1940 *Present :* **Keuneman and Cannon JJ.**

In re DE MEL *et al.*

61—D. C. (Inty.) Colombo, 2,362

Trust—No provisions in deed for appointment of new trustees—Power of surviving trustee—Trusts Ordinance, s. 75 (Cap. 72)

Where in a trust deed there was no power vested in the trustees specifically named or in their successors, who are designated therein, to appoint any new trustees, a sole surviving trustee is entitled by virtue of the provisions of section 75 of the Trusts Ordinance to appoint new trustees for the purpose of filling vacancies caused by death or incapacity.

[1] *5 Call. 558.* [2] *5 All. 226.*

APPEAL from an order of the District Judge of Colombo.

N. E. Weerasooria, K.C. (with him *A. L. J. Croos Da Brera* and *E. B. Wickremanayake*), for petitioners, appellants.

Cur. adv. vult.

October 16, 1940. KEUNEMAN J.—

By his deed No. 873 of 1890, V. Francisco de Mel conveyed the premises mentioned in the schedule to the deed to his sons, namely, (1) Pedro de Mel, (2) Johannes de Mel, (3) Manuel de Mel, (4) Jacob de Mel, and (5) Charles William de Mel, on certain trusts which are fully set out in the deed :—

> "To have and to hold unto the said trustees and to the survivor and survivors of them and the executors and administrators of such survivor and other the trustee or trustees for the time being of these presents upon the trusts following that is to say . . . .
>
> "Fifth. Upon the death of any of the trustees hereinbefore named the eldest male son of the trustee so dying shall be a trustee in the place of his deceased parent . . . . and he shall by virtue of such succession be vested with all the powers of an original trustee under these presents".

The affidavits filed in this case establish that (1) Pedro died without issue, (2) Johannes died leaving a son, Charles Francis de Mel, (3) Manuel died leaving a son, Matthias de Mel, (4) Jacob died leaving as his eldest son, Sir Henry de Mel, (5) Charles William died leaving a son, William. According to the terms of the deed of 1890, each of these sons succeeded the deceased parent in the office of trustee.

Matthias de Mel and Sir Henry de Mel died before July, 1936. At that time Charles Francis de Mel was alive, and so was William de Mel, but the latter was of unsound mind since birth and never accepted the trust, and was adjudged a lunatic in lunacy proceedings No. 2,842, D. C. Colombo.

By his order dated July 17, 1936, in this case, the District Judge found that William de Mel was of unsound mind and incapable of acting as a co-trustee, and that Charles Francis de Mel was the sole trustee in terms of the deed of trust.

Thereafter, on July 23, 1936, Charles Francis de Mel, by his deed No. 36/200 appointed the present petitioners "to be additional trustees to act with him jointly in carrying out with him the provisions of the said Instrument of Trust No. 873". He purported to act as sole surviving trustee.

Later, Charles Francis de Mel, died, and on October 11, 1939, the present petitioners filed petition and affidavit praying that they be allowed to draw the sum of Rs. 10,158.19 with accrued interest deposited in Court to the credit of the trust by the executors of Sir Henry de Mel, one of the deceased trustees.

The learned District Judge refused this application on the ground that there was considerable doubt whether the petitioners have any right to claim the status of trustees of the trust. The petitioners appeal from this order.

In his order, the District Judge has correctly stated that in the trust deed there was no power vested in the trustees specifically named or their successors who are designated therein to appoint any new trustees. This is admitted by Counsel for the appellants, who, however, claims that by virtue of section 75 of the Trusts Ordinance (Cap. 72) Charles Francis de Mel was entitled to appoint new trustees.

Section 75 runs as follows :—

"(1) Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is absent from Ceylon for such a continuous period and under such circumstances that, in the opinion of the Court, it is desirable, in the interests of the trust, that his office should be declared vacant, or is declared an insolvent, or desires to be discharged from the trust, or refuses or is or becomes, in the opinion of the Court, unfit or personally incapable to act in the trust, a new trustee may be appointed in his place by—

"(*a*) the person nominated for that purpose by the instrument of trust (if any); or

" (*b*) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

" (2) Every such appointment shall be by writing under the hand of the person making it, and shall be notarially executed".

There can be no doubt that, with the exception of William de Mel and Charles Francis de Mel, the trustees appointed under deed No. 873 were dead. William de Mel was on July 17, 1936, declared to be incapable of acting as trustee. Charles Francis must therefore be regarded as the last surviving and continuing trustee. *Prima facie,* therefore, he was entitled to appoint new trustees, and he has done no more than to fill the vacancies caused by death and incapacity.

The District Judge, however, was of opinion that on the death of Charles Francis de Mel, he was succeeded by his executor or administrator. I think the District Judge is in error. Under deed No. 873, " executors and administrators of such survivors " are also nominated trustees, but this only applies to what has been described as the first generation of trustees, namely, the five persons specifically named in the deed, and not to the second generation, namely, the eldest sons of the named trustees. Further, in any event, there is, I think, no doubt that Charles Francis de Mel was " the last surviving and continuing trustee ", and that he had the statutory power of appointing new trustees under section 75 (1) (*b*) of the Trusts Ordinance.

It may also be that the District Judge was influenced by the words, " in the opinion of the Court ", which he has underlined and which appear twice in section 75. But I think these words must be limited to their context, and that the opinion of the Court is only needed (*a*) where the trustee is absent from Ceylon, for the purpose of determining whether the period and the circumstances of his absence make it desirable that

his office be declared vacant, and (*b*) where the trustee is, or becomes, unfit or personally incapable to act in the trust, for the purpose of determining whether he is so unfit or personally incapable. In the other cases mentioned, *e.g.*, the death of the trustee, it is not necessary to obtain the opinion of the Court for any purpose.

In this case, at the time of the deed of appointment all the other trustees were dead, except William who was declared by the Court incapable of acting as a co-trustee. In his case, the opinion of the court was correctly claimed and obtained.

The last point made by the District Judge is that in the deed Charles Francis de Mel does not purport to replace himself, but appoints new trustees to act jointly with him. In this case Charles Francis de Mel was not proposing to retire. If he had been a retiring trustee, it would have been necessary for him under section 75 to obtain the consent of the Court with a view to the appointing of new trustees. All that he sought to do in fact was to appoint new trustees for the purpose of filling the vacancies caused by the deaths and the incapacity of the other trustees, and section 75 conferred on him the power to make such new appointments.

I accordingly set aside the order of the District Judge and hold that the petitioners are the trustees duly appointed to carry out the trusts created by deed No. 873 of 1890.

As regards the application to draw the money deposited in Court, the District Judge has not dealt with this on its merits, and it is not possible in this Court to make any order on this matter. I send the case back for the District Judge to consider and deal with this application.

I make no order as regards the costs of this appeal.

CANNON J.—I agree.

Appeal allowed.