1954 *Present :* **Gunasekara J. and de Silva J.**

MOHAMEDALY ADAMJEE *et al.*, Appellants, *and* HADAD SADEEN *et al.*, Respondents

*S. C. 72, with Application 203—D. C. Colombo, 5,951 L*

*Registration—Will—Probate—Failure to register it—Effect as against person claiming adverse interest under subsequently registered deed.*

*Fideicommissum—Claim by prescription as against fideicommissary—Burden of proof—Evidence Ordinance (Cap. 11), ss. 101, 103—Prescription Ordinance (Cap. 55), proviso to s. 3.*

*Partition Ordinance (Cap. 86)—Section 9—Finding of fraud and collusion—Final decree cannot be set aside on that ground.*

The non-registration of the probate of a will affecting immovable property renders it void as against a person claiming an adverse interest under a duly registered deed of a subsequent date. Therefore, where property of the estate

[1] *(1953) 55 N. L. R. 57.*

**is disposed of by a devisee, who is also an heir of the deceased, or is sold against him in execution, upon an instrument which is registered prior to the probate of the will, the transferee obtains, in respect of any share or interest to which the devisee would have been entitled by law but for the will, a title superior to that of the executor or a party claiming under him.**

**Where a plaintiff claims title to immovable property by prescriptive possession as against a fideicommissary, the burden is on him to prove the point of time when the fideicommissary acquired, under the fideicommissum, a right of possession to the property in dispute and to establish that from that time he (the plaintiff) has been in possession for a period of ten years or more.**

**Fraud and collusion on the part of the parties to a partition action does not entitle the person defrauded to an order setting aside the decree entered in that action ; his only remedy, according to section 9 of the Partition Ordinance, is an action for damages.**

APPEAL from a judgment of the District Court, Colombo.

*H. V. Perera, Q.C.*, with *S. J. Kadirgamar* and *B. S. C. Ratwatte*, for the plaintiffs appellants.

*E. B. Wikramanayake, Q.C.*, with *V. Arulambalam*, for the 1st to 8th, 13th, 21st, 29th to 31st, and 37 defendants respondents.

*Cur. adv. vult.*

February 10, 1954. GUNASEKARA J.—

In District Court Colombo Case No. 5,706/P, which was an action under the Partition Ordinance (Cap. 56), a decree was entered on the 30th April, 1950, declaring the respondents entitled to certain immovable property in Kollupitiya and directing a sale of the property under the Ordinance. On the 20th May, 1950, the appellants, who had not been parties to that action, instituted in the district court the action out of which this appeal arises, claiming title to the entire property and alleging that the respondents had obtained the decree in the partition action by fraud. They prayed that the district court should " set aside or vacate " that decree and declare that it was " null and void and of no force or effect in law " ; or, in the alternative, award them damages in a sum of Rs. 100,000. The learned district judge held that the appellants were entitled (up to the time of the decree in the partition action) to an undivided 1/16 share of the property and to compensation for certain improvements effected by them, and that the respondents " wrongfully, unlawfully, fraudulently and collusively " omitted to make them parties to the partition action or give them notice of it and that they obtained the decree in question by fraud. Upon this footing he awarded the appellants damages in a sum of Rs. 29,687·50 and ordered the respondents to pay them half the costs of the action. He held that the appellants were not entitled to have the decree in the partition case set aside, or to have it declared null and void or to be declared owners of the premises in question.

The property was originally part of the estate of one Idroos Lebbe Marikar, who died in 1876 and whose last will was admitted to probate on the 29th May of that year. In accordance with directions contained in

the will the estate was divided among those who would have been the intestate heirs in such a manner that each received the equivalent in value of what would have been his or her share upon an intestacy. In that division this property was conveyed by the executor, by the deed No. 2,575 of the 14th September, 1888, attested by Don Simon Lewis, Notary Public, to Savia Umma, a daughter of the testator. The conveyance was made subject to conditions that were set out in certain clauses of the will, which were also reproduced in the deed. It has been held by the Privy Council in *Siti Kadija v. de Saram* [1] (where the same will was construed) that the effect of these clauses was to create a fideicommissum in favour of the children and grandchildren of the devisees. Later, in an appeal in the partition action, it was held by this court that the property was subject to a single fideicommissum and that the time of the gift-over was the death of the last of Savia Umma's children. The learned district judge holds that Savia Umma and her children are all dead, and that the respondents are her grandchildren. The appellants have not canvassed this finding of fact or the view that the property was subject to a fideicommissum from which it was freed only upon the death of Savia Umma and all her children.

In January, 1916, the property was sold in satisfaction of a mortgage decree entered against Savia Umma and her husband, and was purchased by the mortgagee, Leonora Fonseka, to whom it was conveyed by a fiscal's conveyance dated the 29th March, 1916. This conveyance describes the property by reference to a "diagram or map annexed to the deed No. 2,575 dated 14th September, 1888, attested by Don Simon Lewis of Colombo, Notary Public". Leonora Fonseka sold the property on the 16th August, 1919, to Adamjee Lukmanjee, whose interests have devolved on the appellants.

The fiscal's conveyance of 1916 and the other deeds in the appellants' chain of title have been duly registered, and the probate of 1876 and the executor's conveyance of 1888 have not been registered. Upon this ground the learned district judge holds that the probate is void as against parties claiming an adverse interest under the fiscal's conveyance and therefore the appellants were "entitled to claim the intestate rights of Savia Umma from Idroos Lebbe Marikar free of the fideicommissum created by his Last Will by virtue of due prior registration", and that the interest to which they were so entitled was a 1/16th share of the property. He rejected a contention that what they were entitled to upon this view was "the entirety of the property in question that was allotted to Savia Umma at the division of Idroos Lebbe Marikar's property amongst his heirs".

If the learned judge is right in his view that the last will is void as against the appellants, it seems to me that he is also right in holding that the interest they became entitled to was no more than the share that Savia Umma would have inherited (free of the fideicommissum) from Idroos Lebbe Marikar if the latter had died intestate. It was held in *Fonseka v. Carolis* [2], upon a point of law reserved for consideration by a Bench of three Judges, that the non-registration of the probate of a will affecting

[1] [*1946*] *1. C. 208; (1946) 47 N. L. R. 171.* [2] *(1917) 20 N. L. R. 97.*

immovable property will render it void as against a person claiming an adverse interest under a duly registered deed of a subsequent date. Referring to this decision de Sampayo J. said in the same case [1],

> " The effect of the decision on the point referred to the Full Bench, so far as this case is concerned, is that where property of the estate is disposed of by a devisee, who is also an heir of the deceased, or is sold against him in execution, upon an instrument which is registered prior to the probate of the will, the transferee obtains, in respect of any share or interest to which the devisee would have been entitled by law but for the will, a superior title to that of the executor or a party claiming under him. "

There is no dispute as to the extent of the share of her father's estate to which Savia Umma would have been entitled but for the will. It is contended for the appellants, however, that that by virtue of the fiscal's conveyance of 1916 they are entitled to claim not merely the share that Savia Umma would have inherited in this property as an intestate heir but the shares of the other heirs as well, upon the footing that there had been cross-conveyances among all the heirs at the division of the estate. It is also argued, upon the authority of the decision in *Fonseka v. Fernando* [2], that the will is void only *quoad* the adverse interest claimed by the appellants, and that Savia Umma must be regarded as having been allotted the property in question free of the fideicommissum in a division of the estate among the intestate heirs. It seems to me that to treat the executor's conveyance of the property to Savia Umma as being in effect a conveyance by the other heirs of a 15/16ths share to her would be to take an altogether unreal view of the transaction. I am therefore unable to accept the appellant's contention on this point.

Mr. Wikramanayake has argued that the interest that can be claimed by virtue of the fiscal's conveyance is not adverse to the probate, and that therefore the learned judge has erred in holding that the will is void against the appellants. In the view that I take of the effect of this finding it is not necessary to consider the argument that the will is not void against the appellants. The respondents have not appealed from the learned district judge's decision that the appellants become entitled to a 1/16th share of the property.

The appellants have also set up a title by prescription. The learned district judge holds that they and their predecessors have been in exclusive and uninterrupted possession of the property from 1919, but that they have failed to prove a title by prescription inasmuch as they have not proved possession for a period of ten years after the accrual of the respondents' right of possession. The latter were fideicommissaries, and, in terms of the proviso to section 3 of the Prescription Ordinance (Cap. 55), the period of ten years " shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute ". The time when the respondents acquired this right has not been established, and the learned judge holds that the burden of proof on that issue lay on the appellants. It is contended for the appellants that this finding is erroneous.

[1] *(1917) 20 N. L. R. 97, at page 108.* [2] *(1912) 15 N. L. R. 491.*

The argument for the appellants is that it was not necessary for them to prove that their possession was adverse to any particular person, but that it was sufficient to prove as regards the character of their possession that it was possession *ut dominus* ; and when they had proved that they had such possession for a period of ten years or more, the burden shifted to the respondents to prove that the appellants did not have possession for ten years after the respondents had acquired their right of possession.

I am unable to accept this argument. Section 3 of the Prescription Ordinance provides that the possession by a defendant for ten years that must be proved in order to entitle him to a decree in his favour is possession " by a title adverse to or independent of that of the claimant or plaintiff ; " and, conversely that the possession by a plaintiff for ten years that must be proved to entitle a plaintiff to a decree in his favour is possession " by a title adverse to or independent of " that of the defendant. It seems to me, therefore, that before it can be held that the appellants have established a title by prescription there must be proof that they possessed the property adversely to the respondents for a period of ten years or more. There appears to be support for this view in two cases that were cited to us ; while no authority was cited in support of the appellants' contention. In *Raki v. Lebbe* [1] a decision that the predecessor of the respondents in that case had a title by prescription was based on a finding that his possession was adverse *as against the appellants*. In *Abdul Cader v. Habibu Umma* [2] it was held that (to quote the head note) " possession which commenced before the accrual of a fideicommissary's right is not adverse against the fideicommissary ". Mr. H. V. Perera contends that the headnote is misleading where it uses the expression " adverse *against the fideicommissary* ". With respect, I disagree. The idea that the possession that had to be proved by the defendants who were setting up a title by prescription was possession that was adverse to the plaintiffs (who had been fideicommissaries) is implicit in both the judgments delivered in that case. Lyall Grant J. said [3] " It seems to us clear on the Ordinance that a *fideicommissarius* does not become an adverse claimant under the second proviso of section 14 [4] until he acquires a right of possession. If this be so, there is no *adverse possession as against the present plaintiffs* for thirty years, and there is nothing to take the case out of the ordinary rule that the ten years required to establish a prescriptive possession do not begin to run until the adverse claimant has attained majority ". Jayawardene A.J. said : [5] " Mr. Hayley's argument requires that adverse possession commenced before the accrual of the fideicommissary's right should be regarded as *adverse possession against the fideicommissary* himself. That would certainly be a contravention of the principle laid down in *Casim v. Dingehamy* [6] ".

If the possession that had to be proved before the appellants could get judgment was possession that was adverse as against the respondents, then both under section 101 and under section 103 of the Evidence Ordinance (Cap. 11), the burden of proving such possession lay on the appellants. As possession could be adverse as against the respondents only from the time

[1] *(1912) 16 N. L. R. 138.*
[2] *(1926) 28 N. L. R. 92.*
[3] *at page 94.*
[4] *Now Section 13.*
[5] *at page 96.*
[6] *(1906) 9 N. L. R. 257.*

of the accrual of their right of possession, it follows, I think, that the burden of proving when that right accrued was on the appellants. As was pointed out in *Chelliah v. Wijenethan* [1], " where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights ". I agree with the learned district judge's view that the appellants have failed to prove a title by prescription.

A further contention that was urged in support of the appeal was that the decree in the partition action was a nullity or at any rate was not binding on the appellants as a decree that was conclusive in terms of section 9 of the Partition Ordinance. It was urged that it had not been given in the manner provided in the Ordinance, in that there had been no proper investigation of the title to the property. In our opinion the learned district judge was right in his conclusion that the decree was not open to this criticism, and we therefore did not call upon the learned counsel for the respondents to address us on this ground of appeal. Nor did we call upon him to reply to a further argument, that the finding of fraud and collusion on the part of the respondents entitled the appellants to an order setting aside the decree in the partition action. Mr. Perera submitted that it was a general principle of the Roman-Dutch Law that fraud vitiates any transaction that is tainted by it, and that a decree that has been obtained by fraud can be set aside on that ground where no other remedy is available. This common law remedy, he argued, had not been taken away by statute : section 9 of the Partition Ordinance did not provide that the decree must stand notwithstanding that it may have been obtained by fraud, but only made it conclusive against all persons while it stood, and the proviso merely saved the common law right of a party who might be prejudiced by a partition or sale to recover damages in certain circumstances in those cases in which the decree was not aside. This view of the effect of section 9 is in conflict with a current of authority that is binding on this court. It is sufficient to refer to one of the series of decisions on the point, *Jayawardene v. Weerasekera* [2], where Sir Alexander Wood Renton said :

> " It is as well settled as any point of law can be that a partition decree is conclusive against all persons whomsoever, and that a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the court in the partition proceedings, is not entitled on that ground to have the decree set aside, his only remedy being an action for damages. "

The appeal must be dismissed with costs, and Application No. 203, which is an application for revision of the proceedings in the partition action, must be refused.

DE SILVA J.—I agree.

*Appeal and Application dismissed.*

[1] *(1951) 54 N. L. R. 337 at 342 ; 46 C. L. W. 27 at 31.*
[2] *(1917) 4 C. W. R. 406.*