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ANNAMALAI PILLAI *v.* PERERA.

SUPPRAMANIAN CHETTY, Added Party, Appellant.

D. C., Negombo, 4,072.

Partition Ordinance, No. 10 of 1863, s. 17—Alienation of land during pendency of proceedings for partition.

E P having instituted a partition suit in the District Court of Colombo in respect of several lands, her share of one of the lands sought to be partitioned was seized on a writ of execution against her and sold on 23rd July, 1898, to M S, who sold it to A P on 11th September, 1899. On 29th October, 1899, the District Judge of Colombo ordered that the land in question should be struck out of the partition suit, which was still pending. E P then sold to S C on 8th January, 1901, the half share which had been previously sold by the Fiscal to M S.

In an action for partition of this land brought in the District Court of Negombo by A P, who claimed to be the owner of one-half thereof under M S,—

Held, per MONCREIFF, A.C.J., and MIDDLETON, J. (WENDT, J., dissenting), that the Fiscal's transfer to M S and M S's transfer to A P were not only void *quoad* the partition suit raised in the District Court of Colombo, but void absolutely.

Baban v. Amarasinha (*1 S. C. C. 24*), decided by Phear, C.J., and Dias, J., questioned.

THE plaintiff in this case claimed one-half of Ambagahalanda, and, allotting the other half to defendants, prayed for a partition thereof. Suppramanian Chetty, by his petition of intervention, averred that he was entitled to the undivided half share claimed by the plaintiff, and prayed that he may be made an added party to the case, and that plaintiff's claim for a sale of the said land under the Partition Ordinance de dismissed, or in the alternative that the petitioner be declared entitled to the said half share in the decree for partition.

The District Judge, Mr. E. F. Hopkins, found as follows upon the facts and law of the case:—

"One Elizabeth Perera was entitled to an undivided half of the land. This share was seized by the Fiscal on writ against her in D.C., Colombo, 11,023, dated 4th May, 1898. The land was sold on the 23rd July, 1898, and purchased by Marthelis de Silva, who obtained the Fiscal's transfer (marked A) on 20th April, 1899. On 11th September, 1899, Marthelis sold it to the plaintiff by deed B. The Fiscal's transfer A was registered on 22nd April, 1899, and the transfer B to the plaintiff on 28th March, 1900.

"On 8th January, 1901, Elizabeth Perera sold the same land to the added party by deed Z. He intervenes in this case, asserting that the sales relied on by plaintiff are null and void, being contrary to the provisions of the partition.

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" It appears that on the 22nd October, 1897, Elizabeth Perera and her husband instituted the partition suit No. 10,653 in the District Court of Colombo, and the land now in dispute was one of the lands sought to be partitioned. On 19th October, 1899, the District Judge made order striking this land off the list of lands to be partitioned. The added party contends that the sale by the Fiscal in 1898, and the transfer to plaintiff in 1899, are null and void as having taken place during the pendency of the partition action.

" Thus, the validity of these sales is the sole issue between the plaintiff and the added party.

" The first authority on the point is the judgment of Phear, C.J., and Dias, J., in *Baban v. Amarasinha* (*1 S. C. C. 24*). It is clearly favourable to the plaintiff, for it is there held that alienation or encumbrance of the property which forms the subject of a partition suit is void *quoad* the partition only, the object of the restriction being to prevent any party from defeating or embarrassing partition proceedings by transferring his interests to a stranger.

" I am, however, referred to subsequent decisions as superseding the above authority.

" The case of *Gunawardana v. de Livera* (*4 S. C. C. 55*) clearly does not reverse the first decision, which was quoted apparently with approval by Clarence, J., and not disapproved by Cayley, C.J.

" In *Perera v. Perera* (*9 S. C. C. 106*), Burnside, C.J., appears to disapprove of the decision in *Baban v. Amarasinha* (*1 S. C. C. 24*). But Clarence, J., again quotes it with approval. The third Judge, Dias, J., does not refer to the point.

" The last authority quoted, D.C., Colombo, 7,717 (*Koch's Reports*, 10), does not appear to me to bear on the point at all.

" I am therefore of opinion that the clearly expressed opinion of Phear, C.J., and Dias, J., in *Baban v. Amarasinha* is still binding on this Court, not having been specially over-ruled by the subsequent cases quoted.

" It is clear that the proceedings in the partition suit, D.C., Colombo, 10,653, were in nowise defeated or embarrassed by the transfer to plaintiff, or his vendor. And I must also point out that this land was specially struck out of the schedule of lands sought to be partitioned.

" I hold that the Fiscal's transfer to Marthelis, and Marthelis's transfer to the plaintiff, are valid, and that the plaintiff is entitled to the half share of the land claimed by him."

Hopkins, D.J., decreed partition accordingly.

The added party appealed.

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The case came on for argument in November, 1901, before Moncreiff, J., and Browne, A.J., and was ordered by their Lordships to be re-listed for hearing before three Judges. The re-argument took place on 17th July, 1902, before Moncreiff, A.C.J., and Wendt and Middleton, J.J.

Lascelles, A.-G. (with him *Walter Pereira*), for the added party, appellant.

Dornhorst (*with him H. J. C. Pereira*), for respondent.

The authorities cited by counsel appear in the following judgments of the Supreme Court:—

16th October, 1902. MONCREIFF, A.C.J.—

Elizabeth Perera was entitled to an undivided half of Ambagahalanda. In October, 1897, she and her second husband entered a suit for the partition of the land.

In 1898 Elizabeth Perera's share was seized on a writ issued against her. It was sold on the 23rd of July, 1898; the Fiscal's transfer was obtained on the 20th April and registered on the 22nd April, 1899.

On the 11th September, 1899, Marthelis de Silva, the purchaser of the land, transferred it to the plaintiff Annamalai Pillai, and that transfer was registered on the 28th March, 1900.

On the 29th October, 1899, while the partition suit was still pending, the Judge, for the sake of convenience, struck this portion of land out of the suit; and Elizabeth Perera sold it on the 8th January, 1901, to Suppramanian Chetty, the added party and appellant in this case.

The plaintiff, founding upon the transfer of the 11th September, 1899, from Marthelis de Silva to himself, entered the plaint in this case on the 6th May, 1901, for the sale of the land under the terms of the Partition Ordinance of 1863. Suppramanian Chetty, the added party intervened, alleging that the sale of the land pending the partition suit which the plaintiff set up was absolutely void in terms of section 17 of Ordinance No. 10 of 1863. The Judge held that it was not void, and allotted to the plaintiff the half share of the land, which Suppramaniam Chetty also claimed.

The terms of section 17 are as follows: "Whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein, unless and until the Court before which the same were instituted shall, by its decree in the matter have refused to

grant the application for such partition or sale, as the case may be; and any such alienation or hypothecation shall be void ".

We are to construe this section according to the intention of the Legislature if we can find it, and if we find it expressed in clear and unambiguous language in the section, we are not to import a meaning which is foreign to the words. The language is to my judgment too clear to admit of any doubt, and I am not disposed to listen to any suggestion that the Legislature meant alienation or hypothecation under the circumstances to be voidable, because it has declared it to be void and unlawful.

The motive of a provision is immaterial where it forbids the transaction in point. If a penalty is provided, that is *primâ facie* proof that a transaction is expressly prohibited. That was the principle followed by Sir James Mansfield, C.J., in *Gye v. Felton* (1813), *4 Taunt. 881*. The principle is there clearly stated that the provision of a penalty under the circumstances made the contract " not only void but unlawful ", and that it was impossible to proceed upon a contract forbidden by law.

We were referred to cases in which it was held that transactions declared by Statute to be void are only so as regards the persons whom the law desires to protect. These cases, I think, are confined to provisions for the protection of particular classes of persons, or trades, or professions, whilst here we have to do with the safeguarding of justice. But in any case they do not apply here. there is no penalty here, but the fact is immaterial so long as the transactions are otherwise shown to be unlawful. The significance of the penalty is that it tends to show that the transaction is unlawful. Here the section flatly declares that such transactions are unlawful. It is this declaration which makes the transaction in this case absolutely void. In the case quoted from *Koch's Decisions, p. 10*, Bonser, C.J., endeavoured to make this principle clear. What he said was *obiter dictum*, and does not bind us, but I have no hesitation in accepting it as being in accordance with sense and the proper construction of language. I have no doubt that the sale impugned in this case was absolutely void. I do not agree with the Judge. I think that this appeal should be allowed with costs.

WENDT, J.—

The Roman-Dutch Law, following the Civil Law, forbade the alienation of a *res litigiosa*, that is to say, of a thing concerning the right to which a judicial proceeding was pending. The prohibition only applied to parties to that proceeding, and only to the particular interest involved in the litigation. Thus, if the dispute were about

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a servitude, and the *dominium* not involved, the latter was capable of alienation, and so also if the action were a mere *actio hypothecaria*, or if it affected the possession only. The prohibition applied from the time that citation issued and notice was given to defendant. The effect of the prohibition was to render the alienation void, and an assertion of title under it could be defeated by an exception. Such an assertion of right during the course of the proceeding by virtue of an alienation affected during its pendency would not be recognized, but the litigation would proceed " just as if nothing had been done ". If plaintiff recovered judgment, he could follow up the thing in the hands of the third person to whom the defendant had transferred it (Sande, *De Prohibitâ Rerum Alienatione, cap. IX.*). The prohibition was equally applicable to actions *communi dividundo* (Menochius, *De Præsumpt, lib. 2, præsumpt 97, num. 24; Voet 10, 3, 7, 18, 3, 3*). The defect due to such forbidden alienation was, however, extinguished if the action was compromised, or discontinued, or withdrawn, and the defendant absolved (Menochius, *ut cit., num. 61*).

The reason of the prohibition is stated to be that the alienation by the plaintiff or defendant was presumed to have been made in fraud of his adversary. As far as I have been able to ascertain, the prohibition against alienation pending action was only given effect to when, by virtue of such alienation, some right was asserted in the action itself, or in the execution of the decree in which it culminated, or by way of opposition to the right declared by the decree. When the litigation was terminated the alienation operated to the extent of the rights adjudged to the alienor by the decree. In fact, Voet (*44, 6, 3*) and Groenewegen (*ad Cod. 3, 37*) clearly lay it down that in the later Roman-Dutch Law the *res litigiosa* might be freely sold, devised, or in any other recognized manner alienated pending action, with this qualification only, that if judgment was recovered against the alienor, it could be executed against the alienee without the necessity for a fresh action against him. And Voet (44, 6, 1) shows that the alienation was not *ipso jure* void, because, by requiring the *exceptio litigiosi* to be pleaded to defeat the alienee's claim, the law recognized the existence of an effectual transfer; and besides, if it were void, it could not gain validity in cases in which the alienor came off victorious in the action and thereby made it clear that the alienation had injured no one, such injury being the *ratio* of the prohibition. " If therefore ", he continues, " you seek to recover from the victorious plaintiff the *res litigiosa* which you acquired pending the action from the unsuccessful defendant, you will be repelled by the *exceptio litigiosi*, even though you may have purchased *bonâ fide*;

but you could not be so repelled if you had bought pending the action indeed, but from a third person against whom the action was not directed ".

This being the Common Law, the Legislature enacted Ordinance No. 21 of 1844, which dealt first with wills, and then (sections 10-19) provided a procedure for the partition of lands owned in common, comprising section 17, which was in almost exactly the same words as section 17 of the Ordinance of 1863, which we now have under consideration, with the addition, at the end, of the words " and the party making the same shall be guilty of an offence and punishable at the discretion of the District Court ". I have not been able to find any case decided under this provision of the Ordinance of 1844. Sections 10-19 were repealed by Ordinance No. 11 of 1852, which enacted nothing in their place, and the Common Law presumably again came into operation, as actions for partition were instituted and decided before the present Ordinance was enacted in 1863 (see *Duff v. Crosbie, 2 Lorenz, 19; Austin, 207*). The present Ordinance is purely and simply a Partition Ordinance. Its object is declared to be " to provide for the partition or sale of lands held in common ", and its provisions must be construed with reference to that object, due regard being of course had to the language employed in the words of the enactment.

Section 17 is in the following terms: " Whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein, unless and until the Court before which the same were instituted shall, by its decree in the matter, have refused to grant the application for such partition or sale, as the case may be; and any such alienation or hypothecation shall be void ".

It will be seen at once that the prohibition binds all owners, whether parties to the partition proceedings or not, whether having notice of those proceedings or not. Why should the act of a man who owns an undivided share of land,—or, it may be, who owns the entirety of the land which a collusive plaintiff and defendant without title are trying to partition between them,—and who has no knowledge of the pendency of the action, be rendered absolutely void? It may be that, if the actual parties are denying his title, the prohibition is ancillary to section 9 (which makes the final decree binding on the whole world) to make his dealing with the land nugatory. But they may be practically admitting his title: they may each claim one-third and be unaware in whom the remaining one-third is vested.

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In such a case, I suppose, if the Court is unable to discover the present owner of the outstanding one-third; the plaintiff and defendant will each be allotted a portion in severalty, and the remainder be reserved for the absent shareholder. When he appeared he could claim that portion; his title was never denied; yet, if he had in good faith sold or mortgaged it pending the action, his act would be absolutely null and void, and his grantee would have no interest whatever. I cannot see that this was necessary for the carrying out of the purpose which the Legislature had in view. It goes beyond the Common Law, which, as I have shown, applied the prohibition to parties only.

The earliest decision of this Court on section 17, to which we have been referred, is the case of *Baban v. Amarasinha* (1 *S. C. C. 24*). There a party to a partition action had, pending the action, mortgaged his undivided share. In the final decree he was allotted a portion of the land. This portion was purchased in execution of a money decree by plaintiff, whose title was disputed by a purchaser who had bought at a subsequent execution sale under a decree obtained on the mortgage. The plaintiff impeached the mortgage as void under section 17, in which case his earlier purchase must prevail, but this Court (Phear, C.J., and Dias, J.) held that it was not void. Phear, C.J., who delivered the judgment of the Court, said: "It seems to us clear that the District Court has given these words too extensive an operation. The sole purpose of this clause seems plainly to be to reserve full effect to the legal proceedings for partition, when once instituted, and to take care that it shall not be in the power of any party concerned to defeat them or embarrass the course of them by transferring his share or any interest in the property to a stranger. As regards these proceedings—the maintenance and progress of them—the alienation or hypothecation must be treated as void, but there seems no reason to be found, either in the passage itself or to be drawn *aliunde*, why the dealing with the share should be to any greater extent invalidated. The larger construction placed upon the clause by the District Court would have the effect of enabling any claimant of a share in land to tie up all dealings with the land by the true owners thereof in the most mischievous way, by the simple expedient of instituting proceedings for the partition of it, and it is not reasonable to suppose that the Legislature intended this without a purpose".

This decision was pronounced in 1878, and from my own practice since 1880 I am able to say that it has ever since been regarded as law. It has been approved and followed in very numerous cases, but though individual Judges have, as I shall

presently mention, expressed dissent from the principle enunciated, a contrary view has never been given effect to by a judgment of this Court, and the decision has never been overruled. As I said, it has been regarded as declaring the law, and that law has, without a single exception, been administered of nearly a quarter of a century by this Court, and I think we ought, therefore, to make no change now, even if we were of opinion that originally the construction contended for by the learned Attorney-General ought to have been adopted. It is a matter affecting titles to land, and titles to land should not readily be unsettled, especially in a country where litigation relating to land titles is accountable for the great majority of cases in our Courts.

In the next case, *Edo v. Markar, 2 S. C. C. 114 (1879)*, Phear, C.J., who delivered the judgment of the Court composed of himself and Stewart and Dias, J.J., again expressed the same opinion; and it was also approved in *Gunawardena v. De Livera (4 S. C. C. 52)* by Cayley, C.J., and Clarence and Dias, J.J.

In *Perera v. Perera (9 S. C. C. 105)*, decided in 1890, the question arose in the partition proceeding itself, one of the defendants having donated her interest to certain other defendants. The question with which we are now concerned, therefore, did not arise, but Burnside, C.J., expressed the first dissent from the view enunciated by his predecessor Sir John Phear. He said: " The Ordinance is plain in its terms; there is no ambiguity at all in them, and I do not recognize any canon of construction or any authority which would bind the plain words of a Statute by reference to what (it is assumed) was the purpose of the Legislature. The Ordinance says. ' it shall not be lawful for any of the owners to alienate or hypothecate '. It is a violation of the plain meaning of very plain words to say that the Legislature meant to say it shall be lawful to alienate or hypothecate under certain circumstances. I have never heard it contended on authority that the unambiguous language of a Statute might be varied by a presumption as to what the Legislature meant ".

In *De Silva v. Carlina (9 S. C. C. 141)* Clarence and Dias, J.J., again approved of *Baban v. Amarasinha*, and they also held that the term " owners " in section 17 must be limited to owners who are parties to the partition proceedings.

In D.C., Colombo, No. 7,717 (*Koch, 10*), again the point did not arise, but Bonser, C.J., took the view of the present question expressed by Burnside, C.J. He said: " I find very great difficulty in acceding to the argument that when the Legislature says: it shall be unlawful for a man to do a certain thing, and that if he does that thing his act shall be void—that has only a limited

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operation. There is no doubt that in many cases where the Legislature has declared an act to be void, Courts have treated the declaration as meant merely for the protection of certain parties, and held the act not altogether void, but only voidable at the instance of the party intended to be protected. But I am not aware of any case in which, where the Legislature has declared that the act shall be unlawful, such a construction has been adopted. There is an old case of *Gye v. Felton* (*4 Taunton, 876*) where Lord Mansfield held that a particular act having been declared not only void but unlawful could not be ground for action ".

The case of *Anund Loll Doss v. Jullodhur Shaw* (*14 Moore's Ind. Apps. 543*), decided by the Privy Council in 1872, arose under sections 235 and 240 of the Indian Civil Procedure Code of 1859, which related to the execution of decrees, and were in these terms: Section 235: " Where the property shall consist of lands, houses, or other immovable properties, the attachment shall be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise ". Section 240: " After any attachment shall have been made by actual seizure, or by written order as aforesaid, and in case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise, and any payment of the debt, or debts, or dividends, or shares to the defendant during the continuance of the attachment, shall be null and void ".

The Judicial Committee adopted the view of the Chief Justice of Calcutta, that the object of the enactment was to make the sale null and void so far as it might be necessary to secure the execution of the decree, relating only to alienation which would affect the creditor who obtained the attachment: " It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bonâ fide* purchaser by the vendor could be set aside by the vendor himself; the words must, therefore, necessarily be read with some limitation. It appears to their Lordships that their construction must be limited in the manner indicated by the Chief Justice, on the ground that they were intended for the protection of the creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions ".

I refrain from further discussing the terms of section 17 or expressing an opinion of my own as to its true construction. If, on

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the one hand, it be said that the words are clear, and that by making alienations *pendente lite* absolutely void the Legislature intended to make the final decree (which section 9 declares to be binding on the whole world) conclusive evidence of the state of the title at its date; it may, on the other hand, be fairly urged that the enactment is one for the protection of the parties to the partition proceedings, and that, so long as they are not prejudiced by the progress of those proceedings being delayed, or the shares respectively allotted to them reduced or altered, the alienation can be given effect to as between the alienor and alienee. As I have shown, the matter does not come before us as *res integra*. It has been regarded as settled law for twenty-four years, and the dissent occasionally expressed by individual Judges has only tended to emphasize this. That being so, we ought not to unsettle the titles which during these many years have been acquired under that view of the law, even if we felt that the contrary view ought, in the first instance, to have been accepted by this Court.

Had I arrived at the conclusion that section 17 must be construed in the sense contended for by the appellant, it would have been necessary to consider whether an alienation by the Fiscal against the will of the owner was an alienation by the owner within the meaning of that section. It may, I think, be fairly argued that such an alienation by the public authority of the Fiscal was not an alienation by the execution-debtor. Section 16 expressly provides for the sale by Fiscal of the undivided share of one of the owners, and I think that, if section 17 had been intended to include execution sales, the Legislature would have employed for the purpose clearer language than now appears in the section. If the Fiscal's sale was valid, the appellant must fail as purchaser from the execution-debtor, even though the execution-purchaser's conveyance to the plaintiff be obnoxious to section 17. For in that case, although plaintiff would have no interest, his vendor Marthelis would be the owner, and not the appellant.

I think the appeal should be dismissed with costs.

MIDDLETON, J.—

By ante-nuptial settlement one Don Simon agreed with his wife Elizabeth that, in the event of his predeceasing her, his property should be equally divided between his widow and their children.

Don Simon predeceased his wife, and his widow and children became entitled each to a half share.

Under a Fiscal's conveyance, 20th April, 1899, upon a writ of execution against the widow, Don Marthelis became the purchaser of the widow's half share, and entered into possession of it.

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On the 11th September, 1899, Don Marthelis sold this share to the plaintiff by notarial deed.

The intervening appellant in this action, which is one for partition, shows that on the 20th April, 1899, there was pending before the District Court of Colombo a partition action respecting this property instituted on the 22nd October, 1897, and that subsequently an order was made striking out the property in question from the partition action on the 19th October, 1899, and that afterwards, on the 8th January, 1901, the intervenient purchased her half share from the widow Elizabeth.

The District Judge held that he was bound by the decision of the Supreme Court in the case reported in *1 S. C. C. 24*, and that the Fiscal's sale to Marthelis and Marthelis's sale to the plaintiff were valid, and that plaintiff was entitled to the half share. The intervenient appealed.

The question we have to decide is what is the right construction of section 17 of the Partition Ordinance of 1863. That section says: "Whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein, unless and until the Court before which the same were instituted shall, by its decree in the matter, have refused to grant the application for such partition or sale, as the case may be; and any such alienation shall be void". If the words of that section are to have their natural force and meaning, they most distinctly declare that any such sale as they mention shall be unlawful and void.

It is contended, however, on the authority of the case reported in *1 S. C. C. 24*, that their effect is only to invalidate a sale or incumbrance pending a partition, *quoad* the partition proceedings, and the result of holding otherwise is pointed out to us as it appears from the judgment of Phear, C.J.

This result will be that any claimant of a share of land will be able to prevent all dealings with the land by the true owners by simply instituting proceedings for partition of it.

I do not think the Legislature could have contemplated this result, which is a factor that has weighed heavily on my mind in considering the meaning of the very plain words of the section.

It is worthy of remark that the old Ordinance No. 21 of 1844 by section 17 made any such alienation or hypothecation as that now in question punishable as an offence by the District Court at its discretion.

There can be no question, therefore, that under that section, on the authority of *Gye v. Felton* (*4 Taunton, 876*), any alienation or

hypothecation pending partition proceedings would have been absolutely void, and not voidable, as the penalty made it illegal.

Now, our present section 17 provides no penalty, but says it shall be unlawful, which is practically the same thing, but without the punishment for illegality.

The object of the section was no doubt, as Phear, C.J., says, to take care " that it shall not be in the power of any party concerned to defeat or embarrass the proceedings for partition by transferring his share or any interest in the property to a stranger ".

This object also would be quite attained by construing the section as Phear, C.J., did, but the words appear to me far wider, in fact unnecessarily wide, for the attainment of the object in view. In my opinion the words of the section admit but of one meaning, and we are not at liberty to speculate on the intention of the Legislature, or to construe the Ordinance according to our notions of what ought to have been enacted. *Per curiam, in York & N. Midland Ry. Co. v. R., 1 E. & B. 864; 22 L. J., Q. B. 230.*

With reluctance, therefore, I admit that the words of the section must have their full force and effect, as contended for by the Attorney-General, and hold that these alienations, which certainly took place while the property alienated was the subject of partition proceedings, are null and void.

I am therefore of opinion that this appeal must be allowed with costs. In view of the effect of this decision, as pointed out by Phear, C.J., I take it that legislation will be initiated to modify the terms of section 17.