

1906.
May 28.

Present : Mr. Justice Wendt and Mr. Justice Wood Renton.

GEDDES v. VAIRAVY *et al.*

D. C., Jaffna, 4,078.

Fidei commissum—Prescription against fidei commissaries—Ordinance No. 22 of 1871.

Where a property is burdened with a *fidei commissum*, a third party cannot acquire title by prescription to such property against the *fidei commissarii* during the lifetime of the *fiduciarius*, inasmuch as prescription does not begin to run against the *fidei commissarii* until after the death of the *fiduciarius*.

The principle that prescription when it once begins to run is not interrupted by the death of the owner does not apply in such a case.

THE facts sufficiently appear in the judgment of Wendt J.

The Hon. Mr. Kanagasabai (Balasingham with him), for the defendants, appellants.

Walter Pereira, K. C. (Wadsworth with him), for plaintiff, respondent.

Cur. adv. vult.

28th May, 1906. WENDT J.—

The plaintiff has shown a complete paper title derived from Ramalingam, the admitted original owner of the land in question. The executors of plaintiff's father, the mortgagee from Ramalingam,

purchased the land in execution of the decree obtained by them on the mortgage, being allowed credit for the whole of the price, and the Fiscal duly conveyed it to them, and they subsequently conveyed it to plaintiff and his co-heirs, as directed by the joint last will of Mr. Geddes, senior, and his wife.

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Plaintiff's title being established, the burden lay on defendant to prove his claim by prescriptive possession, and that was the main defence to the action. Ramalingam was the admitted owner at the date of the mortgage in 1875, and within nine years of that date, viz., in October, 1884, came executor's purchase. That purchase had the effect of substituting the *dominium* in the land for the hypothec held by the testator and of bringing land within the general devise contained in the will of all the testator's and testatrix's estate in favour of the survivor. In the event (which happened) of the testatrix being the survivor the devise was subject to the provision that she was to keep the whole joint estate under her sole and entire discretion, and remain in the full and undisturbed possession thereof, and in the enjoyment of the rents and profits thereof for life, provided she remained unmarried, but without the right to sell or encumber any part thereof. On her death the estate was to be divided equally among the children (the plaintiff and the first, second, third, fifth, and seventh defendants) with representation. The testatrix accordingly continued in possession of the whole estate until her death in December, 1901. The effect of the will was to create a *fidei commissum*, or at all events to give the widow the usufruct of the whole estate. In either case it precluded the children from interfering with the possession until after their mother's death. It follows from this that possession by any third party during the widow's life might be adverse to her, but could not be adverse to her children so as to give that party any right of prescription as against them, whose right to possession only accrued within four years of the institution of this action. Assuming, therefore (what the District Judge does not find), that the appellants and their predecessors in title had possession *ut domini* from 1875 to the present time, that possession avails nothing as against the plaintiff and his co-heirs.

The learned counsel for the appellants sought to apply to this case the well-known principle that once prescription has commenced to run against an owner it will continue after his death to run against his heir, notwithstanding the latter's minority, but, as we pointed out, there is a fundamental distinction between the two cases. In the case of the minor he is entitled to possession, and by a guardian or next friend could vindicate the property from the wrongful holder.

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whereas a *fidei commissary*, although of full age, could not object to an outsider's possession, because the right to object belongs to the fiduciary. Of course the fiduciary or usufructuary will himself lose the right to possession when that outsider has completed ten years' adverse enjoyment as against him, but the moment the *fidei commissary's* right to possession accrues the term of prescriptive possession must begin over again.

Appellants questioned the right of an owner, against whom a person has held adversely for (say) nine years, to render that adverse possession nugatory by creating *fidei commissum*, but we fail to see any injustice in upholding that right. *Ex hypothesi*, the owner is full *dominus* until the completion of the ten years. He may at once himself vindicate the land, or sell it outright and enable the purchaser to do so. Why then may he not alienate it by way of *fidei commissum*? And on what ground can the wrongful possessor complain that his attempt to steal the land has been frustrated?

In the view we have taken it is unnecessary to consider whether appellants have in fact shown ten years' possession of the character required by the Ordinance.

The decree appealed from comprises an order for the ejectment of the defendants, who have a claim for compensation for improvements to the land. This claim the District Judge has reserved to be dealt with in a separate suit. Respondent's counsel very properly conceded that the decree for possession could not be sustained, and it will therefore be struck out.

The appeal costs should, I think, be divided.

WOOD RENTON J.—I agree.

