Present: Bertram C.J., Garvin J., and Jayewardene A.J. 1924.

CARLINAHAMY *v.* JUANIS *et al.*

377—D. C. Matara, 312.

Gift in favour of six children subject to fidei commissum*—Death of one child—*Jus accrescendi*—Partition decree allotting one lot jointly in favour of one family group—Decree assigning rights to deceased persons—Rights of representatives of deceased person under the decree—Decree giving rights to wife of one defendant—Wife dead at the time—The defendant married to another woman—Court not aware of second marriage—Construction of decree—Latent ambiguity—Evidence Ordinance, ss. 94 and 96—Powers of Court in revision.*

Per BERTRAM C.J. and GARVIN J. (*dissentiente* JAYEWARDENE A.J.): *ratne v. Abeysekere* [1] further considered and defined.

Per BERTRAM C.J. and GARVIN J. (*dissentiente* JAYEWARDENE A.J.): That principle is not confined to testamentary *fidei commissa*, but applies equally to *fidei commissa* created by a deed *inter vivos*.

By the whole Court: Where a partition decree *per incuriam* allots interests to persons already dead, it must, unless set aside, be interpreted as allotting those interests to their representatives in interest.

Where a partition decree allots a particular lot to a family group, it is not necessarily to be presumed that they are to hold it in equal shares.

Per BERTRAM C.J. and GARVIN J.: In interpreting a document the state of knowledge of the author of the document at the time it was executed may be taken into account for the purpose of determining whether the circumstances of the case disclose a latent ambiguity.

Sabo and his wife Nonno, who were entitled to a one-fourth share of a land, gifted the same in 1875 to their six children (first to fourth defendants and Babappu and Donsina, wife of Mathes) subject to certain conditions. The material parts of the deed of gift 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, in terms of the agreement appearing hereunder, the following property:—

. . . . 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.

Donsina, who married Mathes, died in 1888, leaving a child Guruwa, who also died in 1889 issueless. Mathes then married Carlina, and died in 1915, leaving him surviving his widow and two children, fifth and sixth defendants. In 1905 a partition action was instituted, when Nonno and her children were given jointly lot D, in lieu of their undivided one-fourth share. The decree read as follows:—"Lot 'D is assigned to second to sixth defendants and wife of the seventh defendant." (The second defendant was Nonno, and third to sixth defendants were her children, and

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

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Mathes was seventh defendant in that action.) The deed of 1875 was not produced. The fact that Mathes was at the time married to Carlina was not mentioned to Court. Carlina brought this action for partition of lot D.

Held, by the whole Court, that the gift to the six children was subject to a *fidei commissum*.

Held, further, per BERTRAM C.J. and GARVIN J. (*dissentiente* JAYEWARDENE A.J.):—

(1) That on the death of Guruwa his share devolved on his mother's brothers and sisters and not on Mathes.

(2) That the words "wife of the seventh defendant" in the partition decree referred to Donsina, the deceased wife of Mathes, and not to Carlina, who was the wife of Mathes at the time of the action.

H. J. C. Pereira, K.C. (with him *Keuneman* and *S. J. C. Schokman*), for defendants, appellants.

E. J. Samarawickreme (with him *Soertsz* and *A. L. Jayesuriya*), for plaintiff, respondent.

August 4, 1924. BERTRAM C.J.—

This case raises a series of difficult questions which arise out of a certain deed of *fidei commissum*, and for that reason has been referred to a Court of three Judges. The principal question is that of the application of the rule in the well-known case of *Tillekeratne v. Abeyesekere* (*supra*) to the facts of the case. But there are other incidental questions that have first to be determined.

The land in question was once a part of a larger land, which in 1905 became the subject of a partition suit. The original owners of the share represented by this land were Sabo and his wife, who is variously referred to as Nonno and Punchina. On April 19, 1875, Sabo and Nonno executed the deed of *fidei commissum* which we have to interpret. I will discuss it more fully later, but at this point it is sufficient to say that it settled the land upon their six children, but reserved a life interest in the parents. The interests of the children were subject to a *fidei commissum* in favour of their descendants. The document was not accepted by the children, and a question arose whether their acceptance could be inferred from the facts of the case. We came to the conclusion that that acceptance might be legitimately inferred, and this question need not further concern us.

In the year 1905 a partition suit, No. 3,681, was instituted for the whole land by another co-owner. By that time the family group had been reduced in numbers by death. Sabo, the original donor, was dead. Babappu, one of the six children, had died without issue. Donsina, one of the daughters, was also dead. It is from Donsina that all the controversies in the case originate. She married a man named Mathes, and by him had one child, Guruwa. She died in 1888, and Guruwa died in 1889. But when the partition action was instituted in 1905, her husband Mathes was made a party

to the action, being seventh defendant. As a matter of fact, Mathes had by this time been married again to Carlina, the plaintiff in this action, but this circumstance does not appear to have been realized. The family group was thus represented by Nonno, her four children (now the first, second, third, and fourth defendants in this action), and Mathes, the husband of the deceased Donsina. Three of the children disputed the rights of Mathes. No one disclosed or set up the deed of *fidei commissum* of 1875, and the Court consequently knew nothing about this deed. In the final decree dated May 6, 1907, this family group were allotted lot D, but their shares were not divided, although they had, of course, been divided in the preliminary decree. In drawing up the decree two singular mistakes were made. Nonno, mother of all the children, had died pending the action. She was, nevertheless, included in the decree as one of the persons entitled to lot D. Further, Donsina, the wife of Mathes, had died nearly twenty years before the decree. Yet she was referred to as one of the persons entitled under the description of "wife of seventh defendant." The decree reads as follows: "Lot D is assigned to the second to sixth defendants and wife of seventh defendant"—Nonno being the second defendant and Mathes, the seventh defendant.

Mathes died in 1915, leaving as his heirs his wife Carlina and his two minor children, the fifth and sixth defendants in this action.

The first question that we have to decide is whether any effect can be given to this extraordinary decree. It is defective on the face of it, inasmuch as it purports to assign interests to two persons already dead. The answer to this question is that the decree must be considered good until it is set aside, and that the rights assigned to the deceased persons must be considered as having devolved upon those who now in law are their representatives in interest.

Now the whole question in this action is whether the interest of Donsina, who died in 1888, has passed to her four brothers—first, second, third, and fourth defendants—or whether it devolved by inheritance upon her husband's widow Carlina and Carlina's two children. If it devolved by inheritance, the course of the devolution would be as follows: On Donsina's death in 1888 her share would pass half to her child Guruwa and half to her husband Mathes. On Guruwa's death his half share would also pass to Mathes. On the death of Mathes in 1915, half his share would go to his second wife Carlina and the other half to the fifth and sixth defendants.

It would be well at this point to deal with a contention put forward by Mr. Samarawickreme as disposing of the whole question. We are bound, he contends, by the form of the partition decree of 1907. That decree specifically assigns lot D to the deceased Nonno, to the first, second, third, and fourth defendants, and to the wife of Mathes. The wife of Mathes at the date of the decree was Carlina. And therefore, although she never appeared in the action (and there is no sign that she was ever heard of), the decree must be taken as giving her one-seventh of lot D. We are precluded, he contends,

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from showing that the wife of Mathes referred to was his deceased wife Donsina. The language used in the decree being plain in itself and applying accurately to an existing fact, namely, the fact that Carlina was the wife of Mathes, evidence may not be given to show that it was not meant to apply to this fact. See section 94 of the Evidence Ordinance, No. 14 of 1895. Mr. Pereira, on the other hand, contends that the case comes within section 96 of the Evidence Ordinance, and that this is a case in which the facts are such that the word " wife " might have been meant to apply either to Donsina or to Carlina, and that evidence may be given of facts which show that Donsina is meant. I am of opinion that the case is within section 96. In the first place, I think it is clear that section 94 must be read as subject to section 96. In other words section 96 qualifies section 94 for the purpose of a particular class of case. It may be perfectly true that the words to be interpreted apply with apparent exactness to a particular person, but as soon as it is shown that they are also capable of applying with equal exactness to another person, an ambiguity arises, and the section comes into operation. The section is designed to give effect to the old rule of English law with regard to latent ambiguity. The circumstances to which that rule applies in the case of wills are thus expressed by Lord Abinger C.B. in *Doe v. Hiscocks* [1]: " Where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible; but from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express."

Now we have to interpret the words of the decree, not absolutely but with reference to the circumstances under which it was delivered. It is not merely the grammatical or logical meaning of the words, detached from all surrounding circumstances, that we have to determine. We have to determine what the author of the document meant by them in the circumstances under which he was writing. In determining this intention, are we not as part of those circumstances entitled to take into account the state of the knowledge, and the belief of the author of the document, at the time when he used the words? In this particular case the Judge used the expression " wife of Mathes " in the belief that Donsina was still alive, and without the knowledge that she had died and that Mathes had married again. Is it really to be contended that we have to leave these circumstances out of account in determining the meaning of his words?

Supposing a man left a legacy to his son's wife, in the belief that the son was legally married to a particular woman, but supposing that, unknown to all concerned, a woman previously married to the son but believed to be dead proved to be still alive, so that the son's second marriage was, in fact, bigamous, is it really to be

[1] *(1839) 9 L. J. Exch. on p. 30.*

supposed that the legacy would go to the stranger thus appearing on the scene? Or suppose that an enthusiastic patriot on his deathbed left a legacy of £1,000 to Lord Nelson, but that at the time of the execution of the will, unknown to all concerned, Lord Nelson had just perished at the battle of Trafalgar, would the legacy really go to the person, who, at his death, had succeeded to Lord Nelson's title.

It is singular that there is no very direct authority on the question, but I have observed two cases which seem to indicate that, in determining the meaning of the words used by a testator, the state of his knowledge may be taken into account. One case is *In re Taylor-Cloak v. Hammond.*[1] There a testator gave a share of her residue to her "cousin Harriet Cloak." She had no cousin of that name, but she had a married cousin, Harriet Crane, whose maiden name was Cloak; and the wife of one of her cousins was called Harriet Cloak. Cotton L.J. observed: "Evidence of the surrounding circumstances and of the state of knowledge of the testatrix is admissible . . . . There is also evidence that the testatrix knew that her cousin who had been Harriet Cloak was married."

The other case is *In re due Bochet.*[2] There it was universally supposed that a certain Richard du Bochet was married to a woman, who was reputed to be his wife. The testatrix bequeathed certain property amongst others to the children of her nephew Richard du Bochet. When the legacy took effect, it was discovered that Richard du Bochet and his wife were not actually married till after the death of the testatrix. By a very strict rule of law, subject to certain recognized qualifications, "children" in a will must be interpreted as "legitimate children." It was held that under this will, in the circumstances, that is to say, in the state of knowledge under which the testatrix made it, the two illegitimate children of the union, who were in existence at the date of the will, were included in the beneficiaries.

The surrounding circumstances, therefore, in my mind disclose an ambiguity. And the question we have to determine is this: Did the expression "the wife of Mathes," used by the Judge in drawing up the decree, mean the first wife of Mathes, whom he believed to be alive, and whose rights he conceived himself as having to determine, or the second wife, of whose existence he was wholly ignorant. To ask this question is to answer it.

Were we reduced to such an arbitrary and unjust position as that which Mr. Samarawickreme maintains that we are to accept, we should still be able to do justice by the exercise of our powers of revision. All the persons interested are before us; we could send for the record in the partition action and correct the decree so as to bring it into accord with the obvious intention of the judgment. It is not necessary, however, in the view I take to pursue this course.

We will, therefore, in the first instance, ascertain the effect of the partition decree which declares lot D to belong to the representative

[1] *(1886) 34 Ch. Div. 255.* [2] *(1901) 2 Ch. 441.*

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in interest of the deceased Nonno and her four children (first, second, third, and fourth defendants), and to the representative in interest of the deceased Donsina. The present action is a partition action, and we have to assign shares in this lot. We might do this in three different ways:—

(*a*) We might, as Mr. Samarawickreme contends, divide the lot equally, and assign one-sixth to each.

(*b*) We might assign to each claimant shares according to the allotment of the preliminary decree.

(*c*) We might assign shares in accordance with the deed of *fidei commissum* of the year 1875.

The first of these alternatives would be clearly arbitrary. Such a result could not have been intended by the Court. In assigning lot D to this family group, the Court must have intended that they should hold it in undivided shares according to their respective interest whatever they were. There is no reason to impute to the Court any intention further to define those interests. We have two authorities which bear upon the question. That first is *Sinno Appu v. Dingirihamy* [1] which declares that " where a Crown grant in favour of several grantees conveys the property to them *simpliciter*, without specifying the respective shares of the several grantees, there is no presumption that the grant was made in equal shares." The other is the case of *Appu v. Silva* [2] which declares that " when a property is purchased by several persons, and the deed does not specify what share is conveyed to each, the deed itself is *primâ facie* evidence that they acquired title in equal shares. This inference may be rebutted by specific evidence as to the intention of the purchaser.". In a partition decree I do not think there would be any such *primâ facie* inference. The intention of the Court would necessary be that person to whom such a lot was assigned should enjoy it in accordance with their respective rights.

There is very much more to be said for the second alternative, namely, that shares should be in accordance with those assigned in the preliminary decree, which is recited or referred to in the final decree. But what then is to happen to the deed of *fidei commissum*? It was not produced in the action, and is brought forward for the first time in this action by the plaintiff herself. The assignment of lot D to the family group by the partition decree is not in itself inconsistent with this deed. The deed varies the respective rights to which the parties interested under the decree would be entitled as among themselves. Even if the decree was interpreted as being inconsistent with the deed, the fidei commissary rights of children in the next generation would be unaffected. It is settled law that a decree in a partition suit does not prejudice the rights of fidei commissaries. See the cases collected in *Marikar v. Marikar*.[3]

[1] *(1912) 15 N. L. R. 259.* [2] *(1922) 24 N. L. R. 428.*
[3] *(1920) 22 N. L. R. 137.*

Even if we were to assign shares in accordance with the preliminary decree, we should have to declare those shares to be subject to the rights of fidei commissaries under the deed of 1875. In my opinion in taking an assignment of lot D under the partition decree of 1907, the family group, with which we are dealing, left unaffected the rights under the original deed of *fidei commissum*. And now that lot D has to be partitioned, it must, in my opinion, be partitioned in accordance with the terms of that deed.

This brings us to what is the crux of the case, namely, the interpretation of the deed. The deed creates an undoubted *fidei commissum*. As I read it, it makes a present gift to the six children mentioned in the deed, subject to two provisos. The first is that Sabo and his wife Nonno are to retain life interests in the lands donated, and the second is that after their death, the lands are to be subject to a *fidei commissum* in favour of the descendants of the six children "for ever throughout their generations." It is not necessary to subject this document to a very minute analysis. Mr. Pereira contended that there was no present gift to the six children, but that they only took in succession to Sabo and his wife, and that Sabo and his wife were both owners and not merely usufructuaries until their deaths ; with this difference that Sabo reserved to himself the right to dispose of the property, whereas that right was withheld from his wife. I prefer the interpretation of Mr. Samarawickreme, namely, that the interests of Sabo and his wife were usufructuary only, and that the power of disposition which seems to be impliedly reserved to Sabo must be interpreted in effect as a power of revocation coupled with the power of disposition. In the view I take of the meaning of the deed, it makes no difference whether the six children took a present gift or only a gift in succession to their father and mother.

It remains, therefore, to interpret the *fidei commissum* clause. It is, as a matter of fact, in a form which has been repeatedly interpreted already. It is not distinguishable from the formula which was interpreted by the Privy Council in *Tillekeratne v. Abeyesekere* (*supra*). A long succession of cases has dealt with a succession of similar formulæ differing in details of expression, but not in substantial effect, and the rule in *Tillekeratne v. Abeysekere* (*supra*) has in fact become a rule for the interpretation of formulas of this description. It is not, of course, an absolute rule. Circumstances in the facts or particular expressions in the context may serve to show an intention differing from that which the rule has laid down as the intention *primâ facie* to be imputed to the parties. But subject to this, the course of the decisions has been uniform, and they were recently re-examined and reviewed in the case of *Usoof v. Rahimath*.[1]

The rule in *Tillekeratne v. Abeyesekere* (*supra*) may be thus formulated ; that where a *fidei commissum* is created in favour of

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

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the children of the founders and their succeeding descendants, it must first be determined whether the intention of the instrument was to subject the property to one entire *fidei commissum* in favour of all the children and their descendants, or whether it was to subject it to a bundle of separate *fidei commissa* in favour of each of the children severally. In my judgment in *Usoof v. Rahimath* (*supra*) I observed that the "question was often put in this way," but this was a misconception. This initial test is the basis of the whole doctrine. If it is determined that the intention was to create a single *fidei commissum*, this of itself involves the conclusion that upon any one line of the descendants being exhausted, the interest of that line shifts to the other lines. It involves the possibility that the interest of one brother or sister, who dies without issue, may shift to one of the other brothers or sisters or their issue, if they still survive. The result is that "so long as any one person is in existence who can show title either as an institute or as a substitute, the whole property remains burdened with a *fidei commissum*."

Let us apply that rule to the present case: If the intention of Sabo and Nonno was to subject the land to one single *fidei commissum* in favour of their children and their descendants, then, on the death of Guruwa in 1889, his interest passed to his four uncles, the first, second, third, and fourth defendants. If, on the other hand, the intention was to create six separte *fidei commissa*, then, on the death of Guruwa, his interest passed to his father Mathes, and on the death of Mathes, the interest so acquired passed to the plaintiff Carlina and her two children.

The strongest distaste has, from time to time, been expressed for the rule laid down in *Tillekeratne v. Abeysekere* (*supra*). It has been contended that it is wholly uncongenial to the local atmosphere of Ceylon; that the idea of a share in the property passing from one member of the family to another by survivorship and not by inheritance is alien to local ideas; that, in practice, people never treat such a process as having taken place; that co-ownership is the only form of tenure locally known; and that joint-tenancy and benefit of survivorship are conceptions of English or Scottish law.

Under the pressure of this distaste, repeated efforts have been made to evade the rule in *Tillekeratne v. Abeyesekere* (*supra*) by a variety of expedients. I have discussed these expedients in my judgment in *Usoof v. Rahimath* (*supra*). All these expedients have been revived in the present case, and we have been asked to examine them afresh. The first of these expedients is the suggestion that an artificial force should be given to the words "in equal shares," and that the use of these words themselves indicate that the donors intended to create a separation of interests. I think it has been sufficiently shown that these words have no artificial force, though they may, of course, conceivably be an element to be taken into

account in determining the intention of the testator or donor in any particular case. In the present instrument, however, it seems clear that the expression referred to, if properly translated, simply means "equally." It is less specific than a similar expression "equally according to shares" used in *Tillekeratne v. Silva* [1], where the words were held not to create a separation of interests.

The second plea was a reference to a casual expression in *Voet VII., 2, 1,* to the effect that the *jus accrescendi* has ceased as soon as the shares of the co-legatees have vested. This expression does not enunciate a special principle. It merely refers to an obvious circumstance for an incidental purpose, namely, to explain the fact that by a special rule of law the interest of co-usufructuaries is considered as being acquired from day to day. The result of this peculiar principle is that as soon as one of the co-usufructuaries ceases to exist, his share accrues to the others.

The third expedient is a more substantial one. It is the suggestion that a special rule applies where the *fidei commissum* is created not by a will but by an instrument *inter vivos*, and that this special rule excludes the application of the rule in *Tillekeratne v. Abeyesekere* (*supra*). I will proceed to examine this suggestion more fully. It is based upon two passages in *Voet*, which I have referred to in my previous judgment. *Voet 39, 5, 14*, and *36, 1, 67*.

The first passage specifically states that the *jus accrescendi* does not apply to donations, contracts, and other acts *inter vivos*, and that Justinian only extended it to *donationes mortis causa* because they were practically identical with legacies. This passage primarily refers to direct gifts and not to *fidei commissa*. But I concur with my brother Jayewardene in what I understand to be his view that the principle of it applies to *fidei commissa*.

The second passage deals with *fidei commissa*. It may be convenient that I should translate it. "The *fidei commissum* fails on the intervention of an accidental circumstance, if the fidei commissary dies pending the fulfilment of the condition on which the *fidei commissum* takes effect, masmuch as he does not transmit the expectation of this *fidei commissum* to his heirs . . . . But if the *fidei commissum* originates, not in a last will, but in an instrument *inter vivos* as, for example, in a pact attached to a donation *inter vivos*, or in a nuptial pact, it is the better opinion that if the fidei commissary successors designated by the pact die before the fulfilment of the condition, they transmit the expectation of the *fidei commissum* to their heirs; for it is agreed that those to whom a contractual debt is due, subject to the fulfilment of a condition, are creditors in respect of that debt, pending the fulfilment of the condition contrary to the rule which obtains in the case of legatees, where the legacy is subject to a condition, and that a man who makes a contract subject to a condition transmits the expectation of what is due to him to his heirs, if, before the condition comes

[1] *(1907) 10 N. L. R. 214.*

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into effect," he is overtaken by death." This is a passage of importance. It undoubtedly indicates a difference between *fidei commissa* establish by wills and *fidei commissa* established by instruments *inter vivos*. We shall best appreciate it if we consider each case separately and under two heads:—

(1) Let us take the case of a *fidei commissum* created by will. If the will bequeaths the property to A as fiduciary with remainder to B as fidei commissary, and B dies before A, the property does not devolve upon B's heirs, but belongs absolutely to A. If, however, the will bequeaths the property to A as fiduciary, with the remainder to B and C as co-fidei commissaries, and B dies before A, then by virtue of the *jus accrescendi* the whole property on A's death goes to C.

(2) Let us now consider the same two cases where a *fidei commissum* is created by deed of gift. In the first case, where the gift is made to A as fiduciary, with remainder to B as fidei commissary, and B dies before A, then the property does not, as in the case of a will, vest absolutely in A, but goes to B's heirs, by virtue of the *spes successionis*, which has been transmitted to them. So also in the second case, that is to say, where the gift is made to A as fiduciary, with remainder to B and C as co-fidei commissaries, and B dies before A, B's share passes to B's heirs, and does not go either to A or to C. This is not because the *jus accrescendi* does not apply, nor is it because the same words are to be interpreted differently according as they appear in a will or in an act *inter vivos*. It is because a *spes successionis* definitely vested in B by virtue of the bi-lateral nature of the instrument establishing the *fidei commissum*. The gift under that instrument was accepted by A presumably on behalf both of himself and of his succeeding fidei commissaries, and this acceptance gave an immediate interest to B, which he was able on his death to transmit to his heirs. This principle was applied in this Colony in the case of *Mohamad Bhai v. Silva*.[1] That decision cannot be harmonized with the decision of the Frisiæi Supreme Court reported in Sande, and referred to on page 232 of my judgment in *Usoof v. Rahimath* (*supra*). But the Court which decided *Mohamad Bhai v. Silva* (*supra*) was a Court of three Judges, and I take it that it must be considered locally authoritative until it is overruled.

But it is important to note what that case and the principle which it embodies really decide.

(1) It applies only to cases where the fidei commissary who dies is the ultimate beneficiary, in whom the property is intended to be absolutely vested. In such a case, if he dies, he transmits his interest. But if, on the true construction of the intrument, he is himself also only a fiduciary, and has only a life interest, then he has nothing to transmit. The *spes successionis*, which vests in him is merely the hope of succession to a life interest, and as soon as he himself dies, his interest evaporates. The rule has no application to the present case, if, on the true construction of the instrument Guruwa was not entitled to an absolute interest, and his interest was still burdened with a *fidei commissum*.

(2) It only applies to cases in which the fidei commissary, who is the ultimate object of the liberality, predeceases the fiduciary, and consequently a question arises whether the property, or his share in the property, goes to his fiduciary or to his heirs. No such question arises here, and, again, the rule has no application.

(3) Voet's observations are subject to a qualification which has not been hitherto noted, but which should not be forgotten. "And this is the case if the nuptial pacts have been so entered into as to have the force of a contract; but it is not so where they take the place of last wills or intestate succession." In other words, if I understand this qualification aright, the principle does not apply where the instrument is in effect a testamentary instrument.

It will thus be seen that the principles embodied in the passage from Voet quoted above have no bearing here. Guruwa, if the rule in *Tillekeratne v. Abeysekere* (*supra*) applies, was not the ultimate beneficiary, and he did not predecease Donsina, so there is no question of his transmitting the *spessuccessionis* to his heirs. It does not seem to me that any hopeful avenue of escape lies in this direction for those who wish to challenge the rule laid down in *Tillekeratne v. Abeysekere* (*supra*).

The only real substantial question which remains for further discussion is whether that rule applies to instruments *inter vivos* in the same manner in which it applies to wills. It is undoubtedly the case that a stricter rule of construction applies to the former than that which applies to the latter. In the case of wills the paramount consideration is the intention of the testator, and effect is, in all cases, given to that intention even though it may be indicated by inartistic or inadequate language, while instruments *inter vivos* must be interpreted strictly in accordance with their terms. I am not, however, able to discern in the judgment of Lord Watson in *Tillekeratne v. Abeyesekere* (*supra*) any indication that it was affected by this point of view, or that it was inspired by the necessity of giving a liberal interpretation to the terms of the will. On the contrary, the material parts of the judgment are closely reasoned and proceed expressly upon the terms of the will and the form of the disposition. He inquired, in the first place, whether the will, in respect of the moiety in question, constituted three *fidei commissa* or one. Having formed the conclusion that it constituted one *fidei comimssum* he proceeded: "Their Lordships have had little difficulty in coming to the conclusion that according to the terms of the will the entire moiety settled upon grandchildren is made the subject of one and the same *fidei commissum*. 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." It is impossible to discern in this precise and considered language,

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any suggestion that the instrument was being interpreted with a certain latitude, with the object of giving effect to some not fully expressed intention of the testator. I find it impossible not to agree with what is said by De Sampayo J. in *Carry v. Carry*.[1] That decision does not turn on the fact that the *fidei commissum* was created by will and not by deed *inter vivos*, but lays down a rule of construction which is applicable to all fidei commissary dispositions whatever the form of the instrument containing them may be.

The *just accrescendi*, in its ordinary sense, has nothing to do with this question. The *jus accrescendi* applies to accruals between individuals. A man bequeaths a property to two persons. One of these persons predeceases the testator. What is to be done with his share? The law presumes an intention that it should accrue to the other. Here there is no question as to the share of an individual, nor is there any predecease. It is a question not of accrual between individuals, but of accrual between lines. It is a question of the construction of a particular document, and the question is whether, on the true construction of the document, the maker intended that, on the failure of one line, its interests should accrue to the others.

The disposition in this case is more fully expressed than that in *Tillekeratne v. Abeyesekere* (*supra*), but I cannot draw any substantial distinction between the two forms. I do not think that the words "to own equally and possess peaceably for ever throughout their generations" are in any way inconsistent with the shifting of the interest derived by Guruwa from Donsina to Donsina's brothers on Guruwa's death.

I confess that I am not at all clear that the rule established in *Tillekeratne v. Abeyesekere* (*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 procpect which the testator and donors could have contemplated,

[1] *(1917) 4 C. W. R. 50 on p. 55.*

and I am by no means sure that the rule in *Tillekeratne v. Abeyesekere* (*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.

If the above reasoning is sound, it would appear that Carlina Hamy has no interest in the property, and that her claim for a partition should be dismissed. There is, however, one last plea on which Mr. Samarawickreme relies. By the judgment in the partition action it was declared that lot D was vested in the first, second, third, and fourth defendants, and the wife of Mathes, that is to say, Donsina. This is to be interpreted as a declaration that, at the date of the judgment, the personal represenative of Donsina Hamy, that is to say, Mathes himself, had an interest in the land. First, second, third, and fourth defendants, as parties to the judgment, are estopped under section 207 of the Civil Procedure Code from denying its effect, or from disputing Carlina Hamy's right to be in possession. They are estopped, not absolutely, because future fidei commissaries cannot be bound by the judgment, but to the extent of their several life interests. Carlina Hamy claims through Mathes, and she is entitled to take advantage of this estoppel, and to sue for partition of the land, as though first, second, third, and fourth defendants had conveyed to her a portion of their several life interests. Let us assume that these defendants are estopped to this extent as against Carlina and her children. This simply means that during their respective lives they are precluded from denying the right of these persons to possess in common with themselves. Does this entitle her to bring a partition action as one of the owners of the land? This seems to me a suggestion which it is impossible to accept. I cannot hold that a person, who claims simply an interest as against a particular co-owner, by estoppel is an owner within the meaning of section 2 of the Partition Ordinance. If she is entitled to assert this estoppel (a question on which it is not necessary to express an opinion) her rights will be not affected by the dismissal of her action.

Since I dictated the above judgment I have read the judgment of my brother Jayewardene, and, as it appears to me, if I may say so, to be a very important contribution to the subject, I may be permitted to add the following observations.

I agree that it must be taken that the *jus accresendi* in the proper sense of the term does not apply in instruments *inter vivos*, that is to say, that in the case of an instrument *inter vivos*, the law will not presume merely from the conjunction of two or more persons in the same liberality, that, in the event of one of these predeceasing the vesting of the liberality, his share was intended to accrue to the others. In the case of such an instrument, such a result can only arise from operative words, which either expressly or by implication have this effect. The Frisian case cited in Sande, in which a "conventional *fidei commissum*" was assimilated to a testamentary

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fidei commissum, if regarded as decided from this point of view, is apparently counter to the general current of the authorities.

I also agree that the dictum of the vesting of the *spes successionis* under such instruments (though it may in any given case have the same effect as the exclusion of the *jus accrescendi*) is a separate and independent principle. In so far as the Frisian case above referred to seems to conflict with this principle, as adopted by *Mohamad Bhai v. Silva* (*supra*), it must yield in our Courts to the authority of the later decisions.

I do not understand, however, that those who maintain in this case that on the deaths of Donsina and Guruwa their interests shifted to the other lines contend that this is so by virtue of the *jus accrescendi*. Nor do I understand that the Judges who decided *Carry v. Carry* (*supra*), and other similar local cases, intended to decide that the *jus accrescendi* applied between fidei commissary donees. In all these cases, the interpretation adopted or asserted was, as I understand it, quite independent of the *jus accrescendi*. It was regarded as being the natural and proper construction of the terms of the instrument.

This brings us to what is now seen to be the central question in the case. What was the *ratio decidendi* in *Tillekeratne v. Abeyesekere* (*supra*)? My brother Jayewardene propounds a very interesting suggestion, namely, that when Lord Watson said that the bequest was "a gift of the whole to the three constituents jointly with benefit of survivorship," and when he emphasized the "form of the disposition," he was referring to the fact that the institutes were "*re et verbis coniuncti*," and to the presumption which the Roman and Roman-Dutch law is said to draw from such a conjunction that the *jus accrescendi* would apply. If this proposition is sustained, it goes to the root of the matter, for, as appears above, this presumption is a special rule of testamentary construction, and does not apply in the case of an instrument *inter vivos*. But I do not so read the judgment of the Privy Council. It does not seem to me that Lord Watson was speaking in any way with reference to a predecease and a possible lapse—the contingency upon which the *jus accrescendi* arises. It might be true that in such a contingency a particular result would follow from such a form of words. But this is not what the Lords of the Privy Council were considering. What they were considering was the operation of the substitution, and they came to the conclusion that "following the tems of the gift, the substitution must be read as referring to the whole estate settled upon the institutes as a class.55 This is an interpretation which is applicable equally to a will, and to a dead *inter vivos*, and is equally authoritative in any similar case, whether of a deed or of a will, when the same or an indistinguishable collocation of words occurs.

In view of the above considerations, I am of opinion that the appeal must be allowed, and that the action must be dismissed, with costs, both here and below.

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The opinions I have formed on the various points which were raised and argued at the hearing of this appeal are fully in accord with those expressed by my Lord in his judgment. But inasmuch as my brother Jayewardene has not been able to take the same view, it would perhaps be as well that I should set down my own reasons for the opinions I have formed on the points which appear to me to be decisive of this appeal.

The facts are fully set out in the judgment of the Chief Justice, and need not be restated.

The first of the contentions advanced by Mr. Samarawickreme was that the effect of the final decree, entered in the earlier partition case by which this land was carved out of a larger land of which it was a part, was to vest an interest in this land in the plaintiff. This land is admittedly the lot D referred to in that decree which assigned lot D jointly to the "second defendant, third to sixth defendants, and the wife of the seventh defendant." The evidence in this case indicates that at the date of the decree referred to, the seventh defendant was married to the plaintiff Carlina, his first wife being then dead.

It was argued that section 94 of the Evidence Act requires that this decree shall be construed as if it read "seventh defendant's wife, Carlina." Where the external circumstances are that the seventh defendant was twice married, I cannot accede to the contention that the words "seventh defendant's wife" refer without ambiguity to the living wife and not to the deceased wife. This is, in my opinion, a case which is governed by section 96 of the Evidence Act. I am clearly of opinion that it is competent for a Court to look at the other documents which together form the record of a proceeding in Court together the meaning and effect of the adjudication embodied in the decree.

The portion of the final decree quoted by me can only mean that the lot D is assigned to the persons who were the second, third, fourth, fifth, and sixth defendants, and the person referred to in the proceedings as the wife of the seventh defendant. It is obviously necessary to refer to the other parts of the record to determine the identity of the persons referred to in the decree as the second, third, fourth, fifth, and sixth defendants. If this which is necessary is permissible, it is surely permissible to refer to the record to determine the identity of the person referred to as the seventh defendant's wife. The argument that each of several documents which together form one whole must be regarded as separate and distinct to be interpreted and construed independently of the other documents which go to make the whole is not sound.

There can be no doubt that the person referred to in the final decree as the seventh defendant's wife was his deceased wife Donsina, who was the daughter of the second defendant and sister of the third, fourth, fiftd, and sixth defendants in that case. We are all

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agreed that the document before us is a deed of gift, whereby the donors, Sabo and his wife Nonno, gifted this land to their six children subject to certain conditions; that the reservations in favour of Sabo and of his wife Nonno are in effect a reservation of a life interest with a right of revocation, unto the survivor of them a life interest only. We are agreed also that the gift to the six donees was subject to a *fidei commissum*, and that there is sufficient evidence from which an acceptance by the donees may be inferred. But there appears to be a difference between us as to the nature and scope of the *fidei commissum*.

The donors by their deed gifted the property to their six children, and the words by which this *fidei commissum* is created are as follows:—

> "It is also directed that after the death of us both, our aforesaid six children shall be at liberty to own equally and peaceably possess for ever throughout their generations the property above mentioned, and that the above six children of ours or even their heirs may by leasing out possess the said property as specified above, and not sell, mortgage, or gift over the same nor make any other grant thereof."

The language is perhaps not as artistic as it might have been, but the meaning is, I think, clear. The condition upon which this gift was made and accepted is that the six children and their descendants shall hold and possess the property, and that neither they nor their descendants shall sell, mortgage, gift, or otherwise dispose of the property. The persons to benefit by the liberality are clearly designated; they are the six children and their generations. Each and all of them are laid under a prohibition against alienation of the property specified in the gift.

Throughout the property is dealt with as one whole, and the object of the donor's liberality is their six children and their descendants. The effect of the language is to create one *fidei commissum* over the property as a whole in favour of the six children and their descendants.

It was urged that the words "to own equally," which occur in the passage quoted earlier, indicate that this was not a gift of the whole land to the six children, but in effect separate gifts to each of the six children of a one-sixth share of the land, and upon this, as a foundation, counsel sought to base his contention that there are here six separate *fidei commissa* and not one *fidei commissum*.

The actual words of gift are these:—

> ". . . . therefore we with our hearty desire have gifted and set over unto our aforesaid six children, in terms of the agreement hereunder, the following property, to wit, ... "

Later follows the direction that on the death of both the donors, the six children "shall be at liberty to own equally and possess, &c."

This is a gift of the whole property to the six children jointly followed by a direction that they shall share equally. The deed is in Sinhalese, and the word rendered in the translation as " equally " is *ekkakarawe*. In the case of *Tillekeratne v. Silva* (*supra*) a similar argument to the one now under consideration was founded upon a somewhat stronger expression *ekkakera kotas wasayen*, *i.e.*, in equal shares. The words *kotas wasayen* in shares was, it was there contended, used in contradistinction to *poduwa*, which means " jointly " or " in common." Wendt J. found himself unable to accept the contention that these words implied that each child was to have a separate and divided one-sixth of the land. The Sinhalese words, he thought, no more implied a division than the English word " share."

The facts of this case are in all material respects similar to the facts of that case, except that the words *kotas wasayen* are not to be found in the deed.

The condition in the deed that on the death of both the donors their six children were " to own equally and possess peaceably " implies no more than the direction in *Tillekeratne v. Abeyesekere* (*supra*); it regulates the enjoyment of the land by the institutes.

I am unable to distinguish this case from that of *Tillekeratne v. Abeyesekere* (*supra*), and in this view, inasmuch as there are both institutes and substitutes in existence, the heirs of Guruwa have no legal claim to any share or interest.

Counsel sought to escape from the rule laid down by the Privy Council in that case by suggesting that it was only a particular instance of the rule that in construing a will the paramount consideration is the intention of the testator. This is a deed in the interpretation of which such considerations have no place. But there is nothing in the judgment of the Privy Council which shows that their decision was merely an attempt to give effect to the supposed intention of the testator. It proceeds upon the form of the bequest and the terms in which it is made. Their Lordships of the Privy Council had no difficulty in holding that it impresses the whole property with a single *fidei commissum*. That case has been understood as laying down the rule that where upon a construction of the document it appeared that such a single *fidei commissum* was created, it followed that so long as a single person was in existence who could show a title, either as an institute or a substitute, he took the property to the exclusion of all persons who did not belong to those classes.

It was then contended that the *jus accrescendi* applied only to *fidei commissa* created by will, and that it has no application in the case of *fidei commissa* created by deeds of gift, except in the case of donations *mortis causa*. The true meaning of the rule known as the *jus accrescendi*, the limits within which it operates, and generally the whole history of the law on this subject has been fully considered in the judgment of Bertram C.J. in the case of *Usoof v. Rahimath*

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Umma (*supra*). What he then said has been developed with special reference to the circumstances of this case in his judgment which I have had the advantage of reading.

Guruwa was not the ultimate beneficiary. He was himself fiduciary for those who belonged to the classes of persons designated as successive beneficiaries under this liberality. On his death his interests ceased and passed to those for whom he was fiduciary. There was nothing left which could pass to his intestate heirs. This, it seems to me, is decisive of the case.

I agree with my Lord that this appeal should be allowed, and the plaintiff's action dismissed. The appellant is entitled to costs both here and in the Court below.

JAYEWARDENE A.J.—

This is an intricate case involving difficult questions of law. It is a partition action for the partition of lot D of a land called Talgahahenawatta. A one-fourth share of this land admittedly belonged to one Sabo and his wife Nonno, *alias* Punchina, who were married in community of property. In the year 1875 Sabo and his wife Nonno executed a deed of gift in favour of their six children, viz., the first second, third, and fourth defendants, Baba Appu who died without issue, and Donsina who married R. Mathes, and about whose share all this trouble in the case has arisen. The gift contained a prohibition against alienation in favour of the descendants of the donees. Questions have been raised with regard to the effect of this deed of gift. I shall refer to it later. In the year 1905 one of the co-owners of the land instituted a partition suit—No 3,861—presumably admitting Sabo's right to a one-fourth share, and allotting it to Sabo's wife, Nonno and her children, on the basis of intestate succession.

The deed of gift—P 1—was not referred to. At this time two of the children were dead, viz., Baba Appu and Donsina. The defendants filed no answer, and so without reference to the deed of gift, a preliminary decree was entered declaring Nonno (second defendant) entitled to half of one-fourth or one-eighth, and the first, second, third, and fourth defendants in the present case, who were respectively the fifth, sixth, third and fourth defendants there, and the wife of the seventh defendant, who was Mathes, to the balance half of one-fourth. Mathes had at this time married another woman, the present plaintiff. Final decree was thereafter entered awarding jointly to the second defendant, third to the sixth defendants, and the wife of the seventh defendant in that case, as absolute owners, the lot D sought to be partitioned in the present action.

Nonno died in 1906, Donsina had died in 1888, leaving a son Guruwa who died in 1889. The plaintiff claims a share of the lot D either as the wife of Mathes, referred to in the decree, or as having inherited it from Mathes along with her minor children, the present fifth and sixth defendants. The first four defendants deny the plaintiff's right to any share, and say that the wife of the seventh

defendant Mathes, referred to in the decree, is Donsina, who was then dead, and not the plaintiff to whom he was then married. There is no doubt that the Court intended to refer to Donsina, and if the evidence and facts of this case—No. 3,861—can be referred to to explain the judgment, it seems quite clear that Donsina, and not the plaintiff, was allotted a share under the decree. But is it open to the defendants to do so ?

In my opinion, section 94 of the Evidence Ordinance stands in their way. Section 94 runs thus:—" When the language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts." The term " document " in this section includes a judgment or decree, for section 91 provides, *inter alia*, that " . . . . in all cases in which any matter required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms . . . . of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Now judgments and decrees must under sections 186 and 188 of the Civil Procedure Code be reduced to the form of a document, and " document " in section 94 includes a " document " required by law to be in writing. As I read section 94, it means this: That when a document deals with facts in existence, and the language used in the document describes them without ambiguity, evidence cannot be led to show that it was not meant to apply to those facts, but to something else. It embodies a well-known rule of the English law that " when the words of a document are free from ambiguity, and external circumstances do not create any doubt or difficulty as to the proper application of the words, the document is to be construed according to the plain common meaning of the words, and that in such cases extrinsic evidence for the purpose of explaining the document according to the supposed intention of the parties is inadmissible ": Amir Ali and Woodroffe on the *Law of Evidence in India*, section 94. This must be read in connection with what Page Wood, Vice-Chancellor, said in *Webb v. Byng* [1]:—

> " Of course, in interpreting any instrument which purports to deal with property, some extrinsic information is necessary, in order to make the words, which are but signs, fit the external things to which those signs are appropriate. In reality, external information is requisite in construing every instrument; but when any subject is thus discovered, which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop; you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator, and are not permitted to go any further."

[1] *(1855) 1 K & J 584 at 593.*

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Here the words " the wife of the seventh defendant " are plain and unambiguous. They apply accurately to existing facts, for Mathes had a wife at the time. External circumstances cannot create any doubt or difficulty, as a man can have only one wife. The words must be taken as referring to that wife. It is by a consideration of extrinsic circumstances that ambiguity is created by trying to give effect to the supposed intention of the Court. I also cannot see how section 98 can have any application here. It refers to ambiguities known to the law as " latent " ambiguities, that is, where the words, as they stand, are quite clear and intelligible, but it is shown that they can apply equally well to two or more persons or two or more things. In such cases parol evidence is admissible to show what is really meant. Thus in the present case, if the seventh defendant had been a Muhammadan married to more than one wife, evidence might be led to show which of these wives was intended. This does not contradict the document, but explains it. But in the case of monogamous people to attempt to prove that the word " wife " applied not to a wife then in existence, but to one who had died, would be to contradict the terms of the document. In applying the principle of *res judicata* a decree or judgment can be construed with reference to the pleadings, but that is on a point in which the judgment or decree is silent.

In my opinion, therefore, section 94 applies, and evidence of the pleadings, depositions, or judgment cannot be led to show that the wife of the seventh defendant referred to in this decree is not the plaintiff, who was his wife at the time, but the deceased Donsina. This may appear strange and puzzling to the lay mind, but such, in my opinion, is the law.

To allow the present plaintiff to benefit by a decree entered *per incuriam* would be to sanction an injustice, which should be averted if possible. It would be open to us, if the circumstances rendered it necessary, to amend the decree in case No. 3,861 in revision, and thus prevent the plaintiff getting a share of a land owing to the failure of the Court to express its intention clearly. But in the view I take of the plaintiff's right to succeed to the share of Donsina through her husband Mathes, rectification of the decree becomes unnecessary.

By the deed of gift of 1875—P 1—as I have already said, Sabo and his wife Nonno gifted several properties to their six children subject to certain reservations or conditions and a *fidei commissum* among the donees. The material part of this deed which is in Sinhalese runs as follows:—

" Whereas we, Weeramunda Sayakkarage Sabo and lawful wife Don Philippu Muhandiramage Punchina, both of Dewundara, in the Wellaboda pattu of Matara, do deem it fit and proper to set apart something separate unto our six children, viz., W. S. Baba Appu, Juan, Donsina, Christina, Sardiyel, and Juanis, all of the same village, for their welfare and advancement, and therefore we, with our

> hearty desire, have gifted and set over unto our aforesaid six children, in terms of the agreement appearing hereunder, the following property of the value of Rs. 1,497.50 which we are entitled to, to wit (here follow the names of several lands including the land in question here) . . . . so it is directed that we shall have the right to possess as we wish the above-mentioned property thus gifted and do our pleasure therewith during our lifetime, that after the death of any one of us the two persons, the survivor may become entitled to and possess as well as lease out (if necessary) the lands mentioned above, and not sell, mortgage, or gift over the same, nor make any other grant thereof, and it is also directed that 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 above mentioned, and that the above-named six children of ours and their heirs may by leasing out possess the said property as specified above, and not sell, mortgage, or gift over the same, nor make any other grant thereof. "

The effect of this deed was to make an immediate gift of his property to the six donees. But the donors reserved to themselves the right to possess and do whatever they pleased with the properties during their lifetime, on the death of one of them the survivor was to be entitled to possess and enjoy the same without the right to mortgage or alienate, and after the death of both the donors, the donees were to be at liberty " to own in equal shares " and possess them for ever from generation to generation without mortgaging or alienating the same. Whether the properties or any of them could have been sold or otherwise disposed of during the lifetime of both the donors need not be considered now, as none of them has been alienated. The survivor, in my opinion, got only a life interest, and this is the right the wife, who survived the husband, claimed for herself under the deed of gift in D. C. Matara, 1,245 (P 5, paragraph v.) The donees received the property subject to a *fidei commissum* passing from generation to generation or descendant to descendant (*Ibanu Agen v. Abeyasekara*,[1] *Weerasekera v. Carlina* [2]), so far as the law would allow. (*Selembram v. Perumal*,[3] *Voet 36,1,33.*) Donsina, one of the fiduciary donees, died as already stated in 1888, leaving a son Guruwa, who succeeded to her rights by virtue of the deed of gift. He too died in the following year, 1889. Nonno died in 1906. Mathes, the husband and father, survived both. Mathes then married the plaintiff, and died about nine years ago, leaving as his heirs his widow, the present plaintiff, and two children, the fifth and sixth defendnts. The plaintiff contends that on the death of Guruwa the *fidei commissum* attaching to the one-sixth donated to Donsina lapsed, and that this one-sixth devolved on the

[1] *(1903) 6 N. L. R. 344.* [2] *(1922) 16 N. L. R. 1.*

[3] *(1913) 16 N. L. R. 6.*

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heir *ab intestato* of Guruwa, viz., his father Mathes, and on the death of Mathes it devolved on his heirs, the plaintiff and the fifth and sixth defendants. The contesting defendants, on the other hand, say that on the death of Guruwa without descendants, his one-sixth passed to the other beneficiaries under the deed of gift by virtue of the *jus accrescendi*. This raises very difficult and important questions. The first question to be considered is whether the *jus accrescendi* has any application to a case of this kind where the *fidei commissum* is created by an act *inter vivos*, such as a deed of gift. The history and evolution of the law of *jus accrescendi* have been traced by Bertram C.J. in *Usoof v. Rahimath* (*supra*), and I need not repeat them here. There is, in my opinion, overwhelming authority in Roman-Dutch law in support of the view that the *jus accrescendi* has no place in contracts, and a deed of gift is in our law a contract. *Voet* (*39,5,14*) in his book on *Donations*, says (*Krause's Translation. p. 34, section xiv.*):—

> " If a donation either of a particular piece of property or of all property be made to several persons together, and one of them does not accept the gift, his share by no means accrues to the others, but it rather remains outside the operation of the transaction of the donation ; because such a donee is neither an heir nor a legatee ; and one reads nowhere that this right of accrual (*jus accrescendi*) has been received in contracts or other transactions *inter vivos*, but it is found to have been applied by Justinian (*in lex unica*, sect. *hæc acutem 14, c, 6, 51*) only to donations *mortis causa*, which have been assimilated in almost all respects to legacies. "

In his title on " *Donations mortis causa* " *Voet* (*39, 6, 4*) points out that one of the characteristics common to legacies and donations *mortis causa* is " the right of accrual in the case of a donation to several, provided the requisites elsewhere pointed out in the case of legacies occur. " Again, in *bk, 7, 2, 1,* where he is treating of the " *jus accrescendi* in usufruct " he says: " If therefore the usufruct of the same thing be left to two persons by last will (not so if by contract) on the failure of one to take his portion by a special law not admitted in other servitudes accrues to the other co-usufructuary. " Dekker in his notes to chapter XXX. of *Van Leuwen's Commentaries on the Roman-Dutch Law*, which deals with " Donations and Gifts, " speaking of the differences between donations *inter vivos* and donations *mortis causa*, says :—" Whence it follows *per se* that the *jus accrescendi* and the *lex Falcidia* must likewise be observed as regards donations *mortis causa*." Then after referring to various other points of difference, he adds " donations *inter vivos* are transmitted to heirs, whereas donations *morties causa* are determined by the death of the donee before the donor, " citing " *Holl. Consultations, vol. 2, Consultation 39.* " This note by Dekker is interesting, for in a note to *Van Leuwen's Commentaries on the Roman-Dutch Law* (*4,1,6,8*)

he has " combatted in language of extraordinary vigour " the rules laid down by Voet as to the " *conjunctio* " which gives rise to the application of the *jus accrescendi*. Dekker must have known something of what he was speaking about.

Perez (*VI. 51, 9*) is of the same opinion:—

" *Nam in iis dumtaxat quæ ultima voluntate relinquntur locum habet, non item in contractibus, qui iudicantur secundum formam, qua sunt initi.*" In all the Roman and Roman-Dutch law writers, the *jus accrescendi* is referred to in connection with wills, testators, heirs, and legatees, and donees under a donation *mortis causa* who are placed in the same position as legatees under a will.

Burge (*vol. 2, p. 144*) adopts the law as stated by Voet: " If a donation is made to two, of the whole of the donor's property, or of a particular subject, and one of them has not accepted it, his part does not belong to his co-donee by the *jus accrescendi*, but is considered not to have been given, and therefore to remain with the donor." *Maasdorp* (*vol. 3, p. 95*) and *Nathan* (*vol. 3, section 1,087*) takes the same view, and Nathan adds " the right of accrual (*jus accrescendi*) does not apply where several persons are donees."

Voet dealing with the transmission of rights by fidei commissaries who predecease the fiduciary or die before the fulfilment of the condition subject to which the property is to pass to them (*Voet 36, 1, 67*) draws a distinction between *fidei commissa* created by will and those created by acts *inter vivos*.

Again in his book on *Donations* (*39, 5, 4*) he says: "The consequence of this is that such a gift (*inter vivos*) . . . . is transmitted to the heirs of the donee, if it should happen that the donee dies before the donor, and thus before the day added to the donation, in accordance with the nature of other transactions *inter vivos;* since every one is presumed to have contracted, and to have made provision, not only for himself, but also for his heirs" (*Krause, p. 13*).

These propositions negative the possibility of the *jus accrescendi* applying in the case of acts *inter vivos*.

The authorities in support of the view that the *jus accrescendi* has no application in the case of donations is extremely weighty, and it would necessarily be so for the right of accrual is based on the probable wish of the testator and his presumed affection for the legatees (*Voet 7, 2, 9*), considerations which can have no place in the construction of contracts *inter vivos*. In Ceylon until the decision of the case of *Carry v. Carry* (*supra*), in the year 1917, there has been only one case in which the *jus accrescendi* has been applied as between fidei commissary donees (*Babahamy v. Marcinahamy.*[1]) But in that case this question was not raised, and its applicability was taken for granted. In South Africa, too, where it has been applied in numerous cases in which wills were contrued (see *Juta on Wills, p. 126*) in only one case was an attempt made to apply it in the case of a donation, but the attempt proved unsuccessful. See note in *Krause's Translation of " Donations " 4, p. 11.*

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In *Carry v. Carry* (*supra*), it was contended that the principle of *jus accrescendi* could not apply to *fidei commissa* created by acts *inter vivos*, but that it applied only to *fidei commissa* created by will. The passage from *Voet 39, 5, 14* was cited, but it was said that it had no bearing on the point in issue. Wood Renton C.J. said:—"The passage in *Voet 39, 5, 14* cited for the appellants does not appear to me to be of much weight, for as my brother de Sampayo pointed out, Voet is there discussing the effect of the non-acceptance of the gift and not the rules of succession," and de Sampayo J. said:—"I do not think that *Voet 39, 5, 14* which was cited for this proposition has any particular bearing on the present question, which appears rather to turn upon the nature of the *fidei commissum* created by the deed of gift." He then proceeded to hold that one and the same *fidei commissum* had been impressed on the property as a whole, and that as long as any of the *fidei commissarii* existed at the death of the fiduciary, no part of the *fidei commissum* would have failed, but the entire property would go to the survivors. He relied upon the Privy Council judgment in *Tillekeratne v. Abeyesekere* (*supra*), where the construction of a will was under consideration, and in regard to that case he observed "that decision does not turn on the fact that the *fidei commissum* was created by will and not by deed *inter vivos*, but lays down a rule of construction which is applicable to all fidei commissary dispositions, whatever the form of instrument containing this may be."

The principle laid down here was followed in *Ayamperumal v. Menan*,[1] although Shaw J. "felt considerable doubt upon the second point involved in this case and of the application of the rule of construction laid down in *Tillekeratne v. Abeyesekere* (*supra*) to *fidei commissa* created otherwise than by will." But he did not feel justified in differing from the ruling in *Carry's case* (*supra*). Now, in my humble opinion, the reason given in *Carry's case* for applying the principles of the *jus accrescendi* to instruments *inter vivos* are not satisfactory.

The law as laid down by *Voet* in *39, 5, 14* cannot be disregarded on the ground that he was there dealing with a case of the non-acceptance of a gift. Voet, as I have pointed out above, insists on the difference in question again and again, and he gives his reasons for his opinion, and what we have to consider is not the particular instance to which the rule was applied, but the principle on which it is based. The principle is that the *jus accrescendi* has no place in contracts or acts *inter vivos*. In another place in the same book and title, section 4, he speaks of the donees transmitting their rights to their heirs, if they predecease the donor, for the same reason. If this principle is accepted as sound, then the *jus accrescendi* is inapplicable to acts *inter vivos* not only at the acceptance stage of a deed of gift, but also at the subsequent stages, that is in the succession to the property gifted, &c.

[1] *(1917) 4 C. W. R. 182.*

As regards the reason given for applying the principle laid down in *Tillekeratne v. Abeyesekere* (*supra*) in the case of a deed of gift, it cannot be said that the Privy Council was laying down a principle applicable generally to all cases whether the instrument was a deed of gift or a will. It was then construing a will, and in the construction of a will the Court is entitled to take into consideration the intention of the testator though it is not expressed, but this cannot be done in the case of a contract *inter vivos*. When we bear in mind this fundamental distinction, it becomes clear that rules laid down for construing a will cannot be applied to the construction of a deed of gift.

Opinions of Judges and the judgments they deliver must be read in the light of and in relation to the questions they have to decide.

" There are two observations of a general character which I wish to make " said Lord Halsbury L.C. in *Quinn v. Leathem*,[1] " and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

It is, therefore, not possible to say that the principle laid down by the Privy Council in construing a will can be applied to the interpretation of a deed of gift. where the principles for construing the two classes of instruments are not identical.

In the last case on the point (*Usoof v. Rahimath* (*supra*)), this distinction was again urged, and the question was fully discussed, but Bertram C.J., after a critical survey of the whole field of controversy, said:—

> " In view of this case (*Sande's Dec. Fris. IV.. 5, def. 19*) and the local cases in which an accrual has been held to be intended in the case of *fidei commissa inter vivos* (*Carry v. Carry* (*supra*), *Sandenam v. Iyamperumal*,[2] and *Babahamy v. Marcinahamy* (*supra*) which an examination of the record shows to be a case of this nature), I prefer to reserve my opinion on the question, whether so far as relates to the *jus accrescendi*, there is any substantial difference between testamentary *fidei commissa* and *fidei commissa* constituted by instrument *inter vivos*. The argument, in my opinon, could not, in any case, be put higher than this: that in an instrument of the latter nature an intention in favour of an accrual would not be presumed merely from the fact of the conjunction of several beneficiaries in the same liberality, though such an intention in an appropriate case might be inferred."

[1] (*1901*) *A. C. 495 at p. 506.*

[2] (*1916*) *3 C. W. R. 59.*

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And Shaw J. said:—

> "In *Carry v. Cary* ", (*supra*) and *Ayasuperumal v. Meenan*,[1] this Court has 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."

The case of *Carry v. Carry* (*supra*) was decided not on the ground that the donor intended by his words to create the right of accrual among the co-donees, but on the ground that the same *fidei commissum* was impressed on the property as a whole, and that as long as any of the *fidei commissarii* existed at the death of the donor, no part of the *fidei commissum* would have failed, but the entire property would go to the survivors.

But the principle laid down by Shaw J. in *Usoof v. Rahimath* (*supra*), that the *jus accrescendi* may apply to deeds of gift when the language of the donor expresses such an intention is unexceptionable, and the observation of the learned Chief Justice, when he said that in the case of a deed of gift " an intention in favour of an accrual would not be presumed merely from the fact of the conjunction of several beneficiaries in the same liberality " practically amounts to the same thing and qualifies to a very great extent the law as laid down in *Tillekeratne v. Abeyesekere* (*supra*) and *Carry v. Carry* (*supra*).

Therefore, according to *Usoof v. Rahimath* (*supra*) the *jus accrescendi* arises from an expression of intention to be found in the language used, and not from a mere " conjunction of beneficiaries " in respect of the same land as under the Roman-Dutch law.

But is it possible to get over the effect of the rules based on the conjunction of persons, for inferences as to intention to induce the right of accrual arise from a conjunction of persons, unless there is an express " shifting clause " in the document ? In my opinion, unless the intention of the testator or donor is to be presumed from the rules derived from the conjunction of words, there would be no words on which the shifting of the rights from one legatee or donee to another can be justified. The intention of the donor to be presumed from the conjunction of words and things would compel us to read into the deed of gift the words: " If one of the donees dies without descendants or heirs, his share should go to his co-donees. "

Whatever justification there may be for adding these words for the purpose of giving effect to the presumed or probable intention of a testator, I can find no justification for reading them into an act

[1] *(1917) 4 C. W. R. 182.*

inter vivos especially in a case like the present where the terms were the result of an agreement between the parties as expressly stated in the deed of gift. In refusing to read into a will the condition *si sine liberis*, in the case of a substitution which was direct and not fidei commissary, Lord de Villiers in his judgment before the Privy Council in *Galliers v. Rycroft* [1] said:—" To read into a will words which the testator has not used, to presume an intention which the testator has not expressed, can only be justified by a positive rule of construction having the force of law; " and in *Ahamadu Lebbe v. Sularigamma* [2] this Court (Shaw and de Sampayo JJ.) refused to read such a condition into a deed *inter vivos*.

De Sampayo J. said :—

" *Voet 36, 1, 17* explains the origin of the rule as follows:—' But often as this condition *si sine liberis* is expressly added, it is not infrequently implied in accordance with the interpretation prompted by feelings of family affection. Such is the case where the father or grandfather charges the son or grandson, whom he has appointed his heir and who is childless, to restore the inheritance to a third person. The said heir is not held to be bound by the testator's wishes to make restitution, unless he die without leaving children, considering that it is not very likely that the father would have imposed such a charge, if he had contemplated the case of there being grandchildren, or would have given the preference to the succession of others' descendants to the exclusion of his own.', (*Macgregor's Trans. p. 40.*) Commentators also deal with the subject on the same footing. See *Burge, vol. 4 (new edition), p. 766; Morice, English and Roman-Dutch Law, p. 333.* Judicial decisions do not appear to have extended the principle. The case of *Galliers v. Rycroft (supra)*, which collates all the authorities, shows that the cases in which the implied condition has been allowed are concerned with wills. It may be added that there is less scope in the case of deed for the rule of construction, which seeks to give effect to the presumed intention of a settler of property. A deed is a much more formal document than a will, and it may well be taken to contain the entire intention of the donor. It deals with specific property and not with the whole inheritance, and in disposing of a portion of his estate during life, a person need not be supposed to have thought of other persons as the objects of his benevolence than those whom he has expressly named or designated. "

The rule of *jus accrescendi* was applied in the Roman-Dutch law for the same reasons, " as being in accordance with the probable wish of the testator and his affection for the legatees " (*Voet 7, 2, 9*). The

[1] *(1891) A. C. 130 ; 3 Bal. 74.*

[2] *(1916) 2. C. W. R. 208.*

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reason given by de Sampayo J. apply with peculiar aptness to the present case, as there is no " positive rule of construction having the force of law " to compel us to apply the *jus accrescendi* to acts *inter vivos*.

There is, however, to be found in *Sande's Collection of Frisian Decisions* a case which strikes a contrary note : *Broer Gosses v. Gerbrandt Hiddes, Lib. 4, tit. 5, def. 19*,[1] in which it is laid down that the rule which obtains in *fidei commissa* created by wills and in legacies should be observed in the case of *fidei commissa* created by contract. Voet notes this decision in his *bk. 36, 1, 67* without comment, and Bertram C.J. has referred to it in his judgment in *Usoof v. Rahimath* (*supra*). In that case there was a division of the paternal and maternal property among the brothers and sisters by which certain of the brothers were given particular mansions. One of the brothers died without issue, and the other brothers and sisters entered into an agreement that if one or other of the brothers should die without male issue, the remaining brother or brothers should succeed to both the mansions, and if all the brothers should die without lawful (male) issue, the mansions should devolve equally on their lawful daughters and sisters. All the brothers died without male issue, but two of them left daughters. All the sisters had predeceased the brothers, but one of them left daughters. The Court held that the sister who died leaving children did not transmit any right to her heirs, and that the children of the brothers took the entire property by virtue of the *jus accrescendi*. The Dutch authority relied on in Sande in support of this view in *Peregrinus* on *Fidei Commissa*.

But in dealing with Sande we have to bear in mind what Wessel says of his works in his *History of the Roman-Dutch Law*: " It must be remembered," he says: " in dealing with Sande that the Frisians adhered more closely to the Roman law than the Hollanders, though where both follow the Roman law, the writings of Sande are admitted to be of high authority."

I have not been able to refer to Peregrinus' work which is not available locally, and Wessel does not even refer to him, although he gives sketches of all the writers of any note on the Roman-Dutch law. In his headnote to the case Sande says:—" An agreement as to succession to an inheritance which is similar to a *fidei commissum* is not legal, although generally tolerated by the jurists, if it relates not to the whole estate or a part thereof, but to a particular thing. This opinion was approved by the Court. Under this if the person called to the *inheritance* conditionally dies before the fulfilment of the condition, he transmits nothing to the heir."

It is to be noted that the headnote avoids referring to the agreement in question as a donation or a contract *inter vivos*, but speaks of it as an agreement as to " succession to an inheritance, " and of " the person called to the inheritance conditionally, " it may be, that where the contract *inter vivos* was an agreement of such a nature, the

[1] *De Vos' Translation of Frisian Decisions, p. 83.*

same principles as in fidei commissary succession under a testament applied. Voet notes a similar distinction in *bk. 36, 1, 67*. The key to the decision may be found in the distinction suggested. But even if we regard the decision as laying down that in contracts *inter vivos* the *jus accrescendi* applies, it is in direct conflict with the law as laid down by Voet, and the other writers I have mentioned.

Voet does not regard the dissent of Sande seriously as he repeats the same principle *bk. 39, 1, 4*. In this paragraph he also takes occasion to point out that under the law of Holland a donation made by ante-nuptial contract by a third person in favour of a bride or bridegroom is irrevocable, and their rights pass to the heir, if the donees die before the condition is fulfilled, but that in Friesland it was otherwise, and that such an ante-nuptial contract can be entirely altered by testament. (*Sande Decis. Fris., bk. 3, tit. 2, def. 7.*) This is the state of the law on the subject.

Sitting as we are as a Bench of three Judges, we are not bound by the decisions I have referred to, and we are entitled to review them. But it is with the greatest diffidence that I venture to express an opinion contrary to that of so many eminent Judges, but I feel the weight of the original authorities, and in my humble opinion, the law as laid down by Voet ought to be followed, that is, that in the case of donations which are contracts *inter vivos*, the rule of *jus accrescendi* has no application at the stage of acceptance or at any subsequent stage.

The rule of law laid down by Voet (*bk. 36, 1, 67*) that in the case of a *fidei commissum* created by deed *inter vivos* if the fidei commissary dies before the fiduciary, the former transmits his expectations under the deed to his heirs, was acted upon by a Bench of three Judges of this Court in *Mohamad Bhai v. Silva* (*supra*). This decision is binding on us, and must be followed if the principle laid down there applies to this case. But neither that case nor the passage from Voet on which it is based can have any direct application *to the facts* of the present case for Guruwa was a fiduciary and not a fidei commissary. That decision and Voet's statement of the law are only useful here as negativing the applicability of the rule of *jus accrescendi* in contracts *inter vivos*. They can only be used for that purpose. Voet speaks of " fidei commissary successors " and in *Mohamad Bhai v. Silva* (*supra*) the Court was discussing the devolution of a fidei commissary's rights.

However, I may remark, that I do not know of any authority for saying that the " successors " referred to in Voet are the ultimate beneficiaries or successors. The reference cannot be to the ultimate beneficiaries, for they have this right when the *fidei commissum* comes to an end, and they become absolute owners of the property under the instrument which created the *fidei commissum*. To illustrate the position: Suppose A gives a property to B subject to a *fidei commissum* in favour of his children, grandchildren, and their descendants. B has a child C, who has a child D. D dies in the lifetime of C, leaving children.

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If the *fidei commissum* was created by an act *inter vivos*, D's children would succeed to the fidei commissary property, but they would be bound by the terms of the *fidei commissum* and would have to hand over the property to their children. The same thing would happen if at any subsequent stage a similar situation arose unless the fidei commissaries are the ultimate beneficiaries, when their heirs would take the property absolutely (*Voet 36, 1, 33*). But in the case of a will D being dead when the time arrived for him to succeed, the property would vest in C absolutely and pass to his heirs *ab intestato*, unless a contrary intention appears in the will.

The children of D would not succeed to the property. According to *Vander Linden* (*bk. 1, chap. 9, sec. 8*), a *fidei commissum* ends " when the person in expectancy dies before the heir (fiduciary) or becomes incapable or disqualified to take."

Lord de Villiers has also stated this rule in *De Geest's Executor v. De Geest's Executors*, given by Macgregor as a note to *Voet 36, 1, 67* thus:—" If Eugenius stood in the position of a fiduciary legatee and not that of a mere usufructuary, he would, on the failure of fidei commissary legatees, at his death transmit the full property to his heirs." This is the distinction which Voet emphasizes in section 67. It has therefore no application to the facts in dispute here. Guruwa was a fiduciary. His right was not a mere usufruct. He had the *plena proprietas cum onere fidei commissi.* " But Roman-Dutch law the *fiduciarius* was a true owner, he had a real though burdened right of ownership " *per* Lascelles C.J. in *Baby Nona v. Silva.*[1] This right in certain circumstances ripens into full ownership, for instance, if the fidei commissary substitute predeceases him, the ownership becomes absolute.

That is the right which every fiduciary has. In this case on the death of Donsina, her son Guruwa became a fiduciary with a vested right in the property, but subject to a liability to hand it over to his descendants, if any such existed at his death. His right was not merely a *spes successionis*. That was the nature of his right in the lifetime of Donsina. If he had predeceased Donsina without descendants, Donsina would have become absolutely entitled to her share (if there was no *jus accrescendi*) which would have devolved on her heirs *ab intestato*, but if he had left children, then those children would have succeeded to her rights under the *fidei commissum*, as this is a deed of gift and not a will. Thus Guruwa being vested with the ownership as fiduciary, on his death without descendants, he would transmit his rights to his heirs. The distinction between *fidei commissum* created by wills and those created by acts *inter vivos* with regard to succession was recognized and acted upon in *Mohamad Bhai v. Silva* (*supra*). It is binding on us. That decision clearly negatives the applicability of the *jus accrescendi* to transactions *inter vivos*. I would accordingly hold that on the death of Guruwa

[1] (*1906*) *9 N. L. R. 251.*

his share passed to his heir who was his father, Mathes, and on the death of Mathes, the plaintiff and the fifth and sixth defendants inherited that share.

Mr. Samarawickreme raised another point, he contended that, assuming that the *jus accrescendi* applied in this case, as the share of Donsina had vested in her and there had been a separation of interests: (*Voet 7, 2, 1*), *Carron v. Manual*,[1] and *Mijiet's Executors v. Ava*,[2] a South African case, the *jus accrescendi* would no longer operate.

But in this case Nonno, who had a life interest, survived Donsina and Guruwa, and the latter never became entitled to possess their share, and consequently there has been no separation of interests as in the South African case.

Further we are bound by the judgment of the Privy Council in *Tillekeratne v. Abeysekere* (*supra*), where although there had been a separation of interests and enjoyment of the property for two generations, the *jus accrescendi* was held to operate.

Then we come to the question, does the deed of gift indicate an intention on the part of the donors that the right of accrual should take place as between the co-donees and their descendants. In *Usoof v. Rahimath* (*supra*), the principle on which an intention in favour of accrual should be presumed was stated. Bertram C.J. thought that in the case of a deed of gift such an intention should not be presumed merely from the fact of the conjunction of several beneficiaries in the same liberality." This is a reference to dispositions *re conjuncti* and *re et verbis conjuncti* of the Roman law (*Digest 50, 16, 142, 32, 89*) and adopted by some Roman-Dutch jurists *Voet* (*36, 1, 71*) among others and followed in South Africa (*Stenkamps v. De Villiers* [3]) which were considered to necessarily induce the *jus accrescendi* between the *conjuncti*.

Shaw J. said that a right of accrual may exist in donations or wills " when the language of the donor or testator expresses such an intention." But the Privy Council drew the presumption that the operation of the *jus accrescendi* was intended not from any express words used by the testator, but from the fact that they had been joined *re et verbis*. It said " according to the terms of the will the entire moiety settled upon grandchildren is made the subject of one and the same *fidei commissum*. The bequest is not in the form of a disposition of a 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 the substitution of the descendants."

The will did not contain the words " in equal shares " or " equally," and the Privy Council emphasized the fact that the gift was given to the three jointly, that is *re et verbis conjuncti*, and from such a conjunction without more, the law infers that the testator intended that the right of accrual should take place.

[1] *(1914) 17 N. L. R. 409.* [2] *Jones' and Ingram's Leading Cases, 157.*
[3] *Jones' and Ingram's Leading Cases, 154.*

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In the deed of gift under consideration does the language used by the donors express such an intention ?

In the Roman-Dutch law great latitude was permitted in the interpretation of wills, and the Court gave effect to what it considered to be the *probable* wish of the testator, it considered his status and that of the legatees, his affection for his family, and various other extrinsic circumstances, so much so, that a cynic was led to remark that the dispositions of the dead depend on the will of the living.

Can such considerations influence us in the interpretation of a deed of gift or even of a will at the present day ? I think not. The deed of 1875 proceeded upon an agreement between the parties and the deed was drawn up in terms of the agreement. It was not a joint gift to the several donees, as the donees were to take the property and own in *equal shares.* These words according to some eminent jurists negative any intention on the part of the testator to introduce the *jus accrescendi.* What then are the words in the deed which would make us read into it the words: " If any of the donees or their descendants die without issue, his share should go to the other donees or their descendants." I can find none. This was evidently, not one of the terms of the agreement between the parties, if it had been, it would have been so stated in the deed. To insert it now would be to add a new term to the contract between the parties and to make a new agreement for them. Does the fact that the property is to pass from generation to generation necessarily imply that if the line of descent of any of the donees was exhausted before the expiry of the *fidei commissum*, the share of that donee was to accrue to the other donees or their descendants. I cannot find any such implication in the words of this gift. The deed of gift must be read as a whole, and reading it as a whole, and as an act *inter vivos*, I cannot gather any intention expressed or implied that the rule of *jus accrescendi* should apply, and there is " no positive rule of construction having the force of law " to compel me to presume the intention attributed to the donors by the contesting defendants.

I would, therefore, hold that, even if the rule of *jus accrescendi* applied to deeds of gift, there is nothing in this deed of gift to bring this rule into operation.

I would affirm the decree passed by the District Court declaring the plaintiff entitled to a one-twelfth share and the fifth and sixth defendants to a one-twelfth share jointly, and dismiss this appeal, with costs.

Appeal allowed.