1962 *Present :* Weerasooriya, S.P.J., and H. N. G. Fernando, J.

SENEVIRATNE *et al.*, Appellants, *and* MENDIS *et al.*, Respondents

S. C. 188/1959—D. C. (Inty.) Negombo, 16592/P

Fideicommissa—Tacit fideicommissum—Elements necessary—Gift of immovable property—Reference in the vesting clause to the donee's "children, heirs, executors, administrators and assigns"—Uncertainty as to the fideicommissaries —Effect.

A tacit fideicommissum cannot be inferred unless there is, firstly, an express prohibition against alienation imposed on the donee, and secondly, a clear designation of the person or persons in whose interest the prohibition is imposed.

A deed of gift of immovable property imposed on the donee a prohibition against alienating the property and further stated that the donee's "children, heirs, executors, administrators and assigns etc. may uninterruptedly possess for ever subject to Government regulations, or they may deal with the same as they please for which authority is hereby given . . . . ."

It was common ground that the deed did not create a fideicommissum in express terms, and the question was whether a tacit fideicommissum could reasonably be inferred.

Held, that although the deed expressly imposed on the donee a prohibition against alienation, the use of the phrase "donee's children, heirs, executors, administrators and assigns etc."—meaning as it does that the children and heirs of the donee as well as the donee's executors, administrators and assigns are to take the property on the death of the donee—if given full effect to, would result in uncertainty as to the fideicommissaries. The deed, therefore, did not create a fideicommissum. In such a case, the difficulty cannot be solved by rejecting all the words in the phrase, except the word "children", as mere notarial flourish or surplusage.

William Nonis v. Simon Nonis (1960) 61 C. L. W. 17 not followed.

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the 5th and 6th defendants-appellants.

Y. C. David, for the substituted plaintiffs-respondents and the 5th respondent (4th defendant).

Cur. adv. vult.

December 21, 1962. WEERASOORIYA, S.P.J.—

This is an action for the partition of a land called Gorakagahawatte depicted in preliminary plan No. 3101 marked X. At the trial it was agreed between the parties that only lots A, B, B1 and C in that plan comprise the corpus to be partitioned. The land originally belonged to two persons, husband and wife, who by deed P1, dated 7th October, 1887, gifted it to their son Peter Mendis Gunatilake, the 1st defendant (since deceased) subject to certain terms and conditions. One of the points of contest at the trial was whether this deed created a fidei commissum in favour of the children of the donee. This point was decided in the negative by the District Judge after a careful consideration of numerous judgments of this Court, and at the hearing of the appeal most of the arguments addressed to us by Mr. Jayewardene who appeared for the appellants were directed towards showing that the conclusion arrived at by the learned Judge on this point is wrong.

The deed P1 is in Sinhala. The plaintiff-respondent contended that the translations P1A and P1B, which are more or less identical, represent the correct rendering of P1, while the appellants relied on the translation 4D 9. According to P1A and P1B, the persons to be benefited are "the said donee Peter Mendis's *children, heirs*, executors, administrators and assigns etc.," but according to 4 D 9 they are "the *children-heirs*, executors, administrators and *trustees*" of the donee. The words italicized denote the main points on which the parties are at variance in regard to what is the correct translation. The trial Judge accepted P1A as the correct translation in preference to 4 D 9, and although Mr. Jayewardene pressed on us to reverse this finding, I see no reason for doing so, especially as support for the view taken by the Judge is to be found in the judgments of Lascelles, C.J., and de Sampayo, A.J., in *Silva v. Silva* [1], a case decided nearly fifty years ago and which, as far as I am aware, has not been dissented from.

The relevant clauses of P1 according to the accepted translation are as follows: " . . . . and the said donee Peter D. Mendis Gunatilake Seneviratne Appuhamy . . . . shall possess the same, but he shall not sell, or mortgage or alienate in any manner whatsoever, or lease for a period exceeding ten years, and the said donee Peter D. Mendis's children, heirs, executors, administrators and assigns etc. may uninterruptedly possess for ever subject to Government regulations, or they may deal with the same as they please for which authority is hereby given.

[1] *(1914) 18 N. L. R. 174.*

And it is hereby directed that if the said donee Peter D. Mendis Gunatilake Seneviratne Appuhamy were to die without descendants then the said land shall devolve on Juwanis Mendis Gunatilake Seneviratne Appuhamy or his children who are heirs."

It is common ground that these clauses do not create a fidei commissum in express terms, and the question is whether, from the language employed, a tacit fidei commissum may reasonably be inferred. An example of a tacit fideicommissum would be where there is, firstly, an express prohibition against alienation imposed on a donee, and, secondly, a clear designation of the person or persons in whose interest the prohibition is imposed. While P1 expressly imposes on the donee a prohibition against alienation, in regard to the second requirement a difficulty arises in this case from the use of the phrase " the said Peter D. Mendis's children, heirs, executors, administrators and assigns etc." It seems to me that this phrase—meaning as it does that the children and heirs of the donee as well as the donee's executors, administrators and assigns are to take the property on the death of the donee—if given full effect to will result in uncertainty as to the fideicommissaries. In my opinion, the difficulty cannot be solved, as Mr. Jayewardene suggested, by rejecting all the words in the phrase, except the word " children ", as mere notarial flourish or surplusage. Although, as Professor Nadaraja has pointed out in his treatise on the Roman-Dutch Law of Fideicommissa (page 253), " it is especially in the decision of the question how far the use of such a phrase makes the identification of the fideicommissaries uncertain that judicial differences of opinion have manifested themselves", the settled law, as far as can be gathered from the more recent decisions of this Court, does not appear to favour a fideicommissum where the language in a grant is in the terms contained in P1. The correct legal position according to these decisions is discussed in the judgment of Nagalingam, J., in *Jayatunga et al. v. Ramasamy Chettiar et al.*,[1] where the prohibition against alienation was coupled with a provision that on the death of the donee her children " and *their* heirs, executors, administrators and assigns shall have the right to possess the said properties or to do whatever they please with the same ". Nagalingam, J., in deciding that the grant created a fideicommissum in favour of the donee's children, stressed that no difficulty arose through any designation of *the donee's* heirs, executors, administrators or assigns as fideicommissaries. Instead, the persons to be benefited being the children of the donee, he expressed the view that the additional words " their (i.e., the children's) heirs, executors, administrators and assigns " could be construed as used for the purpose of conferring on the children an absolute and unfettered right in the property conveyed. In adopting this construction he followed earlier decisions (see *Dassanayake v. Tillekeratne* [2] and *Gunaratne v. Perera* [3]) where it was held that the further reference to the children's heirs, etc., was a recognized means of vesting the *plena proprietas* in the persons to be benefited. By way of contrast he pointed to the language of the grant in *Boteju v. Fernando* [4] which

[1] *(1950) 52 N. L. R. 171.*
[2] *(1917) 20 N. L. R. 89.*
[3] *1915 1 C. W. R. 24.*
[4] *(1923) 24 N. L. R. 293.*

provided that after the donee's death the land shall be possessed by the donee's heirs, executors, administrators and assigns for ever, and he observed that "not only the heirs of the donee but also the donee's executors, administrators and assigns are indicated as the persons who are to take the property on the death of the donee." It will be observed that the language of the grant in *Boteju v. Fernando* (*supra*) which was regarded as insufficient to create a fidei commissum is not substantially different from the language in P1—"Peter D. Mendis's children, heirs, executors, administrators and assigns etc." For other decisions to the same effect see *Amaratunge v. Alwis* [1]; *Appuhamy v. Mathes* [2]; and *Fernando v. Rasheed* [3]. There seems to be little doubt that in *Jayatunga et al. v. Ramasamy Chettiar et al.* (*supra*) Nagalingam, J., would not have upheld a fidei commissum if the reference in the vesting clause had been to the *donee's children and* the heirs, executors, administrators and assigns *of the donee.*

A recent case to which we were referred by Mr. Jayewardene as supporting the claim that P1 created a fidei commissum is *William Nonis v. Simon Nonis and others* [4]. But, if I may say so with respect, it would seem that the decision in that case was arrived at without consideration of the strong line of authority to the contrary represented by *Boteju v. Fernando* (*supra*) and the other cases referred to above, and which I would prefer to follow.

As for the further provision in P1 that in the event of the donee Peter D. Mendis dying without descendants the land shall devolve on Juwanis Mendis or his children, learned counsel for the appellants did not rely on it, either at the trial or the appeal, as an additional ground for submitting that P1 created a fideicommissum in favour of Peter D. Mendis's children. In *de Silva v. Rangohamy* [5] the claim that such a provision (*si sine liberis decesserit*), when included in a gift from father to son, manifests an intention, if the son has issue, to create a fideicommissum in favour of such issue, was fully considered and it was held that the provision by itself is of no assistance in supporting such a claim.

In my opinion the learned District Judge was right in concluding that P1 did not create a fideicommissum. The only other point which was raised by Mr. Jayewardene at the hearing of the appeal was one of estoppel. It was submitted that in any event the plaintiff is estopped from taking up the position that P1 did not create a fideicommissum. The estoppel is said to arise in this way: By P2 of 1921 Peter Mendis

[1] *(1939) 40 N. L. R. 363.*
[2] *(1944) 45 N. L. R. 259.*
[3] *(1949) 50 N. L. R. 349.*
[4] *(1960) 61 C. L. W. 17.*
[5] *(1961) 62 N. L. R. 553.*

gifted to his daughter, the 7th defendant, a 1/9th share of the rents and profits derived from Gorakagahawatte. P2 recites that the donor was by virtue of deed No. 3417 (P1) entitled during his life time to the rents and profits of the land. By deed P3 of 1926, Peter Mendis and another daughter, the 3rd defendant, sold to the 7th defendant and her husband the 8th defendant, an undivided 1/9th share of the land. In 1947 six of the nine children of Peter Mendis (viz., the plaintiff, the 3rd, 4th, 5th, 6th and 7th defendants) along with the 8th defendant, reciting that they were entitled to Gorakagahawatte, entered into the deed 4D3 by which they purported to partition the land and convey to each other certain divided lots with reference to the plan 4D4. Peter Mendis though not a party to 4D3 appears to have acquiesced in this partition. The divided portion granted to the 4th defendant on 4D3 was the subject of a conditional transfer in 1950 in favour of the 2nd defendant on P5, in which Peter Mendis also joined. In 1952 the plaintiff obtained from the 7th and 8th defendants an outright transfer, P4, of an undivided 2/9th share of the land which the transferors claimed to be entitled to on P2 and P3. Th plaintiff filed the present action on the strength of P4, allotting to himself the undivided share so transferred. Paragraph 9 of the plaint refers to the partition effected by 4D3 and states that it was based on the erroneous belief that deed No. 3417 created a valid fideicommissum, whereas the plaintiff had since been legally advised to the contrary. In view of P2, P3 and 4D3 Mr. Jayewardene submitted that from 1921 up to 1952 Peter Mendis and his children treated the deed P1 as creating a fideicommissum and acted on that footing, and the plaintiff is therefore estopped from taking up a different position now. This defence was rejected by the learned District Judge, who held that P2, P3 and 4D3 at the most indicated a doubt in the minds of the parties thereto whether P1 did create a fideicommissum or not. He also held that the ruling in *Vansanden et al. v. Mack et al.*[1] did not, therefore, apply to the present case. I am in agreement with these findings. I would also add that even if the deed 4D3, to which the plaintiff was a party, was entered into on the definite understanding that P1 created a fideicommissum, I fail to see how the rule of estoppel as stated in section 115 of the Evidence Ordinance can be applied against him and for the benefit of the 4th, 5th and 6th defendants (who were also parties to that deed) since any representation that P1 created a fideicommissum was not that of the plaintiff alone but was mutually made by all the parties.

The appeal is dismissed with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.

[1] *(1895) 1 N. L. R. 311.*