Present : Schneider and Garvin JJ.

1923.

BOTEJU *et al. v.* FERNANDO *et al.*

227—D. C. Negombo, 15,153.

Fidei commissum—*Gift—Prohibition against alienation—After death of donee land to pass to donee's heirs, executors, administrators, and assigns—Class to be benefited.*

A deed of gift provided as follows:—

"It is hereby ordained that when F takes possession of the said share, he shall not sell, mortgage, donate, &c., and if he does any such act, the same shall be void. Nevertheless, if it is found necessary for him to sell only the said share of the house, we do hereby give him the right to sell the same to one of his brothers . . . . ."

"The right, title, and interest of us, the said donors, shall vest in the donee F to be possessed by him, subject to the life interest of us, the two donors, and after his death to be possessed by his heirs, executors, administrators, and assigns for ever, or to do whatever else they like, for which full authority is hereby assigned."

Held, that the deed did not create a *fidei commissum*.

"Where the language used indicates as clearly as it does in this case that it was a matter of no importance or concern to the donor to whom the property passed on the demise of F it is not possible to ascribe to him an intention to benefit a particular class by reading into the language used by him words which he has not used and which he probably never intended to use."

1923.

Boteju v. Fernando

E. W. Jayawardene, for appellants.

Samarawickreme, for respondents.

February 12, 1923, GARVIN J.—

The plaintiffs claim a half share of the land in dispute as the heirs of one Fidelis Boteju. They contend that by deed No. 22,720, dated April 6, 1896, the parents of Fidelis Boteju gifted this half share to him, subject to a *fidei commissum* in favour of his heirs. The District Judge held that the deed did not create such a *fidei commissum*, and from that decision the plaintiffs appeal.

The donors have gifted to Fidelis Boteju the southern half share of the land Gorakagahawatta and " the southern one-third share of the tiled house standing on the remaining northern half share, " reserving to themselves a life interest.

The deed proceeds as follows :—

" . . . . it is hereby ordained that when the said Fidelis Boteju Appuhamy takes possession of the said share of land and share of house, he shall not sell, mortgage, donate, exchange, or lease at a time for a period exceeding three years, or alienate the same in any other manner whatsoever, and if he does any such act regarding the said premises, the same shall be absolutely void. Nevertheless, if it is found necessary for him to sell only the said share of the house, we do hereby give him the right to sell the same to one of his brothers, Velantantrige Stephen Boteju Appuhamy of Kimbulapitiya aforesaid, or to one of his descendants.

" Therefore, the southern half share of the land within the said boundaries and the southern one-third share of the tiled house standing on the remaining northern half share gifted in manner aforesaid, together with all the right, title, and interest of us, the said donors, shall vest in the donee, Fiedelis Boteju Appuhamy, to be possessed by him, subject to the life interest of us, the two donors, and after his death to be possessed by his heirs, executors, administrators, and assigns for ever, or to do whatever else they like, for which full authority is hereby assigned. "

It was strongly urged that these words disclosed a clear intention on the part of the donors to create a *fidei commissum* in favour of the descendants. On the other hand, it was contended for the respondents that even assuming that the deed disclosed an intention on the part of the donors to prohibit alienation by Fidelis Boteju, there was nothing to indicate a desire on the part of the donors by such prohibition to benefit any person or any definite class of persons.

As regards the one-third share of the house the donors contemplate the possibility of its being found necessary to sell it, and expressly confer on him the right to do so to his brother or one of his descendants. They do not say that in the event of the contraventions of the prohibition, the share of the house is to vest in the brothers or any other disignated person. The words material to the determination of the question at issue are contained in the second of the two paragraphs quoted above. If plaintiffs' contention is to prevail, there must be found in this paragraph a clear indication of a definite person or class of persons to whom the property is to pass on the death of Fidelis Boteju, coupled with a prohibition against alienation by him during his life.

The words which must be relied on as indicative and descriptive of the ultimate beneficiaries are the words " his heirs, executors, administrators, and assigns, " for the deed provided that after the death of Fidelis Boteju, the property is to be possessed by " his heirs, executors, administrators, and assigns. "

Now, these words form a group well known in conveyancing and regularly used for the purpose of including every person and every class of person to whom property may pass by operation of law or by act of the person to whom the property belonged. As used in this clause, the words include every person to whom this property may pass on the death of Fidelis Boteju *ab intestato*, every person to whom he may leave it by last will, or to whom he may assign it by any other act *inter vivos*.

It is quite impossible to say whom the donor intended to benefit, or that he intended to benefit any particular class of person. It may well be as suggested by learned counsel for the respondent that the donor's principal object—in fact his only object—was to prohibit alienation by Fidelis in the endeavour to protect Fidelis from consequences which may follow the alienation of the property gifted to him, and that it was wholly immaterial to whom the property passed, so long as its enjoyment was secured to Fidelis during his lifetime.

On the supposed authority of *Wijetunga v. Wijetunga*,[1] we have been invited to read this passage as if it ran as follows :—

> After his death to be possessed by his heirs, and in default of heirs by his executors, administrators, or assigns.

The circumstances of the two cases are not exactly parallel, so that there is no need to consider whether or not the decision in *Wijetunga v. Wijetunga (supra)* should be reconsidered. I may, however, observe that in the case of *Silva v. Silva*,[2] Sir Alfred Lascelles C.J., one of the two Judges who constituted the Court before which *Wijetunga v. Wijetunga (supra)* was argued, remarked, with reference to that case, that it " is a case in which the Court

[1] *(1912) 15 N. L. R. 493.*

[2] *(1914) 18 N. L. R. 174*

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has gone the furthest in collecting from an ambiguous expression the donor's intention as to the persons to be ultimately benefited."

In *Ponusamy v. Kaithie* [1] De Sampayo J. says: "In *Wijetunga v. Wijetunga* (*supra*) this Court went as far as it is ever possible in the broad construction of the deed."

With these views I am in complete accord.

Assuming that these are cases in which it is possible to read into a clause in a deed words so pregnant with meaning, as the words "and in default of heirs," this is not such a case. The words "heirs, executors, administrators, and assigns" are, as I have observed, an expression which has a clear and definite meaning of its own. It is possible to give these words this usual meaning with context in which they occur, and gather from the whole passage an intention on the part of the donor to prohibit alienation, not for the benefit of reversionary heirs, but in the interests of the donee. The question whether or not he has given or is able to give legal effect to that intention is immaterial.

It is impossible to presume an intention to create a *fidei commissum*, unless it can fairly be gathered from the language used that the donor intended that Fidelis Boteju should only have a life estate in the property which, on his death, was to pass to a person or class of persons clearly designated.

Where the language used indicates as clearly as it does in this case that it was a matter of no importance or concern to the donor to whom the property passed on the demise of Fidelis, it is not possible to ascribe to him an intention to benefit a particular class by reading into the language used by him words which he has not used and which he probably never intended to use.

Under these circumstances there can be no justification in embarking upon a voyage of discovery to search for an intention which has not been expressed and which cannot be gathered from the language used.

In my opinion the deed does not create a valid *fidei commissum*. The appeal is accordingly dismissed, with costs.

SCHNEIDER J.—

I entirely agree with the judgment of my brother. As apposite to the argument that we should read in words which are not to be found in the deed so as to express what would appear to have been the intention of the parties to the deed, I would cite the following from *Halsbury's Laws of England, vol. X., section 769, p. 434*: "But the intention must be gathered from the written instrument (*e*). The function of the Court is to ascertain what the parties meant by the words they have used (*f*); to declare the meaning of what is written in the instrument, not of what was intended to have

[1] *1 C. W. R. 91.*

been written (*g*) ; to give effect to the intention as expressed (*h*) ; the expressed meaning being, for the purpose of interpretation, equivalent to the intention (*i*). It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention (*k*). And the ordinary rules of construction must be applied, although by so doing the real intention of the parties may in some instances be defeated. Such a course tends to establish a greater degree of certainty in the administration of the law (*l*). It is not necessary, however, for the intention to be stated in express words; if the intention is clear on the whole instrument, effect will be given to it even without such express statement (*m*)."

Appeal dismissed.