1944 *Present:* **Keuneman and Cannon JJ.**

.CADER LEBBE, Appellant, *and* THENUWARAHENAYA *et al.*, Respondents.

210—D. C. Kandy, 753.

Fidei commissum—*Deed of gift to descendants or heirs—From generation to generation—Valid* fidei commissum *for four generations.*

Where a deed of gift contained the following clause: "After my death this property the aforesaid M. R. and the said M. R's descendants or her heirs, children, grandchildren, &c., shall possess undisputedly for generations and for ever from generation to generation, but (she or they) shall not alienate the same to an outsider to my family by way of transfer, mortgage or security".

***Held*, that the deed created a valid *fidei commissum* operative for four generations.**

APPEAL from a judgment of the District Judge of Kandy.

H. V. Perera, K.C. (with him *H. W. Thambiah*), for defendant, appellant.

N. Nadarajah, K.C. (with him *N. E. Weerasooria, K.C.*, and *C. E. S. Perera*), for plaintiffs, respondents.

Cur. adv. vult.

November 21, 1944. KEUNEMAN J.—

The plaintiffs brought this action to be declared entitled to the field Naran Kumbura. They alleged that the field belonged originally to Pusumba Vidane Henaya who by deed No. 931 of March 29, 1873 (P1), gifted the same to Menu Ridee subject to a *fidei commissum* for generations, Menu Ridee died leaving her son Kuda Henaya, who himself died leaving as his heirs the plaintiffs.

The defendant *inter alia* denied that P 1 created a *fidei commissum*, and alleged that Kuda Henaya had by deed 16085 of August 8, 1921 (D 1), transferred the field in question to Kiri Ukku Ridee, who by deed 1258 of April 4, 1923 (D 2), transferred to the defendant.

As the argument turns mainly on the terms of the deed P 1, I set out the relevant terms which are as follows:—Pusumba Vidane Henaya granted this land among others "by way of gift to my granddaughter, Menu Ridee". Among the conditions imposed was this: "After my death this property the aforesaid Menu Ridee and the said Menu Ridee's descendants or her heirs, children, grandchildren, &c., shall possess undisputedly for generations and for ever from generation to generation but (she or they) shall not alienate the same to an outsider to my family by way of transfer, mortgage or security". The grantor added that "no one of my descendants" shall be entitled to raise any disputes whatsoever.

The principal argument addressed to us by Counsel for the appellant was that the use of the words "or her heirs" brought in a class of

persons quite distinct from the descendants, and that there was uncertainty as to the persons to be benefited by the *fidei commissum*. The *fidei commissum*. it was argued, accordingly failed.

Counsel for the appellant relied on the case of *Amaratunga v. Alwis*.[1] In this case in one *fidei commissum* alleged to have been created the beneficiaries were to be " the children and heirs descending from her and authorised persons such as executors, administrators and assigns ". In the other alleged *fidei commissum* the beneficiaries were to be " her heirs and authorised persons such as executors, administrators and assigns ". Soertsz J. drew attention to the use of the word " assigns " and refused to treat that phrase as surplusage or a notarial flourish and to strike out or ignore it. Soertsz J. adopted the language of Innes C.J. in *Ex parte Van Eden & others*[2] that intention must be arrived at "' 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 these 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 ". Soertsz J. held that no *fidei commissum* was created.

We have also been referred to the Full Bench case of *de Saram et al. v. Kadijar et al*[3]. This related to a complex and badly drafted will, and it is not possible in a short space to set out the full terms. It is sufficient for the purposes of this case to say that *inter alia* it was a devise to certain named " heirs and heiresses " with a prohibition against alienation imposed upon their " issue or heirs "—or as an alternative reading, " heir or heirs ". Howard C.J. comments on this phrase as well as other matters and comes to the conclusion that " there was no certainty with regard to the beneficiaries. The class is too wide for ascertainment and too vaguely described ". Soertsz J. commented on the words " heirs or heirs " which included a much wider class than " children " who were also referred to, and added that if the actual words were " issues or heirs " confusion is worse confounded, and that there was a bewildering uncertainty from the choice that appears to have been given, and that even if the word " or " was given the force of " and " there emerged an indeterminate and almost unlimited group. Hearne J. commented on the phrase " heir or heirs " more particularly with regard to the question of the time of vesting of the *fidei commissum* and drew attention to the absence of such words as " from generation to generation ". He also pointed out that on the language of the will including this phrase it could not be confidently pointed out what persons were intended.

I have only dealt with a particular phrase which had to be interpreted in the Full Bench case, and have not referred to the other difficulties in the case. For instance, one of the many questions raised there was whether the testator intended to create a *fidei commissum* or a trust. I have not referred to all these matters because they are not immediately relevant to the point to be decided in this case, and I have also referred only to the opinions of the majority of the judges. I wish with respect to

[1] *40 N. L. R. 363.*

[2] *(1905) Transvaal Reports 151.*

[3] *45 N. L. R. 265.*

adopt the language of Wendt J. in *Ibanu v. Abeysekera*[1] which Howard C.J. thought of particular interest, viz.—

> " When 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 varying circumstances, have pronounced for or against the *fidei commissum*. " Wendt J. added that " Where there is doubt, the inclination of the Court is against putting a burden upon the inheritance. "

I wish also to draw attention to the language of Lord Porter in the Privy Council decision of *Noordeen v. Badurdeen*[2] :—

> " 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. " Lord Porter had also previously stated— " There is no doubt that under that system (the Roman-Dutch law) the creation of a *fidei commissum* will not lightly be implied and requires both exact language and certainty as to the intention of the testator and as to the persons to be benefited in order to effect its creation. "

I now turn to the language of the present deed. I think Counsel for the appellant has properly drawn attention to the use of the word " heirs ". He argued that this word may be regarded as bringing into the class of beneficiaries persons who are distinct from " descendants " or " children, grandchildren, &c." The word may include for instance the spouse, and in certain circumstances either ascendants or collaterals. I do not think it is open to us to treat the words as mere surplusage or as a notarial flourish, and in my opinion we are not entitled to disregard the word or strike it out. There can be no question that the use of the word creates a difficulty, and we have to consider whether it raises a doubt as to the persons to be benefited.

In this connection I may point out that the word " heirs " would certainly include " children "—although it may also include a wider class. It is true however that in this deed both the words " heirs " and " children " occur, and it may be argued that a distinction was contemplated. In my opinion the word must be regarded in its context. Here I cannot lose sight of the fact that the word " heirs " is flanked on one side by the word " descendants " and on the other by the words " children, grandchildren, &c." Nor is this all. We have the further phrases " for generations " and " from generation to generation ". Clearly these phrases are applicable as much to the word " heirs " as to the words " children, grandchildren, &c.," and I think it follows that the word " heirs " will be read, not in its ordinary significance but as heirs " for

[1] *6 N. L. R. 344.*

[2] *45 N. L. R. 203.*

generations " and " from generation to generation ". If the matter is regarded from this point of view, I think the construction of the word " heirs " as including the spouse or ascendants or collaterals becomes artificial and unreal. The phrases I have mentioned are of great significance, and in my opinion the word " heirs " should be interpreted as descending heirs from generation to generation.

In this connection I may refer to the case of *Umietty v. Ramaiah*[1]. In this case the beneficiaries were to be " our lawful heirs " and there was a prohibition against alienation by " our said heirs or issues " and a provision that the properties should be held and possessed for ten generations under the restrictions imposed and in the form of *fidei commissum*. In this connection de Sampayo J. said—" Now the word ' generations ' itself is indicative of the fact that he (the testator) contemplated only the descendants of the devises as the beneficiaries after them. It is argued however that it only points out the period of time to which the *fidei commissum* is to extend and is not significant of the class of persons who are to take. But I think that the expression is used in this will in the natural sense and signifies degrees of kindred proceeding from the devisees in the descending line, though at the same time, being a measure of succession it also indicates the duration of the *fidei commissum*."

In the deed we have to construe I think this applies with particular force, for the words " for generations " do not stand alone but are accompanied by the words " from generation to generation ", and the argument that these words are used only to indicate the period of time for the continuance of the *fidei commissum* is not applicable. The words are, I think, meant to explain and define the preceding words to which I have referred.

In my opinion the deed in question constituted a valid *fidei commissum* in favour of the descendants of Menu Ridee for generations and from generation to generation. As the deed was executed before the Entail and Settlement Ordinance of 1876, the *fidei commissum* will be operative for four generations.

A further point was urged by Counsel for the appellant, namely, that the prohibition against alienation only extended to alienation to an " outsider to my family ", that is, to the grantor's family. He contended that by implication an alienation to a member of the grantor's family was permitted, and that Kiri Ukku Ridee, the grantee under the deed D 1, was a member of the family of Pusumba Vidane Henaya, the grantor on P 1. The basis of fact upon which this argument is grounded is not supported by the evidence. Kiri Ukku Ridee was a witness, and in examination-in-chief she stated that her father Rana Henaya was a brother of Menu Ridee, and it will be remembered that in the deed P 1 Menu Ridee is described as the granddaughter of Pusumba Vidane Henaya. But in cross-examination she stated—" My father is related to Pusumba Vidane Henaya. They are the children of cousins. There was no re-examination. It is not possible to hold that Kiri Ukku Ridee

[1] *2 C. W. R. 26.*

was a member of the family of Pusumba Vidane Henaya. It is unnecessary therefore to consider the matter of law raised by Counsel for the appellant.

In the circumstances the appeal is dismissed with costs.

CANNON J.—I agree.

Appeal dismissed.