

The Evolution of the Fideicommissum

IN one of the best known of legal classics Sir Henry Maine drew attention to "the singular horror of Intestacy which always characterised the Roman. No evil seems to have been considered a heavier visitation than the forfeiture of Testamentary privileges, no curse appears to have been bitterer than that which imprecated on an enemy that he might die without a Will."¹ One result of the Roman dislike of intestacy was the common practice for testators to appoint some person or series of persons to take the estate if the heir instituted in the first instance did not succeed.²

The reasons preventing the instituted heir from succeeding might be various—for example, he might die before the testator, or lack the capacity to succeed, or be unwilling to accept the inheritance. Apart from the purpose of avoiding intestacy, a secondary object of substitution would often have been the possible desire of a testator to give effect to some scheme of preferences as amongst those whom he wished to succeed him.

This device of substituting some other beneficiary for the instituted heir was called *substitutio*, of which there was more than one form.

The most usual type was that called *substitutio vulgaris*, vulgar or common substitution. For example, "Lucius Titius, be my heir; and decide (whether you will accept the inheritance) within the first hundred days after you know and are able. Unless you so decide, be disinherited. Thereupon Maevius be my heir and decide within a hundred days."³ It was possible to nominate more than one substitute in a series, so that if the first substitute did not for any reason succeed, the succession would go to the next, and so on successively; and the final substitute was often a slave of the testator who, being a *heres necessarius* or "necessary heir," had not the option of refusing the inheritance. The substitution only became effective if the condition on which it depended—usually the event of the instituted heir not succeeding—was satisfied, and if the instituted heir once succeeded, the substituted heir thereafter had no interest in the inheritance.⁴

Two less usual types of substitution were *substitutio pupillaris*, pupillary substitution, and *substitutio quasi-pupillaris* or *exemplaris*, quasi-pupillary or exemplary substitution. Pupillary substitution was that by which a *paterfamilias*, by virtue of his paternal power (*patria potestas*), appointed a substitute for a child in his *potestas* to guard against the contingency, not merely of the child dying before succeeding him, but also of the child dying after succeeding but before reaching the age of puberty and of testamentary capacity.⁵ Here the substitution became inoperative when the child attained the age of puberty.⁶

THE EVOLUTION OF THE FIDEICOMMISSUM

Quasi-pupillary substitution was a device by which, on the analogy of pupillary substitution,⁷ ascendants of either sex⁸ could substitute heirs to descendants of full age who suffered from insanity or certain other disabilities. The substitution ceased with the cessation of the incapacity.⁹

It will be noticed that pupillary and quasi-pupillary substitution were in one respect an advance on vulgar substitution in that by the two former a testator could provide in certain events (for example, the death of the instituted heir before puberty or before sanity was regained) for substitution to an heir even after he had once succeeded, whereas in the former the substitution ceased to operate when the instituted heir once succeeded. But this power of transmitting the inheritance after it had once been entered on by an heir was, in pupillary and quasi-pupillary substitution, limited to the circumstances of those cases (that is, the first instituted heir had to be a descendant of the testator or insane) and was not general—"to a stranger or to a son over puberty that is appointed heir, no one can name a substitute so that if the outsider or adult becomes heir, or dies within a fixed time, that other may be his heir."¹⁰

Yet though it was not possible by any of the three types of substitution so far considered to secure generally the transmission of an inheritance from one heir to another, this object could be secured in another way—the testator could, by the imposition of a trust¹¹ (*fideicommissum*) bind the instituted heir to convey the inheritance to another person.¹² "If then a man writes, 'Let Lucius Titius be heir,' he can add, 'I ask you, Lucius Titius, that as soon as you enter on my inheritance you surrender it to Seius and give it up to him.' He can also ask the heir to give up a part and he is free to leave the *fideicommissum* either absolutely or conditionally or from a fixed day."¹³ This convenient device is distinguished from the three types of substitution considered above by being called *fideicommissary* substitution.¹⁴

It will thus be seen how the device of the *fideicommissum* constituted an advance on the three other types of substitution, and, as we shall see, the later importance of the *fideicommissum* lay almost entirely in its use as a method of transmission of property from one heir to another by way of settlement or entail. In other words, the best-known use of the *fideicommissum* has come to be its use as a device by which a person may control the devolution of property after it has passed out of his possession, usually with the object of keeping it in one family. But, historically, this was not the origin of the *fideicommissum*, which must be traced to the desire of testators to enable persons to take indirectly who could not, by reason of the technicalities of the Roman Law of succession, be appointed direct heirs.¹⁵

As Gibbon says,¹⁶ "the invention of *fideicommissa* or trusts, arose from the struggle between natural justice and positive jurisprudence. A stranger of Greece or Africa might be the friend or benefactor of a childless Roman; but none except a fellow citizen, could act as his heir. The Voconian Law, which abolished female succession, restrained the legacy or inheritance of a woman to the sum of one hundred thousand sesterces; and an only daughter was condemned almost as an alien in her father's house. The zeal of friendship and parental affection suggested a liberal artifice; a qualified citizen was named in the testament with a prayer or injunction that he would restore the inheritance to the person for whom it was truly intended."

Originally the fiduciary, or person on whom the obligation to restore the inheritance was imposed, was bound not by any legal obligation, but only morally to observe the trust in favour of the fideicommissary or ultimate beneficiary—"this indeed is why they were called *fideicommissa* because they were secured by no bond of law but merely by the honour of those to whom they were addressed."¹⁷ This was still the position in the time of Cicero, for he gives examples of cases, in some of which he himself was consulted, where the conflict between the rival claims of law and of honour was involved.¹⁸ "Various was the conduct of trustees in this painful situation: they had sworn to observe the laws of their country, but honour prompted them to violate their oath; and if they preferred their interest under the mask of patriotism, they forfeited the esteem of every virtuous mind."¹⁹

The steps by which *fideicommissa* obtained legal recognition are traced in Justinian's "Institutes" as follows:—"Afterwards the late Emperor Augustus, first being moved to action more than once by way of favour to particular persons, or because a request had been made in the name of the Emperor's safety or because of some notable breaches of faith, ordered the consuls to interpose their authority" (i.e. so as to give *fideicommissa* legal effect). "This seemed equitable and popular and was gradually converted into a regular jurisdiction. So greatly was it favoured that after a little a special *praetor* was appointed to deal with *fideicommissa*, and he was called the *praetor fideicommissarius*."²⁰

Even after the recognition at law of *fideicommissa*, the old maxim of Roman Law "*semel heres semper heres*" ("once an heir, always heir"),²¹ prevented the fideicommissary heir from being treated as succeeding to the legal personality of the deceased²²—so that it was the fiduciary heir, and not he, who could sue and be sued at law. As the fiduciary in addition to being liable for debts, might receive nothing or little for himself (for example, when he was directed to hand over the whole or a large part of the estate to the

THE EVOLUTION OF THE FIDEICOMMISSUM

fideicommissary), he would often have been disinclined to accept the inheritance, in which event the *fideicommissum* would have failed. The main steps by which the difficulties of this situation were surmounted may be briefly indicated.²³

At first it was usual to treat the transfer of the estate from fiduciary to fideicommissary as a purchase by the latter, who promised to relieve the fiduciary of all possible claims against him, and who was allowed to sue creditors of the estate.²⁴ The *S. C. Trebellianum* (passed about 56 A.D. in Nero's reign) made formal transfer and promises unnecessary by directing the *practor* to give the parties the appropriate actions and relief in all cases.²⁵ But as there was still no obligation on, and there might be no inducement to, the fiduciary to accept the inheritance, the *S. C. Pegasianum*, (passed about 73 A.D. in Vespasian's reign), allowed the heir to retain a quarter of the estate (on the analogy of the Falcidian quarter allowed by the *Lex Falcidia*)²⁶ and provided that, if the heir did not enter, he could be forced to do so, taking neither benefit nor liability.²⁷ Justinian finally fused the remedies of the Trebellian and the Pegasian *Senatus consulta*,²⁸ so that in his law the position was that the fiduciary could be compelled to enter but was free of all liability for debts, and if he entered voluntarily, was entitled to retain his quarter (unless the testator expressly excluded this),²⁹ while the fideicommissary had all rights of action against third parties for debts of the estate.

In order to understand better the subsequent development of the *fideicommissum* in Roman-Dutch Law, it is necessary to consider briefly some of its possible forms in Roman Law. We have already seen³⁰ that a *fideicommissum* could be expressed to take effect as soon as the fiduciary obtained the property, or at a given future date, or on the fulfilment of a condition.³¹ Again the *fideicommissum* might relate to the whole inheritance or an aliquot part of it (*fideicommissum hereditatis*),³² or to some particular article (*singula res*).³³ Further, the *fideicommissum* could be imposed not only on the testamentary heir, but on any person who took a benefit by the death—thus, it could be charged on the intestate heir,³⁴ on legatees,³⁵ on fideicommissaries and donees *mortis causa*.³⁶

Turning now to substitution in Roman-Dutch Law, we find that the vulgar substitution of Roman Law found a place in the former system also,³⁷ but that pupillary substitution, "as proceeding from the peculiar power³⁸ (i.e. the *patria potestas*) which the Romans had over children,"³⁹ was not accepted in Roman-Dutch Law;⁴⁰ while quasi-pupillary substitution, though said by some writers⁴¹ to be in use, was practically obsolete.⁴² Fideicommissary substitution was adopted in Roman-Dutch Law, and Professor Lee's statement⁴³ that "no department of Roman-Dutch Law is more thoroughly

penetrated by the Roman tradition than that of Testamentary succession" is probably most true of that branch of the law of testamentary succession which deals with *fideicommissa*. But it is only natural that, with the development of the institution in course of time, certain changes of emphasis should have made themselves felt in the treatment of *fideicommissa* by the Roman-Dutch writers, and in certain respects fundamental changes have also been made in the modern Roman-Dutch Law countries by reason of the introduction of institutions derived from the English Law.

Thus, to mention one development found in the Dutch writers themselves, the original Roman conception of the *fideicommissum* as a device by which the fideicommissary, incapacitated at law from taking directly, was to be given the inheritance by the fiduciary as soon as the latter entered on it, faded gradually into the background: much more prominent in the Roman-Dutch Law is the conditional *fideicommissum* in which the property passes from fiduciary to fideicommissary, not at once, but only after some period of enjoyment by the fiduciary of the ownership.⁴⁴ In other words, the original motive for the introduction of *fideicommissa* in Roman Law—to enable persons, not qualified to take directly, to succeed to the property—having disappeared, the other use of the *fideicommissum* as a device for making a "settlement" of the property was availed of more and more by the Roman-Dutch lawyers.⁴⁵ It is only in modern times that South African judges have resurrected the conception of the *fideicommissum purum*⁴⁶ as explaining in terms of Roman-Dutch Law the English conception of the trust.⁴⁷

The adoption in South Africa and Ceylon of the English system of administration of a deceased person's assets has also modified the Roman and Roman-Dutch conception of *fideicommissum* in some respects. One of the most fundamental changes thus made in the sphere of succession has been the replacement of the Roman Law heir with universal succession by the English institution of executors and administrators,⁴⁸ which has had far-reaching effects in the field of *fideicommissa*. For example, Roman and Roman-Dutch Law drew a distinction between a *fideicommissum* imposed on the heir to transfer to the fideicommissary the whole or an aliquot share of the inheritance (universal *fideicommissum*) and a *fideicommissum* relating to a specific thing (particular or singular *fideicommissum*) which might be charged either on the heir or on a legatee.⁴⁹ When the singular *fideicommissum* was charged on the heir, the similarity between it and an ordinary legacy, which was also a direction to the heir, was very great; and in fact Justinian⁵⁰ assimilated the rules of legacies and *fideicommissa*. There has been much difference of opinion as to whether this assimilation applied to *fideicommissa* of single things only or

THE EVOLUTION OF THE FIDEICOMMISSUM

also to fideicommissary inheritances;⁵¹ but this discussion is now, after the adoption of the English system of executors and administrators, merely academic so far as South Africa and Ceylon are concerned.

For whether a *fideicommissum* relates to the whole or part of the inheritance, or only to some particular object, and whether it is charged on the heir or the legatee is now immaterial, in so far as it is the executor who is now regarded as representing the deceased. Even where a beneficiary under a will is an "heir" in the old sense, (as for example where he is given all the property or all of it except a few specific bequests by way of legacy to others), the heir is now no more than a residuary legatee.⁵² Thus today a *fideicommissum*, charged on a beneficiary who would formerly have been considered as falling under the description whether of heir or of legatee, can be regarded simply as a gift to one person, which is to go over to another on the happening of some certain or uncertain event, or at the expiry of some specified period.

T. NADARAJA

NOTES

1. *Ancient Law* (Pollock's edition) 243. As to the reason for this dislike of intestacy, Maine (*op. cit.* 245-8) suggested it was due to the fact that the civil law rules of intestate succession were narrow and, being based on the artificial conception of agnation, had little correspondence with the impulses of natural affection, so that there was good reason for a person desiring his succession not to be regulated by those rules. The religious factor must also have contributed: the welfare of the dead depended on the continuance of the family religious rites, and, whereas an intestate heir might abandon them, the testamentary heir was bound to continue the *sacra*. Accarias. *Precis de Droit Romain*, Vol. I, 840.

The description of the Roman sentiment in favour of testation as a "horror of intestacy" may, perhaps, be something of an exaggeration (*vide*, for example, O. K. Mc Murray. *Liberty of Testation in Wigmore Celebration Legal Essays*, 1919, 536-563), but it is interesting to note that in England, both before the Norman Conquest and for some time after it, there was a genuine horror of intestacy. The reason for this was "the influence of the Church steadily exercised against intestacy. To die without having made a pious disposition of a considerable part of his estate was not good for a man's soul—or for the Church." Lee. *Elements of Roman Law*, 2nd edition, 250. Cf. Pollock and Maitland. *History of English Law*, Vol. 2, 356-7, Holdsworth. *History of English Law*. Vol. 3, 535-6.

2. Cf. *Lint v. Zipp*, 1876. Buch. 181, 183, per de Villiers, C.J., and *Raymond v. Sanmogam*, 3 Cey. L. Rep. 63, 65, per Withers, J.

3. Gaius, 2. 174.

4. Gaius, 2. 176; Code 6-26-5.

5. For example "Son Titius, be my heir. If my son be not my heir or if he shall be my heir but die before becoming his own guardian," (i.e. reaching puberty) "then Seius be my heir." Gaius 2. 179-180; Institutes 2-16, pr.

6. Institutes 2-16-8; Digest 28-6-14.

UNIVERSITY OF CEYLON REVIEW

7. "*Ad exemplum pupillaris.*" Institutes 2-16-1.
8. Since quasi-pupillary substitution was not based, as was pupillary substitution, on the *patria potestas*, it was open to females.
9. Inst. 2-16-1, Code 6-26-9, Digest 28-6-43.
10. Inst. 2-16-9; Cf. Gaius 2-184.
11. The word "trust" is here used in an untechnical sense, for the English trust and the Roman fideicommissum differ in important respects. See the present writer's article "Fideicommissa and Trusts—Parent and Child or Good Companions?" in 1947. *Ceylon Law Students' Magazine*.
12. Inst. 2-16-9. Cf. Gaius 2-184 and 2-277.
13. Inst. 2-23-2.
14. This name is not Roman, but is found in some Dutch texts (for example Voet 28-6-3 and 36-1-1; Van Leeuwen. *Censura Forensis*. 1-3-6-1 and 15, Huber, *Heedens-daegsche Rechtsgeleertheyt*, 2-17-4 and 2-19-4.
15. Gaius (2-285) says, "Thus aliens could take the benefit of trusts and this was the principal motive in which trusts originated."
16. *Decline and Fall of the Roman Empire*. Ch. 44. (Bury's ed. Vol. 4. p. 492).
17. Inst. 2-23-1.
18. For example, Cicero in *Verrem*. 2-1-47; *de Finibus*, 2-17-55, 2-18-58. It seems to have been usual (cf. Cicero in *Verrem*. 2-1-47) for the testator to make the heir promise on oath to observe the fideicommissum—thus seeking to supply by religious motives the lack of a legal sanction.
19. Gibbon, *op. cit.*, p. 492.
20. Inst. 2-23-1.
21. D. 28-5-89.
22. It will be remembered that the Roman heir was regarded as continuing the legal personality of the dead person—"an inheritance is no other than a universal succession to the deceased" (D. 50-17-62)—and that therefore the heir succeeded to both the assets and liabilities of the deceased. It was only by Justinian's introduction of the *beneficium inventarii* or "benefit of inventory" that an heir who doubted the solvency of an inheritance was enabled to limit his liability to the assets of the estate.
23. The history of this matter is complicated and, for our purpose, the details are largely unimportant, because of the changes caused by the replacement of the Roman universal heir by the English executor. (See *infra* nn. 49,53). The account given in the text relates to fideicommissary inheritances and not to *fideicommissa* of single things which were analogous to legacies (cf. n. 50 *infra*) and did not raise the same difficulties, as to the relation of the fideicommissary to creditors of the estate, as arose in the case of fideicommissary inheritances. For the distinction between universal and singular *fideicommissa*, v. pp. 256, 257 of text *supra*.
24. Gaius 2. 252
25. Gaius 2. 253.
26. Gaius 2. 254. As an inducement to the heir to enter on the inheritance so as to prevent an intestacy, the *Lex Falcidia* of 40 B.C. had provided that a testator should not give away more than one-fourth of his estate by way of legacies.
27. Gaius 2. 258.
28. Inst. 2-23-7.

THE EVOLUTION OF THE FIDEICOMMISSUM

29. arg. Nov., 1-2-2.
30. See, for example, *Institutes* 2-23-2, (*vide* text at n. 13 *supra*).
31. A common condition on which the property was to be restored to the fideicommissary by the fiduciary was "*si sine liberis decesserit*"—if the fiduciary died without children. See for example D. 36-1-3-4; 36-1-23 (22)4; 36-1-33(32).
32. Title 23 of Book 2 of Justinian's *Institutes* which deals with this subject is headed "*De Fideicommissariis Hereditatibus*."
33. Title 24 of Book 2 of Justinian's *Institutes* is headed "*De Singulis Rebus Per Fideicommissum Relictis*."
34. A *fideicommissum* could even be charged on the Treasury (*Fiscus*) when the property passed to it, in default of other heirs, on intestacy D. 30-114-2.
35. Gaius 2-271. Obviously a *fideicommissum hereditatis* could not be charged on a legatee or on a fideicommissary who had himself received only *res singulae*.
36. D. 32-3-3; 31-77-1.
37. Vander Linden, 1-9-7; Grotius, 2-19; Voet. 28-6-15; Van Leeuwen *Commentaries*, 3-7, and *Cens. For.* 1-3-6.
38. "The power of parents over their children differs very much among us from the extensive paternal power among the Romans," V. der L. 1-4-1.
39. V. L. *Comment*, 3-7-5.
40. Gr. 1-6-3 and 2-19-9; Vander Keessel *Theses*, 106, 312 and *Dictata* ad. Grotium 1-6-3; Vander Linden, 1-9-7; V. L. *Comment*, 3-7-5 and *Cens. For.* 1-3-6-14; Groenewegen *de legibus abrogatis*. ad Inst. 2-16; Schorer Note 139, ad. Gr. 2-19-9; Voet. 28-6-26.
41. Vander Linden, 1-9-7; Vander Keessel Th. 312; de Haas' note to V. L. *Cens. For.* 1-3-6-14; and *Rechtsgeleerde Observatien*, 1-41.
42. Groenewegen *de leg. abrog.* ad. Inst. 2-16; Vinnius ad. Inst. 2-16-9 in fin Voet *Compendium*, 28-6-16.
43. *Introduction to Roman-Dutch Law*. (4th edition), p. 352.
44. "At the present day the burden almost always falls on the first heir in such a way as to pass over the property after his death, instead of, as at the original institution of this kind of substitution, the burdened heir being requested to give over the property at once." Huber, 2-19-5.
45. To prevent misunderstanding, it must be said that the *fideicommissum* as a device for creating settlements was not unknown even in classical Roman law. See, for example, the will of Dasumius of 108 A.D in Bruns. *Fontes Juris Romani*. 7th edition I, 304.
46. A *fideicommissum purum* was one in which the fiduciary's duty to hand over the property to the fideicommissary was not postponed till the satisfaction of some condition or the expiry of some period.
47. See the present writer's article cited in n. 11. *supra*.
48. The English law was adopted at different times in the various Provinces of South Africa, but Act No. 24 of 1913 consolidated the law for the whole Union. In Ceylon, "The Charter of 1801 introduced the English law" (of Executors and Administrators) "here as to Europeans other than the Dutch inhabitants. Then came in 1833 the Royal Charter . . . which by its 27th clause empowers the district courts generally to appoint administrators to the estates of intestates, to grant probate to executors, and to exercise

UNIVERSITY OF CEYLON REVIEW

other powers in matters connected with such officers . . . We think that these Charters introduced—the first as to one class of our population, the last as to the whole population of the Island—an entirely new law, and one that could never be blended, or co-exist with the old Roman-Dutch Law. This old system was, in our opinion, entirely abrogated, as being quite incompatible with the English which was ordained." *Staples v. de Saram* (1863-68) Ramanathan, 265, 275, *per curiam*.

49. Inst. 2-24 pr.; Voet. 36-1-2. The difference between the heir and the legatee in Roman law was, it will be remembered, that while the former was universal successor of the deceased (*vide supra* n. 22), the legatee did not continue the deceased's legal personality—in other words, legacy was a mode not of universal succession, but of singular succession. This is brought out in the definition of a legacy given in D. 30-116 pr.: "a legacy is a diminution of the inheritance by which the testator directs that something which should otherwise form part of the whole estate going to the heir is to go to some other person."

50. Code 6-43-1; Inst. 2-20-2.

51. Von Vangerow-*Lehrbuch der Pandekten* s. 556; Windschied-*Lehrbuch des Pandektenrechts* ss. 561, 662; Baron -*Pandekten* s. 454.

52. In South Africa, "the administration of the estate of a deceased person is . . . given to an executor, testamentary or dative, instead of to the heir. The heir, *qua* heir, cannot now adopt his own mode of administering the estate. The executor by law administers . . . There seems to me to be much ground for contending that . . . a testamentary heir is now in this Colony to be regarded rather as a residuary legatee than as heir in the Roman law sense." *Oosthuysen v. Oosthuysen*, 1868, Buch. 51, 62, per Conno: J; Cf. *White v. Landsberg's Executors* (1918) C.P.D. 211, per Scarle J; and *Estate Smith v. Estate Follett* (1942) A.D. 364, 383, per Watermeyer, J.A. For Ceylon, cf. *Livera v. Gunaratna* 17 N.L.R. 289, 293, per Pereira, J.