1944 *Present:* **Howard C.J., Soertsz, Hearne, Keuneman and Wijeyewardene JJ.**

DE SARAM *et al.*, Appellants, *and* KADIJAR *et al.*, Respondents.

211—D. C. Colombo, 2,025.

Fidei commissum—*Last will of Muslim—Devise of property to wife, children and father—Lawful heirs and heiresses—Prohibition against alienation—Failure to indicate the receipients of testator's bounty—Time of vesting involved in doubt—No valid* fidei commissum—*Trust.*

Where a last will contained the following clauses:—

1. 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 he entitled to and take their respective shares according to my religion and Shafie sect—to which I belong, but they nor their heirs and heiresses 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 and the grandchildren of my heirs and heiresses only that they may receive the rents, income, and produce of the said lands, houses, &c., without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or 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 parties 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 times of their minority or lunacy.

2. I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along 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 apportioned to each of the heirs and heiresses according to their respective shares and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions.

Held, by HOWARD C.J., SOERTSZ AND HEARNE JJ. (KEUNEMAN AND WIJEYEWARDENE JJ. dissenting) that the will did not create a valid *fidei commissum*.

Per KEUNEMAN AND WIJEYEWARDENE JJ.—That the will devised the immovable property to the devisees burdened with a *fidei commissum* in favour of their children and grandchildren in successive generations, and that the testator intended to create not one *fidei commissum* but separate *fidei commissa* affecting each of the devisees with the appropriate conditions applicable to each.

CASE referred to a Bench of five Judges under section 51 of the Courts Ordinance.

The original owner of the property was one Isubu Lebbe Idroos Lebbe Marikar who died in 1876 leaving a last will (P 1) dated December 12, 1872, which was proved in testmentary case No. 3,909 of the District Court of Colombo and probate was issued to the sole surviving executor named in the will. In accordance with the directions given in the will the executor allotted the property in dispute to Abdul Hamid, a son of the testator, and conveyed the same to him by deed (P 2) of February 19, 1878, subject to the terms and conditions in the will. Abdul Hamid mortgaged the property with Peter de Saram by bond (P 3) of May 15, 1931. The bond was put in suit and in execution of the hypothecary decree entered in the action the property was sold and purchased by the plaintiffs-appellants, as executors of the last will of the mortgagee.

The defendants-respondents, who are some of the children of Abdul Hamid, who is dead, disputed the title of the plaintiffs on the ground that the will created a valid *fidei commissum* and that Abdul Hamid could have mortgaged only his fiduciary interest. The learned District Judge held that the will created a valid *fidei commissum* and dismissed the plaintiff's action.

H. V. Perera, K.C. (with him *E. B. Wikramanayake* and *H. Wamigatunge*), for the plaintiffs, appellants.—The will (P 1) does not create a *fidei commissum*. It was merely intended to tie up the properties in question for all time by means of a trust. The trust, however, fails because it offends against the rule against perpetuities. This will was considered in four earlier cases, namely, *Sabapathy v. Mohamed Yoosoof et al.*[1]; *Saleem v. Mutturamen Chettiar*[2]; *Sinnan Chettiar v. Mohideen et al.*[3]; and *Ramanathan v. Saleem et al.*[4] and on each occasion it was interpreted in a different manner. The language of the document makes it clear that the intention of the testator was to create a trust. The word *fidei commissum* does not occur at all. On the contrary, the word " trust " is definitely used. The will was made shortly after Ordinance No. 7 of 1871, formally introducing the English law of trusts, was passed. The English law of trusts was part of the law of Ceylon even before that date—*Supramaniam et al. v. Erampakurukal et al.*[5]. The intention of the testator was to create a trust for the benefit of his descendants.

It is impossible to discover who the beneficiaries under the will are and at what point of time any gift over is to take place. The gift over is bad whether the will is regarded as creating a trust or a *fidei commissum*. There are two conclusive reasons why it cannot be held that there is a *fidei commissum*:—(1) if the word " they " referred to the immediate devisees there is a clear indication that they are not to have the whole beneficial interest. This separation of legal ownership from the beneficial enjoyment of the bequeathed property is characteristic of a trust and is foreign to *fidei commissa*. A trust does not include a *fidei commissum*—section 3 of the Trusts Ordinance (Cap. 72); *Estate Kemp v. Mc Donald's Trustee*[6]. (2) In a *fidei commissum*, the point of time at which the property is to go over to the *fidei commissaries* has to be indicated with certainty. It cannot be said, in the present case, that the

[1] *(1935) 37 N. L. R. 70.*
[2] *(1938) 15 C. L. W. 115.*
[3] *(1939) 41 N. L. R. 225.*
[4] *(1940) 42 N. L. R. 80.*
[5] *(1922) 23 N. L. R. 417.*
[6] *S. A. L. R. (1915) A. D. 491.*

testator contemplated any particular event or point of time when the property should go over. The condition in the will is too vague and uncertain to be enforced. See *Sifton v. Sifton* [1]; *Craib v. Lokku Appu et al.*[2]; *Kirthiratne v. Salgado* [3].

In *Ramanathan v. Saleem et al.* (*supra*) the earlier cases were closely examined, but it was held that the testator's intention in P 1 was to create a trust which, however, was invalid because it was obnoxious to the rule against perpetuities. The rule against perpetuities is explained in *London & South Western Rly., Co. v. Gomm*[4]. When we adopted the English law relating to trusts it must be held that we adopted also the rule against perpetuities. Ordinance No. 9 of 1917 (Cap. 72) which defined the law of trusts includes, in section 110, the rule against perpetuities, thus indicating that it was always a part of our law. In the absence of any trust or *fidei commissum* the grantees under P 1 would, as admitted at the trial, get absolute title.

N. Nadarajah, K.C. (with him *H. W. Thambiah* and *R. A. Kannangara*), for sixth defendant who is second respondent in appeal.—When the meaning of a will is doubtful that construction ought to be given which is in accord with the testator's wishes rather than that which would nullify the same—*Steyn on Wills (1935 ed.), pp. 32-35.* No special words are necessary for the creation of a *fidei commissum*. The presence of the word " trust " is not, by itself, a bar to construing a document as a *fidei commissum—Annamal v. Saibo Lebbe*[5]; *Steyn on Wills (1935), p. 205; Lee on Roman-Dutch Law, p. 372.* There are two elements necessary to create a *fidei commissum:* (1) a gift of property to one person with (2) a gift over to another person. Both these ingredients are present in P 1. The will creates not one, but several *fidei commissa.* It was executed before the Entail and Settlement Ordinance (Cap. 54) came into operation. The beneficiaries are the devisees, their children, and their grandchildren. It is clear beyond any doubt that the ultimate beneficiaries are the grandchildren of the devisees. Even if there is a gap during which there may be no fiduciaries the ultimate *fidei commissaries* will succeed to the property when they become qualified. For case in point see *Estate Kemp and others v. Mc Donald's Trustee*[6]. When no clear condition is attached as to the time of vesting, property passes on death of the fiduciaries. A definite point of time for the vesting of title in the *fidei commissaries* is not an essential ingredient. See *Abeyratna v. Fernando et al.*[7]; *Naina Marikar v. Amarasuriya* [8]; *Steyn on Wills, p. 167.* The dominant intention of the testator in P 1 was that the devisees should not alienate and that the properties should finally go to their grandchildren; all the other provisions in the will should be construed in such a manner as to give effect to that intention. Assuming, without conceding, that there is no English trust in P 1, a Court in Ceylon would construe the document in favour of a valid *fidei commissum* such as is recognized by the Roman-Dutch law—*Weerasekere v. Peiris*[9]; *Alia Marikar Abuthahir v. Alia Marikar Mohammed Sally*[10].

[1] *(1938) 3 A. E. R. 435.*
[2] *(1918) 20 N. L. R. 449 at 458.*
[3] *(1932) 34 N. L. R. 69 at 77.*
[4] *L. R. 20 Ch. D. 562.*
[5] *(1902) 6 N. L. R. 163.*
[6] *S. A. L. R. (1915) A. D. 491.*
[7] *(1911) 14 N. L. R. 307*
[8] *(1918) 5 C. W. R. 60.*
[9] *(1932) 34 N. L. R. 281.*
[10] *(1942) 43 N. L. R. 193 at 204–5.*

Whatever may have been the position in regard to resulting and constructive trusts, the English law relating to express trusts was not applicable in Ceylon—*Narayanen Chetty v. James Finlay & Co.*[1]. Even if the English law of trusts was tacitly accepted, the rule against perpetuities did not form part of the law of Ceylon before 1917. That rule is based on the common law of England and not on equity—*In re Ashforth*[2]; *Evered v. Leigh*[3]. In the circumstances P 1, if it does not create a *fidei commissum*, can be construed as an instrument of trust.

Cyril E. S. Perera (with him *Dodwell Gunawardana* and *P. Malalgoda*), for fifth defendant who is first respondent in appeal.—Mere pious directions would not impose a trust—*In re Oldfield*[4]; *Re Downing*[5]. Not merely legal title but full dominium was given to the devisees—*Re Downing*[6]; *Gunawardene v. Visvanathan*[7]. P 1 therefore does not create a trust.

A pure gift with a gift over are the only essentials for a *fidei commissum*, and the employment of the word "trust" does not change the *fidei commissary* character of the Will—Walter Pereira's *Laws of Ceylon (1913 ed.), p. 430*; *Jobsz v. Jobsz et al.*[8]. As long as the intention to create a *fidei commissum* is clear the confused or ambiguous nature of the language of the document does not defeat it—*Pinwardene v. Fernando*[9]; *Craib v. Lokku Appu et al.*[10]; *Coudert v. Don Elias*[11]; *The Government Agent, Central Province v. Silva et al.*[12]; *Seneviratne v. Candappapulle et al.*[13]; *Vansanden et al. v. Mack et al.*[14]; *Higgins et al. v. Dawson et al.*[15]. When the time for vesting of title is not expressly specified, the event on which the *fidei commissaries* are to take over is the death of the fiduciaries—*Fernando v. Fernando*[16]; *Jayatileke v. Abraham*[17]; *Appuhamy v. Jayasooriya*[18]; *Ismail v. Marikar*[19]; *Pinwardene v. Fernando (supra)*; *Cassim v. Tambi*[20]; *Ibanu Agen v. Abeyasekere*[21]; *Jobsz v. Jobsz et al. (supra)*; *Wijewardene v. Abdul Hamid et al.*[22]

H. V. Perera, K.C., in reply.—Trusts have been long recognized in Ceylon. See section 62 of Courts Ordinance (Cap. 6). They are very different in character from *fidei commissa*—Morice on *English and Roman-Dutch Law (2nd ed.), p. 309*. The use of the expressions "trust", "accumulation of income", &c., in P 1 indicates the intention to create a trust. The rule against perpetuities is a substantial part of the law of trusts. It was an invention of the Chancellors and not based on the common law—*Vol. 25 Halsbury's Laws of England (2nd ed.) Art. 173, note (n)*.

If a *fidei commissum* was intended to be created in P 1 we are left in doubt as to when the grandchildren get the property and as to the intervening fiduciaries and *fidei commissaries*. The whole document is

[1] *(1927) 29 N. L. R. 65 at 69–70.*
[2] *L. R. (1905) 1 Ch. 535 at 542.*
[3] *L. R. (1905) 1 Ch. D. 191 at 196.*
[4] *L. R. (1904) 1 Ch. 549.*
[5] *(1889) 60 L. T. (N. S.) 140 at 142.*
[6] *Ibid.*
[7] *(1922) 24 N. L. R. 225.*
[8] *(1907) 3 A. C. R. 139.*
[9] *(1919) 21 N. L. R. 65 at 67.*
[10] *(1918) 20 N. L. R. 449 at 455.*
[11] *(1914) 17 N. L. R. 129.*
[12] *(1922) 24 N. L. R. 62.*
[13] *(1912) 16 N. L. R. 150.*
[14] *(1895) 1 N. L. R. 311.*
[15] *L. R. (1902) A. C. 1 at 10.*
[16] *(1921) 3 C. L. Rec. 80.*
[17] *(1914) 4 C. W. R. 31.*
[18] *(1922) 24 N. L. R. 449.*
[19] *(1932) 34 N. L. R. 198.*
[20] *(1896) 1 Mat. C. 119.*
[21] *(1903) 6 N. L. R. 344.*
[22] *(1909) 12 N. L. R. 241.*

vague and full of uncertainty from beginning to end. Words which were not used by the testator cannot be read into it—*Galliers et al. v. Kycroft* [1]. When the words are capable of more than one construction the Court would lean towards the one most in favour of freedom of alienation—*Amaratunga v. Alwis* [2].

Cur. adv. vult.

May 26, 1944. HOWARD C.J.—

This appeal relates to the interpretation to be given to the last will and testament of one I. L. I. L. Marikar. This will is dated December 12, 1872, and its provisions have been considered by the Court of Appeal on four previous occasions. In *Sabapathy v. Yoosoof* [3], in *Saleem v. Mutturamen Chettiar* [4] and in *Sinnan Chettiar v. Mohideen* [5] this court held that the testator had created a valid *fidei commissum*. The fourth case was that of *Ramanathan v. Saleem* [6] in which it was held that the rights of those who claimed by virtue of a *fidei commissum* were ousted by prescription. In this case, however, doubts were expressed by the Court as to the correctness of the three previous decisions and the Judges who constituted it were unable to find in favour of a *fidei commissum*. In spite of these doubts the learned District Judge considered himself bound by those three decisions and has held that " on the death of Abdul Hameed the fiduciary heirs would be his children and therefore . . . . the 5th and 6th defendants have the right to be in possession of the property, and that until the death of the children of Abdul Hameed his grandchildren have no right to the property ". He, accordingly dismissed the plaintiff's action with costs. In view of the disparity of views expressed in the three cases that found in favour of a *fidei commissum* as to the character of that *fidei commissum* and the direct conflict between the Judges in those three cases and those who heard the appeal in *Ramanathan v. Saleem* (*supra*), the question of the interpretation of the will comes up for consideration under section 51 of the Courts Ordinance before a court constituted by five Judges.

We are deeply indebted to Counsel on both sides for the able and lucid argument that has been put before the court. The fact that we are unable to reach agreement is an indication of the complexity of the problem which confronted us in the interpretation of the will of the testator. The clause in the will and the circumstances in which the problem of its interpretation arises are set out in the judgments of my brothers Soertsz and Wijeyewardene J.J. There is, therefore, no necessity for me to recapitulate those facts. The questions we have to decide are whether the will created a *fidei commissum* and if so, in whose favour such *fidei commissum* operates. The first point that attracts attention is that the words " fidei commissum " do not appear in the will, whereas the word " trust " is employed. The omission to use the words " fidei commissum " is not, however, in itself fatal to the creation of a *fidei commissum* if such creation can be inferred from the document that such was the testator's intention. On page 136 of Van Der Linden's *Institutes of the Laws of Holland*, the author states that no peculiar words

[1] *(1899) 3 Bal. Rep. 74 at 83.*
[2] *(1939) 40 N. L. R. 363 at 365–6.*
[3] *37 N. L. R. 70.*
[4] *15 C. L. W. 115.*
[5] *41 N. L. R. 225.*
[6] *42 N. L. R. 80.*

are necessary to the creation of a *fidei commissum* provided the person to whom the property is to go over is clear. On the other hand the principle is formulated in Voet (*Mc Gregor's Translation, bk. XXXVI., tit. 1*) that where there is any doubt it is presumed that the direct substitution is intended. In a South African case, *Cruse v. Pretorius' Executors*[1] Sir Henry de Villiers C.J. stated as follows:—

> "Where it is 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."

Again in another South African case, *Ex parte Van Eeden, Badenhorst N. O., and Lombard, N. O.* ((*1905*) *S. C. Transvaal 151*) Innes C.J. stated at page 153 as follows:—

> "In this case, as in the majority of cases which arise with regard to the construction of wills, what the court has to do is to endeavour to arrive at the intention of the testators; 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 testators' language admits of only one construction then we must give effect to it, regardless of the consequences."

Doubt, however, must not be confounded with difficulty. In this connection see the following dictum of Lord Porter in the Privy Council Appeal No. 2 of 1942, *Noordeen v. Badurdeen and others*:—

> "Difficulty of construction alone would not prevent the creation of a *fidei commissum*. To bring about that result doubt is required, either as to whether such a condition has been created or who are the recipients of the bounty."

The principles to which reference is made by text-book writers have been followed by our Courts. In *Ibanu Agen v. Abeyasekere* [2] the following passage at p. 346-347 from the judgment of Wendt J. is of particular interest:—

> "In construing a will the paramount question is, what was the intention of the testator. And if it is clear that the person to whom the property is in the first place given is not to have it absolutely; if it is also clear who is to take after him, and upon what event, then the Court will give effect to the testator's intention. No particular form of words is necessary to create a *fidei commissum* (*Voet, XXXVI. 1, 10; Van Leeuwen, Censura Forensis, pt. 1, lib. 3, cap. 7, sec. 7*). Where the intention to substitute another (or *fidei commissary*) for the first taker (or fiduciary) is expressed or is to be gathered by necessary implication from the language of the will, a *fidei commissum* is constituted. Where these requisites appear, it matters not that the language employed is open to criticism, and therefore too much weight ought not to be attached to decided cases in which the courts, seeking to ascertain the testator's intention from variously worded wills and

[1] *9 B. 124.*

[2] *6 N. L. R. 344.*

varying circumstances, have pronounced for or against the *fidei commissum*. One principle of construction, however, is generally recognized, and that is that, where there is doubt, the inclination of the Court is against putting any burden upon the inheritance—*Tina v. Sadris 7 S. C. C. 135, per Fleming A.C.J., citing Van Leeuwen's Commentary, lib. 3, 8, 4: Kotze's Trans. Vol 1, p. 376.*

In *Wijetunga v. Wijetunga*[1] it was held as follows:—

"An important test to be applied in considering whether a will or other instrument creates a *fidei commissum* is whether any provision or stipulation expressed in it can be regarded as having been inserted for any purpose other than that of creating a *fidei commissum*. If this question cannot be answered in the affirmative, then other provisions and stipulations in the instrument, if they are susceptible of an interpretation that is not inconsistant with the conception of a *fidei commissum*, must be given that interpretation."

In his judgment at page 496 Pereira J. stated as follows:—

"If the intention of a donor or testator to create *fidei commissum* is clear, and the words used by him can be given an interpretation that supports that intention, I should be slow to embark on a voyage of discovery in search of possible interpretations that defeat that intention. In the words of Van Leeuwen again: *In fidei commissis sola testatoris voluntas spectatur, nec solum verbis expressa, sed et tacita et ex conjectura collecta* (Cens. For. 1, 3, 7, 7)."

The opinion of Pereira J. in *Wijetunga v. Wijetunga* was cited with approval by Shaw J. in *Mirando v. Coudert* [2].

Can it be said that the will of the testator indicated an intention to create a *fidei commissum*? If so, is it clear to whom the property is to go over? Is it apparent what person or class of persons are to be benefited after the death of the fiduciary? A further point arises as to whether, even conceding that the testator desired to create something in the nature of a *fidei commissum*, the will expressed anything further than a wish on the part of the testator that his descendants should not alienate the property without imposing on them any legal obligation. It has been argued on behalf of the appellants that the use of the words "shall be held in trust" in paragraph (*c*) of clause 1 of the will indicated an intention to create something which in English law is known as a trust rather than a *fidei commissum*. Perusal of the text-books on Roman-Dutch law and local decisions indicates that the word "trust" has been employed in connection with the creation of *fidei commissa* and does not in itself indicate an intention to create an English trust rather than a *fidei commissum*. On the other hand, I do not think it is open to this Court to speculate as to whether a notary in 1872 when asked to give effect in a testamentary disposition to the intentions of the testator was more likely to have in mind the provisions relating to the English law of trusts or those relative to the Roman-Dutch law of *fidei commissa*.

[1] *15 N. L. R. 493.*

[2] *19 N. L. R. 90.*

In this connection I would cite what was said by Sir Henry de Villiers in *Galliers v. Kycroft* [1]:—

> "To read into a will words which the testator has not used, to presume an intention which the testator has not expressed, can only be justified by a positive rule of construction having the force of law."

Innes C.J. in *Estate Kemp v. Mc Donald's Trustee* [2] stated as follows:—

> "The truth is that a decision upon the meaning of one will is often of no assistance in ascertaining the meaning of another, in spite of surface similarities between the two. Each document must be read as a whole and must stand upon its own language."

There is no doubt that the testator in making his testamentary disposition was inspired by a desire that there should be no alienation by his descendants or at any rate by the two generations that succeeded him of what I will describe as the family immovable property. First of all the "lawful heirs and heiresses" of his estate and their "issue or heirs" are prohibited from alienating any of the lands, houses, estates or gardens belonging to him or which he might acquire hereafter. Then follows a trust in favour of the "grandchildren" of the testator's children and "the grandchildren of his heirs and heiresses", they, meaning either the lawful heirs and heiresses and their issue and heirs, or giving a more grammatical interpretation to "they" meaning grandchildren of his children and the grandchildren of his heirs and heiresses, receiving only a proportion of the rents and income of the property sufficient for their subsistence, the surplus being devoted to the purchase of lands for the benefit and use of the children and grandchildren of the lawful heirs as hereinbefore stated. Then follows a clause that seems to oust the jurisdiction of the Courts except "at times of their minority or lunacy". I need hardly say that the material clause is exceedingly difficult to construe. The grammar is atrocious. This in itself is not a sufficient reason for not finding a *fidei commissum* if the intention is plain. As I have already pointed out, the testator first of all evinces an intention to prohibit alienation by the two succeeding generations or in perpetuity. This is followed by the creation of a trust of surplus funds to be devoted for the purchase of lands for the benefit of the children and grandchildren of the lawful heirs. It cannot, owing to the ambiguity of the phraseology, be said with certainty whether these persons are also restrained from alienating. In fact it is a matter of doubt whether or not there is a prohibition in perpetuity against alienation. Are the *fidei commissarii* the children or the grandchildren of the testator's lawful heirs? Can it be said that there are any ultimate beneficiaries? It is impossible to say. In the recent Privy Council Case, No. 2 of 1942, cited above, in the judgment of their Lordships Lord Porter said:—

> "As they have indicated their Lordships do not think that there is any doubt that the testator intended to create a *fidei commissum*. It is true that as a general rule a class too wide for ascertainment

[1] *3 Bal. Rep. 74 at p. 83.*

[2] *(1915) S. A. Law Rep. A. D. at p. 505.*

as in *Dias v. Kaithan* [1] or too vaguely described as in *Amaratunga v. Alwis* [2] would prevent a *fidei commissum* from attaching and it may well be that in the present case such a result would have followed if the translation adopted by the learned District Judge were correct. But if the translation which was approved by the Supreme Court be followed, there is a definite and easily ascertained class and indeed one whose limits are more clearly drawn than were those of the recipients in *Perera v. Perera* (*supra*).''

There is no certainty with regard to the beneficiaries. The class is too wide for ascertainment and too vaguely described. Hence for this reason alone I am of opinion that it has not been established that the testator intended to create a *fidei commissum*.

Having regard to the use of the words '' will and desire '' and the ousting of the jurisdiction of the Courts, I have come to the conclusion that the testator has not done more than express a desire that his descendants should not alienate the family property but has not imposed on them any obligation binding in law not to do so. In these circumstances the dictum of de Villiers C.J. in *Cruse v. Pretorius' Executors* [3] is applicable and as it is a matter of doubt if a *fidei commissum* has been imposed, the will must be construed as giving the heir the property unburdened.

I have had the advantage of reading the judgment of Soertsz J. and agree with him that, apart from the impossible task of discovering who the testator intended to benefit, there is a further difficulty with regard to the time of vesting. Can it be said that the testator has created a binding trust? If so, it offends the rule against perpetuities and is, therefore, void.

For the reasons I have given I am of opinion that the appeal must be allowed and decree entered as prayed by the plaintiffs against all the defendants and with costs in both this Court and the Court below against the 5th and 6th defendants.

SOERTSZ J.—

The last will and testament with which we are concerned in this case, like the Witches' cauldron, appears to hold '' a charm of powerful trouble ''. Three different Benches of this Court have already extracted three substantially different *fidei commissa* from it. It now comes before us, on a reference made under section 51 of the Courts Ordinance, for us to consider whether it created a *fidei commissum* at all, and if it did, for us to find what precisely that *fidei commissum* is—the one defined in the case of *Sabapathy v. Yoosoof* [4]; or that in *Saleem v. Mutturamen Chettiar* [5], or that in *Sinnan Chettiar v. Mohideen* [6], or some yet undiscovered *fidei commissum*.

The clause in the will which has caused all this controversy and provoked this embarrassing variety of views is in these terms:—'' I do hereby will and desire that my wife Assena Natchia . . . . and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe,

[1] *2 N. L. R. 233.*
[2] *(1939) 40 N. L. R. 363.*
[3] *9 B. 124.*
[4] *37 N. L. R. 70.*
[5] *15 C. L. W. 115.*
[6] *41 N. L. R. 225.*

Abdul Ryhiman, Mohamadoe Usubu, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usubu Lebbe 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—to which I belong, but they nor their *heir or heiresses* (according to the copy of the will filed in this case) or, *issues or heirs* (according to the copies in all the other cases) (the record of proceedings in which the original will is said to have been filed, is lost) 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 and the grandchildren of my heirs and heiresses only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized attached or taken for any of their debts or 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 times of their minority or lunacy."

Stated in a few words, the circumstances in which this clause arises for interpretation in the case we are dealing with are these:—At the date of the death of the testator, on May 8, 1876, his father whom he had named in the will as an heir was dead, and another child, a son, Abdul Hamid, had been born. No question appears to have arisen—and there is no question now—in regard to this child's right to take a share, for the surviving executor acting in compliance with a request contained in another clause in the will, executed deed No. 247 dated February 19, 1878, transferring to him the house and premises in litigation here " to have and to hold the said premises . . . . subject to the trusts and conditions in the said last will and testament contained, that is to say that *he or his issues or heirs* shall not sell, mortgage or alienate the said premises but the same shall be held in trust for " the grandchildren of *my* children and the grandchildren of *my* heirs and heiresses only that they may receive the rents, income and produce . . . . except at times of their minority or lunacy " . . . . . (as in the will).

In 1931, Abdul Hamid mortgaged this property with Peter de Saram. His executors, the plaintiffs before us, sued on the bond and having obtained a hypothecary decree, purchased the property at the sale held in execution of the decree. They now seek to be declared entitled to the property as against the defendants who, they allege, are in wrongful possession. The first to the fourth defendants who are the children of a deceased daughter of Abdul Hamid disclaimed title in the course of the proceedings in the Court below. They were added as parties respondents to this appeal and were given notice of the appeal, but they have taken no part in it. The fifth and sixth defendants, however, who are the other children of Abdul Hamid, dispute the plaintiffs' claim, the fifth defendant, on the ground that his father held the property " subject to a

fidei commissum in favour of the grandchildren of the said Abdul Hamid and subject to the other conditions and restrictions . . . . and this defendant, fifth and the sixth defendants, who are the children of the said Abdul Hamid, are in lawful possession of the said premises," the sixth defendant going further to state that " this defendant (sixth) and the fifth defendant who are the fawful children of the said Abdul Hamid *are fiduciaries* under the last will and *as such* are in the lawful possession of the premises."

From these answers to the plaintiffs' claim it would appear that the fifth and sixth defendants took each a different view of the effect of the devise, the sixth defendant asserting that he and his brother were *fidei commissaries* while the fifth defendant made no such assertion.

The learned trial Judge, bound as he declared himself to be by earlier decisions of this Court given in interpretation of this will, upheld the position taken by the sixth defendant, for he found, that " on the death of Abdul Hamid, the fiduciary heirs would be his children and, therefore . . . . the fifth and sixth defendants have the right to be in possession of the property, and that until the death of the children of Abdul Hamid, his grandchildren (*i.e. inter alia* first to fourth defendants) have no right to the property." He accordingly dismissed the plaintiffs' action with costs.

Before going on to consider the relevant clause for ourselves, it would be convenient to examine the views taken in the three earlier cases. In the first of these cases Akbar and Koch JJ. held that there was a *fidei commissum* in favour of the grandchildren of the testator's daughter Amsa Natchia—it was her property that was involved in that case—and that as many of those grandchildren as were ascertainable, at the time the prohibition against mortgaging was violated by one of Amsa Natchia's daughters, succeeded to that daughter's share, but that those grandchildren would have to suffer a reduction in those shares, if and when other grandchildren came into existence.

The next case was that of *Saleem v. Mutturamen Chettiar* [1] in which Maartensz and Moseley JJ. agreed with the view taken in the first case that the will created a *fidei commissum* and that the *fidei commissaries* were the grandchildren of Amsa Natchia—her property being the property again involved—but they differed from the earlier Bench in regard to the time of vesting and, on that point, they held that, in the absence of an express statement in the will " as to when the properties are to devolve, they must be *deemed* to pass on the death of the fiduciary heirs "—meaning, in the context, the devisees expressly named in the will.

In the third case—*Sinnan Chettiar v. Mohideen* [2]—another interpretation was given in regard to both matters. The *fidei commissaries* were found to be *not the grandchildren of Amsa Natchia*—her property being once more involved—*but her children, and after them the grandchildren.* As to the time of vesting, it was held that "the event on the happening of which the property devolves on each succeeding set of *fidei commissary* heirs is the death of the immediate previous fiduciary who last entered into the possession of the property." Incidentally,

[1] *15 C. L. W. 115.*

[2] *41 N. L. R. 225.*

it is worthy of observation that the two different interpretations of the devise indicated in the answers filed by the fifth and by the sixth defendant in regard to the *fidei commissaries* recur in these judgments.

The finding in *Sinnan Chettiar v. Mohideen* that Amsa Natchia's children constituted the first set of *fidei commissaries* is said to be deduced from the prohibition imposed on them against selling, mortgaging, or alienating the properties of the estate, but that inference overlooks the full connotation of the words used by the testator—" heir or heirs " or " issues or heirs "—for those words, assuming a *fidei commissum* to have been intended, contemplate a much wider class than " children ". If the words actually used are " heir or heirs " then under the Muslim law according to which the testator directed that shares should be taken, those words indicate a large group including wives, father, mother, brothers, sisters, and even the poor (see sections 52, 54, 56 of the Mohamedan Law Ordinance). If, however, the actual words be taken to be " issues or heirs ", confusion is worse confounded. If " or " in " issues or heirs " is given its ordinary meaning, there is the bewildering uncertainty resulting from the choice that appears to be given. But, if "or" is given the force of " and ", there emerges an indeterminate and almost unlimited group. In either event, there is a failure to designate or indicate sufficiently " the recipients of the testator's bounty " and the attempted *fidei commissum* fails *in limine*.

In regard to the assumption that a prohibition against alienation presupposes the conveyance of a title with a view to a *fidei commissum* I would only observe that such a prohibition is not inconsistent with the idea of a trust. The other view that the grandchildren of the devisees were the only *fidei commissaries* appears to be simpler and more consistent with the express words of the testator, assuming, of course, that he intended to create a *fidei commissum*. But then, the question arises, who, upon that view, are the grandchildren that the testator can be said to have had in mind as *fidei commissaries*. For instance, this being a case of separate *fidei commissa*, would the property that, on distribution, went to a particular child be held by him for his own grandchildren only, or for the grandchildren of his brothers and sisters as well ? According to the plain meaning of the words used by the testator in the will and repeated, word for word, by the executor in the deed to Abdul Hamid, the property was to be held in trust " for the grandchildren of *my* (the testator's) children". In the earlier cases, it appears to have been assumed that each child would hold for his own grandchildren only. But the testator has not said so, nor has his executor. In fact, their words tend in the contrary direction.

It is not only the question of the *fidei commissaries* that is wrapped in doubt, but also that of the time of vesting. The view in the first case that the violation of the prohibition against mortgaging, &c., resulted in the *fidei commissaries* being called upon to take at once, was dissented from in the two later cases. No attempt was made before us to reinstate that view. Indeed it is quite untenable. What then is the time or condition of the gift over ? Surely not the death of the " fiduciary heir ", that is to say of the relevant devisee, as Maartensz J. thought it *must be deemed to be*. The words of the testator do not say that at

all, nor can that be inferred by necessary or even by reasonable implication as one may infer, for instance, in a case where the designated *fidei commissaries* are successive classes—" descendants from generation to generation ", " children, grandchildren, great grandchildren ". If from the words " in trust for the grandchildren of my children, &c.", it is permissible to infer that the death of the devisee is the event determining succession it would be equally reasonable to infer some other event to be the determining factor, such as the birth of the first grandchild, or of all the grandchildren on their attaining majority and so on and so forth till conjecture and ingenuity are exhausted. In these circumstances it is incredible that if the testator had set out to create a *fidei commissum*, he could or would have left both the *fidei commissaries* and the time of vesting involved in such doubt and uncertainty.

As I ventured to observe in the case of *Ramanathan v. Saleem* [1], assuming an intention to create a *fidei commissum*, it can scarcely be contended that the *ultimate* beneficiaries the testator contemplated were the " grandchildren of his children and of his heirs and heiresses " for that contention ignores the immediately following words " only that they may receive the rents, income and produce of the said lands, houses and gardens without encumbering them in any way as the same may be liable to be seized, attached or taken for any of their debts and liabilities ", words which, according to their grammatical arrangement and according to their plain meaning, must be understood as defining and limiting the interest those " grandchildren of my children and of my heirs and heiresses " were to take. It would do violence to the structure of the sentence to read the adverb " only " as modifying the phrase " grandchildren of my children and of my heirs and heiresses " and not as modifying the subsequent words " that they may receive ". Similarly, it would be ungrammatical to treat the antecedent of " they " in the phrase "only that they may receive " as the original devisees and not the immediately preceding " grandchildren of my children and of my heirs and heiresses ". The whole sentence, properly construed, seems to mean that the testator desired that the devisees should hold the properties in trust for the " grandchildren, &c. " only that those grandchildren might take the rents and profits, subsist on them, and devote the surplus to the acquisition of other property for the benefit of their own *children* and grandchildren who in turn are placed under a similar obligation by the use of the words " as hereinbefore stated ". This interpretation that the " grandchildren of the children of the heirs and heiresses " were not given an absolute title appears to be supported by the fact that in regard to them too there is a prohibition against alienation similar to that imposed at the beginning of the clause. I cannot regard the second prohibition as no more than a repetition of the prohibition imposed on the first group and affecting them and not the " grandchildren, &c. "

In short, the testator does not appear to have contemplated *fidei commissaries* because he was not thinking in terms of a *fidei commissum*. He, more probably, contemplated a perpetual trust in a sense much wider than the trust that the law of England regards as obnoxious to the perpetuity rule of which he was, most probably, not aware. But for this

[1] *42 N. L. R. 80.*

perpetuity rule, there are, as Akbar J. observed in his judgment in *Sabapathy v. Yoosoof*, indications that the testator was thinking of a trust. The will says, in so many words, that the lands, &c., of the estate shall be held " in trust " for the grandchildren, &c. Now, the view has been inveterate in our Courts that the English Law of Trusts was long ago received into the law of this country—(*Ibrahim v. Oriental Banking Corporation* [1]; *Suppramaniam v. Erampakurukal* [2]) and as for *fidei commissa*, they have been part of the law of the land from the time of the Dutch. In an endeavour to ascertain as far as possible, what this testator had in mind, one may, therefore, I think, regard it as a point of some importance that he used the words " in trust " rather than the words "under the bond of *fidei commissum*" or "subject to *fidei commissum* ", at least equally familiar phrases as our Law Reports show. It must, however, be conceded that there are instances in which the phrase " in trust for " occurs when, by every other token, the creation of a *fidei commissum* is indicated. But, in this instance, there is additional significance in the use of the phrase "in trust for" for the reason that the will was executed on December 13, 1872, less than two years after the passing of the Ordinance entitled " An Ordinance to amend the law of Property and to relieve Trustees ", and we find, on the one hand, this Ordinance providing, *inter alia*, that—

> " any person, having first obtained permission from the Court, may file a petition in the name of any lunatic or infant interested in any trust fund,"

and for an inquiry to be held thereupon; and, on the other hand, we find a provision in this will, that the beneficiaries shall not be called upon to account " except at the time of their minority or lunacy ". This is either pure coincidence, or the testator and the notary had the Ordinance in front of them, or at any rate vividly in mind. Both these facts tend to show that the testator's and the notary's minds were occupied with the idea of a trust. Above and beyond these facts the separation of the legal and equitable estates that results from the interpretation suggested that the antecedent of the word " they " in the phrase " only that *they* may receive ", is " the lawful heirs and heiresses of my estate ", an interpretation according to which the character of those heirs and heiresses would be that of trustees with a certain interest in the equitable estate too, namely the right to subsistence and maintenance, and the definite provision for the accumulation of the surplus income suggest that the testator contemplated something more in the nature of a trust than of a *fidei commissum* but the rule against perpetuities and the uncertainty in which he left the question of the beneficiaries and of the time at which they were to call in the legal estate frustrated the contemplated trust.

For my part, I have already stated my reasons for not being satisfied that the antecedent of " they " is that suggested and I have pointed out that, at least as strong a contention is possible in support of the view that the proper antecedent of " they " is the " grandchildren of my children, &c. " and I have dealt with the real doubt that exists in regard to the

[1] *3 N. L. R. 148.* [2] *23 N. L. R. 417.*

fidei commissaries and to the time of vesting even if the original devises are treated not as trustees but as fiduciary heirs. There was some questior, during the argument, as to whether the English rule against perpetuities is part of our law of trusts, but in my view there can be no doubt on that point for the rule against perpetuities is an integral part of the English Law of Trusts itself, quite apart from its place in common law.

This is not a case in which by reasonable adaptation of the words used by the testator or his notary or by correction of grammatical errors, the meaning of the clause in question can be ascertained with a feeling of comfortable assurance, but rather a case in which the more that clause is examined the deeper the sense of enigma, and although it is probably never done to mix sonnets with *fidei commissa* or with trusts, the lines keep recurring with an insistence that cannot be resisted:

> "We ask and ask. Thou smilest and art still,
> Out-topping knowledge."

It was submitted to us that where indications exist that the testator intended to tie up his property for the benefit of his descendants, we should endeavour to give effect to that intention. That, of course, almost goes without saying, but always subject to the limitation that solicitude for the descendants of a testator, should not be permitted to prejudice creditors by urging us to resort to adventurous thought in an attempt to grope along a conjectural way to a *fidei commissum*. As Their Lordships observed in the Privy Council in the course of the opinion delivered by Sir Henry de Villiers in the case of *Galliers v. Kycroft*[1], "To read into a will words which the testator has not used, to presume an intention which the testator has not expressed, can only be justified by a positive rule of construction having the force of law", and again, in the words of Innes C.J. in the South African case of *Ex parte Van Eden and others (1905) Transvaal Repts. 151* "What the Court has to do is to endeavour to arrive at the intention of the testators *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 are capable of more than one construction, then of course, the Court would lean towards the one most in favour of freedom of alienation."

On the view taken by the District Judge, judgment should have been entered for the plaintiffs for a one-third share of the premises in question inasmuch as the 1st to 4th defendants who are the grandchildren of Abdul Hamid, the children of a *deceased* daughter, declared that they did not contest the plaintiffs' claim, but for the reasons I have given, I would allow the appeal and enter judgment for the plaintiffs in terms of their prayer with costs of both Courts to be paid by the 5th and 6th defendants-respondents.

HEARNE J.—

This appeal concerns the interpretation that is to be placed on a will in so far as it relates to immovable property. The will deals with

[1] *(1889) 3 Bal. Rep. p. 74.*

immovable property which bélonged to the estate of the testator at death and also purports to deal with immovable property which, if his directions were followed, would have been purchased after death.

With the latter we are not concerned. The property involved in this appeal was not purchased after the testator's death. It formed part of his estate at death and the provisions of the will which relate to such property are these:—

" I will and desire that my wife, my children and my father (they are named in the will and will hereafter be referred to as the devisees) . . . . shall be entitled to take their shares . . . . but they or their heirs or heirs shall not sell, &c. . . . . (on the contrary) they (the devisees or their heir or heirs) may *only* receive the rents, &c., and after defraying their expenses lands should be purchased by them . . . . ".

I have so far quoted the provisions of the will in regard to the duties cast upon the devisees to collect the rents, &c., and to dispose of them in a specified way. In regard to the corpus of the estate, " the lands, houses and gardens " belonging to the testator at death " they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses "

It has been argued that the intention of the testator was to create a *fidei commissum*. That may be so, but the question to be answered is not so much what he intended as what is the meaning of the words he used. For his intention must be sought in his words and not be founded upon speculation.

What then is the meaning of the will? Does it create a *fidei commissum*? Was there a devise of property to fiduciary heirs for the benefit of *fidei commissarii*? Was there provision made in the will in regard to the time when the property was to vest absolutely in *fidei commissarii*? Are they designated in the will?

It would appear at once that, although there is a devise to certain named persons (the wife, the children and the father of the testator) of property for the ultimate benefit of certain other persons (" the grandchildren of my children and the grandchildren of my heirs and heiresses"), the former were not given the status under Roman-Dutch law of fiduciary heirs. They were not entitled to the beneficial interest in the property devised to them. On the contrary they were required to invest the rents and profits in immovable property, not for their own benefit, but for the benefit of " their children and grandchildren as hereinbefore stated ", and in return they were allowed to retain only so much of the rents and profits as was necessary for the maintenance of themselves and their families. In other words, their status was that of trustees with a limited interest in the income from the property. I do not intend it to be understood that, in my opinion, the testator created a valid trust. Far from it. Even if all the elements of a trust could be gathered from the terms of the will, it would infringe the rule against perpetuities. But it does appear that the intention of the testator, so far as it can be ascertained from his language. was to confer on the devisees not the character of fiduciary heirs but of trustees.

Under the Roman-Dutch law the dominium as well as the beneficial interest were united in the fiduciary and passed usually at death, to the

fidei commissarii. The interests of the fiduciary, legal and beneficial, and those of the *fidei commissarii* were *successive*. The idea of the separation of the legal and beneficial interests, the legal from the equitable estate—as in English law where the former is in the trustee and the latter is in the *cestuique* trust—had not been evolved.

It was, to my mind, precisely in conformity with this idea and not in conformity with the Roman-Dutch law conception of the position of a fiduciary that the will was drafted The devisees were to " take " the property, collect the rents, &c., and invest them; in return they were entitled to their living expenses. They were given the dominium but not the beneficial interest.

The concluding portion of the will is as follows:—" 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 . . . .". If the devisees were fiduciary heirs with the legal right to all the income from the property devised to them, the executors could not ask for an accounting. Is it not clear that while the testator hoped there would be no litigation over his will, he was placing the devisees on their honour, not as fiduciary heirs entitled to the whole of the income derived from immovable property in which they had a beneficial interest, but as trustees the terms of whose trust he had laid down- It appears to me that when the testator said that the devisees were to hold their " shares " in trust, he meant exactly what he said, namely, as trustees.

This view of the matter has been met by the suggestion—it is, I say, with respect, a very drastic suggestion—that that portion of the will which deprived the devisees of their enjoyment of the " fruits of possession " should be disregarded as being of no effect in law.

There is no doubt that if a *fidei commissum* is *assumed*, then the only way of dealing with a clause which deprives the fiduciary heirs of their beneficial interest, which is repugnant to the Roman-Dutch law conception of the position and rights of a fiduciary, would be to ignore it. But, by doing this, one would not be construing the will of the testator. One would be constructing a will for him out of a part and not out of the whole of what he said. Surely the will must be examined in its entirety, not in disregard of a most important provision, but in the light of it.

The assumption that the testator intended to create a *fidei commissum* is based mainly upon the prohibition against alienation. But this is far from being conclusive. A prohibition may be imposed in a will when a trust is contemplated. It is true that it is unnecessary to do so, but it is equally unnecessary in the case of a *fidei commissum*.

But even if the assumption is made, are all the elements of a *fidei commissum* set out in the will ? As we are dealing with the " share " of immovable property " taken " by Abdul Hamid, one of the children of the testator, I would confine myself to his case. Who are the *fidei commissarii* who, according to the intention of the testator, were to succeed ultimately to the " share " taken by him ? Are they " the grandchildren of *my* children ", that is to say *all* the great grandchildren of the testator, or only the great grandchildren of the testator who are the grandchildren of Abdul Hamid ? The answer to this question, it is argued, would depend upon whether the testator intended to create

a *fidei commissum* in respect of all the shares of property " taken " by all the children or a separate *fidei commissum* in respect of each " share taken " by each child. But is there any indication in the will of what the testator intended ?

When was the " share " of Abdul Hamid to devolve on the *fidei commissarii* whoever they might be ? It is argued that it would take place when his " heir or heirs " died. But this again is merely an assumption. There are no words, such as for instance "from generation to generation" on which such a conclusion could be based. One could as easily, or just as arbitrarily, assume that the attainment of majority by the *fidei commissarii* was the time the testator had in mind.

Finally who are Abdul Hamid's heirs ? If the testator intended to create several *fidei commissa*, that is to say a separate *fidei commissum* in respect of each " share " taken by each of his children, the heirs of Abdul Hamid would be his children and his heirs other than his children, *e.g.*, his wife. His heirs would not include his brothers and sisters. If, on the other hand, the testator intended to create a joint *fidei commissum* in respect of all the property taken by all his children, the fiduciary heirs or the heirs of Abdul Hamid in respect of the " share " taken by him would include his brothers and sisters. Can it confidently be said what he intended ?

In previous appeals in which the same will has been construed (*37 N. L. R. 70, 15 C. L. W. 115, 41 N. L. R. 225*) the words corresponding to " they or their heir or heirs " are " they or their *issue* or heirs ". I am told that the testamentary case in which the original will was included is missing. If the word " heir " should be " issue ", as is probably the case, a further difficulty must be faced. I shall illustrate what I have in mind by reference to a previous judgment of this Court.

In *37 N. L. R. 70* Akbar J. deduced from the prohibition that " the dominium vested (he took the case of a single devisee) in the devisee and then in his issue *or* heirs ". But in another passage he held that " after the devisee's death the property was to pass to his issue *and* heirs ". Can it be said what the testator intended ? Did he intend, as Akbar J. put it, that the dominium in respect of the shares, "taken" by his children, should pass to his children and in the event of his children having no issue to their heirs, in other words to issue *or* heirs; or did he intend that the dominium should pass from his children to his children's issue *and* their heirs ? Whether the testator intended, if he intended to create *fidei commissa* at all, that the second set of fiduciaries should be " issue *or* heirs " or " issue *and* heirs ", he would make provision for non-alienation by heirs. It does not follow from the prohibition that the testator intended (*a*) that the heirs should share the dominium with the issue or alternatively (*b*) that the heirs should take the dominium only in the absence of issue. Either is possible, but neither has been provided for expressly or by necessary implication.

The conclusions at which I have arrived are—

(1) It is impossible to hold from the language of the will that the testator intended to create a *fidei commissum*.

(2) If he did, he failed to achieve his object. The requisites of a valid *fidei commissum* have not been satisfactorily set out.

(3) The wording of the will, and the effect of its provisions, strongly suggest an attempt to create a trust.

(4) In this attempt, if it was consciously made, the testator failed.

Applying these conclusions to the facts of the case Abdul Hamid took his share absolutely. That share has legally passed to the plaintiffs and they are, therefore, entitled to the decree for which they prayed. I would allow the appeal. The plaintiffs' costs in the trial Court and here are payable by agreement by the 5th and 6th defendants only.

KEUNEMAN J.—

I do not think it is necessary to set out the facts of the case, which are fully set out in other judgments. I am also of opinion that we must act on the footing that Abdul Hameed, the son of the testator, though not specifically named in the will, was bound by the terms of the will P 1. Not only was this the agreed basis at the argument before us, but further it is clear that deed P 2, by which Abdul Hamid derived title, specifically imposed on him the terms of the will.

The principal matter we have to decide is the interpretation of the terms of the will. There have been considerable differences in previous decisions as to the meaning of its language. It must be admitted that the draftsman of the will had a very imperfect mastery of the English language, and in several instances disregarded the rules of grammar. In fact, when I first read the will, it reminded me very strongly of a jigsaw puzzle, with the pieces confused and disarranged, but as I examined the pieces and began to arrange them a distinct pattern emerged, which I think indicated with sufficient clearness the intention of the testator. I can best show how I arrived at this intention, by examining the various sections of the will separately, and by considering how they fitted in to the picture I arrived at finally. The italics in each section into which I have divided the terms of the will are my own.

The first material section of the will runs as follows:—

A.—" I do hereby will and desire that my wife . . . . (named) and my children . . . . (named) and my father . . . . (named) who are the lawful heirs and heiresses of my estate, *shall be entitled to and take their respective shares* according to my religion and Shafei sect to which I belong . . . . ".

(1) I think this section is of considerable importance. When we examine section H later, we shall see that the testator was dealing with both "movable and immovable properties ". In view of the fact that the conditions in the will are only imposed in respect of the immovable property, it is clear that the testator was giving to his " heirs and heiresses " absolute *dominium* in respect of the movable property. This throws a strong light on the intention of the testator with regard to the immovable property also. In that case also I am inclined to think that the testator granted to the " heirs and heiresses " *plenum dominium*, which however was subject to the conditions later set out.

(2) It may be noted that as the testator was a Muslim, his wife and his father as well as his children would be among his " heirs and heiresses ".

B.— . . . . " but *they* nor *their heir or heirs* shall not sell, mortgage or alienate *any of the lands, houses, estates or gardens* . . . ".

(1) The word " they " in this context clearly refers to the " heirs and heiresses " of the testator: for the purposes of convenience I shall hereafter refer to them as the devisees.

(2) It is clear that the prohibition against alienation only applies to the immovable property, and that the movable property is not affected by the prohibition.

(3) There is no indication in the whole will that the transfer of dominium must take place in the case of an alienation. This particular clause may therefore be regarded as nugatory, in the sense that there was to be no transfer of *dominium* on alienation.

(4) The reference to the " heir or heirs " of the devisees is of importance. I think this indicates that the "heir or heirs" of the devisees were expected by the testator to have an interest in the land. If the devisees, as I think, were to have *plenum dominium*, their " heir or heirs " were also intended to have the same.

(5) In the will P 1 the phrase used is " heir or heirs ". In Abdul Hamid's deed P 2 the words used are " issues or heirs ". I shall show later that section F throws some light on what is meant by the term " heir or heirs ".

(6) The clause prohibiting alienation is very commonly found in Ceylon in the case where a *fidei commissum* is created. but it need not necessarily be restricted to a *fidei commissum*.

C.— . . . . " and *they* shall be held in *trust* for the grandchildren of my children and the grandchildren of my heirs and heiresses ".

(1) The word "they" in this context clearly refers to the immovable property.

(2) I think this section indicates a paramount intention to benefit the grandchildren of the devisees, but in itself it is not sufficiently clear as to when and how they are to be benefited.

(3) At first sight the use of the word "trust" may appear to indicate a trust as understood in England, but on the contrary I think it has been made abundantly clear that the word " trust " is frequently used to describe what the Roman-Dutch law regards as a *fidei commissum*. I do not think we are entitled to draw any inference from the mere use of the word " trust ".

D.—" . . . . only that *they* may receive the rents, income and produce of the lands . . . . without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities . . . . ".

(1) There has been a notable difference of judicial opinion as to the meaning of the word " they ". After considering the clause itself in its context, and the previous opinions expressed, I have come to the conclusion that the word " they " means the devisees. It is to be noted that the word "they" has occurred twice previously. In section B

"they" relates to persons and clearly means the devisees. In section C "they" relates to things and means the immovable property. In this section "they" again refers to persons and I think it is used in the same sense as in section B. Of course if the word "they" is to be given a strict grammatical construction, it would refer back to the immediately antecedent phrases " grandchildren of my children " and " grandchildron of my heirs or heiresses ", but I think that without any excessive violence to grammar it may be referred back, not to the word " grandchildren ", but to the words "children" and "heirs and heiresses" *i.e.*, to the devisees themselves, or even referred further back to section A which sets out the devisees.

(2) I think this construction is the most reasonable, because otherwise (see section E) the condition with regard to accumulations would not apply to the devisees or their children. but would only become operative in the third generation, *i.e.*, in the case of the grandchildren of the devisees. I think the interpretation I have given of the word " they " is the most reasonable.

(3) In fact all Counsel, including appallants' Counsel eventually, gave this interpretation to the word " they ".

(4) I incline to the opinion that this section is a mere amplification of the conditions including the prohibition against alienation, imposed on the devisees.

(5) This amplification does not apply to the " heir or heirs " of the devisees but only to the devisees themselves.

(6) I may emphasize the fact that the devisees are entitled to receive the rents, income and produce of the lands. I think this is a further argument in favour of the view that the devisees were to have *plenum dominium*.

> E.— ". . .. and out of such income . . . . 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 ".

(1) Clearly a wish as to accumulation is superimposed on the devisees. Such a wish, as far as I know, has not been connected with a *fidei commissum* in Ceylon, and is very reminiscent of English law, but

(2) At the same time we have already seen that the devisees were to "be entitled to and take" their shares (see section A) and to receive the income (see section D). Under the present section they were entitled to take for their own use out of the income sufficient for their "subsistence" and for the "maintenance of their families ". Certainly the devisees were not to be bare trustees. I think that on a construction of the whole will, the devisees were given *plenum dominium*, subject to a wish expressed as to a restriction on the use of the income and as to the accumulation of the balance or surplus.

(3) The use of the words "subsistence" and "maintenance of families" appears to suggest that the interest of the devisees is restricted to their *lives*. I think there is some indication here that the interest of the devisees was to continue only during their lives.

F.—". . . . and out of such surplus lands should be purchased *for the benefit and use of their children and grandchildren as hereinbefore stated* . . . . ".

(1) I think the key to this section is the phrase " as hereinbefore stated . . . . ". This is a clear reference back to the earlier sections (see A. B. C.). The persons to be benefited are not only the grandchildren but also the children of the devisees. This is the first specific reference to the children of the devisees, and I think this throws a light on the words " heir or heirs " in section B. I am of opinion that by the phrase " heir or heirs " of the devisees was meant that special class of heirs, viz., the children of the devisees.

(2) I think the will shows an intention to benefit three classes of beneficiaries, the devisees, their children, and their grandchildren. There is a sufficient indication in the will that each class should hold their interest for life, and that successive interests should arise on death.

G.—" . . . . 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 circumstance, except at times of *their* minority or lunacy . . . . ".

(1) The testator appointed as his executors his younger brother and one of his sons.

(2) The words " receive them " are not very clear. I think in the context they probably mean "receive the income ".

(3) The word " their " I think refers to the devisees.

(4) The testator's wish as to accumulation and purchase of new properties was only imposed on the honour of the devisees. Neither the executors nor any Court could call them to account or claim the surplus income. This perhaps fortifies the view that *plenum dominium* was vested in the devisees.

(5) The only special case contemplated by the testator was the minority or lunacy of any of the devisees. In that case the executors or the court could claim the income and apply it according to the wishes of the testator. This seems to be a reasonable exception.

H.—" . . . . I further desire and request that after my death the heirs or heiresses or the major part of them shall appoint along with the executors . . . . three competent and respectable persons . . . . and get *the movable and immovable property* of my estate *divided* and *apportioned* to *each* of the heirs and heiresses . . . . *and get deeds executed* . . . *in the name of each of them* subject to the aforesaid conditions ".

(1) It is clear, as already pointed out under A, that the testator was dealing with movable as well as immovable property.

(2) It is clear that the testator intended to create not one *fidei commissum* but a number of *fidei commissa* affecting each of the devisees with the appropriate conditions made applicable to each.

In substance then I hold that the testator devised the immovable property to the devisees, burdened with a *fidei commissum* in favour of

their children and grandchildren in successive generations. The *fidei commissum* was to become operative on death in each case. The devisees were requested to apply the surplus, after they had provided for " their subsistence " and " maintenance of their families ", to the purchase of immovable property subject to similar conditions, but this wish was not enforceable by any person or in any Court, except where the devisees were minors or lunatics. As the will was executed before the Entail and Settlement Ordinance of 1876, the *fidei commissum* is operative to the full extent to which it has been imposed.

I have endeavoured in this analysis to ascertain the intention of the testator, so far as it can be obtained from the will. I am well aware of the difficulties which arise as to the construction of the will, but in my opinion the intention of the testator to create a *fidei commissum* has been expressed with sufficient clearness. On this point I may cite a dictum from a recent judgment of the Privy Council (*Noordeen v. Badurdeen and Others*, Privy Council Appeal No. 2 of 1942)—

> " Difficulty of construction alone would not prevent the creation of a *fidei commissum*. To bring about that result doubt is required, either as to whether such a condition has been created or who are the recipients of the bounty."

In the present case, I do not have a doubt as to these two points. But even if my conclusion, in construing the will, that the children of the devisees were to be beneficiaries, is inaccurate, there can, I think, be no doubt that the grandchildren of the devisees were to be the recipients of the bounty. I have set out my reasons for holding that the devisees themselves were only to be fiduciaries, and that the property in the estate was to pass over to the beneficiaries on the death of the devisees.

I have considered the alternative suggestion that what was intended was a trust as known in England. I think it has been made clear in the course of the argument that at the date of this will (December, 1872) the law of trusts had been recognized in this Colony, and accepted as part of our law, though the extent of this acceptance may remain a matter for inquiry. The term " trust " is actually mentioned in the will, as well as the words " for the benefit and use ". But as I have pointed out, this phraseology is inconclusive.

I have shown earlier that the interest given to the devisees more closely resembled the interest of a *fiduciary* as known to the Roman-Dutch law than the interest of a ***trustee*** as known in England. I have also been satisfied, on the language of the will, that the interests were successive rather than concurrent. There is the further point that this interpretation that the will created a trust is put forward merely to defeat the intention of the testator, because it is urged that the will offends against the rule against perpetuities, and it is argued that the rule against perpetuities has also been introduced into Ceylon. In the result I am not disposed to accept the argument that the will created a trust, as known in England.

The effect of my finding is that the interest of Abdul Hameed ceased on his death, and that the plaintiffs who are purchasers from Abdul Hamid had no title to the premises at the date of their plaint.

The appeal is dismissed with costs.

WIJEYEWARDENE J.—

One Isubu Lebbe Idroos Lebbe Marikkar, who was the original owner of the property in dispute and several other properties, died in 1876, leaving a last will P 1 dated December 12, 1872. That last will was duly proved in Testamentary Case No. 3,909 of the District Court of Colombo and probate was issued to the sole surviving executor named in the will.

In accordance with the directions given in that last will, the executor allotted the property in dispute to Abdul Hamid, a son of the testator, and by deed P 2 of February 19, 1878, conveyed the same to him subject to the terms and conditions set out in the last will. Abdul Hamid mortgaged the property with Peter de Saram by bond P 3 of May 15, 1931. That bond was put in suit and the property was sold in satisfaction of the hypothecary decree entered in the mortgage action and was purchased by the plaintiffs-appellants, as executors of the last will of the mortgagee. The conveyance issued in favour of the plaintiffs is P 7 of July 7, 1938.

The defendants-respondents, who are some of the children of Abdul Hamid, who is now dead, dispute the title of the plaintiffs-appellants, on the ground that P 1 created a *fidei commissum* and that Abdul Hamid could have mortgaged only his fiduciary interest by bond P 3.

The plaintiffs-appellants have preferred the present appeal from the judgment of the District Judge dismissing their action.

The contention for the appellants was that the testator intended to create by P 1 and did in fact create, a trust, as known to the English law, in favour of the grandchildren of his children and grandchildren of his " heirs and heiresses " and remoter descendants, but that the trust was void, as it offended the rule against perpetuities. Briefly, the Counsel for the appellants adopted the view expressed in *Ramanathan v. Saleem* [1]. The respondents contended, on the other hand, that the last will created a *fidei commissum*.

I give below the relevant clauses in the copy of the last will produced in the case. (I have divided the first clause into a number of paragraphs in order to facilitate reference to them in the course of my judgment.)

Clause 1.

(*a*) I do hereby will and desire that my wife Assena Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Abdul Ryhiman, Mohamadoe Usubu, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usubu Lebbe 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—to which I belong,

(*b*) but they nor their heir 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,

(*c*) and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only.

[1] *(1940) 42 N. L. R. 80.*

(*d*) that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities,

(*e*) and out of such income, produce and rents after defraying expense for their subsistence, and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party,

(*f*) and out of such surplus lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated,

(*g*) 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 times of their minority or lunacy.

Clause 2.

I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along 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 apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions.

I may add that, in the copies of the last will produced in the earlier cases where the same will has been construed, the words " issue or heirs " occur in place of " heir or heirs " in paragraph (*b*) of clause 1. The same words " issue or heirs " occur in the executor's conveyance P 2..

It is also desirable to observe at this stage that Abdul Hamid in whose favour P 2 was executed was not a child of the testator mentioned in the last will P 1. It was stated at the argument before us that Abdul Hamid was a child of the testator born after the execution of P 1, and it was agreed by the appellants and the respondents that the argument before us should proceed on the footing that the last will applied to Abdul Hamid as if he were, in fact, on of the children of the testator named in the will.

As the last will P 1 was executed before the Entail and Settlement Ordinance, 1876 (Legislative Enactments Vol. 2, Chap. 54), came into operation, the question whether P 1 created a *fidei commissum* has to be determined according to the principles of Roman-Dutch law and independently of the provisions of that Ordinance.

According to the Roman-Dutch law authorities, no particular words are necessary for the creation of a *fidei commissum*, if it can be collected from any expressions in the instrument that it was the testator's intention to create it. (1838) 2 Burge 106. It is not, therefore, of much significance that the word *fidei commissum* is not mentioned in the last will P. 1. 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 (*Censura Forensis 1,3,7,7,8.*). On the other hand, there is the well known rule that in case of doubt the presumption is in favour of direct rather than of *fidei commissary* substitution (Voet 36.1.1.). It should, however, be remembered as pointed out in a South African case (referred to at page 11 of Mc Gregor's translation of Voet's Commentaries on *Fidei Commissa*) that " doubt must not be confounded with difficulty ". With regard to the proposition that *fidei commissa* are " odious ", Voet states.

> " It is commonly laid down that *fidei commissa* are odious in respect of the person burdened, and are strictly interpreted and must not be extended from person to person nor from one case to another: and this contention must be allowed if circumstances do not point in another direction, as has been made clear in the different cases we have already examined, especially since the testator's wishes ought to be regarded and observed above everything else, and consequently those general rules about the interpretation of *fidei commissa* often have a certain use but often are fallacious." (*Voet 36.1.72.*)

Discussing these principles Wendt J. said in *Ibanu Agen v. Abeyasekera*[1].

> " Where the intention to substitute another (or *fidei commissary*) for the first taker (or fiduciary) is expressed or is to be gathered by necessary implication from the language of the will, a *fidei commissum* is constituted. Where these requisites appear it matters not that the language employed is open to criticism."

This view was adopted and acted upon in *Wijetunga v. Wijetunga* [2] and *Mirando v. Coudert* [3]. In the latter case of *Mirando v. Coudert* Shaw J. said—

> " I agree with the opinion expressed by Pereira J. in *Wijetunga v. Wijetunga* (*supra*) that if the intention of a donor or testator to create a *fidei commissum* is clear, as it appears to me to be in the present case, and the words used by the donor or testator can be given an interpretation that supports that intention, one should not embark on a voyage of discovery in search of a possible interpretation that defeats that intention."

The principles set out in these cases should be followed more readily in construing a last will.

Keeping these principles in view I proceed to consider clause 1 of the will in detail.

Paragraph (*a*) indicates that the testator devised his movable and immovable property to his father, wife and children whom he called his " lawful heirs and heiresses ". I would refer to them in my judgment as immediate devisees. Paragraph (*b*) shows that those immediate devisees or their " heir or heirs " do not have the right of alienation in respect of the immovable property, and that, therefore, they do not get the immovable property absolutely. Paragraph (*c*) indicates that the ultimate beneficiaries under the will are the grandchildren of his immediate devisees. Paragraph (*d*) states that " they " (namely, the immediate devisees) may enjoy the income of the property.

[1] *(1903) 6 N. L. R. 344.* [2] *(1912) 15 N. L. R. 493.*
[3] *(1916) 19 N. L. R. 90.*

This clause does not provide for the " heir or heirs " of the immediate devisees enjoying the income. This is probably due to a clerical error, but " the bequest with respect to a *fidei commissum* remains of force notwithstanding a clerical error and although the *fidei commissary* clause be inadequately worded ". (De Bruyn's Opinions of Grotius page 284 Section 1.) Apart from that, paragraph (*d*) is not a necessary paragraph. The property is given absolutely by paragraph (*a*) and the immediate devisees and their " heir or heirs " are prohibited by paragraph (*b*) from alienating the property. It must follow as a necessary consequence from paragraphs (*a*) and (*b*) that the immediate devisees and their " heir or heirs " would have the right of enjoying the income. The omission, therefore, to mention the " heir or heirs " of the immediate devisees in paragraph (*d*) does not create any difficulty with regard to the interpretation of the will. Paragraph (*e*) along with paragraphs (*f*) and (*g*) refer to the fund which the testator wanted to be established by the immediate devisees for the purchase of the properties by them.

Paragraph (*f*) shows that the properties to be purchased with the aid of the fund were to be held for the benefit of " the children and grandchildren as hereinbefore stated ", *i.e.*, the children and grandchildren of the immediate devisees. This indicates—as has been made clear by paragraphs (*b*) and (*c*)—that between the " immediate devisees " mentioned in paragraph (*a*) and the ultimate beneficiaries—the grandchildren mentioned in clause (*c*), there was an intervening group. Even if there is no such intervening group that would not invalidate the *fidei commissum*.

Paragraph (*g*) refers to the minority or lunacy of the immediate devisees.

It will thus be seen that the last will gives the *plena proprietas* to the immediate devisees by paragraph (*a*), then prohibits them from alienating the properties by paragraph (*b*) and imposes a burden by paragraphs (*b*) and (*c*) in favour of their " heir or heirs " and grandchildren, the grandchildren being the ultimate beneficiaries. Paragraph (*d*) is merely explanatory of the joint effect of the earlier paragraphs. Those paragraphs (*a*), (*b*), (*c*) and (*d*) create a valid *fidei commissum*. There is nothing in the paragraphs (*e*), (*f*) and (*g*) to prevent a Court from holding in favour of a *fidei commissum*. It was argued for the appellants that these paragraphs deprived the immediate devisees of a part of their beneficial interests by directing them to form a fund out of a portion of their income. I do not think that any legal effect can be given to these paragraphs as the immediate devisees cannot be asked to account for the surplus which, it was desired, they should contribute to that fund. Moreover, even if the immediate devisees are deprived of a part of the beneficial interest, I do not see how that fact invalidates the *fidei commissum* created by the earlier paragraphs.

It was argued in favour of the appellants that the words " shall be held in trust " in paragraph (*c*) of clause 1, indicated an intention on the part of the testator to create a trust. But there are many instances in the text books on Roman-Dutch law and in the decisions of this Court where

the words " trust " and " *fidei commissa* " have been used as interchangeable terms. (*Henry's Translation of Vander Linden p. 113; Walter Pereira's Laws of Ceylon, 1913 Edition, page 451; Tillekeratne v. Abeyesekere* [1] and *Jobsz v. Jobsz* [2]).

There is no doubt whatever that the testator, a Muslim, who engaged a Sinhalese Notary to prepare this will in English, did not intend to give the property absolutely to the immediate devisees but subject to certain limitations. I do not think there is anything in the language used in the will which compels us to say that the testator has failed to express this intention with sufficient clearness. According to my reading of the last will, the testator has imposed a burden on the property and has indicated the persons in whose favour the burden was imposed. I do not think that the testator or the Notary intended to create a trust. It is no doubt true that there are old decisions of this Court which have been decided according to the principles applicable under the English Law of Trusts. I believe, however, that most of the decisions dealt with implied or resulting trusts. We have to consider here an express trust and even at the present day most Notaries and their Ceylonese clients are, I believe, more conversant with the notions of a *fidei commissum* than of a trust in spite of the introduction of the law of trusts by Ordinance No. 9 of 1917. In these circumstances, I do not think I should lightly impute to the testator an intention to create an English Trust and not a *fidei commissum* and then proceed to defeat his clear and definite intention to give a limited right to his immediate devisees by having recourse to the rule against perpetuities.

It has also been argued that conflicting views have been taken as to the nature and the incidence of the *fidei commissum* in the earlier decisions of this Court when this last will came up for consideration and those conflicting views indicated the uncertainty of the language used in the will and, therefore, the Court should decide in favour of an unburdened disposition. I shall now consider the earlier decisions briefly.

Sabapathy v. Mohamed Yoosoof [3] was the earliest decision. In that case the plaintiff brought a mortgage action on a bond executed by a daughter of Amsa Natchia—one of the immediate devisees—after the death of Amsa Natchia in respect of a property that came to Amsa Natchia under the last will and a deed given by the executor. The plaintiff made the tenth to sixteenth defendants parties to the action and sought to obtain a hypothecary decree binding on them. Those defendants who were the grandchildren of Amsa Natchia pleaded that they should be discharged from the action and that no hypothecary decree should be entered against them. All that the Court had to decide in that case was whether those defendants had an interest in the property by virtue of a *fidei commissum* created by the last will. Both the judges in that case held that there was a *fidei commissum* in favour of the grandchildren of Amsa Natchia. I do not think that this justifies the suggestion that they meant to hold that the " issue or heirs " of Amsa Natchia were not entitled to the property under the *fidei commissum*. They were concerned only with the rights of the tenth to the sixteenth defendants who were the

[1] *(1894) 3 Supreme Court Reports 76 at p. 80.* [2] *(1907) 3 Appeal Courts Reports 139.*

[3] *(1935) 37 N. L. R. 70.*

grandchildren of Amsa Natchia and they held and, if I may say so, held rightly that the *fidei commissum* was in favour of the grandchildren, who, according to my reading of the will, would be, in fact, the ultimate *fidei commissaries*.

The further question as to the event, on the happening of which the property would pass from a fiduciary heir to a *fidei commissary* heir, need not have been considered in that case and that does not appear to have been argued, if one may judge from the reported arguments of Counsel. One of the judges did not refer to this matter in his judgment. The other judge dealt with this matter and stated in one part of his judgment that " after the devisee's death the property was to pass to his heirs " and again that the vesting will take place " on the death of the last of the children of the devisee. " He then proceeded to consider the question of separate *fidei commissa* and made a statement which I find difficult to reconcile with his previous statement He said that the violation of the condition against alienation " would have the effect of vesting the title in the *fidei commissaries* ." (See pages 81, 82, 83.)

The next case *Saleem v. Muthuramen* [1] appears to have been an action by a grandchild of Amsa Natchia against a purchaser of a property governed by the terms of the last will and sold in satisfaction of a mortgage decree entered against Aysha Umma, a daughter of Amsa Natchia. It was held in that case that the last will created a *fidei commissum* and that the property devolved on the *fidei commissary* heirs on the death of the fiduciary heir. I do not think that the judges in that case were called upon to consider the rights of the " issue or heirs " of Amsa Natchia in respect of the property. If Aysha Umma was dead at the date of the action, it was not necessary for the Court to consider those rights, as, in that case, the defendant would have had no title under his purchase whether or no Aysha Umma acquired an interest in the property as an " issue or heir " of Amsa Natchia.

In *Sinnan Chettiar v. Mohideen and others*[2] a child of Majida Umma, a daughter of Amsa Natchia, claimed a property which had devolved on Amsa Natchia under the last will, as against a purchaser from Majida Umma. It was held in that case that there was a *fidei commissum*, that Majida Umma acquired an interest in the property on the death of Amsa Natchia and that that interest would devolve at her death on her children including the plaintiff.

I am unable to agree that the different views expressed in these decisions all of which agreed in holding in favour of a *fidei commissum* should compel us to a conclusion against the existence of a *fidei commissum* on the ground that the language of the last will leaves us in doubt whether a *fidei commissum* has been created. It has to be admitted that the will presents some difficulties, but I do not think these difficulties afford sufficient ground for saying that the language employed in the last will is so involved in doubt that a Court is compelled to hold that the testator has failed to create a valid *fidei commissum*.

Now I shall deal more specifically with the title to the property conveyed to Abdul Hamid by P 2. By the execution of P 2 in pursuance

[1] *(1938) 15 C. L. W. 115.*

[2] *(1939) 41 N. L. R. 225.*

of clause 2 of the last will, a separate *fidei commissum* was created in respect of that property. (See also *Vansanden v. Mack*[1] with regard to the effect of family arrangements.) In fact, both the appellants and the respondents presented the case on the footing that there was a separate disposition of property in favour of Abdul Hamid. According to the copy of the last will produced in this case, Abdul Hamid got his property subject to the condition that he and his "heirs" should not alienate the property, but hold it in trust for the grandchildren of Abdul Hamid. The fact that the "heirs" of Abdul Hamid have been prohibited from alienating the property show that these "heirs" were to get the property after Abdul Hamid, as there would be no sense in prohibiting an alienation by people who were to get no interest in the property. These "heirs" would be the children of Abdul Hamid. Though in a number of cases (*c.g., Samaradiwakara v. de Saram*[2]) it has been held that the word "heirs" in the wills construed in those cases meant the heirs *ab intestato*, I think that the clauses of the last will under discussion indicate that the testator had used the word to refer to children only. The property would pass from Abdul Hamid to those "heirs" at his death, for, where a testator creates a *fidei commissum* in favour of his sons and their heirs, the heirs are not to be regarded as being called to the inheritance along with the sons, but they will succeed in the same order as is observed in intestate succession. (*Censura Forensis 1, 3, 7, 19,* and *Raymond v. Sanmugam*[3]). The grandchildren of Abdul Hamid for whom the property is "to be held in trust" are the ultimate *fidei commissaries*. The question whether these ultimate *fidei commissaries* will have to wait till the death of all the "heirs" of Abdul Hamid or will become entitled to the share of that "heir" through whom they claim on the death of such heir depends on the question whether the property went to the "heirs" as a joint *fidei commissum* or as separate *fidei commissa*. This is a question that arises in most cases where the devolution of property burdened with a *fidei commissum* has to be considered. The fact that such a question arises and has to be considered does not throw any doubt on the existence of a valid *fidei commissum* as the appellants' Counsel attempted to argue. Suppose a testator says "I devise my immovable property to my two sons A and B under the bond of *fidei commissum* subject to the condition that on their death the property should go to the sons of A and B." There can be no doubt whatever in such a case that a valid *fidei commissum* has been created and yet a question may be raised when A and B enter upon the inheritance on the death of the testator and then A dies leaving a son C. Does C succeed to the half share of A on his death or does that half share go by accrual to B and has C to wait till the death of B? Such questions have been raised and decided in our Courts and by the Privy Council in cases where a valid *fidei commissum* has been admittedly created. (See *Tillekeratne v. Abeyesekere*[4] and *Perera v. de Silva*[5]. I am of opinion that, in the present case, the property was held as separate *fidei commissa* by the "heirs" of Abdul Hamid, each heir getting the share to which he was entitled under the rules of the Muslim Law of intestate succession. Any difference

[1] *(1895) 1 N. L. R. 311.*
[2] *(1911) 14 N. L. R. 321.*
[3] *(1894) 3 Supreme Court Reports 52.*
[4] *(1897) 2 N. L. R. 313.*
[5] *(1913) 3 Court of Appeal Cases 1.*

of opinion on this question as to the right of accrual cannot involve in doubt the intention of the testator to create a valid *fidei commissum*. There is one other matter which was referred to in the course of the argument before us. Even if it be the correct view that, according to the last will, the property would go from Abdul Hamid to the grandchildren without passing through the hands of Abdul Hamid's "heirs"—and this was said to be the view taken in *Saleem v. Muthuramen Chettiar (supra)*—that does not invalidate the *fidei commissum*. In that case, if Abdul Hamid died without leaving grandchildren, the *fidei commissum* would have lapsed and the property would have become part of the estate of Abdul Hamid, but such a contingency has no bearing on the consideration of the question whether a valid *fidei commissum* was, in fact, created.

I may add that I do not agree with the view expressed by one of the judges in *Sabapathy v. Mohamed Yoosoof* (*supra*) that the event on the happening of which the property vested in the *fidei commissaries* was the alienation of the property by the fiduciary heirs contrary to the terms of the will (see *Walter Pereira's Laws of Ceylon, 1913 Edition, pages 431, 432*).

I am of opinion, therefore, that the plaintiffs, appellants, have no title to the property, as Abdul Hamid is dead and has left children, and that their action must fail.

I would dismiss the appeal with costs.

Appeal allowed.