1913.

Present: Wood Renton A.C.J. and Ennis J.

PERERA *v.* SILVA *et al.*

102—D. C. Chilaw, 4,708.

Joint will—Bequest of property to three persons subject to a fidei commissum*—Death of testator—*Jus accrescendi.

By a joint will the testators bequeathed one-half to Lucia, Ana, and Maria, and one-half to Phillippa and Helena. After their death "the said shares" were to devolve "on their lawful issue without any restriction whatever."

Held, that on the death of Maria without issue her share devolved on her husband (to whom Maria had left it by last will), and did not accrue to Lucia and Ana.

ENNIS J.—*Tillekeratne v. Abeysekera* [1] does not establish more than the principle that there is a right of accrual in a case where one of the institutes dies before the testator, *i.e.*, before the estate has vested in the institutes. In this case the three institutes entered into possession of the half share left to them, and it has to be considered whether the rule of *jus accrescendi* still applied.

THE facts appear from the judgment. The material clause in the last will is as follows:—

We do hereby give and bequeath to Lucia Perera, Ana Perera, and Maria Perera of Colombo one just half of our property whatsoever belonging to us, and the other one-half to Phillippa Mories and Helena Mories, who shall after our death hold and possess the same without mortgaging, selling, granting, or otherwise alienating the same or any part thereof, but shall only enjoy the rents and profits thereof, and after their deaths the said share shall devolve on their lawful issue without any restriction whatsoever.

J. Grenier, K.C. (with him *Zoysa*), for the first defendant, appellant.—The half share of the estate given to Lucia, Ana, and Maria formed a single *fidei commissum*. The testator and testatrix did not give one-third of half to each of the three sisters of the testatrix, but half share was given to the three sisters jointly; there was only one *fidei commissum*. On Maria's death her share did not pass to her husband under her will, but passed to Lucia and Ana. Counsel cited *Tillekeratne v. Abeysekera*,[1] *Vansanden v. Mack*,[2] *Jayewardene v. Jayewardene*,[3] *Tillekeratne v. Silva et al.*[4]

H. J. C. Pereira (with him *F. H. B. Koch* and *Canekeratne*), for the third defendant, respondent.—The intention of the testator is clear from the words "after their deaths the said share shall

[1] *(1897) 2 N. L. R. 313.*
[2] *(1895) 1 N. L. R. 311.*
[3] *(1905) 8 N. L. R. 283.*
[4] *(1907) 10 N. L. R. 214.*

devolve on their lawful issue without any restriction whatever." If the contention for the appellant were to be upheld, the children of the survivor of the three sisters would inherit the half share; that does not appear to have been the intention of the testator. Section 20 of Ordinance No. 21 of 1844 abolishes the law as to survivorship (*jus accrescendi*). In *Tillekeratne v. Abeysekera* [1] the judgment of the Privy Council does not consider this section.

The principle of *jus accrescendi* would not apply after the death of the testator, once the *fiduciarii* have entered on the inheritance. Counsel cited *Morice's English* and *Roman-Dutch Law 304.*

J. Grenier, K. C., in reply.—On the death of the survivor of the three sisters, the children of all the sisters would divide the property, and it would not go to the children of the survivor only.

Cur. adv. vult.

June 16, 1913. ENNIS J.—

This was a partition action regarding the estate formerly belonging to Simon Mories and his wife, and bequeathed by them in a joint will, one-half to Lucia, Ana, and Maria Perera, and one-half to Phillippa and Helena Mories. After their death " the said shares " were to devolve " on their lawful issue without any restriction whatever."

Maria Perera died without issue, and the District Court has allowed one-sixth share of the estate to her husband Louis de Silva (third defendant).

The appeal has been presented by Lucia Perera (first defendant) on the ground that the interests of Maria Perera accrued to herself and Ana Perera on the death of Maria Perera.

The evidence shows that the intention of the will was to divide the property equally between the sisters of the husband on the one part and the sisters of his wife on the other, and the District Judge has found that it was the intention of the testators that the lawful issue of the institutes should take the property as a " free inheritance."

It has been argued for the appellant that as the form of disposition was not one-third of a half share to each of the institutes, but a gift of a half to the three institutes jointly, there was a right of survivorship.

The case of *Tillekeratne v. Abeysekera* [1] was the principal case relied upon in support of the argument. That case, however, does not appear to me to establish more than the principle that there is a right of accrual in a case where one of the institutes dies before the testator, *i.e.*, before the estate has vested in the institutes. In this case the three institutes entered into possession of the half share left to them, and it has to be considered whether the rule of *jus accrescendi* still applied.

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

1913.

ENNIS J.

Perera v. Silva

Section 20 of Ordinance No. 21 of 1844 was held in *Vansanden v. Mack* [1] to be suspended where the intention of the testator was to preserve the estate intact in the family.

In the present case the District Judge has found that this was not the intention of the testators, but that it was their intention that the issue of the institutes should take the property as a " free inheritance."

In the words of the will the property was to devolve on the lawful issue of the institutes " without any restriction whatever." If the rule of *jus accrescendi* were to apply, to preserve the property intact, the property would devolve only on the children of the last surviving institute. This would be a restriction on the devolution of the property to the issue of the institutes who died first. I am therefore of opinion that the finding of the learned District Judge as to the intention of the testators was right; that the intention of the testators was not to preserve the property intact, but to divide the property equally between the two groups, the sisters of the husband and the sisters of the wife surviving at the death of the testators; and that on the death of Maria without issue, her share in the property was freed from the *fidei commissum*.

I would dismiss the appeal with costs.

WOOD RENTON A.C.J.—

I agree. 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*,[2] nor by necessary implication does the will indicate that, on the death of one institute, the survivors are to take by substitution. The construction placed by the learned District Judge upon the will is thus justified both by the intention of the testator and testatrix and by the language which they have used. It is also a construction the practical application of which presents no difficulty. The interpretation, on the other hand, which the appellant asks us to adopt compels us either to read the will as if 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 then surviving of all three institutes should succeed. The appellant's counsel seemed to favour this latter alternative. But the will throws no light on the question whether, if it were adopted, the succession be by representation or *per capita*. To construe the will in either of the senses which the appellant's position involves would be to make a new will for the parties rather than to interpret their existing one. I think that the language of the will itself

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

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

excludes the *jus accrescendi*. But apart from that, there would be a serious question whether section 20 of Ordinance No. 21 of 1844, which does not seem to have been considered by the Privy Council in *Tillekeratne v. Abeysekera*,[1] does not abolish that right as regards every will made after its enactment, the dispositions of which do not expressly, or at least by necessary implication, recognize it.

The appeal must be dismissed with costs.

Appeal dismissed.