1959 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

J. D. FRANCIS ASSISI *et al.*, Appellants, *and* A. R. TAMPOE *et al.*, Respondents

S. C. 466—D. C. Chilaw, 15,052

Fideicommissum—Designation of fideicommissaries—Use of word " or " in a substitutional sense—Fideicommissum in favour of a class of persons after death of fiduciary—Effect when a fideicommissary predeceases the fiduciary.

Sale of immovable property—Description of corpus—Variance between body of deed and Schedule—Interpretation.

(i) Certain immovable property was gifted to X subject to the condition that X " shall not sell, transfer, mortgage or in any otherwise alienate or encumber the said premises or any part or portion thereof but that she shall enjoy and possess the same during her lifetime and that after her death the same shall devolve upon her children or lawful heirs ".

It was contended that the phrase " children or lawful heirs " pointed to two possible sets of beneficiaries and that it was uncertain which of them was to succeed.

Held, that the phrase " children or lawful heirs " meant that the lawful heirs should inherit only in default of children. In such a context, the word " or " is used in a substitutional sense. Therefore, a valid fideicommissum in favour of X's children was created.

(ii) When the fideicommissaries are a class (e.g., the children of the fiduciary), and there is one fideicommissum created in favour of that class, and the property is to pass on the death of the fiduciary, the fideicommissaries are to be ascertained only at the time of the death of the fiduciary. Accordingly, if one of the fideicommissaries transfers his interests to a stranger and subsequently predeceases the fiduciary, the transferee will get nothing on his purchase. The principle which draws a distinction between fideicommissum created by a deed and one created by a last will does not apply in such a case.

(iii) Where, in a deed of sale of immovable property, the body of the deed conveyed no more than a ¼ share of the property but the Schedule mentioned the generality of the interests of the vendor as the property conveyed—

Held, that the description in the body of the deed prevailed over the description in the Schedule.

APPEAL from a judgment of the District Court, Chilaw.

N. E. Weerasooria, Q.C., with *J. M. Jayamanne* and *S. D. Jayasundere*, for the Defendants-Appellants.

H. V. Perera, Q.C., with *G. T. Samerawickreme*, for the Plaintiffs-Respondents.

Cur. adv. vult.

June 29, 1959. SANSONI, J.—

Two lots of land were gifted to Charlotte Caroline Tampoe on a deed of 1894 subject to the condition that she " shall not sell, transfer, mortgage or in any otherwise alienate or encumber the said premises or any part or

portion thereof but that she shall enjoy and possess the same during her lifetime and that after her death the same shall devolve upon her children or lawful heirs ". The two lots were sold with the sanction of Court and the proceeds of that sale were applied to purchase the land in dispute in this action in 1904. The conveyance executed in favour of Charlotte Caroline Tampoe contained the same condition as appeared in the deed of gift.

Charlotte Caroline Tampoe had four children : Albert (1st plaintiff), Agnes, Alfred and Rose (2nd plaintiff). The 1st plaintiff and Caroline executed a deed 1 D 1 of 1934 in favour of Weerappa Chetty, while the 2nd plaintiff and Caroline, and Alfred and Caroline, executed two similar deeds 1 D 2 of 1934 and 1 D 3 of 1937 respectively, in favour of Weerappa Chetty. These three deeds are all in the same terms. Each child renounces his right to his or her $\frac{1}{4}$ share " to the intent and purposes that the title of the grantee in respect of the $\frac{1}{4}$ share should become absolute and perfect " and each child and Charlotte Caroline also sell, assign and convey to the grantee all the right title and interest that they may now have or may accrue to them hereafter in respect of the $\frac{1}{4}$ share of the lands described in the schedule to the deed. In the schedule appears the land " together with all the right title and interest which the grantors have and hereafter may be possessed of and also all their right title and interest claim and demand in and to it ".

Alfred died in 1940 and Charlotte Caroline died in 1955. The interests which passed to Weerappa Chetty on the deeds 1 D 1, 1 D 2, and 1 D 3 have now devolved on the defendants, as also have all Agnes's interests in the land.

The 1st and 2nd plaintiffs brought this partition action claiming to be jointly entitled to an undivided $\frac{1}{6}$ share of the land and allotting to the defendants the remaining $\frac{5}{6}$ share. The plaintiffs' case is that because Alfred predeceased his mother, the land, upon Charlotte Caroline's death, devolved on her three surviving children, Agnes, the 1st plaintiff, and the 2nd plaintiff, each of whom then became entitled to an undivided $\frac{1}{3}$ share. The 1st and 2nd plaintiffs had each transferred $\frac{1}{4}$ share to Weerappa Chetty so there was still left to each of them a 1/12 share. The learned District Judge accepted this position and ordered a partition according to the shares set out in the plaint. The defendants have appealed against the judgment.

Three points were taken on behalf of the appellants. They were: (1) that there was no fidei commissum created by the clause containing the condition in the deeds of 1894 and 1904 which I have already set out ; (2) that when Charlotte Caroline died, Alfred's transfer of $\frac{1}{4}$ share to Weerappa Chetty became effective ; and (3) that each of the deeds 1 D 1, 1 D 2 and 1 D 3 conveyed all the right title and interest which each child then had and subsequently acquired in the land in dispute, and not merely $\frac{1}{4}$ share.

On the first point, the question is whether the phrase " children or lawful heirs " is sufficient to designate the beneficiaries who were to take on Charlotte Caroline's death. It was suggested for the appellants that

the phrase pointed to two possible sets of beneficiaries, and it was uncertain which of them was to succeed. If one were to interpret the phrase " children or lawful heirs " as meaning " either children or lawful heirs ", the argument would prevail. But there is strong authority for the view that the word " or " is generally in such a context as this used in a substitutional sense. De Sampayo J. interpreted it in that way in the case of *The Government Agent, Central Province v. Silva* [1]. The phrase would then mean that the lawful heirs should inherit only in default of children. The matter has been considered recently by Pulle J. in *Silva v. Silva* [2]. As the learned Judge there pointed out the meaning of the word " or " is in each case a question of fact. In the present case I have no doubt that the word is equivalent to " whom failing ", and I would hold that a valid fidei commissum in favour of Charlotte Caroline's children was created by the clause in question.

On the second point, reliance was placed on the principle that in the case of a fidei commissum created by a deed, if the fidei commissary dies before the fiduciary, the former transmits the expectation of the fidei commissum to his heirs or successors. Hence, it was argued, when Alfred died his interests passed to his transferee Weerappa Chetty. The answer to this is that when the fidei commissaries are a class, and there is one fidei commissum created in favour of that class, and the property is to pass on the death of the fiduciary, the fidei commissaries are to be ascertained only at the time of the death of the fiduciary. There is only one fidei commissum in the present case. The class consisted of Charlotte Caroline's children. Since Alfred predeceased his mother and ceased to be a member of the class, his transferee got nothing on his purchase, because the members of the class who were to take must be ascertained only when Charlotte Caroline died. The property accordingly passed to the three surviving children only.

Dalton J. refers to this principle in *Bakelman v. Goulding* [3]. In that case, which was one of a will, property was left by the testators to their son Charles, subject to a fidei commissum in favour of the children of Charles. The learned Judge pointed out that the question whether, on the death of one of Charles' children, the expectation of the fidei commissum was transmitted to that child's heirs or transferees cannot be answered by merely ascertaining whether the fidei commissum was created by deed or by will. The answer depends on the construction of the particular instrument, and where the fidei commissaries are a class they can only be ascertained at the time of the gift-over which in that case was the death of Charles. The principle which draws a distinction between fidei commissum created by a deed and one created by a last will does not apply in such a case.

On the third point it was argued that the schedule in each of the deeds 1 D 1 and 1 D 2 was something more than a mere schedule; stress was laid on the wording, and it was submitted that all interests, both present and future, of the transferors passed to the transferee. But the body

[1] *(1922) 24 N.L.R. 62.*

[2] *(1954) 57 N.L.R. 436.*

[3] *(1929) 30 N. L. R. 490.*

of the deed is quite unambiguous. Each child renounces and conveys no more than a $\frac{1}{4}$ share of all that right title and interest. It is impossible to ignore the reference to $\frac{1}{4}$ share, and that reference controls the generality of the interests described in the Schedule.

In the result, since the 1st and 2nd plaintiffs each became entitled to $\frac{1}{3}$ share on the death of their mother, but had each conveyed only $\frac{1}{4}$ share to Weerappa Chetty, they are now jointly entitled to $\frac{1}{6}$ share.

The appeal is dismissed with costs in both Courts.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.