Present: Schneider J. and Maartensz A.J.

1925.

FERNANDO *v.* ROSALINA KUNNA *et al.*

113—D. C. (Inty.) Chilaw, 7,595.

Jus accrescendi—Fidei commissum—*Failure of children—Deed* inter vivos.

Where a deed of gift contained the following clause : " The said donees are interdicted from selling, mortgaging, gifting, exchanging, leasing, or in anywise alienating the said property hereby gifted, and after their death their progeny shall deal with the same as they may desire, which I do hereby direct ",—

Held, that on the death of one of the donees without issue her share devolved on her heirs-at-law, and not on the surviving donees or their issue.

THIS was an action for partiton of a land called Talgahawatta. One Pemiyanu by deed No. 28,639 gifted his three-fourth share, less 12½ coconut trees, to four persons—Apolonia, Maria, Rosalina and Emerencia. The dispute in the present case is as to the devolution of Apolonia's interests. Apolonia died without issue, leaving as heirs her husband, Tissera, and her parents, Rosa Maria and Suse Kunna, who by deed No. 3,449 of November 14, 1916, sold this share to Padirikku Fernando, from whose husband the plaintiff purchased it. Rosalina and Emerencia, the third and fourth defendants, and seventh, eighth, and ninth defendants, the heirs of Maria, claim this share, as against the plaintiff, alleging that on the death of Apolonia her share devolved on them.

The District Judge held in favour of the defendants, and the plaintiff appealed.

H. V. Perera, for plaintiff, appellant.—The argument on behalf of the appellant may be divided into (1) that based on the existence of the *fidei commissum;* (2) that there is no *fidei commissum.*

On the first point it must be urged that there was a separation of interests, as the only reservation is the life interest for twenty years. So that in the present case the interests were vested, and the principle of *jus accrescendi* does not apply to such a case. *Perera v. Silva.*[1] The principle applies where the vesting takes place only after the death of the donor. *Carron v. Manuel.*[2] The second argument is based on the construction of the words of the deed. The deed indicates as heirs the " respective children." This is not a sufficiently clear designation of the beneficiaries, and hence the *fidei commissum* fails.

[1] *(1916) 16 N. L. R. 474.*

[2] *(1914) 17 N. L. R. 407.*

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De Zoysa, for defendants, respondents.—The two questions to be decided are (1) whether the document P 3 creates a *fidei commissum*; (2) if so, whether it is one single *fidei commissum* or a bundle of *fidei commissa*.

The case *Carlinahamy v. Juanis* [1] which is on all fours with the present one, is in favour of the respondents.

Whether the document creates a *fidei commissum* or not is to be decided by gathering the intention of the donor from the tenor of the deed. The intention is paramount, and the Court ought, where possible, to give effect to it. The intention was clearly to create a *fidei commissum* in favour of the children.

That being so, Apolonia was not the final beneficiary; and hence had nothing of a *spes* to transmit.

So long as there is either a substitute or an institute the *fidei commissum* does not fail, and the defendants have therefore clearly title, as otherwise the intention of the donor to benefit the children of the institutes would be frustrated.

H. V. Perera (in reply).—Relied strongly on passage at page 138 in *Carlinahamy v. Juanis* (*supra*). Guruwa's position is very similar to Apolonia, it has been urged. But that is not so, Guruwa is a *fidei commissary*, but Apolonia is a grantee.

Apolonia takes free of any *fidei commissum*, and hence is free to alienate. *Usoof v. Rahimath.*[2]

This is not a family endowment, but is merely to prevent the children from alienating.

October 6, 1925. SCHNEIDER J.—

I have had the advantage of seeing the judgment of my brother Maartensz, and agree with him that on the death of Apolonia the interest she derived from Pemiyanu devolved on her heirs-at-law, and not on the surviving donees or their progeny.

I agree with the order he has made.

MAARTENSZ A.J.—

This is an action to partition a land called Talgahawatta. There is a dispute regarding the title to three-fourth share, less 12½ coconut trees, which admittedly belonged to one Pemiyanu. Pemiyanu by deed of gift No. 28,639 donated this share to four persons, namely, Apolonia Kunna, Maria Kunna, Rosalina Kunna, third defendant, and Emerencia Kunna, fifth defendant, subject to certain conditions which I shall presently refer to.

Apolonia died without issue, leaving as heirs her husband Gracianu Tissera, and her parents, Rosa Maria and Suse Kunna, who by deed No. 3,449 dated November 14, 1916, sold that share to Padirikku Fernando. Padirikku Fernando had in 1903 bought another share which is not in dispute.

[1] *26 N. L. R. 135.* [2] *20 N. L. R. 225.*

After Padirikku Fernando's death her husband sold the share of Apolonia in dispute and the other share to the plaintiff.

The seventh, eighth, and ninth defendants are the heirs of Maria Kunna, who died about six years ago.

The third, fourth, seventh, eighth, and ninth defendants contend that under the terms and conditions of the deed of gift No. 3,449 executed by Pemiyanu, Apolonia's interest on her death devolved on them, and that Gracianu Tissera, her husband, and her parents acquired no interest as her intestate heirs. Pemiyanu by this deed reserved a right of possession for twenty years, which has ceased to have effect, and imposed the following conditions, expressed thus :—

> "Besides this, the said donees are interdicted from selling, mortgaging, gifting, exchanging, leasing, or in any wise alienating the said property hereby gifted, and after their death their progeny shall deal with the same as they may desire, which I do hereby direct.
>
> "Wherefore that all the right, title, and interest that I, the donor, have had in and to the said immovable property have hereby assigned and set over unto the said four donees, Warnakulasuriya Apolonia Kunna, Warnakulasuriya Maria Kunna, Warnakulasuriya Rosalina Kunna, and Warnakulasuriya Emerencia Kunna, as that they may own and possess the same subject to the said twenty years' possession and conditions, and after their death, their heirs, executors, and administrators shall deal with the same as they may desire."

The learned District Judge held, on the authority of the case of *Carlinahamy v. Juanis* (*supra*), that on the death of Apolonia without "progeny" her share accrued to the surviving donees.

In appeal it was contended that the deed executed by Pemiyanu did not create a *fidei commissum*, and that if it did, it created a bundle of separate *fidei commissa*, and on the principle laid down in the case relied on by the District Judge, Apolonia's interest on her death without issue did not accrue to the surviving donees.

The principle laid down by Bertram C.J. and Garvin J. (Jayewardene J. dissenting) regarding the applicability of the *jus accrescendi* to deed *inter vivos* may be shortly stated as follows :—

The *jus accrescendi* does not apply to deed *inter vivos*, unless it can be gathered from the instrument in question that it was the intention of the donor to subject the property to one entire *fidei commissum* in favour of all the children and their descendants.

The corollary to this proposition is that the *jus accrescendi* does not, as a matter of course, apply to the case of donations *inter vivos* if one of the donees dies without issue.

The intention of the donor must be determined in each case.

The deed of donation we have under consideration differs from the instrument which the divisional Court had to construe in this

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very important feature, namely, that in the case of Pemiyanu's deed the *fidei commissum* if any, terminated with the donees, whereas in the latter the prohibition against alienation extended to the substitutes.

The importance of this difference is clearly brought out in the case of *Perera v. Silva* (*supra*), where the testators by a joint will devised one-half of their property to the sisters of the husband, namely, Lucia and Maria, and the other half to the sisters of the wife, namely, Helena and Philippu, subject to a *fidei commissum* in favour of their lawful issue. The issue were to take without any restrictions.

Maria died without issue, and it was contended that the share accrued to Lucia and Ana. It was held by Ennis J. and Wood Renton A.C.J. that on the death of Maria without issue her share devolved on her husband, to whom she had bequeathed it by will.

Sir Alexander Wood Renton said: "The testator and testatrix clearly intended that the lawful issue of each institute, as well as the institutes themselves, should be benefited by the will. Neither expressly, as in *Tillekeratne v. Abeysekera*[1] nor by necessary implication does the will indicate that on the death of one institute the survivors are to take by substitution." And with regard to the argument that Maria's share accrued to her sisters observed "that such an interpretation would compel him either to read the will as it took account only of the lawful issue of the last surviving institute, or to add to it a clause, which would do equal violence to its language providing that on the death of the last surviving institute the lawful issue of all these institutes should succeed." He concluded as follows: "I think the language of the will itself excluded the *jus accrescendi*."

The will considered in *Perera v. Silva* (*supra*) again came up for consideration in the case of *Carron v. Manuel* (*supra*), and Lascelles C.J. and Pereira J. agreed with the view taken by Ennis J. and Wood Renton A.C.J.

In the case of *Van Sanden v. Mack*,[2] *Tillekeratna v. Abeysekera* (*supra*), and *Carlinahamy v. Juanis* (*supra*) it was inferred from the fact that the prohibition against alienation extended to the substitutes that it was the intention of the maker of the instrument to preserve the property dealt with intact and integrate for the benefit of coming persons. This inference cannot be drawn in the case of Pemiyanu's deed of gift, which limits the *fidei commissum* to the institutes, and there are no words from which an inference can be drawn that Pemiyanu intended to preserve the property intact for the benefit of coming persons.

I am therefore of opinion that the principles laid down in the case of *Perera v. Silva* (*supra*) and *Carron v. Manuel* (*supra*) are entirely applicable to the deed of gift, which is the subject of this

[1] (*1897*) *2 N. L. R. 313.* [2] (*1895*) *1 N. L. R. 311.*

appeal, and venture to think that the learned District Judge was wrong in applying to it the rule laid down in the case of *Carlinahamy v. Juanis* (*supra*). I accordingly hold that on the death of Apolonia the interest she derived from Pemiyanu devolved on her heirs-at-law, and not on the surviving donees or their progeny.

I would allow the appeal, with costs, and allot to the plaintiff, appellant, the share claimed by him from Apolonia.

I find I have made no order regarding the costs of contention. I therefore add to my order that the plaintiff will be entitled to the costs of contention in the District Court.

The other costs will be borne *pro rata* My brother Schneider agrees to this addition.

Appeal allowed.