*Present :* Wood Renton C.J. and Shaw J. 1917.

DASSANAYAKE *v.* TILLEKERATNE.

*57—D. C. Ratnapura, 2,655.*

Fidei commissum—*Bequest to children, their heirs, and assigns—Compensation for improvements effected by fiduciary.*

T left his property by last will to his wife for life, and the will further provided: "After her demise all my property to devolve and descend unto my said children, share and share alike, to be held and possessed by them, their heirs and assigns, for ever, subject to the reservations and restrictions hereinafter mentioned, that is to say, I will and direct that neither my said wife, nor children, nor any of them whomsoever, nor their nor any of their heirs or assigns, shall nor may on any account whatsoever alienate, transfer, &c., the following premises, viz., all my lands situated at Ratnapura, which property I will and direct only to be enjoyed and held by my wife and children during their natural lives, and at their respective deaths to devolve unencumbered unto the survivor or survivors of them, and unto their respective heirs and assigns in succession for ever."

*Held*, that the will created a *fidei commissum* in favour of the surviving children of the testator, and that consequently, when one of the testator's children died intestate and issueless, no part of such child's share devolved on his widow; the other children of the testator were entitled to it.

A fiduciary is entitled to the same right of compensation for improvements as any other *bona fide* possessor, and to retention of the property until the compensation is paid; a purchaser from a fiduciary is in the same position as the fiduciary.

THE facts are set out in the judgment.

*E. W. Jayewardene* (with him *Batuwantudawa*), for appellant.—This will does not create a *fidei commissum*, as the persons to be benefited are not clearly designated. Here the word "assigns" is

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not used merely to confer *plena proprietas*, but occurs in every clause along with heirs, executors, and administrators. In *Wijetunga v. Wijetunga* [1] there was a clear designation of the persons in favour of whom the prohibition was declared, in spite of the presence of the word "assigns." That case went the furthest your Lordships were prepared to go in gathering from ambiguous words an intention to create a *fidei commissum*. *Silva et al. v. Silva et al.*,[2] *Hormusjee v. Cassim*, [3] *Aysa Umma v. Noordeen*, [4] *Dassanaike v. Dassanaike*. [5]

In any case the appellants are entitled to compensation, as a fiduciary is a *bona fide* possessor.

*Bawa, K.C.* (with him *M. W. H. de Silva*), called upon to reply only on the point with regard to compensation.—A fiduciary is entitled only to compensation for necessary improvements, see *Livera et al. v. Abeyesinghe et al.* [6]

*Cur. adv. vult.*

May 30, 1917. SHAW J.—

Don Moses Tillekeratne by his last will, dated January 8, 1866, left certain property to his wife for life, "and after her demise all my said property to devolve and descend unto my said children, share and share alike, to be held and possessed by them, their heirs and assigns, for ever, subject to the reservations and restrictions hereinafter mentioned, that is to say, I will and direct that neither my said wife, nor children, nor any of them whomsoever, nor their nor any of their heirs or assigns, shall nor may on any account whatsoever alienate, transfer, sell, mortgage, or otherwise encumber the following premises out of those bequeathed and devised unto them as aforesaid, namely,.....,all my lands and houses situated within the town of Ratnapura, which property I will and direct only to be enjoyed and held by my said wife and children during their natural lives, and at their respective deaths to devolve unencumbered unto the survivor or survivors of them, and unto their respective heirs and assigns in succession for ever."

The testator died in 1868, leaving a widow and six children. Two of these children died intestate and without issue, and the widow also died some time ago. The four remaining children were Dona Sophia, Helen Kumarihamy, Alice Dissanayake, and W. D. Tillekeratne. W. D. Tillekeratne died intestate in 1913, leaving a widow, Susan Tillekeratne, who has taken out administration of his estate, and who is entitled to one-half of his property under section 26 of the Matrimonial Rights Ordinance, 1876.

The plaintiffs, who are grantees from Dona Sophia, have brought the present action, claiming a declaration that they are entitled to a one-third share of the property in Ratnapura, on which has been

[1] *(1912) 15 N. L. R. 493.*
[2] *(1914) 18 N. L. R. 174.*
[3] *(1896) 2 N. L. R. 190.*
[4] *(1902) 6 N. L. R. 173.*
[5] *(1906) 8 N. L. R. 361.*
[6] *(1914) 18 N. L. R. 57.*

erected a building known as the Survey Office bungalow, and has allotted the other two-thirds to Helen Kumarihamy and Alice Dissanayake, the second and third defendants, and claim damages against Susan Tillekeratne, who is in possession of the bungalow.

The rights of the parties to shares in the property depend upon whether or not the will of Don Moses Tillekeratne is to be construed as creating a *fidei commissum* in favour of the children. I feel no doubt that the decision of the Judge that it does so is correct.

A large number of old cases were cited to us on behalf of the appellant, in which it was held that the use of the words " heirs, " " heirs and assigns, " and " heirs, administrators, executors, and assigns " in certain clauses of a will or deed must be held to prevent the construction that a *fidei commissum* was intended.

I do not think that these cases, in which great emphasis was given to the form of particular words, and to the particular clause of the deed in which such words occur, are of authority at the present day. The trend of the more recent decisions, of which I will mention *Wijetunga v. Wijetunga*,[1] *Coudert v. Don Elias*,[2] *Silva v. Silva*,[3] *Guneratne v. Perera*,[4] and *Mirando v. Coudert*,[5] is to give effect to the true intention of the donor whenever it can be gathered from the language used, and not, as remarked by Pereira J. in *Wijetunga v. Wijetunga*,[1] to embark on a voyage of discovery to search for a possible interpretation that defeats this intention. As said by Wood Renton C.J. in *Guneratne v. Perera*,[4] " the recent cases have laid down the rule that the words ' heirs, executors, administrators, and assigns ' in a deed alleged to create a *fidei commissum* may be nothing more than a means of vesting in the fiduciary the *plena proprietas* as a preliminary to imposing a *fidei commissum* upon property. "

In the present case I feel no doubt of the intention of the testator from the language used, namely, to create a *fidei commissum* in favour of his children, and he clearly intended, as indeed he said in his will, that at the respective deaths of his wife and children the property was to pass unencumbered to the survivor or survivors of them. On the death of W. D. Tillekeratne, therefore, his share passed to his surviving sisters, who each became entitled to one-third.

The plaintiffs stand in the position of Dona Sophia, so far as her life interest and possibility of succession to the entirety is concerned, and they would be entitled to the possession of one-third. It appears, however, that the bungalow was put up by W. D. Tillekeratne, who was in possession of it until the time of his death. The Judge has held that he can have obtained no right to it by prescription, and in this he is clearly correct; he has also held that he and his widow are not entitled to compensation for the improvement to the property, on the ground that there cannot be ownership

[1] *(1912) 15 N. L. R. 493.*
[2] *(1914) 17 N. L. R. 129.*
[3] *(1914) 18 N. L. R. 174.*
[4] *(1915) 1 C. W. R. 24.*
[5] *(1916) 19 N. L. R. 90.*

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of the entirety of a building put up by a co-owner, and that he can only get compensation on a partition. This is undoubtedly so with regard to co-ownership, but W. D. Tillekeratne was in possession as a fiduciary, and it is well-established law that a fiduciary is entitled to the same rights of compensation for improvements as any other *bona fide* possessor, and to retention of the property until the compensation is paid (see *Walter Pereira* 452). The case of *Livera v. Abeyesinghe*,[1] cited *contra* on behalf of the plaintiffs, does not conflict with this proposition ; there the person claiming compensation was not a fiduciary, but a purchaser from a fiduciary heir, who was in the position of a *mala fide* possessor.

I would set aside the decree appealed from *pro formâ*, and remit the case back to the District Judge for inquiry what, if any, compensation is payable, and for him to make a new decree in accordance with his finding.

Neither party having entirely succeeded on the appeal, I would make no order as to the costs of the appeal.

The costs of the trial and further hearing I would leave to the discretion of the Judge after he has ascertained what, if any, compensation the first defendant is entitled to receive and retain possession in respect of.

WOOD RENTON C.J.—I agree.

*Set aside and sent back.*