Was the Fideicommissum Simplex peculiar to Amsterdam?

IT is an essential feature of an ordinary fideicommissum that, although the fiduciary may alienate his fiduciary life-interest, he has no power of alienating the fideicommissary property.[1] But if a testator[2] has intended the fiduciary to have this power such an intention must be given effect to, where that intention is clearly expressed or can be reasonably implied from the testator's language.

The best illustration of an implied permission to alienate given the fiduciary is where property is bequeathed to a person on condition that whatever is left over of the property on his death is to go to somebody else (*fideicommissum residui*[3]). In such a case the fiduciary may alienate by act *inter vivos* to the extent of three-fourths of the estate [4, 5]. Where the power of alienation is expressly given the fiduciary, the fideicommissum is said to be a *fideicommissum simplex*, and it is with this that the present article is concerned.

Voet explains as follows the distinction between this kind of fideicommissum and the ordinary fideicommissum which he distinguishes by calling the latter the *fideicommissum duplex*.

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1. Voet. 36.1.62 and 18.1.15, *In re Insolvent Estate of Beck*, 1 Menzies, 332.

2. It may be noted here that the same principles apply to testamentary and to non-testamentary fideicommissa.

3. "It is a fideicommissum because there is a gift over, but it is a *fideicommissum residui* because the gift over is only of the assets remaining, and these words 'whatever shall be left' are taken in law to imply that although there is a fideicommissum yet the (fiduciary) shall have the right of alienation". *Ex. p. Van Staden*, 1923, O.P.D. 19, 21. per de Villiers, J.P.

4. Voet. 36.1.54, V. Leeuwen. 3.8.9, V der Keessel Dict. ad. Grotium, 2.20.13 and Theses, 320, *McCarthy v. Newton*, 4 Searle 64, *Est. Smith v. Est. Follett*, 1942, A.D. 364.

5. The true *fideicommissum residui* must be distinguished from the case where by mutual will spouses reciprocally institute each other heirs with power of alienation and direct that whatever is left of the joint estate at the survivor's death is to go over to somebody else. Voet. 36.1.56. *Brown v. Rickard*, 2 S.C. 314. In such cases of what may conveniently be called the Rule in *Brown v. Rickard*, the surviving spouse is free to alienate even the *whole* estate by act *inter vivos*.

It is to be regretted that the term *fideicommissum residui* is often (v. e.g., *Hattingh, N. O. v. Human, N. O.*, 1920, O.P.D. 219, 225, per de Villiers, J.P., Steyn. "Law of Wills in S. Africa", 2nd edn. pp. 306-7, *Fernando v. Fernando*, 9, N.L.R. 293, *Fernando v Alwis*, 37 N.L.R. 201, *Wirasinghe v. Rubeyat Umma*, 16 N.L.R. 369) indiscriminately used to cover both the true *fideicommissum residui* (where the fiduciary may not alienate more than three-fourths) and the Rule in *Brown v. Rickard* (where the surviving spouse may alienate even the whole).

The fideicommissum is called *simplex* " when the fiduciary is able, the fideicommissum notwithstanding, to alienate the property subject to the fideicommissum, both by last will and by act *inter vivos*[6], to such an extent that in either event[6] the fideicommissary heirs are defeated in their expectations of benefiting in respect of the fideicommissum, and are only able to succeed to the fideicommissary property in terms of the fideicommissum where the fiduciary has effected no alienation thereof by act *inter vivos* or by will[6] in favour of a third party. The term *duplex*, on the other hand, describes a fideicommissum in which the property is in such wise burdened in terms of the fideicommissum that the fiduciary is unable to effect any alienation or testamentary disposition thereof to the prejudice of those who have been substituted as fideicommissary heirs by the person creating the fideicommissum. It follows that in this sense the *simplex* is much weaker than the *duplex* fideicommissum[7] ", which " is a fideicommissum properly so called[8]".

As the existence of a *fideicommissum simplex* depends entirely on the testator's intention as manifested by the particular words used, it may take different forms. Thus, the testator may provide that the fideicommissary's right of succeeding to the property is to depend on the fiduciary not having alienated by act *inter vivos* alone[9], or by will alone[10], or in either way[11]; and again, the testator may place no limitations on the purposes for which alienation is permitted, or he may limit the permitted alienation only to specified purposes[11a].

The above is a statement of the law relating to the *fideicommissum simplex* as it is stated in the Roman-Dutch texts as applied in S. Africa[12] and recognised

6. Although this suggests that the power of alienation conferred on the fiduciary must be such that it is exercisable by act *inter vivos* and by will, it is clear from what Voet says later that the permitted mode of exercise of the power depends entirely on the testator's intention. The power may be expressed to be exercisable by act *inter vivos* alone, or by will alone, or in either way.

7. Voet, 36.1.5.

8. Van der Keessel. Thes, 318.

9. v, e.g., *Estate Roodt v. Registrar of Deeds*, 1924, C.P.D. 366, *Moore v. Esterhuyzen*, 1930, C.P.D. 19, *Asiathumma v. Alimanchy*, 1 A.C.R. 53 (on which v. n. 13 infra). cf. *Ex. p. Radloff*, 1932, O.P.D. 118.

10. v, e.g., *de Kroes v. Don Johannes*, 9 N.L.R. 7, 10, per Moncrieff, J.

11. v, e.g., *de Wet v. Brink*, 1904, T.S. 332. Cf. *Gunatilleka v. Fernando*, 21 N.L.R. 257, 272, per Bertram, C.J.

11a. as e.g., in *De Bruin v. De Bruin*, 1946, O.P.D. 34.

12. v. notes 9-11, *supra*.

in at least three Ceylon cases[13]. But in more recent times in Ceylon it seems sometimes to have been considered[14] that the *fideicommissum simplex* was peculiar to the local laws of Amsterdam, and that institution has consequently been treated with a measure of suspicion. It is submitted that this view is based on a misunderstanding of the Roman-Dutch texts.

The view that the fideicommissum simplex was peculiar to Amsterdam may appear to be justified by Voet's statement[15] " in another sense, obtaining among the Hollanders, or rather according to the special law of Amsterdam, a fideicommissum is either simplex or duplex "; but the correct position is clear from Voet's later statement in the same section that " Grotius has very clearly shown that *throughout the whole of Holland* a fideicommissum simplex can be imposed by will also, by simply inserting such words as in the case of antenuptial contracts would constitute a fideicommissum simplex and not take away the power to alienate by will or otherwise "[16].

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13. See Bertram, C.J.'s view of the effect of the disposition in *Gunatilleka v. Fernando*, 21 N.L.R. 257, 272, which (as his reference to his own remarks in *Perera v. Perera*, 20 N.L.R. 463 shows) he considered created a *fideicommissum simplex*.

The disposition in *De Kroes v. Don Johannes*, 9 N.L.R. 7, was considered by Moncrieff, J., to create a *fideicommissum simplex*, (though he did not use that technical name), but by Middleton, J., to create an ordinary, fully-binding (i.e. *duplex*) fideicommissum.

In *Asiathumma v. Alimanchy*, 1 A.C.R. 53, Wendt, J., seems to have held (v. p. 59) the deed to create a fideicommissum which did not prevent alienation by the fiduciary—in other words, a *fideicommissum simplex*; and, it is submitted, that in effect Grenier, A.P.J., also held the same view. (For, even if we admit with him that the words " or his heirs " were not a sufficiently precise description of the beneficiaries who were to succeed as alternative fideicommissones in the event of Sinne Lebbe Poddi not being able to succeed, S. L. Poddi himself was clearly indicated as fideicommissary in the event of Similal Umma, the fiduciary, dying issueless and without having exercised the power of alienation conferred on her. Both Wendt, J. (at p. 59) and Grenier, A.P.J. (at pp. 54-56) admit that there was a gift over from Similal Umma, the first taker of the property, to S. L. Poddi on the happening of the contingency of the former dying issueless and without alienating: and what is a gift to A with a gift over on a contingency to B but a fideicommissum, though by reason of the power of alienation conferred on A, the fideicommissum was of the special type called the *fideicommissum simplex ?*)

14. v, e.g., *Noordeen v. Badurdeen*, 42 N.L.R. 393, 401, per Wijeyewardene, J., and an article significantly entitled " The Fideicommissum Simplex of Amsterdam " by Mr. Kingsley Herat in 22, Ceylon Law Recorder, XXXVII.

15. 36.1.5, *ad init.*

16. v, also, Voet, 23.4.66 (referred to in *Perera v. Perera*, 20 N.L.R. 463, 467, per Bertram, C.J.), and the case referred to by Voet 36.1.5, *ad. fin* in which he was one of the arbitrators.

What was peculiar to the local laws of Amsterdam was that a prohibition on alienation *verbis in rem conceptis* (i.e. framed in real terms)[17], which elsewhere gave rise to a fully-binding or *duplex* fideicommissum of the real as distinguished from the merely personal kind[17], did not at Amsterdam prevent the fiduciary from alienating by act *inter vivos* or making a testamentary disposition of the property[18]. All the effect that such a prohibition on alienation had in Amsterdam was that it " was understood merely to indicate how the property shall devolve upon intestacy, that is in default of a last will and so far as it had not been alienated *inter vivos* "[19].

But the point that requires to be emphasised is this: the fact that at Amsterdam the use of a particular form of words—a prohibition on alienation framed in real terms, which elsewhere created a fully-binding or *duplex* fideicommissum—had the effect of creating only a *fideicommissum simplex* did not exclude the possibility of creating a *fideicommissum simplex, whether in or outside Amsterdam*, by any other appropriate words showing the testator's intention to allow the fiduciary, if he so wished, to defeat the fideicommissary's expectations by alienation of the property.

Having thus shown that the view sometimes held in Ceylon that the *fideicommissum simplex* was peculiar to Amsterdam finds no support in the texts, we may go on to consider some of the alleged reasons which have led to a suspicious and unfriendly attitude to the institution of the *fideicommissum simplex*, and to its ostracism in Ceylon. The two cases that must in this connection be considered are *Perera v. Perera*[20] and *Noordeen v. Badurdeen*[21], in both of which the existence of a *fideicommissum simplex* was unsuccessfully sought to be established. These decisions can be supported on the facts, on the ground that the intention to allow the fiduciary a power of alienation was not clearly[22] manifested by the creator of the fideicommissum ; but the remarks

17. For the distinction between the *multiplex* (or recurring) fideicommissum created by a prohibition on alienation framed in real terms and the *unicum* (or single) fideicommissum created by a prohibition framed in personal terms, v. Voet 36.1.28, *Union Government v. Olivier*, 1916, A.D. 74, *Moolman v. Est. Moolman*, 1927, A.D. 133, *Sopinona v. Abeywardene*, 30 N.L.R. 295.

18. Van der Keessel. Theses, 318, V. Leeuwen Comm. 3.8.8. *ad fin* and *Cens. For.* 1.3.7.12.

19. Gr. 2.20.12. The Aasdoms law of succession was excluded. Vd. Keessel. *Dictat* ad Gr. 2.20.12, V.L. *Cens. For.* 1.3.7.12.

20. 20 N.L.R. 463.

21. 42 N.L.R. 393.

22. The testator's intention to create a *fideicommissum simplex* must be clear: for " once real rights have been conferred upon third parties after termination of those of the (fiduciary) heir, one would expect express provision or very clear indications before coming to the conclusion that . . . the fideicommissary beneficiaries must be satisfied with less than the subject-matter in respect of which they are substituted". *De Bruin v. De Bruin*, 1946, O.P.D. 34, 41, per Van den Heever, J.: Cf. *Ibid.* 42, per Krause, A.J.

of Bertram, C.J. and of Wijeyewardene, J., which exhibit a scarcely-veiled distrust of the *fideicommissum simplex* must, with all respect, be dissented from.

Enough has been said already with reference to the view of the latter learned judge that the *fideicommissum simplex* was peculiar to the local laws of Amsterdam and, as a consequence, unknown to Ceylon in the absence of affirmative proof of introduction here of the institution. But even Bertram, C.J. who did not regard the institution as peculiar to Amsterdam and did not preclude its recognition in Ceylon if raised by appropriate words[23] said[24] that by such a recognition " we should be introducing into the Colony, for the first time, a form of tenure of property which is wholly unfamiliar both here and in England, with whose legal system our own is bound up ".

With respect, it must be submitted that this objection is not valid. The incompatibility of the concept of the *fideicommissum simplex* with notions of the English law of Real Property is not surprising when we remember that the law of fideicommissa is distinctively Roman in origin and development ; and, in any event, such incompatibility is not in point as the English law has not been made applicable to Ceylon in this sphere. As to the alleged inconsistency with notions of our law of the conception " that any person should be conceived as having a life-interest in a property, and at the same time as having a power to dispose . . . of the whole *dominium*[25] ", it is necessary by way of rejoinder to cite only the *fideicommissum residui* and the Rule in *Brown v. Rickard*[26].

The whole matter is one of intention : has the testator shown an intention that the first taker of the property should if he wishes have the power of alienating it (whether wholly or in part, and whether for specified purposes only[27] or generally), so that the property is to go over to subsequent beneficiaries only if the former dies without having exercised the power of alienation ? If such an intention has been clearly[28] shown, it must be given effect to, however strange the conception of a *fideicommissum simplex* (or the *fideicommissum residui* or the Rule in *Brown v. Rickard*) might appear to English votaries of the cult of " Our Lady of the Common Law ". For " the testator's wishes ought to be regarded and observed above everything else[29] ", and " under the civil law and the Law of Holland, there are scarcely

23. 20 N.L.R. at 468. See, e.g., *Gunetileka v Fernando*, 21 N.L.R. 257 (cf. n. 13 *supra*).

24. *Ibid.*

25. *Ibid.*

26. v. p. 11 and n. 5, *supra*.

27. Cf. n. 11*a*, *supra*.

28. Cf. n. 23, *supra*.

29. as Voet says in the last section of his long title on Fideicommissa, 36.1.72.

any dispositions of property which even the caprice of its owner could suggest, which might not be effected by substitutions, fideicommissa and conditions[30]".

As a final argument in support of a plea for a less hostile attitude by our courts to the *fideicommissum simplex*, it is submitted that some Ceylon cases which are difficult to reconcile with principle or authority might have been satisfactorily treated as applications of the *fideicommissum simplex*, if that institution had not been unjustifiably ostracised in Ceylon.

Thus, it is submitted that, in the absence in the instruments in question of any words to show that only the residue and not the whole of the property vested in the first taker of it was to go over to the subsequent beneficiaries, *Veerapillai v. Kantar*[31] was not (as was held) a case of *fideicommissum residui*, nor *Weerasinghe v. Rubeyat Umma*[32] an application of the Rule in *Brown v. Rickard*[33]; and that these cases, as well as *Rettiar v. Wijenaike*[34], might well have been treated as cases of *fideicommissum simplex*.

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30. Burge—Colonial and Foreign Laws. 1838, edn., Vol. II, p. 166.

31. 30 N.L.R. 121.

32. 16 N.L.R. 369.

33. The judgments in *Weerasinghe v. Rubeyat Umma*, refer to it as a case of *fideicommissum residui*, but it is not a case of the *fideicommissum residui* proper, but an application of the Rule in *Brown v. Rickard*. V. n. 5, *supra*.

34. 42 N.L.R. 505.