Present : Pereira J. and Ennis J. 1914.

COUDERT *v.* DON ELIAS.

446—D. C. Colombo, 36,298.

Fidei commissum—*Gift to A and his heirs, executors, administrators, and assigns under the bond of fidei commissum—Prohibition against alienation—Non-acceptance of gift by fidei commissary—Gift to take effect after death of donor—Acceptance after death of donor.*

A gift in the following terms: " I have given unto A and B, their heirs, executors, administrators, and assigns, as a donation, absolute and irrevocable, but subject to the provisions and conditions hereinafter stated and mentioned, the following property, to wit [property described], to have and to hold the said premises unto them, the said A and B, their heirs, executors, administrators, and assigns, for ever, provided always that the said property shall not at any time be sold, mortgaged, or in any other manner alienated, but shall be only held, possessed, and enjoyed by them and their heirs and descendants in perpetuity under the bond of *fidei commissum*, and provided also that on failure or extinction of heirs, the said property shall revert to and become the property of C. And I covenant with the said A and B, their heirs, executors, and administrators, that I have not done any act whereby the said property may be impeached in title "—was held to have created a valid *fidei commissum*.

The word " assigns " as used above has no more force in repelling an intention to create a *fidei commissum* than either of the words " executors " and " administrators." All these words are used above as a means of vesting in the fiduciary the *plena proprietas* as a preliminary to burdening the property with a *fidei commissum*, and the words " in perpetuity under the bond of *fidei commissum* " permit of no construction being placed on the deed other than one indicative of an intention to create a *fidei commissum*.

In the case of a *fidei commissum* created by means of a deed of gift, the effect of non-acceptance of the gift by the fidei commissary is no more than to give the donor a right to revoke the gift. Should he die without having revoked the gift, the right of revocation does not pass to his heirs. A gift that is to take effect after the death of the donor may be accepted after his death ; and (*semble*) an action by a fidei commissary to recover the property which is the subject of the *fidei commissum* from a stranger who is in possession of it at the time of its vesting in the fidei commissary in terms of the *fidei commissum* is sufficient manifestation of the acceptance by him of the gift.

THE facts appear from the judgment.

A. St. V. Jayewardene, for defendant, appellant—A meaning must be given to every word in the deed. It is not possible to ignore the word " assigns." By the use of the word " assigns " power was given

1914.

Coudert v. Don Elias

to the grantees to sell the property. The grant of the property under this deed was therefore free, and not subject to any *fidei commissum*. Counsel cited *Hormusjee v. Cassim*,[1] *Aysa Umma v. Noordeen*,[2] *Dassanaike v. Dassanaike*,[3] *Perera v. Fernando*,[4] *MacGregor's Fidei Commissum 70*, *Aysa Umma v. Noordeen*.[5]

Even if the deed created a *fidei commissum*, there was no acceptance by the fidei commissary, and the gift to the fidei commissary cannot be valid without such acceptance. *De Silva v. Thomis Appu*.[6] The property was sold by the fiduciary before it was accepted by the fidei commissary.

Samarawickreme (with him *Bawa*, *K. C.*, and *Canekeratne*), for the plaintiff, respondent.—In *Hormusjee v. Cassim* [1] and *Aysa Umma v. Noordeen*[4] the intention of the testator was not clear, and the class to be benefited was not properly designated. It was on that ground that the Supreme Court held that there was no *fidei commissum* in those cases. In almost all the other cases cited there was the same defect in the instruments which had to be construed.

In the present case no such doubt exists. The deed expressly says that the property is to be held under the bond of *fidei commissum*. Counsel cited *Selembram v. Perumal*.[7] If we give the word "assigns" the meaning which the appellant contends for, we shall have to ignore several clauses in the deed for the purpose of giving effect to that one word. Counsel also referred to 163 D. C.—Colombo, 20,345.[8]

Acceptance by the fidei commissary is necessary to render a gift irrevocable, but not for its validity. *Asiathuma v. Alimanatchy*,[9] *2 Burge 149*.

A. St. V. Jayewardene, in reply—The mere use of the words "under the bond of *fidei commissum*" is not enough to create a valid *fidei commissum*. In *Selembram v. Perumal*,[7] even without the words "under the bond of *fidei commissum*," there was a clear *fidei commissum* created by the deed. Counsel cited *Nugara v. Gonsal*,[10] *2 Burge 143*.

Cur. adv. vult.

February 23, 1914. PEREIRA J.—

The first question argued in appeal was whether deed No. 7,522 dated September 20, 1853, created a valid *fidei commissum* in respect of the property now in claim. The grantor of the deed was one Johana Perera, and the immediate grantees were her son and daughter, Johannes and Brezina. The material portion of the deed was as follows: "I have given, granted, assigned, transferred, and

[1] (*1898*) *2 N. L. R. 190*.
[2] (*1902*) *6 N. L. R. 173*.
[3] (*1906*) *8 N. L. R. 361*.
[4] (*1912*) *6 Leader 12*.
[5] (*1905*) *8 N. L. R. 350*.
[6] (*1903*) *7 N. L. R. 123*.
[7] (*1912*) *16 N. L. R. 6*.
[8] *S. C. Min., June 11, 1906*.
[9] (*1905*) *1 A. C. R. 53*.
[10] (*1911*) *14 N. L. R. 301*.

set over unto Johannes and Brezina, their heirs, executors, administrators, and assigns, as a donation, absolute and irrevocable, but subject to the provisions and conditions hereinafter stated and mentioned, all that [description of the property donated], to have and to hold the said premises unto them, the said Johannes and Brezina, their heirs, executors, administrators, and assigns, for ever. provided always that the said garden and buildings shall not at any time be sold, mortgaged, or in any other manner alienated, but shall be only held, possessed, and enjoyed by them and their descendants in perpetuity under the bond of *fidei commissum*, and that the rents, issues, and profits thereof shall not be liable to be attached, seized, or sold by others for the debts of the said Johannes and Brezina or of their heirs and descendants, and provided also that on failure or extinction of heirs, the said garden and buildings shall revert to and become the property of the Roman Catholic Church of St. Lucia..... and I, the said Johana, for myself, my executors, and administrators, do covenant, promise, and agree to and with the said Johannes and Brezina, their heirs, executors, and administrators, that I, the said Johana, have not at any time made, done, or committed any act whereby the hereby granted premises may be impeached in title," &c. In support of the contention that no *fidei commissum* is created by this deed, certain judgments of this Court were cited, but, in my opinion, they have no application whatever to the present case. In *Hormusjee v. Cassim* [1] the gift was a gift, absolute and irrevocable, to M, his heirs, executors, administrators, and assigns, subject to the condition that M should not be at liberty " to sell, mortgage, or otherwise alienate the property gifted, but possess the same during his life," and out of these words it was sought to evolve a *fidei commissum*, but it is clear that the parties to benefit were not clearly designated in the deed. Similarly, in the case of *Aysa Umma v. Noordeen* [2] the words used in the deed were " I have given, granted, assigned, transferred, and set over unto A and B, their heirs, executors, administrators, and assigns, as a gift, absolute and irrevocable, all that portion of a house, &c., to have and to hold the said premises unto the said A and B, their heirs, executors, administrators, and assigns, and their children and grandchildren; and the children and great-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." Here too the words used import no more than a prohibition against alienation by the parties to whom the property is granted, namely, " A and B, their heirs, executors, administrators, and assigns," and there is no clear

[1] *(1898) 2 N. L. R. 190.*

[2] *(1902) 6 N. L. R. 173.*

1914.

PEREIRA J.

Coudert v. Don Elias

indication of any party to benefit by the prohibition, nor are there other words to indicate that the creation of a *fidei commissum* was intended. In the case of *Dassanaike v. Dassanaike* [1] the material words of the deed in question were: "We have given, granted, assigned, and set over as we do hereby give, grant, assign, transfer, and set over as a gift, absolute and irrevocable, unto L, his heirs, executors, administrators, and assigns, the following,....., to have and to hold the said premises unto the said L, his heirs, executors, administrators, and assigns for ever, subject, nevertheless, to the following condition, that he, the said L, and his generation shall possess the said lands for ever, but he or his heirs shall not sell, mortgage, or alienate the same in any manner whatsoever." The same remarks as those made on the case last cited apply. In the case with which we are now concerned, however, it is manifest that the word "then" in the provision that the garden and buildings shall be only held, possessed, and "enjoyed by them and their heirs and descendants in perpetuity under the bond of *fidei commissum*," refers only to the original institutes, namely, Johannes and Brezina, and that the words "in perpetuity under the bond of *fidei commissum*," and also the provision that "in case of failure or extinction of heirs the property shall revert to and become the property of the Roman Catholic Church of St. Lucia," indicate an intention to create a *fidei commissum*. In the case of *Selembram v. Perumal*,[2] where similar words were used, my brother Wood Renton observed: "The words 'in perpetuity' and 'under the bond of *fidei commissum*' leave no doubt in my mind that the testator intended to create a *fidei commissum*"; and it is noteworthy that in the present case there is an omission of the word "assigns" in the warranty clause, while Wendt J. makes a point of the presence of that word in the corresponding clause in the deed in question in the case of *Dassanaike v. Dassanaike*.[1] While, if the facts of the cases cited were such as to make them applicable to the present case, I should unhesitatingly follow the decisions, I should like to observe that I cannot help thinking that too much importance has been attached to the use of the word "assigns" in those cases. It has really no more force than "executors" or "administrators." Property subject to a *fidei commissum* does not go to "executors" or "administrators" any more than it vests in "assigns," and why the word "assigns" should be singled out for condemnation I cannot quite understand. It is said that the word "assigns" means any person to whom the donee may be pleased to assign the property; but, similarly, it may be said with reference to the word "executor" that it implies that the donee might will away the property to any person he liked, and, with reference to the word "administrator," that the property vested in the legal representatives of the deceased donee as property that belonged to him absolutely. A grant to A B without qualifications

[1] *(1906) 8 N. L. R. 361.*

[2] *(1912) 16 N. L. R. 6.*

is exactly the same as a grant to " A B, his heirs, executors, administrators, and assigns "; and the fact that words are used to vest, in the first instance, absolute *dominium* in the fiduciary is by no means repugnant to the creation of a *fidei commissum*. Unlike a mere usufructuary, a fiduciary has title and *dominium*. So much so that an alienation by him of the property, which is the subject of the *fidei commissum*, by will or deed, would be operative if there be a failure of the fidei commissary. Voet puts the position thus (*Voet 7, 1, 13*): " When a bare usufruct appears given, the ownership immediately on the death of the testator is considered as acquired by those who at the time were the next of kin of the deceased, or whom he in his last will declared his universal successors at law, so that even if they die during the existence of the usufruct, nevertheless they transmit their ownership and their hope of becoming full owners to their heirs, which is not the case when full ownership with the burden of *fidei commissum* (*plena proprietas cum onere fidei commissi*), or of making restitution after the death of the fiduciary, is understood to have been left; for the *fidei commissarius* who dies during the lifetime of the *fiduciarius* does not transmit his chance of obtaining the *fidei commissum* to his heirs, but restitution is made to those who are alive at the death of the fiduciary, and if none such survive to whom restitution should be made, the fiduciary is taken to be released from the burden of *fidei commissum*, not finding any one to whom to restore it, and he can then alienate the property as if unburdened or transmit the full right of ownership to his next heirs." So that it will be seen that under the Roman-Dutch law there is such a thing as *plena proprietas cum onere fidei commissi*. The *plena proprietas* may be first conferred by some such words as " I grant to A, his heirs, executors, administrators, and assigns," and then the burden engrafted on it. The only question is whether the words used sufficiently indicate a clear intention to burden the *plena proprietas*. In the present case it is inconceivable that the words " in perpetuity under the bond of *fidei commissum* " were used for any purpose other than that of creating a *fidei commissum*. The application to this case of the test that I have laid down in *Wijetunga v. Wijetunga* [1] would give only one result, and that is that the deed in question created a valid *fidei commissum*.

The next question argued was whether it has been shown that the heirs of Johannes and Brezina are extinct. On this point I am not prepared to question the verdict of the District Judge on the evidence.

The third question is whether the gift has been duly accepted by the plaintiff. In *De Silva v. Thomis Appu* [2] it was held that a gift should be accepted by a fidei commissary, but in the case of *Asiathuma v. Alimanatchy* [3] Wendt J., who was one of the two Judges who so

[1] *(1910) 13 N. L. R. 493.*

[2] *(1903) 7 N. L. R. 123.*

[3] *(1905) 1 A. C. R. 53.*

1914.

PEREIRA J.

Coudert v. Don Elias

held, stated that the conclusion that he had arrived at in the case of *De Silva v. Thomis Appu* [1] was erroneous, and that after reconsideration of the point his opinion was that the acceptance of a gift by the fidei commissary was necessary only in order to render the gift to him irrevocable by the donor. Now, it is, I think, clear law that if the donor himself died before the period had arrived when the property was to be delivered to the fidei commissary, the power of revocation was at an end, and could not be exercised by the heirs of the donor (see *2 Burge 149*). Anyway, in the present case it is clear that the donor's heirs did not exercise or purport to exercise any power of revocation. The property vested in them (Johannes and Brezina), and the conveyance in favour of Seneviratne, the defendant's vendor, was not executed by them, but by the heirs of Johannes. The conveyance itself is not tantamount to a revocation by Johana and Rosa Maria *qua* heirs of Johannes, even if they were such. The respondent's counsel argued that there was in any case an acceptance of the gifts by the plaintiffs, in that they had brought the present action to recover the subject of the donation, and that that act of theirs was by itself an acceptance of the gift. Now, where a gift really takes effect after the death of the donor, it may be accepted even after that (*Cens. For. 14, 12, 16*). In the present case, when the gift to the Roman Catholic Church of St. Lucia took effect, the property gifted was already in the possession of the respondent, who would not allow the plaintiffs to take possession of it. How were the plaintiffs to accept the gift except by means of an attempt to take possession of the property? This action is such an attempt and I am inclined to agree with the respondent's counsel that in the circumstances of a case like this an action to gain possession of the property donated would be tantamount to a manifestation of the acceptance by the donee of the gift.

For the reasons given above I would affirm the judgment appealed from with costs.

ENNIS J.—I agree.

Appeal dismissed.

[1] *(1903) 7 N. L. R. 123.*