Present : Bertram A.C.J. and Shaw J.

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USOOF *v.* RAHIMATH *et al.*

29—D. C. Colombo, 46,977.

Jus accrescendi—Fidei commissum *created by deed* inter vivos—*Accrual with respect to interests after the death of the fiduciary* — Fidei commissum *from generation to generation*— "*Share and share alike*"—*Ordinance No. 21 of 1844, s. 20—Prohibition against sale, alienation, or mortgage — Is alienation by last will contrary to prohibition ?—Rule* ejusdem generis—Res judicata—*Privies.*

By deed of July 22, 1871, Lebbe Marikar gifted the property in question to his daughter Candoo, subject to the condition that she "shall not sell, alienate, mortgage, or encumber the same, but shall possess the same during her life, and that after her death the same shall devolve on her children share and share alike, or if there be but one child, on such child, and thereafter on the child or children of such her child or children, and so from generation to generation under the *fidei commissum* law of inheritance.". The deed further provided that in the event of Candoo dying without leaving any issue surviving her, the property shall go to her heirs, and that Candoo, her child or children, or the person or persons lawfully claiming under the deed, may transfer to her, his, or their "lawful heir or heirs" under the same condition. Candoo died leaving her surviving four children: Rahimath, Abdul, Ahamad, and Mariam. The last two children died intestate and issueless. The plaintiff, who is one of the children of Rahimath, instituted a partition action claiming one-sixth share, and allotted the other shares to the other children of Rahimath and to the children of Abdul. The appellant (husband of Candoo) intervened and claimed the whole land: one-half of the shares of Ahamad and Mariam by intestate succession, and the rest by virtue of a conveyance from Rahimath and by a last will of Abdul.

Held, (1) That the appellant inherited no share by intestate succession from Ahamad and Mariam, and that their shares accrued to the benefit of Abdul and Rahimath under the bond of *fidei commissum.*

(2) The restriction on alienation contained in the deed extended to alienation by will as well, and consequently the appellant gained no title under Abdul Cader's will.

(3) The decision in an action between Abdul and the appellant, that the appellant was entitled by inheritance to a portion of the shares of Ahamad and Mariam did not estop the children of Abdul from denying the appellant's title, as they do not take by inheritance from Abdul, but under a separate title, the deed of 1871.

BERTRAM A.C.J.—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 commissum* and *fidei commissa* constituted by instrument *inter vivos*. The argument 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

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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.

SHAW J.—A right of accrual may exist in either case, when the language of the donor or testator expresses such an intention..... In the present case the intention of the donor was to benefit, not merely the children of Candoo, but the children of such children from generation to generation, and to establish one single *fidei commissum* in favour of Candoo's descendants, with rights of accrual, and not four separate *fidei commissa* in favour of the children.

BERTRAM A.C.J.—The *jus accrescendi* applies only where but for its application there would be a lapse. It has no application where the objects of the donor's bounty are not designated individuals, but successive classes of persons to be ascertained at successive stages. In such a case the question is a question of construction only, unencumbered by presumptions.

The words "share and share alike" in a *fidei commissum* do not of themselves import that each share is to constitute a separate *fidei commissum.*

The distinction between "*re coniuncti,*" "*re et verbis coniuncti,*" and "*verbis tantum coniuncti*" is an obsolete technicality.

THE facts are set out in the judgment of Shaw J. as follows:—

By deed dated July 22, 1871, one I. L. A. Lebbe Marikar, the owner of the property the subject-matter of the present suit, gifted it to his daughter, Candoo Umma, as fiduciary, subject to certain conditions and restrictions. These are as follows: "That the said Candoo Umma shall not sell, alienate, mortgage, or encumber the same or any part thereof, or the issues, rents, and profits thereof, but shall possess and enjoy the same during her natural life, and that after her death the same shall devolve on her children share and share alike, or if there be but one child, on such child, and thereafter on the child or children of such her child or children, and so from generation to generation under the *fidei commissum* law of inheritance."

The deed further provides that in the event of Candoo Umma dying without leaving any issue surviving her, the property shall go to her heirs, and that Candoo Umma, her child or children, or the person or persons lawfully claiming under the deed, may transfer her, his, or their interest in the property by way of gift or dowry to her, his, or their "lawful heir or heirs" under the same conditions.

Candoo Umma died leaving four children: Rahimath Umma, the first defendant; Abdul Cader, who has since died leaving three children, the plaintiff and the second and third defendants; and Ahamad and Mariam, who have both died intestate and childless.

The plaintiff in the present suit claimed a sale under the provisions of the Partition Ordinance, allotting one-sixth each to himself and to the second and third defendants and half to the first defendant.

The second added defendant, who was the husband of Candoo Umma and the father of her four children, has intervened in the suit, and claims to be entitled to the whole property. He claims one-half of the shares of Ahamad and Mariam under the law of inheritance, the share of Rahimath Umma under a conveyance from her dated June 25, 1910, the share of Abdul Cader as sole heir under the will of Abdul Cader dated January 10, 1916, and the remaining half shares of Ahamad and Mariam, which he says were inherited by Rahimath Umma and Abdul Cader under the law of inheritance, under the conveyance from Rahimath Umma and the will of Abdul Cader above referred to.

The District Judge had decided against his claim, and has decreed the shares according to the plaintiffs' claim, giving to the second added defendant Rahimath Umma's life interest only.

The second added defendant appeals from this decision.

A. St. V. Jayawardene (with him *Tygarajah*), for the appellant.

Bawa, K.C. (with him *Canakaratne*), for first and second plaintiffs, respondents.

E. W. Jayawardene (with him *J. S. Jayawardene*), for third, fourth, and fifth defendants, respondents.

Cur. adv. vult.

June 14, 1918. BERTRAM A.C.J.—

This case originates out of a *fidei commissum* created by an instrument *inter vivos* by one A. L. Marikar, who by deed of gift conferred certain valuable property in Chatham street to his daughter Candoo Umma, subject to the condition that she should not sell, alienate, mortgage, or encumber the same....., " but shall possess and enjoy the same during her natural life, and that after her death the same shall devolve on her children share and share alike, or if there be but one child, on such child, and thereafter on the child or children of such or children, and so on from generation to generation under the *fidei commissum* law of inheritance."

Candoo Umma was married to Mohamadu Usoof, the second added defendant. She had four children: Abdul Cader, Rahimath Umma, Ahamad, and Mariam, the last two of whom died in her lifetime.

The real question in issue in this action is a claim made by Mohamadu Usoof, the husband of Candoo Umma. That claim is part of a persistent and long-continued attempt on the part of Mohamadu Usoof to secure for himself, at the expense of his children and grandchildren, the whole benefit of the liberality which A. L. Marikar desired to confer upon those children and grandchildren as the descendants of Candoo Umma. In pursuance of this attempt in 1895, on the death of Candoo Umma, he laid claim to half the property, which was the subject of the *fidei commissum*, as having devolved upon him as the natural heir of Ahamad and Mariam,

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and as being no longer subject to that in favour of his children and the children of those children. At that time the law on the subject of dispositions of this character had not been elucidated. The claim was unsuccessfully contested by his son Abdul Cader, and by the judgment in that case Mohamadu Usoof was declared entitled to the interest which he claimed.

Rahimath Umma next, in 1910 (in pursuance of a family arrangement), executed a deed, by which, without any reference to the fidei commissary rights of her children, she purported to convey one undivided fourth of the *fidei commissum* property to her brother. Abdul Cader, subject to a life interest in Mohamadu Usoof, and on the death of Abdul Cader in 1916 it was found that by his will (possibly in pursuance of the same or a similar arrangement) he had left the whole of his property to his father, Mohamadu Usoof. Mohamadu Usoof now claims that, having already acquired the shares of Ahamad and Mariam by inheritance, he acquired the shares of Rahimath Umma and Abdul Cader under Abdul Cader's will discharged altogether from the *fidei commissum*. Even assuming that Abdul Cader by will could displace his own children, it is not explained on what possible ground the children of Rahimath Umma are also supposed to be displaced from their rights. If, however, the contentions of Mohamadu Usoof are to be accepted, the whole interest in the property is now vested in him, and the children of Abdul Cader and Rahimath Umma are excluded from the benefit of A. L. Marikar's liberality.

The case falls under two heads:—

(*a*) Upon the deaths of Ahamad and Mariam, did half the property, which was subject to the *fidei commissum*, devolve upon Mohamadu Usoof free from any restriction?

(*b*) Have the judgment recovered against Abdul Cader in 1895, the agreement with Rahimath Umma in 1910, and the will of Abdul Cader in 1916 any effect as against the grandchildren of Candoo Umma?

The first of these questions is obviously a question of the construction of the *fidei commissum*. It is a question which has been discussed in a series of cases referred to in the judgment of my brother Shaw, and enumerated at the end of my judgment,[1] and

[1] Previous cases on the construction of *fidei commissa* :—

Tillekeratne v. Abeyesekere, (1897) 2 N. L. R. 313.
Jayawardene v. Jayawardene, (1905) 8 N. L. R. 283.
Tillekeratne v. Silva, (1907) 10 N. L. R. 214.
Jobsz v. Jobsz, (1907) 3 A. C. R. 139.
Babahamy v. Marcinahamy, (1908) 11 N. L. R. 232.
Samaradiwakara v. De Saram, (1911) 14 N. L. R. 321.
Wirasekera v. Carlina, (1912) 16 N. L. R. 1.
Seneviratne v. Candapapulle, (1912) 16 N. L. R. 150.
Perera v. Silva, (1913) 16 N. L. R. 474.
Carron v Manuel, (1914) 17 NLR 407
Sandenam v. Iyamperumal, (1916) 3 C. W. R. 59.

commencing with the judgment of the Privy Council in the case of *Tillekeratne v. Abeyesekere*.[1] The terms of the various instruments considered in these cases were very similar in character to those of the instruments which form the subject of the present action, and in all these, except two, which I will discuss presently, and which both related to the same will, the same construction was given to the instruments under consideration. The result of this series of cases may be summarized as follows: That while in such case the question must be a question of the intention of the testator or donor, as the case may be, to be determined by the construction of the particular instrument, yet when an instrument conveys property to a fiduciary or fiduciaries, burdened with an obligation in favour of their descendants in succeeding generations, that the intention of the instrument must be taken to be that, so long as any of the beneficiaries who are to be substituted in place of the fiduciaries are in existence, the whole property must be considered as burdened with an obligation in their favour. As it was put in the case of *Tillekeratne v. Abeyesekere*:[1] " No right of succession could arise, on her decease, to the heirs-at-law of Isabella, who were not in the direct line of descent from the testator, so long as any person was in existence who could show title either as an institute or as a substitute under the provisions of the Will. "

The question discussed has sometimes been put in this way. Where there are one or more fiduciaries, and the interest of these fiduciaries is burdened with obligations in favour of children in the next generation, the question to be considered is, Did the testator (or donor, as the case may be) intend to create a single *fidei commissum* for the benefit of all the objects of his liberality so long as they continued to exist, or was it his intention that at some stage or other his liberality should be subdivided into separate *fidei commissa*, by which the interest of each fiduciary or of each child or grandchild succeeding to the position of a fiduciary should be burdened with a specific obligation in favour of his own branch of the family to the extent indicated in the instrument ?

It does not seem to me possible, after a consideration of the terms of this instrument, to distinguish it in principle from those considered in *Tillekeratne v. Abeyesekere*[1] and the other cases, in which it was held that the intention of the instrument was to create a single *fidei commissum* in favour of all the objects of the testator's or donor's bounty indicated in the instrument. On this construction, so long as any of the objects of that bounty continue to exist, no one can acquire an unrestricted right to any part of the property. The interest of Ahamad and Mariam could not devolve upon their father, Mohamadu Usoof, but the rights they had in the property were burdened with an obligation in favour of their brother,

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

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Abdul Cader, and their sister, Rahimath Umma, and any children that might have been or might be born to that brother and sister.

Mr. A. St. V. Jayawardene, for the appellant, laid before us an argument, which was elaborated with much force and industry, but which was in effect an attempt to restrict the interpretation of the instrument within arbitrary limits, upon the authority of isolated passages. Almost all his propositions have already been over-ruled, either expressly or by implication, in cases already decided either by this Court or by the Privy Council; but as he contended that up to the present the authorities on the subject had not been fully presented, and as the property involved is of some considerable value, I will submit his argument to a detailed examination. His propositions may be summarized as follows:—

(i.) The *jus accrescendi* only obtains in testamentary dispositions. There can be no *jus accrescendi* in the case of an instrument *inter vivos*.

(ii.) In any case (assuming that an accrual could arise in the case of a *fidei commissum inter vivos*) there can be no accrual with respect to interests already vested.

(iii.) An intention in favour of an accrual ought not to be inferred in the absence of express words, unless the case can be brought within the principles of the *jus accrescendi*.

(iv.) The expression "share and share alike" is fatal to an accrual.

(v.) Even if an accrual was intended, in the absence of express words we are precluded from giving effect to such an intention by local statute.

(vi.) On the true construction of this particular *fidei commissum*, there was nothing to prevent Abdul Cader from disposing of the *fidei commissum* property by will.

(vii.) The children of Abdul Cader, even though on the construction of the instrument they would be entitled to its benefits, are bound by the judgment recovered in 1895 by the appellant against their father.

The first proposition, namely, that the *jus accrescendi* has no application under an instrument *inter vivos*, is based partly upon the circumstance that the doctrine of the *jus accrescendi* between co-heirs in the Roman law originated in the repugnance of that law to a partial intestacy, and partly upon certain passages in Voet.

With regard to the repugnance of the Roman law to partial intestacy, this was undoubtedly the basis of the original doctrine of *jus accrescendi* between co-heirs; but this is a purely historical circumstance and need not concern us. The reasoning of the Roman law as to partial intestacy was always discarded by the Roman Dutch jurists as a technical subtlety. With them the *jus accrescendi*

was allowed, not as a rule of law (*ex juris necessitate*), but only when it was either the evident, or at least the probable, intention of the testator (*quotiens vel evidens vel saltem probabilis voluntas testatoris est. Voet XXIX., 2,40*). The doctrine was not in Roman law confined to co-heirs, but was extended to co-legatees, co-usufructuaries, and co-fidei commissaries. But in all these cases, even in Roman law, the question of partial intestacy never entered. In all these cases the basis of the right was the intention of the testator. "*Cum hac in parte ius accrescendi non in aliqua juris necessitate, uti quidem in heredibus directo institutis, sed tantum in probabili testatoris voluntate fundamentum habeat.*" (*Voet XXXVI., 1, 71, and cf. also XXX.—XXXII., 61 and 64.*) It is clear, therefore, that the question of the repugnance felt against partial intestacy under the Roman law may be left out of account.

With regard to the passage cited from Voet, it is undoubtedly the case that there are certain differences between testamentary *fidei commissa* and *fidei commissa* by instruments *inter vivos*. In the first place, the latter are bilateral instruments, and consequently it may be necessary to consider, not merely the intention of the author of the *fidei commissum*, but that of all the parties. In the second place, the instruments being of a more deliberate nature than wills are presumed more completely to express the intention of their authors (see per de Sampayo J. in *Ahamadu Lebbe v. Sulagamma*,[1] see also the observation of Perez cited in the next paragraph). Thirdly, wills receive a more liberal interpretation than instruments *inter vivos* ("*Præscértim si consideres, favorabiliores esse dispositiones ultimarum voluntatum quam quæ inter vivos fiunt.*" *Voet XXXVI., 1, 27*); so that in the case of a will an intention to restrict the bounty given to a *fiduciarius* will not be readily inferred. Fourthly, fidei commissary dispositions by a deed *inter vivos* are, generally speaking, unlike similar dispositions in wills, not subject to revocation. (Note, however, *Voet XXIII., 4, 64, 66.*) It is further suggested that from the point of view of the *jus accrescendi*, fidei Commissaries under such an instrument are in a special position by virtue of its contractual nature.

There are two specific references to this point in Voet. The first (*XXXIX., 5, 14*) says that the *jus accrescendi* has no application to gifts *inter vivos*, and that consequently, if one of several donees dies before acceptance, his share does not accrue to the other (*cf. Sande, Dec. Fris. V. 1* ?). But this has no relevance here; the reason for this is that no gift is complete till acceptance, and in such a case the unaccepted share does not descend to the donee's heirs, but reverts to the donor. Voet, however, adds the following general observation: *Nec uspiam legitur, in contractibus aut aliis inter vivos actibus ius accrescendi receptum esse, sed ad solam mortis causa donationem, legatis fere per omnia exequatam, ius accrescendi aperte*

[1] *(1916) 2 C. W. R. 208.*

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invenitur a Iustiniano productum esse. (*XXXIX., 5, 14.*) A similar general observation is made by *Perez* (*VI., 51, 9*) : *Nam in iis dumtaxat quæ ultima voluntate relinquuntur locum habet, non item in contractibus, qui iudicantur secundum formam, qua sunt initi.*

The question is more specifically referred to in another passage of *Voet* (*XXXVI., 1, 67*). Voet there declares that it is the better opinion (*magis est*) that when a fidei commissary under a *fidei commissum* constituted by act *inter vivos* predeceases the fiduciary, the *fidei commissum* property does not, as in the case of a will, vest absolutely in the fiduciary, but that the fidei commissary is considered as possessing, by virtue of the contractual nature of the instrument, a *spes obligationis*, which he transmits to his heirs. This opinion was followed with some hesitation in a local case, *Mohamed Bhai v. Silva.*[1] It will be noted here that Voet says nothing about the *jus accrescendi*. He is considering the question as between the heirs of the fidei commissary and the fiduciary, not as between the heirs of the fidei commissary and the surviving fidei commissaries; but as he notes that Sande dissents from this view, and as Sande's dissent has reference to the *jus accrescendi*, it is probable that he had it in mind.

Sande's dissent, however, discloses a fact of great interest, namely, a reported case decided by the Frisian Supreme Court in a sense contrary to Voet's opinion, and with special reference to the *jus accrescendi*. (See *Sande, Dec. Fris. IV., 5, def. 19.*) In that case, by a family *fidei commissum inter vivos*, it was agreed that two properties severally vested in each of two brothers should, on their deaths, in the absence of male children, devolve upon their daughters and sisters equally. The sisters all predeceased the brothers, but one of the sisters left heirs. The Court discussed the extent to which *fidei commissa* by instrument *inter vivos* are permissible, and the supposed difference between testamentary *fidei commissa* and *fidei commissa inter vivos* from the point of view of the *spes successionis*, disallowed the claim of the daughters of one of the predeceasing sisters to the share claimed, and gave effect to the *jus accrescendi*. ("*At cum quinque sorores ante fratrem sixtum obierint harum portiones pro rata accrescerent Sixti et Francisci filiabus.*") The Court, on a final review of the case, treated the expression "equally" merely as indicating that the fidei commissaries should share *per capita*. I quote the following passage: "*Alii tamen hanc differentiam non admittunt, sed ut in fidei commissis ultima voluntate constitutis et in legatis ita est, ut si legatarius vel fidei commissarius decedat, antequam conditio existit, is nihil ad heredem transmittat . . . . . idem in hoc fidei commisso conventionali obtinere volunti . . . . . Hos Senatus secutus etiam Catarinae filias a petitione sua submovit.*" (*Dec. Fris. IV., 5, def. 19, ch. 2.*)

[1] *(1911) 14 N. L. R. 193.*

In view of this case 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*,[1] *Sandenam v. Iyamperumal*,[2] and *Babahamy v. Marcinahamy*,[3] 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 opinion, 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.[5]

With regard to Mr. Jayawardene's second proposition, it is undoubtedly the case that. except in the case of co-usufructuaries (which is governed by special considerations of a technical nature, explained by Voet in *VII., 2, 4*), the *jus accrescendi* has no application when the shares of the objects of the liberality have once vested (see *Voet VII., 2, 1: evanesceret omne accrescende ius, quamprimum coheredes ac collegatarii agnovissent defuncti iudicium, atque ita concursu partes suas incepissent habere*). But the vesting there referred to is the final vesting of the property. The vesting of the property in persons as fiduciaries cannot affect such rights of survivorship as may belong to the fidei commissaries. If the intention of the author of the *fidei commissum* is that there should be a right of survivorship among the fidei commissaries, that right cannot be prejudiced by the fact that the fiduciary, through whom a particular fidei commissary traces his title, has previously entered into the enjoyment of his own interest as fiduciary. The only vesting that is material is the vesting in the persons among whom the question of the *jus accrescendi* arises.

This is such an obvious truism that it seems superfluous to state it. Some confusion, however, appears to have arisen from a passage in the judgment of De Villiers C.J. in *Mijiet's Executor's v. Ava*.[4] The passage is as follows: "When once, therefore, the fiduciary heirs have entered upon their respective shares of inheritance the separation of interests has taken place, which, differing in this respect from the effect of a mere usufruct, prevents the operation of the *jus accrescendi* in favour of the survivor." Both in the argument

[1] *(1917) 4 C. W. R. 50.*
[2] *(1916) 3 C. W. R. 59.*
[3] *(1908) 11 N. L. R. 232.*
[4] *14 S. C. R. 511.*

[5] It may be noted that the Roman Dutch jurists appear to have considered that the status in life of the parties had a bearing, not only on the validity of the instrument, but also on the presumed intention of its author. See *Sande, loc. cit.*: "*Tale pactum inter nobiles præsertim valare et obligare etiam successores tradunt Doctores.*" *Vinnius, II., 20, viii., 18*; "*Idque æstimari non ex verbis tantum et rei pretio verum etiam ex conditione et qualitate tum testatoris, cum legatariorum.*"

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in this case and in one of the judgments in *Carron v. Manuel*[1] this passage seems to have been treated as laying down a general principle with regard to the vesting of fiduciary interests. It seems to have been overlooked that in *Mijiet's Executors v. Ava*[2] the only interest in question was a fiduciary interest, and it is solely to that interest that the words cited refer. The testator had left his estate, on the death of his wife, to his two children, Ibrahim and Ava, burdened with a *fidei commissum* in favour of the children on the death of both. Ibrahim died. The question was: What was to happen to his interest until the death of Ava? There was thus no question as to the succeeding fidei commissary interests. These were provided for by the will. All that the case decided was that the fiduciary interests of Ibrahim and Ava having once vested, there was no accrual of the iterest of the deceasing fiduciary in favour of the survior. The case has no bearing on the question whether on the true construction of the document now in question the interests of Ahamad and Mariam were burdened with a *fidei commissum* in favour of their nephews or nieces, nor is it an authority for the proposition that, when once the several fiduciaries under a *fidei commissum* enter into the enjoyment of their respective interests, the effect of this is to convert a single *fidei commissum* into a bundle of separate *fidei commissa*.

This brings me to what I have formulated as Mr. Jayawardene's third proposition, that an intention in favour of accrual ought not to be inferred in the absence of express words, unless the case can be brought within the principles of the *jus accrescendi*. The real answer to this and to the two previous propositions is that the *jus accrescendi* has nothing to do with the case. The *jus accrescendi* is a special rule invented by the Roman law. It is not, as Mr. Bawa plausibly suggested, a mere expression used for describing what happens when rights that were intended to be enjoyed by one of several beneficiaries accrue on his death to the remainder. On the contrary, it is an extremely definite rule, and its application has excited the most diffuse and prolonged controversies. Nor is it identical with the *jus accrescendi* between joint tenants in English law, which is governed by widely different considerations. The rule was evolved to deal with one special case only, namely, the case where a testator's wishes fail with respect to part of the inheritance, because one of the persons designated as heirs either cannot or will not take up his share of the inheritance. In other words, the rule was invented to prevent a lapse. The rule was subsequently extended from the case of a universal inheritance to the case of a particular legacy, but both in the case of an inheritance and in the case of a legacy the *jus accrescendi* only arose where but for the accrual there would be a lapse. As it is put by Monsieur Planiol: " *L'accroisément suppose une libéralité caduque.*" (*Traité*

[1] *(1914) 17 N. L. R., on p. 409.* [2] *14 S. C. R. 511.*

de Droit, Civil, vol. 3,2866.) The subject is treated in the Code of Justinian under the heading: "*De Caducis Tollendis.*" There is an interesting discussion of the matter in *Domat, book III., section 9*, where he very truly observes that the doctrine was, as a matter of fact, purely gratuitous, and that no harm would have resulted if the law had declared that where part of the testator's wishes fail through the decease or refusal of one of their objects, the interest in question should lapse to the heirs *ab intestato*, unless the testator otherwise provided. The rule, in fact, was in its inception an arbitrary rule of construction, invented for the purpose of averting a purely theoretical catastrophe. Even where as in Roman-Dutch law, a partial intestacy was no longer regarded as something contrary to the order of nature, the point to which the rule was directed was the case of a lapse. Apart from cases of a refusal to adiate, it only comes into operation where, in the case of a direct bequest, one of the designated objects of the testator's bounty predeceases him, or, in the case of a *fidei commissum*, where one of the designated fidei commissaries predeceases either the testator or an antecedent fiduciary. The beneficiary may, of course, be designated either by name or by description, but there must be a designation, and there must be a predecease of a person designated, otherwise there is no failure of the testator's gift; and there is no occasion for the application of the rule at all. There is no such failure where, as in this case, the objects of the donor's bounty are not designated individuals, but successive classes of persons to be ascertained at successive stages. There can be no such failure, because until any particular stage is reached no one can tell who will constitute the class to be benefited. As it is put in *Jarman on Wills, at page 431*: "Where the devise or bequest embraces a fluctuating class of persons, who by the rules of construction are to be ascertained at the death of the testator or at a subsequent period, the decease of any such persons during the testator's life will occasion no lapse or hiatus in the disposition."

Mr. Jayawardene, indeed, himself insisted on the fact that the *jus accrescendi* only arose upon a predecease, but from this he drew the inference that in other cases there could be no accrual at all. But this is not a proper inference. The proper inference is that where there has been no predecease, and consequently no failure of the testator's or the donor's bounty, in determining whether or not an accrual of interest is to take place, we are wholly emancipated both from the presumptions and from the limitations of the rule known as the *jus accrescendi*. Nor is there any foundation for the suggestion that an accrual should only be inferred where it is provided for by express words. The rules governing the interpretation of instruments know nothing of any limitation to express words. That is a device of the legislator in statutes. In the interpretation of instruments according to the rules of the common law (except

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in places where operative words are necessary), the intention may be inferred both from what is expressed and from what is implied. Nor is there any counter-presumption that the author of the liberality did not intend an accrual. The *jus accrescendi* was not an anomaly which the law regarded with horror and restrained by every measure possible; it was a benevolent device invented for the purpose of giving effect to an intention of the testator, which he was supposed to have forgotten to express. We are free, therefore in cases outside the rule, to consider the question without taking into consideration any supposed bias on the part of the law, either in one direction or the other.

The fourth of the propositions restricting the natural interpretation of the instrument was the contention that the words " share and share alike " had an artificial force, and precluded us from interpreting the instrument as directing an accrual. This contention is based upon an antiquated and technical classification of the Roman law, which has been the subject of voluminous controversies as artificial as the classification itself. It has, in my opinion, no bearing on the present case. As, however, it appears to be referred to both in modern text books and modern judgments as though it embodied some intelligible principle, and as Mr. Jayawardene expressly insists on it, I will proceed to examine it.

The disquisitions upon the subject in the Roman-Dutch jurists are so minute and intricate that it would be useless to attempt to summarize the whole controversy. But this may be observed, that the Roman-Dutch jurists in such matters as this are not to be considered as expositors of legal principles, but rather as commentators upon the compilations of Justinian. What they have to do is to harmonize a number of detached passages divorced from their context and embodied in the Code or Digest. As the authors of these passages are not directing their minds to the same point, and are not using words in the same sense, it is impossible to harmonize the passages. The disputants are accordingly compelled to emphasize some and explain others, according to the view taken in the controversy. But it should be borne in mind that the controversy is not so much as to the principle which would govern the question, as to the meaning to be attached to the passages in the compilations.

Briefly stated, the question is as follows. It is agreed that the *jus accrescendi* arises only *inter coniunctos*. " *Ubi ius coniunctionis est, ibi ius est accrescendi.*" (*Vinnius, II., 20, 7.*) Now, it appears from a combination of certain passages of the *Digest* (*50, 16, 142; 32, 89*) that for this purpose *coniuncti* are classified under three heads, according to three supposed types of disposition, namely:—

(*a*) *Re coniuncti.*—Where the testator in one sentence in his will says, " I give my farm to A," and in another and separate sentence says, " I give my farm to B."

(*b*) *Re et verbis coniuncti.*—Where the testator says, "I give my farm to A and B."

(*c*) *Verbis tantum coniuncti.*—Where the testator says, "I give my farm to A and B in equal shares" ("*æquis partibus*").

It is not altogether easy nowadays for any one to treat this classification seriously. In the first place, with regard to (*a*), it refers to a thing which never happens. People do not in one part of their wills leave a farm to A, and in another part of the same will leave the same farm to B. Domat's observation is (*book III., 3, 9*): "Although this manner of devising may seem to be whimsical to us, and to be very improper to any testator who has any sense, or who is used to be any ways exact in his affairs, yet the examples of it are frequent in the Roman law." In the second place, with regard to (*b*) and (*c*), these to the untutored mind mean precisely the same thing.[1] It is not without surprise that one learns that the whole controversy turns upon a suggestion that they mean two things entirely different.

The trouble arises from certain passages of the *Digest*, of which the following two may be cited:—

"*Coniunctim heredes institui, aut coniunctim legari hoc est: totam hereditatem et toto legata singulis data esse, partes autem concursu fieri.*" (*Dig. XXXII., 80.*)

"*Cui sententiæ congruit ratio Celsi dicentis totiens ius accrescendi esse, quotiene in duobus, qui in solidum habuerunt, concursu divisus est.*" (*Dig. VII., 2, 3.*)

From this it is argued that a *coniunctio* implies that the whole is given to each, and that it is only by a *concursus* that shares arise; that a testator who gives a property to two persons in equal shares cannot intend that each should take the whole; that consequently persons who are thus *verbis tantum coniuncti* are not really *coniuncti* at all; that, in fact, the addition of the words *æquis partibus* destroys the conjuction; and that consequently between such persons there is no *jus accrescendi*. It is no doubt tedious to explain such artificial reasoning, but as Voet adopts this conclusion. and Mr. Jayawardene relies upon it, it is well that it should be understood upon what it is based. It is satisfactory to know, however, that Voet's view is repudiated by Van Leeuwen, Sande, Huber, Vinnius, Perez, and Bynkershoek. It is combated in language of extraordinary vigour by Dekker in a note to *Van Leeuwen's Commentaries, III., 6, 8,*

[1] *Cf. Perez., VI., 51, 13: "Partes illæ æquales intellegerentur etsi expressæ non essent."*
Vinnius, II., 20: "Nec mutat hanc coniunctionem partium æqualium expressio, nam etsi hæ partes non exprimuntur, tacite tamen significantur enumeratione personorum."

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where he says that if a testator when he leaves a thing to three persons really intends that each should acquire the whole, he must be out of his mind.[1]

But it is not necessary to pursue further so obviously artificial a subject. It is sufficient to say that the opinion of Voet is everywhere declared to be contrary to the *communis sententia;* and that all the phraseology discussed above ought to be regarded as the technicalities of an extinct phase of legal thought, and (to quote words quoted by Dekker) as belonging "*ad ius romanum mere positivum, quod apud nos receptum haud est, explosa romani iuris scrupulosa subtilitate.*" There is, of course, a significance in the phrase "*verbis tantum coniuncti,*" and it is this, that there is no *jus accrescendi* between the objects of two separate bequests merely because they are joined together in the same sentence of a will, but the example chosen does not really illustrate the proposition. A bequest of a thing to two people is not really converted into two separate bequests because the testator adds that they shall have it in equal shares. It may be taken, therefore, that (to use a favourite phrase of Lord Bowen's) there is no magic about the words "*æquis partibus,*" or any similar expression.

Two further observations may, however, be made. The one is, that a perfectly natural explanation of the words "share and share alike" is afforded by the fact that the parties to the instrument are Muhammadans, and that all that they indicate is, therefore, that the females are to share equally with the males, instead of taking only a half share as under the Muhammadan law. The other is, that as the case under consideration is not a case of lapse, and consequently not a case to which the principles of the *jus accrescendi* come into consideration, the supposed magical efficacy of the words "*æquis partibus*" has no bearing on the case.

The next attempt to restrict the freedom of the Court in interpreting the intention of the testator was based upon a local enactment, already discussed in several previous cases, namely, Ordinance No. 21 of 1844, section 20. As to this, it is sufficient to quote the words of the judgment of the Privy Council in *Tillekeratne v. Abeyesekere,*[2] namely: that the enactment appears "to be limited to cases

[1] The jurists I have cited suggest more ways than one of escaping from this purely verbal complication :—

Cf. Sandel Dec. Fris IV., 4, def. 7: "Istæ partes non sunt divisæ, sed indivisæ, nihilo magis rem dividentes, quam si expressæ non essent."

Perez, LI., 6, 13.: "Nam habent quidem partes pro indiviso, non pro diviso, ideoque non videntur res diversæ legari singulis."

Vinnius (who rejects the above explanation), *II, 20, 16: "Partium in hac coniunctione testator meminit ..... quod, cum sciret, si concurrerent ambo, quod et futurum speravit, singulos totum habere non posse, istis verbis demonstrare voluerit quid in hunc eventum singuli habituri essent."*

Bynkershoek, II., 3: "Si nempe dicamus, hæc verba, æquis partibus, continere præcedentium explicationem, qua significatur utrumque legatarium, si concurrant scilicet, non habiturum solidum, sed rei legatæ quemque partem dimidiam, ita consulitur menti simul ac verbis defuncti."

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

in which the persons interested, whether as joint tenants or as tenants in common, are full owners, and are not burdened with a *fidei commissum.*" It is true that in *Perera v. Silva* [1] a doubt is expressed whether the Privy Council in its observations on Ordinance No. 21 of 1844 considered section 20, but there seems no reason why section 20 should be construed differently from section 7, to which those observations were primarily directed.

The next fetter on our right of free interpretation (Mr. Jayawardene's sixth proposition) was sought in a passage of Sande:—

" *His amplius prohibita venditione donatione et oppigneratione, alienatio per ultimam voluntatem permissa censetur ..... Quin etsi generale alienandi verbum positum sit inter verba specialia ut si dictum sit, ' Prohibeo vendi, donari, alienari aut oppignerari,' generale illud verbum alienari restringitura verbis specialibus ob illum articulum alternativum. Quando enim plura verba alternative iunguntur, quorum unum est generale alia vero sunt specialia, generale restringitur a specialibus. Et quando genus ponitur inter duas species, ab eis semper restringitur.*" (*Sande, De Prohib. Rerum Alien., ch. 6 and 9.*)

In other words, as in our own instrument, which forbids Candoo Umma to " sell, alienate, mortgage, or encumber " the property, the word " alienate " (though it would otherwise include a last will), coming between " sell " and " mortgage," must be restricted to transactions *ejusdem generis* as a sale or mortgage, and consequently the prohibition against alienation does not exclude a disposition by will. The passage cited is certainly at first sight one of extraordinary aptitude, but there are two answers to the contention, both of them conclusive. The first is, that if the whole of the chapter in which this passage occurs is read, it will be seen that what Sande primarily insists on is that the intention of the author of the *fidei commissum*, as inferred from all the circumstances, must prevail. (See in particular paragraph 8.) It is only when there is no adequate indication of the intention that the special rule of interpretation is supposed to apply. In the case of the instrument in our own case, the indications of intention are ample. If the contention were correct, it would have been open, not only to Abdul Cader, but to his mother Candoo Umma, to have disposed of the property by will, as the formula of prohibition applies both to her and the subsequent fiduciaries; but the instrument expressly goes on to declare " that after her death the same shall devolve on her children ....., and thereafter on the child or children of such child or children, and so on from generation to generation under the *fidei commissum* law of inheritance." A clearer indication of an intention to prohibit alienation by will throughout the course of the *fidei commissum* could hardly be imagined. But, apart from all

[1] *(1913) 16 N. L. R., on p. 477.*

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this, the rule enunciated in the passage from Sande is nothing more than an arbitrary and technical extension of the rule *ejusdem generis*. There is no modern authority, and, indeed, no other authority cited, for such an extension. Modern authority is all the other way, and a useful corrective to the tendency to insist on a strict application of the rule *ejusdem generis* will be found in the case of *Anderson v. Anderson*,[1] where it was clearly laid down that general words in collocation with a series of particular words are *primâ facie* to be constructed as having their natural and larger meaning.

The seventh and last of the suggested obstacles to the free interpretation of the instrument was the judgment recovered against Abdul Cader by Mohamadu Usoof in 1895, in which the interpretation now contended for by the appellant was adopted by the Court; it was argued that this judgment was *res judicata* as against Abdul Cader's children. But this is clearly untenable. These children are not claiming through Abdul Cader, but on the deed. It is certainly singular that it should be open to successive generations of persons claiming under the same *fidei commissum* to litigate questions already the subject of a judicial decree. But it is clear that, just as no agreement of Abdul Cader could affect the rights of his children, they are equally unaffected by any judgment against him to which they were not parties.

I have reserved to the last the consideration of two cases in which an interpretation of a different tendency to that adopted in *Tillekeratne v. Abeyesekere* [2] was given to a particular testamentary *fidei commissum*, namely, *Perera v. Silva* [3] and *Carron v. Manuel*.[4] Both cases related to the same instrument, and the Court which decided the second case, though differently constituted from that which decided the first case, came to the same conclusion. Three dicta in the judgments of these cases have been referred to. All were in the fullest sense *obiter*, and all appear to have been based upon a misapprehension. The first was a suggestion that in *Tillekeratne v. Abeyesekere* [2] the Privy Council overlooked section 20 of Ordinance No. 21 of 1844; the second was a reference to a passage in the judgment in *Mijiet's Executors v. Ava*,[5] as though it laid down a general principle as to the effect of the vesting of the shares of fiduciaries; the third was a suggestion that, so far as the facts of the case go, *Tillekeratne v. Abeyesekere* [2] merely establishes that there is a right of accrual where one of several conjoint institutes dies before the testator. The first two of these dicta have been discussed above; with regard to the third, a fuller examination of the facts in *Tillekeratne v. Abeyesekere* [2] discloses that Isabella, the devolution of whose interest was in dispute, did not predecease either of the authors of the joint will under consideration, but survived them both.

[1] *(1895) 1 Q. B. 749.*
[2] *1897) 2 N. L. R. 313.*
[3] *(1913) 16 N. L. R. 474.*
[4] *(1914) 17 N. L. R. 407.*
[5] *14 S. C. R. 511.*

The decisions were not based upon any of these dicta, but upon the special terms of the will in that case. The will was a joint will, and divided the property between two groups, three sisters of the wife on the one side and two sisters of the husband on the other. The bequest was subject to a restraint on alienation, and provided that " after their deaths the said shares shall devolve on their lawful issue without any restriction whatever." The Court in both cases came to the conclusion that the expression " the said shares " referred, not to the half share above mentioned, but to the respective interests of the several fiduciaries, and held that the intention was to create separate *fidei commissa* in respect of each interest, or, in other words, that the interest of each fiduciary was burdened with an obligation in favour of her issue alone, and that consequently on the death of one fiduciary without issue the interest of that fiduciary was freed from the *fidei commissum* and devolved upon her husband as her heir. I confess that, quite apart from the three points to which attention has been drawn above, I am unable to follow much of the reasoning of the judgments in these two cases. In particular, I should have interpreted the words " without any resctriction whatever " simply as meaning " without any further restraint upon alienation "; nor should I myself have interpreted the expression " the said shares " in the way in which it was interpreted; but questions of construction are pre-eminently questions on which two views may be held. It is obvious, however, that both decisions turn upon the special force attached to this expression as indicating an intention to create separate *fidei commissa,* and the decisions must be considered simply as decisions upon the special terms of a particular will.

For the reasons above explained I am of opinion that the appeal should be dismissed, with costs.

SHAW J.—

[His Lordship set out the facts, and continued]:—

The first and most important question that arises is whether the shares to which Ahamad and Mariam were entitled in their lifetime accrue to the other children and grandchildren of Candoo Umma, or whether they go to the heirs of Ahamad and Mariam under the ordinary law of inheritance.

Numerous extracts from the writers on Roman-Dutch law were cited on behalf of the appellant, with the object of showing that the right of accretion which arises from a conjunction of persons in a donation was unknown to the Roman-Dutch law, except in the case where several people were jointly instituted as heirs in a will and one or more of them predeceased the testator, and it was contended that no *jus accrescendi* can, therefore, arise in the case of a *fidei commissum* constituted by deed *inter vivos*, such as in the present case.

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I am unable to draw any such inference from the extracts quoted. The writers are referring to the presumption of the intention of a testator that arises from the use of certain words and the conjunction of persons as heirs in a will where one or more of the persons intended to be benefited have predeceased the testator, and it may well be that this presumption may be limited to the case mentioned; but I can find no justification for the contention that a right of accrual cannot exist in cases where a donor or testator has, by the language used, shown his intention that it shall.

In the course of the argument we were referred to numerous cases where a right of accrual has been held to exist in cases other than that of a beneficiary under a will predeceasing the testator. In *Tillekeratne v. Abeyesekere* [1] the right of accrual under a *fidei commissum* established by will was given effect to by the Privy Council upon the death of a beneficiary who died subsequent to the testator, and the same was done by this Court in the case of *Babahamy v. Marcinahamy*;[2] *Jayawardene v. Jayawardene* [3] also is a decision of the majority of the Full Court to the same effect. In *Carry v. Carry* [4] and *Ayasuperumal v. Meenan* [5] 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.

In the present case the intention of the donor was, in my opinion, clearly to benefit, not merely the children of Candoo Umma, but the children of such children from generation to generation, and, as in the cases of *Tillekeratne v. Abeyesekere* [1] and *Tillekeratne v. Silva*,[6] to establish one single *fidei commissum* in favour of Candoo Umma's descendants with rights of accrual, and not four separate *fidei commissa* in favour of her children.

The only authorities that seem at first sight to support the appellant's contention are *Carron v. Manuel* [7] and *Mijiet's Executors v. Ava*, cited in *Nathan, vol. 3, s. 1878*. In those cases it was held that when once the fiduciary heirs have entered upon their respective shares of inheritance, a separation of interest has taken place, which prevents the operation of the *jus accrescendi* in favour of the survivor. In the present case, however, the instituted heirs are not merely the children of Candoo Umma, but their children from generation to generation, who on the death of Ahamad and Mariam had not

[1] *(1897) 2 N. L. R. 313.*
[2] *(1908) 11 N. L. R. 232.*
[3] *(1905) 8 N. L. R. 283.*
[4] *(1917) 4 C. W. R. 50.*
[5] *(1917) 4 C. W. R. 182.*
[6] *(1907) 10 N. L. R. 214.*
[7] *(1914) 17 N. L. R. 407.*

entered upon the inheritance, and, unlike in the cases referred to, the intention of the donor was in the present case, not merely to benefit the first set of the instituted heirs, but the descendants of Candoo Umma generally.

The next point taken on behalf of the appellant was that the restriction on alienation contained in the deed did not prevent Abdul Cader alienating by will, because, in the prohibition against alienation contained in the deed, the word "alienation" comes between the words "sell" and "mortgage or encumber."

The opinion of Sande (*Restraints on Alienation, part 3, chapter 3, paragraph 9*) was cited in support of the contention. He says that if the general term "alienation" is placed in the midst of special terms, for instance, if it be said "I prohibit a sale, a donation, an alienation, or a pledge," then the general term "alienation" is limited by the special terms by reason of the alternative "or," but that if the general term "alienation" is placed last, it includes every class of alienation.

However, this somewhat subtle and technical rule of construction may apply in a case where there is no intention of the testator to be otherwise gathered; it is clear from the preceding paragraph to those referred to that Sande did not consider the rule would apply if the testator otherwise expressed his intention, for he there says that even if a testator has said "I forbid the property to be sold," and adds as his motive "because I desire it to be kept in my family," in that case the property is considered to be prohibited from being transferred to a stranger by last will. In the present case there is ample evidence from the words used by the donor, from which his intention to keep the property intact for the descendants of Candoo Umma can be gathered, and therefore the prohibition against alienation should be held to apply to a prohibition against alienation by will, in whatever collocation the words occur.

The third point taken on behalf of the appellant was that, so far as the plaintiff and the second and third defendants are concerned, they are estopped from alleging that the appellant is not entitled to inherit the shares of Ahamad and Mariam, because the same point was decided against their father Abdul Cader in a previous action, D. C. Colombo, No. 6,442, between him and the appellant.

This point must also, in my opinion, fail, because these parties are not privies in title with Abdul Cader in regard to the property; they do not take by inheritance from him, but under a separate title under the deed of July 22, 1871.

I am of opinion that the decision of the District Judge is correct, and that the appeal should be dismissed, with costs.

Appeal dismissed.