1907.
April 10.

Present: Mr. Justice Wendt and Mr. Justice Middleton.

TILLEKERATNE *v.* SILVA *et al.*

D.C., Matara, 3,804.

Joint Will — Fidei commissum — *Construction* — *Single* fidei commissum —Jus accrescendi—*Survivorship.*

A joint last will made by a husband and wife married in community of property, after giving the survivor of the spouses a usufruct in the whole estate, provided "that at the death of such survivor, whilst possessing only the issues, rents, and profits of this estate, all his said properties and his debts and credits, if any, shall equally devolve (ඒකකාර කොටස්වශයෙන්) on all the children that we now have and those that we may hereafter get, or on such of them as may then be living, and that the said children cannot either sell, gift, or mortgage the properties which they shall so receive, and that the same shall devolve on their children and grandchildren unto generations."

Held, that the will created one single *fidei commissum* over the entire estate, and that on the death of one of the children his share devolved on the surviving children according to the rule of *jus accrescendi.*

Tillekeratne v. Abeyesekara [2] followed.

THE facts are fully set out in the following judgment of the District Judge (T. R. E. Loftus, Esq.):—

"The plaintiff in this case sues to be declared entitled to one-fifth of the land Kaluhalgodawatta. Parties admit that this land

[1] (1891) 1 *S. C. R.* 71.

[2] (1897) 66 *L. J. P. C.* 55; (1897) 2 *N. L. R.* 213.

formed one of the lands belonging to the late D. W. Tillekeratne, senior, and his wife, who executed a joint last will disposing of all their lands, including the land in question.

" D. W. Tillekeratne, senior, and his wife died leaving six children, of whom the plaintiff is one, and the late D. W. Tillekeratne, junior, another. In 1889 the six children executed a deed of distribution of the land belonging to the estate of their parents. By that deed the entirety of this land, among other lands, was allotted to the late D. W. Tillekeratne, junior. He in 1893 leased the land in question to defendant for a period of ten years commencing from 1st January, 1900. In 1894 he granted a further lease to the defendant for a period of eighty-four years, and in 1897 he died.

" Plaintiff contends that the last will executed by his parents contained a valid *fidei commissum*, and hence the leases executed by his brother, D. W. Tillekeratne, junior, were good only during his lifetime. He now claims one-fifth of the land under his parents' will.

" The defendant in his pleadings denied that the will contained a valid *fidei commissum*, and further urged that, even if it did contain a valid *fidei commissum*, such *fidei commissum* had lapsed by the death of his lessor. The first issue, which was ' Does the last will of the late D. W. Tillekeratne, senior, and his wife create a valid *fidei commissum?* ' was not seriously contested.

" Mr. Buultjens cited the judgment in appeal in D. C., Matara, No. 3,346, in which their Lordships held that the will executed by the late D. W. Tillekeratne, senior, and his wife contained a valid *fidei commissum*.

" Mr. Keuneman informed the Court that he would not contend that that judgment in appeal was wrong. He was free to admit that the will contained a valid *fidei commissum*. His main argument was that the will contained six different bequests, each burdened with a *fidei commissum*.

" Mr. Buultjens, for the plaintiff, argued that the will in question contained only one bequest to the six children jointly. He cited 2 *N. L. R.* 313 and 8 *N. L. R.* 283 in support of his argument that the will should be read as one joint bequest to the six children.

" Mr. Keuneman, however, points to the Sinhalese words in the will relating to the disposition of the property. They are *ekakara kotas wasayen*. He contends that those three Sinhalese words can leave no possible doubt as to the intention of the testators to convey a divided one-sixth share of the entire estate to each child individually.

" I have carefully perused the judgments quoted by Mr. Buultjens, paying special attention to the translations of the wills referred to. I, however, labour under the disadvantage of not having the original Sinhalese wills before me to compare them with the will now under construction.

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" In the present case I have the original Sinhalese will before me, and I quite agree with Mr. Keuneman that the words *kotas wasayen* are no mere redundancy, as Mr. Buultjens would have me construe them, but contain the express wishes of the testator and testatrix that each child should have a divided one-sixth of their estate.

" My Interpreter Mudaliyar agrees with me that that is the only possible construction of the words *ekakara kotas wasayen*.

" *Ekakara*, of course, means ' equally '—in this case in sixths. The words *kotas wasayen* are used in contradistinction to the Sinhalese *poduwa*, which means ' in common ' or ' jointly '. Thus, my construction of the will is that by it the testator and the testatrix made six different bequests, with one clause providing for a *fidei commissum* governing all six bequests.

" Consequently, I cannot but hold that the *fidei commissum* in respect of the late D. W. Tillekeratne, junior, one-sixth share has lapsed, and that the plaintiff, along with his four brothers and sisters, take *ab intestato*. The leases are therefore valid.

" Plaintiff's action is dismissed with costs."

The plaintiff appealed.

Peiris (with him *E. W. Jayewardene*), for the appellant.—The will when read as a whole can only be construed to contain one bequest to the children of the testator burdened with one *fidei commissum*. The words used are not distinguishable from those construed by the Privy Council in *Tillekeratne v. Abeyesekara*,[1] and the ruling in that case should be followed. The *fidei commissum* is created in favour of a class, viz., the descendants of the testator; and it was clearly their intention to preserve the property in the family. The District Judge was wrong in his interpretation of the words *ekakara kotas wasayen*. The expression *kotas wasayen* is not the opposite of the word *poduwa* as suggested by the District Judge. It has no reference to the mode of possession. It only means " in shares." The addition of the word *ekakara* makes it mean " in equal shares." If divided shares were meant, the Sinhalese words used would have been quite different.

Sampayo, K.C., for respondent.—The expression used in the will imports the idea of division and separate ownership, and it is submitted that this is not a case of a joint *fidei commissum* in respect of the whole estate, but of a separate and distinct *fidei commissum* attaching to each legatee's share. This is borne out by the subsequent acts of the legatees themselves when they entered into the deed of partition, whereby the property in question was allotted to D. W. Tillekeratne. On the death of D. W. Tillekeratne without issue the *fidei commissum* failed, and the land became the absolute property of his estate. *Tillekeratne v. Abeyesekara*;[1] *Gould v. Souza*;[2]

[1] (1897) 2 *N. L. R.* 313. [2] (1902) 2 *Browne* 378.

Voet, 7, 1, 13; *Voet*, 36, 1, 16. Even if the words merely mean " in equal shares," as contended by the appellant, the result is the same, for in such a case the legatees are joined *verbis tantum*, and the legacies are several and not joint and there would be no *jus accrescendi*. *Voet*, 36, 1, 71; *Voet*, 30, 31, 61.

Peiris in reply.—The deed of partition entered into by the original devisees cannot affect the *fidei commissum*. Once it is conceded that the will created a valid *fidei commissum*, such a deed can only affect the mode of possession and could be operative only between the parties to it. With regard to the argument that the *jus accrescendi* does not apply in the case because here the conjunction is *verbis tantum*, it is submitted that the passages quoted from Voet do not apply to this case, but have reference to the lapse of legacies before they vest in the legatees. Here there is a *fidei commissum* created in favour of a class, and effect must be given to it irrespective of any question of *jus accrescendi*.

Cur. adv. vult.

10th April, 1907. WENDT J.—

The plaintiff in this action seeks a declaration of his right to possess and enjoy an undivided fifth share of a land called Kaluhalgodawatta. To the second, third, fourth, and fifth defendants, who represent three of his brothers and his sisters, he alleges the remaining four-fifths to belong, and his complaint is that the first defendant, claiming under a fourth brother, now deceased, named Dionysius, keeps him out of possession. The land formed part of the common matrimonial estate of plaintiff's parents, who died in 1867 and 1889 respectively, leaving a joint last will, upon the right construction of which the decision of this appeal depends. Their will, which was in Sinhalese, gave the survivor of the spouses a usufruct in the whole estate, and then proceeded in clause 2 as follows (I quote from the translation filed in the record): " And we have hereby determined that at the death of such survivor, whilst possessing only the issues, rents, and profits of this estate, all his said properties and his debts and credits, if any, (the Sinhalese words were *ekakara kotas wasayen ayitikaradena hetiyata niyamakaranta yedunaya*), shall equally devolve on all the children that we now have and those that we may hereafter get, or on such of them as may then be living, and that the said children cannot either sell, gift, or mortgage the properties which they shall so receive, and that the same shall devolve on their children and grandchildren unto generations."

At the death of the testatrix, who was the surviving spouse, there were living six children of the marriage, viz., the plaintiff and Dionysius, and the four others represented by the second to the fifth defendants. Eight months later these six children entered

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into a deed of distribution, dated 20th December, 1889, whereby the lands of the estate were allotted among them in severalty, the land now in question falling to Dionysius. The deed recited the provisions of the last will, and confirmed the usual cross conveyances which were made expressly subject to those provisions. By deed dated 8th October, 1893, Dionysius leased this land to first defendant for a term of ten years, and by deed dated 8th February, 1894, for a further term of eighty-four years commencing from the expiry of the term previously granted.

The parties are agreed that the devise to the children was subject to a *fidei commissum*, but while plaintiff contends that it was a single *fidei commissum* of the entire estate to the devisees jointly, with benefit of survivorship and substitution of their descendants, the first defendant, who is the respondent to the present appeal, contends that there were in effect six *fidei commissa*, each affecting a direct one-sixth of the estate devised to one of the children. On the one hand plaintiff argues that so long as any one of the children or any descendant of any one of them survives, the *fidei commissum* affecting Dionysius' one-sixth has not failed in default of his descendants. If plaintiff is right, he, as one of Dionysius' five brothers and sisters, would be entitled to the enjoyment of the one-fifth which he claims of the land in dispute. If first defendant is right, Dionysius was entitled to dispose of the land as his absolute property, and his lease cannot be disturbed. The distribution of the lands among the children, while it might on the principle of *Babey Nona v. Silva*[1] limit the substituted heirs to lands allotted by the partition deed to their respective institutes, need not here be considered in the absence of descendants of Dionysius. No such partition could affect the *fidei commissum* devolution in other respects.

The question before us is, in my opinion, governed by the decision of the Privy Council in *Tillekeratne v. Abeyesekara*.[2] There, too, the will gave the survivor a usufruct, and then, in effect, gave a moiety of the estate to a surviving daughter of the testators and the other moiety to the three surviving children of a deceased daughter, directing that the devisees "shall divide into two" and "inherit according to custom, and they and their descendants possess without interruption." At the determination of the usufruct, one of the three grandchildren being dead, his only child, Isabella, entered into possession of his share. She having died without issue, her administrator claimed that share absolutely on the ground that the *fidei commissum* had failed for lack of her descendants—the same ground which the present first defendant takes up. The Privy Council said: "Their Lordships have had little difficulty in coming to the conclusion that according to the terms of the will the entire moiety settled upon the grandchildren is made the subject of one and the same *fidei commissum*.

[1] (1906) 9 *N. L. R.* 251. [2] (1897) 66 *L. J. P. C.* 55; (1897) 2 *N. L. R.* 313.

" The bequest is not in the form of a disposition of one-third share of the whole to each of the institutes, but of a gift of the whole to the three institutes jointly, with benefit of survivorship and with substitution of their descendants. Following the terms of the gift, the substitution must be read as referring to the whole estate settled upon the institutes as a class. The words ' and inherit according to custom ' were obviously not meant to imply that the estate was to devolve in terms of law, so as to defeat the interests of heirs-substitute. They refer to the succession, not of the substituted heirs, but of the institutes, and simply indicate that the shares bequeathed to them are the same which they would have taken had there been no will. Their Lordships are accordingly of opinion that no right of succession could arise, on her decease, to the heirs-at-law of Isabella, who were not in the direct line of descent from the testators, so long as any person was in existence who could show a title either as an institute or as a substitute under the provisions of the will."

This decision was cited to the learned District Judge, but he held that the language of the present will was distinguishable from that which the Privy Council considered, and disclosed " the express wishes of the testator and testatrix that each child should have a divided one-sixth of their estate. . . . .*Ekakara*, of course, means ' equally '—in this case in sixths. The words *kotas wasayen* are used in contradistinction to the Sinhalese *poduwa*, which means ' in common ' or ' jointly '. . . . . .Thus, my construction of the will is that by it the testator and the testatrix made six different bequests, with one clause providing for a *fidei commissum* governing all six bequests." He added that his Interpreter Mudaliyar agreed with this construction. We have had the advantage of having the case very ably argued before us on both sides by counsel who are themselves Sinhalese gentlemen well versed in their native language, and in the result we think that the defendant's interpretation of the will cannot be supported. *Ekakara* certainly means " equally," *kotasa* (plural *kotas*) means " a share." It no more implies a physical division than the English word " share." *Kotas wasayen* means according to shares or by way of shares. The exact equivalent of the whole expression would therefore appear to be " in equal shares." The direction in the will then amounts to no more than the direction in the Privy Council case that the legatees were to take in equal shares—it is a direction regulating the enjoyment of the institutes and themselves, and having no reference to the substitution on the death of the institutes. The District Judge's idea that each child should have a divided one-sixth is negatived by the words of the 2nd clause of the will, which expresses the determination to " make them entitled " on the death of the surviving spouse. This is equivalent to devolution, and of course such devolution could not be in divided shares. It was argued that the *jus accrescendi* did not

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belong to the surviving brothers and sisters of Dionysius, because this was a case of conjunction *verbis tantum*, this estate being to the devisees in equal shares; and *Voet*, *bks*, 30-32, *ss*. 58-63, was cited, and also *bk*. 36, 1, 71, together with the note at page 153 of McGregor's translation. I am not sure that those passages are applicable, because they deal with the case of legacies in which one of the joint legatees dies before the vesting of the legacy. In the present case Dionysius had entered into possession of his legacy. The question here rather is, whether the will had substituted anybody in his place in the event of his dying without issue after having himself taken the legacy. According to my reading, by the light of the decision in *Tillekeratne v. Abeyesekara*, the will in that event substituted the surviving legatees.

I think the decree of the District Court must be reversed and judgment entered for the plaintiff as prayed, with damages at the agreed rate of Rs. 5 per annum from the 9th January, 1904, until possession is given to plaintiff. The first defendant will pay the plaintiff's cost in both courts. No costs of the other parties.

MIDDLETON J.—

I agree. The words at the end of the will, " the same shall devolve on their children and grandchildren unto generations," seem to me to negative the construction put on the will by the District Judge, and to support strongly the *jus accrescendi* in favour of the surviving institutes contended for by the appellant.

Appeal allowed.