1948 *Present:* **Howard C.J., Canekeratne and Windham JJ.**

PABILINA, Appellant, *and* KARUNARATNE *et al.*, Respondents

S. C. 210—D. C. Colombo, 3,389

Fidei commissum—Requisites for validity—Doubt as to ascertainment of event or condition of gift over—Absolute title to donee.

A deed of gift contained the following clause " We hereby grant the same by way of gift unto William, Hendrick, and Luvina to be vested in them share and share alike after our death and after we shall have possessed the issues and profits during our life time. We authorize the said three donees, their descending heirs, executors, administrators and assigns to own and undisputably possess the same for ever after our death. We hereby covenant with the said William, Hendrick and Luvina and their heirs, executors, administrators and assigns that the said three donees or each of them can neither sell, mortgage, gift nor alienate the portion of land and that their children can do whatever they please therewith ".

Held, that the deed did not create a *fidei commissum* as it was not clear when the children of the donees, if beneficiaries, were to succeed.

APPEAL from a judgment of the District Judge, Colombo.

H. V. Perera, K.C., with *W. D. Gunasekere*, for defendant, appellant.

H. W. Jayewardene, for plaintiffs, respondents.

Cur. adv. vult.

December 14, 1948. CANEKERATNE J.—

This is an appeal by the defendant from a judgment ordering her removal from lot A 2, in plan No. 1,841 dated June 29, 1916, which has been declared the property of the plaintiffs. They are the grand-children of one Juana Fonseka, who was the owner of a land called Kapitan Moruparangiyawatta *alias* Galpottewatta. By deed No. 3,841, dated July 27, 1907, the latter assisted by her husband, T. S. Fernando, donated an undivided three-fourth share towards the west of the portion marked A in a plan dated July 16, 1907, to her three children, William, Hendrick, and Louisa. By a later deed she transferred the eastern fourth share and it ultimately passed to one R. M. Hendrick Perera. In October, 1913, Hendrick sold his undivided one-third share to one K. Don Hendrick. On January 23, 1914, Louisa and her husband instituted an action for partitioning this land against William, Hendrick and R. M. H. Perera, allotting this portion, *inter alios* to the second defendant. K. D. Hendrick intervened in this action about March 2, 1914, and pleaded that the share that passed to Hendrick Fernando on deed 3,481 should be allotted to him. An interlocutory decree was entered after trial on February 15, 1915, whereby the first plaintiff, first defendant and the added defendant, K. Don Hendrick, were each allotted an undivided third share of the western portion and the third defendant an undivided fourth share on the east. The land was divided into separate lots and by the final decree,

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dated November 12, 1917, lot A 2 was allotted to Louisa. She by deed (D 2) dated February 5, 1920, sold this lot to K. Don Paules, who sold the same to the defendant by deed (D 3), dated February 28, 1944. The defendant also succeeded to the interests of her father K. Don Hendrick in lot (A 1). Louisa died on December 21, 1935, and her children, the two plaintiffs, instituted this action on May 16, 1944.

Two points were argued before us in support of the appeal. In the first place, that deed No. 3,841 did not create a valid *fidei commissum* and that therefore the powers of Louisa under it were unfettered, and in the second place that the plaintiffs were precluded from disputing the validity of the transfer by their mother to Don Paulis, and of the transfer for value by Don Paulis to the appellant. The interlocutory decree in the partition action was entered by a member of the Bar, then officiating as District Judge, who was noted for the care with which he handled every matter before him ; he had the deed of gift before him and had to consider whether the share given to Hendrick by his mother passed to his vendee, both Hendrick and the vendee being parties to the action. The enquiry was held about a year after the decision in *Coudert v. Elias* [1], which stemmed the current of authority and the Judge would have been aware of that decision.

A solution is to be reached rather from an examination of the context than from a comparison with other decisions. Interpreters have to deal with the written expression of a donor's intention. They have to ascertain that intention from the language used really by the draftsman employed by him. It is now settled that the presence of the word " assigns " is not inappropriate for the purpose of conveying the *dominium* in the property to a fiduciary ; it would not necessarily make invalid a *fidei commissum* which is otherwise well created. For the creation of a *fidei commissum* the language used must clearly show, (1) that the gift is not absolute to the donees ; (2) who are the persons to be benefited, and (3) when are they to benefit [2]. The person to whom a property is given is enjoined after a certain time, or after his death, to hand over the property or allow it to pass, either in whole or in part, to another. Where a real doubt arises on any of these points, a court would rather be inclined to adopt the view that the person, the donee or legatee, holds the property free of any burden. Doubt as to whether a valid *fidei commissum* has been created includes such doubt as to the event or condition as will prevent its ascertainment by a court of law. It was not disputed by Counsel for the respondents that the third part was as essential as the others.

The deed is in Sinhalese, and two translations have been filed in the case (P 1) by the plaintiffs and (D 5) by the defendant ; the learned Judge seems to have followed (D 5). The operative part of the deed runs thus : We . . . . hereby grant the same by way of gift unto the said William Fernando, Hendrick Fernando and Luvisa Fernando, to be vested in them share and share alike after our death and after we shall have possessed the issues and profits during our lifetime,

[1] *(1914) 18 N. L. R. p. 175.*
[2] *Van der Linden, Institutes (Henry's translation p. 137, 139.)*
Grotius, Introduction 2-20-2
Van Leeuwen, Roman Dutch Law, 3-8-1.

to wit the western three-fourth share". The next clause authorises "the said three donees, their descending heirs, executors, administrators and assigns to own and undisputably possess the same for ever after our death". The translation on (P 1) has the words "their heirs," instead of "their descending heirs". It was not disputed that the Sinhalese words mean "the executors, administrators and assigns" of the donees. The words referred to above are used as words of limitation in respect of the estate conveyed to the donees, and thus an unfettered title is conveyed to them in the first instance. The donors provided that the full proprietary right in the share should *prima facie* be vested in a donee, and unless there is anything in the rest of the deed to modify this, the right of a donee would be absolute.

The deed proceeds as follows, "We hereby covenant with the said William . . . . and their heirs, executors, administrators and assigns that the said three donees or each of them can neither sell, mortgage, gift, nor alienate the portion of land and that their children can do whatever they please therewith". It is not clear when the children are to benefit. Do the words used mean, that the children are to succeed to the property, if the donees act contrary to the prohibitory clause, or is it on some other event? Mr. Perera contends that the devolution depended on the donees making no alienation in their lifetime nor any disposition of it by will. It is important to note that the words used are not "their heirs", but "their children". It was argued for the respondents, that the words, "possess for ever" in the earlier clause mean, "possess during their lifetime," for a person, it is said, can only possess while he is alive and that the language used in the deed does not make the event on which the substitution is to take effect uncertain, i.e., it takes place on the death of the donee. As the draftsman of the deed is a Sinhalese Notary any apparent incoherency should, it is argued, be attributed to the notary's want of care rather than to any uncertainty on the part of the donors. The duty of interpreters is to declare the meaning of what was written in the instrument, not of what was intended to have been written. The document must be read as a whole. It is, generally, not possible to disregard any part of a document. It may, however, be permissible sometimes to ignore words inserted carelessly in one part of a document, especially where the rest of it makes certain what was intended. One would act arbitrarily in striking out the words "executors, administrators and assigns" from the context. It would be impossible to disconnect the words, "for ever," from the rest of the expression used in the deed.

It may possibly be that this view is not in accord with the real intention of the donors, but that is a matter of conjecture. If Juana entertained the intention that her grand-children should be substituted for her daughter as regards the share the latter got, she or her draftsman has failed to use language to express it. This is essentially a case where a court should take the view that the language used by the donors has failed to disclose an intention to give a share of the property to Louisa's children on her death.

It is unnecessary to consider the second point. Mr. Jayewardene contends that the observations of the learned Judge in *Soysa v. Miskin* [1], were *obiter* and refers to the views of the Privy Council as regards *bona fide* alienee, in *Sitti Kadija v. De Saram* [2]. It may be a point for consideration in a future case how far these varying views can be reconciled. When that occasion arrives a court may also refer to the observations made by Lord Phillimore in *Gunatilleke v. Fernando* [3], and consider the special case mentioned by the institutional writers that the property should remain with the purchaser where the fiduciary and the vendee were both ignorant that the property was the subject of the *fidei commissum*, and the ignorance could be attributed to no fault on their part, but wholly to the conduct of the testator [4].

The judgment of the District Court is set aside and the respondents will pay the costs of the trial and of the appeal to the appellant.

HOWARD C.J.—I agree.

WINDHAM J.—I agree.

Appeal allowed.