DE SILVA *v.* THOMIS APPU.

D. C., Galle, 6,902.

1903.
December 4 and 16.

Donation and fidei commissum inter vivos *to avoid probate duty—Acceptance by* fiduciary *and* fidei commissary—*Section 547, Civil Procedure Code.*

A donation and *fidei commissum inter vivos* in the following terms,—"I, Don Baron Lewis Gunasekara, do hereby declare to have gifted unto my hamine (wife) named Dona Madalena [here follow particulars of lands, their value being stated as Rs. 1,990] on condition that the premises so gifted shall not be sold, mortgaged, gifted, or alienated to third parties hereafter, and after the death of the said hamine the said lands shall vest in my two daughters and their heirs and estates to do what they please with."

Requires acceptance by the *fiduciary* donee (the wife) to validate the gift to her, and also by the *fidei commissary* donees (the daughters) to validate the gift to them.

It vests in the wife, not a *usufruct*, but a *proprietas*, and the wife's *proprietas* will become absolute at her death if the daughters have not, before her death, expressly accepted the donation.

Their acceptance after her death will be of no avail.

On the wife's *proprietas* so becoming absolute on her death, the lands gifted form part of her estate, which therefore, by the terms of section 547, Civil Procedure Code, requires administration to validate its devolution or the transfer of any part of it by her heirs.

ONE Gunasekara and his wife Madalena lent to the defendant Rs. 350 upon a mortgage bond dated 14th July, 1897. Madalena died intestate leaving her surviving her husband and two daughters, their only children. On the 7th October, 1902, they assigned the mortgage bond to the plaintiff, who raised the present action, alleging that Madalena's estate was under Rs. 1,000 in value and did not require administration.

The defendant denied this allegation, and contended that the transfer to the plaintiff of Madalena's rights as mortgagee by her husband and daughters, who had not taken out administration to her estate, was illegal by section 547 of the Civil Procedure Code.

It appeared that Gunasekara died in 1902, and that by two deeds dated respectively 17th February, 1896, and 17th February, 1897, he gifted all his property to his wife Dona Madalena subject to a *fidei commissum* in favour of their two daughters and their heirs.

The District Judge (Mr. G. A. Baumgartner) found that there was no acceptance of the gift on the part of the daughters during the lifetime of the donor, but that the wife had accepted the gift in the deeds of gifts themselves. He held that a person making a donation must openly part with the dominium by securing the acceptance of the donation by all the donees, whether the property was to vest in them or at some future date; that such acceptance must be expressed by notarial deed in the case of immovable

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property; and that until such acceptance the property did not vest in the donee, but remained in the donor. As the daughters had not accepted the donation, the District Judge thought that the properities gifted all formed part of the estate of the wife only who had accepted the gift, and that therefore her estate exceeded Rs. 1,000 in value. He dismissed the plaintiff's claim because the assignment of her rights as mortgagee was invalid for want of administration.

The plaintiff appealed, and the case was argued on the 4th of December, 1903.

W. Pereira, for plaintiff, appellant.

H. A. Jayawardana and *Wijeyekoon*, for defendant, respondent.

Cur. adv. vult.

16th December, 1903. MIDDLETON, J.—

The question in this case is whether the plaintiff can maintain the action as assignee of the interests on a mortgage bond given to Don Baron Lewis Gunesekara Appuhamy and his deceased wife, Dona Madalena Hamine. The said Don Lewis and his two daughters asigned to the plaintiff, and it is alleged by the defendant that the estate of the deceased Dona Madalena exceeded the value of Rs. 1,000, and that therefore the intervention of an administrator was necessary for a valid assignment by the terms of section 547 of the Civil Procedure Code.

This question, as put by the learned District Judge, depends on the effect of two deeds of gift executed by Don Lewis Gunasekara in favour of his wife and two daughters. The operative part of the first deed of 17th February, 1896, was as follows: "I, Don Baron Lewis Gunasekara, do hereby declare to have gifted (here follow particulars of 16 lands, all amounting in value to Rs. 1,241) unto my hamine named Dona Madalena, and that the said rights and premises are not to be mortgaged, sold, gifted, or alienated to others, and after her death the premises thus gifted are to devolve on my two daughters and their heirs and estates to do what they please with the same."

That of the 17th February, 1897, was as follows:—"I, Don Baron Lewis Gunasekara, do hereby declare to have gifted the garden and house wherein I reside and the iron chest in the said house of the value of Rs. 750 unto my hamine named Dona Madalena, on condition that the premises so gifted should not be mortgaged, sold, gifted, or alienated to third parties hereafter, and after the death of the said hamine the said garden and house should vest in my two daughters and their heirs and estates to do what they please with."

I agree with the District Judge that the terms of the two deeds do not give an *usufruct* to the wife, Dona Madalena, but vest in

her *properties* but not *plena*, as there is a prohibition against alienation, but such *properties* as would I think give her *plena proprietas*, provided that she accepted the gift (which she has done) in case the gift to her were ultimate. That is to say, if there were no *fidei commissarii* to whom to make restitution (*Voet 7, 1, 13*) the gift to the wife would vest an estate in her which would descend to her heirs on her death.

In the gift to her, however, there is a further gift over to the donor's two named daughters, which there is no evidence to show has been accepted by them. No donation is complete till accepted by the donee (*Vanderlinden, translated by Henry, p. 215*). I do not agree with the District Judge that such acceptance must be evidenced by notarial deed.

The cases cited from *Ramanathan 1851, p. 155 and 1 S. C. R. 19; and Vanderlinden, p. 215, and Grotius, translated by Maasdorp, p. 307*, show that it may be evidenced in many other ways, and that this Court has held that it is a matter of proof.

The action also appears to have proceeded to trial on the assumption that there was no proof of acceptance by the two daughters. We have, therefore, a gift *inter vivos* of the property vesting in her *proprietas* to Dona Madalena and prohibiting her from alienation, which she has accepted with a further gift over on her death to the two daughters which they had not accepted before Dona Madalena died. This would be if accepted the creation of a *fidei commissum* by act *inter vivos* which can, according to *Voet 36, 1, 9*, be as well imposed by such act as by last will. It would seem that *Voet 39, 5, 45*, would appear to consider that acceptance is as much required from the *fidei commissarius* as from the *fiduciary donee*.

If the *fidei commissarii* did not accept the part of the gift designated for them before the death of the *fiduciarius*, *the gift to* her would be ultimate, and the *plena proprietas* would vest in the heirs of the *fiduciarius* on her death, and no acceptance thereafter could be of any avail.

Under these circumstances, it seems to me that Dona Madalena died leaving the property donated to her as part of her estate, and it appears to be of a value exceeding Rs. 1,000. Even if Dona Madalena divested herself by the deed of 14th July, 1897, of the property mentioned in that deed according to the value given in the deeds, and we have no other evidence to act on, her estate would still exceed in value Rs. 1,000.

I think, therefore, that the judgment of the District Judge must be affirmed, and the appeal dismissed with costs.

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Section 13 of the Ordinance No. 15 of 1876 renders valid donations between husband and wife, which, by our Common Law, were invalid except so far as confirmed by the donor's death. And no question has been raised but that the donation by the husband of his entire estate to his wife made her the separate owner of it. On this footing I agree with my brother Middleton that the two donations createtd *fidei commissa*, under which the *fiduciary* (the wife had the *proprietor* subject to her handling over the lands on her death to a fidei-commissary qualified to vindicate them. I also agree that the fidei-commissaries failed for want of acceptance by them of the donations to them, and that the wife's title thereby became absolute; so (the lands being over Rs. 1,000 in value) formal administration of her estate was necessary before a valid assignment could be made of the mortgage in her favour. The action was therefore rightly dismissed.