1949 *Present:* **Windham and Gratiaen JJ.**

PERERA *et al.*, Appellants, *and* DE FONSEKA *et al.*, Respondents

S. C. 425—D. C. Colombo, 2,643L

Fidei commissum—*Deed of gift* inter vivos—*Entail and Settlement Ordinance (Cap. 54)—Sections 4 and 8*—" *Exchange* " *of* fidei commissum *property—Meaning and effect of such exchange—Single and separate* fidei commissa—Jus accrescendi—*Meaning of word* " *surviving* ".

(i) The " exchange " which is contemplated in sections 4 and 8 of the Entail and Settlement Ordinance is an exchange in the sense of the substitution of one property for another. The properties may correctly be said to have been " exchanged " the one for the other, whether or not the former owner of the property which is received in exchange becomes the new owner of the property which is given in exchange.

(ii) A *fidei commissum* created by deed of gift gave property to two sisters, L and A, as fiduciaries " in equal undivided shares for over " and imposed the condition that " the said premises shall after their death devolve on their lawful issues respectively and in the event of any one of the said donees dying without lawful issue her share, right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions aforesaid ". L died in 1935 leaving nine children. A died in 1941, intestate, without having had issue.

Held, that the deed of gift created a single *fidei commissum* in favour of L and A and their respective issues and that upon the death of A without issue, her half share did not devolve on her intestate heirs but shifted over by virtue of a *jus accrescendi* to the children of the already deceased L, in accordance with the rule in *Tillekeratne v. Abeysekera (1897) 2 N. L. R. 313.*

Held, further, that the expression " surviving donee ", in the context, should be construed as " other donee ".

APPEAL from a judgment of the District Court, Colombo.

E. B. Wikramanayake, K.C., with *D. S. Jayawickrama*, for 37th and 39th added defendants, appellants.

H. V. Perera, K.C., with *N. E. Weerasooria, K.C., N. M. de Silva* and *Ivor Misso*, for plaintiff, respondent.

Cur. adv. vult.

October 13, 1949. WINDHAM J.—

This is an appeal from a judgment given in favour of the plaintiff-respondent, for the sale, under the Partition Ordinance, of certain premises at No. 20, Baillie Street, Colombo, of which the plaintiff-respondent and the first to eighth defendant-respondents claimed exclusive co-ownership.

The plaintiff-respondent traced title to the premises from as early as 1817, and it is uncontested that by a deed (P7) of 1893 they passed into the ownership of one Mututantrige Siman Fernando, who was the grandfather of the plaintiff-respondent and of the latter's brothers and sisters the first to eighth defendant-respondents.

1——J. N. A 93567–1,040 (11/49)

The points raised in this appeal, however, arise upon the terms of a *fidei commissum* contained in an earlier deed of gift of 1883,—P8—, whereby Siman Fernando and his wife Maria Perera, who were possessed of several other properties as well as that at No. 20, Baillie Street, gifted certain premises at No. 21 (now No. 24) Chatham Street, Colombo, to two of their daughters, Leonora and Arnolia, upon the following terms and conditions :—

> "To have and to hold the said premises with the easements rights appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto them the said Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando their heirs executors and administrators in equal undivided shares for ever subject however to the conditions following that is to say, that the said Mututantrige Siman Fernando shall during his life time be entitled to take use and appropriate to his own use the issues rents and profits of the said premises and that after his death and in the event of his wife Colombapatabondige Maria Perera surviving him, she shall during her life time be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits the other half being taken used and appropriated by the donees, to wit the said Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando and subject also to the conditions that the said donees Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando shall not nor shall either of them be entitled to sell, mortgage, lease, for a longer term than four years at a time or otherwise encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of any one of the said donees dying without lawful issue her share, right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid ".

Before proceeding to consider the effect of the *fidei commissum* or *fidei commissa* which the above recited portions of the deed P8 admittedly created, it is necessary to recite what subsequently happened. In 1893, Siman Fernando and his wife made an application to the court under the Entail and Settlement Ordinance, No. 11 of 1876 (now Cap. 54), to which their daughters Leonora and Arnolia were parties, to sanction the transfer of the premises at No. 21, Chatham Street, by Leonora and Arnolia to their brother (Siman's son) James Fernando, in consideration for the transfer by Siman and his wife of No. 20, Baillie Street (the premises now in dispute), to Arnolia, and of premises No. 22, Baillie Street, to Leonora. This application was granted, and the transfers were duly effected. By deed P13 of 2nd March, 1894, No. 20, Baillie Street, was transferred to Arnolia, and by deed 9D4 No. 22, Baillie Street, was on the same day transferred to Leonora. These deeds, and the decrees of court upon which they were made, did not contain the same restrictions upon alienation and designation of beneficiaries as the deed P8 of 1883 had done, and they contained no corresponding gift over to the survivor in the event of any one of the two sisters dying without issue.

Leonora died a widow in 1935, leaving nine children, namely the plaintiff-respondent and the first to eighth defendant-respondents. Arnolia died in 1941, intestate, without having had issue, leaving as her heirs her husband (as to one half) and her brothers and sisters (as to the other half). Her husband Dr. W. A. de Silva, died in 1942, leaving a will. The 37th, 38th and 39th added defendants, who are the appellants in this appeal, claim the premises at No. 20, Baillie Street, as the intestate heirs of Arnolia or as beneficiaries under the will of her husband.

Briefly, the appellants' claim is based on the following contentions. First, it is contended that the devolution of the premises at No. 20, Baillie Street, is to be governed, not by the terms of P8 which have been set out above, but by the terms of the later deed P13 of 1894, which transferred those premises to Arnolia without any gift over to Leonora or the latter's children in the event of Arnolia dying without issue. Secondly it is contended that, even if the terms of P8 are applicable, then in accordance with those terms, by reason of Arnolia's having died issueless after the death of Leonora, Arnolia's share devolved on her intestate heirs and was not subject to a gift over in favour of the issue of Leonora.

Now the transactions in March, 1894, whereby Arnolia and Leonora transferred No. 21, Chatham Street, to their brother James Fernando in consideration for the transfer by their parents of No. 20, Baillie Street, to Arnolia and No. 22, Baillie Street, to Leonora, purported to be made in pursuance of an application by their father Siman Fernando under the Entail and Settlement Ordinance, and the decrees consequent upon the granting of that application by the District Court purported similarly to be made under that Ordinance. If the transactions constituted an "exchange" of properties within the meaning of section 4 of the Entail and Settlement Ordinance (Cap. 54), then there can be no doubt that No. 20, Baillie Street, which was taken by Arnolia in exchange for her half share in No. 21, Chatham Street, became subject to the same *fidei commissum* as the latter had been subject to under the deed P8, by operation of the clear provisions of section 8 of the Ordinance, which provides that—"Any property taken in exchange for any property exchanged under the provisions of this Ordinance shall become subject to the same entail, *fidei commissum*, or settlement as the property for which it was given in exchange was subject to at the time of such exchange".

That such would be the legal effect of section 8 notwithstanding that the terms of the *fidei commissum* in the deed P8 were not embodied in the deed P13 (whereby 20, Baillie Street, was transferred to Arnolia) or in the decree to which P13 gave effect, was laid down clearly in *Abeywardene v. Tyrell*[1], where the precise point arose. That case was concerned with a similar exchange of properties effected by this same Siman Fernando and his wife in favour of two other daughters of theirs, to whom they had given a property called "The Priory" subject to a *fidei commissum* similar in terms to that contained in the deed P8, which was later exchanged for a property called "Srinivasa" under a decree and consequent deed of transfer which did not embody the terms of that *fidei commissum*.

[1] *(1938) 39 N. L. R. 505.*

Indeed the only feature which has been argued to distinguish that case from the present one is that in that case Siman and his wife transferred "Srinivasa" to the two sisters, and the two sisters in return transferred "The Priory" to Siman and his wife, whereas in the present case the parties to the transfer of 20, Baillie Street, were not the same as the parties to the transfer of 21, Chatham Street. For 20, Baillie Street, was transferred by Siman and his wife to Arnolia, while 21, Chatham Street, was transferred by Arnolia not to Siman and his wife but to their son (her brother) James Fernando. Such a transaction, it is argued, unlike that in the earlier case, cannot be deemed to be an "exchange" at all, with the result that the Entail and Settlement Ordinance, and section 8 in particular, do not apply. An "exchange", it is contended, must involve two parties, no more and no less, and covers only the case where A transfers property to B, and B in return transfers property to A, (it being conceded that A and B might be the same person acting in two different capacities). In support of this contention it is pointed out, with truth, that under the Roman Law an "exchange" is a contract (*permutatio* being one of the innominate contracts "re" according to the Proculean view adopted by Justinian), and that the "*do ut des*" nature of such a contract necessitates that if A gives property to B it must be A who receives other property back from B in return.

That may well be the position of an "exchange" viewed as a contract under the Roman Law. But I do not consider that this concept, with its implications, should be grafted on to the expression "exchange" in the Entail and Settlements Ordinance. The Ordinance is not concerned with an exchange viewed as a contract. The "exchange" which it has in mind in sections 4 and 8 is an exchange in the sense of the substitution of one property for another,—the coming of one property into the ownership of a person in place of another property which goes out of his ownership. Such properties may correctly be said to have been "exchanged" the one for the other, whether or not the former owner of the property received in exchange becomes the new owner of the property given in exchange. The Ordinance is not concerned with the origin of the property received, nor with the destination of the property given, but only with the replacement of the latter by the former, its object being to reconcile the freedom of alienation with the safeguarding of existing rights in the property alienated. It is in that setting that the word "exchange" in the Ordinance should be construed.

For these reasons I hold that the transactions under consideration constituted an exchange for the purpose of the Entail and Settlements Ordinance, with the result that the *fidei commissum* to which Arnolia's share in the 21 Chatham Street property was subject under the deed P8 attached in 1894 to the 20 Baillie Street property for which it was exchanged.

The next point for determination is whether the deed P8 created one *fidei commissum* in favour of Arnolia and Leonora and their respective issue, or whether it created two separate *fidei commissa*, one in respect of the half share given to Arnolia and one in respect of the half share given to Leonora. For if on a true construction of P8 one *fidei commissum* only was created, then I think there can be little doubt that upon the

death of Arnolia without issue, her half share would not devolve on her intestate heirs, as the appellants contend that it did, but would shift over by virtue of a *jus accrescendi* to the children of the already deceased Leonora, in accordance with the rule laid down by the Privy Council in *Tillekeratne v. Abeysekere* [1], that so long as one of the persons mentioned or able to show title as an institute or a substitute under the *fidei commissum* is in existence, there will be no lapse, and the *fidei commissum* will accrue so as to benefit such person to the exclusion of the intestate heirs of a deceased fiduciary or fideicommissary. It was laid down by Bertram C.J. in *Carlinahamy v. Juanis* [2], that this initial test is the basis of the whole doctrine of *jus accrescendi*. It was further laid down in that case, following earlier decisions on the point, that the *jus accrescendi* (using that expression in its wider modern sense as meaning any right of accrual and not in its narrower and exclusively testamentary sense under the Roman Law) is applicable not only to *fidei commissa* created by a will, but also to *fidei commissa* created by deed of gift, as in the present case, though it was pointed out by Bertram C.J. that in the case of a deed the *jus accrescendi* will only arise from "operative words, which expressly or by implication have this effect".

Do the words in P8 create one *fidei commissum* in favour of Arnolia and Leonora and their respective issue, so that the *jus accrescendi* will operate on the share of Arnolia in favour of Leonora's issue? The important words in P8 for this purpose are those which give the property to them as fiduciaries "in equal undivided shares for ever", and the condition that "the said premises shall after their death devolve on their lawful issues respectively and in the event of any one of the said donees dying without lawful issue her share, right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid".

I will consider presently the bearing of the English decisions on the meaning to be given to the word "surviving" in this passage. But taking the effect of the gift in P8 as a whole, it does seem to me that the donor intended, by the words he used, to create a single *fidei commissum* only. With regard to the words "in equal undivided shares for ever" I do not think that these words indicate an intention to make two separate gifts, one to Arnolia and her issue and one to Leonora and her issue, any more than the words "share and share alike" were held to indicate a plurality of gifts in the cases of *Sandeman v. Lyamperumal* [3], and *Usoof v. Rahimath* [4]. Similarly I consider that the word "respectively" is merely an indication that the children of Arnolia and Leonora were to take *per stirpes* as representing their respective mothers, and not *per capita*. For the rest, the condition that "in the event of *any one* of the said donees" (sc: whether Arnolia or Leonora) "dying without lawful issue her share . . . . shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid" does seem to indicate a clear intention that neither of the institutes, Arnolia and Leonora, is to take anything absolutely, whether her own original

[1] *(1897) 2 N. L. R. 313.*
[2] *(1924) 26 N. L. R. 129*
[3] *(1916) 3 C. W. R. 58*
[4] *(1918) 20 N. L. R. 225*

half share or the share of a sister predeceasing her without issue, but that the only persons to take absolutely are the *fidei commissaries*, their respective children. Had the words "any one of the said donees" been replaced by such words as "the donee who shall first die", the position would of course have been otherwise. But the condition as worded indicates, to my mind, an intent that the children of both or either sister shall be the ultimate beneficiaries of the share of both sisters, in short, an intent to create a single *fidei commissum*, with the result that the rule in *Tillekeratne v. Abeysekere* will apply.

The use of the words "surviving donee" in the gift over would at first, and if interpreted literally, appear to negative this intention, and to prevent the going over of Arnolia's share to the issue of Leonora by reason of Leonora not having survived Arnolia. This, however, is in my view a case where the intention of the donor appears sufficiently clear from the other words in the gift to enable this court to construe "surviving" as "other", in order to give effect to that intention. There appears to be no decided case in Ceylon where the question has arisen whether this word should be so construed, as in similar cases it has been construed in England. With regard to the English decisions, there is perhaps no branch of English case law which forms a better example of what has been called a "wilderness of single instances" than that relating to the interpretation of expressions used in wills, and of the expression "survivor" in particular, and it would be profitless to examine the cases in detail. *Smith v. Osborne* [1] is the leading case on the subject, and there the House of Lords interpreted "survivor" as "other" on facts very similar to those in the present case, where there was a gift to the testator's two daughters as tenants in common in tail, with a gift over to the survivor and the heirs of her body should either die without issue. The interpretation was allowed as the only means of giving effect to the intention of the testator. In *re Palmer's Settlements* (1875) 44 L. J. Ch. 247, and in *Hodge v. Foot* [2] where "survivor" was similarly interpreted as "other" the wording was again more favourable to such an interpretation, since in both cases the gift over was made expressly to the survivors *and their children*, showing a clearer intention to benefit such children than to make their parents' survivorship a pre-requisite to their benefiting. The tendency in more recent English cases, however, appears to be to insist on a more strict interpretation of the word "survivor" unless the testator's intention in a contrary sense is very clearly expressed. In *Auger v. Beaudry* [3], the Privy Council, in refusing to read "survivor" as "other", laid down the general working rule in the following terms:—

> "The truth is that in the preparation of such gifts the draftsman is liable to fix his mind simply upon the death of the first of the children to die, in which case the gift over works without difficulty, and he does not concentrate his attention upon what will happen in the event of the death of a child without issue, who has been predeceased by another child leaving issue behind. The gift over, therefore, only too often does not carry out what, if speculation were permitted, it would

[1] *(1857) 10 E. R. 1340* [2] *(1865) 55 E. R. 669.*
[3] *(1920) A. C. 1010.*

be reasonably certain that the testator wished, and it is these considerations that have sometimes led the Courts to attempt so to read the words as to make the will conform to what it is confidently believed must have been the testator's intention. If the words are so ambiguous as to leave room for such construction, or if there are other words to help the meaning, it is one which no doubt the Courts would readily adopt. But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognised that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean ".

This decision was followed in *Gilmour v. Mac Phillamy*[1], where the Privy Council refused to interpret " survivors " in the loose or " stirpital " sense, notwithstanding that the gift over was to " surviving daughters and their children ". It was held that—" In order to justify a departure from the natural and ordinary meaning of any word or phrase there must be found in the instrument containing it a context which necessitates or justifies such departure. It is not enough that the natural and ordinary meaning may produce results which to some minds appear capricious or fail to accord with a logical scheme of disposition ".

Upon a consideration of these and other English authorities I think that, if we were to be bound to apply them to the interpretation of the word " surviving " in a *fidei commissum* in a deed of gift in Ceylon, in relation to the question whether the *jus accrescendi* operates, then the donor's contrary intention in P8 might not be held to be clearly enough expressed to justify the word being interpreted as " other ". In particular, any mere plea that the strict interpretation would not give effect to the donor's probable wishes, or that it would presume an unlikely capriciousness on his part, would fail, since those were the very pleas which the Privy Council in *Auger v. Beaudry* and *Gilmour v. Mac Phillamy* (*supra*) held to be inadequate, in the passages which I have quoted.

But, while I think this court should be guided by the principles of interpretation laid down in those English cases, I do not think it need feel bound by them to the extent of being precluded from interpreting the expression " surviving donee " as " other donee " in the present case. The circumstances differ. In England the trend of the decided cases appears to be towards a stricter interpretation of the word, and the testator's intention will be ascertained not by making the will conform merely to what it is " confidently believed it must have been ", but by giving " the fair and literal meaning to the actual language of the will ". In Ceylon, on the other hand, while the testator's or donor's intention must of course likewise be ascertained from the terms of the instrument, the position is somewhat different when the meaning to be given to the word " survivor " or " surviving " is, as in the present case, intimately bound up with the question whether he intended to create one single *fidei commissum* or more than one, and whether the *jus accrescendi* was intended to operate. For in Ceylon, the question whether the *jus*

[1] *(1939) A. C. 712.*

accrescendi operates depends on the probable intention of the person creating the *fidei commissum* as disclosed in the last will or donation (Voet 29. 2. 40); and, as pointed out in *Usoof v. Rahimath* (*supra*) "the *jus accrescendi* was not an anomaly which the law regarded with horror and restrained by every measure possible; it was a benevolent device invented for the purpose of giving effect to an intention of the testator, which he was supposed to have forgotten to express". And the trend of judicial decisions in Ceylon over the last fifty years appears increasingly to favour the application of the *jus accrescendi*. Bertram C.J. in *Carlinahamy v. Juanis* (*supra*, at page 140) made the following relevant observations, with which I respectfully concur:—"I confess that I am not at all clear that the rule established in *Tillekeratne v. Abeysekere* (*supra*) is alien to local conceptions. On the contrary I venture to think that if those who made dispositions of this sort thought the matter out, they would find that this rule gave effect to their real intention. Their object is to endow their descendants with a particular property. What are the circumstances which occasion cases in which that rule is challenged? They generally arise from the fact that some stranger to the family claims to have acquired an interest in the property by marriage. Sometimes it is the husband of one of the daughters; sometimes it is some comparatively remote member of his family claiming by inheritance through the husband. I can scarcely believe that the authors of these liberalities contemplated such invasions. Further, if these liberalities were to be construed as creating separate *fidei commissa* attaching to individual shares, the result would be that, as time went on, certain shares in the property would become disengaged from the *fidei commissum*, while others would remain bound. Some of the shares would be subject to alienation, others would not. The homogeneity of the property as a family endowment would be destroyed. I doubt very much whether this is a prospect which the testator and donors could have contemplated, and I am by no means sure that the rule in *Tillekeratne v. Abeysekere* (*supra*), though in fact based on the logical and legal interpretation of a particular document, does not work out as a very discerning interpretation of local conditions".

These factors, in my opinion, justify the courts in Ceylon in interpreting the expression "surviving" as "other" in certain cases where perhaps the courts in England would hesitate to do so, and in doing so in the present case. I am therefore of the view that the learned District Judge was right in holding that No. 20, Baillie Street, was subject to the single *fidei commissum* imposed by the deed of gift P8 upon the property for which it was exchanged, and in holding that the effect of that *fidei commissum*, upon Arnolia dying issueless after the death of Leonora, was that Leonora's children became entitled to No. 20, Baillie Street, by right of accretion notwithstanding that Leonora did not survive Arnolia, and that the property did not devolve upon Arnolia's intestate heirs.

I would accordingly dismiss the appeal with costs.

GRATIAEN J.—I agree with my brother Windham.

Appeal dismissed.