1954 *Present :* Pulle, J., and Swan, J.

H. KIDA SILVA, Appellant, *and* H. BUILIS SILVA *et al.*, Respondents

S. C. 160—D. C. Colombo, 6,216

Fideicommissum—Designation of fideicommissaries—Use of word " or "—Does not always bear substitutionary meaning.

A father gifted a ½ share of a land to his son B. S. subject to a fideicommissum in favour of B.S's children. On the same day he executed three other deeds gifting a ⅙th share of the land respectively to each of his three daughters ; each deed was subject to the following conditions :

"I the said donor do hereby reserve to myself the right of enjoying the rent· issues and profits of all the premises described in the schedule hereunto during my life ; and also subject to the conditions that the said donee shall not sell, mortgage or otherwise alienate the said premises but after her death the same should evolve on B. S. *or her* lawful heirs. " (B. S. was the aforementioned son of the donor.)

Held, that none of the deeds in favour of the daughters created a fideicommissum inasmuch as the fideicommissaries were not sufficiently clearly designated. The word " or " could not, in the context in which it was used, be given the usual meaning " whom failing ".

APPEAL from a judgment of the District Court, Colombo.

S. W. Walpita, with *J. R. M. Perera*, for the plaintiff appellant.

No appearance for the defendants respondents.

Cur. adv. vult.

May 10, 1954. PULLE, J.—

The plaintiff who is the appellant sought to partition the land depicted in Plan No. 90 of 20th August, 1951. There were three defendants of whom the first was her brother Hathimuni Builis Silva, to whom she allotted a ½ share and the second and third her sisters to each of whom she allotted a 1/6th share. The plaintiff claimed the balance 1/6th. The 2nd defendant Hathimuni Gardin Silva died pending the action. The principal question for determination is whether upon her death her share passed by intestate succession to the plaintiff and the 1st and 3rd defendants or whether by reason of the provisions contained in a deed of gift No. 872 marked P4 from her father dated the 29th July, 1938, her share passed exclusively to the 1st defendant. The donor, Hathimuni Martin Silva, the father of the plaintiff and the defendants, executed on the 29th July, 1938, three other deeds No. 871 marked 1D 1, No. 873 marked P5 and No. 874 marked P6. By deed No. 871 Martin Silva donated a half share to the 1st defendant subject to a fideicommissum in favour of the 1st defendant's children. Deeds Nos. 872, 873 and 874 were in identical terms by which Martin Silva gifted a 1/6th share respectively

to each of his daughters. The case for the 1st defendant is that these deeds also created fideicommissa in his own favour and the learned District Judge has so held.

The donor made the gifts to his daughters subject to the following conditions :

> "I the said donor do hereby reserve to myself the right of enjoying the rent, issues and profits of all the premises described in the schedule hereunto during my life; and also subject to the conditions that the said donee shall not sell, mortgage or otherwise alienate the said premises but after her death the same should devolve on Hathimuni Builis Silva *or her* lawful heirs."

Now the submission on behalf of the plaintiff both here and below is that if the donor intended to create a fideicommissum he did not succeed in giving effect to his intention because there is not in the deed a sufficiently clear designation of the fideicommissaries. On a literal reading of the deed it would seem that upon the death of the donee either the 1st defendant succeeded to the whole of the property donated or he succeeded jointly with the plaintiff and the 3rd defendant. Could one say with reasonable certainty from the beginning in whom the property would vest upon the death of the donee? Before answering this question I shall analyse the reasons which appear to have weighed with the learned Judge in holding that there was a sufficient designation of the ultimate beneficiaries.

There can be no doubt, as the Judge says, that fideicommissaries can be indicated in the alternative or successively or as a class by the use of the word "heirs". The basic point of the decision is expressed by him as follows :

> "The recipients were to be Builis Silva in the first instance and failing him the intestate heirs of the donees. There is in my opinion a clear designation of the fideicommissaries in the substitutional sense indicated by the use of the word 'or'."

For this proposition he relies on a footnote at p. 269 of Professor T. Nadarajah's work on the Roman-Dutch Law of Fideicommissa where it is stated,

> "Although the meaning of the word 'or' must in each case be a question of fact, the South African courts have followed the view of the English courts that, generally, where there is a bequest to 'A' or 'B', the 'or' is used in a substitutional sense."

The learned author refers to *In re Estate of Albertyn,*[1] and *Peduru Fernando v. Mary Fernando*[2]. In the former case the court had to construe a paragraph of the will which reads in effect as follows :

> "3. To my nephew C the interest on a capital of £5,000 and after his death the interest on said capital shall devolve on his child J. *or* such other lawful issue by subsequent marriage him surviving in equal shares who shall likewise only be entitled to the interest on the capital in equal shares."

[1] *1929 C. P. D. 244, 253—255.* [2] *40 N. L. R. 44.*

At the time the will was made C had only one child by his first marriage, namely J, and his wife was then dead. C married a second time and had two children. One of the questions which had to be decided was whether, in the event of C's death, J and the two children of C would succeed jointly to £5,000 ; or whether J alone would succeed, if J survived his father C. The decision was that upon C's death J, if alive, would be vested absolutely with £5,000. It was further held that if J predeceased C, the two children would succeed in equal shares. In the course of his judgment Van Zyl, J., after citing the case of *Bowman v. Bowman* [1], said,

" It seems to me that it will be in accordance with the ordinary and natural use of the English language if ' or ' in paragraph 3 is taken to be equivalent to ' whom failing'. " He went on to add,

" I am further strengthened in my view that a decision should be given in favour of the sixth defendant as against the other children of the fifth defendant by two circumstances. Firstly, the sixth defendant was the only child the fifth defendant had when the testator made his will, and it seems to me neither unnatural nor unreasonable to assume that to the mind of the testator, when he made his will, the sixth defendant was more important than any possible further children who might be born to the fifth defendant who was not even married at the time. And secondly, the words " who shall likewise only be entitled to the interest on the capital in equal shares does not seem to me to be consistent with a reading of paragraph 3 which would bring in the sixth defendant on equal terms with the other surviving children. Those words clearly refer to the other children only and show that the testator in drawing up paragraph 3, was not contemplating an alternative in which the sixth defendant should share with the other children." The fifth defendant referred to was C and the sixth defendant J.

I have cited *in extenso* from the judgment of Van Zyl, J., to show that the word " or " in the context of P4, P5 or P6 cannot automatically be given the meaning " whom failing ". By the deed 1D 1 the 1st defendant received a ½ share subject to a fideicommissum in favour of his children. If the 1st defendant's contention is accepted then it was not the intention of the donor that the balance half share given to his sisters should, when it devolves on him, be burdened with a fideicommissum in favour of his children. In other words he would have a free disposing power over it. I do not see any particular reason, from the bare circumstance that all the sisters were childless, for thinking that the donor must have intended that each sister's share should devolve only on the brother. Speculation as to intention is an unsafe guide, one way or the other, especially in interpreting a contractual instrument. Ultimately one has to fall back on the language used in the instrument and gather the intention from that language with the help of such extraneous evidence as the law permits.

The learned Judge says that the passage which I have quoted from P4 shows clearly the donor's intention to create a fideicommissum. He is, perhaps, right in the sense that a prohibition against sale, mortgage or

[1] *1899 A. C. 518.*

alienation is often found in clauses creating a fideicommissum, but it is no less essential that what was in the mind of the donor must be expressed with that degree of clarity which the law demands. There are many cases in England relating to charitable trusts in which the most praiseworthy intentions of testators to benefit the public have been defeated because of faulty draftsmanship. One of the best known is *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson and others* [1] in which the House of Lords held that a direction to the executors to apply the residue of a large estate " for such charitable institutions or other charitable or benevolent object or objects " as they should select was void for uncertainty. In the present case the donor did probably intend to make a fideicommissary gift but he used language which left it in doubt whether upon the death of the alleged fiduciary the property was to pass to A alone or jointly to A, B and C. The result is that neither of the deeds P4, P5 and P6 could be held to have created a fideicommissum. In reaching this conclusion I have borne in mind that while generally in a will by which a bequest is made to a person or a class " or " his or their heirs, issue, children or descendants, the word " or " is substitutionary—Vide *Stroud*, 1953 edition, p. 2007—the use of the word " or " is not conclusive that the gift is substitutional. *Williams on Executors 1930 ed. p. 782.*

I would set aside the decree under appeal and direct that a decree be entered giving effect to this judgment. The 1st defendant will pay the plaintiff the costs of appeal. The other costs will be pro rata.

Swan, J.—I agree.

Decree set aside.