1969 *Present :* H. N. G. Fernando, C.J., and de Kretser, J.

MURIEL COORAY and others, Appellants, *and* B. NARAINDAS and others, Respondents

S.C. 526/65 (F) and 528/65 (F)—D. C. Colombo, 9970/L

Fidcicommissum by deed—Designation of donee's children as fideicommissaries upon donee's death—Probibition against alienation and seizure for donee's debts—Condition that upon seizure for debt the property should revert to donee's " other heirs "—Effect of such seizure—Meaning of expression " other heirs "—Matrimonial Rights and Inheritance Ordinance (Cap. 57), ss. 24, 25.

The land in dispute was gifted to B in 1902 by his mother. The gift was subject to a fideicommissum in favour of B's children or remoter issue, to take effect upon B's death. It contained a prohibition against voluntary alienation and against seizure for any of B's debts and provided that in the event of its being alienated or seized the land should revert to B's other heirs and " the said donee shall thereby lose all benefit of the said premises hereby gifted ".

On September 25, 1925, the land was seized by the Fiscal in execution of a decree entered against B in respect of a debt and was subsequently conveyed by the Fiscal on February 9, 1926, to a sister of B, who was the purchaser at the execution sale. The plaintiffs in the present action claimed title under a deed of 1961 by which the sister purported to sell the whole land to them.

B died in 1959, unmarried and issueless, so that the gift-over to his children could not take effect.

Held, that, in terms of the deed of 1902, the land reverted to B's " other heirs " upon its seizure in execution of the decree against B. The term " other heirs " in its context meant the heirs of B other than his children or remoter issue. The expression " heirs " can have a meaning although used with reference to persons who are alive. The condition conveying the land to B's issue after his death was distinct from and uncontrolled by the second condition relating to the persons who should benefit in the event of seizure in execution of a decree against him.

APPEAL from a judgment of the District Court, Colombo.

In S.C. 526/65—

C. Ranganathan, Q.C., with *D. W. Ediriweera* and *F. C. Perera*, for the 1st defendant-appellant.

C. Ranganathan, Q.C., with *C. Chellappah, Edgar Cooray* and *C. Sandarasagara*, for the 2nd, 3rd, 4th, 6th, 7th and 8th defendants-respondents.

In S.C. 528/65—

C. Ranganathan, Q.C., with *C. Chellappah, Edgar Cooray* and *C. Sandarasagara*, for the 3rd, 4th, 5th, 11th, 13th and 14th defendants-appellants.

1*—J 15020—2,255 (7/70)

C. Ranganathan, Q.C., with *D. W. Edirisweera* and *F. C. Perera*, for the 1st defendant-respondent.

2nd defendant-appellant appeared in person in S.C. 528/65 and for the 1st defendant-respondent in S.C. 526/65.

H. W. Jayewardene, Q.C., with *S. Sharvananda, G. M. S. Samaraweera* and *Neville de Alwis*, for the plaintiffs-respondents in both appeals.

Cur. adv. vult.

October 21, 1969. H. N. G. FERNANDO, C.J.—

The decision of this case turns principally on the construction to be placed on certain conditions in a deed of gift, P6 of 1902, by which the former owner of the land in dispute gifted the land to her son Benjamin. The conditions were in the following terms :—

> "That the said Donee shall not sell mortgage or otherwise alienate or encumber the said premises buildings, or plantations or any part or share thereof but he shall only hold and occupy the said premises buildings and plantations and enjoy the rents income and profits thereof during his life time and on his death the said premises together with the buildings and plantations should devolve on his children or remoter issue as their absolute property nor the said premises buildings and plantations or any part thereof should be liable to be seized or sold for any of his debts or defaults and it is hereby provided that in the event of the said premises buildings or plantations being alienated or seized then and in such case the said premises buildings and plantations should revert to his other heirs and the said Donee shall thereby lose all benefit of the said premises buildings and plantations hereby gifted.".

It is common ground that the first condition (ending with the words "as their absolute property") created an express *fideicommissum* in favour of the children of Benjamin, to take effect upon his death. It is also common ground that any breach of the prohibition against alienation which was imposed in the first sentence of the condition would not have had the effect of advancing the time at which the property would pass to the children of Benjamin. In the event, Benjamin died in 1959, unmarried and issueless, so that the gift-over to his children has not taken effect.

The land in dispute was seized on September 25, 1925, in execution of a Writ issued in D.C. Colombo No. 12977 for the seizure and sale of the property of Benjamin. At the subsequent sale in execution, the land was purchased by one Mrs. Annie Peiris, in whose favour the Fiscal executed a deed P7 of 9th February 1926, conveying to her all the right title and interest of Benjamin in the land. The plaintiffs now claim title under a deed P16 of 1961, by which Annie Peiris purported to sell the land to them.

The principal contention for the defendants in this case has been that the Fiscals's conveyance of 1926 was void and inoperative, on the ground that upon the seizure of the land in 1925 the second condition in the deed P6 of 1902 had the effect of vesting Benjamin's right title and interest in the persons designated in the condition as Benjamin's " other heirs ". The second condition being thus of vital importance, it is convenient to reproduce once more the terms of this condition, (while bearing in mind also that the first sentence of the first condition imposed on Benjamin a clear prohibition against any voluntary alienation) :—

" x x x x x x nor the said premises buildings and plantations or any part thereof should be liable to be seized or sold for any of his debts or defaults and it is hereby provided that in the event of the said premises buildings or plantations being alienated or seized then and in such case the said premises buildings and plantations should revert to his other heirs and the said Donee shall thereby lose all benefit of the said premises buildings and plantations thereby gifted. "

The learned District Judge rejected the contention of the defendants for reasons which were thus stated in his judgment :—

" The party who shall lose all benefit is clearly designated as the Donee, Benjamin, himself. No other party is brought under this disqualification and specifically mentioned that they would lose all benefit like the Donee, Benjamin. The children or remoter descendants are not mentioned as a group that would lose all benefit along with their father, the donee. I do not think, therefore, that the term 'other heirs' means heirs other than the children or remoter issue. If in fact it was the intention of the Donor to cut off the children and remoter issue completely in the event of seizure or sale it could easily have been mentioned specifically in the way it was provided that the 'Donee shall lose all benefit'. The absence of any such specific provision excluding the children would show that in any event the children were not excluded. Even assuming that the Donor was contemplating some distinction between the various classes of heirs she had not succeeded in designating them clearly. The term 'other heirs', in my view means nothing in the circumstances of this case. In this view that I have taken I find that that part of the deed conveys no meaning and one must proceed, therefore, on the basis that the provisions in this deed arising out of the second set of circumstances do not exist. "

Counsel appearing for the plaintiffs in appeal sought support in certain English judgments for the argument that the second condition was void for uncertainty. He cited in this connection the decisions in *Clayton v. Ramsden* [1] and in *Sifton v. Sifton* [2]. It suffices to point out that the conclusion as to the uncertainty of the forfeiture clause in each of these cases depended on the fact that the clause

[1] *(1943) 1 A. E. R. 16.* [2] *(1938) 3 A. E. R. 435.*

did not set out with sufficient certainty the event or the fact, the occurrence of which would entail a forfeiture. The *ratio decidendi* of these cases, in their relevance in the instant case, is that Benjamin must not be held to have forfeited his interests in this land, unless the deed in his favour clearly defined the fact or event upon the occurrence of which he would incur that forfeiture. But the fact or event was uncompromisingly stated in the deed of gift to Benjamin, namely the event of the land " being alienated or seized ". It should have been perfectly clear to Benjamin and to anyone who read the deed that, in terms of the deed, the land would revert to his " other heirs ", upon its seizure in execution of a decree against him.

I should observe in passing that Counsel appearing in appeal on both sides at first appeared to favour the construction that, if the second condition as to the forfeiture was in law effective and became in fact operative, the first condition imposing a *fideicommissum* in favour of Benjamin's children would be thereby defeated. I am very nearly certain however that observations which fell from the Bench persuaded Counsel of the error of that construction. The first condition created in simple words an express *fideicommissum* in favour of Benjamin's children. That right of the children could only have been defeated by some further condition which provided expressly or by necessary implication that the property will not in some specified event pass to the children on Benjamin's death. But the second condition is not in any way inconsistent with the right of the children to take the property ultimately. The provision that the property should " revert " to Benjamin's " other heirs " has to be read together with the final clause that " the said donee shall thereby lose all benefit of the said premises hereby gifted ". The express reference to the loss of benefit by Benjamin, when considered together with the absence of any reference to the loss of benefit by his children, fortifies the conclusion that the operation of the second condition would not defeat the gift-over to the children which is contained in the first condition. Assuming therefore that the second condition did become operative, what reverted to Benjamin's other heirs was Benjamin's right as fiduciary, subject to the gift-over to his children on his death.

The learned trial Judge himself realized that a breach of the second condition could not operate to " cut off " the children and remoter issue of Benjamin ; but this very point led him to the opinion that the condition was uncertain. The error I think flowed from the failure to realize that the first condition, conveying the land to Benjamin's issue after his death, was distinct from and uncontrolled by the second condition. Just as much as a breach of the second condition could not deprive the issue of the right ealier conveyed, so also such a breach could not confer on the issue any additional benefit during Benjamin's life-time. This latter purpose was clearly achieved by a designation which would exclude the issue from taking under the second condition.

The persons designated in the second condition as the reversioners are Benjamin's "other heirs". It is in my opinion important to note that this reference to the other heirs occurs in the paragraph which contains the gift-over to Benjamin's "children or remoter issue"; the very proximity of the references, the first to Benjamin's issue, and the second to his other heirs, assists in the understanding of the meaning of the term "other heirs". Indeed, Counsel appearing for the plaintiffs in appeal conceded, I think quite properly, that in this context "other heirs" must mean heirs of Benjamin, not being his children or remoter issue. The learned Judge in my opinion fell into error when he thought that the children were not excluded from taking Benjamin's fiduciary interest in the event of a breach of the second condition.

In the case of *Selembram v. Perumal* [1] the Court considered the effect of a condition that the property bequeathed by a testator "shall be always held and possessed by them (the donee) and their heirs in perpetuity under the bond of *fideicommissum*. The construction placed on this bequest was that a *fideicommissum* was created in favour of the persons who, under the law of Intestate Succession, would be entitled to succeed to the property of the donees. The Court in this case approved a similar construction of the term "heirs" which had been adopted in the earlier case of *Paterson v. Silva* [2]. The concept that the expression "heirs", even when occurring in a statute, can have a meaning although used with reference to a person who is alive, was approved in the case of *Ponniah v. Kandiah* [3].

Had therefore the donor in the deed P6 provided in the second condition that the property if seized will revert to *Benjamin's heirs*, the condition would not have been void on the ground that the persons to benefit under the condition were not designated with certainty. The meaning which would have then to be given to the condition is that the property would pass to those persons who would have been Benjamin's intestate heirs, if he were to have died at the time of the seizure of the property. The fact that there could not have been fore-knowledge, at the time of the execution of P6, of the identity of the persons who would actually take at the time of a breach of the second condition, would not have been a ground for holding that there was any lack of certainty in the designation of the persons who would thereby be entitled to take the interest of Benjamin. Does then the fact that there was not a designation of heirs *simpliciter*, but instead a designation of "other heirs", give rise to uncertainty? As I have already observed, the plain meaning of this expression in this context is "heirs other than issue", so that the persons designated are no less certainly designated than they would be in a case of a reference simply to "heirs".

Counsel for the plaintiffs in appeal has however presented an argument which was not taken into account in the judgment of the learned trial Judge. This argument depends upon the reasoning, with which I agree,

[1] *(1912) 16 N. L. R. 6.*
[2] *(1887) 9 S. C. C. 33.*
[3] *(1920) 21 N. L. R. 337.*

that in deciding whether " other heirs " is a designation which has a clear meaning, the event of Benjamin having children but no wife at the time of a seizure of the land must be taken into consideration. In that event, argued Counsel, the children would be Benjamin's heirs by virtue of s. 24 of the Matrimonial Rights and Inheritance Ordinance (Cap. 57), in preference to all persons, and it must follow that in law such other persons will not be heirs qualified to succeed to Benjamin's rights. In the event contemplated, therefore, the designation " other heirs " would denote neither the children nor other persons, and would thus be without meaning.

This argument is founded on an assumption that the preferent right accorded to children by the Ordinance must be inflexibly recognised in every case. The unsoundness of this assumption is I think easily demonstrable.

Let me assume that a parent makes a Will, in which he merely declares that his children shall not inherit any of his property. In such a case, the Will will be operative to disinherit the Testator's children; but because of the absence of any testamentary disposition, the property will pass as on an intestacy in accordance with the provisions of Cap. 57. Assuming then that the testator leaves no widow surviving him, the first provision of the Ordinance apparently applicable will be section 24, and I can see no reason why that section will then not operate to pass the property to the testator's grand-children if any ; and if there are no grand-children or remoter descendants, it seems clear that the property will pass under s. 25 on the basis " the children and remoter descendants failing ". It appears therefore that in this hypothetical case the circumstance of the disinherison of the testator's children is a matter which is covered by the words " the children failing " which occur in s. 24.

Let me also assume a different but more likely case ; that of a Will in which a testator bequeaths specific properties to each of his children, and then directs that all his residuary property shall devolve on his " other heirs ". In such a case also, I can see no difficulty in the way of a conclusion that the residuary property will pass in accordance with s. 25, or with one or other of the succeeding provisions of Chapter 57, on the basis that the terms of the Will have the effect that in relation to the residuary property " the children fail ".

I have in mind in this connection Counsel's argument that the special rules, which apply to the construction of the intention of a testator in a Will, do not apply to the construction of a deed *inter vivos*. But I cannot agree that the conclusions which are to be reached in the hypothetical cases just discussed are in any way influenced by any special considerations applicable to the construction of Wills. These conclusions depend entirely on the plain meaning of a testator's directions, and on the application of the relevant statutory provisions. I am unable to perceive any distinction which can fairly be drawn between the second of these hypothetical cases and the condition which we have to construe in the

instant case. Because "other heirs" bears in the present context the plain meaning "heirs not being children", the effect of the designation is that "the children fail".

In the case of *Francis Assisi v. Tampoe*[1] there was a condition in a deed of gift to X which prohibited X from alienating the property and provided that after the death of X the property "shall devolve upon her children or lawful heirs". The claim that this condition created a *fideicommissum* was resisted on the ground that the phrase "children *or* lawful heirs" pointed to two possible sets of beneficiaries, and that it was therefore uncertain which of the two sets was designated. The Court reached without difficulty the conclusion that the word "or" in this context was used in a substitutional sense, so that the designation was equivalent to the designation "children *or whom failing* the lawful heirs". This construction of a deed *inter vivos* is of assistance in the present case; firstly, in that it lays emphasis on the need for a Court to ascertain the meaning, in the context of a deed, of a term employed in order to designate the persons entitled to a benefit under the deed; again, it will be seen that the Court here read into the phrase the words "children failing" and thus found its true meaning.

I am satisfied on the grounds which have been stated that the second condition was not uncertain, in its references, either to the event which it mentioned, or to the persons to whom the interest conveyed to Benjamin by the deed would pass on the occurrence of the event.

It was shown by the evidence that at the time of the seizure of this property in 1925 there were living two sisters of Benjamin, one of whom was Annie Peiris who purchased the property at the subsequent sale of execution, and a brother Edward. Benjamin had another brother Joseph, the father of the 1st and 3rd defendants in this case; but there is no proof either that Joseph was dead at the time of the seizure of the land, or that he died intestate. There is therefore some uncertainty as to whether it was Joseph or else his children who succeeded to a share. But upon the available evidence it is at least certain that Annie Peiris, the vendor to the present plaintiffs was one of the "other heirs" and became entitled to a 1/4 share of Benjamin's interest upon the seizure of this land. That interest was at that time subject to a *fideicommissum* in favour of Benjamin's then unborn children, but that *fideicommissum* ultimately lapsed on Benjamin's death in 1959 because he died without issue. That being so, Annie Peiris became entitled on the death of Benjamin to a 1/4 share of the land free of any restrictions, and that 1/4 share passed to the plaintiffs under the deed P16 of 1961.

As has already been stated, the learned District Judge held that the second condition in the deed P6 was void for uncertainty and that accordingly Annie Peiris became entitled on the Fiscal's conveyance P7 to the entirety of Benjamin's interests. The 1st and 3rd defendants however contended at the trial that even if Annie Peiris became entitled

[1] *(1959) 61 N. L. R. 73.*

to the entirety of those interests, they nevertheless passed again to Benjamin upon the deed PS of 1926 executed by Mrs. Annie Peiris in favour of Benjamin. In this deed PS again, there was a condition that if Benjamin's interests were seized in execution, those interests would revert to Mrs. Annie Peiris. In this connection, the contention for the plaintiffs has been that the condition for reversion to Annie Peiris did become operative because the property was again seized in 1932 in execution of a decree against Benjamin.

The plaintiffs were unable to adduce documentary proof of this seizure; but they were able to prove both that a Writ of Execution had issued from the District Court of Colombo for the seizure and sale of the property of Benjamin, and also that Annie Peiris had written to Benjamin's judgment-creditor a letter, of which P10 is a copy, stating that the property had been seized on or about 17th May, 1932, and further stating that thereupon the rights of Benjamin have reverted to Annie Peiris in terms of P8.. The plaintiffs also proved that the documents in the office of the Fiscal concerning the action taken by the Fiscal upon receipt of the Writ of Execution in 1932 for the seizure and sale of Benjamin's property had been destroyed, and that the files both of the judgment-creditor and his lawyers relating to the action against Benjamin had been destroyed. In these circumstances, the learned District Judge reached a finding that the plaintiffs had established the seizure of this property in 1932. Despite the arguments of Counsel for the defendants, and of the 2nd defendant who appeared in person in appeal, I am unable to say that the finding of the District Judge on this matter was erroneous. I must hold therefore that if the Fiscal's Conveyance P7 of 1926 was effective to pass to Annie Peiris the entirety of the interests of Benjamin under the deed of Gift P6 of 1902, those interests, although re-conveyed by her to Benjamin on P8, reverted to her in 1932. That being so, I must hold in agreement with the trial Judge that, if the second condition in the deed P6 of 1902 was ineffective, the plaintiffs now have an unfettered title to the property.

The question of prescription was also the subject of dispute between the parties. On this question, the learned trial Judge has held in favour of the plaintiffs' on the ground that after the purchase of the property by Annie Peiris at the Fiscal's sale in 1926 she has been in exclusive possession of the property. Apart from the important point that the learned Judge did not regard the dispute as being one between co-owners, there are in my opinion several circumstances which he failed to consider when he reached this finding. Although Annie Peiris purchased the property at the Fiscal's sale in 1926, it is apparent that she did so only to assist her brother Benjamin and to prevent Benjamin's interests from being acquired by some outsider. Between 1926 when Annie Peiris by the deed P8 re-conveyed to Benjamin the interests which he had formerly held, and 1932 when the property was seized against Benjamin, it was Benjamin who must be presumed to have had possession, and that on his own account. It can at best only be claimed for Annie Peiris that she

had exclusive possession from and after May 1932, when apparently Benjamin's creditors refrained from any further attempt to have Benjamin's interests sold in execution. But in May 1933 Mrs. Annie Peiris joined with her sister and brother, and the widow of her brother Joseph, in executing a lease of the land for a ten-year period. According to the evidence, this lease would have expired in 1943, but the lessee continued to be the tenant of the land until 1955 on terms identical with those specified in the lease. The evidence of the lessee establishes that she herself for these 22 years recognised all the lessors as her landlord. The rent due from the lessee was paid during the whole period, not to Annie Peiris, but to an Agency Firm which at the time of the execution of the lease in 1933 was authorised by all the lessors to receive rent. There was no evidence either from Annie Peiris herself, or from the Agency Firm, to the effect that the rents paid by the lessee were in fact exclusively appropriated by Annie Peiris. But even if such evidence had been available, I much doubt whether it would have sufficed to found a plea by her of prescriptive title to this property. Of course if Mrs. Peiris became fully entitled to all Benjamin's interests by virtue of the Fiscal's Conveyance of 1926, there was no need for her to rely on the plea of prescription. But if, as I have earlier concluded, Benjamin's interests passed in 1925 to his brothers and sisters and/or the heirs of any deceased brother, then Mrs. Peiris was only a co-owner.

The explanation of Annie Peiris for the fact that her sister, her brother Edward and the widow of her deceased brother Joseph, joined as lessors in executing the lease 1D1 of 1933, although it found acceptance by the learned trial Judge, was slender indeed. Her explanation was that because the lessee proposed to develop the land by the erection of substantial buildings, she was anxious to make sure that the other parties who joined as lessors, and who would ultimately be her own heirs, should not raise difficulties after her death in regard to buildings erected by the lessee. This explanation found no support whatsoever in the evidence of the lessee. The fact that the other parties joined in the lease is in the circumstances capable only of one explanation, namely that Mrs. Peiris acknowledged the rights of those other parties, including the rights of the minor children of her brother Joseph, in this property. Whatever secret intention or motive Annie Peiri may have entertained, she did not profess to have informed the other parties who joined as lessors that they were being joined on any ground other than the ground that they were entitled to interests in the property. In these circumstances, the finding of the learned trial Judge that Annie Peiris acquired a title by prescription cannot possibly be sustained.

I have dealt with the question whether Benjamin's interests passed solely to Mrs. Peiris and thereafter to the plaintiffs, only on the supposition that the second condition in the deed P6 of 1902 was void for uncertainty. But if, as I have already held, that condition was effective and became operative upon the seizure of the property in September 1925, then the plaintiffs can claim only a declaration that they are entitled to a 1/4 share

of the property. Although the claims of the 1st and 3rd defendants to be in possession either directly in their own right, or as successors in title to their father Joseph, has not been definitely established in this action, it is clear that on one or other such basis they do have a right of possession as co-owners with the plaintiffs. That being so, they cannot now be ejected from this property.

The decree appealed from is set aside. Decree will now be entered declaring the plaintiffs entitled to a 1/4 share of the property in dispute. The plaintiffs will pay to the appellants, other than the 2nd Defendant-Appellant, their costs in both Courts.

DE KRETSER, J.—I agree.

Decree set aside.