1944 *Present:* **Howard C.J. and de Kretser J.**

APPUHAMY, Appellant, *and* MATHES, Respondent.

86—D. C. Negombo, 11,886.

Fidei commissum—*Reservation of life-interest—Prohibition against alienation—Words of grant—Doubt as to intention—Free inheritance.*

Where a deed of gift contained the following clauses:—

(1) And it is hereby directed that the said three donees shall not sell, mortgage, gift, exchange, lease for a period exceeding 15 years at a time or alienate in any manner whatsoever the said properties and on their deaths their children are entitled to deal with them as they please.

(2) Therefore all the right, title, claim and interest of the said donors in and to the said properties hereby gifted shall vest in the said three donees and they may possess the same subject to the said life-interest and to the said condition and after their deaths their heirs, executors, administrators, and assigns may deal with them as they please for which full authority is hereby given,—

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

APPEAL from a judgment of the District Judge of Negombo.

H. V. Perera, K.C. (with him *Cyril E. S. Perera*), for the second defendant, appellant.

N. E. Weerasooria, K.C. (with him *E. B. Wikremanayake* and *H. Wanigatunge*), for the plaintiff, respondent.

Cur. adv. vult.

May 26, 1944. HOWARD C.J.—

This is an appeal by the second defendant from a judgment of the District Judge, Negombo, allocating to the plaintiff and the first defendant in a partition action each an undivided one-third share of the old house, one-third share of the land and the plantations and one-third share of the well. The second defendant, the appellant, was awarded one-third share of the land, one-third share of the plantation and one-third share of the old house, all being subject to the fiduciary rights of his mother, the first defendant. The plaintiff was awarded his costs of contest.

The original owners of the land—Ana Silva and Theodora Silva—by a deed of gift dated September 12, 1909 (P 1) donated the land in disqute to the three minor children of one of the donees Theodora, namely, Eugina Silva, the first defendant, Isabella Silva and Miguel Silva. After the death of Miguel, the first defendant, Isabella and Theodora, one of the original donors, by deed P 2 of January 26, 1918, sold the one-third share they had inherited on the death of Miguel to Peter Singho and Manuel Singho. By deed P 3 of February 6, 1920, Manuel Singho sold his one-sixth share to Peter Singho. This one-third share was sold

in execution in case No. 8,969 D. C. Negombo, and the plaintiff, who had been the mortgagee of the property and put his bond in suit, became the purchaser. On this title the plaintiff brought this action for partition.

The case for the second defendant was based on the deed of gift P 1, and it was contended on his behalf that this deed created a *fidei commissum* in his favour. That being so, the share of Miguel on the latter's death devolved on the remaining donees under P 1, namely, his sisters, the first defendant and Isabella, and subsequently, on Isabella's death, unmarried and issueless, her interests passed to the first defendant. The first defendant being the fiduciary heir her interests are subject to the *fidei commissum* in favour of the second defendant who will be entitled to the property on the death of the first defendant.

The learned Judge has held in favour of the second defendant so far as the creation of a *fidei commissum* in her favour is concerned. In his judgment he says that in his opinion P 1 creates a valid *fidei commissum* as there is a clear restraint on alienation by the donees and a clear indication of the persons to be benefited. The next passage in the judgment is as follows:—

> "But as the fiduciaries had entered upon their respective shares of inheritance a separation of interests had taken place which prevents the operation of "*Jus accrescendi*" in favour of the survivors when the fiduciary Miguel died. Therefore the vendors on P 2 had the right to dispose of the ⅓ share they inherited from Miguel free from any entail and the purchasers on that deed—P 2—got absolute title to ⅓. Then the plaintiff is entitled to ⅓ share of the land and of the buildings that stood on it when Miguel died."

It is contended by Mr. Perera on behalf of the appellant that the passage I have cited from the judgment is not a correct exposition of the law and that whatever title the plaintiff obtained is subject to the *fidei commissum* in favour of the second defendant. The most that the plaintiff can claim is an undivided one-third of the land during the lifetime of the first defendant. On behalf of the plaintiff it has been contended that the learned District Judge was wrong in holding that P 1 created a *fidei commissum*. The passage in P 1 on which reliance is placed by the appellant occurs after the reservation of a life interest in favour of the donees and is as follows:—

> "And it is hereby directed that the said three donees—Jayasinghe Arachchy Eugina Silva Hamine, Jayasinghe Arachchige Isabela Silva Hamine and Jayasinghe Arachchige Migel Silva Appuhamy shall not sell, mortgage, gift, exchange, lease for a period exceeding fifteen years at a time, lease before the expiry of an existing lease or alienate in any manner whatsoever the said properties and on their deaths their children are entitled to deal with the same as they please."

The next clause in P 1 is worded as follows:—

> "Therefore all the right, title, claim and interest of the said donors in and to the said properties, hereby gifted shall vest in the said three

donees Jayasinghe Arachchy Eugina Silva Hamine, Jayasinghe Arachchige Isabela Silva Hamine and Jayasinghe Arachchige Migel Silva Appuhamy and they may possess the same subject to the said life-interest and to the said condition and after their deaths their heirs, executors, administrators and assigns may deal with the same as they please for which the full authority is hereby given.''

In support of his contention that P 1 creates a valid *fidei commissum* Mr. Perera has maintained as a principle of English law that if there be two clauses or parts of a deed repugnant one to the other, the first part shall be received and the latter rejected. In support of this principle he has referred us to the Second Edition of *Norton on Deeds*, P 89, and Halsbury's *Laws of England*, vol. 10, p. 280, para. 348. It is true that authority for this proposition is to be found in these text-books. On the other hand it is also stated with reference to this principle that is a matter of doubt whether there is much authority for the rule and at any rate it is one only applied in the last resort if a Judge can find nothing else to assist him in determining the question. Numerous cases are cited in Norton to demonstrate that the rule has been followed. But the author states that in most of the eases the true reason for rejecting the latter words was that they were inconsistent with the general scope of the deed. The rule is also subordinate to the general principle that the intention must be ascertained from the entire contents of the deed. In this connection I cannot do better than cite the remarks of Wilde C.J., in *Walker v. Giles*[1] when he said—

'' As the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt that, applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected; and so construing the deed, the Court is of opinion that the latter part, importing a demise cannot have that effect, without defeating the intention of the parties.''

Is it possible to derive from the entire contents of P 1 the intention of the donors ? The words of grant indicate that the donors intended that the donees could do anything they liked with the property. The use of the words '' their heirs, executors, administrators and assigns '' clearly indicates this intention. But the donors have made this grant subject to the ''said condition''. It is not absolutely clear whether the '' said condition '' refers to the direction against alienation contained in the previous clause. Whether it does so or not, the words of grant are quite inconsistent with the words in the '' direction ''. It is, therefore, difficult to discover what the intention of the donors or the notary were in using these words. The question is, what was in the mind of the donors at the time they executed the deed. Had they any clear and definite ideas as to what they were doing ? It is impossible to treat the words, '' heirs, executors, administrators and assigns '' as mere surplusage or notarial ffourish. These words must be given the effect they were intended to have. In this connection I would invite attention to the

[1] *18 L. J. C. P. 323.*

judgment of Soertsz J., in *Amaratunga v. Alwis* [1]. It seems to me clear, as in *P. Swaris Perera v. D. Christina Fernando and others* [2], that the words of grant and the direction are so irreconcilable that it is impossible to say what the intention of the donors was. Are we, in these circumstances, to apply the principle for which Mr. Perera has contended? I think not, because this principle is only to be employed as a last resort. I find that I have at my command another principle to assist me in determining the question. It is a principle of Roman-Dutch law that where there is any doubt it is presumed that the direct substitution is intended—*vide* McGregor's translation of Voet, Book XXXVI, titles I. and II., p 9. This doctrine has received frequent illustration in the South African Courts. "Where it is matter of doubt whether a *fidei commissum* has been imposed or not, that construction should rather be adopted which will give the legatee or heir the property unburdened", per de Villiers C.J., in *Cruse v. Pretorius'* Executors, 9B, 124. In my opinion the learned Judge was wrong in holding there was a valid *fidei commissum*.

Mr. Perera has also contended that the respondent is precluded from raising on appeal a question of the validity of the *fidei commissum* on the ground that no objections with regard to this part of the Judge's finding have been served on the appellant. This contention is without substance. Section 772 (1) of the Civil Procedure Code is worded as follows:—

> "Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his proctor seven days' notice in writing of such objection."

It is obvious that the plaintiff can support the decree of the learned Judge, on the ground that P 1 does not create a *fidei commissum*—a ground decided against him in the District Court—without filing an objection in the form prescribed in section 758 (*e*).

For the reasons I have given the appeal is dismissed with costs. The plaintiff must be paid by the second defendant the costs of contest in the District Court and the costs of appeal. Other costs will be borne *pro rata*. The order made by the District Judge with regard to partition is not in order. It is set aside and it is directed that the property should be partitioned in the following shares:—

Plaintiff to $\frac{1}{3}$ of land, plantations, old house and compensation for half of 11 buildings;

First defendant to $\frac{2}{3}$ of land, plantations, old house and compensation for half of 11 buildings.

DE KRETSER J.—I agree.

Appeal dismissed.

[1] *40 N. L. R. 363.*

[2] *6 Leader Law Rep. 12.*