1939 *Present :* **Soertsz and Nihill JJ.**

AMARATUNGA *v.* ALWIS.

147—D. C. Colombo, 407.

Fidei commissum—*Prohibition against alienation—Beneficiaries designated as children, heirs and authorized persons as executors, administrators, and assigns—Not a sufficient designation.*

Where a deed of gift was expressed in the following terms : "It is hereby directed by the two of us the said donors that the said C. F. shall have no right to sell, donate, mortgage . . . . or alienate in any other manner the said lands except to possess only the lease during her lifetime, and that the children and heirs, descending from her and authorized persons such as executors, administrators, and assigns, shall have the right to sell . . . . or to do whatever they please with the same . . . . ."

"We do hereby give the right to the said Christina to possess indisputably after our death . . . . and after the death of the said Christina to her heirs and authorized persons such as executors, administrators, and assigns to possess the said properties and to do whatever they like with them".—

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

[1] *110 English Rep. 1007.*

IN this action the only question argued in appeal was whether the deed P 8 of 1895 created a *fidei commissum.*

The relevant portions of the deed are set out in the headnote. The learned District Judge who tried the case held that the deed created a valid *fidei commissum.*

The first defendant, appellant, who contended that it did not create a *fidei commissum,* appealed against the finding of the learned Judge.

N. E. Weerasooria, K.C. (with him *E. B. Wikramanayake* and *H. Wanigatunga*), for the first defendant, appellant:—The deed gifted the property to "her heirs and authorized persons such as executors, administrators, and assigns". It was held in *Salonchi et al. v. Jayatu*[1] that a prohibition against alienation was null and void unless there was a proper description or designation of the persons in whose favour or for whose benefit the prohibition was provided. In that case, too, the description, "authorized persons" was used. The beneficiaries were named in *Tillekeratne v. Abeysekera et al.*[2] Hence the deed did not create a valid *fidei commissum.*

Further the first defendant appellant was in possession of the property.

J. E. M. Obeyesekere, for plaintiff, respondent.—*Salonchi et al. v. Jayatu* (*supra*) can be distinguished. In that case there was no indication of the "authorized persons". In the case under review the persons who would be benefited can be gathered. In *Agostina and three others v. John Chrisis Silva*[3] His Lordship, Mr. Justice Wijeyewardene, said that too great emphasis should not be placed on words so as to defeat the clear intention of the donor. In that case Mr. Justice Hearne disagreed with the reasons of Mr. Justice Wijeyewardene, though they agreed with regard to the decision in the case. The word "assigns" has no more force than the words "executors" and "administrators" as held in *Coudert v. Don Elias*[4], *Miranda v. Coudert*[5]. The question of devolution of property where the fideicommissary donees die before the fiduciary is discussed in *Mohamad Bhai et al. v. Silva et al.*[6]

N. E. Weerasooria, K.C., in reply, cited *Usoof v. Rahimath*[7].

Cur. adv. vult.

February 20, 1939. SOERTSZ J.—

One question that arises in this case is whether the deed P 8 of 1895 created a valid *fidei commissum.* That deed according to the translation accepted by the learned trial Judge, stated *inter alia* that (A) "it is hereby declared or directed by the two of us the said donors that the said Christina Fernando shall have no right to sell, donate, mortgage, give as security, exchange for other lands, or alienate in any other manner the said lands, except to possess only the lease during her lifetime, *and that the children and heirs descending from her and authorized persons such as executors, administrators, and assigns,* shall have the right to sell . . . . or to do whatever they please with the same . . . .

[1] (1926) 27 N L. R. 366 at p. 371.
[2] (1897) 2 N. L. R. 313.
[3] (1938) 13 C. L. W. 31 at p. 35.
[4] (1914) 17 N. L. R. 129.
[5] (1916) 19 N. L. R. 90.
[6] (1911) 14 N. L. R. 193.
[7] (1918) 20 N. L. R. 225.

(B) It is hereby directed by the two of us . . . . *that when the time comes for the children of the said Christina to become entitled to these lands, her children by the second marriage shall be entitled to the portion of the land called Millegahawatta . . . . and her children of the first and second marriages shall divide in like manner the remaining lands.* (C) "We the said donors hereby give the right to the said Christina to possess indisputably after our death . . . . and after the death of the said Christina to *her heirs and authorized persons such as executors, administrators, and assigns to possess the said properties and to do whatever they liked with them".*

A consideration of these terms in the deed enables me to reach without difficulty the conclusion that no valid *fidei commissum* was created. One condition for the creation of a good *fidei commissum* is satisfied. There is a clear prohibition against alienation. But the other necessary condition fails in that there is no clear designation or indication of the parties to be benefited. The words "the heirs descending from her, and authorized persons such as executors, administrators, and assigns" are both too vague and too general.

As Bonser C.J. observed in *Hormusjee v. Cassim*[1] "the word assigns means any person in the world to whom the donee may be pleased to assign the property, and it cannot be contended that this condition was meant to benefit the whole world". Since that date there has been a welter of decisions on *fidei commissa*, some of which have gone the length of saying that once an intention to create a *fidei commissum* is apparent, words like assigns, executors and administrators should be treated as "surplusage" or notarial flourish and struck out or ignored. I can see no justification for taking such liberties with words chosen by parties or their agents. There are other decisions which say that even if parties indicate their intention to create a *fidei commissum* by employing such words as "under the bond of *fidei commissum*, those words are of no avail if the parties to be benefited are not clearly designated or indicated. I share that view. In *Wijetunga v. Wijetunga*[2] Pereira J. said "if the intention of a donor or a testator to create *fidei commissum* is clear, and the words used by him can be given an interpretation that supports that intention, I should be slow to embark on a voyage of discovery in search of possible interpretations that defeat that intention". In regard to this observation, I would only say that when, despite an intention to create a *fidei commissum* to be gathered from such words as "under the bond of *fidei commissum*, the testator or donor fails to designate or indicate clearly the parties to be benefited, there does not seem to be any occasion to embark on a voyage of discovery in order to construct a *fidei commissum* for the testator or donor by striking out or ignoring words on the assumption that they are "surplusage" or "notarial flourish". If a testator or donor clearly imposes a prohibition against alienation and then goes on to frustrate his intention to create a *fidei commissum* by employing words which do not designate or indicate clearly the beneficiaries, he must be left just where he placed himself, on the threshold of a *fidei commissum*. It may well be that he has deliberately placed himself in that position. In the words of Innes C.J. in *ex parte Van Eden and*

[1] 5 *N. L. R. 190.* [2] 15 *N. L. R. 493.*

others (*1905, Transvaal Reports, 151*) "what the Court has to do is to endeavour to arrive at the intention of the testator" or I would add, donor—and to arrive at that intention 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".

Roman-Dutch law writers say that *fidei commissa* are odious in the eye of the law, and must be strictly construed. Now, in the case before us, the trial Judge says that on the authority of the case of *Salonchi v. Jayatu*[1] he would have held that "the presence of the words heirs and authorized persons . . . . refers to an indeterminate class of persons to be benefited and that, therefore, no valid *fidei commissum* has been created." But, he goes on to say that in the second passage cited from the deed the persons to be benefited are sufficiently designated, namely, the children of the donor and that, for that reason, he holds that there is a *fidei commissum*. I regret I am unable to accept this reasoning. In my view, the resulting position is—to use the words of Innes C.J. from the passage I have quoted—that, at best, "the words are capable of more than one construction, and that therefore "the Court would lean towards the one most in favour of freedom of alienation". To uphold the view taken by the Judge, one has to strike out the words in passages (A) and (C) cited above, "the children and heirs descending and authorized persons such as executors, administrators, and assigns". In my view that is an utterly unwarranted course to take. All the terms of the deed must be considered and when this is done I find it difficult, if not impossible, to say that the intention of the donor was to impose a *fidei commissum*. At any rate, even if that was their intention, they have failed to give effect to it.

Counsel for the respondent relied upon the judgment of my brother Wijeyewardene in an unreported case appearing in the *S. C. Minutes of September 21, 1938,* in regard to case *No. S. C. 34—D. C. Colombo, 666.* In that case a deed in very similar terms to these so far as the first and third passages cited by me from the deed are concerned, was construed by him as creating a *fidei commissum*. He took the view that too much emphasis should not be placed on such words as "heirs descending from them and their authorized persons such as executors, administrators and assigns", because a clear intention on the part of the donor to create a *fidei commissum* could be gathered from the whole document. I have already made my comment on this view. I would add that this view was expressed *obiter*. The case was decided on another point. My brother Hearne disagreed with this *obiter dictum* and I find myself in agreement with the view taken by him. I am, therefore, of opinion that the deed in question did not create a *fidei commissum*.

In that view of the matter, it is not necessary to consider the other questions discussed during the argument of this appeal. The appeal is allowed and the plaintiff's action is dismissed with costs in both Courts.

NIHILL J.—I agree.

Appeal allowed.

[1] *27 N. L. R. 366.*