1939 *Present :* **Soertsz A. C. J. and Keuneman J.**

UPASAKAPPU *v.* DIAS *et al.*

290—D. C. Galle, 36,634

Jus accrescendi—*Gift* inter vivos *to six persons—Single* fidei commissum.

A deed of gift contained the following clause :—As I have adopted the late Daniel James Dias from his infancy as a beloved child of mine, I do hereby gift of my free will and pleasure unto . . . . his six children by his married wife . . . . to have and hold in equal rights (*ekka hateeata*) and to inherit by their descendants, children, grandchildren for ever according to law, enacting that the said (*i.e.*, Daniel's wife) do live there during her life-time and that the said interests shall not be mortgaged, alienated or transferred to any outsider.

***Held*, that the terms of the deed indicated an intention on the part of the donor to create one *fidei commissum* and that on the death of a child without issue his or her share accrued to the others.**

APPEAL from a judgment of the District Judge of Galle.

H. V. Perera, K.C. (with him *E. B. Wikramanayake* and *H. A. Chandrasena*), for the second and third defendants, appellants.

N. Nadarajah, for the plaintiff, respondent.

Cur. adv. vult.

July 20, 1939. SOERTSZ A.C.J.—

In the year 1877, Angenetta Tenekoon made a deed of gift in which she declared as follows :—"As I have adopted the late Daniel James Dias . . . . from his infancy as a beloved child of mine, I do hereby gift of my free will and pleasure unto the girl called Alice, the boy called Richard, the boy called Stewart, the girl called Ellen, the boy called Arthur, the boy called Victor, his six children by his married wife . . . . to have and to hold in equal rights (*ekka hateeata*) and to inherit by their descendants, children, and grandchildren (*ohoongeng pevataenne Dharoo munupuroo aahdeenta*) for ever according to law,

enacting that the said . . . . (*i.e.*, Daniel's wife) do live there during her life time, and that the said interests shall not be mortgaged, alienated or transferred to any outsider." It is not disputed that this deed created a *fidei commissum inter vivos*. The only question is whether four of the six childern having died without marriage or issue, and their rights having accrued to the surviving children, Ellen and Stewart, a conveyance by Ellen who died childless, to the plaintiff her husband was a conveyance that passed title to him that endured to him after her death, or whether on her death, Stewart, who survived her, succeeded to her interests and passed them to his childern the second and third defendants, when he himself died a short time after Ellen. The answer to that question depends on whether the deed of gift created six different *fidei commissa*, or only one, for in the former case, there being no children born to Ellen, her share was unaffected by any substitution, while in the latter case, on her death, her share passed to the other donees and their children, grandchildren, &c., in whose favour there was substitution.

In the case of *Tillekeratne v. Abeyesekere*[1], the Privy Council examined a testamentary bequest couched in similar terms and Lord Watson who delivered the opinion of the Council said "the conflicting claims depend not upon any disputed principle of the Roman-Dutch law (he was referring to the *jus accrescendi*), but upon the construction of that part of the will which regulates the destination" of the property. "If the will constitutes three *fidei commissa*", one result will follow; if "on the other hand, the entire moiety was the subject of one *fidei commissum*". the result would be different. Their Lordships came to the conclusion that the case before them was the case of one single *fidei commissum* because "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."

When this question again arose in our Courts twenty years later in connection with a *fidei commissum* created by a deed *inter vivos*, Bertram C.J. declared that he reserved his opinion "whether so far as relates to the *jus accrescendi*—that is how he expressed himself—there is any substantial difference between testamentary *fidei commissa* and *fidei commissa* constituted by instrument *inter vivos*", and Shaw J. who sat with him said "In *Carry v. Carry*[2] and *Ayamperumal v. Meeyan*[3] this Court held the *jus accrescendi* to apply in cases of *fidei commissa* constituted by gifts *inter vivos* on the ground that the language used by the donor showed an intention to that effect. I was a party to the latter decision and expressed a doubt whether a similar rule of construction applied in the case of a donation *inter vivos* as applied in the case of a will; but I did not, and do not now, doubt that *a right of accrual* may exist in either case, when the language of the donor or testator expresses such an intention". I should prefer not to express myself quite in that manner. It is not really a question of the *jus accrescendi* applying in these cases, but a similar result being achieved by an express declaration on the part of the

[1] 2 *N. L. R.* 313.
[2] 4 *C. W. R.* 50.
[3] 4 *C. W. R.* 182.

testator or donor, or by an intention clearly to be inferred, that he desired the property to devolve in that manner. The *jus accrescendi* was a rule of the Roman law by which among co-heirs in testamentary succession or among co-legatees there is a right of accretion, so that if one of them cannot or will not take his portion, it falls to other heirs to the exclusion of heirs at law. This rule was evolved in deference to the Roman horror of dying partly testate and partly intestate, but the Roman-Dutch law adopted that rule to the extent of saying that in no case had it automatic operation, but that it would be accepted or rejected as would best give effect to the testator's intention. The point, however, is that in that case Bertram C.J. and Shaw J. inclined to the view that either a testator or a donor could provide for such a result.

Finally in the case of *Carlinahamy v. Juanis*[1], the majority of a Divisional Bench held that the principle enunciated in *Tillekeratne v. Abeyesekere* (*supra*) was not confined to testamentary *fidei commissa* but applied equally to *fidei commisa* created by a deed *inter vivos*. Bertram C.J. added that "it is undoubtedly the case that a stricter rule of construction applies to instruments *inter vivos* than to will'". He applied that rule to the deed before him and came to the conclusion that although the instrument was a deed of gift the intention of the donor was clearly to bring it within the scope of the principle of *Tillekeratne v. Abeyesekere* and that there was accretion. Garvin J. agreed with him. The material parts of the deed in that case were as follows. "Whereas we do deem it fit and proper to set apart something separate unto our six children for their welfare and advancement, we have gifted unto our six children . . . . . We shall have the right to possess the above property and do our pleasure therewith, and after the death of us both, our aforesaid six children shall be at liberty to own in equal shares, and possess peaceably for ever throughout their generations the property, and the six children and their heirs may by leasing out possess the property and not sell, mortgage, &c.

In my view, the terms of the deed of gift in the case before us indicate more strongly the intention of the donor to create one *fidei commissum* by which the property was to devolve on the donees and their children, grandchildren, &c., so long as there were any such in existence. It is quite a different matter that a local law stands in the way and curtails the line of such a devolution. Just as in the Divisional Bench case, so in this case, it was contended that the words by which the property was given "*in equal shares*" negatived an intention on the part of the donor to create one *fidei commissum*. That contention was rejected in the earlier case and I have no less hesitation in rejecting it in this. Indeed, in my view it can be urged with great force in this case that the words *ekka hateeata* are more consistent with an intention to create one *fidei commissum* than the words *ekkakara* in *Tillekeratne v. Silva*[2] and *ekkakara kotas wasseng*, in *Carlinahamy v. Juanis* (*supra*).

We were also pressed to hold that the fact that the deed allowed a mortgage, alienation or transfer to one who was not an outsider indicated by necessary implication, a contemplation by the donor of the possibility

[1] *26 N. L. R. 129.* [2] *10 N. L. R. 214.*

of the property passing out of the family, for the result, it was said, of a mortgage to one within the family, might well be that an outsider purchased the property at an execution sale. But, in my opinion, the answer to that is the answer suggested by Mr. H. V. Perera during the argument, that at such an execution sale nothing more than the interest of the mortgaging donee could pass to the purchasing outsider, namely, his life interest, and that on his death, if he died without issue, his share would accrue to the surviving donees and their children, &c. In other words, that the permission given to the donees to deal with the property in certain circumstances, operated only within the scope of the prohibition and could not transcend it. The result is that, in my view the rules in *Tillekeratne v. Abeyesekere* (*Supra*) and *Carlinahamy v. Juanis* (*supra*) apply in this case, and that, therefore, nothing passed to the plaintiff or to the first defendant.

I set aside the judgment of the District Judge and dismiss the plaintiff's action with costs in both Courts.

KEUNEMAN J.—I agree.

Appeal allowed.