*), on a later occasion appears to me to have somewhat qualified his agreement with the correctness of the judgment. In *Silva et al. v. Silva et al.* (*supra*) he refers to the earlier cases of *Hormusjee v. Cassim* (*supra*) and *Tina v. Sadiris* (*supra*) with approval, and continues :—

> "From these authorities it is clear that the Courts have consistently insisted on the requirement of the Roman-Dutch law, that the persons for whose benefit the *fidei commissum* is created should be plainly designated, and that instruments which do not comply with this requirement are not effective to create *fidei commissa*, even when the intention of the donor or testator to create a *fidei commissum* may be gathered from the document. *Wijetunga v. Wijetunga* (*supra*) is the case in which the Court has gone the furthest in collecting from an ambiguous expression the donor's intention as to the persons to be ultimately benefited. Here we are to take a distinct step further in that direction. This I am not disposed to do. The rule of the Roman Dutch law is a salutary one, and in cases of doubt the presumption is against a *fidei commissum*."

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And, if I may amplify this, it seems to me that not only is the existence of this presumption a salutary one, but the law is clear. I am unable to see that any case arises for the Court to embark upon a voyage of discovery in search of possible interpretations of words used to defeat an ambiguously expressed intention. Whether the document to be construed be a deed or a will, I do not think the duty of the Court can be better expressed than by adopting the words of Innes C.J. in *ex parte Van Eeden and others*,[1] in which the Court had to decide whether the testators had by their language created a *fidei commissum* :—

> "In this case as in the majority of cases which arise in the construction of wills, what the Court has to do is to endeavour to arrive at the intention of the testator ; and to arrive at that intention not by considering what we think it would have been a good thing if they did mean, or what they ought to have meant, but by ascertaining the plain meaning of the words used. If those words in a case like the present are capable of more than one construction, then of course the Court would lean towards the one most in favour of freedom of alienation. But if the testator's language admits of only one construction, then we must give effect to it regardless of the consequences."

And he points out that decisions of Courts in other cases with regard to other documents containing other language can hardly be of much assistance although principles laid down therein are useful and should be applied.

Later cases have laid stress upon the necessity of the intention to create a *fidei commissum* being carried out by the use of appropriate language. Even the use of the very term *fidei commissum* may however be inconclusive. In *Craib v. Loku Appu*,[2] a Full Court decision in which all three Judges differed the words in the deed provided that the land in question was to be possessed "subject to the bond of *fidei commissum*." Enis J. held that, in that it was not clear who was to benefit by the restriction or alienation and when, it was not open to the Court to supply the deficiency, and the deed must therefore be construed as an absolute gift to the donees. In the same way in *Breda v. Master, Supreme Court*[3] the testator himself applied the term *fidei commissum* in an imperfect sense, the disposition being in essence a usufructuary and not a fidei-commissary one.

After giving my best attention to the argument addressed to us by Mr. De Zoysa, and having considered the cases cited by him, and numerous other decisions also, I am unable to say that the language

[1] *(1905) T. S. (Transvaal Law Report, 151.)* [2] *(1918) 20 N. L. R. 449.*
[3] *7 S. C. Juta's Reports, 363.*

used in the deed admits of the construction which he seeks to place upon it. Even if it were a possible construction it is clearly to my mind not the only construction. I can find in the words used no clear and precise indication, no naming or designation of the persons or class in whose favour or for whose benefit the prohibition is provided. On that finding this Court must apply the rule of law that that construction is to be adopted which will impose the least burden on the heir or donee, and the least restraint on the freedom of alienation.

I would, therefore, hold that the deed of August 7, 1882, does not create a *fidei commissum*, answering the issue in the negative. The finding of the learned District Judge should therefore be set aside, and judgment entered as set out in the judgment of His Lordship the Chief Justice. Defendant is entitled to the costs of this appeal.

MAARTENSZ A.J.—

The land in dispute in this case was gifted by the owner Simia, to his daughter Setu, by deed No. 2,787 dated August 7, 1882.

Setu by deed No. 19,658 dated December 23, 1911, leased the land to the first defendant and one Udias Appuhamy for a term of twenty-five years from the date of execution.

In 1919 on a writ issued against Setu the land was sold and purchased by the first defendant and Udias Appuhamy. It was conceded that the purchasers could not claim more than half the land, as Setu was married in community of property and her husband had died prior to the sale in execution.

The plaintiffs, who are the children and grandchildren of Setu, allege that the deed of gift No. 2,787 created a *fidei commissum*, and that the first defendant's right to possession under the lease and by virtue of the sale in execution terminated on the death of Setu.

The first defendant appeals from the finding of the learned District Judge that the deed of gift created a *fidei commissum*.

The deed of gift is in Sinhalese in which the donor after setting out his title and the boundaries of the land continues as follows :—

> " This land, within these four boundaries, 3 acres 2 roods and 30 perches in extent, together with all the plantations, &c., belonging thereto, and valued at Rs. 200 of the currency of Ceylon, is hereby granted as a gift to, and is put in possession of, Horatalpedige Setu of Assanawatta, a daughter of mine, owing to the affection, love, and regard that I bear towards her, and owing to diverse other duties which drew my heart unto her. Then I, Sinhalapedige Kekula, the husband of the said Setu, accept this gift, with thanks, by signing this. Therefore the aforesaid

gifted land is hereby put in possession and proprietorship of, and is given over with power only to be possessed undisturbed, subject to the regulations of Government, without selling, mortgaging, or otherwise alienating or leasing the same for a period of exceeding five years by the said Setu and all her descending heirs and authorized persons."

The issue to be decided is whether the deed of gift executed by Simia created a *fidei commissum*.

The operative clause conveying the land to Setu contains no words of limitation, but it has been held that even the use of the words heirs, executors, administrators, and assigns, coupled with the name of the fiduciary heir, may be nothing more than a means of vesting in the fiduciary heirs the *plena proprietas* as a preliminary to imposing a *fidei commissum* in the property, *Guneratne v. Guneratne*,[1] and that they do not prevent a construction in favour of a *fidei commissum* if it can be gathered from the language of the document in question. *Wijetunga v. Wijetunga* (*supra*), *Coudert v. Don Elias*,[2] and *Mirando v. Coudert*.[3]

This principle would apply more strongly to the deed of gift executed by Simia as the name of the fiduciary is not coupled with the words which had been previously held as negativing a construction favourable to a *fidei commissum*.

The operative clause, therefore, does not, in my opinion, affect the question whether a *fidei commissum* was created.

The passage on which the respondents rely is contained in what may be called the *habendum clause*. The passage runs thus :

> " Therefore, the aforesaid gifted land is hereby put in possession and proprietorship of, and is given over with power only to be possessed undisturbed, subject to the regulations of Government, without selling, mortgaging, or otherwise alienating or leasing the same by the said Setu and all her descending heirs and authorized persons."

There can be no doubt that the donor has prohibited the alienation of the lands gifted by Setu and her descending heirs and authorized persons.

The appellant's contention is that under the proviso to section 3 of the Entail and Settlement Ordinance, 1876, the prohibition against alienation is rendered nugatory by reason of the donor's failure to designate the person or persons in whose favour or for whose benefit the prohibition was provided.

[1] (*1915*) *1 C. W. R. 24.*
[2] (*1914*) *17 N. L. R. 129.*
[3] (*1916*) *19 N. L. R. 90.*

The proviso runs as follows :—

" But where the will, deed, or instrument in which any prohibition, restriction, or condition against alienation is contained, does not name, describe, or designate the person or persons in whose favour or for whose benefit such prohibition, restriction, or condition is provided, such prohibition, restriction, or condition shall be absolutely null and void."

The respondents contend that the persons are designated and that they are the descending heirs and that the words " and authorized persons " are mere surplusage.

They further contend that there was no necessity to embark on an inquiry as to who were meant by " authorized persons " as long as there were descending heirs in existence.

A number of authorities were cited commencing with *Tina v. Sadiris* (*supra*), all of which I have examined.

In *Tina v. Sadiris* (*supra*) Fleming A.C.J. laid down the principle that a gift to A, his heirs and administrators, coupled with a prohibition against alienation by A, his heirs and administrators did not create a *fidei commissum*, as the persons in whose favour the prohibition was imposed were not designated.

This principle was adopted in the case of *Hormusjee v. Cassim* (*supra*), *Ayso Umma v. Noordeen*,[1] *Nugara v. Gonsal.*[2] In this case the gift was to B, his heirs, executors, and administrators, coupled with a prohibition against alienation (*Perera v. Fernando et al.*[3] *Silva et al. v. Silva et al.* (*supra*) *Silva v. Kekulawala*[4]).

In the group of cases cited by the respondent the document which this Court had to construe contained a gift over after the death of the donees.

In *Wijetunga v. Wijetunga* (*supra*), the donee A was prohibited from alienating, and after her death the property was to be possessed by A's heirs, executors, or administrators absolutely. In *Mirando v. Coudert* (*supra*), the deed provided that the property should pass to the Roman Catholic Church on failure of heirs.

In *Dassenayake v. Tillekeratne* (*supra*), the testator left the property to his wife for life, and after her death to the testator's children and their heirs and assigns.

In the case of *The Government Agent, Central Province v. Silva* (*supra*), there was a gift over to the children and grandchildren of the donees or their lawful heirs.

In the deed of gift under consideration there is no such gift over. The words " authorized persons " are very comprehensive and may comprise executors, administrators, and assigns. If the latter words are substituted for the words " authorized persons," the

[1] *(1902) 6 N. L. R. 173.*
[2] *(1911) 14 N. L. R. 301.*
[3] *6 Leader Law Reports 12.*
[4] *(1925) 26 N. L. R. 489.*

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deed would run : " by the said Setu and all her descending heirs, executors, administrators, and assigns," and would be very similar the deed of gift construed in the case of *Silva et al. v. Silva et al (supra)*.

In this case the donors donated the property to their seven children, subject to the following condition :—

> " . . . . and when one of us dies a half out of the said rights should devolve on our said seven children, and when both of us are dead all the aforesaid rights should be entitled to the aforesaid children and their heirs, executors, administrators, and assigns, and they can only possess the same, but they cannot mortgage, sell, gift over, or lease over for a period of over five years, or alienate in any other manner, and our said children may get the rights partitioned."

De Sampayo J. observed :

> " For it is argued that the *fidei commissarii* are the ' heirs ' who are mentioned in that context, it appears to me impossible to disconnect the words ' heirs ' from the rest of the context, and so I think that is a case in which there has been no designation of the person in whose favour or for whose benefit the prohibition against alienation is provided.

But for the case of *Pinnwardene v. Fernando, (supra)*, I should have no difficulty in holding on the authority of the first group of cases that the deed executed by Simia did not create a *fidei commissum*.

By the will construed in the case the testators devised their property to their seven children and three others, subject to the following condition :—

> " . . . . in this manner, after our death, they shall take charge of their said respective properties, as we have ordained, and they, their children, grandchildren, heirs, and representatives descending from them shall possess the same ; but they shall not sell or alienate the said properties in any manner, or cause the same to be subject to any mortgage or security. Should such an act be committed, the right of the person who sells or alienate the lands or land . . . . shall cease, and it is ordained that the same shall go over to the Crown."

and it was held that the will created a valid *fidei commissum* in favour of the children, grandchildren, and remoter descendants of the devisees.

The Sinhalese expression for representatives in the will is " balayalath ayavolu." The Court held that this expression meant representatives descending from them and may be disregarded as meaningless or be taken as a mere extension of the idea of succession conveyed.

I am unable to adopt the course taken in the case of *Pinnwardene v. Fernando* (*supra*), to give effect to the *fidei commissum* which the testator possibly intended to create.

That course might have been taken in the cases of *Tina v. Sadiris* (*supra*), *Hormusjee v. Cassim* (*supra*), *Silva et al. v. Silva et al.* (*supra*), and the contention that there was a *fidei commissum* upheld by ignoring the heirs and administrators, or executors, administrators and assigns, as the case may be.

I am, therefore, of opinion that the deed of gift executed by Simia does not create a *fidei commissum*, and I would allow the appeal with costs, in both Courts. I would declare the plaintiff entitled to a moiety of the land in dispute, and to possession of that moiety on the expiry of the term of the lease granted by Setu, No. 12,658, marked D1.

Appeal allowed.