

1948

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

COLONNE, Appellant, and SENARATNE et al. Respondents.

S. C. 294-5—D. C. Colombo, 3,515.

Fidei commissum—Land donated to two persons with fidei commissum in favour of their heirs—Death of one donee—Sale by intestate heirs—Partition action by vendee—Decree allotting particular lot to vendee—Conclusive title.

By a deed of 1884 a donor gifted certain property to his two daughters S and F on condition that after their death the property should descend to their heirs. S died unmarried and without issue and her intestate heirs sold their rights to one C who brought an action for the partition of the property. In the final decree C was allotted lot A in lieu of his undivided shares. F died thereafter and her children sued for declaration of title to this lot on the footing that on the death of S her half share passed to her sister F subject to the *fidei commissum*.

Held, that it was not open to the plaintiffs to reopen the fideicommissary succession adopted in the partition case and that the title under the partition decree was conclusive.

Held, further, that the words "after their death" in the context meant after the death of S and F respectively.

¹ *S. C. 310/M.C. Galle, 5,343.*

APP**EAL** from a judgment of the District Judge, Colombo.

N. E. Weerasooria, K.C., with *K. Herat*, for plaintiff, appellant.

H. V. Perera, K.C., with *E. B. Wickremanayake*, for first defendant, respondent.

Vernon Wijetunge, for third defendant, respondent.

Cur. adv. vult.

February 23, 1948. SOERTSZ S.P.J.—

That deed No. 5,648 of September 28, 1884, created a *fidei commissum* was not seriously disputed. It seems clear that it did. The question that was open to debate was in regard to the devolution of title on the death of the first dying donee. The donor gave, granted, assigned, and transferred a land three acres, three roods and twenty-one perches in extent to his two daughters Sophia and Francina and to their heirs, executors, administrators and assigns on the condition that he should have the right to recover, receive, take and enjoy the rents, profits and revenue during his lifetime, and that after his death, the donees should hold the property and enjoy the rents, profits and revenue thereof but that the property should not be subject to any debts of themselves, and that the same should not be sold or alienated and that after *their* death, the said property should *descend* to their heirs. The plaintiff contends that, upon a true interpretation, the property passed on the death of Sophia unmarried and issueless, to the surviving donee, her sister Francina. The defendant, however, asserts that the half share that Sophia got under the deed, passed, on her death, in the manner stated in the plaint filed in D. C. Colombo Case No. 25,575 by one Don Davith who sought to have this land partitioned, that is to say that Sophia's half share did not go, in its entirety, to her sister Francina, her co-donee, but that it devolved on Francina, Cornelis her brother, the children of a deceased sister Helena, and the children of another deceased sister Regina. This was the fideicommissary succession adopted in that partition case and the present first defendant's father the plaintiff in the partition who had acquired 125/640 from persons in that line of succession was allotted that share and was, later, given lot A in respect of that share. The present plaintiff now asks that he be declared entitled to a half of lot A on the footing that on Sophia's death Francina became entitled to the whole land and that he, the plaintiff, bought, in the year 1943, a half share from one of Francina's two children.

The learned trial Judge approached the question thus raised in regard to the correct fideicommissary succession under the deed of gift by way of a preliminary consideration of the vexed question whether a final decree in a partition suit extinguishes *fidei commissa* which have not been referred to or reserved in that decree, and confers an absolute title on parties to whom separate lots are given in lieu of their shares in

severalty, and he came to the conclusion that a *bona fide* purchaser without notice who had bought a defined lot from a *fiduciarius* who had obtained it under a partition decree, held the lot free from the *fidei commissum*, the partition decree not making any reference to the *fidei commissum*. He then proceeded to apply the principle he had so adopted to the facts of this case which he found to be that the present first defendant who claims under a partition decree is a son of the plaintiff who filed the partition action. The plaint shows how the property was said to devolve on the parties to that action. Mention was made of the deed which creates the *fidei commissum* under which Sophia and Francina became *fiduciarii*. The plaint recites that on the death of Sophia her rights devolved on all her collateral heirs and not on Francina alone as the plaintiff now alleges, and, for these reasons, the trial Judge held that as the separate lots were allotted to the parties without any reference in the decree itself to the *fidei commissum* that decree created a new title and that in regard to the shares the first defendant in this case bought from his mother and sisters, he was a *bona fide* purchaser without notice of the *fidei commissum* and that he, therefore, held those shares free from the *fidei commissum*, but that he stood in a different position in respect of the share he inherited from his father, the plaintiff in the partition case.

The learned Judge overlooks the real question in the case, namely, the fact that the partition decree was based on the fideicommissary succession set forth and adopted in the plaint in that case. The trial Judge went on to give judgment on that footing. He held that the present first defendant was entitled to the 41/48 shares he had bought from his brothers and sisters and that the 7/48 shares he had inherited, he found was subject to the *fidei commissum* and that the present plaintiff was entitled to that fractional share subject to claims for compensation.

Neither the plaintiff nor the first defendant appear satisfied with these findings. The former has appealed and the latter has filed cross objections. For the reasons given by me for the view I expressed in the case of *Tillakaratna v. de Silva*¹ I should have been disposed to hold, in this case, that the *fidei commissum* attached to the shares actually allotted in severalty to the parties in the partition action and to the lots they were given in lieu thereof, but that would not have been of any avail to the plaintiff here because, on that basis he would be entitled to half of 5/8ths of Francina, but the present first defendant did not claim any interest under Francina nor did his father the plaintiff in the partition suit. What the plaintiff is now seeking to do is to reopen the fideicommissary succession adopted in the partition case, and substituting therefor, a succession on the basis that, on Sophia's death, Francina got Sophia's entire half to the exclusion of her brother and of her two deceased sisters' children, to throw the present first defendant out of Court. I am quite clearly of the opinion that this he cannot now do. Perhaps, much could have been said in support of that contention but for the partition decree, but in view of that decree, the title found and decreed thereunder must from the date of the decree be deemed to be a title good against the world, as the phrase goes. The question whether that

¹ (1947) 49 N. L. R. 25.

title itself is or is not subject to the *fidei commissum* is a different matter that does not arise, on the facts, as between the plaintiff and the first defendant here.

I must therefore, hold that as between the two of them the first defendant is entitled to lot A which is the land now in dispute and that means the plaintiff's action fails and must be dismissed with costs in both Courts.

CANEKERATNE J.—I agree. The words "after their death" mean in the context, after the death of Sophia and Francina respectively.

Plaintiff's action dismissed.

