1941 *Present :* **Howard C.J. and Soertsz J.**

RETTIAR *v.* WIJENAIKE.

39 Inty.—D. C. Kandy, 117.

Fidei commissum—*Deed of gift—Donee to possess the land or deal with it at will and pleasure—Devolution on children after death of donee*—Fidei commissum residui *or* simplex.

Where a deed of gift by a father to his son, after reciting that in consideration of the love and affection he bears towards the son and with the object of receiving assistance and succour from him donates, grants and conveys certain lands and premises, subject to the following conditions,—

Firstly, as long as I (*i.e.*) the donor and my wife live in this world the said . . . . (donee) shall render all assistance and succour.

Secondly, after the death of both of us, the said donee shall be entitled to hold and possess all the aforesaid lands and premises or to deal with the same at will and pleasure and after the death of the said donee the same shall devolve on his children.

And in the event of the said donee dying without issue all the aforesaid lands and premises shall devolve on the surviving brothers and sisters of the said donee or on their children.

***Held*, that the deed created not merely a *fidei commissum residui* but a *fidei commissum simplex*.**

***Dantuwa v. Setuwa* (*11 N. L. R. 39*) distinguished.**

APPEAL from a judgment of the District Judge of Kandy.

The only question argued in appeal was whether the deed of gift P 1 the material portions of which are given in the headnote, creates a *fidei commissum*.

L. M. D. de Silva, K.C. (with him *N. Nadarajah* and *M. M. I. Kariapper*), for defendant, appellant.—The only question that arises is whether the deed of gift P 1, created a valid *fidei commissum*, or whether it vested the properties absolutely on Harry Keppitipola Bandara. The case for the defendant is that the deed conveyed absolute title. All *fidei commissa* must belong to one or other of two classes—

(1) Simple *fidei commissum*, where there is a conveyance from A to B with express or implied prohibition against alienation and a designation of the person to be benefited ;

(2) *Fidei commissum residui*, where authority to alienate is given and whatever is left passes to certain persons.

This deed does not create a *fidei commissum* of class (1). It does not create a *fidei commissum* of class (2), as it stipulates the whole of the property to pass. There is a profound inconsistency and the *fidei commissum* fails for uncertainty. It is impossible that Harry shall "deal with" the properties "at will and pleasure" and that the "same shall devolve on his children". This is an absolute gift coupled with a proviso inconsistent with that gift. Therefore effect cannot be given to the

proviso—*Dantuwa v. Setuwa* [1]. The principle enunciated in *Amaratunga v. Alwis* [2] should be applied here. One cannot ignore or strike out certain words in this document. One cannot make conjectures to ascertain intention—*Ramanathan v. Saleem* [3]. If there is a doubt one must hold donee unburdened by *fidei commissum—Walter Pereira's Laws of Ceylon, 2nd ed., p. 442.* The *dictum* of Garvin J. in *Veerapillai v. Kantar* [4] is against the above view. That is *obiter*. It was a border-line case and the views expressed there are diametrically opposed to the view of Soertsz J., expressed in *Amaratunga v. Alwis* (*supra*), that one cannot ignore the words used in ascertaining intention.

H. V. Perera, K.C. (with him *N. E. Weerasooriya, K.C.*, and *T. Nadarajah*), for plaintiff, respondent.—Our case may be put alternatively. Firstly, it is submitted that the deed created a *fide commissum* simple. One must construe the document as a whole so as not to render nugatory any operative words. "Deal" does not mean "alienate permanently". Here there is a clear intention that donee's children should benefit. The word "deal" must be so interpreted as to give effect to the operative parts of the document. Words descriptive of what a grantee may do cannot destroy the operative words—*Wirasinghe v. Rubeyat Umma* [5]. The only question here is "is the gift over a residue or the whole property ?"' In *Dantuwa v. Setuwa* (*supra*) there was no designation of a beneficiary. There was no gift over by the donor. The immediate donee is asked to make the gift. Where the actual gift over is made in the document itself there is a *fidei commissum*. In *Amaratunga v. Alwis* (*supra*) there was no designation of a beneficiary or the designation was confused. Here, reading the document as a whole, it is clear that the gift over is an integral part of the document. The word "deal" must therefore be consistently interpreted. Alternatively, if the word "deal" means alienate inconsistently with the gift over, what is not alienated must go over. At the worst there is a *fidei commissum residui*.

L. M. D. de Silva, K.C., in reply.—As regards the meaning of the words "deal with the same at will and pleasure" the position taken up by plaintiff in appeal is different from that taken up by him in the lower Court. There was no dispute as to the meaning of the words. They were taken to mean "could do as he pleased". It is too late to contend that there is another meaning. It is not purely a question of interpretation. It is one of translation and interpretation. Respondent in the lower Court has accepted that defendant could deal with the property absolutely; any other meaning would cause prejudice to the defendant.

Cur. adv. vult.

August 4, 1941. HOWARD C.J.—

The only question that arises on this appeal is whether the learned Judge was right in holding in favour of the plaintiff that the deed of gift—P 1—created a *fidei commissum* in favour of the children of Harry Keppitipola Bandara, the son of the donor. In P 1 the donor, after reciting that in consideration of the love and affection he bears towards

[1] (*1907*) *11 N. L. R. 39.*
[2] (*1939*) *40 N. L. R. 363.*
[3] (*1940*) *42 N. L. R. 80.*
[4] (*1928*) *30 N. L. R. 121.*
[5] (*1913*) *16 N. L. R. 369.*

Harry and with the object of receiving assistance and succour from him, "donates, grants and conveys by way of gift the aforedescribed lands and premises unto the said Harry in manner following; that is to say :—

> Firstly, as long as I the said Keppitipola Ratemahatmaya and my wife, Dunuwila Rajakarunadhara Ekanayake Dharmakirti Wasala Pandita Mudiyanse Ralahamillahe Keppitipola Kumarihamy live in this world the said Harry Keppitipola Bandara shall render us all assistance and succour.
>
> Secondly, after the death of both of us, the said Harry Keppitipola Bandara shall be entitled to hold and possess all the aforesaid lands and premises or to deal with the same at will and pleasure and after the death of the said Harry Keppitipola Bandara the same shall devolve on his children. And in the event of the said Harry Keppitipola Bandara dying without issue all the aforesaid lands and premises shall devolve on the surviving brothers and sisters of the said Harry Keppitipola Bandara, or on their children".

The learned Judge held that the case could not be distinguished from *Wirasinghe v. Rubeyat Umma*[1], and *Veerapillai v. Kantar*[2], and found accordingly that P 1 created a *fidei commissum residui.* Mr. de Silva on behalf of the appellant has contended that P 1 creates an absolute gift to which a condition has afterwards been attached. That there is no express or implied prohibition against alienation. That the words "or to deal with the same at will and pleasure" cannot be ignored or struck out. That an intention to create a *fidei commissum* cannot be deduced from the deed. If there is any doubt, the *fidei commissum* fails and the deed must be construed in favour of the deceased. In this connection Mr. de Silva invited our attention to the following passage from *Voet 36.1.1* and *7* cited in the 2nd edition of *Walter Pereira's Laws of Ceylon,* at page 442 :—

> "Where there is any doubt as to whether a substitution in a testament is direct or *fidei commissary,* the former is to be presumed to have been intended. A *fidei commissum* is to be strictly interpreted, and its existence should not be lightly presumed ; and in case of doubt the Court will assume that no incumbrance was intended."

Mr. de Silva also relied on the cases of *Dantuwa v. Setuwa*[3] ; *Amaratunga v. Alwis*[4]; and *Ramanathan v. Saleem*[5]. In *Amaratunga v. Alwis (supra),* Soertsz J. held that the *fidei commissum* failed. He came to that decision when, after considering all the terms of the deed, he found it difficult, if not impossible, to say that the intention of the donor was to impose a *fidei commissum.* If that was his intention, he had failed to do so inasmuch as the persons to be benefited were not sufficiently designated unless one strikes out certain words in the deed which the learned Judge regarded as an utterly unwarranted course to take. The resulting position, according to Soertsz J., was that the words are capable of more than one construction and hence the Court would lean towards the one

[1] *16 N. L. R. 365*
[2] *30 N. L. R. 121.*
[3] *11 N. L. R. 39.*
[4] *40 N. L. R. 363.*
[5] *42 N. L. R. 80*

most in favour of freedom of alienation. The following passage from this judgment also merits attention :—

"In *Wijetunga v. Wijetunga*[1], 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.*"

In *Ramanathan v. Saleem* (*supra*) the judgment of the Court was also delivered by Soertsz J. who found difficulty in deciding whether the will to be interpreted created a *fidei commissum* and his decision was given on the ground that the gift over was void as it offended the rule against perpetuities. In *Dantuwa v. Setuwa*[2] D "gave, granted and conveyed by way of gift" to his wife U and their four children, certain lands subject to the following proviso :—

"It has been hereby covenanted that my wife Ukku and children, N. S. T and U, all five aforesaid, shall hereafter render to me all assistance and comforts of life, while I continue to live in this world, and that after my demise my said wife and four children shall be entitled to have and to hold all the several high and low grounds and houses and plantations at their disposal for ever, but my said wife, Ukku, having possessed her share of the said premises, shall at the approach of her death, grant and convey the same unto my said four children, and shall not make the same over to any outsider."

It was held that the proviso in the deed of gift being inconsistent with the previous absolute gift in the same deed could not be given effect to and that under the said deed, U, the wife, was entitled to one-fifth share and was at liberty to dispose of it as she pleased. It is contended by Mr. de Silva that the deed of gift in *Dantuwa v. Setuwa* (*supra*) is indistinguishable from the deed in the present case. I am unable to accept this contention. The words "or to deal with the same at will and pleasure" which it is maintained indicate an intention to create an absolute gift to Harry are vague and uncertain. In *Dantuwa v. Setuwa* (*supra*) even if there was a gift over, it is inconsistent with the previous absolute gift. Moreover there is really no gift over but merely an injunction to Ukku at some uncertain time—namely, at the approach of her death—to grant and convey the property to her four children. Apparently she might

[1] *15 N. L. R. 493.*

[2] *11 N. L. R. 39.*

have disposed of the property by will to anyone she pleased. If the donor intended that Ukku should have merely a life interest with remainder to his children his intention was not clear. I am unable, therefore, to agree with Mr. de Silva that the three cases cited by him determine the matter at issue in favour of the defendant.

On the other hand Counsel for the plaintiff, putting the case for the latter at its very lowest, maintained that having regard to the decisions in the cases of *Wirasinghe v. Rubeyat Umma*[1]; and *Veerapillai v. Kantar*[2], P 1 created a *fidei commissum residui.* In the former case the joint will of A and his wife B, who were married in community of property, contained the following clauses :—

> " (2) It is directed that all the movable and immovable property belonging to us be possessed by us, the above-named, during the lifetime of both of us according to our wish; if one should die and the other survive, the person who lives is directed as far as in us lies to possess the property according to his or her pleasure and also to do whatever he or she likes with it.
>
> (3) It is directed that after the death of both of us all the movable and immovable property belonging to us shall devolve on the children, grandchildren, and such other heirs descending from us."

It was held that the will created a *fidei commissum residui* and that the survivor was a fiduciary with free power of alienation. In *Veerapillai v. Kantar* (*supra*) a last will contained the following clause :—

> "I bequeath to my husband all the immovable and movable property belonging to me . . . . to be possessed and enjoyed by him as sole owner thereof with full right of donating, transferring or otherwise alienating the same . . . . and on the death of my husband the properties should devolve on my elder brother as sole owner."

It was held that the devise to the husband was subject to a *fidei commissum residui* in favour of the brother. In my opinion it is difficult to distinguish the will in these two cases from the deed of gift in the present case. In each of them there is an absolute gift coupled with a gift over. It has been argued that inasmuch as the case was decided on other grounds, the finding of Garvin J. in *Veerapillai v. Kantar* (*supra*) is obiter so far as the question of a *fidei commissum* is concerned.

Even if these two cases are of doubtful authority, the case for the plaintiff may be resolved in his favour on a still higher ground, namely, that the deed creates not only a *fidei commissum residui* but a *fidei commissum* simple. The word " deal " used in the deed is indefinite and vague and I do not consider that the expression " to deal with the same at will and pleasure " can be held to connote an absolute gift. Any apparent repugnancy is eliminated when these words are interpreted to mean that the donee is given the right not only to possess the lands but also the right to deal with them otherwise to the extent of the estate donated to him (in this case the estate of a *fidei commissarius*). Unless a contrary interpretation is given or the words " and after the death of the said Harry Keppitipola Bandara the same shall devolve on his children " are ignored the deed creates a life interest of the whole property to Harry

[1] *16 N. L. R. 369.* [2] *30 N. L. R. 121.*

and a gift over to his children. It has been contended by Mr. de Silva that inasmuch as the point was not made in the lower Court it is not open to the plaintiff to raise it on this appeal. He argues that if the point had been taken in the lower Court the defendant would have called expert evidence to show that the Sinhalese words which appear in the English translation as "to deal with the same at will and pleasure" had a meaning denoting an absolute gift. There is in my opinion no substance in this contention. Issue (1) was worded as follows :—

"Whether deed 9479 of 9.6.93 created a valid *fidei commissum* in favour of the children of Harry Keppitipola ?"

On that issue it was open to the plaintiff to have argued that the words "to deal with the same at will and pleasure" did not create an absolute gift. The English translation was accepted by both parties without reservation. Whilst agreeing on the authority of *Wirasinghe v. Rubeyat Umma*[1] that it is open to a party to call expert evidence in support of the particular meaning that must attach to Sinhalese words in a document I do not consider that, after this issue had been settled and the English translation accepted, such evidence could have been called. Nor can I see in what manner the defendant has been prejudiced by the raising of this point on appeal.

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

SOERTSZ J.—I agree.

Appeal dismissed.