[FUL BENCH.] 1913.

Present : Bertram C.J., Ennis and De Sampayo JJ.

CRAIB *v.* LOKU APPU *et al.*

146—146 A—D. C. Kegalla, 4,593

Fidei commissum—*Interpretation of deed—Gift to seven children—"Heirs, executors, administrators, and assigns"—"After their deaths, or after the death of the last survivor of them, the said lands shall devolve on their children"—Time of vesting*—Jus accrescendi.

H gifted all his property to his seven children: to each of his five daughters he gave separate lands, and to the two sons he gave the remaining lands jointly. The deed contained the following clauses:—

"And further, by reason of the natural love and affection which I bear towards my five daughters and my male children of tender age, and in consideration of other good reasons, I do hereby, in the manner above specified, grant unto, settle upon, and dividedly give unto the said seven persons and their heirs, executors, administrators, and assigns, or any survivor of them, or any heir, executor, administrator, or assign of him or them, the said lands and all rights and privileges appertaining thereto as an irrevocable, regular, and complete gift."

"The said donees, or any survivor of them, shall be at liberty to possess the produce, rents, and profits derivable from the said lands, subject to the bond of *fidei commissum, i.e.*, the said donees, or any one of them, shall not be entitled to sell, mortgage, or encumber in any other way, or alienate the said lands, or any one of them, or any share thereof."

"And further, it is hereby ordained that, although the afore-mentioned stipulations, prohibitions, limitations, and restrictions are herein imposed for the benefit of the said donees, yet, after their deaths, or after the death of the last survivor of them, the said lands shall devolve on their children, their descendants, and their issues, who, and their heirs, executors, administrators, and assigns; are hereby empowered to for ever hold and possess and do whatever they like therewith without being subjected to the afore-mentioned prohibitions, limitations, and restrictions."

One of the sons, J, sold a half share of the land in question to the plaintiff, who brought this action for partition, and allotted to the other son, L, the other half. J died issueless pending appeal.

Held, per BERTRAM C. J. and ENNIS J. (DE SAMPAYO *J. dissentiente*), that plaintiff had absolute title to one-half share, and was entitled to a partition decree on that footing.

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On the question whether the deed created a *fidei commissum*, and if so, whether the *fidei commissum* was a joint one with the benefit of survivorship, or a separate *fidei commissum*, the Judges held as follows:—

BERTRAM C.J. held that the deed created seven separate *fidei commissa*, and that there was no joint *fidei commissum* with the *benefit* of survivorship, even as to the lands given to the sons.

ENNIS J. held that the deed created no *fidei commissum*, as it was not clear who was to benefit, and when.

DE SAMPAYO J. held that the deed created a separate and distinct *fidei commissum* in regard to each daughter in favour of her children and descendants, and a single *fidei commissum* in the case of the two sons, with the benefit of survivorship and in favour of their children and descendants.

THE facts are set out in the judgment of De Sampayo J. The deed referred to in the judgment was as follows:—

No. 5,575.

Know all persons by these presents that I, Mangalagama Galladdalage Handu Appu, of Mangalagama, in Deyaladahamuna pattu in Kinigoda korale in the Four Korales, in the Western Province of the Island of Ceylon, being upon the herewith delivered deed of *paraveni* No. 897, dated May 4, 1859, attested by Don Poloris Jayasekera, Notary Public, of Utuwankanda, and upon the herewith delivered deed of *paraveni* No. 896, dated May 4, 1859, attested by the said Notary Public, and upon the herewith delivered deed of sale No. 757, dated September 5, 1872, attested by Gabriel Perera Wijeyaratne, Notary Public, of Rambukkana, entitled to and ever since long time past up to the present time indisputably and in *paraveni* the following lands, situated at Mangalagama, in the said korale and pattu, viz.:—

1. The field called Dunumadalawa, in extent two amunams of paddy .....

5. The field Paldeniyakumbura, in extent three pelas of paddy, bounded on the east by the ditch, on the south by the fence of Dunumadalawekumbura, on the west by the *iwura* of Paligala *alias* Gallenawatta, and on the north by the fence of Matotagewatta, of the value of Rs. 75 .....

Out of the said lands, which are of the value of Rs. 2,760, the following lands I do hereby vest in, settle upon, donate, and deliver unto my eldest daughter, Mangalagama Galladdalage Rubarahamy, viz. .....

Excepting the afore-mentioned shares of lands out of the lands mentioned in this deed, which I have in the foregoing manner separately donated unto and settled upon my five female children, all the remaining high and low lands I do hereby vest in, settle upon, donate, and deliver unto my begotten sons of tender age, namely, Galladdalage Loku Appu and ditto Jeewathamy, both of Mangalagama aforesaid.

And further, by reason of the natural love and affection which I bear towards my five daughters and my two male children of tender age, and in consideration of other good reasons, I do hereby, in the manner above specified, grant unto, settle upon, and dividedly give unto the said seven persons and their heirs. &c., or any survivor of them, or any

heir, executor, administrator, or assign of him or them, the said lands, and all rights and privileges appertaining thereto, as an irrevocable, regular, and complete gift.

And further, the said lands are thus donated on condition that the said donees shall submit themselves to the under-mentioned prohibitions, limitations, and restrictions. viz.:—

The said donees, or any survivor of them, shall be at liberty to possess the produce, rents, and profits derivable from the said lands, subject to the bond of *fidei commissum*, *i.e.*, the said donees, or any one of them, shall not be entitled to sell, mortgage, or encumber in any other way, or sign (elienate) the said lands, or any one of them, or any share thereof.

It is further hereby ordained that the said lands, or any one of them, or any share thereof, or any produce, rents, and profits therefrom, shall not be liable to be seized or sold under or by virtue of any writ of execution which may be issued or taken against the donees hereof, or any one of them, or any survivor of them.

And further, it is hereby ordained that, although the afore-mentioned stipulations, prohibitions, limitations, and restrictions are herein imposed for the benefit of the said donees, yet, after their deaths, or after the death of the last survivor of them, the said lands, &c., shall devolve on their children, their descendants, and their issues, who, and their heirs and executors, &c., are hereby empowered to for ever hold and possess and do whatever they like therewith, without being subject to the afore-mentioned prohibitions, limitations, and restrictions.

It is further hereby ordained that so long as I, Handu Appu, the donor, any my brother, born of the same womb, Mangalagama Galladdalage Tikiri Appu, and my wife, Wadudeniye Kamategedera Punchi Menika, presently residing at my house in Mangalagama, live in this world, the said donees, my seven children, shall render unto us all assistance and succour, and after our deaths bury our dead bodies in a decent manner according to custom, and for the welfare of our future existence perform the requisite religious rites according to custom.

It is also hereby ordained that for the welfare of my seven children, the donees, in the next world, shall keep in good repair the two ambalams, the dagoba, and the vihare built by me.

Signed, witnessed, and attested on January 30, 1888.

Hayley, for plaintiff, appellant.—The deed did not create any *fidei commissum*. Even if the deed created a *fidei commissum*, as Jeewathamy, vendor to the plaintiff, died issueless, the *fidei commissum* is at an end, and the plaintiff is absolute owner of an undivided half. The words "heirs, executors, administrators, and assigns" are inconsistent with a *fidei commissum*. If the donor does not use proper language to convey his intention, the Courts cannot supply the deficiency. There is a presumption against a *fidei commissum*. It is not quite clear who the beneficiaries are. Nor is it clear when they are to succeed. The words "after their deaths, or after the death of the last survivor of them," make it difficult to say when the beneficiaries are to succeed. The words seem to contemplate different times in the alternative.

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[DE SAMPAYO J.—The word " survivor " may have been applied with reference to the gift to the sons.] There were only two sons, and the words " last survivor " are not appropriate if they were meant to refer to the sons.

As both the beneficiaries and the time when they are to succeed are not clear, the deed cannot be said to create a *fidei commissum*. *Aysa Umma v. Noordeen* [1] was decided by the Full Court, and is still a binding authority. See also *Tena v. Sadris*,[2] *Aysa Umma v. Noordeen* [3] *Dassanaike v. Dassanaike* [4], *Silva v. Silva* [5]. In *Coudert v. Don Elias* [6] and in *Mirando v. Coudert* [7] it was perfectly clear who the beneficiaries were, and the intention to create a *fidei commissum* was expressed in unequivocal language.

Section 20 of Ordinance No. 21 of 1844 enacts that there shall be no right of survivorship as to property held in common, unless there is an express provision to that effect; so that, even if there was a joint *fidei commissum* in the case of the gift to the two sons, on the death of Jeewathamy there was no accrual of his share to his brother. Jeewathamy having died issueless, in any case, therefore, his share went absolutely to the plaintiff, who bought his interest. Privy Council did not consider the effect of section 20 in *Tillekeratne v. Abeyesekere* [8].

J. W. de Silva, for the defendant, respondent.—The deed creates a *fidei commissum*. All the later decisions are in favour of giving effect to the intention of the deed, and not to allow notarial flourishes to defeat the clear intention of the donor. See *Coudert v. Don Elias* [6], *Mirando v. Coudert* [7], *Dassanayake v. Tillekeratne* [9]. The mere presence of words like " assigns " and " survivors " cannot defeat the intention to create a *fidei commissum*. The intention is clear from the very words " *fidei commissum* " used in the deed.

There is one *fidei commissum* with respect to all the children, and the word " survivor " is intelligible on that hypothesis. At any event there is one *fidei commissum* in respect of the lands given to the two sons. There is a right of survivorship between the sons. Ordinance No. 21 of 1844, section 20, was considered by the Privy Council, as it was referred to in the judgment of the Supreme Court. See *3 S. C. R. 77*.

Hayley, in reply.

Cur. adv. vult.

September 4, 1918. DE SAMPAYO J.—

The land which is the subject of this partition action belonged in Mangalagama Galladdalage Handu Appu, who had five daughters, Rubarahamy (eighth added party), Ran Etana (ninth added party).

[1] *(1905) 8 N. L. R. 350.*
[2] *(1885) 7 S. C. C. 136.*
[3] *1902) 6 N. L. R. 173.*
[4] *(1906) 8 N. L. R. 361.*
[5] *(1914) 18 N. L. R. 174.*
[6] *(1914) 17 N. L. R. 129.*
[7] *(1916) 19 N. L. R. 90.*
[8] *(1897) 2 N. L. R. 313.*
[9] *(1917) 20 N. L. R. 89.*

Dingiri Etana (tenth added party), Subarat Etana, and Ran Menika, and two minor sons named Loku Appu (defendant) and Jeewathamy. By deed of gift dated January 30, 1888, Handu Appu made a gift of all his landed property to his seven children. To each of the five daughters he gave separate lands, and to the two sons he gave the remaining lands jointly. The land sought to be partitioned in this action is one of the lands donated to the two sons. By deed dated July 11, 1917, Jeewathamy purported to sell to the plaintiff an undivided half share of the land, on the footing that under the deed of gift he was absolutely entitled to such half share, and the plaintiff brought this action to partition the lands, assigning to Loku Appu, the defendant, the other half share. The defendant pleaded that under the deed of gift the lands donated to him and his brother Jeewathamy were subject to a *fidei commissum*, in favour of their children and descendants, and that the transfer by Jeewathamy gave plaintiff only his life interest in a half share of land. The defendant also raised the objection that the land being subject to a *fidei commissum*, the plaintiff could not maintain this action for partition. The defendant has several children, and they have been added as parties, and, as above indicated, three of the daughters of the donor, Handu Appu, have also been so added. On the issues thus arising, the District Judge held that the deed of gift created a *fidei commissum* over the whole estate of the donor with the benefit of survivorship among all the donees, and that the last survivor of them was entitled to possess all the lands according to the rule of *jus accrescendi*, and that upon his death the property would devolve on the children of all the donees and their descendants *per stirpes* free from the burden of *fidei commissum*. He accordingly decreed a partition of the land between the plaintiff and the defendant, declaring them entitled each to a half share of the land subject to the *fidei commissum*, which he found to be created by the deed to the above effect. Both the plaintiff and the defendant have appealed. The appeal of the plaintiff raises the question whether the deed created a valid *fidei commissum* at all, and the appeal of the defendant is concerned with the objection that the land being subject to a *fidei commissum* the plaintiff is not entitled to maintain an action for partition. It appears that Jeewathamy died pending this appeal, without leaving any issue. Mr. Hayley, for the plaintiff, agrees that if this Court decides in favour of the existence of a *fidei commissum*, the interest acquired by the plaintiff from Jeewathamy has come to an end, and this action must necessary fail. In these circumstances, the question for determination is as to whether the deed of gift created a valid *fidei commissum*.

The deed of gift is in Sinhalese, and the construction of it is not rendered easier by the fact that the notary has employed technical phraseology, the significance of which apparently he himself did

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not quite know. The translation filed in the case is fairly accurate, and may be adopted for the purposes of this appeal. The deed first of all enumerates all the lands the grantor was possessed of, and conveys out of them certain specified lands to each of the five daughters, and the remaining lands jointly to the two sons, and it then proceeds to provide as follows: "And further, by reason of the natural love and affection which I bear towards my five daughters and my two male children of tender age, and in consideration of other good reasons, I do hereby, in the manner above specified, grant unto, settle upon, and dividedly give unto the said seven persons, and their heirs, executors, administrators, and assigns, or any survivor of them, or any heir, executor, administrator, or assign of him or them, the said lands and all rights and privileges appertaining thereto as an irrevocable, regular, and complete gift."

Here it may be noted that as the deed already contained operative words of grant, this further clause of conveyance was superfluous and unnecessary. It may be that the notary had some dim idea of the *habendum* in an English form of conveyance, and attempted to put in something of the same kind. This would have been harmless but for his use of the formula "heirs, executors, administrators, and assigns," and for the expression "survivor of them." which, in view of the subsequent limitations and restrictions, have created some difficulty. These limitations and restrictions are the following:—

"The said donees, or any survivor of them, shall be at liberty to possess the produce, rents, and profits derivable from the said lands subject to the bond of *fidei commissum, i.e.*, the said donees or any one of them shall not be entitled to sell, mortgage, or encumber in any other way, or alienate the said lands, or any one of them, or any share thereof.

"It is further hereby ordained that the said lands, or any one of them, or any share thereof, or any produce, rents, or produce therefrom, shall not be liable to be seized or sold under or by virtue of any writ of execution which may be issued or taken against the donees hereof, or any one of them, or any survivor of them.

"And further, it is hereby ordained that, although the aforementioned stipulations, prohibitions, limitations, and restrictions are herein imposed for the benefit of the said donees, yet, after their deaths, or after the death of the last survivor of them, the said lands shall devolve on their children, their descendants, and their issues, who, and their heirs, executors, administrators, and assigns, are hereby empowered to for ever hold and possess and do whatever they like therewith, without being subjected to the afore-mentioned prohibitions, limitations, and restrictions."

Mr. Hayley, in the first place, argued that by reason of the expression " heirs, executors, administrators, and assigns " occurring in the passages above quoted no *fidei commissum* can be regarded as being created by the deed, and he cited the well-known decisions on that subject. Those decisions are reviewed and discussed in the later cases, *Coudert v. Don Elias*,[1] *Mirando v. Coudert*,[2] and *Dassanayake v. Tillekeratne* [3], the effect of which is to lay down that the use of such words as the above will not necessarily defeat a *fidei commissum* which is otherwise well created by the instrument. I may say that I entirely agree with this view, and expressed myself to that effect in *Silva v. Silva* [4]. It is therefore necessary to consider whether the clauses in the deed which I have cited at length, apart from the use of the above conveyancing formula, do or do not create a valid *fidei commissum*. There is undoubtedly a clear intention to create a *fidei commissum*, and, indeed, it is expressly provided that the lands are to be possessed " subject to the bond of *fidei commissum*." I think this intention is carried out by the use of appropriate language, for by the first of the above clauses the immediate donees are given the right of possession only, and and are prohibited from selling, mortgaging, or otherwise alienating the property, and the children and descendants of the donees are by the last clause designated as the persons who are to take after them Consequently it seems to me that the essential elements of a *fidei commissum* are present. It is, however, suggested that the words " survivor," and especially the expression in the last clause " after their deaths, or after the death of the last surviver of them," make it uncertain on what event the *fidei commissum* is to take effect, and whether there is one *fidei commissum* in favour of the children and descendants of all the donees, or several *fidei commissa* in favour of the children and descendants of each of the donees respectively. These words and expressions do not present to my mind any insuperable obstacle. I think it is not wrong to bear in mind that the draftsman of the deed is a Sinhalese notary, who was manifestly endeavouring to imitate conveyancing phraseology without duly considering its relevancy to the matter in hand, and I am inclined to attribute any apparent incoherency to the notary's want of care rather than to any uncertainty of intention on the part of the donor. It seems to me also that the notary's difficulty has arisen out of his endeavour to include in the same clauses entirely the *fidei commissary* provisions affecting the several donees, without taking due note of the fact that the donor gave the lands to the donees separately, or, as the deed puts it, " dividedly," that is to say, specified lands to each of the five daughters separately, and the remaining lands to the two sons jointly. The construction of the deed should be such as to carry out the obvious intention of the

[1] *(1914) 17 N. L. R. 129.*
[2] *(1916) 19 N. L. R. 90.*
[3] *(1917) 20 N. L. R. 89.*
[4] *(1914) 18 N. L. R. 174.*

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donor, and not to defeat it. The prohibition against alienation must, in the first place, be given a reasonable application. The five daughters being given separate lands, there is no sense in prohibiting one daughter from alienating the lands given to the others, nor in providing that the land given to one should not be liable to be seized and sold in execution against the others. It is obvious that what was intended was to prohibit each daughter from alienating the lands given to her, and to provide that on her death her children and descendants should succeed her. In this connection the expression " after their death " must be read as meaning " after the death of each of them." The same reasoning shows that in the case of the daughters the word " survivor " is inapplicable and meaningless, except, perhaps, so far as the notary thereby wished unnecessarily to emphasize the fact that the death of one daughter was not to affect the prohibitions and restrictions as regards the survivors. Moreover, the reference to " survivor " appears to me to be partly accounted for by the fact that the same passages in the deed were made to apply to the two sons, with regard to whom survivorship had some meaning. For in their case there was but one *fidei commissum*, and it was, I think, intended that on the death of one, the other should have possession of the entirety of the lands jointly gifted to them, and that on the death of the survivor, the *fidei commissum* should take effect. This view of the deed, it is true, involves a certain disregard of some of its language, or its grammatical construction, but this is inevitable when the Court wishes, as it is bound, to give effect to the clear intention of the donor to create a *fidei commissum* in favour of the children and descendants of the donor. *Wijetunga v. Wijetunga* [1] enunciates the principle that if the intention of a donor or testator to create a *fidei commissum* is clear, and the words used by him can be given an interpretation that supports that intention, any apparent difficulty arising out of the use of particular words and expressions may be explained away in a manner that may give effect to that intention. In *Mirando v. Coudert* (*supra*) Shaw J. observed : " In considering whether a *fidei commissum* is created, one has to look at the document as a whole, and if the intention to create a *fidei commissum* is clear, effect should be given to it, even though the donor or testator may have used in the document expressions that are inconsistent with a *fidei commissum*." This is all the more so if, as in this case, the instrument is the work of an inexpert notary, and the language comes through the medium of a translation.

I have come to the conclusion that the deed of gift created a separate and distinct *fidei commissum* in regard to each daughter in favour of her children and descendants, and a single *fidei commissum* in the case of the two sons, with the benefit of survivorship and in favour of their children and descendants. In the latter case

[1] *(1912) 15 N. L. R. 493.*

the principle of *jus accrescendi* applies. *Tillekeratne v. Abeyesekere* [1], *Usoof v. Rahimath* [2]. Consequently, Jeewathamy, the vendor to the plaintiff, having died without any issue, the defendant has become entitled to the property donated to them subject to a *fidei commissum* in favour of his children and descendants. This finding puts the plaintiff wholly out of Court.

I would set aside the decree under appeal, and dismiss the plaintiff's action, with costs, in both Courts.

ENNIS J.—

This was a partition action, and there are two appeals. I deal first with the appeal No. 146A. The question for determination in this appeal turns on the construction of the deed of gift P 1. We have to decide whether the deed creates a *fidei commissum*, or several *fidei commissa*, or none at all.

The operative clause of the deed is: " I do hereby, in the manner above specified, grant unto, settle upon, and dividedly give unto the said seven children and their heirs, executors administrators, and assigns, or any survivor of them, or any heir, executor, administrator, or assigns of him or them, the said lands . . . . . as an irrevocable, regular, and complete gift. And further, the said lands are thus donated on condition that the said donees shall submit themselves to the under-mentioned prohibitions, limitations, and restrictions. "

" The manner above specified " was a grant of distinct lands to each of the five daughters separately, and a grant of the remaining lands to two minor sons, Loku Appu and Jeewathamy.

The land in dispute is one of these remaining lands in respect of which Jeewathamy conveyed his share to the plaintiff-appellant. (Jeewathamy has died since the date of the decisions appealed from.) Loku Appu is the first defendant, and the second to seventh defendants are his children; the eighth, ninth, and tenth defendants are the survivors of the five daughters mentioned in the deed.

After the clause I have set out above, the deed declares that " the donees, or any survivor of them," were to possess subject to the bond of *fidei commissum*, which was explained as meaning that they were prohibited from alienating the property, and the next clause provided that the lands should not be liable to be seized in execution on a writ taken out " against the donee hereof, or any one of them, or any survivor of them."

Next comes the clause which is most difficult of interpretation: " And it is further hereby ordained that, although the aforementioned stipulations, prohibitions, limitations, and restrictions are herein imposed for the benefit of the said donees, yet, after their deaths, or the death of the last survivor of them, the said lands, &c., shall devolve on their children, their descendants, and their

[1] *(1897) 2 N. L. R. 313.*

[2] *(1918) 20 N. L. R. 225.*

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issues, who, and their heirs, executors, administrators, and assigns, are hereby empowered to for ever hold and possess and do whatever they like therewith, without being subject to the aforesaid prohibitions, limitations, and restrictions."

Counsel for the plaintiff-appellant contended that this document was an absolute conveyance to each of the five daughters of separate parcels of land, and a conveyance to the two sons to hold in common as provided by section 20 of Ordinance No. 21 of 1844. For the respondents, it was argued that the document created one *fidei commissum* of all the lands to the seven donees, with a gift over to the children with benefit of survivorship, or, in the alternative, that there are six *fidei commissa*, one each in respect of the parcels to the five daughters, and one in respect of the parcel to the two sons, and that on the death of Jeewathamy the property went by survivorship to Loku Appu. To hold that a *fidei commissum* is created, it must clearly appear—

(*a*) That the gift is not absolute to the donees;

(*b*) Who are the persons to be benefited; and

(*c*) When they are to benefit.

In a series of cases it was held that the word " assigns " in the operative clause was inconsistent with anything but an absolute gift, but in later cases an explanation was suggested which would not necessarily be inconsistent with a qualified gift, and this explanation has been accepted and acted upon in the later cases. *Wijetunga v. Wijetunga* [1], *Coudert v. Don Elias* [2] *Mirando v. Coudert* [3]. The principles of the earlier cases, however, remained unaffected, and two principles stand out:—

(1) That the document is to be construed so as to be least burdensome to the donees, and in case of doubt, there is a presumption against incumbrance. *Voet 36, 1, 7.*

(2) That it is not possible to disregard any word in the document. *Aysa Umma v. Noordeen;* [4] *Dassanaike v. Dassanaike.* [5]

Applying these principles to the present document, it seems to me impossible to say what the donor meant to do. We are not only confronted with the word " assigns," but also with the word " survivor." The word " survivor " in the operative clause cannot apply to " assigns," but it might apply to " heirs," words which appear among those immediately preceding the use of " survivor." Further, the word is difficult of application to the donees, who were all alive at the date of the gift. The word " survivor " in the next two clauses comes after " donees," and here, if it is to be given any meaning, it must relate to some later date, but what date?

[1] *(1912) 15 N. L. R. 493.*
[2] *(1916) 19 N. L. R. 90.*
[3] *(1914) 17 N. L. R. 129.*
[4] *(1902) 6 N. L. R. 173.*
[5] *(1906) 8 N. L. R. 361.*

The words in the next clause do not help. "After their (the donees) deaths, or after the death of the last survivor of them," is wholly unintelligible, as it gives different times in the alternative. If the property is to pass absolutely to the heirs of each of the donees at their respective deaths, there is no meaning in the alternative that it is only to pass on the death of the last survivor.

In my opinion any question of a *fidei commissum* fails, in that it is not clear who is to benefit, and when. If the document does not make this clear, it is not open to the Court to supply the deficiency, and the deed must be construed as an absolute gift to each of the donees. That being so, the two minors would take undivided shares absolutely, and the conveyance to the plaintiff would be good. I would accordingly allow the appeal, with costs, and consequently dismiss the other appeal (No. 146), with costs.

BERTRAM C.J.—

This case was originally argued before myself and my Brother Ennis. In view of the obscurity of the deed, which was the subject of the action, we thought it desirable to have the assistance of our Brother de Sampayo before deciding the case. I have now had the advantage of reading the judgment of my Brother de Sampayo, and by the help of that judgment I feel able, in part at any rate, to accept the interpretation of the deed which he has suggested, and which may be considered as removing the obscurity in which the intention of its maker was involved.

The difficulty arose from the fact that the notary who drafted the deed thought it necessary throughout the deed to introduce certain technical conveyancing phraseology, of the significance of which he was probably ignorant. Throughout the deed he introduces references to the survivors of the donees, and the heirs, executors, administrators, and assigns of such survivors. As the deed purports to make a complete gift of the various lands it comprises to the donees themselves, their heirs, executors, administrators, and assigns (subject to a *fidei commissary* obligation), and makes no express provision for any right of survivorship, these references to a right of survivorship seem to import an intention inconsistent with the terms of the gift. The passage which gives the greatest difficulty with regard to the interpretation of this reference to survivorship is the passage which expresses the terms of the *fidei commissary* obligation. If we were forced to come to the conclusion that the presence of these words made the conditions of the *fidei commissary* obligation obscure, and that, consequently, it was not possible to ascertain the real intention of the testator, as to the persons in whose favour the obligation was imposed, the extent to which they were to be benefited by them, and the time

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when their rights were to accrue, we should be compelled to say that, owing to the uncertainty of this obligation, it was not possible to enforce it.

A series of decisions of this Court has dealt with cases in which obscurity was thought to be introduced into a deed by the unconsidered use of another conveyancing formula (*vide Tena v. Sadris*,[1] *Aysa Umma v. Noordeen*,[2] and *Dassanaike v. Dassanaike* [3]). In those cases it was emphatically laid down that such a technical formula introduced into a *fidei commissary* obligation cannot be disregarded, and if it cannot be explained, the *fidei commissary* obligation must be ignored. A subsequent series of cases, however, has evolved a means of giving an interpretation to the formula in question not inconsistent with a definite *fidei commissary* intention, and the Courts have thus been able to give effect to what they believe to be the real intention of the testator or donor (*vide Coudert v. Don Elias*, [4] *Wijetunga v. Wijetunga*, [5] *Mirando v. Coudert*, [6] and *Dassanayake v. Tillekeratne* [7]). The former series of authorities, nevertheless, is still binding, so far as the general principle which it enunciates is concerned.

De Sampayo J. has in this case suggested a similar means of solving the difficulty created by the conveyancing formula under consideration in this case. That suggestion, as I understand it, has two branches. In the first place, it is suggested that the notary merely wished to emphasize the fact that the death of one child was not to affect the prohibitions and restrictions as regards the survivors; and that when he said " the said donees, or any survivor of them, shall be at liberty to possess subject to the bond of *fidei commissum*," he merely meant that all the said donees, from the date of the operation of the deed, should have this right, and that as they successively died, the survivors should continue to have this same right with regard to the lands conferred upon them; and that, similarly, when he said " after their deaths, or after the death of the last survivor of them," he was merely making a reference to a succession of events which must necessarily occur, and intimating that the deed was to continue to operate in accordance with the intention already expressed throughout this succession.

I am prepared to adopt this view of the deed. I do not find myself, however, in accord with the second branch of the suggestion, namely, that the references may be partly accounted for by the fact that the same passages in the deed were meant to have a special application to the two sons, with regard to whom survivorship might have some meaning. It appears to me that all the references to survivorship apply equally to the sons and to the

[1] *(1855) 7 S. C. C. 136.*
[2] *(1902) 6 N. L. R. 173.*
[3] *(1906) 8 N. L. R. 361.*
[4] *(1914) 17 N. L. R. 129.*
[5] *(1912) 15 N. L. R. 493.*
[6] *(1916) 19 N. L. R. 90.*
[7] *(1917) 20 N. L. R. 89.*

daughters, and I should not feel justified in giving to them an interpretation with regard to the sons which did not apply to the daughters.

Considering the deed on this basis, what we have now to determine is the nature of the *fidei commissum* which it sets up. There is no question as regards the daughters; it creates separate *fidei commissa* with regard to the lands conferred upon each. The question only arises with regard to the sons. Here the lands gifted were gifted to them in common, so that each son had an undivided half of each land comprised in the gift. Was it intended to create a separate *fidei commissum* with respect to the lands given to each son, or was there to be a joint *fidei commissum* of the whole with benefit of survivorship? I have given in *Usoof v. Rahimath* [1] my reasons for thinking that the principles of the *jus accrescendi* only apply in cases where but for their application there would be a lapse; and that where this is not the case (as in the present instance), the only question before the Court is a question of construction, to be considered without any presumption as regards an accrual either in one direction or the other.

The construction of every deed must depend upon its own terms. In this case I do not feel able to infer any intention on the part of the donor to create a joint *fidei commissum* with respect to the lands conferred upon the two sons. The predominant note of the deed is the assignment of a definite gift to each of his children, with a *fidei commissum* in favour of their issue. He speaks emphatically of giving these lands "dividedly." I cannot feel that he had in his mind any idea of making a distinction between his sons and his daughters. I conceive that in endowing his sons with undivided moieties of the lands not gifted to his daughters, he considered himself as giving separate gifts to each. I see no reason why in his mind he should constitute a composite group of the joint descendants of the two sons, while he was in respect of the daughters thinking only of the independent groups of their respective issue. In my opinion, therefore, the interest given to each son was the subject of a separate *fidei commissum*, and each son had the power to dispose of his interest subject to any right that might accrue to any child upon the birth of such child. In this case Jeewathamy having sold to the plaintiff the whole of his interest; and Jeewathamy having since died without issue, the purchaser, the plaintiff in this case, has acquired an unrestricted title to the lands conveyed to him, and is entitled to judgment.

In the course of the argument we were pressed with the contention that section 20 of Ordinance No. 21 of 1844 necessarily entailed this conclusion, and we were asked—as this Court has been frequently asked—to say that the judgment of *Tillekeratne v. Abeyesekere* [2] and *L. R. (1897) A. C. 277* in the Privy Council should be disregarded

[1] *(1918) 20 N. L. R. 225.*

[2] *(1897) 2 N. L. R. 313.*

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in so far as it suggests a contrary view. The argument is that the judgment of the Privy Council says nothing about section 20 of this Ordinance; that that section could not have been brought to its attention; and that nothing, therefore, that appears in the judgment of the Privy Council should be regarded as militating against what is contended to be the effect of that section. There is undoubtedly some confusion in the judgment of the Privy Council with regard to section 20. There can be no question, however, that it was brought to the notice of the Lords who heard the case. The judgment of Mr. Justice Withers in this Court on review was expressly grounded upon section 20. See (*1899*) *3 S. C. R. 76*. The argument in the *Law Reports* (*page 280*) shows that section 20 was specifically discussed. It could not, therefore, have been overlooked. Further, the opinion of Withers J. as to the effect of Ordinance No. 21 of 1844 was expressly referred to in the judgment. Section 20, in all the compilations of our legislative enactments in ordinary use at the date when the case was argued, follows immediately upon section 6. Apparently for this reason, in the drawing up of the judgment, it was confused with section 7; and section 7 was therefore cited and discussed instead of section 20. Section 7 had, however, been long ago repealed, so early as 1852. Indeed, the Lords of the Privy Council must have been at some trouble to get access to section 7, as the only compilation in which it appears is that of 1852, which is a rare volume, and could hardly have been used in the argument in Court. Even in this edition sections 7 to 19 are printed in special type as being repealed.

Reference in the judgment is, however, expressly made to section 7 alone. It is permissible to suggest that before the judgment was drawn up the Lords of the Privy Council had come to the conclusion that section 20 of Ordinance No. 21 of 1844 and section 2 of Ordinance No. 10 of 1863 were " limited to cases in which the persons interested, whether as joint tenants or as tenants in common, are full owners, and are not burdened with a *fidei commissum* "; but that for some reason, which it is not easy exactly to define, section 7 was cited *per in curiam* instead of section 20. In any case my own opinion is that section 20 of Ordinance No. 21 of 1844 only applies to property held in full ownership, and I do not think it has any bearing on the question under discussion in this case.

I am therefore in accord with the conclusion, though not with the reasoning, of my Brother Ennis, and I would allow the appeal of the plaintiff, with costs, and dismiss, with costs, the other appeal.

Plaintiff's appeal allowed.