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Present: De Sampayo J. and Schneider A.J.

PERERA *v.* MARIANO.

320—*D. C. Negombo, 12,524.*

Fidei commissum—Failure of fidei commissarius—Sale by fiduciary.

When *fidei commissarius* fail, the last holder's fiduciary interest is enlarged into full ownership, and any disposition by him by act *inter vivos* or by last will is operative.

THE facts appear from the judgment.

Croos-Dabrera, for second defendant, appellant.—Under our law no prohibition against alienation is necessary to constitute a *fidei commissum*. If A leaves his property to B, subject to the condition that it should go to C after B's death, a complete *fidei commissum*

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is created. In such a case a prohibition is a superfluity. But if A gives his property to B, prohibiting him from alienating, and providing that, in the event of alienation, the property is to go to C, then, too, a *fidei commissum* is created. In the first case, the event on the happening of which the property is to vest in C, is the death of B. If C predeceases B the *fidei commissum* lapses, and B becomes vested with absolute ownership. In the second case, the event on the happening of which the property is to vest in C, is alienation by B. Justina was allotted a half share by the interlocutory decree, subject to a *fidei commissum* in favour of her descendants. She died unmarried and issueless. The *fidei commissum* therefore lapsed. Her half share should go to the appellant, who got it by a deed of gift from her prior to the institution of the partition suit. The prohibition against alienation not being subject to any condition is inoperative. Counsel cited 1 *Maasdorp* 169 and 2 *Maasdorp* 33. Even if Justina had no title at the time of the deed of gift, the subsequent acquisition of absolute ownership enured to the benefit of the donee. [DE SAMPAYO J.—I do not think it is necessary to go into this question.]

A. St. V. *Jayawardene* (with him *Abdul Cader*), for respondent—The original donees were the respondent Juan Perera and his wife Catherina. On Catherina's death her half share devolved on Justina, subject to the *fidei commissum*. On the death of Justina without children her half share went back to the original donee, Juan Perera, by operation of the *jus accrescendi*. If any one of the institutes is living, then the property goes to him, in order to prevent the *fidei commissum* lapsing. Justina, therefore, got no title on her death, and the appellant, who claims through her, is not entitled to anything. Counsel cited *Úsoof v. Rahimath*¹ *Tillekeratne v. Silva*,² *Tillekeratne v. Abeyskere*,³ *Vansanden v. Mack*,⁴ *Carry v. Carry*,⁵ and *Ayamperumal v. Meeyan*.⁶

The deed of gift by Justina is bad, and conveyed no title. She acquired absolute ownership only at her death. It has been held that the interests of a *fidei commissarius* cannot be sold during the lifetime of the *fiduciarius* (*Mohammodo Bhoj v. Lebbe Maricar*⁷).

Croos-Dabrera, in reply.—A separation of interests had taken place, and therefore the *jus accrescendi* does not apply (*Perera v. Silva*,⁸ *Carron v. Manuel*⁹). *Jus accrescendi* raised for first time in appeal could be successfully met by pleas of estoppel and prescription.

*Cur. adv. vult.*¹ (1918) 20 N. L. R. 225.⁵ (1917) 4 C. W. R. 50.² (1907) 10 N. L. R. 214.⁶ (1917) 4 C. W. R. 182.³ (1897) 2 N. L. R. 313.⁷ (1912) 15 N. L. R. 466.⁴ (1895) 1 N. L. R. 311.⁸ (1913) 16 N. L. R. 474.⁹ (1914) 17 N. L. R. 407.

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March 26, 1919. DE SAMPAYO J.—

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This is an appeal from the final decree in a partition action, and the question is whether a certain half share of the land should be allotted to the second defendant-appellant or to the respondent Juan Perera. The land originally belonged to one Lawrenti Fernando, and was given by him by deed of gift dated November 30, 1874, to his daughter Catherina and Juan Perera, who was her husband. It is agreed that the deed created a *fidei commissum* in favour of the descendants of the two donees. Catherina died leaving one child, Justina, the original first defendant, who died pending the action. The second defendant's claim to the half share is founded upon a deed of gift granted by Justina before the institution of the action, while the respondent Juan Perera claims it as having come to him absolutely on the death of Justina without issue. The District Judge has allowed the claim of Juan Perera, who was substituted as first defendant in the place of the deceased first defendant Justina. The second defendant has appealed.

It appears to be common ground that the land was held dividedly, and that a *fidei commissum* was imposed on each half share given to Catherina and Juan Perera respectively, and I do not think we need go behind the case so put by both parties before the District Judge, who also decided the matter on the same footing, and decreed Juan Perera's half share to the plaintiff as purchaser of it, but subject to the *fidei commissum* as Juan Perera is still alive, and Justina's half share to Juan Perera himself absolutely as Justina's heir, as he is described in the judgment. The District Judge's reason for not giving effect to Justina's deed of gift in favour of the second defendant is that the deed is invalid in consequence of the *fidei commissum*. But it is good law that when *fidei commissarius* fail, the last holder's fiduciary interest is enlarged into full ownership, and that any disposition by him by act *inter vivos* or by last will is operative. I therefore think that the half share in question should have been allotted to the second defendant on the partition. If I had not come to this conclusion, I would have considered it right to require further proceedings, because in her deed to the second defendant Justina recites as her source of title not Lawrenti Fernando's original deed of gift, but deed No. 2,527 dated June 18, 1878, attested by J. C. Samarasinghe, Notary Public, which has not been produced.

In the circumstances I would allow the appeal, and order that the partition decree be amended by allotting lot A to the second defendant instead of to the substituted first defendant. Juan Perera. The second defendant-appellant is, I think, entitled to the costs of the day in the Court below and of this appeal.

SCHNEIDER A.J.— I agree.

Set aside.