Present: The Hon. Mr. A. G. Lascelles and Mr. Justice Middleton.

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BABEY NONA *et al. v.* SILVA.

D. C., Negombo, 6,172.

Fidei Commissum *property—Partition—Effect of partition decree—Conclusiveness*—Fidei commissarii *how far bound—Ordinance No.* 10 *of* 1863.

Property burdened with a *fidei commissum* may be partitioned under the provisions of Ordinance No. 10 of 1863, but such partition has not the effect of destroying the *fidei commissum*. It only sets apart a specific portion of the common estate to which the rights of the *fidei commissarius* attach in severalty.

A partition effected between the *fiduciarii*, whether by judicial decree or by mutual agreement, binds the *fidei commissarii*, and cannot be reopened by them when their interests accrue.

THIS was an action *rei vindicatio*.

The plaintiffs alleged that one Maria Silva by deed No. 490 dated 19th August, 1870, donated the land in dispute to her three children, to wit, Diyonis Silva, Manuel Silva, and Bastian Silva, subject to a *fidei commissum* in favour of their descendants; that the said land was partitioned in case No. 5,104 of the District Court of Negombo and the portion B was allotted to Diyonis Silva, while the portion A was allotted to Manuel Silva (defendant); that lot B was sold under writ against Diyonis Silva and purchased by the defendant; that Diyonis Silva died a few months prior to the action, leaving five children, to wit, the plaintiffs and two others; that on the death of their father lot B came to the plaintiffs under the *fidei commissum*. The plaintiffs prayed for a declaration of title to three-fifths share of B.

The defendant denied that the deed of gift created a valid *fidei commissum;* and alleged that, even if it did, the effect of the partition decree was to destroy the *fidei commissum* and to give absolute title to Diyonis Silva to lot B.

The deed of gift No. 490 contained the following clauses:—

"That I, in consideration of the natural affection which I bear to my three children Migelhewage Diyonis Silva, Pin Manuel Silva, and Pin Bastian Silva of Udayartoppu aforesaid, and in consideration of divers other good reasons, have transferred, assigned, and made over as a gift unto the said three persons or their lineal

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descendants from generation to generation, subject to the hereinafter-mentioned conditions and enactments, the following four portions of lands and houses standing thereon of the value of two hundred and twenty-four pounds and ten shillings of the lawful money of Ceylon, to wit:—

* * * * *

"The said Diyonis Silva, Manuel Silva, and Bastian Silva shall not sell, mortgage, or alienate or lease the above-mentioned lands or any portion thereof, and shall not sell the said lands for a debt of any one of them. It is ordained that all such acts shall become null and void.

"Therefore the said donors, Diyonis Silva, Manuel Silva, and Bastian Silva, have become owners for ever of the said lands and their appurtenances, so that they and their lineal descendants from generation to generation shall, subject to the aforesaid conditions and enactments, possess the same in equal shares. And I ordain that they shall redeem the mortgage effected by me of the portion of Kosgahawatta and the houses standing thereon first mentioned herein, and the deed for the said land bearing No. 22,095 hypothecated therewith; with the exception of the said mortgage no act has been done whereby any person may hereafter set up any claim to the said lands.

"Promising that I hold myself responsible as against all persons objecting to these presents and to pay compensation, I have hereby transferred, assigned, and set over as a gift in manner aforesaid."

The District Judge (A. de A. Seneviratne, Esq.) dismissed the plaintiffs' action. The plaintiffs appealed.

H. Jayewardene (with him *G. Koch*), for them.—The deed creates a valid *fidei commissum*. The intention of the donor is quite apparent. Property burdened with a *fidei commissum* cannot be partitioned under Ordinance No. 10 of 1863—*D. C., Colombo*, 69,169 (1), *Saram v. Perera* (2), *Tillekeratne v. Abeyesekere* (3)—but may be partitioned under the common law, and such partition will only affect the possessory rights of the parties entitled to possession at the time, *Parkin v. Parkin* (4); such partition will not bind the successors in the line of the *fidei commissum* (*Maasdorp, vol I.*, p. 34). The *fiduciarius* cannot enter into any compromise which has the effect of an alienation—*De Montmort v. Broers* (5);—and a partition amounts to an alienation (Jayewardene on Partition,

(1) *Ram.* (1877) 304.
(2) 3 *Browne* 188.
(3) 2 *N. L. R.* 313.
(4) *Buchanan* (1869) 136.
(5) 57 *L. J. P. C.* 47.

p. iv.). The case of *Sathianaden v. Mathes Pulle* (1) was wrongly decided. There the Supreme Court seems to have converted a partition action into a proceeding under Ordinance No. 11 of 1876.

Even if *fidei commissum* property be partitioned under Ordinance No. 10 of 1863, such partition does not extinguish the *fidei commissum*, *Tillekeratne v. Abeyesekere* (2). The plaintiffs do not repudiate the partition; they are willing to abide by it, but subject to the *fidei commissum*.

Van Langenberg (with him *F. de Soyza*), for the defendant, respondent.—The deed does not create a *fidei commissum*, the gift being in the alternative. It is bad for uncertainty. The most recent judgment of the Supreme Court on the question whether *fidei commissum* property could be partitioned is *Sathianaden v. Mathes Pulle* (3), which was adhered to by Lawrie J. in *Saram v. Perera* (4). (See also judgment of Baumgartner, D.J., in D. C., Galle, 6,673 cited in Jayewardene on Partition, p. 14.)

The effect of a partition decree under section 9 of the Ordinance is to give the parties absolute title to the several shares, and if any party has been prejudiced his only remedy is an action for damages, *Fernando v. Fernando* (5). The decree is conclusive and gives absolute title. For the appellant to succeed, the decree ought to have expressed that the shares in severalty would be subject to the *fidei commissum* as suggested by Lawrie J. in *Saram v. Perera* (4).

H. Jayewardene in reply.—The Court acted without jurisdiction in partitioning *fidei commissum* property under Ordinance No. 10 of 1863, and its decree amounts to a nullity, *Nussirwanjee v. Meer Mynoodeen* (6).

Cur. adv. vult.

13th August, 1906. LASCELLES A.C.J.—

The facts which have given rise to this appeal are simple, and may be stated as follows. One Maria Silva, being the owner of a land called Kosgahawatta, by deed dated 19th August, 1870, donated this and another land to her three children, Diyonis, Manuel (the defendant), and Bastian. This deed is said to create a *fidei commissum* in favour of the descendants of the donees. By decree of the District Court of Negombo the land was partitioned, and lot B was allotted to Diyonis. The share of Diyonis was seized and sold in execution and bought by the defendant. Diyonis died

(1) 3 *N. L. R.* 200.
(2) 2 *N. L. R.* 313.
(3) 3 *N. L. R.* 200.
(4) 3 *Browne* 188.
(5) 9 *N. L. R.* 241.
(6) 6 *M. I. A.* 134 (155).

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shortly before the institution of this case. The first, third, and fourth plaintiffs are three of the five children of Diyonis. The plaintiffs contend that the deed of gift created a *fidei commissum* in their favour, so that the defendant, when he purchased the share of Diyonis, took only the life interest of Diyonis. The first question which arises is whether the deed of donation creates a *fidei commissum*. In construing the deed the paramount question is, What was the intention of the grantor? If the intention is clear to substitute another *fidei commissarius* for the first taker or fiduciary, then a *fidei commissum* is established, *Ibangu Agen v. Abeyesekere* (1).

The deed begins with a transfer " unto the said three persons or their lineal descendants from generation to generation subject to the hereinafter-mentioned condition and enactments." Then follows the usual prohibition of alienation. If the deed had stopped here, the alternative gift " to these three persons or their lineal descendants " might have given rise to doubt as to the grantor's intention. But the concluding clause of the deed throws light on the real intention. " Therefore the said . . . . . have become owners for ever of the said lands and their appurtenances, *so that they and their lineal descendants from generation to generation shall, subject to the aforesaid conditions and enactments, possess the same in equal shares.*"

Reading the deed as a whole, I am satisfied that it does create a *fidei commissum* in favour of the lineal descendants of the donees.

What, then, is the effect of the partition decree? The appellant has contended that the Partition Ordinance has no application to lands which are subject to a *fidei commissum*, and that the partition decree in this case must be treated as a nullity; he has also urged that, even if the land was properly the subject of partition, the partition decree could not enlarge the life interest of Diyonis into *plenum dominium*. The respondent, on the other hand, contends that the partition decree has conclusively established the defendant's title as absolute owner to the portion allotted to him.

The question whether the existence of a *fidei commissum* is a bar to partition has been the subject of much judicial difference of opinion. The authorities bearing on this question have been carefully collected by Mr. Baumgartner in his judgment in District Court, Galle, No. 6,673, which is reproduced in Mr. A. St. V. Jayewardene's work on Partition. There is abundant authority that the Roman-Dutch Law allowed the partition of property subject to *fidei commissum*. It will be enough to cite one passage from *Voet* (10, 2, 38), which

(1) 6 *N. L. R.* 344.

clearly lays down that partitions between *fiduciarii*, whether effected by decree or by mutual agreement, are binding upon the *fidei commissarii*, and cannot be reopened when their interests fall into possession:—

"*Quod si fiduciarius heres, pendente fidei commissii conditione, cum ceteris cohereditibus ad divisionem processerit, non potest fidei commissarius post conditionis eventum novam petere divisionem, infirmata priore; sed in, quæ per fiduciarium bona fide factum est standum erit, sive in judicio sive extra judicium mutua coheredum pactione patrimonium defuncti distributum sit, cum hac in parte lex non distinguat.*"

The law in Cape Colony appears to be the same, *Parkin v. Parkin* (1).

By English Law a partition decree can be obtained by a person having only a limited interest as tenant for life, *Gashell v. Gashell* (2); by a tenant for life determinable on marriage, *Hobson v. Sherwood* (3); or by a tenant for a term, *Baring v. Nash* (4); and where there are remaindermen who may come into *esse* and be entitled they will be bound by a decree made against the tenant for life, *Wills v. Slade* (5).

The partition of property subject to *fidei commissum* is thus allowed by the common law of the Colony, and is in accordance with the principles of English Law. I would add that any argument based on considerations of convenience appears to tell in favour of the liability of such properties to partition.

It is true that the language of the Partition Ordinance appears at first sight to limit the scope of the Ordinance to land which is held in common by two or more persons as absolute owners. Section 2, for example, deals with the case of landed property *belonging* in common to two or more *owners*, and authorizes one or more of such owners to compel partition.

This difficulty is largely reduced, if it is not altogether removed, when it is remembered that by the Roman-Dutch Law the *fiduciarius* was a true owner; he had a real though a burdened right of ownership. It is also material that in *David v. Sarnelis Appu* (6) this Court held that a trustee under the Buddhist Temporalities Ordinance was an owner for the purposes of the Partition Ordinance. In my opinion the balance of reason and authority is in favour of the view that property subject to *fidei commissum* may be the subject of partition, and I hold, in the case under consideration, that

(1) *Buchanan* (1869) 136.
(2) 6 *Sim.* 543.
(3) 4 *Beav.* 184.
(4) 1 *Vesey and Beams* 551.
(5) 6 *Vas.* 498.
(6) 7 *N. L. R.* 163.

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the property in dispute, though subject to *fidei commissum*, was lawfully partitioned.

But the partition decree in no way extinguishes the reversionary interest of the *fidei commissarius*. It merely sets apart a specific portion of the common estate to which the rights of the *fidei commissarius* attach in severalty.

By no reasonable construction of the Ordinance can it be held that the effect of a partition decree is to enlarge the life interest of the *fiduciarius* into absolute ownership. In the words of Lord Watson in *Tillekeratne v. Abeysekere* (1): " the partition . . . . . would not necessarily destroy a *fidei commissum* attaching to one or more of the shares before partition."

In the present case, if the deed of gift created a *fidei commissum* in favour of the plaintiffs, as I hold it did, the partition decree operated subject to the conditions of the *fidei commissum*, and in no way prejudicially affected the rights of the plaintiffs as *fidei commissaries* under the deed.

In my opinion the judgment of the District Court should be set aside and judgment entered for the plaintiffs in conformity with their plaint.

MIDDLETON J.—

The first and most important question to be considered in this case was whether the deed of gift on the part of Maria Silva, dated 19th August, 1870, impressed a *fidei commissum* in favour of their children on the property which he thereby donated to Manuel, Diyonis, and Bastian.

At the argument I was inclined to think that the persons to be benefited were not designated, but having carefully considered the terms of the *habendum* of the deed, it is plain, I think, that the intention of the donor was to substitute the lineal descendants of his three donees as his heirs, and the restraint on alienation is clear.

If, then, this land is impressed with a *fidei commissum*, what is the effect of partitioning it ?

At the time of the partition and allotment of B to Diyonis he had but the fractional interest of a fiduciary in the whole land partitioned. How, then, can it be argued that the effect of partition is to give him *plenum dominium* in a separate portion ?

A *fiduciarius* has, it is true, a real though burdened right of ownership which may or may not develop into *plenum dominium*. Assuming that property subject to a *fidei commissum* cannot be partitioned, in the present case it has, rightly or wrongly, been partitioned by a

(1) 2 *N. L. R.* 313.

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Court with jurisdiction to order partition, and I do not think this Court can say that the act of partition was a nullity on the ground that the Court had no power to order the partition of property in *fidei commissum* any more than it could say that a decree ordering a testator's property to be sold for the personal debt of the executors, after the property had been sold, was a nullity: *Gavin v. Hadden* (1).

I would prefer to say that in partitioning the Court has done no more than to confer on Diyonis the interest of a *fiduciarius* in a separate portion of the property.

Upon the writ issued on the 15th July, 1904, in the case against Diyonis all that was sold was the right, title, and interest of Diyonis.

This interest would expire upon his death soon after, and the property in B would devolve in the terms of the *fidei commissum* upon his heirs.

I agree, therefore, that the judgment of the District Court should be set aside, and judgment entered for the plaintiffs in terms of the prayer in their plaint with costs in this Court and in the Court below.