[FULL BENCH.] 1920.

Present: Bertram C.J. and Shaw and De Sampayo JJ.

MARIKAR *v.* MARIKAR.

407—D. C. Puttalam, 3,221.

Partition—Trust not extinguished by decree—Right of cestui qui trust.

A trust, express or constructive, is not extinguished by a decree for partition, and attaches to the divided portion, which on the partition is assigned to the trustee.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Cooray*), for appellant.—In the case of *fidei commissum* property the trust attaches to the share in severalty, although there is no mention of the *fidei commissum* in the partition decree; even a *bona fide* purchaser for value has been held to be affected by the trust. The same principle should apply in the case of any other trust such as the one in question. The words "right or title" in section 9 of the Partition Ordinance must be taken to refer to right or title inconsistent with the title set up by the party to the suit. A trustee's title is not inconsistent with the title of the *cestui qui trust*. In the case of a trust of this nature innocent purchasers are protected by section 66 of the Trusts Ordinance, No. 9 of 1917. Appellant has no remedy as the action for damages is only available to persons who have been designedly shut out. Counsel cited *Babey Nona v. Silva*,[1] *Abeyesundere v. Abeyesundere*,[2] *Weeresekera v. Carlina*.[3]

F. M. de Saram (with him *Chitty*), for respondent.—There is no analogy between the case of *fidei commissum* and a trust of this nature. In the case of a *fidei commissum* the trust is impressed on the land and exist as an established fact, partition cannot destroy it. The trust set up by the appellant is in the nature of a mere obligation express or implied to reconvey. It has to be proved and established, if proof is possible, considering that it is a trust agreement. All interests, except those specially conserved under the Partition Ordinance, are wiped out by the decree. Section 9 confers absolute title. To read the words "as to trustee for" into the decree would amount to a variation of the decree, which is not permissible.

[1] *(1906) 9 N. L. R. 251.* [2] *(1909) 12 N. L. R. 373.*
[3] *(1912) 16 N. L. R. 1.*

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Appellant has his remedy in damages under the Ordinance whether he was accidentally or designedly shut out. Counsel cited *Babunona v. Cornelis Appu*,[1] *Galgamuwa v. Weerasekera*,[2] *Silva v. Silva*.[3]

Cur. adv. vult.

August 4, 1920. BERTRAM C.J.—

The question for determination in this case relates to an alleged constructive trust attaching to an undivided share of a land which was the subject of a partition suit. The person beneficially interested under the alleged trust—though himself otherwise a party to the suit—did not assert a claim to his equitable right in the suit. Judgment was given, and a decree entered, without any reference to the trust. The question is therefore, whether, assuming the existence of the trust, it is extinguished by the decree, or whether it attaches to the share allotted in severalty.

The question comes before us as the result of a progressive process of interpretation of sections 2 and 9 of the Partition Ordinance. In the case of a *fidei commissum* that process has been carried to its full extent; in the parallel subject of trusts, the process has been checked and suspended at a point short of its logical conclusion by the decision of this Court in *Babunona v. Cornelis Appu*.[1] It is for the purpose of reviewing that decision that the present Court has been constituted.

The history of the process in its application to *fidei commissum* has been as follows: In D. C. Colombo, No. 69,169,[4] the Full Court declared that a property subject to a *fidei commissum* could neither be sold nor partitioned under the Partition Ordinance. Twenty years later this view was supported by an *obiter dicta* of the Privy Council itself in the well-known case of *Tillekeratne v. Abeyesekere*.[5] In the same year, however, in *Sathianaden v. Matthes Appu*,[6] this Court held that such a property could at any rate be sold under the Partition Ordinance by treating the plaint as though it were a petition under the Entail and Settlement Ordinance, No. 11 of 1876. Nothing was said in that case about a partition, and two years later the negative view on this aspect of the matter was followed by Bonser C.J. and Lawrie J. in *De Saram v. Perera*.[7] There the facts were of a special nature. Plaintiff was not a fiduciary, but a person who had acquired the rights of certain fiduciaries. Such a person was considered not to be an "owner." Lawrie J. hinted that, in other circumstances, land held in *fidei commissum* might be partitioned if the decree were appropriately expressed.

In two subsequent cases, on the other hand, which have for some time been treated as settled law—*Babey Nona v. Silva*[8] and

[1] *(1910) 14 N. L. R. 45.*
[2] *(1919) 21 N. L. R. 108.*
[3] *(1916) 19 N. L. R. 47*
[4] *(1877) Ram. 304.*
[5] *(1897) 2 N. L. R. 200.*
[6] *(1897) 3 N. L. R. 313.*
[7] *3 Browne 188.*
[8] *(1906) 9 N. L. R. 251.*

Abeyesundere v. Abeyesundere[1]—the positive position was adopted. In the latter case all that the Court held was that there was a power to partition lands subject to a *fidei commissum*. In the former case the Court went further. Here the property had been partitioned without reference to the *fidei commissum*; and the share allotted to the fiduciary in severalty was bought at a Fiscal's sale, apparently by a *bona fide* purchaser without notice. It was, nevertheless, held that, notwithstanding the partition, the *fidei commissum* attached to the divided share in the hands of the purchaser. These cases were followed in *Weeresekera v. Carlina*.[2]

The process of interpretation in the case of lands subject to a *fidei commissum* was thus carried to its full length. Such lands are capable of being partitioned; the partition decree operates subject to the conditions of the *fidei commissum*, which thus attach to the interest assigned in severalty. It is immaterial whether the *fidei commissum* is mentioned in the decree or not; it binds the property in the hands of a purchaser whether with or without notice.

In the case of a trust the history of the process has been otherwise. It has been held, indeed, that property subject to a trust may be dealt with under the Ordinance. The trustee himself may institute that action. *Daniel v. Saranelis Appu*.[3] But if an undivided interest subject to a trust is included in the decree, the trust is extinguished, unless expressly preserved. *Babunona v. Cornelis Appu*.[4] The *cestui qui trust*, if he wishes to preserve his rights, must intervene before the decree. He is entitled to do so. *Galgamuwa v. Weerasekera*.[5] If he does not do so, they are lost.

It is not easy to see how these divergent lines of interpretation can be reconciled or explained. In either case the question must be a question of the interpretation of two sections of the Partition Ordinance, namely, sections 2 and 9, and more particularly the latter. Unfortunately, in none of the cases relating to *fidei commissa* is section 9 discussed. Section 2 is referred to, and it has been held that the word "owner" in that section, though meaning a person in whom the *dominium* is vested, does not necessarily mean a person with an unqualified *dominium*. This deals with a point up to which both the lines of interpretation are parallel. It is after this that they diverge, and from this point section 9 is the material section. The decisions seem based, not on the words of the section, but on a consideration of the common law, of the principles observed in England, and of the preposterous result of any contrary conclusion. In the principal case on trusts, on the other hand, *Babunona v. Cornelis Appu*,[4] section 9 is indeed considered, and the decision is based upon the words of the section,

[1] *(1909) 12 N. L. R. 373.*
[2] *(1912) 16 N. L. R. 1.*
[3] *(1903) 7 N. L. R. 163.*
[4] *(1910) 14 N. L. R. 45.*
[5] *(1919) 21 N. L. R. 108.*

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but, again unfortunately, the cases on the parallel question of *fidei commissa* were either not put before the Court in the argument, or, if mentioned in the argument, do not seem to have been considered relevant for the purposes of the judgment.

As all these cases are now before us for the purpose of a review of the whole subject, it is necessary that we should determine on what principle the words of section 9 should be interpreted. The material passages for the purpose of this subject are the following :—

(*a*) The decree . . . . . shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property ;

(*b*) And shall be good and sufficient evidence . . . . . of the titles of the parties to such shares or interests as have been thereby awarded in severalty.

Mr. Jayawardene has suggested that the expression " right or title " must be interpreted as referring only to rights or titles inconsistent with the existence of the title of the persons to whom the shares are awarded in severalty. I think that Mr. Jayawardene is seeking a solution in the right direction, but I am not quite satisfied with this suggested formula. The share awarded in severalty, being a share of the ownership, would presumably impart the full *dominium*. A servitude, a *fidei commissum*, and a trust are alike in a certain sense inconsistent with this full *dominium*, for the *dominium* ordinarily implies both a right of beneficial enjoyment and a right of free disposal of the whole of the property. I prefer the suggestion of Shaw J. (whose judgment I have read), namely, that the expression " the title of the parties to such shares or interests " means the title to the legal ownership, and that the words " right or title " are not intended to include obligations of an equitable nature, which, originally binding on the conscience, have subsequently come to be enforceable in law on the persons vested with the legal ownership. I would, in fact, in the first passage quoted above, construe the words " right or title " as meaning in the case of the word " right " a *jus in re aliena*, and in the case of the word " title " as meaning the title to the *dominium ;* and in the second passage I would construe the word " title," in its reference to both " shares and interests," as meaning " title to the *dominium*." The word " interest " in this connection has throughout the Ordinance a special reference to the interest referred to in section 14, and I would so construe it here, and not as referring to what in English law would be described as an " equitable interest."

This interpretation is in accordance with the principle of a case not cited in the argument. *Sultan v. Sivanadian.*[1] In that case, at a sale in pursuance of a partition action, a share was bought with the money of the appellant, but in the name of his sister. It was contended in that case that the certificate of sale being made out

[1] *(1911) 15 N. L. R. 135.*

in the name of his sister it was conclusive against him, and that he could not assert his title. The contention was disallowed. Wood Renton C.J. observed :—

> "I do not think that Sir Joseph Hutchinson, in the case of *Catherina Hamy v. Baba Hamy*, when he said that the intention of the Partition Ordinance was to give an indefeasible title to the purchaser . . . . intended to say anything more than that the title of the purchaser was indefeasible as regards the estate that passed to him under the decree.

Grenier J. observed :—

> "Such a claim, if successful, will in no way challenge or defeat the title. It will only have the effect of substituting the real purchaser for the nominal one."

In that case the constructive trust came into existence, not before the partition action, but in the course of it. But the principle of these observations equally applies to the present case.

The late Mr. Morgan de Saram, in his argument before us, attempted to draw the distinction for the purpose of the point to be decided in this case between express trusts and constructive trusts. He pointed out that both *Babunona v. Cornelis Appu*[1] and the case in which it was followed the trust was a constructive trust only, and he drew our attention to the case of *Silva v. Silva*,[2] which related to a constructive trust, and in which the Court held that a constructive *cestui qui trust* is not entitled to institute a partition action. It is possible that the decision of the Court in *Babunona v. Cornelis Appu*[1] was indirectly influenced by the fact that the trust was a constructive trust. If the point had been before the Court in the form of an express trust, probably the analogy of the *fidei commissum* would have been more apparent, and the case in regard to *fidei commissa* would have received consideration. But if the interpretation which Shaw J. has suggested is the right interpretation, it is obvious that there is no decision for this distinction to be drawn between express trusts and constructive trusts. Both are equitable obligations imposed by the Court upon the holder of the legal title.

I would, therefore, adopt this proposed interpretation. I would decline to follow *Babunona v. Cornelis Appu*,[1] and I would allow the appeal, with costs.

SHAW J.—

The question for our decision in this case is whether a decree in a partition suit has the effect of extinguishing a constructive trust that attached to an undivided share in the land partitioned, or whether the specific portion of land allotted to the constructive

[1] *(1910) 14 N. L. R. 45.*

[2] *(1916) 19 N. L. R. 47.*

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trustee still remains liable in his hands to the trust. The District Judge following, as he was bound to do, the decision in *Babunona v. Cornelis Appu*,[1] has decided that the trust is extinguished.

In my opinion the decision in that case cannot be supported. I think that section 9 of the Partition Ordinance, 1863, does not and was not intended to extinguish equitable interests. The provision that the decree shall be good and sufficient evidence of the titles of the parties to such shares or interests as have been thereby awarded in severalty refers to legal titles only, and cannot properly be stretched to extinguish a trust attaching to the property. The provision in section 9, in so far as it takes away previously existing rights, must, under the ordinary rules of construction of statutes, be construed strictly, and not be extended to interfere with such rights further than the wording of the enactment necessitates. Had it been intended to extinguish equitable interests in the land partitioned, or in the proceeds if the land is directed by the decree to be sold, it should and would have said so. The decree is good and conclusive against all persons whatever, including a *cestui qui trust*, as to the partition or sale and as to the specific lot or sum of money to which the trust relates, but the effect, so far as the *cestui qui trust* is concerned, is merely to set apart a specific portion of the common estate to which his rights attach in severalty. Neither does there appear to be any reason for the Ordinance to have otherwise enacted. Under our trust law, as declared by section 66 of the Trusts Ordinance, No. 9 of 1917, a transferee in good faith for consideration without notice of the trust and a transferee for consideration from such transferee is amply protected, and the only effect of extinguishing trusts upon a partition would be to give a dishonest trustee an interest in the property to which he is not entitled.

A distinction was sought to be drawn during the argument on the appeal between express and constructive trusts, but I am unable to see any legitimate distinction, and in the case of constructive trusts, a *bona fide* transferee by section 98 is equally protected. The case of *Babunona v. Cornelis Appu* (*infra*) does not appear from the report of the case to have been very fully considered, and previous cases that have a very direct bearing on the point under consideration are not referred to in the judgments or mentioned as having been cited in argument.

In *Babey Nona v. Silva*[2] it was held that the decree in a partition suit has not the effect of destroying a *fidei commissum* which attached to an undivided interest in the land partitioned, and that after the partition it attached to the portion of the common estate allotted in severalty. To the same effect is the case of *Abeyesundere v. Abeyesundere*.[3] That a *fidei commissum* may still attach to a

[1] *(1910) 14 N. L. R. 45.*
[2] *(1906) 9 N. L. R. 251.*
[3] *(1909) 12 N. L. R. 373.*

property notwithstanding a partition is recognized in the judgment of the Privy Council in *Tillekeratne v. Abeyesekere*.[1]

The decision in *Babey Nona v. Silva* has since been recognized as correct, and was followed in the reported case of *Fernando v. Shewakram*.[2]

A distinction was drawn on behalf of the respondent between a *fidei commissum* and a trust, on the ground that under the former the beneficiary has a legal interest in the land, whereas in the latter he has not. In my opinion this only makes it clearer that a trust should remain unaffected, for in the former case a fiduciary can give no good title to an innocent purchaser for value, whereas a trustee can. In *Daniel v. Sarnelis Appu*[3] it was held that the trustee of a Buddhist vihare is entitled to bring a partition action in respect of the property of which he is a trustee, and Layard C.J. in his judgment recognized the rights of executors and administrators and other trustees to bring partition suits under the Partition Ordinance. It can hardly be contemplated that such trustees could be allowed to bring such suits and then to become absolute owners of the land and subject only to an action for damages on the part of the beneficiaries if they should upon the partition conceal the trusts on which they hold the property. In my opinion trusts of all description attaching to property partitioned remain attached to the lot awarded in severalty to the trustee, and the appeal should, therefore, be allowed, with costs.

DE SAMPAYO J.—

I have had the advantage of perusing the judgments of the Chief Justice and my brother Shaw, and I agree that a trust, express or constructive, will not be extinguished by a decree for partition, but will attach to the divided portion, which on the partition may be assigned to the trustee. An action for partition, as section 2 of the Ordinance provides, lies where any landed property belongs in common to two or more "owners," and, in my opinion, the conclusive effect given by section 9 to the decree for partition or sale has reference to such owners. In the case of a trust affecting a share of the land, the beneficiary is not an "owner" in that sense, and cannot institute an action for partition, as was decided in *Silva v. Silva*.[4] For that purpose the trustee must be regarded as the owner of the share which is subject to the trust. But whether, where the partition is effected in the absence of the beneficiary, the trust is extinguished is a different question. If a less inconvenient or unjust interpretation can be placed on section 9, it should, I think, be adopted. The trustee, being the owner of the share, will represent the beneficiary in respect of it, and the decree in his favour will be "conclusive" against all those who may claim the

[1] *(1897) 2 N. L. R. 313.*
[2] *(1917) 20 N. L. R. 27.*
[3] *(1903) 7 N. L. R. 163.*
[4] *(1916) 19 N. L. R. 47.*

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same share or any interest therein. Section 9, I think, is not intended to shut out the beneficiary himself. If it was so intended, I should have expected the Legislature to employ plainer language. Where once a divided portion is assigned to the trustee in respect of the undivided share, which was the subject of the trust, the object of the Partition Ordinance to put an end to undivided ownership of land is carried out, but the rights and obligations of the trustee and the beneficiary *inter se* remain as they were. This, I think, is the principle underlying the decisions with regard to the partition of *fidei commissum* property. When the existence of a constructive trust of the kind in question is disclosed in the partition proceedings and the beneficiary is a party to the action and a contest arises between him and the trustee, I recognize the inconvenience of having a subsidiary inquiry in the partition proceedings, but I think the inconvenience is not greater than in the case of separate contests between two of several parties with regard to title, such as questions of pedigree and prescription. It is open to the Court, however, in such a case, as in the ordinary case of contested titles, to suspend the proceedings and refer the parties to a separate action.

I therefore agree that *Babunona v. Cornelis Appu*[1] should not be followed, and I would allow the appeal.

Appeal allowed.