1967 *Present :* **Manicavasagar, J., and Alles, J.**

A. T. PIYADASA, Appellant, *and* M. PIYASENA, Respondent

S.C. 667/1964—D. C. Galle, 6704/LN

(i) *Donation—Fideicommissum created by will—Gift of* spes successionis *by fideicommissary—Donee a minor—Sale by minor with permission of Court—Invalidity—Equitable plea of* exceptio rei venditae et traditae—*Inapplicability to a gift.*

(ii) *Landlord and tenant—Evidence Ordinance, s. 116—Estoppel of tenant—Scope.*

(i) Where, in a fideicommissum created by last will, the fideicommissary donates his *spes successionis* during the life of the fiduciary, the gift cannot pass any title or interest to the donee, because, at the best, the *spes* is an uncertain one which may not materialise. In such a case, if the donee is a minor and his guardian, after obtaining permission from Court without disclosing the true facts, sells the fideicommissum property to a third party, the Court's sanction is in effect no sanction at all. Nor can the vendee, after the death of the fiduciary, rely on the equitable plea of *exceptio rei venditae et traditae* in order to claim that the title acquired by the fideicommissary on the death of the fiduciary enured to the donee (the vendor) and passed to the vendee. The plea of *exceptio rei venditae et traditae* has no application to a gift.

(ii) Where a landlord has no title to the premises let by him, section 116 of the Evidence Ordinance does not estop the tenant from disputing the title of a person who claims to have succeeded to the landlord, unless the tenant has already acknowledged the successor in title as his landlord.

APPEAL from a judgment of the District Court, Galle.

E. St. N. D. Tillekeratne, for the defendant-appellant.

C. Ranganathan, Q.C., with *M. T. M. Sivardeen*, for the plaintiff-respondent.

Cur. adv. vult.

February 7, 1967. MANICAVASAGAR, J.—

This was an action for a declaration of title to the land described in the schedule to the amended plaint of 17th December, 1963, ejectment of the defendant-appellant, and damages for wrongful and unlawful occupation, till the plaintiff was placed in quiet possession of the land in suit.

The defendant denied that he was in wrongful occupation, and pleaded that he was in lawful occupation as tenant of M. Seelawathie and Alice Cecilia jointly, and disputed the plaintiff's title.

The facts relevant to the decision of this appeal are as follows : Carolis de Silva was at one time the owner of the land : by his last will (P3) of 18.12.49, which was admitted to probate in D.C. Galle 8501 (Testy.), he devised the premises in suit to his wife, Alice Cecilia, as fiduciary, and thereafter to his son Francis de Silva, as fideicommissary ; if Francis de Silva predeceased his mother, Alice Cecilia, the property was to vest in the children of Francis de Silva. Alice Cecilia died in March 1962, during the life of Francis, who was alive at the time of the trial in the District Court. The latter, by deed 1746 (P6) of 1.3.55 donated the premises in suit to his minor son, Gamini Bennet de Silva ; the deed recited that the premises were held and possessed by him, under the last will (P3) : the gift was accepted by the minor's mother, Seelawathie : the minor did not have possession of the land. In January 1960, Seelawathie, as curatrix of the estate of her minor son, having obtained sanction of the District Court, together with Alice Cecilia sold the premises to the plaintiff, by deed 3207 (P9) of 26.1.60. The plaintiff claims title to the premises on the deed of sale, P9.

The main question that arises for determination in this appeal is whether P9 passed any title to the plaintiff.

It was contended on behalf of the plaintiff that though Francis had only an expectation of succeeding to the property at the time he gifted to his son, which expectation, in turn was conveyed to the plaintiff, yet on the death of the fiduciary, the title acquired by Francis enured to the minor, and passed to the plaintiff, who thereby became the full owner of the property by the operation of the equitable doctrine of " exceptio rei venditae et traditae ".

On behalf of the appellant two submissions were made ; firstly, that the equitable plea, relied on by the plaintiff, would not apply to a donation : in support of this submission, counsel relied on the decision of *Kanapathipillai v. Vethanayagam* [1]. Secondly, that the sanction of the Court granted to the curatrix of the minor, was of no effect, as it was obtained by suppressing from the Court the material fact that Francis's interest was no more than a *spes successionis*, of a fidei commissum created by last will : counsel relied on the decision in *Cassaly v. Buhary* [2], in support of this submission.

In regard to the first submission, Francis's interest was the very uncertain hope of succeeding to the property as fideicommissary heir, for

[1] *(1963) 66 N. L. R. 49.* [2] *(1956) 58 N. L. R. 78.*

the fidei commissum was created by last will, and if he died before the fiduciary, he transmitted nothing by P6 to Bennet, for the fiduciary, Alice, took free of the entail (*Mohamed Bhai et al. v. Silva* [1]) : as subsequent events turned out, the fiduciary, Alice predeceased Francis ; but this makes no difference : the question is whether on P6 any interest passed to Bennet. A gift is said to be made when anyone grants property and at the same time delivers it with the intention that it should immediately become the property of the person receiving it . . . . (Perezius on Donations . . . . Wikramanayake's translation. Title LIV, Section 1). At the best, the spes which Francis gifted was an uncertain one, and which may not have materialised. The case cited by counsel for the appellant is authority for the view that the equitable plea of *exceptio rei venditae et traditae* has no application to a gift. I am in respectful agreement with the reasoning of Basnayake C.J., and uphold the appellant's first submission.

In regard to the second submission, the application of the curatrix for sanction was made on the basis that the minor was entitled to the property, which in fact he was not : there was a suppression of relevant facts relating to the interest of Francis. A solemn duty rests on a petitioner who seeks the sanction of the Court to deal with a minor's property, to disclose the true facts so that the Court may decide in its capacity as upper guardian of the ward, whether the minor had a saleable interest, and whether the sale was to the advantage of the minor. The Court's sanction was in this instance improperly obtained, and in effect was no sanction at all.

Counsel for the plaintiff-respondent however submitted that the appellant being only a tenant of the premises, cannot be heard to dispute the plaintiff's title, the onus of proving title is on the plaintiff, and he had not discharged that burden.

The appellant entered into occupation as tenant of Seelawathie and Alice : Alice died in March 1962, whilst Seelawathie was alive at the time of the trial : Alice was fiduciary at the time of the letting, whilst Seelawathie as curatrix had no title. However, one may let property to another without having any right or title to it, and such a letting is valid : the tenant who enters into occupation, is estopped during his tenancy from disputing his landlord's title, except under certain circumstances with which we are not concerned in this case. It is therefore clear that the appellant could not in law dispute the title of Seelawathie. The issue here is whether the appellant can successfully dispute the title of one who claims to have succeeded by assignment to the minor's interests. Under Section 116 of the Evidence Ordinance, the estcppel is only in favour of the person who placed the tenant in possession, and does not estop the tenant from disputing the title of one who claims to have succeeded to the landlord : in such a case the estoppel will arise only if the tenant had acknowledged the successor in title as his landlord.

[1] (*1911*)-*14 N. L. R. 193.*

Since the defendant has successfully challenged the plaintiff's title he is entitled to succeed, and consequently the appeal is allowed. The plaintiff's action is dismissed with costs here, and in the Court below.

ALLES, J.—I agree.

Appeal allowed.