1951 *Present :* **Basnayake J. and Gunasekara J.**

IBRAHIM, Appellant, *and* ALAGAMMAH *et al.*, Respondents

S. C. 351—D. C. Batticaloa, 515/L

Jus accrescendi—*Not applicable to gift—Wills Ordinance, s. 7.*

The rule of *jus accrescendi* has no application to gifts. The *jus accrescendi* has no application when the shares of the objects of the liberality have once vested and there is nothing to suggest that the donor intended an accrual in respect of these interests.

APPEAL from a judgment of the District Court, Batticaloa.

S. Nadesan, for the plaintiff appellant.

P. Navaratnarajah, with *S. Sharvananda*, for the defendants respondents.

Cur. adv. vult.

April 27, 1951. BASNAYAKE J.—

This is an action under section 247 of the Civil Procedure Code by the assignee of a decree in favour of one Mylvaganam Ponnammah to have one-third share of a land called Kovil adi Valavu bearing Lot No. 1648 at Kommathurai in Eravur Pattu (hereinafter referred to as the land) declared liable to be sold in execution of a decree against the second, third and fourth defendants and one Abdul Majeed Abdul Jaleel.

There are four defendants to this action. The first, Marimuttu Alagamma, is the person who objected to the seizure under the decree. The second, third and fourth are the heirs of one Abdul Majeed who the plaintiff asserts was at the time of his death entitled to a third share of the land.

The point that arises for decision in this action is whether Abdul Majeed was at the time of his death entitled to a third share of the land. The material facts shortly are as follows.

The original owner of the land was Mohamaduthambylevval Maraicair Mohideen Abdul Careem Udayar. He gifted the land to his son Abdul Samath by deed No. 8056 of 19th September, 1929, subject to certain conditions. Abdul Samath being a minor the gift was accepted on his behalf by his mother. Samath died without issue in October, 1933, and in terms of the deed the land went to his three brothers, Abdul Majeed, Abdul Salam, and Abdul Hameed. Two of them sold two-thirds of the land to Vyramuttu Peter Arumugam who by deed No. 10898 of 27th October, 1945, sold that share to the first defendant Marimuttu Alagamma, who also purchased the remaining one-third. In 1940, Abdul Majeed died, and the question that arises for decision is whether on his death his interests went to the other two brothers or devolved on his heirs.

The learned District Judge has held that on Abdul Majeed's death his interests went under the deed of gift to his brothers. This appeal is from that judgment.

In order to resolve the matter in dispute the meaning and effect of the deed of gift No. 8056 has to be ascertained. The material portion of that deed, which is in Tamil, according to the official translation reads:

"I Mohammaduthambylevvai Marikar Muhaiyadeen Abdulcareem Udayar . . . . in consideration of the love and affection which I bear unto my son Muhaideen Abdul Careem Udayar Abdul Samath of the same division and place aforesaid do hereby set over and assure unto him the property described in the schedule hereto, which is valued at Rs. 4,000 so as to possess and enjoy the same as donation in the manner mentioned below.

"I do hereby declare that the said M. A. U. Abdul Samath shall without encumbering and alienating the said property for any reason whatever take only the produce thereof and out of it after spending for kerosene oil to be used for the Meerapalli Mosque at Division I, Kattankudy, daily and for the three meals of Musafars daily shall take the balance for himself, that as the said Abdul Samath is at present a minor, of his brothers Muhaiyadeen Abdulcareem Udayar Abdul Majeed, Muhaiyadeen Abdulcareem Udayar Abdul Salam and Muhaiyadeen Abdulcareem Udayar Abdul Hameed those who are majors shall for and on his behalf manage and take the produce of the said property and out of the produce thereof after spending for the abovesaid two charitable purposes shall give over the balance to the said Abdul Samath, that should be die issueless the said property shall subject to these conditions devolve on the abovesaid three persons who shall perform the abovesaid acts. Thus declaring and binding them I have executed this deed".

The deed in question is clearly a deed of gift. Certain obligations and restrictions attach to the gift. The obligations are to carry out the charitable purposes the donor has in mind. The restrictions are that the land cannot be alienated and that it does not pass to the donee's heirs on his death intestate and without children.

A donor may when making a gift make it subject to conditions [1]. The gift is therefore a valid gift. In the prohibition against alienation equally valid? A prohibition against alienation is not valid if it is based upon no apparent reason and where there is no one to benefit upon its breach [2]. But in the instant case the object of the donor is to benefit the charity mentioned in the deed during the lifetime of his sons. The prohibition is good and they are therefore not free to alienate the property. But as the prohibition does not extend beyond the lifetime of each of them the share of each son would pass to his heirs on his death.

In the instant case Majeed's share would pass to his heirs free of all the obligations and restrictions and can be sold in execution against them. The learned District Judge is wrong when he applies the rule of *jus accrescendi* to this gift. That rule has no application to gifts [3]. The *jus accrescendi* or right of accrual is a rule of Roman Law. Under that law if one of several instituted heirs died in the testator's lifetime, or

[1] *Burge, Colonial and Foreign Laws, Vol. 2, p. 150.*
[2] *Sande on Restraints, p 168.*
[3] *Voet, Book XXXIX, Tit. 5, Sec. 14.*

failed for any reason to become heir, his share went to his co-heirs. This arose from the rule of Roman Law that no one could die partly testate and partly intestate. Under the Roman-Dutch Law that rule became obsolete and consequently the right of accretion except where the testator in his will indicated that the *jus accrescendi* should apply [1].

Van Leeuven observes [2] " for since by usage one may die partly testate and partly intestate, that rule as to accrual, which by virtue of law used to apply in that case has, as we have said, been abrogated by custom ". In his commentaries Van Leeuven states the legal position still more clearly [3]: " But as regards the rule of accretion if any one has been instituted heir, without co-heirs in the other shares, the subtlety of the Roman Law has no application among us, and we understand that in such a case the other portions to which no heir has been appointed, do not accrue to the instituted heir, but remain and devolve *ab intestato* upon those who are nearest in blood to the testator. "

Questions of *jus a crescendi* can arise only where property is bequeathed to certain legatees or heirs jointly and one of them dies in the *lifetime* of the testator. Once interests under a will vest there is no room for the *jus accrescendi* [4].

I have referred to the Roman-Dutch Law because the learned District Judge has rested his decision on a statement in Wille's Principles of South African Law at page 270 (2nd Edn). That passage applies to a case where a legatee or heir under a will dies in the lifetime of the testator and has no application to a case such as the one under consideration. I do not therefore propose to discuss that citation more especially as our law on the subject of accrual is very clearly set out in section 7 of the Wills Ordinance. That section reads:

> " And for the avoiding of all doubts and questions as to the respective rights of persons jointly holding landed property situated within certain districts of this Island, it is further enacted and declared that all landed property situated in this Island which shall belong to two or more persons jointly, whether the same shall have come to them by grant, purchase, descent, or otherwise, is and shall be deemed and taken to be held by them in common, and upon the decease of any of such persons the said property so jointly possessed shall not remain or belong to the survivor, but all the right, share, and interest of the person so dying in and to the property so jointly possessed as aforesaid shall form part of his estate; and the person or persons to whom the same shall by him be devised or bequeathed, or to whom it shall devolve, shall thereupon become and be co-proprietors with the survivor in the said property, in the proportion and according to the share of such deceased person therein, unless the instrument under which the said property is jointly held and possessed, or any agreement mutually entered into between them, shall expressly provide that the survivor, upon such deceased, shall become entitled to the whole estate."

The appellant is entitled to succeed. The appeal is allowed with costs both here and below.

[1] *Maasdorp's Grotius—Schorer's Notes CLII, CLXIII, CLXXXII.*
[2] *Censura Forensis, Book 3. 5. 17.*
[3] *Book III, Ch. IV, Sec. 4.*
[4] *Smuts N. O. v. Smit N. O., 1928 C. P. D 471.*

GUNASEKARA J.—

The quotation from Wille's Principles of South African Law upon which the learned District Judge's decision is based is as follows:

> " In the absence of any indication in the will as to the testator's intention, *jus accrescendi* takes place where the beneficiaries have been appointed jointly or *re et verbis* but not where they have been appointed to separate shares or *verbis tantum*."

It has no application to the present case which concerns a deed of gift and not a last will.

Upon the death of Samath the property vested finally in Majeed, Salam and Hameed, subject only to the condition that they should continue to pay for the oil used in the mosque and for the *musafar's* meals. The *jus accrescendi* has no application when the shares of the objects of the liberality have once vested (*per* Bertram C.J. in *Usoof v. Rahimath* [1]) and there is nothing to suggest that the donor intended an accrual in respect of these interests.

I agree that the appeal should be allowed with costs in both Courts.

Appeal allowed.