1932 *Present:* **Macdonell C.J. and Garvin S.P.J.**

KUSMAWATHI *et al. v.* WEERASINGHE.

415—D. C. Matara, 5,440.

Fidei commissum—*Deed of gift subject to* fidei commissum—*Donor remains in possession—Obtains partition decree—Sale to defendant—Bona fide purchaser without notice—Claim by heirs of donee—Incidence of* fidei commissum.

In 1889 G donated by deed, duly registered, an undivided half share of a land to her son A "as a gift *inter vivos* . . . . to have and to hold the said premises subject to the following conditions:—(1) That this gift shall take effect after my death; (2) that the donee shall not alienate, sell, or encumber the property; (3) the shares of land gifted should, after the death of the donee, descend to his children or their descendants by representation according to law".

G remained in possession and in 1907 obtained title under a partition decree to a portion in severalty of the land, representing the undivided half interest which she had dealt with in 1889, A being a party to the partition action.

Thereafter G sold the land to defendant's predecessor in title, reciting in her conveyance her title under the partition decree.

G died in 1912 and A in 1927.

Held (in an action brought by the heirs of A, claiming under the *fidei commissum*), that the defendant had the superior title.

THIS was an action brought by the plaintiffs as heirs of one Don Andris for declaration of title to land. They based their title on a deed of October 16, 1889, by which their grandmother Dona Gimara gifted an undivided half share of the land in question to their father. They claimed that the deed of gift created a *fidei commisum* in their favour. It would appear that Dona Gimara remained in possession of the land and in 1907 obtained a partition decree in her favour in respect of a portion in severalty of the land, representing her undivided half share. Don Andris was a party-defendant to the partition action. Thereupon Dona Gimara sold the property to one Johannes Weerasinghe, from whom defendant derived title.

The learned District Judge held that the deed of 1889 was not acted upon and that the partition decree wiped out the *fidei commissum*. He dismissed the plaintiff's action.

N. E. Weerasooria, for plaintiffs, appellants.—The partition proceedings are on the footing that the deed of gift creates a *fidei commissum*. The donee is stated in the plaint to be a fiduciary and the donor to have a life-interest. The decree should be read with the pleadings. Even otherwise the decree does not wipe out the *fidei commissum* (*Ram. (1877) p. 304, Tillekeratne v. Abeyesekere* [1], *Abeysundere v. Abeysundere* [2], *Nona v. Silva* [3], *Marikar v. Marikar* [4]). A partition decree cannot affect the title

[1] *2 N. L. R. 313.*
[2] *(1909) 12 N. L. R. 373.*
[3] *(1906) 9 N. L. R. 251.*
[4] *(1920) 22 N. L. R. 137.*

of *fidei commissarii* as they are not in a position to put forward a claim (*2 Burge 678; Voet X., 2, 14; Voet X., 2, 38*). The donation here is to take effect after death. It is distinguishable from a pure gift *inter vivos* and a *donatio mortis causa*. On donor's death title automatically passes to donee subject to conditions (*Voet XXXIX., 5, 4; XXXIX., 6, 2; 2 Nathan, s. 1020; 4 N. L. R. 288*). The right of donee can even be said to come under section 3 of Trusts Ordinance, No. 9 of 1917. Then *Marikar v. Marikar* (*supra*) will apply.

H. V. Perera, for defendant, respondent.—The donor is not a fiduciary. See *Macgregor's Voet XXXVI., 1, 1*, for definition. A *fidei commissum* is a trust imposed on a person to whom the property is given (*Zeedeburg v. South African Association* [1]). A fiduciary represents the *fidei commissarii*, but here the donor does not represent them. She is a stranger so far as the partition proceedings are concerned. The deed is nothing more than a contract. There was no delivery. The rights of the donee and *fidei commissarii* were contractual and not real rights (*Voet XVIII., 6, 6; XLI., 1, 2; Lee's Roman-Dutch Law* (*2nd ed.*), *p. 338-345*). The deed is in effect a testamentary disposition (*Vaity v. Jacob* [2]; *Theobald on Wills*, pp. *14 and 15; Thorold v. Thorold; 1 Philimore's Cases, p. 1.* The words are " give after death ". See *Voet XXXIX., 5, 4.* The partition decree was registered. The defendant's predecessor was a *bona fide* purchaser without notice. All previous titles are extinguished. The deed does not create a trust. Even so, equity does not assist volunteers. No action for specific performance would lie (see section 93 of Trusts Ordinance, No. 9 of 1917; *Fry on Specific Performance, p. 56; Fernando v. Peiris* [3]; *Silva v. Salo Nona* [4]). Counsel also cited *Mudalihamy v. Dingiri Menika* [5].

Weerasooria, in reply.

March 5, 1932. MACDONELL C.J.—

This was an action for declaration of title to certain lands brought by the three plaintiffs who claim as *fidei commissarii*. They base their title on a deed of October 16, 1889, P 4, by which their grandmother Dona Gimara dealt with a one-half undivided share of the land in question in the following terms:—" Know All Men by these presents that I, ..., Dona Gimara, ..., widow, ..., in consideration of the love and affection which I have to my youngest son, ..., Don Andris, ..., do hereby give and grant unto the said . . . ., Don Andris as a gift *inter vivos* the hereinafter mentioned premises entitled to me" (follow the particulars and boundaries of the parcels in question) " To have and to hold the said premises, ..., unto him the said . . . ., Don Andiris, subject however to the following conditions:—

1. That this gift shall take effect after my death;
2. That the donee cannot alienate, sell, or encumber the property gifted, and are not liable to be sold for any debt of his;

[1] *5 Searle 214.*
[2] *2 A. C. R. 45.*
[3] *(1916) 19 N. L. R. 281.*
[4] *(1930) 32 N. L. R. 81.*
[5] *28 N. L. R. 412.*

3. That the shares of lands gifted by me should after the death of the donee descend to his children or their descendants by representation according to law; and

4. That any lease which the donee may make for his benefit shall end at the term of his natural life."

This deed was duly registered. It is common cause that the half undivided share dealt with in this deed was Dona Gimara's to dispose of and that the conditions attached created a valid *fidei commissum*. Don Andris, the son named in this deed, was the father of the plaintiffs and they claim under him by virtue of the *fidei commissum* created by it. In accordance with condition No. 1 of the deed, Dona Gimara remained in possession but in 1907 as a consequence of two partition actions, eventually consolidated into one, she obtained a partition decree title under Ordinance No. 10 of 1863 to a portion in severalty of the same land, expressly stated to represent the undivided half interest which she had dealt with in her deed of 1889. Don Andris, her son, the beneficiary, was joined as a defendant in both these partition suits, " as he is entitled to the fiduciary of which his mother, the first defendant, has a life interest ", but he does not seem to have taken any part in the partition proceedings, still less to have opposed the decree made thereon. Dona Gimara acquired then by this partition suit " the good and conclusive title" which a partition decree gives, to the land dealt with by her in the deed of 1889. The partition decree was duly registered. Thereafter Dona Gimara mortgaged, and in 1910 sold, the land in question on D 3 to Johannes Weerasinghe duly reciting in the conveyance her title by partition decree; this conveyance also was duly registered. On the death of the purchaser, Johannes Weerasinghe, intestate, his immovables were sold in 1919 and purchased by his mother Tochcho Baba Hamine who in 1920 sold to the present defendant. It is not suggested that the defendant when he purchased or that either of his predecessors in title had actual notice of the *fidei commissum* created in 1889. Dona Gimara died in 1912, two years, that is, after she had sold to Johannes Weerasinghe. Her son Andris, beneficiary under the deed of 1889, died in 1927. His children filed plaint on December 21, 1929, claiming the land as the *fidei commissarii* under that deed.

They put their claim thus—

" That by the said deed the said Dona Gimara was entitled to possess the said premises until her death and on her death her son Don Andris was entitled to possess the same and on his death the said premises were to vest absolutely in the children of Don Andris.

"That the title which the said Dona Gimara got in the said partition decrees was in law subject to the said terms of the said deed and the said Dona Gimara got and held the said lot A in trust for the beneficiaries under the said deed No. 16. "

The learned District Judge held that the deed of 1889 had never been acted on and that the partition decree, and the title vested thereby in

Dona Gimara, wiped out the *fidei commissum*. From this decree the defendants appeal, and it is convenient to set out their chief reason:—

"4. (*b*) If the deed P 4 created a *fidei commissum* in favour of the appellants and had the effect of vesting the property in Andris at the time of execution as the learned District Judge holds, the partition decrees cannot enlarge the usufructuary right Dona Gimara possessed to absolute *dominium* as the decrees do not wipe off a *fidei commissum* when once such a charge is impressed on the land."

Now of the close and excellent arguments on this appeal many were directed to the question as to the effect of the deed of 1889; did Don Andris acquire under it *dominium* leaving Dona Gimara a mere usufruct for her life, or did she retain the *dominium* during her life, such *dominium* not to be transferred to Don Andris till she was dead? As I understand this case, it can be determined without pronouncing definitely for either of these conclusions.

Take the first view, that Don Andris acquired under it a *dominium* to the land, Dona Gimara being usufructuary for her life. Then Don Andris was *dominus* of the land as well as *fiduciarius*. He could have asserted that position when the partition actions were instituted, and with the greater ease since he was third defendant in each and in the consolidated action. He could have insisted that the partition decree should have adjudged title to him and reserved to Dona Gimara merely a life interest. In fact he did nothing, never asserted any right at all, but allowed Dona Gimara by the partition decree to enlarge her rights as usufructuary into a title "good and conclusive as against all persons whomsoever", a full and indefeasible *dominium*, a title good against all the world. Her position at the time of obtaining it must be analyzed. She had given the land by deed *inter vivos* to Don Andris and had declared it to be subject to a valid *fidei commissum*. But she was not herself *fiduciarius*, that was not and could not be contended. To do so, it would be necessary to maintain that the creator of a *fidei commissum*, whether by act *inter vivos* or by instrument testamentary, was himself or herself a *fiduciarius* although he or she had expressly named a *fiduciarius* in the instrument creating the *fidei commissum*. There would then be two *fiduciarii* to the same *fidei commissum*, in and with different rights, and with possible conflicting interests, and no authority is known to me for the possibility of there being two such *fiduciarii*. I only mention these considerations to show how difficult it would have been to contend that Dona Gimara after creating a *fidei commissum* by the deed of 1889 could be herself a *fiduciarius* under it, and, as I have said, this was not contended in argument. But it is important to notice that had she been a fiduciary she would have held the land obtained by her in severalty under the partition decree in the capacity of a fiduciary, and not in any other capacity, in accordance with the rule in *Baby Nona v. Silva* [1]; per Lascelles A.C.J. at 256, "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 *fiduciarius* into absolute ownership", and per

[1] *9 N. L. R. 251.*

Middleton J., also at 256, " A *fiduciarius* has, it is true, a real though burdened right of ownership which may or may not develop into *plenum dominium* . . . . I would prefer to say that the Court has done no more than to confer on Diyonis " (*i.e.*, the owner under the partition decree) " the interest of a *fiduciarius* in a separate portion of the property ". The burden of the *fidei commissum* will continue as against the fiduciary and as against the successors in title (whether ignorance by them of the *fidei commissum* makes any difference, is a matter that will be discussed later) but no case or dictum known to me suggests that the burden could continue as against the holder of a partition decree title who was not a *fiduciarius*. So to hold would be further to impair the " good and conclusive title " which decree under section 9 of Ordinance No. 10 of 1863 confers, and this I must decline to do until required by authority. Then Dona Gimara, being usufructuary of an undivided share in land, acquired under partition decree a title which, since she was not a fiduciary, was unaffected by the *fidei commissum* created by the deed of 1889 and this title, so unaffected by it, enures to the benefit of a purchaser from her and of his successor in title, the defendant in this case. If it be the case that that deed made Don Andris the *dominus* and left Dona Gimara usufructuary merely, such a conclusion would not help the plaintiffs in this action.

Further, Don Andris if *dominus* lay by all those years and allowed Dona Gimara to deal with the land adversely to his rights under the deed of 1889 and prescription would begin to run against him. I apprehend, from the moment in 1907, when she acquired title by virtue of a partition decree, certainly from the moment in 1910 when she sold to Johannes Weerasinghe. If so, the title through which the defendant claims was perfected by prescription as against Don Andris either in 1917 or 1920, this action having been commenced in 1929.

Then there is the alternative: Dona Gimara retained *dominium* for her life, Don Andris's rights being in expectancy till her death. During the course of argument the question was asked, no very satisfactory answer being given, what then was the nature of Don Andris's rights. If the deed of 1889 was irrevocable, would he become *dominus* of the land *eo instanti* Dona Gimara's death, or would some further act on his part be necessary, such as an instrument from the executor of Dona Gimara if she left a will or from her administrator if she died intestate? As I have said, no satisfactory answer was given to this question, yet to give Don Andris a real right to the land mentioned in the deed of 1889 it would be necessary for him to show that that land became his *eo instanti* Dona Gimara's death and by virtue of the same. If the deed of 1889 was revocable, then clearly Don Andris's right was not a real right to the land but a constructual one merely, the deed would be of the nature of a testamentary instrument, and after Dona Gimara's death he would have to obtain delivery of the land. Further, if the deed was revocable, Dona Gimara revoked it in the most effective manner, namely, by getting an indefeasible title to herself and then selling to a third party. But let us put on the deed of 1889 a construction most favourable to Don Andris's interests; it was irrevocable and the land passed to him *eo instanti* Dona Gimara's

death and without any act by him or anyone else. Then Dona Gimara, *domina* of the land for her life, enlarged that *dominium* into one for more than her life, a *dominium* " good and conclusive as against all persons whomsoever " by the partition decree of 1907. She then sold to a third party and Don Andris, the person with an expectant *dominium* (if the phrase can be used) which would become absolute *eo instanti* her death lay by and allowed her to do both these things. Again, it is to be observed that though *domina* and though maker of the deed of 1889 she was not fiduciary, so the rule in *Baby Nona v. Silva* (*supra*) would not apply and the *fidei commissum* would not affect her or her successors in title, and she, and they through her, would take the land clear of it; at the very least, there is no authority to the contrary.

If I understood it correctly, the argument for plaintiffs was put somewhat in this way. Even if no *dominium passed* to Don Andris at the time of the execution of the deed of 1889 and if Dona Gimara still retained her *dominium*, none the less that *dominium* was affected by the *fidei commissum* she had impressed on it and the *dominium* she obtained by her partition decree title was equally affected by it. On Dona Gimara's death in 1912 the *dominium* so affected vested in Don Andris instanter without the necessity of tradition or of any act by him or on his behalf. On his death in 1927 the rights of plaintiffs under his *dominium* affected by the *fidei commissum* created by the deed of 1889, at once became effective and enforceable. There can be no question of prescription for until those rights became effective and enforceable by Don Andris's death, until the plaintiffs, his children, " acquired a right of possession to the property in dispute ", Ordinance No. 22 of 1871, section 3, time would not run against them. Then they, the plaintiffs, can claim the land against defendant, the successor in title to the purchaser from Dona Gimara. I can only say in reply that to accede to such an argument would be to extend the ruling in *Baby Nona v. Silva* (*supra*) to a totally different case, viz., to the case of land held under partition title by a person other than a *fiduciarius*. *Baby Nona v. Silva* (*supra*) decides definitely enough that the *dominus* under a partition decree title being himself a *fiduciarius*, must hold the land acquired by that title for the *fidei commissarii*, but it does not decide that the *dominus* under such a title not being a *fiduciarius* must hold it for them, still less that the purchaser from him must do so.

But the above considerations do not dispose of this case, since paragraph 4 of the plaint states as follows:—

" 4. . . . . That the title which the said Dona Gimara got in the said partition decree was in law subject to the said terms of the said deed and the said Dona Gimara got and held the said lot A in trust for the beneficiaries under the said deed No. 16."

The case for the plaintiffs is put no longer as a *fidei commissum* but as a trust. Then it can be stated thus. By the deed of 1889 Dona Gimara had, though using phraseology apt to create a *fidei commissum*, yet declared herself a trustee for Don Andris and his descendants; this is to be implied from the words of the deed, the land is to go to Don Andris after her death, and then to his children. Granting that a trust was thereby created, then the plaintiffs are met by the fact that Johannes

Weerasinghe who brought from Dona Gimara was *bona fide* purchaser for value without notice, and if Dona Gimara was trustee for Don Andris and his descendants, this is a complete answer to their claim; if you put it as a trust, you must submit to the rules that govern trusts, you cannot pick and choose from among those rules just that one which suits your case, discarding others. As it was put by James L.J. in *Pilcher v. Rawlins* [1]:—

> " A purchaser's plea of a purchase for valuable consideration without notice is an absolute unqualified, unanswerable defence . . . . such a purchaser, when he has once put in that plea may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him."

But it is said that the purchaser here, Johannes Weerasinghe, was not purchaser without notice, since the deed of 1889 was registered and it was his duty, when buying from Dona Gimara her partition decree title, to search the register and as he did not do so, he had constructive notice of what he would have found had he searched, viz., that Dona Gimara was a trustee by reason of the deed of 1889. No case was cited to us in support of this argument, and I must respectfully decline to accede to this attempt to extend the doctrine of constructive notice to purchasers from holders under a partition title. The words of section 9 of the Ordinance are clear enough: " The decree for partition or sale given as hereinbefore provided . . . . shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty ", and these words seem to mean that in purchasing from the holder of a partition title you have to satisfy yourself by inquiry that the decree was " given as hereinbefore provided " and that your vendor holds a title under that decree, but not that you have, whether as matter of law or conscience, to make any inquiry behind that title and the decree under which it was granted.

I have discussed the case regarded as one of trust, so will now return to it, regarded as one of *fidei commissum* since it was further argued, as I understood, that as *fidei commissarii* cannot be parties to a partition action, they must be protected otherwise, and that this protection is to be given by making the burden of the *fidei commissum* valid as against a third party, even though he purchased the property affected by the *fidei commissum* for value and without notice. In actual fact, decided cases go no further than this, that the *fidei commissum* is valid as against the *fiduciarius* holding it under a partition decree and as against a purchaser

[1] *L. R. 7 Ch. App. at p. 268.*

from such *fiduciarius*, *Baby Nona v. Silva* (*supra*). The dictum of Lord Watson in *Tillekeratne v. Abeyesekere* [1] to the effect that the partition authorized by the Ordinances No. 21 of 1844 and No. 10 of 1863, would not necessarily destroy the *fidei commissum* attached to one or more of the shares before partition, was unnecessary for the decision of that case and is clearly *obiter*, and it must be remembered that "a case is only an authority for what it actually decides" per Lord Halsbury in *Quinn v. Leathem* [2]. Assume, however, that the protection extended to the *fidei commissarii* goes further, and that the *fidei commissum* attaches to land in the hands of any holder of it under a partition title irrespective of whether that holder is the *fiduciarius* or not: the argument will then pray in aid the passage from Justinian's Code, at VI., 43, 3, familiar from its citation in Dr. Lee's book, which passage expressly states that the *fidei commissarius* can claim against any purchaser or mortgagee, and examination of the concluding portions of that passage not quoted in Dr. Lee's book makes it clear that he can claim even though the purchaser or mortgagee has no notice of the *fidei commissum*. How far can such a contention prevail against the very clear words of section 9 of the Partition Ordinance a "title good and conclusive against all persons whomsoever?" It is said that *Baby Nona v. Silva* (*supra*) decides that, on a purchase from the *fiduciarius* who has a partition title, the *fidei commissum* runs with the land even though the purchaser has no notice of the *fidei commissum*, and it was argued here, as I understand that this rule should be extended to such a case as the present, viz., that where the holder of the partition decree title even though not *fiduciarius*, sells in breach of a *fidei commissum* which she herself has created, the *fidei commissum* should be held to continue even as against the purchaser without notice. *Baby Nona v. Silva* (*supra*) has at different times been cited as authority for the proposition that purchase without notice is no bar to the *fidei commissarius's* rights; see *Marikar v. Marikar* [3], and Mr. Jayewardene's book on Partition, at page 213. But the facts in *Baby Nona v. Silva* (*supra*) do not support this proposition. They were these. A woman, Maria Silva, donoted land to her three sons, Diyonis, Manuel, and Bastian, subject to a *fidei commissum* in favour of their descendants. This land came to these three sons after her death under her gift and was by them partitioned under the Ordinance so that lot B was allotted to Diyonis and lot A to Manuel. Diyonis's lot B was sold against him and was purchased by his brother Manuel, the defendant, who like him was a *fiduciarius*. Shortly afterwards Diyonis died leaving children, some of whom were the plaintiffs in that action. They were *fidei commissarii* whose rights became vested rights in *esse* the moment their father Diyonis died. They claimed as against Manuel the lot B which he had purchased from their father Diyonis who had been a *fiduciarius*. Now Manuel had come to the land through his mother Maria's deed creating the *fidei commissum*, so had actual knowledge of the same, and he had obtained a partition title to a portion of that land only because he was a joint donee under that deed. A clear case of purchaser with express notice could not well be imagined. Then *Baby Nona v. Silva* (*supra*) is no authority for the proposition that a *fidei commissum* can be enforced

[1] *2 N. L. R. 313.* [2] *70 L. J., P. C. 81.* [3] *22 N. L. R. 139.*

against a purchaser from a *fiduciarius* who has a partition title, that purchaser having no notice of the *fidei commissum*, and I have been unable to find any other case which does establish that proposition. The point is open for decision. The additional " protection " claimed for *fidei commissarii* would go far beyond the principle of *Baby Nona v. Silva* (*supra*), was not supported by authority cited to us, and would be a further weakening of titles under partition decrees. I must therefore respectfully decline to accede to the argument that such an additional " protection " exists.

As the present case is not a case of purchase from a *fiduciarius* but from some one other than a *fiduciarius*, the question of purchase for value without notice does not on the existing authorities really arise in deciding the present case, regarded as a case of *fidei commissum*. None the less it was one so frequently referred to in argument that perhaps one may venture on some discussion of it—*obiter*—in relation to partition decree titles.

The words of section 9 of Ordinance No. 10 of 1863 seem clear enough " A title good and conclusive against all persons whomsoever ". It has been decided that to make a good and sufficient title the decree relied on must have been in accordance with the requirements of the Ordinance, and Mr. Jayawardene in his book on Partition summarizes at page 195 the grounds upon which final decree in a partition action has been vacated and set aside. Is it necessary or desirable to make any further inroads on the plain words of the statute? As I understand the decision of *Baby Nona v. Silva* (*supra*) it does not decide that a *fidei commissum* attaches to the land sold by a *fiduciarius*. All it decides is that a purchaser from such a *fiduciarius* with knowledge of a *fidei commissum* cannot hold the land purchased as against a *fidei commissarius*. It affirms the principle that a man cannot hold what in conscience he knows he has no right to. Then it affirms the same principle with regard to *fidei commissa* as *Marikar v. Marikar* (*supra*) does with regard to trusts. If this is so, then the law, as I apprehend it, does not impose on land sold by a *fiduciarius* who has a partition decree title the burden of *fidei commissum*, does not say that a *fidei commissum* " runs with the land " when purchased from him. What it does say is something quite different, namely, that if a purchaser buys from a *fiduciarius* with a partition decree title knowing that what he buys is subject to a *fidei commissum*, he cannot hold it as against the *fidei commissarius*, *Baby Nona v. Silva* (*supra*), and that if he buys from a person with a partition decree title knowing that what he buys is subject to a trust, he cannot hold it as against the *cestui qui trust*, *Marikar v. Marikar* (*supra*). This is an intelligible principle, in each case the conscience of the purchaser is affected because he has bought with knowledge of the rights of others, and if so there is good reason for postponing his rights to those of such others. But this is a very different thing from imposing on land purchased from a *fiduciarius* with a partition decree title, the bond of *fidei commissum*, so that it runs with the land in disablement of the good and conclusive title which section 9 of the Partition Ordinance purports to create.

In deference to the arguments addressed to the Court in this case, I have discussed it on several suppositions and from several points of

view, but its essentials can be put very shortly. The donor of the land charged by her with a *fidei commissum* under which she, the donor, was not a *fiduciarius*, thereafter enlarged by virtue of a partition decree the rights, dominial or usufructuary, remaining to her after her gift, into the full and conclusive ownership that a partition decree title gives, which ownership she not being a *fiduciarius*, could transmit unburdened by the *fidei commissum* to her successors in title.

For the foregoing reasons, I am of opinion that this appeal should be dismissed with costs.

GARVIN S.P.J.—

This is a contest as to title. The plaintiffs trace their title back to one Dona Gimara Hamine; so also does the defendant. Dona Gimara Hamine was once the owner *inter alia* of an undivided half share in each of two contiguous allotments of land called Mahawanigewatta and Bogahawatta. She executed a certain deed bearing No. 16 and dated October 30, 1889, in respect of these lands in favour of her son Andris with a *fidei commissum* in favour of his children. Partition actions bearing Nos. 3,198 and 3,508 of the District Court of Matara instituted in respect of these lands were consolidated and on June 13, 1905, interlocutory decree was entered declaring Dona Gimara entitled to a half share. By the final decree which was entered on May 14, 1907, Dona Gimara was declared, as and for her interest in these two allotments of land, entitled to the portion marked A in the plan of partition. It is this lot which is the subject of this action.

On November 27, 1907, Dona Gimara and her son Andris executed the bond No. 2,660 marked D 2 binding themselves to repay a sum of Rs. 500 borrowed and received by them and to secure the repayment of this sum Dona Gimara mortgaged and hypothecated the said lot A reciting as her title the decree in the partition action above referred to.

Three years later Dona Gimara for and in consideration of the sum of Rs. 2,000 sold and conveyed the land by deed No. 1,646 (D 3) to the mortgagee Johannes de Silva Weerasinghe reciting that she was selling the premises for the purpose of paying off the costs payable by her in the two partition cases and the debt on the mortgage bond No. 2,660.

The position taken up by the plaintiffs in the Court below and as set out in their plaint was that upon the execution of the deed No. 16 of October 30, 1889 (P 4), Dona Gimara was left only with the right to the possession and enjoyment of the lands referred to and that on the death of her son Andris in 1927 the premises by virtue of the *fidei commissum* imopsed on him vested in his children, the first and third plaintiffs. As to the partition decree which in 1907 declared Dona Gimara the owner in severalty of the lot A it was urged on the supposed analogy of *Baby Nona v. Silva* [1] and *Marikar v. Marikar* [2] that the *fidei commissum* imposed on Andris remained operative and unaffected by the decree.

On the plaintiff's own statement of the case, Dona Gimara after the execution of P 4 was neither a fiduciary nor a trustee but only an usufructuary. It is impossible to apply the principle of *Marikar v. Marikar* (*supra*) and the earlier case on the point except to the case of a person

[1] *(1906) 9 N. L. R. 251.* [2] *(1920) 22 N. L. R. 137.*

who while being vested with the legal title either as fiduciary or trustee has been declared by a partition decree to be the owner. If as the plaintiffs' say Dona Gimara was not the legal owner but only a fiduciary her position is no different to that of a person who in the absence of the true owner was declared by a partition decree to be the owner. The effect of the partition decree was to declare Dona Gimara the legal owner and since she was in fact neither a fiduciary nor a trustee the title she passed to the defendant's predecessor was absolute and unfettered.

It was urged however in appeal that the deed P 4 was not a deed which passed title to Andris with the reservation of a life interest in Dona Gimara but was a gift of the premises to Andris " after her death ". Counsel's submission was that when a person "gives after his death " the effect of the transaction is such that while the donor remains vested with the full *dominium* the title passes automatically to the donee on the death of the donor without further conveyance and presumably notwithstanding that the donor had in the meantime conveyed the premises to another.

Donations to take place " after the death of the donor " or " when the donor shall die " are known to the Roman-Dutch law. Such donations are distinguishable from donations *mortis causa;* they are irrevocable and are classified as donations *inter vivos.* In such cases death, it is said, is mentioned not with the view of making a donation *mortis causa* but with the view of indicating at what point of time the donor intends the property to be given over (*Voet XXXIX., 5, 4*). Such donations are only distinguishable from testamentary dispositions in that they are irrevocable. A donation even a donation *inter vivos* does not necessarily pass the *dominium* in the subject of the donation. When the donation is perfected by tradition the *dominium* passes. But if the donation has been effected by contract alone the donee must by appropriate action obtain delivery and clothe himself with the *dominium.*

In the case of a donation such as it is alleged this is, the donor clearly does not intend to part either with the *dominium* or the possession and consequently remains clothed with the full *dominium* though under a contractual liability which his heirs or his legal representative may be compelled to discharge. The donor remains the owner but in a contractual relationship which gives the donee a right on the death of the donor to claim that the subject of the gift be transferred to him.

What then is the effect of the partition decree in favour of Dona Gimara? It recognizes and confirms her title but at the same time converts it from an interest common in the two allotments of land into a title in severalty to the lot A. It may be—I express no opinion on the point—that if Dona Gimara died seized and possessed of lot A an action may lie against her legal representative for specific performance of the donation notwithstanding the entry of the partition decree in the interval. But when she sold and conveyed the lot A to which she was declared the owner in severalty the remedy of specific performance would not be available except possibly upon proof that the purchaser took with notice of the deed of donation. There is no evidence that the purchaser had such notice. It was suggested however that inasmuch as the deed was

registered the purchaser must be deemed to have had notice. The proposition that a person who purchases land must be deemed to have notice of other registered transactions relating to the land cannot be resorted to for the purpose of fixing a person with notice of all registered transactions prior in date to the entry of a partition decree. A partition decree, it has been said, is the start of a new title. A purchaser is not concerned with the state of the title prior to such a decree; he would not therefore ordinarily make a general search of the register or take note of any transactions prior thereto. He cannot reasonably be held to have had constructive notice of entries in the register prior to the partition decree on the faith of which he purchased the premises. This line of argument does not therefore avail the plaintiffs.

It remains to be considered whether the deed P 4 is a donation of the character referred to. At the commencement of the document we find the words " I do hereby give and grant unto the said Hewabadgamage Don Andris as a gift *inter vivos* the hereinafter mentioned premises . . . ." A description of certain allotments of land is next set out and is followed by the *habendum*—

> " To have and to hold the said premises with their and every of their appurtenances unto him the said Hewabadgamage Don Andris subject however to the following conditions:—
>
> 1. That this gift shall take effect after my death.
> 2. That the donee cannot alienate, sell, or encumber *the property gifted* and are not liable to be sold for any debt of his.
> 3. That the shares of lands gifted by me, should after the death of the donee descend to his children or their descendants by representation according to law."

The words at the commencement of the deed are words of grant; they import a present grant of the interests specified. The *habendum* again implies that there has been a grant but attaches certain conditions to the grant. Something was granted. If the words of the first condition " that this gift shall take effect after my death " be given the meaning implicit in counsel's contention nothing was granted and this is merely an agreement to give after death. But it is impossible to arrive at such a conclusion by any process of interpretation. There is here a clear and unmistakable grant of certain shares in the lands specified. The *habendum* directs that the donee shall have and hold the said premises. In the second condition of the *habendum* the donor refers to these lands as the " property gifted " and in the third as " the shares of lands gifted ". The intention of the donor to make an immediate gift of the premises is clearly manifested. It seems to me therefore that the words " that this gift shall take effect after my death " must and can be given an interpretation consistent with that grant and the intention of the donor manifested in the language of the deed. The premises having been granted the condition must in my opinion be interpreted as implying that it is only to take effect in possession after the donor's death. It reserves to the donor a life interest. This is how it was interpreted by

the parties to the deed at the time of the partition actions as appears from the answer filed and that is how the plaintiffs in this action interpreted it when plaint was filed.

Dona Gimara therefore had only a usufructuary interest and mistakenly or otherwise she was declared to be the owner by a decree which is binding on all the world. The title she passed thereafter is unimpeachable and those claiming under the deed of gift P 4 must fail.

The appeal is dismissed with costs.

Appeal dismissed.