1951 *Present :* **Gratiaen J. and Gunasekara J.**

HEWAVITHARNA, Appellant, *and* CHANDRAWATHIE *et al.*, Respondents

S. C. 575—D. C. Galle, 3,738

Quia timet *action—Nature and scope of relief—Ingredients necessary—Requirement of proof of actual damage or substantial imminent danger—Infringement of vested or contingent rights—Fideicommissary interests—Risk of extinction under partition decree—Partition Act, No. 16 of 1951, ss. 5, 48, 72.*

A *quia timet* action should not be entertained merely because the rights of the plaintiff have been disputed by the defendant. To succeed in such action the plaintiff must establish acts or conduct committed or threatened on the part of the defendant which can be construed as an *effective* infringement of the alleged interests of the plaintiff. The interest threatened need not be a present vested interest in immovable property, but a contingent interest which may eventually enlarge into a vested right is sufficient. A fideicommissary, therefore, may in certain circumstances legitimately claim a judicial declaration for the protection of his rights, even though such rights can be classified only as future of contingent, provided that he can prove that there is a present risk of their infringement to his ultimate prejudice.

A declaratory decree granted in *quia timet* proceedings is not available to a party as of right, and a Court should not exercise its discretion in favour of a plaintiff unless the immediate advantages accruing therefrom would substantially outweigh the unsatisfactory features attendant on premature pronouncements as to the future contingent rights of claimants—more so, of persons who are not parties to the proceedings.

The provisions of the Partition Act, No. 16 of 1951, have reduced the possibility of a decree being entered in a partition action without due consideration of the rights of persons who have fideicommissary interests in the *corpus*.

APPEAL from a judgment of the District Court, Galle.

Plaintiffs alleged that they were fideicommissaries under a gift and that the defendant, who was the transferee of the interests of the fiduciary in the property gifted held the property subject to their interests as fideicommissaries. The defendant claimed to be the absolute owner of the property unfettered by any fideicommissum. The alleged cause of action against the defendant was specified in the plaint as follows:—

" The plaintiffs fear that the defendant may deal with the property to the prejudice of the plaintiffs by the sale of a portion of it and the institution of a partition action without notice to the plaintiffs.

A cause of action has arisen to the plaintiffs to sue the defendant *quia timet* to have themselves declared entitled to the premises described in the schedule hereto subject to a life interest in favour of the defendant abovenamed ".

The plaintiffs accordingly asked for a decree declaring them entitled to the premises subject to an interest in favour of the defendant which would terminate on the death of the alleged fiduciary.

The learned trial Judge entered judgment declaring that " the plaintiffs be entitled to the premises on the death of their mother (the fiduciary) ".

H. V. Perera, K.C., with *M. H. A. Aziz*, for the defendant appellant.

E. B. Wikramanayake, K.C., with *Lucian de Alwis*, for the plaintiffs respondents.

Cur. adv. vult.

August 29, 1951. GRATIAEN J.—

Deonis Appuhamy, the maternal uncle of a woman named Jane Nona, had admittedly owned the property which is described in the schedule to the plaint. A marriage between Jane Nona and Hendrick Appuhamy was arranged to take place on June 7, 1926. In anticipation of this event Deonis, by a notarial conveyance, P4 dated June 2, 1926, gifted the property to her subject to the following conditions:—

" The said Ekanayaka Jane Nona, the donee herein, shall enjoy and possess the said premises hereby gifted and everything appertaining thereto from the date hereof but cannot sell mortgage or alienate same in any way but she is at liberty to lease the said premises for a term of below two years at a time.

" And I appoint the lawful children of Ekanayakage Jane Nona to be the owners, and they shall not sell mortgage or alienate same in any way but shall reserve same to the children and grandchildren. And I declare that the said premises hereby granted by me are subject to mortgage bond No. 30,262 dated 26th February, 1925, attested by J. P. Weerasinghe for Rs. 500 payable with interest thereon at 12 per cent. per annum and the donee shall pay and settle the same. "

This gift was accepted by Jane Nona on the face of the deed P4.

The celebration of the marriage between Jane Nona and Hendrick Appuhamy was postponed, for some reason which has not been disclosed, but it eventually took place on August 13, 1926. In the meantime she and her uncle Deonis purported to take certain steps to have the deed of donation P4 hedged in, as it was, by the conditions and restrictions recited above, revoked. For this purpose a notarially attested document P5 was executed on July 27, 1926, whereby Deonis revoked, with Jane's consent, the earlier gift. Her previous acceptance of the gift was thus rescinded by implication. On the same day, by a fresh deed of donation P6, he donated the property to her absolutely to take effect from the date of her marriage with Hendrick and subject only to a life interest in himself. The mortgage bond No. 30,262 referred to in P4 continued to encumber the property.

About 18 months after Jane Nona and Hendrick's marriage had taken place she, with the concurrence of her husband who joined in the deed, sold the property to the defendant in this action by P7 of April 10, 1928. Part of the consideration was applied in discharge of the mortgage bond No. 30,262. P7 recites Jane Nona's title as having been derived

not from P4 but from the later deed of donation P6, and it purported to vest in the defendant full *dominium* free from any encumbrances. The defendant has since then been in possession of the property claiming to be its absolute owner unfettered by any fideicommissum.

Jane Nona and Hendrick are still alive. At the time when this action commenced on September 23, 1948, seven children had been born to the marriage. Of these, the 1st plaintiff is a major and the 2nd to the 7th plaintiffs were still minors.

The plaintiffs have adopted in these proceedings a form of action which, though well recognised in law, is not frequently resorted to in our Courts. Their complaint against the defendant is that he claims the property absolutely whereas in fact he enjoys only the limited interest which had originally passed to their mother Jane Nona under the earlier deed of donation P4. His title, they contend, is subject to their interests as fideicommissaries in terms of P4 which, by reason of Jane Nona's earlier acceptance of the gift, could not validly be revoked to their prejudice without their consent. The alleged cause of action against the defendant is specified in paragraphs 9 and 11 of the plaint as follows:—

> "9. The plaintiffs fear that the defendant may deal with the property to the prejudice of the plaintiffs by the sale of a portion of it and the institution of a partition action without notice to the plaintiffs.
>
> 11. A cause of action has arisen to the plaintiffs to sue the defendant *quia timet* to have themselves declared entitled to the premises described in the schedule hereto subject to a life interest in favour of the defendant abovenamed ".

They accordingly asked for a decree " declaring them entitled to the premises . . . . subject to a life interest in favour of the defendant "—presumably meaning thereby an interest which would terminate on Jane Nona's death.

This case would have presented fewer difficulties if, as the plaint suggests, P4 can legitimately be construed as having passed only an usufructuary life interest to Jane Nona and, subject to that life interest, vested the property in the children who would be born to her marriage with Hendrick. In that event the plaintiffs might well have been entitled to relief in a *quia timet* action on the basis that they already enjoy vested interests in the property—vide *Atchi Kannu v. Nagumma*, *9 N. L. R. 282*—subject of course to our decision as to whether the gift had subsequently been validly revoked, as against the plaintiffs, by the execution of P5. Mr. Wickremanayake concedes, however, and the learned District Judge has held, that the particular interpretation given to the deed of donation P4 in the plaint cannot be supported. His argument on behalf of the plaintiffs may be summarized as follows with reference to this part of the case under appeal:—

(1) that P4 created a valid fideicommissum in favour of the lawful children of Jane Nona's marriage with Hendrick;

(2) that the acceptance of the gift P4 by Jane Nona on her own behalf operated as an irrevocable acceptance on behalf of her unborn children (i.e., the fideicommissaries) as well; and that her purported subsequent revocation of the gift without their consent was of no avail against them. *John Perera v. Lebbe Marikar, 6 S. C. C. 138; Soysa v. Mohideen* [1]; *Abeysinghe v. Perera* [2] and *Wijetunga v. Duwalage Rossie* [3] (where Wijeyewardene J. followed the earlier authorities which I have cited, and dissociated himself from the doubts as to their correctness expressed by Soertsz J. in *Carolis v. Alwis* [4]) and, finally, *Vullipuram v. Gasperson* [5];

(3) that although P4 does not specify in explicit terms the time when the property was to vest in the fideicommissaries, there is a sufficiently clear indication that the donor had intended the time of vesting to be the date of Jane Nona's death; and that the fideicommissum created by P4 was therefore not bad for uncertainty. Mr. Wickramanayake points out that the absence of an *express* indication as to the time of vesting has not deterred this Court in the past from adopting the interpretation for which he now contends. *Vide*, for instance, the decisions referred to in *Mr. Nadarajah's Treatise, page 258.* and the dissenting judgments of Keuneman J. and Wijeyewardene J. in *Sitti Kadija's case* [6] which were approved on appeal by the Privy Council in *47 N. L. R. 171.* In view of these authorities, Mr. Wickramanayake has invited us to depart from, if we cannot distinguish, the later rulings of the learned Judges in *Pabilina v. Karunaratne* [7] and *Lewis Appu v. Perera* [8] on this point.

This summary represents the substance of the conclusions arrived at by the learned District Judge in the Court below, and he entered judgment declaring that "the plaintiffs be entitled to the premises *on the death of their mother Jane Nona*". It should be noted in this connection that there is no suggestion that a breach by Jane Nona of the prohibition against alienation contained in P4 operated to vest the property immediately in her lawful children.

Mr. H. V. Perera, who appeared before us for the defendant, has in the first instance joined issue with Mr. Wickremanayake on each of the points which I have enumerated above. He contends, for instance, that the deed of donation P4, in so far as it purports to create a fideicommissum in favour of Jane Nona's children, is void for uncertainty as to the date of vesting; that in any event the acceptance of the gift P4 by Jane Nona on *her own behalf* could not be construed as an acceptance on behalf of the unborn fideicommissaries designated by the instrument, and that this court should, on reconsideration, considerably modify the earlier doctrine whereby an acceptance of a gift by a fiduciary has been regarded as a sufficient acceptance on behalf of the fideicommissaries in cases "where the donation involves a benefit to the family"; and that P5 being a valid revocation of the earlier gift, the subsequent deed P 6 passed to Jane Nona not merely a fiduciary interest but absolute *dominium* in the property which she has since conveyed to the defendant.

[1] *(1914) 17 N. L. R. 279.*
[2] *(1915) 18 N. L. R. 222.*
[3] *(1946) 47 N. L. R. 361.*
[4] *(1944) 45 N. L. R. 156.*
[5] *(1950) 52 N. L. R. 169.*
[6] *(1944) 45 N. L. R. 265.*
[7] *(1948) 50 N. L. R. 169 at 171.*
[8] *(1949) 51 N. L. R. 81.*

I have sufficiently indicated, I think, the extent of the controversy upon which we have at this stage been invited to adjudicate. Some of these questions are complicated by a conflict of judicial authority, other by *dicta* which cannot, to say the least, be easily reconciled. I would refer, by way of illustration, to the contrary views expressed by Soertsz J. and Wijeyewardene J., both of whom were Judges with considerable experience in this branch of the law, as to the doctrine of acceptance in relation to fideicommissary gifts "for the benefit of a family."

Is it really necessary or desirable for the Court now to pronounce a decision, affecting perhaps the interests of persons who cannot yet be ascertained with certainty, as to the proper construction of the deed P4 and as to the validity or otherwise of the purported deed of revocation P5? This question seems to me to go to the root of actions such as proceedings for *quia timet* relief, and I proceed therefore to examine the defendant's fundamental ground of objection to the judgment appealed from in the present case.

Mr. Perera has strongly urged that the plaintiff's cause of action is premature. He argues that none of the facts pleaded in the plaint or proved at the trial in the Court below entitle the plaintiffs at this stage to a declaratory decree in their favour. He has invited us to go to the extent of assuming that the interpretation of the deed P4 for which Mr. Wickremanayake contends is correct according to our present understanding of the law. Even upon such a hypothesis, says Mr. Perera, we should bear in mind that the fiduciary Jane Nona is still alive, and that admittedly the condition has yet to be fulfilled upon which the present *contingent* interests in the property claimed by the plaintiffs can become enlarged into vested rights. Whether, as Mr. Wickremanayake contends, each plaintiff already enjoys a *spes* or expectation which would be transmitted to his heirs in the event of his pre-deceasing Jane Nona, or whether the true intention of the donor was to benefit only those children who would still be alive at the date of vesting, it is impossible to take the view that all the persons who may eventually succeed to the property are now before the Court. In the result, can one exclude the possibility that disputes may on Jane Nona's death arise between some of the plaintiffs themselves (or their lawful heirs) as to who should eventually benefit under the deed P4?

At this point of time the *spes fideicommissi* of each of the plaintiffs, even if transmissible, is in a sense only a "fleeting and uncertain hope" of acquiring *in his own right* a vested interest in the property. *Voet 2-15-8.* The ultimate beneficiaries under P4 cannot at present be ascertained with certainty; indeed, we do not know that the class has yet been closed. In the face of these unpredictable contingencies, it is apparent that, even if a cause of action has accrued to the present plaintiffs to claim some declaration *in general terms* that the conveyance by Jane Nona to the defendant under P7 transmitted to him only her fiduciary interest which is subject to the fideicommissum created by P4, a premature interpretation of P4 in respect of all its implications seems to

be extremely undesirable. *In re Grobler* [1]. The same point of view has been emphasised in the English Courts with regard to the proper scope of declaratory action. *In re Staples* [2].

The question arises whether any events have yet occurred giving rise to a cause of action entitling the plaintiffs to relief in *quia timet* proceedings; and, as a corollary, whether in that event the circumstances of the present case would justify the exercise of our discretion to grant a declaratory decree. That such relief is not available to a party *as of right* is recognized even in South Africa although special legislation was introduced in 1935 to remove some of the limitations inherent in the common law jurisdiction to enter declaratory decrees. *Durban City Council v. Association of Building Societies* [3]. It is implicit in this principle that a Court of law should not exercise its discretion in favour of a plaintiff unless the immediate advantages accruing therefrom would substantially outweigh the unsatisfactory features attendant on premature pronouncements as to the future contingent rights of litigants—more so, of persons who are not parties to the proceedings.

The ingredients of a cause of action in *quia timet* proceedings in this country have invariably been examined by reference to the principles of the English Law. *Fernando v. Silva* [4], *Atchi Kannu v. Naguma* (supra); *Haramanis v. Haramanis* [5], *Ceylon Land and Produce Co. v. Malcolmson* [6], *Raki v. Cassi Lebbe* [7], *De Silva v. Dheerananda Thero* [8], and *Gunasekara v. Kannangara* [9]. It is not desirable, as Wood Renton J. points out in *Raki v. Cassi Lebbe*, to attempt to lay down any general rules as to the classes of cases in which such actions are maintainable, but they are admittedly designed " to accomplish the ends of precautionary justice " by preventing wrongs or anticipated mischiefs instead of merely redressing them after they have been committed. *Story on Equity, pages 349 to 350.* " There must, if no actual damage is done, be proof of imminent danger, and there must also be proof that the apprehended danger will, if it comes, be very substantial . . . . It must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action ". *Fletcher v. Bailey* [10]. I have not discovered any local precedents for the granting of relief to protect purely contingent interests in immovable property, and the *ratio decidendi* of some of the authorities previously cited by me certainly suggests that a threat to a present *vested* interest in land is a *sine qua non* to a *quia timet* action. On the other hand, Story points out in paragraph 827 at page 350 that " the jurisdiction is equally applicable *to cases where the right of enjoyment is future or contingent* ". As at present advised, I see no reason why relief in a *quia timet* action should necessarily be denied to a person who, though possessing only a contingent interest in land, is placed by the conduct of some third party in such a situation that there exists at present a substantial and imminent risk of the loss or impairment of his interests when the

[1] *(1916) T. P. D. 205.*
[2] *(1916) 1 Ch. 322.*
[3] *(1942) A. D. 27.*
[4] *(1878) 1 S. C. C. 27.*
[5] *(1907) 10 N. L. R. 335.*
[6] *(1908) 12 N. L. R. 16.*
[7] *(1911) 14 N. L. R. 441.*
[8] *(1926) 28 N. L. R. 257.*
[9] *(1942) 43 N.L. R. 174.*
[10] *(1885) 28 Ch. D. 688.*

time eventually arrives for its enlargement into a *vested* right. The principles applicable under our common law are in conformity with this view. So long as proof is forthcoming of some threatened " concrete invasion of a party's rights ", he can claim the protection of a declaratory decree in his favour. *Norris v. Mentz* [1]. In the words of de Villiers C.J. in *Geldenhuys v. Neetling and Beuthin* [2] the claim " must be founded upon the *actual infringement of rights* ", and it is not impossible to visualise rare instances when an invasion of future or contingent rights can be committed or threatened before they have reached the stage of final vesting. In such an eventuality, it would be idle to wait until the damage has actually occurred. I am therefore inclined to the view that a fideicommissary may in certain circumstances legitimately claim a judicial declaration for the protection of his rights, even though such rights can be classified only as future or contingent, provided that he can prove that there is a present risk of their infringement to his ultimate prejudice.

The plaintiffs' complaint against the defendant must now be examined. They allege that the defendant " wrongfully and unlawfully disputes the rights of the plaintiffs to the property ". This circumstance by itself is insufficient to establish a cause of action. As de Villiers C.J. pointed out in *Geldenhuys' case* (supra), a declaratory order cannot be claimed " *merely because the rights of the claimant have been disputed* ".

It seems to me that the plaintiffs have failed to prove an actual or threatened infringement by the defendant of their alleged fideicommissary rights. It is no doubt true that, in a pending partition action instituted by a neighbouring landowner who had sought to include this property in the *corpus*, the defendant had intervened in order to have the property excluded from the scope of those proceedings. But this intervention, though influenced primarily by the defendant's desire to protect his own interests rather than those of the plaintiffs, was not calculated to prejudice their rights. Indeed, one finds that the members of the plaintiffs' family were no less vigilant in the same proceedings to achieve this end. Mr. Wickremanayake has urged, however, that his clients genuinely fear that the defendant might at some future date, and without notice to his clients, dispose of an undivided share in the property to someone else, so as to pave the way for dishonestly obtained thereafter a partition decree in which their rights are not reserved. He argued that, if in that event the property should subsequently pass to a bona fide purchaser, the fideicommissum created by the deed P4 would be extinguished. Under the new Partition Act, No. 16 of 1951, the consequences of such an improper proceedings would, I think, be even more fundamentally prejudicial to the plaintiffs.

The risks attaching to fideicommissary rights which are not expressly reserved in decrees for partition are indeed substantial, and when one examines the authorities on this subject one cannot but endorse the observation of *Mr. Nadarajah* at page 186 of his *Treatise on the Roman Dutch Law of Fideicommissa* that " the law of Ceylon relating to the partition of fideicommissary property (i.e., under Ordinance No. 10 of 1863) cannot be said to rest on any very satisfactory basis ". The present

[1] *(1930) W. L. W. 160.* [2] *(1918) A. D. 426.*

trend of judicial authority inclines to the view that such property could properly be partitioned or sold in terms of the earlier Ordinance, and that unless the rights of fideicommissaries are expressly reserved under the decree, a subsequent *bona fide* purchaser would take the property unaffected by those rights. (*Vide* the authorities discussed at *pages 181 to 187 of Mr. Nadarajah's Treatise*). It is a situation of this kind that the plaintiffs apprehend.

It seems to me that the plaintiffs' fears are premature. In the first place, Jane Nona's title, whether it be absolute or limited only to a fiduciary interest, is now enjoyed exclusively by the defendant, so that no "common ownership" of the property yet exists which is a prerequisite to the institution of partition proceedings. Besides, the earlier Ordinance has, since this action commenced, been superseded by the Partition Act, No. 16 of 1951, and many of its provisions are specially designed to afford a greater measure of protection to the interests of persons claiming fideicommissary interests in property sought to be partitioned. For instance, section 5 in terms requires a plaintiff to disclose in his plaint not only the admitted rights of fideicommissaries but also any disputed claims to such rights. As a further precaution, the filling of a proctor's certificate, prepared after due inspection of the relevant land registers, is made essential to the continuation of the action after *lis pendens* has been duly registered; a professional duty is imposed on the proctor concerned to specify in his certificate the names of all persons whose claims or interests can be ascertained from the relevant registers. Finally, any fraudulent or dishonest non-disclosure of fideicommissary claims (whether admitted or not) is made an offence punishable under section 72 of the Act. The purpose of the legislature is by this means to minimise the risk of such claims being overlooked by the Court exercising jurisdiction in partition actions.

In this state of things, no immediate danger attaches at the present time to the interests (assuming that they exist) which in the plaintiff's expectation will ultimately become enlarged into vested rights. Admittedly, if the interpretation which the plaintiffs place upon the deed P4 be found to be correct, no question of adverse prescriptive user against them has yet arisen. *Abdul Cader v. Habibu Umma* [1] and the cases cited in *Mr. Nadarajah's Treatise, page 170 (footnote 77)*. No act or conduct on the part of the defendant has therefore been committed or threatened which can be construed at this stage as an *effective* infringement of the alleged interests of the plaintiffs or of those to whom those interests would, in their submission, be transmitted in a certain eventuality. I would hold that, in the circumstances, no cause of action has accrued to the plaintiffs to claim the relief granted to them by the judgment under appeal. Until such a cause of action has in fact accrued the plaintiffs are not entitled to obtain from this Court a bare declaration as to their hypothetical rights on questions of law which still remain academic. The legal problems now submitted for our adjudication have not yet been crystallised into a "crisp dispute".

It must be remembered that in this country, unlike in England and in South Africa, the common law jurisdiction of the Courts to grant

[1] *(1926) 28 N. L. R. 92 at page 95.*

declaratory decrees has not been enlarged by statute. In England, for instance, Order 25 Rule 5 of the Rules of the Supreme Court provides that:—

> " No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declaration of right whether any consequential relief is or could be claimed, or not."

Order 54A also authorises an application to be made to the High Court by " originating summons " by any person claiming interests under a deed, will or other instrument " for the determination of any question or construction arising under the instrument, and for a declaration of the rights of the person interested ". Even under this enlarged jurisdiction the English Courts refuse on principle to make declarations as to rights accruing *upon a future event* unless (*a*) a present right depends on the decision, or (*b*) all the parties interested in that event are *sui juris* or (*c*) there are other special circumstances. *In re Staples* (*supra*) and *re Freme's Contract* [1]. Similarly, in South Africa, " the inconvenience that has been caused by the inability of the Court to settle a dispute between parties *unless there has been an infringement of rights* " (*ex parte Ginsberg* [2]) has in some respects been removed by the provisions of section 102 of the South African Act, No. 46 of 1935, in terms of which—

> " A Court may in its discretion and at the instance of any interested person inquire into and determine any existing, future or contingent future right or obligation notwithstanding that such person cannot claim any relief consequential upon such determination."

I do not doubt that the introduction of similar statutory provision of this nature in Ceylon would in appropriate cases provide a simple, inexpensive and beneficial remedy for the solution of concrete disputes regarding the true meaning of wills and other instruments.

In the meantime, governed as we are by the principles of the common law, I take the view that, even if the plaintiffs may legitimately be regarded as having a *locus standi* to make the present application, they have not established facts entitling them to claim a declaratory decree against the defendant. I am aware that the Provincial Courts of South Africa have, under the common law and before the Act of 1935 was passed, granted *quia timet* relief to contingent or even potential fideicommissary heirs in circumstances which in this country would not constitute an actual or threatened infringement of future rights. *Van Rensbury v. Registrar of Deeds* [3] and *Mare v. Grobler* [4]. I have not examined the system obtaining in South Africa for the registration of titles to land, but in Ceylon, at any rate, as Mr. Wickremanayake has frankly conceded, no risk can attach to the plaintiffs' future title unless it be extinguished by a decree in a partition action, and I have already pointed out that the provisions of the new Act of 1951 have reduced the possibility of such a decree being entered without due consideration of the rights of persons claiming fideicommissary

[1] *(1895) 2 Ch. 256 and 778.*
[2] *(1936) T. P. D. 155.*
[3] *(1924) C. P. D. 508.*
[4] *(1930) T. P. D. 632.*

interests in the property. The deed P4 is registered in the same folio as P7. The defendant, and those who hereafter derive little from him, would expose themselves to the risk of criminal proceedings if, with the assistance of some negligent proctor, they should attempt before Jane Nona's death to institute proceedings under the Act without giving the plaintiffs (or their heirs) an opportunity to put forward their claims under P4. These are claims which certainly merit adjudication at the proper time and therefore require disclosure in any future partition proceedings. That the defendant or his successors in title would make bold to circumvent their statutory obligations and incur the consequential risk of criminal proceedings under the new Act is not lightly to be presumed. Meanwhile the plaintiffs must continue to realise that the price of all contingent fideicommissary benefits is constant vigilance.

I am in any event not convinced that a declaratory decree which the plaintiffs are now claiming would necessarily guarantee them any certainty of protection. Section 48 of the new Act indicates that a subsequent partition decree entered by a Court of competent jurisdiction, from which notice of even such a declaratory decree has been dishonestly or carelessly withheld, would extinguish any fideicommissum for which provision is not expressly made—leaving the fideicommissaries whose rights have been defeated only the consolation of an action for damages and of a criminal prosecution against the wrongdoer. To this extent the position of fideicommissaries under the new Act is, notwithstanding the precautionary statutory provisions to which I have referred, perhaps more precarious than it used to be. The passing of a declaratory decree would therefore not afford a perfect insurance against dangers of the kind which the plaintiffs appear to apprehend.

The dismissal of this action does not involve an adjudication by us one way or the other as to whether the deed of donation P4 created a valid fideicommissum, the earlier acceptance of which by Jane Nona allegedly rendered it irrevocable by her unilateral act at a later date. My only decision is that the plaintiffs' action is premature. Nor will the plaintiffs be precluded from instituting fresh proceedings for *quia timet* relief it at some future date an actual or threatened infringement of their rights can be established to the satisfaction of the Court. I trust that the outcome of these proceedings will serve at least to convince the defendant and persons succeeding to his present title that the claims of the plaintiffs under P4, although disputed, are sufficiently substantial to merit judicial investigation at the proper time.

I would set aside the judgment appealed from, and, on the analogy of *Fletcher v. Bailey* (*supra*), I would make order that a decree be entered dismissing the plaintiffs' action on the ground that it is premature, but without prejudice to their rights to bring another action in case of actual injury or immediate danger to their alleged interests under the deed P4 No. 26251 dated June 2, 1926, attested by E. A. Gurusinghe, Notary Public. The plaintiffs must pay to the defendant his costs both here and in the court below.

GUNASEKARA J.—I agree.

Judgment set aside.