Present: Lascelles C.J. and Pereira J. 1914.

CARRON *v.* MANUEL *et al.*

470—D. C. Chilaw, 4,702.

Joint will—Bequest of property to three persons subject to a fidei commissum*—Death of one* fiduciarius*—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.

LASCELLES C.J.—The intention, I think, is pretty clear, that the share of each of the three sisters should be regarded as a separate interest subject to a separate *fidei commissum*, and that it should devolve "on the lawful issue" of the respective institutes "with out any restriction whatever"..... It has been held in South Africa that when once the fiduciary heirs have entered upon their respective shares of inheritance a separation of interests has taken place, which prevents the operation of the *jus accrescendi* in favour of the survivor.

THIS was a partition action where the matter for determination was the construction to be placed on the joint will of Simon Moraes and his wife, which had been considered by the Supreme Court in *Perera v. Silva et al.*[1]

F. J. de Saram (with him *Samarawickrema*) for ninth, tenth, eleventh, and sixteenth defendants, appellants.—The decision in case No. 4,708, D. C. Chilaw, is not *res judicata*, as that case was not between the same parties.

There is only one *fidei commissum* created by the will. On Maria's death her share would go to the other sisters by virtue of the rule of *jus accrescendi*. (*Tillekeratne v. Abeysekera*,[2] *Vansanden v. Mack*,[3] *Tillekeratne v. Silva*.[4])

[1] *(1913) 16 N. L. R. 474.*
[2] *(1897) 2 N. L. R. 313.*
[3] *(1907) 10 N. L. R. 214.*
[4] *(1895) 1 N. L. R. 311.*

1914.

Carron v. Manuel

Bawa, K.C. (with him *Canekeratne*), for the fifteenth defendant, respondent.—The intention of the will was to create three distinct *fidei commissa*.

The *fiduciarii* have entered on the inheritance. Once the *fiduciarii* enter on the inheritance there is a separation of the interests, and there is no *jus accrescendi* after that. See *Nathan, vol. III., p. 1897 ; Morice's English and Roman-Dutch Law 304.*

Cur. adv. vult.

July 24, 1914. LASCELLES C.J.—

The matter now in dispute is the one-sixth undivided share to which Maria became entitled under the joint will of her father and mother. Maria survived her parents and died childless, having devised her one-sixth share to her husband, the fifteenth defendant-respondent.

The question is whether this devise holds good, or whether Maria's one-sixth devolved *jure accrescendi* on the appellants, who are the children of Maria's sister Lucia. The precise question now at issue was decided in favour of the respondent by this Court in *Perera v. Silva et al.*,[1] which was a partition action with regard to another property, the right to which depended on the construction of the same will.

At the trial in the District Court the question arose whether the appellants were bound by that decision. The appellants contended that they were not so bound, because the land to be partitioned is not the same as that in question in the other action, because they were not parties to that case in the capacity in which they are now sued, and because the defendant-respondent, though a party, was a party in a different capacity. The learned District Judge overruled these objections, and decided the present case on the footing that it is *res judicata*.

On appeal, it was not contended that the reasons given by the District Judge could be supported. But this is not very material. The judgment of this Court was a ruling on the construction of the will on which the rights of the parties in this case depend; and the learned District Judge would naturally, and properly, have followed the ruling of the Supreme Court in that case quite apart from any question of *res judicata*.

The position, now that the case has come before us in appeal, is as follows.

The previous ruling of the Court, being a decision of two Judges, is binding on this Court as now constituted, but it would be open to us, if we disagreed with the judgment or considered it open to question, to reserve the appeal for consideration by a Bench of more than two Judges.

[1] *(1913) 16 N. L. R. 474.*

After hearing the matter fully argued, I have come to the conclusion that the previous judgment of this Court *is right*. In the technical language of the Roman-Dutch law the three institutes (Lucia, Ana, and Maria) must be taken as joined *re et verbis*, inasmuch as they are joined together in the will both by the language of the devise and with regard to the property devised. It is true that the fact that the institutes are connected in this manner generally gives rise to a presumption in favour of the *jus accrescendi*, but it has been held in South Africa that this presumption is not conclusive, and that it must yield to the testator's intention as declared in the will. (*Nathan's Common Law of South Africa, vol. III., s. 1876.*)

The words in the will, " and after their death the said shares shall devolve on their lawful issue without any restriction whatsoever," must, I think, mean that the shares allotted to the institutes shall devolve on their respective lawful issue. They cannot refer to the half shares (which are the only shares previously mentioned) into which the property was divided for the purpose of partition between the sisters of Simon on the one hand and the sisters of his wife on the other hand.

I think that the language used is inconsistent with the view that the intention of the joint testators was that the half share assigned to Justina's three sisters should be the subject of one and the same *fidei commissum*. The intention, I think, is pretty clear that the share of each of the three sisters should be regarded as a separate interest subject to a separate *fidei commissum*, and that it should devolve " on the lawful issue " of the respective institutes " without any restriction whatsoever."

Very little assistance is to be had from the reports of decided cases, which, it must be admitted, are not easy to reconcile. But it may be noted that it has been held in South Africa that when once the fiduciary heirs have entered upon their respective shares of inheritance a separation of interests has taken place, which prevents the operation of the *jus accrescendi* in favour of the survivor. (*Myiet's Executors v. Ava*, cited in *Nathan, vol. III., s. 1876.*)

With regard to the decision of the Privy Council in *Tillekeratne v. Abeyesekera*,[1] on which the appellant relies, I think that the true principle to be deduced from that case is that the decision of a question such as that now under consideration depends upon the construction of the terms of the will in each case.

Being of opinion that the intention of the joint testators was correctly construed in the previous decision of this Court, I would affirm the judgment of the District Court and dismiss the appeal with costs.

PEREIRA J.—I agree.

Appeal dismissed.

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