AYSA UMMA *v.* NOORDEEN.

1902.
December 17, 19, and 22.

D. C., Colombo, 13,476.

Fidei commissum—*Intention of grantor—Construction of deed—Grant to A and B and their heirs, executors, administrators, and assigns—Insufficient designation of parties intended to be benefited.*

A M L made a deed of gift which contained the following clause:—"I, Assen Meera Lebbe, for and in consideration of the natural love and affection which I have unto my grandsons Casi Lebbe Marikar and Ahamadu Lebbe ..... have given, granted, assigned, transferred, and set over unto them, their heirs, executors, administrators, and assigns, as a gift absolute and irrevocable, all that portion of a house, &c. ..... to have and hold the said premises ..... unto the said Casi Lebbe Marikar and Ahamadu Lebbe, their heirs, executors, administrators, and assigns, and their children and grandchildren, and the children and grandchildren of their heirs and assigns shall not sell, mortgage, or encumber the said premises at any time but hold and possess the same, and the rents, produce, and income thereof shall not be held liable to be attached, seized, or sold for any of their debts, but they shall be able to give and grant the said premises or any part thereof in dowry for their female children, also subject to the aforesaid conditions and restrictions."

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

It is essential to the creation of a *fidei commissum* that the persons intended to be benefited should be sufficiently designated.

When the persons in whose interest the prohibition is made are "assigns," they may be anybody in the world.

THE plaintiffs (wife and husband) prayed for a declaration of title in favour of the first plaintiff for an undivided half of the shop No. 41, Main street, as she was the sole surviving child of Casi Lebbe Marikar, to whom and to one Ahamado Lebbe the original owner of the property in question, viz., Assen Meera Lebbe, had gifted it by deed No. 7,161 dated 4th January, 1873.

The issues settled were (1) whether or not this deed created a valid *fidei commissum* in favour of Casi Lebbe Marikar and Ahamado Lebbe and their descendants; (2) if so, to what share of the house was the first plaintiff entitled; (3) have the defendants been in possession of the first plaintiff's share since 1st October, 1899; and (4) what is the reasonable monthly value of the house.

The gift ran as follows:—

"I, Assen Meera Lebbe, for and in consideration of the natural love and affection which I have unto my grandsons Casi Lebbe Marikar and Ahamadu Lebbe.....have given, granted, assigned, transferred, and set over unto them, their heirs, executors, administrators, and assigns, as a gift absolute and irrevocable

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all that portion of a house, &c.....to have and hold the said premises.....unto the said Casi Lebbe Marikar and Ahamadu Lebbe, their heirs, executors, administrators, and assigns, and their children and grandchildren, and the children and grandchildren of their heirs and assigns shall not sell, mortgage, or encumber the said premises at any time but hold and possess the same, and the rents, produce, and income thereof shall not be held liable to be attached, seized, or sold for any of their debts, but they shall be able to give and grant the said premises or any part thereof in dowry for their female children, also subject to the aforesaid conditions and restrictions."

The Additional District Judge (Mr. F. R. Dias) held that no *fidei commissum* was created by these terms; that the deed was a gift absolute; that the first plaintiff was entitled to $\frac{28}{96}$ths of the house, and that the second and third should restore possession of the house to the first plaintiff and pay her damages at a certain rate.

The plaintiffs appealed against that part of the decree which declared the first plaintiff entitled to only $\frac{28}{96}$th share, instead of half as claimed, and to only $\frac{28}{96}$ths of the rent.

The argument took place on the 17th and 19th December, 1902.

Dornhorst (with him *Sampayo*), for appellants.—The deed manifests a clear intention on the part of the donor to create a *fidei commissum* in favour of the children and descendants of the donees. The words "executors and administrators" appearing in the deed are ignorant additions of the notary who drafted the deed. They may be deleted or ignored. The word "assigns" may mean the female descendants to whom the dowry deeds are permitted by the deed. No particular words are necessary to create a *fidei commissum*. The intention of the donor must be gathered from the whole instrument (*Vansanden v. Mack, 1 N. L. R. 311; Tillekeratne v. Abeyesekera, 2 N. L. R. 313*).

Bawa, for respondent.—A prohibition against alienation is of no force if the deed does not declare clearly in whose favour such prohibition is made (Vanderlinden's *Instituies, p. 63;* Ordinance No. 11 of 1876, section 3; *Hormusjee v. Cassim, 2 N. L. R. 190; Lushington v. Samarasinha, 2 N. L. R. 295; Tina v. Silva, 7 S. C. C. 135*). The words "executors, administrators, and assigns" are not mere notarial flourish, because those words impart specific meanings as to the manner in which the property gifted may be disposed of.

Cur. adv. vult.

22nd December, 1902. MONCREIFF, J.—

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The sole question is whether deed No. 7,161, dated the 15th January, 1873, created a *fidei commissum*. The plaintiff, who appeals, urges that if it did create a *fidei commissum* he is entitled to judgment; but admits that if it did not, the judgment appealed from must stand.

The donor, in consideration of natural love and affection, transferred certain immovable property situated in Colombo to his two grandsons, Casi Lebbe Marikar and Ahamado Lebbe, "their heirs, executors, administrators, and assigns as a gift absolute and irrevocable." These words do not countenance a *fidei commissum*.

The transfer was subject to conditions imposed upon the donees, their heirs, executors, administrators, and assigns, and their children and grandchildren, and the children and grandchildren of their heirs and assigns. The conditions were that the persons designated "shall not sell, mortgage, or encumber the said premises at any time, but hold and possess the same; and the rents, produce, and income thereof shall not be held liable to be attached, seized, or sold for any their debts; but they shall be able to give and grant the said premises or any part thereof in dowry for their female children, also subject to the aforesaid conditions and restrictions."

Again, in the following clause, the donor covenants with his donees, "their heirs, executors, administrators, and assigns." What did the donor mean?

There is a prohibition of alienation, but it is imposed upon executors, administrators, and assigns, as well as upon heirs. Even if we hold that a prohibition in favour of heirs is a sufficient designation of *fidei commissarii*, can we delete the words "executors, administrators, and assigns" from the deed? It is impossible to ignore the words. They are persistently used throughout the deed, and appear to have been intentionally used. The intention is the more clear from the care with which the conditions are imposed upon the children and grandchildren of the heirs and assigns. In *Hormusjee v. Cassim* (*2 N. L. R. 190*) it was decided in this Court that, where immovable property was transferred "as a gift absolute and irrevocable" to the donor's son, "his heirs, executors, administrators, and assigns," subject to the condition that he should not be at liberty to sell, mortgage, or otherwise alienate the property gifted, but possess the same during his life, there was no *fidei commissum*. When the persons in whose interest the prohibition is made are assigns, they may be anybody in the world. There is then no designation of persons such as is essential to the creation of a *fidei commissum*. The appeal should be dismissed with costs.

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MIDDLETON, J.—

The question in this case was whether in a deed of gift dated 4th January, 1873, and registered on the 15th January, 1873, certain words used therein constituted a valid *fidei commissum*. The gift was of a house and ground in Colombo to Casi Lebbe Marikar and Ahamado Lebbe, "their heirs, executors, administrators, and assigns, as a gift absolute and irrevocable.....to have and to hold the said premises with all and singular the appurtenances thereunto belonging, and valued at Rs. 4,000, unto the said Casi Lebbe Marikar and Ahamado Lebbe, their heirs, executors, administrators, and assigns, subject to the following conditions, viz., that the said Casi Lebbe Marikar and Ahamado Lebbe, or their heirs, executors, administrators, and assigns, and their children and grandchildren, and the children and grandchildren of the heirs and assigns, shall not sell, mortgage, or encumber the said premises at any time, but hold and possess the same; and the rents, produce, and income thereof shall not be held liable to be attached, seized, or sold for any of their debts; but they shall be able to give and grant the said premises or any part thereof in dowry for their female children also subject to the aforesaid conditions and restrictions."

In order to bring the case within the authorities quoted, the learned counsel for appellant invited us to construe the deed as if the words "executors, administrators, and assigns" were mere notarial flourish and nonsense and surplusage to the proper wording of the deed, which should be eliminated. On the other hand, it is argued that, if it is possible to give a meaning to the deed (and it is so here) without cutting out these words, we ought not to do so.

I think that the wording of the deed shows some intention of creating a *fidei commussum* on the part of the donor, but that the prohibition against alienation is not followed by a sufficient designation of the parties to be benefited to constitute a valid *fidei commissum* (*7 S. C. C. 135; 2 Burge, 113; Van Leeuwen, Kotze's Translation, vol. I., p. 376*). Amongst other cases quoted by counsel on both sides we were referred by Mr. Bawa to the case of *Hormusjee v. Cassim* (*2 N. L. R. 190*), which seems to be almost on all fours with this case. In that case it was argued that the words now objected to were words of description or designation, but Chief Justice Bonser pointed out what the word "assigns" implies, and that it could not be contended that the condition was intended to benefit the whole world.

I would therefore uphold the decision of the District Judge and, this being the only point raised, dismiss the appeal with costs.