The Scope of the Rule in Tillekeratne *v.* Abeyasekere

THE Privy Council decision in *Tillekeratne* v. *Abeyasekere* 2 N.L.R. 313, as explained in later cases, established the principle that, where there is a single gift to a number of persons burdened with fideicommissum in favour of their descendants, the testator may be taken by implication to have intended that, on failure of descendants of one or more of such persons after their interest has vested in them, the other persons or their descendants were substituted to take the interest of the former (see T. Nadaraja, *The Roman-Dutch Law of Fideicommissa*, p. 298 second paragraph and p. 304 note 32). The principle has been recognised as applying to fideicommissa created by deed as well as by will (*op. cit.* p. 304 note 32).

Although *Tillekeratne* v. *Abeyasekere* and many of the cases in which its ratio decidendi was explained happened to involve instruments which created recurring fideicommissa extending beyond the first generation of fideicommissaries, there is nothing in the judgement in *Tillekeratne* v. *Abeyasekere* and in the cases which explained its principle which restricts that principle to recurring fideicommissa and excludes the application of that principle to non-recurring fideicommissa (i.e. fideicommissa which determine on the property coming into the hands of the first set of fideicommissaries).

But in *Fernando* v. *Rosalina Kumna* 27 N.L.R. at pp. 505-6, per Maartensz, J., it seems to have been suggested for the first time that in the latter type of case where non-recurring fideicommissa were involved the principle in *Tillekeratne* v. *Abeyasekere* was inapplicable. This suggestion was made obiter, being unnecessary for the decision of the case, which was in effect based on the similarity of the wording used in the instrument in that case with the language in the earlier case of *Perera* v. *Silva* 16 N.L.R. 474 and in *Carron* v. *Manuel* 17 N.L.R. 407.

Now the judgements in *Perera* v. *Silva* (which were simply followed without much comment in *Carron* v. *Manuel*) cannot be regarded as satisfactory, in so far as the chief reason given for holding that the fideicommissum in respect of the half share that went to the institutes Lucia, Maria and Ana was not a single joint fideicommissum was that the opposite construction would result in the gift-over to the fideicommissaries being postponed till the death of all three institutes. But this is not a necessary consequence of holding that the fideicommissum was a joint fideicommissum to which

the principle in *Tillekeratne* v. *Abeyasekere* applied : for it was quite possible to have held that the fideicommissum was a joint one to which the principle in *Tillekeratne* v. *Abeyasekere* applied (in other words, that if Lucia, Maria or Ana had died without children, the share of the deceased would not have formed part of her estate but would have gone over to the other institutes or their children) whilst holding that the gift-over to the institutes ' children, if they died leaving children, took place piecemeal at the respective deaths of each institute. In other words, the question when the gift-over on an institute's death to his children takes place is quite separate from the question whether, on failure of children, the creator of the fideicommissum did or did not intend a gift-over to the co-institutes or (if they are dead) to their children.

It may be added that *Perera* v. *Silva* and *Carron* v. *Manuel* (the judgements in which do not suggest any difference between recurring and non-recurring fideicommissa) were dissented from by Bertram, A.C.J., in *Usoof* v. *Rahimath* 20 N.L.R. 225 at p. 241, where he said " I confess that . . . I am unable to follow much of the reasoning of the judgements in these two cases " and he dismissed them as " simply . . . decisions upon the special terms of a particular will ".

It is submitted that the suggestion in *Fernando* v. *Rosalina Kumna* 27 N.L.R 503 that the principle in *Tillekeratne* v. *Abeyasekere* applies only to recurring fideicommissa cannot be accepted. On principle, there is no reason why the rule enunciated in *Tillekeratne* v. *Abeyasekere* should not apply to non-recurring fideicommissa also (see T. Nadaraja, *op. cit.* p. 304 note 32 at pp. 304-5). The principle in *Tillekeratne* v. *Abeyasekere* not being an absolute rule of law but being merely a principle of interpretation based on the presumed intention of a testator or donor (see *Usoof* v. *Rahimath* 20 N.L.R at p. 229, per Bertram, A.C.J., and *Carlinahamy* v. *Juanis* 26 N.L.R. at p. 135, per Bertram, C.J.), it must be a question of intention in each case whether a gift to co-beneficiaries burdened with fideicommissum is a single joint fideicommissum or a bundle of separate fideicommissa. If this " initial test ", which "is the basis of the whole doctrine " in *Tillekeratne* v. *Abeyasekere* (to use the words of Bertram, C.J. in *Carlinahamy* v. *Juanis* 26 N.L.R. at p. 136), is found to be answered in the former sense (i.e. as creating a single fideicommissum), it can be admitted that the intention of the testator or donor was that on the failure of the line of fideicommissaries of one institute, the other institutes (or their fideicommissary substitutes) should take, and it should be immaterial whether the fideicommissaries in each line are themselves burdened with further fideicommissa or not (i.e. whether the fideicommissum is recurring or non-recurring). Nearly all the reported

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cases in which the principle in *Tillekeratne* v. *Abeyasekere* was applied happened to involve recurring fideicommissa, but that is no reason why the principle should be restricted to recurring fideicommissa.

In *Usoof* v. *Rahimath* Bertram, A.C.J., in formulating the principle in *Tillekeratne* v. *Abeyasekere*, used language (e.g. " and the interest of these fiduciaries is burdened with obligations in favour of *children* in the next generation ", lines 24-26 of p. 229 of 20 N.L.R.) that prima facie covers even non-recurring fideicommissa, although he elsewhere reverts to language appropriate to recurring fideicommissa since the facts of the case before him involved a recurring fideicommissum. Again in *Sandenam* v. *Ayamperumal* 3 C.W.R. 58 at pp. 60-1, Schneider, J. regarded the principle in *Tillekeratne* v. *Abeyasekere* as applicable to a case of non-recurring fideicommissum. In that case there was in effect a gift to L, M and I in undivided shares with a prohibition on alienation and a gift-over on their death to their legitimate issue (the alternative gift-over on failure of issue being from our present viewpoint immaterial). Schneider, J. inclined to the view that there was a joint single gift to L, M and I and that the principle in *Tillekeratne* v. *Abeyasekere* was applicable, although it will be noticed that the fideicommissum, not extending beyond the issue, was a non-recurring fideicommissum.

For the above reasons it is submitted that *Fernando* v. *Rosalina Kumna* should not be regarded as of authority in so far as it suggested limiting the applicability of the principle in *Tillekeratne* v. *Abeyasekere* to recurring fideicommissa only.

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