Present : The Hon. Mr. A. G. Lascelles, Acting Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

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CASIM *et al.* *v.* DINGIHAMY *et al.*

D. C., Matara, 2,885.

Powers of Executor—Will proved before Charter of 1833—Fidei commissum *property—Sale by Executor—Roman-Dutch Law—Thirty years' possession* — Fidei commissarius — "*Disability*" — *Prescription — Ordinance No. 22 of* 1871.

Held (by the Full Court), that the executor under the Roman-Dutch Law was merely an agent of the heir and had not the same power and authority as an executor under the English Law.

The powers of an executor appointed under a will proved before the date of the Charter of 1833 must be regulated by the Roman-Dutch Law and not by the English Law.

(1) *L. R.* 3 *P. C.* 726; 8 *Moore P. C.* (*N.S.*) 122.

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According to the Roman-Dutch Law property burdened with a *fidei commissum* cannot be alienated by the executor except for the payment of the testator's debts and legacies, and then only, if there is no other property available for the purpose; or with the consent of all the beneficiaries under the *fidei commissum;* or where the property is perishable; or on certain special grounds with the leave of the Court. When *fidei commissum* property is improperly alienated the *fidei commissarius* is entitled to follow it into the hands of the purchaser and to assert his title by *rei vindicatio.*

Per MIDDLETON J.—When an executor deals with property burdened with a *fidei commissum*, it is his duty to observe the special rules of the Roman-Dutch Law in substance and in practice, so far as his office is compatible therewith.

Section 14 of Ordinance No. 22 of 1871, enacts as follows:—

"Provided, nevertheless, that if at any time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned—that is to say, infancy, idiotcy, unsoundness of mind, lunacy, or absence beyond the seas—then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by the 3rd section of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen; but no further time shall be allowed in respect of the disabilities of any other person. Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by the 3rd section of this Ordinance, notwithstanding the disability of any adverse claimant."

Held (by the Full Court), that "disability" means incapacity to do legal acts, and that a *fidei commissary* whose right to possession has not accrued cannot be said to be under "disability" within the meaning of this section.

Held, also, that this section and its proviso in no way affect the proviso to section 3 of the Ordinance, which enacts that "the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute," and that thirty years' possession does not give prescriptive title against parties whose right to possession had not accrued.

D. C., Matara, 3,236 (1) overruled.

ACTION *rei vindicatio*. The plaintiffs alleged that Kunji Packeer Meera Kandu Shroff was the owner of the land called Addara-ederawatta; that he died on 28th April, 1828, leaving a last will

(1) *S. C. Min., April* 3, 1905.

and testament dated 17th April, 1826, whereby he devised the said property to Sheikh Abdul Cader and Adibu Natchiya in equal shares subject to a *fidei commissum* in favour of their descendants; that probate of the will was granted to Usoof Lebbe Shroff Maricar, the executor named therein; that Sheikh Abdul Cader died on 23rd June, 1892, leaving two children, viz., the plaintiffs, who thereupon became entitled to a half-share of the property according to the terms of the said last will.

The defendants pleaded that the executor in due course of administration sold the property by public auction on 10th February, 1836, to one Christian, through whom they claimed. They also set up title by prescription under section 14 of Ordinance No. 22 of 1871, in that they were in adverse possession of the property for over thirty years.

The District Judge (T. R. E. Loftus, Esq.) gave judgment for the plaintiffs. He held as follows:—

" The plaintiffs in this case sue to be declared the owners of the land called Ganga-addaragederawatta. This land formed part of the estate of the late Meera Kandu Shroff of Matara, a wealthy Moorish gentleman who left an estate valued at £10,000. Meera Kandu Shroff died in 1826 leaving a last will, two translations of which are filed of record.

" At his death his heirs were his two children—Adibu Natchiya, a daughter, and Segu Abdul Cader. Both children were minors at the time of the testator's death. Adibu Natchiya was betrothed of the testator's nephew, who by the last will was created executor of the estate. By the last will certain properties were set apart for charitable purposes. The remaining properties were specifically bequeathed to the two minor heirs. One of the properties bequeathed to the two minors is the land, the subject-matter of this case. Plaintiffs contend that paragraph 6 of the will created a valid *fidei commissum* in their favour, and that they are now the lawful owners of the land, their father Segu Abdul Cader, the son of the testator, having died in 1892. The defendants claim the land through various deeds from the executor appointed by the testator. Twelve issues were framed. The facts were all admitted, and the questions for the decision of this Court are really points of law. The law bearing on the case was most ably argued by counsel on both sides. One of the principle issues in the case was ' Did the will create a valid *fidei commissum*? ' Mr. A. St. V. Jayewardene contended that the wording of the will was loose. Paragraph 6 of the will left the reader thereof in doubt as to the testator's intention, and therefore a free inheritance rather than a *fidei commissum* was to be presumed.

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I am not able to agree with Mr. Jayewardene that there can be any doubt as to the wording of the will. When the testator ordered that on the death of his children the property should go to charities, he could only have contemplated their dying issueless. I cannot, however, but think that if this will came up for construction at the present day, it would have been held that no *fidei commissum* had been created, as the parties to be benefited by the will have been very vaguely described. It is not, however, open to me to consider the point. Lawrie A.C.J. in 1897, in deciding D. C., Matara, 1,396, in which this very point came up for consideration, remarked: 'It is now too late to discuss the question whether the will created a *fidei commissum*. That was decided by this Court so long ago as 1867 (D. C., Matara, 19,100).'

"In D. C., 1,048, Matara, Bonser C.J. and Withers J. did not question the ruling of the Supreme Court in 1867 that this will did create a valid *fidei commissum*. When the case (1,048, D. C.), came up a second time in appeal Withers J. stated: 'So we must govern ourselves by the former decision of this Court on this very will. The will was held to create a good *fidei commissum*.'

"I must adopt the finding of the Supreme Court and hold that a valid *fidei commissum* was created by paragraph 6 of the will. The next important point arising for decision was 'Had the executor the power to alienate, and did such alienation confer an absolute title on the purchaser?'

"There were several issues framed on this point. Several South African authorities were referred to, but I think most of the leading authorities concur in holding that an executor can alienate only for the payment of debts or legacies. That the defendants' counsel recognized that such was the law is borne out by the fact that he attempted to establish that the estate was very largely indebted to the executor (*vide* document filed by defendants). I am however of opinion that, in all instances, leave of Court was necessary before an executor could alienate property. This view is supported by a passage in Sir Chas. Marshall's book, p. 191, which appears to have been followed by the Supreme Court in D. C., Matara, 19,100. This point again appears to have been decided by the Supreme Court, for Withers J. in his judgment in D. C., Matara, 1,048, remarks: 'and it was held that the executor had no right to sell any of the fidei committed property.'

"Mr. Jayewardene doubted whether the Supreme Court was aware that the property was sold to satisfy debts due by the estate. But the Supreme Court in deciding D. C., Matara, 19,100, appears to have had the testamentary proceedings before it, and I

am sure that the Judges who decided that case did not fail to see the accounts filed in the case, which accounts defendants now rely on to prove the indebtedness of the estate. For my own part I must say that I cannot find any proof that the estate was indebted. I can scarcely believe that the executor was so generous as to forego the huge debt which the accounts filed show was owing to him. The accounts are in my opinion utterly false. It is certainly a pity that the Court did not call the executor to account. I therefore hold that the executor had no right to alienate this land, and the transfer is void as against the heirs to be benefited.

" The next important issue was that of prescription. This issue does not appear to have been seriously discussed in any of the previous actions for the recovery of estate lands. In D. C., 1,048, Matara, Lawrie A.C.J. writes as follows: ' The *prescriptio longissimi temporis* was not pleaded. I desired argument on this point in appeal, but counsel for the appellant would not argue it. ' In the present case the defendants made it a point to plead title by prescription, and their counsel pressed the point on the Court. Mr. Jayawardene urged two points, and these were—

" (1) That the cause of action arose when the executor rightly or wrongly alienated the land.

" (2) That in view of the opinion contained in Sande on Restraints, part III, chap. VIII, section 5, sub-sections 52-56, the defendants could yet claim prescription as they do not claim directly from the executor.

" After a careful perusal of the authorities I am of opinion that the cause of action did not accrue until the plaintiff's father died in 1892. In this will there was nothing said about the consequences were the prohibition disregarded. Therefore the right of action accrued to the plaintiffs only on the death of their father, for even if it be held that their father tacitly consented to the alienation, such consent only amounted to an alienation of his life-interest in the property. I therefore hold that the plaintiffs are not estopped by prescription from claiming the land, and the defendants have not acquired a title by prescription. It is certainly very hard on the defendants to give up the land now, but I have to administer the law, however hard it may be. The other issues are of no importance. I have held in favour of the plaintiffs on the principal issues. I give judgment for plaintiffs for the land claimed by them. I award no damages. Let the improvements effected on the land be assessed by a commissioner to be agreed upon by the parties; plaintiffs will pay the amount of compensation to the defendants."

The defendants appealed.

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H. Jayawardene (*A. St. V. Jayawardene* with him), for the appellants.—In view of the previous decisions of the Supreme Court it is conceded that the will creates a good *fidei commissum*. But it is submitted that the executor has power to sell property specially bequeathed, subject to a *fidei commissum* or not, for the purposes of administration, *Fernando v. Muncherjee* (1); *Juta, vol. I., p.* 47, *vol. II., pp.* 181—184, *Morice on English and Roman-Dutch Law, p.* 305. Where an executor sells property, the purchaser is entitled to presume that it is sold in due course of administration, and he cannot be called upon to prove the necessity for the sale, *Corser v. Cartwright* (2). The case of *Marikar v. Casy Lebbe* (3), which related to property dealt with by this very will, was wrongly decided. It seems to have been based on an erroneous view of the powers of an executor under the English Law. As regards prescription, the point is covered by the decision in D. C., Matara, 3,236 (4), in which Layard C.J. and Moncreiff J. held, in connection with a property sold by this very executor, that thirty years' possession gave an absolute title against all persons whatsoever under the latter part of section 14.

Van Langenberg for the plaintiffs, respondents.—The English Law relating to the powers of an executor does not apply in this case, as the will was before the Charter of 1833, which was considered to have introduced the English Law of Executors and Administrators into Ceylon, *Staples v. de Saram* (5); *Gavin v. Hadden* (6); the matter must be decided according to the principles of the Roman-Dutch Law, which are fully set out in *Marshall's Judgments*, p. 191. It was the Roman-Dutch Law that was applied in *Maricar v. Casy Lebbe* (3), and that decision has been followed in all the subsequent cases relating to properties dealt with by this will. At the time that *Maricar v. Casy Lebbe* (3) was decided it was well known, in consequence of the decision in *Staples v. de Saram* (5) that the Charter of 1833 introduced the English Law of Executors and Administrators; but notwithstanding that decision, the principles of the Roman-Dutch Law were applied. It would work great injustice and hardship, if other principles are applied now and all the old decisions ignored. Such a course would unsettle several titles. As regards prescription it is submitted that D. C., Matara, 3,236, was wrongly decided. Section 14 speaks of " disabilities " only, and the disabilities are mentioned in the first proviso. " Disability " means legal incapacity on the part of a person who is entitled to a thing; it does not mean the non-accrual of a right. Section 14 has no application to

(1) (1883) 5 *S. C. C.* 141.
(2) *L. R.* 7 *H. L.* 743.
(3) *Ram.* (1863-1868) 283.
(4) *S. C. Min., April* 3, 1905.
(5) *Ram.* (1863-1868) 265.
(6) 8 *Moore's P. C. Appeals*, 117.

persons whose rights have not accrued yet, and who are not entitled to possession, and it in no way alters or modifies the proviso to section 3. It has already been held in several cases that prescription does not begin to run against a *fidei commissary* until his right to possession accrues, *Anthonisz v. Barton* (1); *Geddes v. Vairavy* (2).

H. Jayewardene, in reply.

Cur. adv. vult.

24th August, 1906. LASCELLES A.C.J.—

This is one of the numerous cases which have arisen during the last half century under the will dated 17th April, 1826, of one Meera Kandu Shroff, who died shortly after the execution of his will possessed of property valued at £10,000 sterling.

In view of the previous decisions of this Court counsel did not press the contention that the will did not create a *fidei commissum* with regard to the property now in dispute, and it may be assumed for the purposes of this appeal that the property in question was devised to the testator's two children, Adibu Natchiya and Segu Abdul Cader subject to a *fidei commissary* trust in favour of their descendants. The plaintiffs are the sons of Adibu Natchiya, who died on 23rd June, 1892, and claim under the *fidei commissum* in their favour an undivided half-share in the garden in dispute.

The title of the defendants is derived from a conveyance dated 10th February, 1836, by which the executor of the will purported to convey the garden to one Christian.

The points for determination are whether the conveyance by the executor passed a good title to Christian and his successors in title, and whether the latter have acquired a title by prescription. As far back as 1867 the validity of a conveyance by this same executor of property subject to the same *fidei commissum* was the subject of a decision of this Court, *Marikar v. Casy Lebbe* (3). This Court ruled in that case, after examination of the testamentary proceedings, that there was no necessity for the sale and no order of the District Court for the sale, and that the sale was consequently illegal. Reference was made in this judgment to a passage in Marshall's reports (apparently based upon an extract from the Supreme Court letter book dated 30th May, 1835), which, after specifying certain cases in which the law will allow the alienation of *fidei commissum* property,

(1) (1903) 7 *N. L. R.* 43 *at p.* 51. (2) (1906) 9 *N. L. R.* 126.
(3) *Ram.* (1863—1868) 283.

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declares that in all cases application should in Ceylon be made to the District Courts for authority to dispose of such property.

We are now asked to review the decision of this Court and to hold that the executor's conveyance did pass a good title to Christian. The real question is whether the validity of this conveyance should be tested by the principles of the Roman-Dutch Law or by those of the English Law, which is now in force in Ceylon with regard to executors and administrators. The Roman-Dutch Law with regard to the alienation of *fidei commissary* property will be found in *Voet*, 36, 1, 62-64, and is summarized in *Burge, vol. II., p.* 129, and in *Maasdorp, vol. I., p.* 163. The *fidei commissary* property cannot be alienated except for payment of the testator's debts and legacies, and then only if there is no other property available for the purpose; or with the consent of all the beneficiaries under the *fidei commissum*, or where the property is perishable; or on certain special grounds with the leave of the Court. When property is improperly alienated the *fidei commissarius* is entitled to follow it into the hands of the purchaser and to assert his title by *rei vindicatio* (*Voet*, 36, 1, 64).

The purchaser as a general rule bought at his own risk, and it was only in cases where it was impossible for him to have notice of the existence of a *fidei commissum* that an executor has made in his favour. *Voet* (36, 1, 63) gives as an example the case of a testator devising property to his wife unconditionally, but by a codicil to be opened after his death imposing a *fidei commissary* condition on the property. There it was ruled that the purchaser, having no means of knowing that the property was subject to a *fidei commissum*, was entitled to retain it, and that the wife's heirs should make good the amount of the purchase money to the *fidei commissary* heir. The executor under Roman-Dutch Law was merely the agent of the heirs and had no special authority analogous to that of the English executor, *Staples v. de Saram* (1). In D.C., Galle, 22,856 (2) the introduction of the English Law of Executors and Administrators was fully discussed. The Charter of 1801 was understood to have introduced the English Law on this subject as to Europeans other than the Dutch inhabitants of the Fort and District of Colombo. The Charter of 1833, though it nowhere does so in terms, was taken to have established the English Law of Executors and Administrators throughout the Island, with the addition that immovable property vested in the executor in the same way as a chattel real. It is clear from *Staples v. de Saram* (1) that in 1867 it was well settled law that the power of an executor in Ceylon are

(1) *Ram.* (1863—1868) 275. (2) *Vanderstraaten* (1870), *p.* 273.

the same as those of an English executor. In *Marikar v. Casy Lebbe* (1) decided also in 1867, the judgment obviously proceeded on the footing that the powers of an executor under a will proved before the date of the Charter of 1833 were regulated by the Roman-Dutch Law and not by the English Law.

Unless it is clearly shown, which certainly is not the case, that the decision in *Marikar v. Casy Lebbe* (1) is wrong, I think that we ought to decide the present case on the principles laid down in that case with regard to the same estate in 1867.

Marikar v. Casy Lebbe (1) has been followed in other cases where sales similar to that now in question have been impeached, both in this Court and very frequently in the District Court of Matara. To go contrary to that decision in the present case would be to shake the title to many holdings which are based on the previous rulings of this Court. But I see no reason to question the soundness of the decision in *Marikar v. Casy Lebbe* (1). There is certainly nothing in the Charter of 1833 to warrant the application of English Law to an executor appointed before the date of the Charter, and the decision is in accordance with the Roman-Dutch Law. We now come to the question of prescription. It is admitted that the defendants are not entitled to the benefit of the ordinary term of ten years, which under the proviso to section 3 of Ordinance No. 22 of 1871 only began to run when the plaintiffs acquired a right of possession, namely, on 23rd June, 1892. Defendants however claim the benefit of the proviso to section 14. The section runs as follows:—

" Provided, nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned—that is to say, infancy, idiotcy, unsoundness of mind, lunacy, or absence beyond the seas—then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by the 3rd section of this Ordinance shall commence to be reckoned from the death of such last-named person or from the termination of such disability, whichever first shall happen; but no further time shall be allowed in respect of the disabilities of any other person. Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of

(1) *Ram.* (1863-1868) 283.

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title in manner provided by the 3rd section of this Ordinance, notwithstanding the disability of any adverse claimant."

Defendants contend that in the case of possession for thirty years the words " notwithstanding the disability of any adverse claimant " in the proviso exclude the application of the proviso to section 3 to the effect that the period of prescription shall only run against parties claiming in remainder or reversion from the time when the party so claiming acquired a right in possession. Layard C.J. and Moncreiff J. in D. C., Matara, 3,236 (1)—a case arising under the same will—have adopted this construction. With the greatest respect to these learned Judges, I am unable to concur with their construction of section 14. The word " disability " in the proviso to section 14 must, I think, be taken to refer to the disabilities specified in the earlier part of the section, namely, infancy, idiotcy, unsoundness of mind, lunacy, or absence beyond the seas. The word " disability " is used and defined in the earlier part of the section; and in the absence of any indication of a contrary intention I think the word when repeated in the proviso must be taken to have the same meaning.

Further, a *fidei commissary* whose expectant estate has not yet fallen into possession cannot in any proper sense of the terms be described as being under disability. The word " disability " implies incapacity to do legal acts.

The *fidei commissary* heir, before he comes into possession of property, is under no such incapacity. It is true that he cannot take action to claim the property, and for that reason, prescription does not run against him. But this is because his interest is merely in expectancy and not on account of any general incapacity to do legal acts.

I also think that the words " in manner provided by the 3rd section of this Ordinance " show that it was intended that provisions of that section with regard to persons claiming estates in remainder or reversion should apply to the period of thirty years' possession. If that were not so, the Legislature would surely have used express words to exclude these provisions.

In my opinion the period of thirty years begins to run in the same way as that of ten years from the date when the claimant to an estate in expectancy comes into possession. This was the rule of the Roman-Dutch Law both with regard to prescription *longi et longissimi temporis* (*Voet* 36, 1, 64). For these reasons I am of opinion that the defendants have not gained prescriptive title and that the appeal must be dismissed with costs.

(1) *S. C. Min., April* 3, 1905.

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This appeal raises two very important questions, the first effecting the powers of an executor in disposing of his testator's lands, and the second as to the true construction of section 14 of the Prescription Ordinance, No. 22 of 1871. The facts upon which these questions arise may briefly be stated as follows:—One Meera Kandu, being the owner of a very large estate including the lands now sued for, died on 28th April, 1826, leaving him surviving his son Abdul Cader and daughter Adibo Natchiya, both minors, and leaving a last will dated 17th April, 1826, whereby he devised a moiety of that land among others to his son Abdul Cader. There were other devises in favour of the daughter. It is admitted by defendant (as in view of the old judicial decisions upon the point, it could not but be admitted) that the will created a *fidei commissum* in favour of the respective descendants of the devisees. The will declared that until the children attained their age of discretion and "for the management of all and singular movable and immovable property as hereinafter specified," the testator transferred "all his right, title, and power of all such property" unto his nephew Usubu Lebbe (husband of his daughter), whom he appointed "as my executor to comply with the following directions after my demise." This will was duly proved before the Provincial Court of Galle and Matara on some date not ascertained.

On the 8th June, 1835, the executor without obtaining any order of Court for the purposes cause the land in question to be sold by public auction, when one Christian became the purchaser, and to him the executor conveyed it by deed dated 29th July, 1835. Christian in 1848 gifted the land to first defendant, who in 1892 gifted one-half to the fifth defendant (reserving the right to possess it for life) and in 1893 sold and conveyed the other half to the third defendant and one Jayasuriya, and Jayasuriya in 1899 conveyed his interest to third defendant. Abdul Cader never had possession of the land, but died on 23rd June, 1892, intestate, leaving as his only heirs his two sons, the plaintiffs, who are now respectively 49 and 47 years of age. They bring this action on 7th April, 1902, claiming the land on the footing that under the *fidei commissum* their right to possession accrued on the death of their father.

The defendants rely upon two main defences. The first is, that the sale by the executor conferred a good title upon Christian; and the second, that by over thirty years' adverse possession they have acquired absolute title to the land in terms of section 14 of the Prescription Ordinance. As regards the first defence, it would appear to be the case, as contended by appellants, that if the

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English Law pure and simple applied—with, of course, the addition that a Ceylon executor had the same powers over real property as an English executor over personalty—Christian acquired a good title as against the devisee under the last will. But, in the first place, we have recognized in Ceylon a modification of the English Law as to the executor's rights in land specifically devised, as the subject of the present action was [see *Cassim v. Marikar* (1), and *De Kroes v. Don Johannes* (2)]. And in the second place, we have I think to inquire, not what the present law is in regard to the powers of executors, but what the law was under which the executor of Meera Kandu's will was constituted and under which he acted. And here we have to reckon with the decision of the Supreme Court pronounced in the year 1867 in the case of *Marikar v. Casy Lebbe* (3), a case not only on all fours with the present, but arising out of the very same will. It was, in fact, brought by the children of Adibu Natchiya, after her death, to recover land specifically devised to her in *fidei commissum* and claimed by the defendants under a sale by the executor. The Supreme Court, reversing the judgment of the District Court, gave judgment for the plaintiffs. They held that there was a good *fidei commissum* created by the will; that a purchaser from an executor was affected with notice of the contents of the will; that, although a sale by the executor might have been supported if it had been shown to be necessary, the contrary had been shown by production of the testamentary case; and that the omission to obtain an order of Court authorizing the sale was very significant. It is clear from the references to Voet and Marshall that this Court applied the Roman-Dutch Law to the construction of the will, and in defining the executor's powers regarded him as standing in the place of the " heir " burdened with a *fidei commissum*. (Note the reference to page 191 of Marshall, who merely summarizes *Voet* 36, 1, 62, and states that the practice in Ceylon requires an application to the Court for leave to sell *fidei commissary* property).

This decision in the Supreme Court was pronounced by two of the very Judges who, less than four months before, ruled that the English Law of Executors and Administrators had been introduced into Ceylon in respect of all classes of the inhabitants by the Royal Charter of 1833. It cannot therefore be assumed that the decision we are considering proceeded upon a different construction of that Charter; but rather upon the footing that the law of the Charter did not apply to the case in hand. And on the very surface a reason

(1) (1892) 1 *S. C. R.* 180; 2 *C. L. R.* 72. (2) (1905) 9 *N. L. R.* 7.
(3) *Ram.* (1863-1868) 283.

appears for the distinction, because the will took effect in 1829, and the same was proved in Court at some date anterior to 1829, whereas the Charter did not come into operation until 1833. In the case of *Staples v. de Saram* (1), the case in which this Court declared the prevalence of the English Law, Creasy C.J. pointed out that an executor under the Roman-Dutch Law was "a very different functionary from the one who bears that name under the English system. He was little more than the agent of the heir appointed by the will. He could not alienate or sell without the heir's consent, and if the heir would not accept the inheritance the executorship became a nullity." It is impossible to hold that this mere agent of the heir, constituted and appointed under the Roman-Dutch system suddenly became vested with the powers of an English executor when, several years later, the Charter empowered the Courts to appoint officers with those powers. It seems therefore clear to me that a definition of the powers of the executor here in question cannot be looked for in the English Law. The Charter of 1801, under which the will was proved, limited (section 53) the application of English Law to British inhabitants and Europeans other than the Dutch, their laws and usages in force at the time of the British occupation should be administered. This section 53 forms a proviso to section 52, which deals specially with testamentary and matrimonial causes, suits, and business. The jurisdiction is conferred over all and singular the inhabitants; then follows the direction I have quoted as to the Dutch and as to the British inhabitants, while as regards natives the only special provision is (section 54) that the jurisdiction in matrimonial causes shall not extend to them. Nothing is said as to testamentary causes, suits, and business to which they are parties. Section 30, however, which conferred the civil jurisdiction, is followed by the proviso (section 32) that "in the case of Cingalese or Mussulman natives their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Cingalese, by the laws and usages of the Cingalese, or in the case of Mussulmans by the laws and usages of the Mussulmans."

There is a question in my mind whether the matter of an executor's powers falls within this proviso: it is not a matter of inheritance and succession, and it does not seem to be a matter of contract and dealing between party and party. If my doubt is well founded, the Roman-Dutch Law, as the common law of the country, would govern the case as one not provided for in the

(1) *Ram.* (1863-1868) 265.

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Charter of 1801. But in *Cassim v. Periatamby* (1)—an action by the present plaintiffs in respect of other land alienated by the executor in 1839, and in the same position as the subject of the present action—Bonser C.J. and Withers J. held that the rights of the executor to sell and the right of the testator—being a Mussulman native—to fetter the land by a *fidei commissum* fell to be determined by the laws and usages of the Mussulmans, and they accordingly sent the case back in order that evidence might be taken on that point. They at the same time expressed the decided opinion that if the will was one governed by the Roman-Dutch Law, the executor would not have had the power to sell. The evidence required having been recorded, the case came a second time in appeal, before Lawrie A.C.J. and Withers J. The Acting Chief Justice considered himself bound by the decision in 1867. Withers J. said the evidence did not throw much light on the local customary law, but the result of it seemed to be that there was Mohammedan law which recognized testamentary trusts and prohibited executors from alienating trust property without judicial sanction; therefore he governed himself by the old decision, in which it had been held that the will created a good *fidei commissum* and that the executor's sale was *ultra vires*.

In the present case neither party in the Court below appealed to the Mohammedan Law, and appellants' counsel did not suggest that evidence should be taken as to the provisions of that law. Both sides were content to rely upon either the Roman-Dutch Law or the English Law, and I see no necessity for our entering upon any discussion of the Mohammedan laws and usages. Both sides were in pursuance of the evidence taken in the case of *Cassim v. Periyatamby* (1), and doubtless governed themselves accordingly.

I therefore consider that it has not been proved that the Supreme Court were wrong when in 1867 they decided the questions raised according to the Roman-Dutch Law. But, even if they erred in so doing, I consider it too late for this Court now to hold differently. There have been many cases decided since, founded on this will, and instituted by claimants under the *fidei commissum* against persons making title under alienations by the executor and by the fiduciary Abdul Cader, and in all of them the law laid down by this Court in 1867 has been consistently followed and many titles have been created and extinguished on that footing. To reverse that law now would be to disturb those titles and create confusion, and I think there is very good reason to avoid this. I shall briefly refer to a few of these cases, taking them in the order of their institution.

(1) (1896) 2 *N. L. R.* 200.

To D.C., Matara, No. 1,048 *Casim v. Periatamby* (1) I have already alluded.

In D.C., Matara, No. 1,396, an action by the present plaintiffs, the sale had been made in 1854 by their father. The District Judge held there was no *fidei commissum*, but his decision was reversed in appeal. Lawrie A.C.J. said: " It is too late now to discuss that question. That was decided by this Court so long ago as 1867—*Ram.* (1863-68) 283—and I understand from the judgment of the learned District Judge that the judgment was followed in subsequent cases." Withers J., after referring to the unsatisfactory evidence taken in *Cassim v. Periyatamby* (1) as to the Mohammedan usages, considered that the Roman-Dutch Law, as the common law of the Island, should apply and followed the case in *Ramanathan.*

In D. C., Matara, 2,101, Bonser C.J. (Withers J. sitting with him) had again to construe the will. He said the devise in question had already received the same judicial interpretation on two different occasions; the first as far back as 1867, and again in 1897; and added: " It seems to me that we sitting here are bound to put the same construction on the devise as the Court has hitherto done."

I now come to the second defence pleaded, viz., prescription. It is admitted, as I understand, that Christian and his successors. down to and including the defendants, have possessed and enjoyed the land *ut domini* ever since 1835. Unless, therefore, plaintiffs' contention as to the effect of the *fidei commissum* be well founded, the defendants are entitled to a decree for prescriptive title. It is clear from *Voet*, 36, 1, 62-64 (McGregor's translation, pp. 128, 136) that in the case of alienation by the fiduciary, prescription does not run against the *fidei commissary* until the happening of the conditions upon which his right to possession accrues: *Agere non volenti non currit prescriptio.* This is only reasonable, for surely the foundation of prescription is that one man has the right to possession while another enjoys the possession without right. If the former, having the right to interfere, fails to do so within the period limited by law, the latter acquires by prescription the right to that which he has so long without right enjoyed. But on a question of prescription we can no longer appeal to the Roman-Dutch Law, inasmuch as the Ordinance No. 22 of 1871 has been held to embrace the whole law of prescription in force in this Island; and defendants seek to bring themselves under section 14 of that Ordinance. Section 3 of the Ordinance in effect enacts that proof of the undisturbed and uninterrupted possession of land by a party to

(1) (1896) 2 *N. L. R.* 200.

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an action, by a title adverse to or independent that of his adversary, for ten years previous to the bringing of such action, shall entitle the person to a decree in his favour, " provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

Sections 4 to 12 deal with the limitation of various causes of action, and section 13 with the effect of acknowledgments and payments. Then comes section 14, which is in these words:—

" Provided, nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned—that is to say, infancy, idiotcy, unsoundness of mind, lunacy, or absence beyond the seas—then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by the 3rd section of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen; but no further time shall be allowed in respect of the disabilities of any other person. Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by the 3rd section of this Ordinance, notwithstanding the disability of any adverse claimant."

The proviso with which the section opens is not a proviso to the enactment immediately preceding, but obviously relates to the subject-matter of section 3, viz., prescriptive title to the land and deals with " disabilities." A " disability," as the etymology of the word implies, is some obstacle which stands in the way of a person enforcing by action some right which he possesses, and such are the instances mentioned in the section. The proviso then enacts that so long as the disability shall continue possession by any other person shall not avail to give him a prescriptive right, but the period of ten years required by section 3 shall commence to be reckoned from the death of the person under disability, or from the termination of the disability, whichever first shall happen, but that no further time shall be allowed in respect of the disabilities of any other person, meaning that if the successor in title of the disabled person is himself under disability the prescription now

commenced shall continue to run against him. So far there is not a word which could be construed as derogating from the proviso to section 3, which enacted that prescription could not begin to run against remainder men and reversioners until their right to possession accrued. Then follow the words upon which the defendants found their case. They are in the form of a proviso and a proviso to the enactment in the earlier part of the same section. They ordain that adverse and undisturbed possession for thirty years shall be taken as conclusive proof of title in manner provided by section 3, " nothwithstanding the disability of any adverse claimant." That means, as I read it, that whereas, according to the first enactment in section 14, the disability of the owner postponed the commencement by prescriptive possession until cesser of the disability—whereby the possessor might have to wait sixty or seventy or more years—now, by the proviso, the possessor would acquire title by thirty years' possession, even although the owner was under disability all that time. The words " in manner provided by the 3rd section " merely import the benefit of the proviso to that section. The owner may be under disability, but he must be the owner, that is, he must have the right to possession. Postponement of the right to possession (as in the case of *fidei commissaries*, who are doubtless included in the description of remainder men and reversioners) is one thing, disability is another. Section 14 and its proviso deal with disability only, and construed in the way I have shown they only embody the Roman-Dutch Law. Their operation will be seen in a case like this. The owner of land entitled to possession of it is an idiot or lunatic, or is absent in England, at the date when defendant enters and takes possession. He lives for seventy years after and continues to be an idiot or a lunatic, or to reside in England. According to the early part of section 14 defendant's seventy years' possession gives him no right whatever, and the idiot or lunatic may reserve the land by a curator, or he may die and his legal representative recover it within ten years of his death, or the owner may come to Ceylon and himself recover it within ten years of his return. But the proviso steps in and enacts that in these cases thirty years' possession will give the possessor a title against the owner.

The defendant's view of section 14 was, however, taken by Layard C.J. (Moncreiff J. concurring) in D. C., Matara, No. 3,236 (1), a case arising on the same last will. With the greatest deference to the former head of this Court, I am unable to take the same view. It appears to me that that decision proceeded upon the footing that a

(1) *S. C. Min., April* 3, 1905.

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fidei commissary's not having the immediate right of possession was not "disability" within the meaning of the Ordinance. For the reasons I have given, I think it clear that it is not.

I think therefore that the appeal should be dismissed with costs.

MIDDLETON J.—

I have had the advantage of reading the judgments of my Lord and my brother Wendt, and it is not necessary for me to set out the facts of this case.

In the first place, considering this Court ruled in 1867 that the will created a *fidei commissum* and that such a construction has been acted on since, we ought not now to disturb that ruling.

On the first point, as to whether the sale by an executor of a property burdened with a *fidei commissum* is good without the leave of the Court or proof of special circumstances according to the blend of English and Roman-Dutch Law administered in Ceylon, I am of opinion that it would not be good.

The executor, as an instrument in the administration of the estates of deceased persons, was imported into the Ceylon system of law as regards all persons in the opinion of the Judges in *Staples v. de Saram* (1) by the Charter of 1833.

There appears no reason to doubt the correctness of the opinion of the learned Judges. The common law of Ceylon is the Roman-Dutch Law, and amongst its institutions are *fidei commissa*.

It does not appear to me incongruous that in a polygenous country with divers systems of law like Ceylon, and where the law as to Vaqfs is practically unknown, a Mussulman should employ the common law for the purpose of keeping his property in the hands of his descendants.

The law regulating *fidei commissa* is laid down by the Dutch jurists and collected by Burge, and it seems that property in *fidei commissum* can only be sold in cases of proved special circumstances rendering it necessary (*Burge, vol. II., p.* 129), and in Ceylon by the authority of the Court (*Marshall's Judgments, p.* 191).

It has not been proved here to the satisfaction of the District Judge that any of these special circumstances existed or that the leave of the Court has been obtained.

The executor who in Ceylon has power to deal with immovable property in my opinion would only have a right to act according to the law in Ceylon affecting the property with which he was empowered under the will to deal.

(1) *Ram.* (1863-1868) 275.

If that property was saddled with a *fidei commissum*, it would be the executor's duty in dealing with it to observe the special rules of the Roman-Dutch Law which apply to *fidei commissa* in substance and in practice so far as his office is compatible therewith, and by English Law a purchaser from an executor is affected with notice of the contents of the will. For this reason I would hold that we ought to follow the decision of this Court in *M. L. Marikar et al. v. Casy Lebbe et al.* (1), which indeed is a decision between other parties to the same will.

I think also that we should follow it also on the ground that for upwards of forty years it has been followed and deemed to be good law in this Colony, on the principle laid down by Lord Mansfield in *Tyril v. Fletcher* (2), that certainty is of much more consequence than which way the point is decided.

On the question of prescription by thirty years' uninterrupted possession, relied on by the defendants, my opinion is that the *fidei commissarii* would not have a right to sue (section 14 of Ordinance No. 22 of 1871) until the property vested in them, and this could not occur till the plaintiffs' father died on 23rd June, 1892 (*Voet*, 36, 1, 62, MacGregor's translation, p. 128), and the action was begun on 7th April, 1902.

The proviso to section 3 specially saves the rights of parties claiming estates in a remainder or reversion until they acquire a right to possession, and I think goes to show that the word "disability" in the proviso to section 14 must refer to the disabilities mentioned in the preceding part of the section.

I agree that the appeal should be dismissed with costs.

(1) *Ram.* (1863-1868) 283.

(2) *Cowper*, p. 166.