1965 *Present :* **Tambiah, J., and Alles, J.**

R. A. JAYASINGHE and another, Appellants,
and S. D. RANSO NONA, Respondent

S. C. 103/62 (Inty.)—D. C. Gampaha, 6011

Jus accroscendi—*Inapplicability to a gift* inter vivos.

The principle of *jus accrescendi* does not apply to deeds of gifts. But if, by the term *jus accrescendi* is loosely meant the right of accrual, and the terms of a deed clearly indicate that there should be such an accrual, then the Courts would give effect to it. But in doing so they do not apply the principle of *jus accrescendi* with its presumptions but are merely construing the terms of the deed.

A person gifted a land to his five sons. The relevant portion of the deed of gift was as follows :—

" Wherefore we the said Donors have hereby gifted donated conveyed and set over unto the said Donees all our rights title and interest to the said premises to be held and possessed by them in any manner they like and during their lifetime and the said five donees shall not alienate the said premises in any manner whatsoever ; and after their deaths their lawful children and grandchildren shall do anything they like with the said premises."

Held, that the principle of *jus accrescendi* did not apply to the deed of gift. On a consideration of the express terms of the deed, there was nothing to indicate that if one of the sons of the donor died issueless and intestate, his share should accrue to his other brothers. The intention to benefit the grandchildren excluded such a view.

APPEAL from an order of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *E. S. Amerasinghe, W. D. Gunasekera* and *I. S. de Silva* for the 15th defendant-appellant.

S. Sharvananda, for the plaintiff-respondent.

Cur. adv. vult.

March 4, 1965. TAMBIAH, J.—

The plaintiff instituted this action for the partition of a land called Delgahawatta, depicted as Lots A to M in Plan X filed of record. It is common ground that one Samel, the original owner of this land, gifted this property to his sons Hendrick, Paulis, Welun, Singhappu and Jamis, by deed of gift No. 9046 of 31.5.1886 marked P1. Welun and Singhappu died issueless and intestate. Jamis, the 25th defendant, who adopted Amaradasa, the 15th defendant, as his child, by deed of gift No. 12926 of 1950 marked 15D1, transferred his interest to the 15th defendant.

It is the plaintiff's case that the deed of gift P1 created a fideicommissum and, by the doctrine of *jus accrescendi*, the share of Jamis lapsed and Hendrick and Paulis got title to the whole land and their interests.

The 15th defendant also led evidence to show that by an amicable partition, in lieu of his 1/3rd share of the land, Jamis and he possessed Lot G in the said plan. The learned District Judge has held that the deed P1 created one joint fideicommissum, and applying the principle of *jus accrescendi* Jamis's share lapsed and Hendrick and Paulis became entitled to the whole land. On this footing he has given shares to the other defendants.

Counsel for the appellant contends that the deed P1 does not create a fideicommissum and in the alternative the principle of *jus accrescendi* does not apply to deeds of gifts and, consequently, the title to 1/3rd share to which Jamis was entitled to, passed by deed of transfer 15D1 of 1950 to the 15th defendant. The Counsel for the appellant did not press the point that Jamis and the 15th defendant exclusively possessed lot G in lieu of 1/3rd share of this land. It is sufficient to consider the short point whether the principle of *jus accrescendi* applies to the deed of gift P1 of 1886.

The relevant portion of P1 is as follows :—

> " Wherefore we the said Donors have hereby gifted donated conveyed and set over unto the said Donees all our rights title and interest to the said premises to be held and possessed by them in any manner they like and during their lifetime and the said five donees shall not alienate the said premises in any manner whatsoever ; and after their death their lawful children and grandchildren shall do anything they like with the said premises."

P1 is a certified copy issued by the Registrar-General. It is significant that in P1 there are many omissions probably due to some of the words in the original being illegible. It was contended that the plaintiff who relied on this deed should place before Court the full terms of the deed and cannot rely on a copy with omissions which are material. Be that as it may, assuming that the omitted words were immaterial, the question arises whether the principle of *jus accrescendi* could be applied to deeds of gifts.

The *jus accrescendi* was a rule of Roman Law which was applied among co-owners in testamentary succession or among legatees by which if one of them cannot or will not take his portion it accrued to the co-legatees to the exclusion of the heirs *ab intestato*.

This rule was evolved in deference to the principle of Roman Law that a person cannot die partly testate and partly intestate. Although this rule was applicable only among co-legatees, Justinian extended it to cover donations *mortis causa*. The Roman Dutch writers applied this doctrine only to testamentary gifts and *donatio mortis causa* and did not apply it to gifts *inter vivos*, which were considered to be in the nature of contracts. But if the words of a deed expressly state that there should be such accrual, then effect should be given to the provisions of the deed and the right of accrual should be recognised. In such cases the words should be clear before one could say that there is a right of accrual but the doctrine of *jus accrescendi* with the various presumptions attached to it have no application.

Voet, one of the greatest of the Roman Dutch writers, states as follows (vide Voet XXXIX. 5.14 of Gane's Translation Vol. VI p. 101) :—

> " If a single thing or if all goods are donated to more persons than one at the same time, and one of them does not accept what is donated, his share by no means accrues to the rest. Nay rather does it stay outside the cause of donation. That is because such a donee is neither an heir, nor a legatee nor in the place of a legatee ; nor do we read anywhere that the right of accrual has been adopted in contracts or other acts *inter vivos*. Nay it is clearly found that the right of accrual was extended by Justinian in the passage cited below only to a donation *mortis causa* which is almost everything put on the same footing as legacies."

In applying the rule of *jus accrescendi*, the Roman Dutch writers took the view that such a rule was in accordance with the wish of the testator and his affection for the legatees (vide Voet VII. 2.9). Dekker in his notes to Chapter 30 of Van Leeuwen's Commentaries on Roman Dutch Law, which deals with donations and gifts, sets out the differences between donation *inter vivos* and donation *mortis causa*, as follows (vide Van Leeuwen's Roman Dutch Law by Kotze, 2nd Edition, page 232) :—

> " Whence it follows *per se* that the *jus accrescendi* and the *lex falcidia* must likewise be observed as regards donation *mortis causa*."

Perez is also of the same opinion (vide Perez VI. 51.9). Both writers apply the principle of *jus accrescendi* only in connection with wills and by extension to *donatio mortis causa*. The modern writers on Roman Dutch Law also adopt the same view (vide Burge Vol. II p. 144 ; Maasdorp Vol. III. 4th Edition, p. 109 ; Nathan, Vol. II section 1087). Nathan emphatically states that the right of accrual, *jus accrescendi* does not apply where several persons are donees.

Jayewardene, A.J., in a very exhaustive judgment, has shown beyond all doubt that the Roman Dutch writers did not apply the principle of *jus accrescendi* to deeds of gift (vide the dissenting judgment of Jayewardene A.J. in *Carlinahamy v. Juanis*[1]). In the same case Bertram C.J. observed as follows (vide ibid, at 141) :—

> " I agree that it must be taken that the *jus accrescendi* in the proper sense of the term does not apply in instruments *inter vivos*, that is to say, that in the case of an instrument *inter vivos*, the law will not presume merely from the conjunction of two or more persons in the same liberality, that, in the event of one of these predeceasing the vesting of the liberality, his share was intended to accrue to the others. In the case of such an instrument, such a result can only arise from operative words, which either expressly or by implication have this effect."

In the case cited above, the majority view proceeded on the footing that by construing the terms of the deed which was before the court, the right of accrual was intended. However, the headnote erroneously states that the principle of *jus accrescendi* is not confined to testamentary fideicommissum but it applies equally to fideicommissum created by deed *inter vivos*.

In *Fernando v. Fernando*[2] it was held that the principle of *jus accrescendi* does not apply to fideicommissary deeds of gift. In dealing with this aspect, Bertram C.J. emphatically stated as follows (vide ibid. at 322) :

> " In the second place, I think it must now be taken as settled that the *jus accrescendi* does not apply in the case of fideicommissary deeds of gift. We have, therefore, to interpret the deed of gift, without the aid of this legal presumption."

This principle has been adopted in subsequent cases (vide *Ibrahim v. Alagammah*[3]).

The Counsel for the respondent relied on the ruling of the Privy Council in *Nagalingam v. Thanabalasingham*[4] for the proposition that the rule of *jus accrescendi* applies to deeds of gift as well. In that case the main question for decision was whether acceptance of a deed of gift on behalf of a minor by his maternal uncle, without appointment by lawful

[1] *(1924) 26 N. L. R. 146.*
[2] *(1924) 27 N. L. R. 321.*
[3] *(1951) 53 N. L. R. 302.*
[4] *(1952) 54 N. L. R. 121.*

authority, was valid or invalid. Sir Lionel Leach, who delivered the opinion of the Board, in dealing with this question, did not express the view that the principle of *jus accrescendi* applies to deeds of gift as well. The works of the Roman Dutch writers on this matter were neither cited nor considered by the Privy Council in dealing with this aspect of the case. In interpreting the deed the Board took the view that one fideicommissum was created and not several fideicommissa. In construing the deed of gift it was held by their Lordships that "The gift..... is not one of a disposition of one share of the whole to each of the three brothers, but a gift of the whole to the three brothers jointly with benefit of survivorship".

The Counsel for the respondent also cited *Upasakappu v. Dias*[1] for the proposition that the principle of *jus accrescendi* applies to deeds of gift. In that case Soertsz J., referring to the doctrine of *jus accrescendi*, stated as follows:—

> "When this question again arose in our Courts twenty years later in connection with a fideicommissum created by a deed *inter vivos*, Bertram C.J. declared that he reserved his opinion "whether so far as relates to the *jus accrescendi*—that is how he expressed himself—there is any substantial difference between testamentary fideicommissa and fideicommissa constituted by instrument *inter vivos*" and Shaw J. who sat with him said, "In *Carry v. Carry* 2 N. L. R. 313 and *Ayamperumal v. Meeyan* 4 C. W. R. 182, this Court held the *jus accrescendi* to apply to cases of fideicommissa 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 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." I should prefer not to express myself quite in that manner. It is not really a question of the *jus accrescendi* applying in these cases, but a similar result being achieved by an express declaration on the part of the testator or donor, or by an intention clearly to be inferred, that he desired the property to devolve in that manner. The *jus accrescendi* was a rule of the Roman Law by which among co-heirs in testamentary succession or among co-legatees there is a right of accretion so that if one of them cannot or will not take his portion, it falls to other heirs to the exclusion of heirs at law. This rule was evolved in deference to the Roman horror of dying partly testate and partly intestate, but the Roman Dutch Law adopted that rule to the extent of saying that in no case had it automatic operation, but it would be accepted or rejected as would best give effect to the testator's intention."

[1] *(1939) 41 N. L. R. 91.*

It was not decided in that case that the doctrine of *jus accrescendi* applies to deeds of gift. But as Soertsz J. observed, if the terms of a deed clearly indicate that there should be a right of accrual, then effect should be given to it.

In view of the clear enunciation that the principle of *jus accrescendi* does not apply to deeds of gift both by the Roman Dutch authorities and by our Courts, it is settled law that such a principle with its presumptions cannot be applied to deeds of gift. But, if by the term *jus accrescendi* is loosely meant the right of accrual, and the terms of a deed clearly indicate that there should be such an accrual, then Courts would give effect to it. But in doing so they do not apply the principle of *jus accrescendi* with its presumptions but are merely construing the terms of the deed.

Therefore I hold that the principle of *jus accrescendi* does not apply to the deed of gift P1. On a consideration of the express terms of deed P1 there is nothing to indicate that if one of the sons of Samel dies issueless and intestate, his share should accrue to his other brothers. The intention to benefit the grandchildren excludes such a view. For these reasons, Jamis's share did not accrue to Hendrick and Paulis and his interest passed on deed 15D1 to the 15th defendant. In view of this conclusion, it is not necessary to decide whether the deed created a fideicommissum or not. Therefore the 15th defendant has title to 1/3rd share of the land which is the subject matter of this partition action. I set aside the order of the learned District Judge and send the case back with the direction to allot 1/3rd share of the land which is the subject matter of this action to the 15th defendant and to allot the remaining 2/3rd according to the persons in the plaintiff's pedigree whose titles were proved.

The appellant is entitled to costs of appeal and the costs of contest in the District Court.

ALLES, J.—I agree.

Order set aside.