1947 *Present :* **Soertsz S.P.J. and Canekeratne J.**

TILLAKARATNA *et al.*, Appellants, *and* DE SILVA *et al.*, Respondents.

S. C. 19—D. C. Matara, 16,229.

Partition action—Land subject to fidei commissum*—Fractional shares in interlocutory decree declared subject to entail—Omitted in final decree—Sale of divided block—Rights of fidei commissaries—*Bona fide *purchaser without notice.*

Where in the interlocutory decree in a partition action there is an express reservation of a *fidei commissum* which however is omitted in the final decree, the *fidei commissum* still attaches to the property and the purchaser of a divided block takes it subject to the *fidei commissum*. In such a case the question of notice does not arise.

Quaere, whether the equitable principle of the English law of a purchaser for value without notice can be applied to the case of property which is subject to a *fidei commissum* for the reason that a fidei commissary in Roman and Roman-Dutch Law was invested with a real right and could follow his property wherever he might find it.

Obiter : The Legislature contemplated only one decree in a partition action, namely, that provided expressly as a decree in section 4.

APPEAL from a judgment of the District Judge of Matara.

H. V. Perera, K.C. (with him *R. N. Illangakoon*), for the plaintiffs, appellants.—In *Tillekeratne v. Abeyesekera*[1] Lord Watson observed that *fidei commissa* are not necessarily extinguished by a Partition. Section 9 of the Partition Ordinance has the effect of making " conclusive " as against every other title that may be asserted the title that is actually put forward and recognised by the Court. If a fiduciary or a non-fiduciary asserts the *fidei commissum* title and the Court recognises that title, then that title is made conclusive as against all other titles whether or not the *fidei commissum* is mentioned in the decree or not. If, however, a fiduciary or a non-fiduciary puts forward a non-*fidei commissum* title, as for example, a title by prescription, and the Court recognises that title, then that title is made conclusive and the *fidei commissum* will be of no effect. But, in the latter case, where a fiduciary is allotted a portion in severalty, the principles of the Trusts Ordinance will produce a result similar to that in the former type of case because he will have to hold the property on a constructive trust for the benefit of the fidei commissaries.

In the present case the title put forward by the parties and found to be established by Court was the *fidei commissum* title—*vide* the plaint in the partition action and the interlocutory decree. Through inadvertence on the part of the Court it is not mentioned in the final decree. The " final judgment " under section 6 is really a mere confirmation by Court of the scheme of partition proposed by the Commissioner on the basis of the rights of the parties declared in the interlocutory decree.

Under the Roman and Roman-Dutch Law *fidei commissa* in their ultimate form had attained the status of rights *in rem*. When the Legislature wanted to set out a method of extinguishing *fidei commissa* it went to the length of enacting a special Ordinance—The Entail and Settlements Ordinance—and an elaborate procedure for achieving that object.

[1] *(1897) 2 N. L. R. 313.*

In *Babey Nona v. Silva*[1] one fiduciary purchased the portion allotted to another fiduciary under a partition decree and was held to hold the property subject to the *fidei commissum*. The basis of the decision was that the title investigated and recognised in the partition action was the *fidei commissum* title and was not that, being a fiduciary himself, he was a purchaser with notice of the *fidei commissum*.

Macdonell C.J. in *Kusumawathie v. Weerasinghe*[2] expressed an opinion that the fiduciary in *Babey Nona v. Silva* was a purchaser with notice. That opinion has had a certain effect on later cases.

The doctrine of a purchaser without notice, however, applies only in the case of rights *in personam* such as trusts but not in the case of rights *in rem* such as fideicommissa—*vide* Lee's *Introduction to Roman-Dutch Law*, 3rd Edition, pages 372-373.

The view contended for is not inconsistent with the later judgments. Assuming that the doctrine of purchasers without notice applies the respondents' predecessor in title had notice of the facts of this case.

There was no issue to justify the trial Judge's finding that the deeds from the fiduciary prevailed over the unregistered partition decree. In any event, the necessity for registration does not apply in the same way to a partition decree as to instruments *inter partes* since the decree prevails by its own inherent power—*vide Bernard v. Fernando*[3]. The respondents themselves claim under the partition decree and they cannot be heard to contend that it is good only for a certain purpose. The respondents relied on the non-registration of the partition decree only on the question of whether their predecessors had notice.

G. Crossette Thambyah (with him *Vernon Wijetunge*), for the defendants, respondents.—The final decree entered in the partition action conferred on Walter Clement an absolute title free of the *fidei commissum*—The conclusive effect given by section 9 of the Partition Ordinance relates to the final decree entered under section 6 of that Ordinance. This has been laid down in a number of cases. See, for example, *Peris v. Perera*[4] and *Catherinahami v. Babahamy*[5].

The preliminary decree under section 4 of the Partition Ordinance may be varied or modified. In so far as the final decree in express terms confers an absolute title on the parties and in variation of the title subject to a *fidei commissum* referred to in the preliminary decree, this change must be deemed to have been deliberate. It should be noted that neither the last will nor the probate were produced in evidence and filed of record. The Judge who entered the final decree had no material placed before him on which he could have held that a *fidei commissum* attached to the land and therefore decreed an absolute title.

The *fidei commissum* not having been reserved in the final decree and which alone an intending purchaser is expected and likely to examine he is entitled to the protection afforded to a *bona fide* purchaser without notice. The District Judge has found that the defendants are *bona fide* purchasers without notice. As pointed out by Macdonell C.J. in *Kusumawathie v. Perera*[6] a *fidei commissum* does not run with the land

[1] *(1906) 9 N. L. R. 251.*
[2] *(1932) 33 N. L. R. 265.*
[3] *(1913) 16 N. L. R. at p. 439.*
[4] *(1896) 1 N. L. R. 362.*
[5] *(1908) 11 N. L. R. 20.*
[6] *(1932) 33 N. L. R. 273.*

so as to bind a purchaser for value without notice. This view was followed in the case of *Anees v. Bank of Chettinad*[1].

On the question of registration, the partition decree, on which the appellants base their title, not being registered, the purchasers from Walter Clement are entitled to the benefit of the priority conferred by the Registration Ordinance to the extent of the adverse interest created by the transfer deeds in favour of the defendant-purchasers. The adverse interest in conflict is the interest claimed by the fidei commissaries. See *Mohamed Ali v. Weerasooriya*[2].

The decree not being registered purchaser's absolute title must prevail. The non-registration of the partition decree does not render it absolutely void—but void *quoad* the adverse interest claimed by the defendant purchaser, *i.e.*, the right to hold the land free of the *fidei commissum*—*Fonseka v. Fernando*[3].

H. V. Perera, K.C., replied.

Cur. adv. vult.

November 28, 1947. SOERTSZ S.P.J.—

The appellants sued the respondents for declaration of title to a certain block of land which, according to their case, had been allotted by decree entered in a partition suit, to one Walter Clement Tillekeratne whose fidei commissary heirs they claimed to be. Their cause of action was that the defendants-respondents were in unlawful possession of this land, setting up title to it on the ground that Walter Clement had, by virtue of that partition decree, become absolute owner of the land and, as such, had conveyed it by two deeds of sale to one Adirian through whom, they asserted, the land had, by transfer, devolved on them. Walter Clement's title prior to the partition decree was, avowedly, the title he derived under the Last Will and Testament of his parents who devised this land and other lands to their children with a *fidei commissum* in favour of "their children and grand-children unto generations". The parties are agreed that the will created a valid *fidei commissum* but they are at issue in regard to the effect of the decree entered in the partition case on the *fidei commissum*. The appellants contend that the title which Walter Clement derived from that decree continued subject to the *fidei commissum* while the respondents maintain that, inasmuch as the "final decree" entered in the partition case made no reference to the *fidei commissum*, Walter Clement's title became an absolute title; as a second line of defence, they plead that Adirian, the purchaser of Walter Clement's title, was a purchaser for value without notice of the *fidei commissum*, and was, therefore, unaffected by it. The questions that arise from these contentions have to be considered, and answered in the light of a long series of decisions which have settled the law to be that property subject to a *fidei commissum* may be partitioned either by agreement or by judicial decree among the co-owners, co-owners being interpreted to include fiduciaries. Partition by agreement of parties can hardly create any difficulty, for the resulting title can be no better or no worse than the pre-existent title. But partition

[1] *(1941) 42 N. L. R. 436.* [2] *(1914) 17 N. L. R. 417.*

[3] *(1912) 15 N. L. R. 491.*

by judicial decree, generally speaking, in virtue of the wide terms of section 9 extinguishes all pre-existing titles and creates a new title. The question is whether it extinguishes *fidei commissa* as well or leaves them unaffected.

Now, when we say that land subject to a *fidei commissum* may be partitioned, we must, of course, be understood to mean land that is brought for partition as land admitted or, at any rate, claimed to be subject to a *fidei commissum*, and not land brought up in a suit for partition with either studied or inadvertent omission to mention the *fidei commissum*. I venture to think that Lord Watson had this in mind when, in the course of delivering his opinion in the Privy Council in the case of *Tillekeratne v. Abeysekera*[1], he observed that " a partition does not necessarily destroy a *fidei commissum* ". When a land is partitioned on the footing that it is land subject to a *fidei commissum*, generally speaking, the divided lots continue to be subject to the *fidei commissum ;* but where a land, in reality, subject to a *fidei commissum* is, for some reason or other, partitioned without disclosure of the *fidei commissum*, the *fidei commissum* must be deemed to have been destroyed by the force of section 9. Logically, this may not be very satisfactory but, now that it is too well settled that land subject to a *fidei commissum* may be partitioned, it is the most reasonable form of compromise between the wide range of section 9 of the Partition Ordinance, and the Roman and Roman-Dutch Law concept of a *fidei commissum* as investing the persons concerned with a real right to the land. In *Babey Nona et al. v. Silva*[2] Lascelles A.C.J. and Middleton J. held that where a land subject to a *fidei commissum* is partitioned, the *fidei commissum* attaches to the portions allotted to the parties to the suit, whether or not the *fidei commissum* is reserved in the decree. The Acting Chief Justice said :— " 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 fiduciaries into absolute ownership ". This view has been questioned from time to time but, in this case, it is not necessary to examine it because, in the view I have formed in the light of the facts of this case, there was an express reservation of the *fidei commissum* in the decree entered in conformity with section 4 of the Ordinance. That decree declared the fractional shares to which the parties were proved to be entitled " subject to the entail laid down in the last will No. 15,140 of January 26, 1867, and filed in Testamentary Case No. 645 of this Court ". The next step taken in the case was the appointment of a Commissioner for the purpose of dividing the land into separate blocks. The Commissioner carried out his Commission and made his report to the Court and, thereupon, what is named as a " Final decree " was entered by a Judge other than the Judge who had entered the Preliminary decree. In that " decree " (see P 4) there is no reference to or no reservation of the *fidei commissum*. The fifth defendant's portion is made subject to a lease and the other portions are given to the other parties " as absolute owners ". It is upon this so-called " final decree " that the respondents take their stand to maintain that the effect of it was to wipe out the *fidei commissum* from their title. The implication of that contention

[1] *(1897) 2 N. L. R. 313.* [2] *(1906) 9 N. L. R. 256.*

is that once the "final decree" is entered, the preliminary decree is of as little avail as if it had not been written. I am quite unable to subscribe to that proposition. My interpretation of the Ordinance is that the Legislature contemplated only one *decree*, namely, that provided expressly as a "*decree*" in section 4. Section 6 provides for a "*final judgment*" confirming the partition proposed by the Commissioner and section 9 makes not the "final judgment" but the "*decree* for partition or sale" the conclusive evidence of partition or sale and title. The expression "final *decree*" has now become inveterate and, probably, resulted from the practice which came into vogue in 1896, after the case of *Peries v. Perera*[1], of admitting interventions by parties not before the Court at the time the decree under section 4 was entered, and in that view of the matter, Bonser C.J. held that the decree referred to in section 9 is the final judgment given under section 6. The difficulties that have arisen from this view might well have been avoided by the necessary modifications resulting from interventions being given effect to by amending the decree entered under section 4 and treating the order under section 6 as the final *judgment* giving the Court's approval to the Commissioner's scheme of partition. But, inasmuch as the view adopted by Bonser C.J. in the case referred to appears to have gained ground the reasonable course to follow when we are considering the effect of a partition decree is to examine both the decree under section 4 and the final judgment under section 6, for, if once final judgment is given, in the way Bonser C.J. appears to have contemplated it, we are not permitted to look at the decree given under section 4, we should, in many cases, be paying servile homage to the form of the thing and neglecting the substance of it. In this case itself, we should not be able to say, without looking at the decree under section 4, who the parties were to whom the lots were allotted. Their names do not appear in the judgment given under section 6. Nor should we know the liability of the different parties in regard to costs. The next question is as to what happens when looking at the decree given under section 4 and the final judgment under section 6, we find a contradiction. The answer to that must depend on the particular circumstances of each case. It is sufficient to say that in this case, it is impossible to hold that the reservation of the *fidei commissum* in the preliminary decree was deliberately omitted in what is called the final decree for there was no inquiry held in the interval in regard to the *fidei commissum* or any other matter and the Court had, consequently, not the power to go behind the decree for partition already entered. In those circumstances the omission to reserve the *fidei commissum* in the "final decree" must be taken to be inadvertent—*actus curiae neminem gravabit.* For these reasons, I hold that the portion of land allotted to Walter Clement remained subject to the *fidei commissum* in view of the express reservation of it in the decree entered under section 4. That burden ran with the land and Adirian acquired, in virtue of his deed, no more than Walter Clement's fiduciary interest. In no case, so far as I am aware, has it been held that in a case in which the *fidei commissum* is reserved in the decree, any question of a *bona fide* purchaser without notice can

[1] *(1896) 1 N. L. R. 362.*

arise. Indeed, as I have already indicated, in the view of the Roman and Roman-Dutch Law, a fideicommissary, invested as he was with a real right, could follow his property wherever he might find it. But, in an attempt—no more happy than such attempts have been found to be—to put new wine in old bottles, South Africa and Ceylon, in recent times, have sought to engraft on that view the equitable principle of the English Law of a purchaser for value without notice. Voet in 36. 1. 63 adduces an exceptional case in which this principle would be admitted in the Roman-Dutch Law but the South African and Ceylon cases appear to be travelling much beyond these limits. (See *Cassim v. Dingihamy*[1]; *Kusumawathie v. Weerasinghe*[2]; *Anees v. Bank of Chettinad*[3]; *Mare v. Grobler*[4]).

In the case before us, I should wish to add that if it had become necessary to consider whether Adirian and the respondents were purchasers without notice, I should have been able to find on the evidence that they were not.

Another question submitted by the respondents was that of priority by registration and I would say a few words about it for it is upon his finding in regard to registration that the trial Judge held in favour of the respondents. The priority claimed, as I have already observed, was claimed on the footing that the Last Will and the deeds in favour of Adirian were in competition but, on this ground, the judge held against the respondents and, if I may say so, rightly so held. But, he went on to consider a question of registration not raised by the parties at all and found that " D1 and D2 create adverse interests to the devolution under the partition decree. D1 and D2 are entitled to the benefit of registration and the partition decree should be considered void as against D1 and D2 ". I am not quite clear as to what the learned Judge meant by this, but it is sufficient to say (*a*) that this question was not raised ; and (*b*) that even if we were to consider the question although it was not raised, the title vested in D1 and D2 is Walter Clement's title under the partition decree and if the partition decree is held to be void, D1 and D2 collapse with it. *Ex hypothesi*, all Walter Clement's pre-partition rights had been wiped out by the decree.

I would, therefore, set aside the judgment of the trial Judge and enter judgment for the plaintiffs declaring them entitled to Lot A and, in view of the agreement reached at the framing of the issues, the plaintiffs are entitled to damages at Rs. 100 per annum from December, 1943, till they are placed in possession of the said lot.

There remains the question of compensation for improvements. That question has been specially reserved " for future decision " and I would, therefore, remit the case on this ground either for settlement or for consideration and decision. The appellants are entitled to costs in both Courts in respect of the trial that has already taken place. Costs in regard to the point remitted will be for the trial Judge to make directions upon unless, of course, the parties come to some settlement.

KANEKERATNE J.— I agree.

Appeal allowed.

[1] *(1906) 9 N. L. R. at p. 264.*
[2] *(1932) 33 N. L. R. 273.*
[3] *(1941) 42 N. L. R. 436.*
[4] *S. A. L. R. 1930 T. P. D. 632.*