

“Heirs, Executors, Administrators and Assigns”

THE phrase “heirs, executors, administrators and assigns”, much favoured by Ceylon notaries, is very often introduced by them as part of the description of those to whom property is given by act *inter vivos* or by will. The use of the phrase, especially in connection with instruments purporting to create *fideicommissa*, has given rise to notable differences of judicial opinion. This article proposes to examine the many cases on the topic, and to suggest what it is hoped will be an acceptable solution of the difficulties raised by the use of the phrase under consideration.

The normal connotation to be attached to the use of the phrase “heirs, executors, administrators and assigns”¹ when used in apposition to the name of the recipient of a gift is that “all this verbiage consists of words of limitation derived from the nomenclature of English law, meaning merely that the rights bestowed on the (recipient) are full rights of ownership”.²

Therefore, if these words are used in conjunction with the name of a legatee or donee, and there is no indication that any diminution of his interest in the

(1) In some of the earlier cases (v. e.g. *Hormusjee v. Cassim* 2 N.L.R. 190, 191, per Bonser, C.J., *Aysa Umma v. Noordeen* 6 N.L.R. 173, 175, per Moncrieff J, 176 per Middleton J, cf. the anonymous case in Koch's Reports 48, 49, per Withers, J.) emphasis seems to have been laid on the use of the word “assigns” on the ground that “the word ‘assigns’ means any person in the world to whom the donee may be pleased to assign the property” (*Hormusjee v. Cassim* 2 N.L.R. 190, 191 per Bonser, C.J.). But in *Coudert v. Don Elias* 17 N.L.R. 129, 132, Pereira J pointed out “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 *fideicommissum* 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 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”.

(2) *Estate Welsford v. Estate Wright* 1930 O.P.D. 162, 167, per de Villiers, J.P., cf.: “The words ‘heirs and executors, administrators and assigns’ are words which are frequently, though unnecessarily, used by Singhalese notaries to denote a gift or transfer of *plena proprietas*” *Silva v. Silva* 18 N.L.R. 174, 175, per Lascelles, C.J., cf. also *ibid.* 178, per de Sampayo, A.J., *Perera v. Fernando* 6 Leader 12, 13, per Grenier, J., *Kirthiratne v. Salgado* 34 N.L.R. 69, 75, 76 per Dalton, J., *Coudert v. Don Elias* 17 N.L.R. 129, 133, per Pereira J., *Dassanaike v. Dassanaike* 8 N.L.R. 361, 367, per Wendt J, *Fernando v. Fernando* 46 N.L.R. 44, 46, per Jayetileke, J. *Aphuhamy v. Malhes* 45 N.L.R. 259, 261, per Howard, C.J., cf. also Voet 36.2.1 *ad. fm.*, V.L. Cens. For. 1.3.5.37, Pothier *Subst.* s. 43.

“HEIRS, EXECUTORS, ADMINISTRATORS AND ASSIGNS”

property was imposed in favour of anybody else, no *fideicommissum* will be created, even if a prohibition of alienation has been imposed upon him.³ In this connection it may be noted that generally “it would be impossible to hold—and there is certainly no authority for the proposition—that the words ‘heirs, executors, administrators and assigns’, used as they are with reference to the original gift to the donees, are a clear and precise indication of the class which is to take after the death of the donees”.^{4, 5}

At one time such great importance was attached to the presence of the phrase “heirs, executors, administrators, and assigns” placed in apposition to the name of the recipient of a gift that, even where there was an indication that after his death the property was to go over to another person designated with sufficient certainty, it was held that there was no *fideicommissum*, on the ground that the inconsistency between the grant of absolute ownership indicated by the use of the phrase “heirs, executors, administrators and assigns” and the gift over was such as to create a doubt as to the testator’s intention to create a *fideicommissum*.⁶

But later the Courts have come round to the more satisfactory view that these earlier decisions “went too far in holding that the use of these words” (i.e. “heirs, executors, administrators and assigns”) “operated mechanically in favour of freedom of alienation”.⁷ “The fact that words are used to vest

(3) v. e.g. *Hormusjee v. Cassim* 2 N.L.R. 190, *Tina v. Sadiris* 7 S.C.C. 135, *Nugara v. Gonsal* 14 N.L.R. 301, *Ponnusamy v. Karthi* 1 C.W.R. 91 cf. *Babahami v. Wickremesinha* 1 Matara cases 114; for the prohibition is “nude” in the absence of an indication of its beneficiaries v. Voet 36.1.27, V. d. Linden 1.9.8.

(4) *Silva v. Silva* 18 N.L.R. 174, 177, per Lascelles, C.J., cf. *ibid.* 175. See *Ponnusamy v. Karthi* 1 C.W.R. 91 *Meiya Nona v. Davith Vederala* 31 N.L.R. 104, and *Boteju v. Fernando* 24 N.L.R. 293, 295-6, per Schneider, J.

(5) The remarks just made denying the existence of a *fideicommissum* are intended to apply only to cases where there is a gift to legatees or donees, their “heirs, executors, administrators and assigns” (coupled perhaps with a prohibition on alienation) and nothing more: the position would be quite different if there is something more in the disposition indicating who is to take after the first legatees or donees.

Thus, a gift “to A and B, their heirs, executors, administrators and assigns, subject to the condition that they may not alienate, and should there be any time that there shall be nobody descending from them, then to X” creates a valid *fideicommissum*, first in favour of the descendants of A and B (on the view that the language used suggests a devolution from generation to generation cf. *Carolus v. Simon* 30 N.L.R. 266, 269, per Garvin, J.), and on failure of descendants in favour of X. *Appuhamy v. Jayetelleke* 2 Bal. Notes 62, *Saidu v. Samidu* 23 N.L.R. 506, *Mirando v. Coudert* 19 N.L.R. 90, *Coudert v. Don Elias* 17 N.L.R. 129, *Peduru Fernando v. Mary Fernando* 46 N.L.R. 44.

(6) v. e.g., *Perera v. Fernando* 6 Leader 12.

(7) *Gunaratne v. Perera* 1 C.W.R. 24, 25, per Wood Renton, C.J., cf. *ibid.* 26, per de Sampayo, J.

absolute *dominium* in the fiduciary in the first instance is by no means repugnant to the creation of a *fideicommissum*⁸. . . The only question is whether the words used sufficiently indicate a clear intention to burden the *plena proprietas*''⁹ and, it may be added, whether the fideicommissaries are designated with reasonable certainty.¹⁰

We can turn now to consider cases where a phrase like "heirs, executors, administrators and assigns" has been used as part of the description, not of the first taker of the property, but of the fideicommissary. It is especially in the decision of the question how far the use of such a phrase makes the identification of the fideicommissaries uncertain that judicial differences of opinion have manifested themselves.

"Some of (the cases) have gone the length of saying that once an intention to create a *fideicommissum* is apparent, words like assigns, executors, and administrators should be treated as surplusage or notarial flourish and struck out or ignored. . . There are other decisions which say that even if parties indicate their intention to create a *fideicommissum* by employing such words as 'under the bond of *fideicommissum*', those words are of no avail if the parties to be benefited are not clearly designated or indicated".¹¹ Illustrations of these two opposite judicial trends may now be given.

Thus, in the following cases *fideicommissa* were held to exist in spite of the existence, in the description of the fideicommissaries, of verbiage like "heirs, executors, administrators and assigns", while in the cases with which they are contrasted, on substantially the same language, no *fideicommissa* were held to have been created :—

- (1) *Wijetunge v. Wijetunge* 15 N.L.R. 493 (with which may be contrasted *Boteju v. Fernando* 24 N.L.R. 293, *Appuhamy v. Mathes* 45 N.L.R. 259 and *Amaratunge v. Alwis* 40 N.L.R. 365.)

(8) See, e.g. *Abeyratne v. Jayaris* 26 N.L.R. 181, 184, per Bertram, C.J. *Udumalevvai v. Mustapha* 34 N.L.R. 46, 48, per Akbar, J., is another illustration. Here the phrase "heirs, executors, administrators, and assigns" was attached to the gift to the first takers only of the property, and there was a clear gift over, in the event of any of them dying without issue, to the surviving brothers. cf. *Deu v. Jayewardene* 5 Times 107 *Griaux v. Jayewardene* 32 N.L.R. 105, and the anonymous case reported in 1873 Grenier (Part III) 28.

(9) *Coudert v. Don Elias* 17 N.L.R. 129, 133, per Pereira J. cf. *Silva v. Silva* 18 N.L.R. 174, 177-8 per de Sampayo, A.J. For example, *Kirthiraine v. Saigado* 34 N.L.R. 69, 76, per Dalton, J., (where there was held to be no such intention clearly manifested) may be contrasted with *Fernando v. Fernando* 46 N.L.R. 44, 46, per Jayetileke J., (where such an intention was held to have been manifested).

(10) *Silva v. Silva* 18 N.L.R. 174, 178, per de Sampayo A.J.

(11) *Amaratunga v. Alwis* 40 N.L.R. 363, 365, per Soertsz, J.

“HEIRS, EXECUTORS, ADMINISTRATORS AND ASSIGNS”

- (2) *Dassanayake v. Tillekeratne* 20 N.L.R. 89 (with which may be contrasted the anonymous case S.C. 84 D.C. Kalutara 5982 reported in 18 N.L.R. at pp. 178-9, where the language was substantially the same.)
- (3) *Government Agent, Central Province v. Silva* 24 N.L.R. 62.
- (4) *Craib v. Loku Appu* 20 N.L.R. 449, (with which may be contrasted *Silva v. Kekulawela* 26 N.L.R. 489, and *Salonchi v. Jayatu* 27 N.L.R. 366.)
- (5) *Mudaliyar Wijetunge v. Duwalage Rossie* 47 N.L.R. 361.

The first line of cases, holding in favour of *fideicommissa*, is based on the view that *fideicommissa* must be derived more from the general intention, both express and tacit, of the testator or donor rather than from a meticulous examination of the letter of his language: as Pereira, J said, in *Wijetunge v. Wijetunge* 15 N.L.R. 493, 496, “if the intention of a donor or testator to create a *fideicommissum* 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”.

The line of contrasted cases, in which no favour was shown to *fideicommissa*, is based on the view that, since *fideicommissa* are “odious”,¹² the language introducing them must be strictly construed: as Soertsz, J said in *Amaratunga v. Alwis* 40 N.L.R. 365, 366, in reply to Pereira, J’s dictum quoted in the last paragraph, “when, despite an intention to create a *fideicommissum* to be gathered from such words as ‘under the bond of *fideicommissum*’, 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 *fideicommissum* for the testator or donor by striking out or ignoring words on the assumption that they are ‘surplusage’ or ‘notarial flourish’”.

In choosing between these two statements of principle, one must respectfully agree with that expressed by Soertsz, J: for although it is true “one must not press the presumption (against *fideicommissa*) too far”,¹³ yet that presumption does operate in case of doubt and would operate where there is uncertainty as to the *fideicommissaries*, certainty as to which is one of the “essentials” of a *fideicommissum*. But at the same time it is perhaps permissible to suggest that the mere use of a phrase like “heirs, executors, administrators and assigns”, so commonly inserted by undiscerning or careless

(12) and, in case of doubt, the law presumes against *fideicommissa*. v. Voet 36.1.72, Huber 2.19.75-7.

(13) *Exp. Odendaal* 1926 O.P.D. 223, 225, per McGregor J. cf. *Mosse v. Est. Ebben* 1913 C.P.D. 567, 584, per Kotze J.

notaries in the description of the fideicommissaries, should not be fatal to the existence of a *fideicommissum* in which the fideicommissaries are otherwise sufficiently clearly indicated :¹⁴ for where "notaries frequently through long-established custom make use of improper expressions. . . (and) clauses taken from old fashioned forms of theirs. . . which are clearly superfluous. . . carelessness and want of skill on the part of notaries does not at all prejudice the testator or his heirs, provided only a different intention. . . on the part of the testator be apparent".¹⁵

T. NADARAJA

(14) Especially should this be the case where, in different parts of the instrument under consideration, there appears more than one description of the fideicommissaries, and it is clear that the same person or group of persons is being referred to. In such cases ambiguity in the language used in one or more references is immaterial, if at least one description is reasonably clear.

Thus, in *Appuhamy v. Mathes* 45 N.L.R. 259 it is submitted with respect that the ambiguous phrase "heirs, executors, administrators and assigns" in the later clause could have been treated as merely a repetition of the class—namely, "children"—which was clearly indicated as the fideicommissaries in the earlier clause. This case may be contrasted with a case like *Dassanaike v. Dassanaike* 8 N.L.R. 361 where the meaning of the ambiguous phrase was not clarified by a repetition elsewhere of the description of the fideicommissaries.

(15) V. Leeuwen. *Cens. For.* 1.3.5.3 and 4.