A CRITICAL STUDY OF TESTAMENTARY SUBSTITUTION

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INTRODUCTORY

CHAPTER I

Dealing with the subject, we find that the testator not only can designate the heirs he may choose, who will enter upon the enjoyment of his estate at his death, but, besides, may be permitted by law to make a second or further designation to take effect in case the instituted heir or heirs, or the legatees, should not wish, or should not be able to accept the inheritance or the legacy, or should die before the testator. He is not only authorized to do these, but may leave the whole or part of the estate with a person, with the instruction to preserve and transmit it, in whole or in part, to another.

There has arisen a problem whether the Civil Code has to abolish radically these substitutions, or has to continue their existence as established by the Partidas. The French Civil Code condemns substitutions declaring them prohibited. Others admit the continued existence of some; but the Spanish Civil Code has preserved these substitutions considering them as established principles in the law of succession; and since it has been implanted in our country, the natural effect is that all the kinds of substitutions are in the state of continued existence here.

Coming to the kinds of substitution, our Civil Code recognizes six of them, to wit, vulgar, pupilar, ejemplar, fideicomissaria, brevilocoa, and reciproca. The first (vulgar) is the simple or ordinary substitution which takes place when a second heir is designated to inherit to the estate of the testator in case the first heir designated dies before the testator, or should not wish, or should not be able to accept the inheritance. This kind of substitution is found in the precept of Art. 774 of the Code.

The second (pupilar) takes place when the testator designates a substitute of his descendants who die before reaching the age of making a will. Under Sec. 614 of the Code of Civil Procedure a person who can make a will must be at least eighteen years of age provided he possesses the other qualifications as provided in said section.

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The third (ejemplar) is the substitution for those who are of unsound mind as provided in Art. 776 of Code.

The fourth kind is the (fideicomissaria) which is no other than the designation of a second heir upon whom is imposed the obligation to preserve and transmit the whole or part of an inheritance to a third person. (Art. 78).

The fifth kind (brevilocua) takes place when it is no more than a substitution of two or more persons for one, or one for two or more heirs.

The sixth and last is the substitution known as reciproca which takes place when heirs instituted in unequal portions should be substituted for each other.

The respect, for the will of the testator justifies the substitution vulgar and fideicomissaria; not so with the pupilar and ejemplar which are not manifestations of the will of the testator but real testaments which one person makes in the name of another who is incapable of doing so, or by reason of unsoundness of mind.

Treating with these above mentioned kinds of substitutions singly, we first deal with substitution vulgar.

CHAPTER II
SUBSTITUTION VULGAR

This kind of substitution depends upon two distinct factors, one depending upon the will of the heir and the other, upon his state or condition. In effect, it takes place when the heir does not wish to accept the inheritance, or is not capable of doing so, or if he dies before the testator.

Our Supreme Court came to apply the provisions of Art. 774 of the Civil Code regarding this kind of substitution in the case of In re Estate of Saavedra, 51 Phil. 267. The Supreme tribunal said that "when a will executed jointly by husband and wife provides that in case of the death of the husband before the wife, certain relative shall inherit certain specified property, and that if any of said relatives die before the husband, the survivor will inherit all, the acquisition of the property by such relatives depends upon the husband's dying before the wife, the last part of such testamentary provision being a substitution of legatees in case some of them die before the husband."

Applying the second paragraph of the article (744 C. C.), a decision of the Supreme Court of Spain decided in 1916, declared that when the testator expressly designates a second heir in case the first heir should predecease the testator, this substi-

tution does not take place when the heir renounces the inheritance.

An interesting question is presented by Demofilo de Buen, a great Spanish commentator of the Civil Code. The question is this: If the heir instituted dies after the testator, but without having accepted the inheritance, who shall have preference to the inheritance, the substitute or the heirs of the instituted?

Traviesas says that Art. 1006 C. C. which provides that should the heir die without having accepted or repudiated the inheritance, the same right he had is transmitted, should be applied. He says so because the heir having died without having accepted nor repudiated the inheritance, the rights which pertained to him shall pass to his heirs.

Mucius Scaevola, on the contrary, maintains that the preference should be given the substitute. Each case must be determined by taking into consideration the circumstances attending; but it is also true that the mere fact that the testator designates a substitute gives a clear idea of his intention to give the preference in favor of the latter over the successors of the heir instituted.

Between these two conflicting opinions, I am inclined to subscribe to the opinion of Scaevola because it is the basic principle in the law of succession that the will of the testator must be respected and once that will is manifest it must be given effect.

Sanchez Roman, the illustrious commentator believes that if the heir instituted dies before having accepted the inheritance, and if the substitution is constituted only in case the heir does not wish to accept it, the rights which pertained to him shall be transmitted to his heirs in accordance with Art. 1006 C. C. But if the substitution is constituted on any of the three cases mentioned in Art. 774, the substitute shall succeed to the inheritance without prejudice to the rights of the forced heirs of the causante.

The substitution vulgar may be express or implied. A question arises: Does the fideicomissary substitution comprehend tacitly a substitution vulgar? This question is interesting for a case where the fiduciary heir predeceases the fideicomissarius; so, if the fideicomissary substitution includes also the substitution vulgar, then the fideicomissarius shall succeed to the inheritance. The German Civil Code says explicitly that the designation of a fideicomissary substitution also includes a substitution vulgar.

When does the right of the substitute cease to exist? The substitution vulgar expires in its effects from the time the first heir becomes such, that is, from the time he accepts the inheritance, altho he should die immediately thereafter. It is so because having accepted the inheritance the rights which pertained to him should pass to his heirs and not to the substitute. The substitute when called to the inheritance is subject to the same rules as any other heir, so that, if he should die before the death of the testator, no right whatsoever is acquired on his part, and neither is there any transmitted.

In case the instituted heir does not become such, what cases does the substitution refer? This question is answered squarely by the second paragraph of Art. 744 of the Civil Code which provided that a simple substitution, without a statement of the cases to which it is to apply shall include the three mentioned in the next preceding paragraph, unless the testator has otherwise provided. If one case is expressly stated by the testator, the coming in of any of the other two is entirely precluded; but the absence of any designation of what case the substitution shall apply includes the three cases mentioned in said Article.

As has been intimated, there exists a question as to whether the right of accretion is more powerful than the right of substitution. Gomez in studying this question maintains that the right of the substitute is more predominant over that of accretion because, the former proceeds from the express will of the testator while the latter is only a presumption of such will and as a supplement made by the law.

CHAPTER III
SUBSTITUTION PUPILAR

We come now to substitution pupilar which is dealt with in Art. 775 of the Civil Code which provides that parents and other ascendants may appoint substitutes for their descendants of both sexes under 18 years of age in anticipation of their death before attaining this age. The age for making a will was raised from 14 to 18 years of age by Act No. 1934 amending Sec. 614 of the Code of Civil Procedure.

This kind of substitution was established by the Roman law after the establishment of the substitution vulgar, for a case where the instituted heir does not become such by reason of his death before reaching the age required by law for making a will. "Se haeres non erit et ante pubertatem decesserit."

What is the reason for the existence of Art. 775? The illustrious commentator Manresa says, the inheritance of an orphan who dies before reaching the age required for making a will, would pass to the nearest relatives. The article was inserted in the Code because in former times, attempts were sometimes made upon the life of the heir or testator and was necessary to prevent such crimes. This provision is for the salvation of the young, preventing instigators of murder from reaping any benefits from the crime.

What property does this substitution refer? Reading the precepts of the Code, it cannot be said that it refers to other property than those to which Art. 774, which regulates the substitution vulgar, refer. The question arises on the fact that Art. 775 in the Spanish text uses the expression, "nombrar sustituto" while art. 774 uses the phrase "sustituir."

Altho in the Civil Code, the question seems clear, an array of brilliant commentators as Sanchez Roman, Valverde, Castan, and Mucius Scaevola are of the opinion that substitution pupilar refers to the property left by the testator to the substituted and not to all the property of the latter. It is also sustained that, the substitution pupilar authorizes the ascendant to make a will in the name of the descendant which is considered a violation of the principle that the making of a will is a most personal act.

In support of his view the illustrious Sanchez Roman gives a hypothetical case. Suppose, he says, that Antonio, the maternal grandfather of Juan, institutes the latter as his heir, appointing Pedro as substitute in case Juan should die before reaching the age of making a will. This will was executed in 1898. The father of Juan, in his will executed in 1900 instituted also the latter as heir and Esteban as his substitute in case Juan should die before reaching the age of making a will. The father of Juan died in the same year, and two years later his grandfather also died. Juan died before reaching the age required by law for making a will. The question arises, who of these two substitutes shall inherit? Which may determine the question? Do you give preference to the will of the father over that of the grandfather? Or must we determine the question on point of time? This question may be difficult to solve but when we follow the opinion that the substitute must inherit that property which is left by the testator to the instituted minor heir, the question can be very easily disposed of. In this case, therefore, Pedro may inherit that property left by the grand-

father to Juan and Esteban may likewise inherit that property left by the father to Juan.

It had been the ancient rule of the Roman Law that the substitution ejemplar carries with it implicitly a substitution vulgar. It is believed that when the testator appoints a substitute in case the descendant heir should die before reaching the age of making a will, his will that the substitute shall be the ultimate heir in case the descendant so dies, is clearly demonstrated. However, the contrary argument may be launched and supported by paragraph 2 of Art. 774 from which it can be deduced that the substitute being appointed for a particular case, is not so for the other cases.

Substitution pupilar may be extinguished by what is called "generic", which is common to all institution of heirs, and "specific". The latter are: (1) When the descendant has reached the age of required by law for making a will; (2) the death of the substituted before the testator in which case the substitution pupilar shall be extinguished, but according to other criterion, the substitution vulgar implicitly takes place; (3) death of the substitute before the ascendant testator; (4) death of the substitute before the death of the descendant substituted, for being an heir subject to an actual suspensive condition, his death before the condition takes place shall forever prevent the acquisition of any right.

Not only the father can appoint substitutes for their minor descendants but also any other ascendant.

CHAPTER IV
SUBSTITUTION EJEMPLAR

The Code dedicates as in the other kinds of substitution, a special article for substitution ejemplar. Art. 766 C. C. provides that any ascendant may appoint a substitute for his descendant over 18 years of age who has been legally declared to be incapacitated on account of being of unsound mind. The substitution referred to shall become inoperative upon the execution of a will by the incapacitated person during a lucid interval or after having recovered his reason. As clearly seen from the precepts of this article, in order that there be substitution ejemplar, it is indispensable as a requisite the previous declaration of the heir's incapacity. It is not enough, says the Supreme Court of Spain, in a decision rendered in 1928, that in order to render the will of the testator ineffective, the heir must have

recovered his judgment, but is necessary that he should make a will of his own.

Navarro Amandi, one of the distinguished authorities in Civil Law, proposes a question: If a person is named as a substitute (ejemplar) for a demented minor of less than 18 years of age, while another is named as a substitute (pupilar) in case he should die before attaining the age of making a will, which of these substitutes shall have the better right? Commentators of the Code opine that the substitute (pupilar) has the better right because in the concurrence of two defects, that one more natural shall prevail over the accidental. As long as the heir dies before attaining said age, the substitution remains to be pupilar.

Art. 777 of the Civil Code finally settles the question which had been frequently the subject of debate among commentators whether in a substitution, the second heir or the forced heir of the first heir should inherit to the estate. It provides that the substitution shall be effected only in so far as it does not encroach upon the legitime reserved for forced heirs. The rights of substitution given by the law to testators are to be reckoned without prejudice to the rights of forced heirs guaranteed by Arts. 777, 813, 761, and 843 of the Civil Code. There are, however, commentators who censure the precept of this article as an attempt against the rights of forced heirs, and contend that a substitution should be ineffective in totality if the person substituted should have forced heirs who should inherit all of his property, because these forced heirs are prejudiced by a disposition not made by the one to whom they succeed and whose rights they represent but by a third person, which, in principle, is contrary to the personal character which a will should have. Manresa, however, says that we should not burden ourselves with the refutation of this opinion.

CHAPTER V
SUBSTITUTION BREVILOCUA

Concerning the right of a testator to substitute two or more persons for one instituted heir, or one for two or more heirs, we have to say that this right is contained in the precepts of Art. 778 of the Code. This right emanates from the freedom given by the law to the testator to dispose of his property subject to the rights of forced heirs. It has been decided that when one substitute has been appointed for two heirs, the death of one of the latter does not give the substitute the right over one half of the inheritance.

CHAPTER VI
SUBSTITUTION (RECIPROCA)

THE NEXT KIND OF SUBSTITUTION IS WHAT IS CALLED (RECIPROCA). This kind of substitution is no other than when heirs instituted in unequal portions should be substituted for each other. This kind of substitution is contained in Art. 779 which provides that if heirs instituted in unequal portions should be substituted for each other, they shall have the same portions in the substitution as in the institution unless it clearly appears that the will of the testator was otherwise.

Manresa propounds to us a question in a case where two or, more heirs are reciprocally designated as substitutes. He asks what shall be the share of the substitute in case the other dies. Suppose, he says, X and Y are reciprocally designated as substitutes. X originally is to get two-thirds of the property and Y the one third. What shares are they to receive in the substitution? There are two opinions in this case. One is: If Y is substituted for X, Y will get all X's property, that is, the two-thirds; if X is substituted for Y, he takes Y's one third, making all the estate. The other opinion is that Y will only receive one-third more, and the other one-third is distributed according to the rules for intestate property. This Y gets only two-thirds in all leaving the other one-third subject to intestate succession. Manresa prefers the first rule; the second is supported by some foreign codes as the Mexican, Lower California, and those of the Republics of Argentina and Uruguay. Manresa maintains that upon examining the question intensely, the second current of opinion is absurd in its consequences. He says that it is contrary to the nature of substitution and also lacks the character of reciprocity which should exist between the reciprocally designated substitutes. He states further that, by the first rule, intestate succession would be avoided, and this is the prime intention of the Civil Code.

Article 780 provided that the substitute shall be subject to the same charges and conditions imposed upon the instituted heir, unless the testator has expressly provided the contrary, or the charges or conditions are merely personal with respect to the heir instituted. It decides the long continued divergent opinion sustained by reknown interpreters of the Code, on the question whether the condition imposed upon the heir in the institution should be understood as repeated in the substitution with regard to the substitute.

The word "sustituido" as used in Art. 780 in the Spanish text is synonimous with the word "sustituto" otherwise the said article would be devoid of sense and meaning. If the substitute acquires by substitution what the instituted heir would have acquired, the former being subrogated in the person of the latter, it is natural that the substitute should also acquire the same conditions and charges which were imposed upon the heir, because there is no reason why we should presume the testator to have favored the substitution more than the heir. The contrary would not be a true substitution. The exceptions are derived from the will of the testator and from the attributes of the heir himself.

CHAPTER VII

FIDEICOMISSARY SUBSTITUTION

The fideicomissary substitution was a trust created by a testament. In order to evade the rigor of the Roman Law, this kind of substitution was established so that the property, or at least a part of it might be held by the heir for the purposes of transmitting it to another person.

This kind of substitution is established by Art. 781 C. C. which provides that fideicomissary substitutions by virtue of which the heir is charged to preserve and transmit to a third person the whole or part of the inheritance shall be valid and effective, provided they do not go beyond the second degree, or that they are made in favor of persons living at the time of the death of the testator.

The heir who received the property for a time and who is obliged to preserve and transmit the whole or part of the same to another is the (heredero fiduciario) or simply the fiduciary. The person to whom the property is delivered is the fideicomissarius, cestui que trust, or beneficiary.

The first heir or the fiduciary is, therefore, the heir by right and the fideicomissario, heir as a fact. This kind of substitution arose with the end in view of preventing the first heir from exhausting the property which shall pass without any alteration (except those legal deductions) to the second heir (fideicomissario).

This kind of substitution is an indirect substitution. It is unlimited in degree if made in favor of persons living at the time of the death of the testator; but if they are born after his death, then the substitution cannot go beyond the second degree. In other words, if the beneficiary is within the second

degree, he need not be living at the time of the death of the testator. If he is beyond the second degree, he must be living at the time of the death of the testator.

What does the phrase "second degree" signify? Manresa and Sanchez Roman believe that the phrase "second degree" means second generation. Monrell believes that the second generation should be counted from the fiduciary, and as such the property may pass to his sons or to his nephews in full ownership. Mucius Scaevola says that the "second degree" means second designation and so he believes that the testator can designate two substitutes besides the fiduciary. The divergence of opinion signifies that the question is yet obscure. However, the Supreme Court of Spain has decided that the nephew is within the second degree with respect to the testator.

According to a decision of the same supreme tribunal rendered on November 18, 1918, there are four requisites for this kind of substitution to exist, to wit: 1. a first heir called to the enjoyment of the inheritance, 2. obligation clearly imposed upon the same to preserve and transmit to another the whole or a part of said inheritance, 3. a second heir, and 4. that the fideicomissarius should have a right to the property from the time of the death of the testator, so that, he has to succeed the latter and not the fiduciary heir.

Therefore, when a testator limits himself in instituting only two heirs, and upon the death of both he designates the heirs of the heirs instituted by him to succeed to the inheritance, there, exists a simple substitution (vulgar) and not a fideicomissaria, inasmuch as Art. 785 in its first paragraph requires that a fideicomissary substitution should be expressed, whether the testator uses the name of fideicomissary substitution, or imposing upon the first heir the whole or in part to another. There exists, therefore, a wide gap between substitution vulgar, and fideicomisaria. When a testator institutes a first heir and upon his death, designates another to succeed the former, it should be understood that the second designation shall take effect only, when the first heir should die before the testator, whether or not such be the intention of the testator. On the other hand, when the first heir, altho predeceased by the testator, has to cease in the enjoyment of the inheritance, the said inheritance to be handed over to another or others, in accordance with the will of the testator, there exists a true fideicomissary substitution because the property has to be preserved by the first heir and be transmitted to another, altho it was not so expressly declared by the testator.

The Code does not expressly provide what qualifications the fideicomissary substitute should possess, but since the substitute is a second heir, it is necessary that he should possess the capacities required by law of heirs in general. The contrary would place the substitute in a better condition than the instituted heir in whose place the substitute is subrogated.

The illustrious commentator, Manresa, presents a question concerning the time at which the fiduciary heir should transmit the property to the fideicomissario. Art. 781 says nothing about it because it leaves it to the absolute will of the testator. This kind of substitution may be pure, conditional or with a term. If the testator fixed a period for the transmission of the property, there is no doubt of its validity, for as we know, the will of the testator is the law governing testamentary succession. But in case he did not fix any period, at what time shall the fiduciary heir fulfill his obligation? According to reknown commentators as Gomez, Gutierrez and most of the others, in such case, the time of transmission of the property lies wholly within the power and judgment of the fiduciary heir; generally, it is understood that the enjoyment of the inheritance by the fiduciary heir should last during his whole life time.

Art. 781 is applicable to donations as expressly provided in Art. 640.

The Supreme Court of Spain held that when the condition imposed by the testator upon the fiduciary heir is to preserve and transmit the property to his coheirs, in case he does not have any descendant, there does not exist a fideicomissary substitution.

There is no fideicomissary substitution when the testator does not order the preservation of the property but permits the heirs to dispose of the whole or part of it, designating other persons to succeed him upon his death with respect to the part of the property that might have been left, for it is a condition prerequisite for the existence of a fideicomissary substitution that there be an obligation imposed upon the first heir to preserve and transmit the whole or a part of an inheritance to the fideicomissario.

It has also been held by the same supreme tribunal that when the testator declares in his will that a certain person shall enjoy during his lifetime, a portion of a land, and that after his death-said property shall pass in its entirety to the heir or heirs instituted, said testator does not order a fideicomissary substitution but only a legacy of usufract which shall have to be

confounded with the naked ownership after the death of the usufructuary.

Again, the rights of forced heirs are secured by the provisions of Art. 782 C. C. which provides that fideicomissary substitutions can never impair the legitime. Should they relate to the third destined for betterment (mejora) they can be made in favor of descendants only. The forced heirs having an absolute right over their legitime, such right can never be burdened with conditions, and therefore, cannot be the object of substitution in so far as it impedes the free disposition of the property comprised in said legitime; and if ever a substitution has for its object that part of the legitime for betterment, it must be made in favor of the descendants. This limitation is a consequence of the precepts of Art. 823 C. C. In effect, when the father disposes of one of the two-thirds which constitute the legitime in favor of his sons and other descendants, the disposition is valid and effective.

The fideicomissary substitution is nothing more than the combination of the substitution and the fideicomiso. There has also been a doubt as to the relations between a fideicomiso and a mayorazgo. The Supreme Court said in the case of Barreto v. Tuason, 50 Phil. 888, that "the essential elements of a fideicomiso exist in a mayorazgo in that it is a fiduciary charge made to the first born, the usufructuary possessor, to preserve the entailed properties in the family and to deliver them at the proper time to the succeeding first born, who shall possess and enjoy them. And while a mayorazgo should not be confused with a fideicomiso, the difference between them are not such as to make them incompatible with another. The fideicomiso is the genus and the mayorazgo is the species. Not every fideicomiso is a mayorazgo but every mayorazgo is a fideicomiso.

The same court explained the nature of a mayorazgo as a fideicomiso in the following words: "In the mayorazgo itself and from the point of view of its nature as a trust, the trustor is the founder; the trustee is successively each first-born possessor of the entail from the time he possesses it and while he possesses it; the beneficiary or 'cestui que trust' so far as the partial enjoyment and possession of the properties of the entail are concerned, is the first-born successor called to possess the entail and prior to the commencement of his possession, for as soon as his possession commences he becomes the trustee and the following first born becomes the beneficiary. As to the naked ownership

of the entailed properties, the beneficiaries or fideicomisarios are the descendants of the founder in their definite succession."

The duties of the trustee are now provided in sections 582, 584, 990, & 695 of the Code of Civil Procedure. In Anglo-Saxon law, the nature of the office of a fiduciary heir is that of a trustee, hence those provisions relating to trusteeship apply also to a fiduciary heir. In the case of Tolentino v. Vitug, 39 Phil. 127, the Supreme Court held that "the acceptance of a trust and the receipt of the property thus intrusted have the weight of an admission on the part of the trustee that the ownership of the property does not belong to him but to the cestui que trust or to the heirs of the latter." It said further, "for the purposes of prescription the possession of the property by a trustee is not an adverse possession, but only a possession in the name and in behalf of the owner of the same. If the trustee has not repudiated the trust nor claimed any right to the property intrusted to him, his possession of said property is not for himself but for the owner, and cannot be a ground for prescription, nor can the trustee's heirs make use of this possession to establish the prescription which they allege. In that case, the period of prescription in favor of the heirs of the trustee should be computed from the date of the trustee's death.

Again in the case of Orden de Predecadores v. Metropolitan Water District, 44 Phil. 292, the same high tribunal held that "where a grant had been made by an administrator or trustee of a certain fund, such obligation is deemed binding in favor of the grantee, as against the succeeding administrators or trustees." In that case, the old city of Manila was charged with the administration of the Carriedo fund and with the construction of the necessary works for conducting the waters from San Juan del Monte to the City of Manila." In its capacity as such trustee, it had the power to buy all the necessary materials for the construction of all the waterworks and consequently, it was authorized to grant the plaintiff the free use of the Carriedo waters in return for the lands donated by it to the said city council and the grant being valid, it is binding against the defendant, the Metropolitan Water District, the latter being the successor in the administration of the Water system."

In the case of "In re Fideicomisario de Santo Cristo de Burgos", G. R. 34781, Nov. 12, 1932, our Supreme Court held after a perusal of the testamentary provision in question, that there existed no trust. The will provided as follows:

"Todas mis propiedades y derechos que pueda dejar, con excepcion de los que se especifican mas abajo del presente testamento, cedo y lego a Gabriela Santos, tambien residente en San Mateo, Rizal, por que he creido conveniente confiar en ella la conservación, cuidado y la celebración de la fiesta anual de la imagen de Nuestro Señor, que tenga aqui en casa y en consideracion, ademas, de los largos servicios que me viene prestando. Ella podrá a su vez dejar el cuidado y manejo de la expresada Imagen a la persona que ella crea conveniente en caso de su muerte. La imagen de Nuestro Señor de Burgos no es de la propiedad de ninguna Iglesia. Encomiendo estrictamente el cuidado y conservación de la misma."

In interpreting the precepts of this testamentary provision, the Supreme Court held:

"It is very clear that this language creates no trust. It is absolutely necessary to the creation of a trust that there should be named a beneficiary, or as commonly said in American and English law, a cestui que trust. It is suggested in the argument that the beneficiaries of this provision were intended to be persons of the Catholic Creed in San Mateo, Rizal. But the will does not express it nor declare any beneficiary whatever. If any such will was made as that from which the above question is taken, it is evident, that the testator, Juan Dizon, if owner of the image, passed the full legal title to the legatee, Gabriela Santos. The words which have apparently been supposed to make the trust, are merely explanatory of the motive which led said Juan Dizon to make this legacy in favor of Gabriela Santos, the reason being that he had confidence in her and that she had rendered long service to him. The sentence wherein he declared that she could in turn leave the person whom she should consider suitable in case of her death, is merely advisory and in no wise transfer the full legal title which had been vested in her. From this it follows that even supposing the testamentary provision to have been made, as the court accepted as true, the whole basis of the action fails because what has been said demonstrates that the assumed trust does not exist."

As deduced from this case, in order to constitute a trust, there should be two persons who occupy the position of trustee and cestui que trust; that the existence of this relation must be clear and indubitable taking into account the intention of the testator or person creating the trust. The case just cited is distinguished from the case of "Orden de Predecadores" vs. Metropolitan Water District, 44 Phil. 292, in that, in the former,

no trust was created, there being no cestui que trust or beneficiary in whose favor the property in question was held by the legatee; while, in the latter, there was an express trust existing, the trustee, there, being the Old City of Manila which was in a charge of the Carriedo funds.

Art. 784 provides that the fideicomissary shall acquire the right to the succession from the time of the death of the testator, even if he dies before the fiduciary. The right of the former shall pass his heirs. If the fiduciary has the duty to deliver to the fideicomissary the inheritance subject to this kind of substitution, and the rights of the latter arise from the death of the testator, undoubtedly, upon the death of the testator, there is created a right in favor of the fideicomissary which even the law cannot ignore. For this reason, if the fideicomissary predeceased the fiduciary, the right and all its effects subsist and are transmitted to his heirs as a part of the inheritance.

The present article has settled the question which has been the subject of debate among legal scholars, as to whether or not the fiduciary should be considered a mere usufructuary, and, as to whether or not the fideicomissary is the heir of the fiduciary or the fideicomitente (testator).

Several decisions of the Supreme Court of Spain point to the conclusion, which is only a mere illustrations of the article under discussion, that the fideicomissary is the heir of the testator; that the fiduciary resembles the character of a usufructuary; and that although the fideicomissary should die before the fiduciary, the right to the inheritance subsists, inasmuch as this right emanated from the testator and not from the fiduciary and commenced to exist from the death of the former.

The order, therefore, is as follows: Testator dies; fideicomissarius dies; the fiduciary dies.

Because of the necessity to put to an end to abuses which are frequently committed in the making of fideicomissary substitutions, Art. 785 of the Code has been inserted to meet such necessity. The Article provides:

The following shall produce no effect:

1. Fideicomissary substitutions which are not made in express manner, either by giving them such a name by imposing upon the substitute the absolute obligation of delivering the property to a second heir.

2. Provisions containing perpetual prohibitions to alienate, and even a temporary one, not within the limits fixed in Article 781.

3. Provisions imposing upon the heir the charge of paying a certain income or pension to several persons in successions beyond the second degree.

4. Provisions intended to leave to a person the whole or part of the hereditary estate in order that he may apply or invest it in accordance with secret instructions given him by the testator.

The first of these confirms the precepts of Art. 781 of the Civil Code, hence if said substitutions were not made in an express manner or without the obligation imposed upon the first heir to preserve and transmit the whole or part of the inheritance to a second heir, they are not to be reckoned as fideicomissary substitutions.

The second and third paragraphs of the Article in question are conducive to the exact compliance with Art. 781 C. C., and the justice of its precepts is evident, for, to hold otherwise, the perpetual or temporary prohibitions to alienate would destroy the liberty to deal with one's property, and would leave the law a mere farce by means of the payment of income or pension to several persons in succession, beyond the second degree.

Under paragraph two of the Article, there is no express substitution. The disposition is null when it passes beyond the limits delineated by Art. 781. That which really occurs is that when the testator prohibits the alienation of the property during a fixed term, say, twenty, forty or sixty years, it cannot be said that this prohibition subsists during the generation of the heir and the two following generations, but not beyond this length of time, after which the property becomes free.

According to a decision of the Supreme Court of Spain on Oct. 13, 1911, there does not exist a perpetual prohibition to alienate when all the persons interested are living at the time of the death of the testator.

The fourth paragraph has for its object to avoid the secret and reserved instructions which are given by the testator with the end in view of giving to the property a destiny not authorized by law. This article has application also to donations, so that, in donations, perpetual prohibitions to alienate is prohibited.

Art. 786 C. C. is the logical and necessary consequence of the rule admitted by the Code that the institution of heir is not necessary for the validity of a will. This testamentary provision is not invalid although the institution of heir is inefficacious, whether by the circumstances of the institution or by the fact that the persons instituted does not become such heir.

On the contrary, the will subsists and is valid in all the dispositions that it contains. For these, article 786, establishes that the fideicomissary clause shall be simply considered as not written.

From the study we have made of the above-mentioned articles, it results that the rules embodied in them to regulate the matter of fideicomissary substitution have to contribute, by the justice of their precepts, to the disappearance of the abuses and questions and to the fulfillment of the essence of said institution, enhancing respect for the will of the testator, and passing to the fideicomissary all that which are to pass to him by the will of the testator.

We come to discuss the precepts of Art. 787 C. C. Said article provides that a disposition by which the testator leaves the whole, or a part of the inheritance to one person and the usufruct to another shall be valid. Should it call several persons to the usufruct not simultaneously but in succession, it shall be governed by the provision of Art. 781.

This article is the consequence of the principle established in Art. 640, that the owner can freely dispose of the full ownership of property that belongs to him or any other rights that pertain to him, and as such, can dispose of the naked ownership of his property to one, and the usufructuary rights in favor of another.

According to this article, if the usufruct over the inheritance is passed to various persons not simultaneously but successively, the provision of Art. 781 is applicable. Therefore this real right must not pass beyond the second degree or must be made in favor of persons living at the time of the death of the testator.

One of the questions discussed by well known civil law writers refers to the concept and juridical nature of this provision, whether it can be considered as a true fideicomissary substitution or not.

Some writers say that there is no fideicomissary substitution but two donations, one of usufruct and the other of the property, for as the second produces its full effects only after the termination of the first, the donee of the property cannot be considered a substitute of the usufructuary who did not acquire ownership over the property.

Fideicomissary substitution is used also for charitable purpcses; Art. 788 of the Code sanctions the investment of specific amounts of the hereditary property for charitable purposes.

This article provides as follows: "A disposition imposing upon an heir the duty of investing periodically specific amounts in beneficent works, such as dowries for poor maidens, pensions for students, or in favor of the poor or the institutions of beneficence or of public instruction, shall be valid under the following conditions:

If the charge is imposed upon immovable property and is temporary, the heir or heirs may dispose of the encumbered property, but the encumbrance shall not be removed until its registration is cancelled.

If the charge is perpetual, the heir may capitalize it and invest the capital at interest secured by a first and sufficient mortgage.

The capitalization and investment of the principal shall be made with the intervention of the Civil Governor of the province and after hearing of the public attorney.

In any case, when the testator has not established a scheme for the administration and applications of the legacy for beneficent purposes, the proper administrative authority under the law shall make such scheme."

According to Willard the fourth and fifth paragraphs are repealed by section 595 of the Code of Civil Procedure according to which the Court of First Instance now has full jurisdiction over the matter of trust.

Our Supreme Court has held in the case of Gov't. of the P. I. v. Abadilla, 46 Phil. 642, that an establishment, not public, as a provincial governor, may accept and receive a testamentary devise in trust without the previous approval of the Central government. In regard to private trusts, it is not always necessary that the cestui que trust should be named or even in esse at the time the trust is created in his favor and this is especially so in regard to charitable trusts. Under an ordinary devise of lands in trust, the trustee holds the legal title, and the cestui que trust, the beneficial title, and the natural heirs of the testator who are neither trustees nor cestui que trustees have no remaining interest in the land devised except the right to the reversion in the event the devise should fail, or the trust, for other reasons terminate.

As regards the statute of limitation, the same court went on ruling that though the Statute of Limitation does not run between the trustee and cestui que trust, a third person who holds actual, open, public and continuous possession of lands for

over ten years, adversely to the trust, acquires title to the land by prescription as against such trust.

Treating with Art. 789 of the Code, the first question that arises is whether said article is still in force or not. It provided that all the provisions of this Chapter with regard to heirs shall be understood as applicable to legatees.

Before the enactment of Act No. 190, our Code of Civil Procedure, an heir, according to Art. 660 of the Civil Code, is a person who succeeds by universal title, and a legatee, one who succeeds under a particular title. After the Code of Civil Procedure, an heir is technically one who is a relative taking property of an intestate by virtue of the laws of descent.

A devise and legatee signify all persons, whether relatives or not, who take respectively real or personal property by virtue of a will. On account of the change of the real concepts of an heir and a legatee, Art. 660 C. C. is considered repealed. (Suiliong & Co. v. Chio Taysan, 12 Phil. 12, 22). As has been decided by the Supreme Court in the case of Del Rosario v. Del Rosario, 2 Phil. 321, the said court announced the fact that said Art. 789 is no longer in force. It there held that a legatee cannot acquire the executor of a will to render him an accounting of the Administration. Art. 907 of the Civil Code, authorizes the heredero to demand such an accounting, but does not confer the same right upon the legatee.

CONCLUSION

Legislations in Spain maintain, these substitutions, although all the circumstances which gave rise to their creation do not now prevail. Notwithstanding the disappearance of the historical reasons for the existence of substitution, yet their principal object exists, which is the just aspiration of the testator to leave an heir, his desire that the inheritance may not be deserted and that his property may go to the persons of his choice, according to the order he places his care and love.

Substitution is really a conditional institution of an heir. As expressed by well known civil law commentators and as deduced from the precepts of the provisions of the Civil Code, its object is to prevent intestate succession or the descent of an estate to those most preferred or chosen by the testator. Hence if the condition does not happen, the substitute acquires nothing from the hereditary property. These conditions are provided by the law from which the testator can select which is to be applied in each case. Examples of these conditions are when

the heir designated dies before the testator; does not wish to accept the inheritance; or is incapacitated from accepting the same; dies before reaching the age of making a will, or in the state of unsound mind. The substitution may be constituted on any of these conditions and the non-happening of the conditions mentioned would not give rise to the acquisition of any right in favor of the substitute. A fideicomissary substitution is different from the other kinds of substitutions in that in the former, the fideicomissario, or beneficiary seems to be the person who was primarily intended by the testator to be the recipient of the benefits derived from the inheritance, the first heir, being only the medium by which the inheritance is preserved and transmitted to the fideicomissario; while in the latter, the heir himself is the primary beneficiary intended by the testator, the substitute to take his place only in case the condition upon which the substitution was constituted is fulfilled.

In closing, I would like to add that the foregoing presentation of the subject does not pretend to cover all the problems that may arise from the field of testamentary substitutions altho it is submitted that it may serve as a clue and a helpful indication to their right and correct determination and solution.