1930

Present : **Fisher C.J. and Drieberg J.**

GRIAUX *v.* JAYAWARDENE.

383—*D. C. Negombo,* 2,994.

Fidei commissum—*Gift of separate shares of two lands—Property to go over to Roman Catholic Church—Separate* fidei commissa *—Failure of heirs*—Jus accrescendi.

Where husband and wife donated divided portions of two lands to their two sons, their heirs, executors, administrators, and assigns ; and the deed further provided that the donors should have the right of possessing the lands, and that after their death, "the donees should possess the shares or any parts thereof gifted to each without selling, mortgaging, exchanging . . . . and that after the death of the said two persons their descending heirs could do whatever they pleased with the same, that if the generation of the said two persons ceases, the portions gifted to each should devolve on the church of the Blessed Mother of Holy Rosay . . . . "

Held, that the deed created a valid *fidei commissum.*

Held, further, that separate *fidei commissa* were created by the deed and that on the death of one of the sons his share did not accrue to the other but devolved on the church.

THIS was an action brought by the administration of the Archdiocese of the Catholic church claiming title to certain lands gifted to one Franciscu, on whose death without issue, it was claimed that they vested in the Catholic church, according to the terms of a gift granted by their parents to the said Franciscu and his brother, the respondent. The respondent contended that the deed of gift did not create a valid *fidei commissum,* and that even if it did, the property did not vest in the church so long as he was alive. The learned District Judge held that the deed did not create a valid *fidei commissum.*

Croos da Brera, for appellant.—All the essentials of a valid *fidei commissum* are present. There is a prohibition against alienation and a clear designation of the persons to benefit. The descending heirs are to benefit and on failure the church of

Our Lady of the Rosary. The presence of the words " heirs, executors, administrators, and assigns " is not obnoxious to the validity of the *fidei commissum*. (*Wijetunge v. Wijetunge*, [1] *Miranda v. Coudert*.[2]) The church is made a beneficiary on the happening of a certain event. (*Carolis v. Simon*. [3]) The words " after the death of the said two persons mean after the death of each of them. (*James v. Daniel*,[4] *Abeyratne v. Jagarias*.[5]) Two separate (*fidei commissa* have been created and no question of *jus accrescendi* arises. (*Perera v. Silva* [6] and *Usoof v. Rahimath*. [7])

De Zoysa, K.C. (with him *Amerasekere*), for defendant, respondent.—The deed does not create a valid *fidei commissum*. *Wijetunge v. Wijetunge* (*supra*) was the furthest to which the Supreme Court went in giving a liberal construction. This case has been differentiated in *Silva v. Silva*.[8] Only one *fidei commissum* has been created and the intention was to benefit the descending heirs of both the donees, and so long as there were children of the donees living, the church could not make any claim.

March 24, 1930. DRIEBERG J.—

By deed (P 1), another translation of which (D 1) was tendered by the respondent, Gabriel Perera and his wife, Catherina, gifted to their son, Franciscu, the northern half of land No. 1 and the western half of land No. 2, and to another son, Eusebi, the resopondent, the southern half of No. 1 and the eastern half of No. 2. The gift is to each of these two donees, their heirs, executors, administrators, and assigns. The deed then went to provide that one coconut tree from each of these shares should be excluded for the " profit " of the Roman Catholic church of Dehiyagatha, that the donors should have the right of possessing the lands, and that after their death the donees should possess the shares or any parts thereof gifted to each without selling, mortgaging, exchanging, letting on lease for a period exceeding four years or letting on lease before the expiration of a period given and that after the death of the said two persons, their descending heirs could do whatever pleased with the same, that, if the generation of the said two persons ceases, the portions gifted to each should devolve on the church of the Blessed Mother of Holy Rosary, Dehiyagatha, and that if the coconut tree set apart for the Church as aforesaid is not given the share gifted to the person so doing should devolve on the said church ".

This extract is from the translation (D1). Franciscu declared that he accepted the gift for himself and Eusebi " subject to the conditions stated therein ".

Franciscu died without issue, and the appellant, the Administrator of the Archdiocese of Colombo, claims that the lands gifted to him vested in the church at Dehiyagatha.

The respondent denies the right of the appellant on the ground that the deed (P 1) did not create a valid *fidei commissum*, and that if it did, the property could not vest in the church so long as the other donee, the respondent, was alive, and that it could vest in the church only if the respondent died leaving no descendants.

The learned District Judge held that the deed did not create a valid *fidei commissum* for the reason that the gift was to Franciscu, his heirs, executors, administrators, and assigns.

It is now well settled that where a *fidei commissum* is otherwise well created the use of those words will not defeat the *fidei commissum*—De Sampayo J. in *Craibu v. Loku Appu*, [1] where the cases on the point are referred to. Franciscu accepted the donation subject to the conditions which created a good *fidei commissum*.

In the case referred to by the learned District Judge there was no clear indication of the persons in favour of whom the prohibition was created, and it was not

[1] 15 *N. L. R.* 493.
[2] 19 *N. L. R.* 90.
[3] 30 *N. L. R.* 266.
[4] 30 *N. L. R.* 244.
[5] 26 *N. L. R.* 181.
[6] 16 *N. L. R.* 474.
[7] 20 *N. L. R.* 225.
[8] 18 *N. L. R.* 174.

[1] (1918) 20 *N. L. R.* 449, *at page* 455.

the mere fact of the donation being to the donee, his heirs, executors, administrators, and assigns that rendered the *fidei commissum* bad.

The other contention proceeds on the ground that there was one *fidei commissum* in favour of Franciscu and Eusebi. Now there is nothing in the deed to suggest this, but, on the contrary, the provision that if the church did not get the benefit of either of the coconut trees set apart for it the share of the person in default should devolve on the church, indicates in the clearest possible manner that there were two separate and distinct *fidei commissa.*

There can be no question here of the share of Franciscu accruing to Eusebi, for the *jus accrescendi* would apply only where there would otherwise be a lapse. There can be no failure of the *fidei commissum* here, for the church is designated as the successor of Franciscu (*Usoof v. Rahimath*[1]).

It is unnecessary to deal with the arguments which were addressed to us on the words of the deed that " after their death the heirs descending from them may do whatever at pleasure ". The intention of the deed being clearly, as I have said, to create two *fidei commissa,* it is not necessary to consider what follows upon the word " their " in this passage. But even the use of the word " their " does not necessarily show that one *fidei commissum* was intended, and in this case it should be read as though it read " their death respectively " (*Abeyaratne v. Jagaris*[2]). I am here referring to the translation P 1. The translation D1 reads " after the death of the said two persons " instead of " their death ", but this can also be similarly construed.

The appeal must succeed. The case was argued in the lower Court on the issues of law only, and there was no evidence led as to damages.

I therefore set aside the decree and direct that judgment be entered for the plaintiff for a declaration of title as claimed and for ejectment, but not for damages.

The respondent will pay to the appellant the costs of this appeal and in the Court below.

FISHER C.J.—I agree.

Appeal allowed.

[1] (1918) 20 *N. L. R.* 225.
[2] (1924) 26 *N. L. R.* 181.