1947 *Present:* **Howard C.J. and Windham J.**

SAMARANAYAKE, Appellant, *and* SENEVIRATNE, Respondent.

S. C. 49—D. C. Negombo, 3,394.

Fidei commissum—*Deed of gift—Designation of beneficiaries—Heirs, executors, administrators and assigns—Sufficiency of designation.*

A deed of gift contained the following clause :—

"It is directed that I and my wife are entitled to do whatever it pleased us with the said lands during our lifetime and in the event of the death of either of us, the survivor is entitled to possess a half share of the income of the said lands and also in the event of the death of either of us the survivor shall not alienate or deal with the same in any other manner and in the event of the death of either of us a half share of the income of the said lands shall be possessed by our said two children and that after the death of both of us our said two children and their children and grandchildren, heirs, executors, administrators and assigns are entitled to possess separately as mentioned hereinbelow the lands not alienated or dealt with at our pleasure by us during our lifetime but they shall not sell, mortgage or alienate in any manner the said lands and when their descending heirs are extinct the said lands devolve on the Government".

Held, that the *fidei commissum* did not extend beyond the grandchildren of the donor as their successors were not clearly designated, nor was there any designation of those for whom the benefit against alienation was provided.

APPEAL from a judgment of the District Judge, Negombo.

H. W. Jayewardene (with him *C. S. Randunu*), for the 1st respondent, appellant.

H. V. Perera, K.C. (with him *Kingsley Herat*), for the petitioner, respondent.

Cur. adv. vult.

September 11, 1947. HOWARD C.J.—

This is an appeal by the 1st respondent-appellant against an order of the District Judge of Negombo granting the petitioner, as the sole heir of the deceased, Domingo Perera Wijesundera Seneviratne, his son, letters of administration to his estate. In coming to this decision the District Judge held that deed 2335 of August 11, 1857 (P 1), did not create a *fidei commissum*. The only question that arises is whether this decision was correct in law. The relevant portion of (P 1) on which the appellant relies is worded as follows :—

"It is directed that I and my wife Dona Francina Hamine are entitled to do whatever it pleased us with the said lands during our lifetime and in the event of the death of either of us, the survivor is entitled to possess a half-share of the income of the said lands and also in the event of the death of either of us the survivor shall not alienate or deal with the same in any other manner and in the event of the death of either of us a half share of the income of the said lands shall be

possessed by our said two children and that after the death of both of us our said two children and their children and grandchildren, heirs, executors, administrators and assigns are entitled to possess separately as mentioned hereinbelow subject to Government regulations the lands not alienated or dealt with at our pleasure by us during our lifetime but they shall not sell, mortgage or alienate in any manner the said lands and when their descending heirs are extinct the said lands devolve on the Government and that if any dispute were to arise to the lands given to Dona Catherine Perera Wijesundera Seneviratne Hamine, Louis Perera Amarasinghe Appuhamy who is married to her is hereby empowered to settle such disputes through Government, but he (the said Appuhamy) shall not by virtue of his marriage be entitled to mortgage or alienate the said lands ".

Mr. Jayewardene, on behalf of the appellant, has referred us to a number of authorities which he maintains support his case. Mr. H. V. Perera, on behalf of the respondent, has also referred us to other authorities. It is never easy to reconcile to one's complete satisfaction the various authorities on this subject. It has been in the past a prolific and unending source of litigation. Perusal of the case law on the subject indicates that a generation ago there was a tendency to find in favour of a *fidei commissum* wherever possible, whereas the tendency in more recent years is in the other direction and Courts have attempted to give effect to the principle of Roman-Dutch Law in favour of a presumption that a donor would not fetter a property bequeathed by will or granted by deed. In this connection I would invite attention to the judgment of Lascelles C.J. in *Silva v. Silva*[1]. Mr. Jayawardene has relied mainly on the following cases. In *Wijetunga v. Wijetunga*[2] B by deed gifted his property to A subject to the provision *inter alia* that A " shall not sell, lease out, mortgage, &c., the property, and that after A's death that A's heirs, executors or administrators shall hold and possess the property or deal with it as they please ". It was held that the deed created a *fidei commissum*; the intention of the donor had not been defeated by the use of the words " executors or administrators ". The words had not been inserted except for the purpose of a *fidei commissum.* Mr. Perera contends that the present case is distinguishable from *Wijetunga v. Wijetunga* as the word " assigns " does not appear in the latter case. In *Silva v. Silva*[3] a deed of gift contained the following clauses :—

> " After the demise of both of us all the aforesaid properties to be entitled to the said seven children in equal shares . . . . and when one of us dies a half of the said rights should devolve on our said seven children, and when both of us are dead all the aforesaid rights should be entitled to the aforesaid children and their heirs, executors, administrators and assigns, and they can only possess the same, but they cannot mortgage, sell, gift over, or lease over for a period of over five years, or alienate in any other manner, and our said children may get the rights partitioned."

It was held that the deed did not create a *fidei commissum.*

[1] *(1914) 18 N. L. R. at p. 177.* [2] *(1912) 15 N. L. R. 493.*
[3] *(1914) 18 N. L. R. 174.*

In regard to this case Mr. Perera places particular reliance on the following words from the judgment of De Sampayo J. at p. 178 :—

> "But where the instrument to be construed is such that there is no clear designation of the persons who are to take after the immediate donee, then I think that the use of such words as 'executors, administrators and assigns' as part of the same formula with the word 'heirs' is of material importance. The present case is in that situation. For it is argued that the *fidei commissarii* are the 'heirs' who are mentioned in that context. It appears to me impossible to disconnect the word 'heirs' from the rest of the context, and so I think that this is a case in which there has been no designation of the persons in whose favour or for whose benefit the prohibition against alienation is provided".

Mr. Perera contends that there is in the present case no clear designation of the persons who are to take after the children and grandchildren of the donee.

Mr. Jayewardene also cited *Mirando v. Coudert* [1]. But in spite of the use of the word "assigns" the intention of the donor was clearly to benefit the descendants of one Isabel Mirando and to create a *fidei commissum* in their favour. In this case there was a clear designation of the person or persons ultimately to be benefited. Again in *Coudert v. Don Elias* [2] there was no uncertainty in the secondary heirs. In that case it was held that the word "assigns" as used 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 as a means of vesting in the fiduciary the *plena proprietas* as a preliminary to burdening the property with a *fidei commissum*. 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*.

Mr. Perera also relies on the cases of *Amaratunga v. Alwis* [3] and *Appuhamy v. Mathes* [4]. In both these cases it was held that the deeds in question did not create valid *fidei commissa*. In regard to these two cases Mr. Jayewardene has stressed the point that the words "assigns may deal with them as they please" appear in the deeds and negative an intention on the part of the donor to create a *fidei commissum*.

In my opinion we have in this case to apply the principle formulated by De Sampayo A.J. in *Silva v. Silva*. Can it be said that there has been a clear designation of the persons to be benefited? The donors were Domingo Perera Wijesundera Seneviratne and his wife, Dona Francina Hamine. There is a gift after their deaths to their two children and their children and grandchildren, heirs, executors, administrators and assigns . . . . but they shall not sell, mortgage or alienate in any manner the said lands and when the descending heirs are extinct the said lands shall devolve on the Government. The donor died leaving two children, John Simon and Catherine Perera. Under the deed they inherited separate properties. John Simon died leaving two children, Martinus Perera and Reimus Perera. Reimus Perera married the petitioner and they had a son Domingo Perera, the deceased, who died unmarried. The 1st respondent is one of the three children of Martinus.

[1] *(1916) 19 N. L. R. 90.*
[2] *(1914) 17 N. L. R. 129.*
[3] *(1939) 40 N. L. R. 363.*
[4] *(1944) 45 N. L. R. 259.*

The deed no doubt creates a *fidei commissum* in favour of the children of the donor and their children and grandchildren. The deceased Domingo Perera is a great-grandson of the donor and I am of opinion that there is no valid *fidei commissum* created after his death as his successors are not clearly indicated nor is there any designation of those for whom the benefit against alienation is provided. Moreover there are not in the deed as in *Coudert v. Don Elias* any words similar to " in perpetuity under the bond of *fidei commissum* ".

For the reasons I have given the appeal is dismissed with costs.

WINDHAM J.—I agree.

Appeal dismissed.