Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Grenier.

1909.
November 17.

ABEYESUNDERE *v.* ABEYESUNDERE.

D. C., Galle, 8,707.

Partition—Land subject to fidei commissum.

A land which is subject to a *fidei commissum* may be partitioned or sold under the Partition Ordinance.

Obiter : HUTCHINSON C.J. — Where it is not practicable to partition the land and a sale is ordered under the Partition Ordinance, it might be right to have a petition presented under Ordinance No. 11 of 1876 and to make the order under both the Ordinances, so that the purchase money may be dealt with in one of the ways directed by the latter Ordinance.

APPEAL from a judgment of the District Judge of Galle. This was an action to partition a land alleged to be subject to a *fidei commissum*. The will by which the *fidei commissum* was created contained a direction that the management of the estate should be left entirely in the hands of the first defendant, and that he be allowed a salary as superintendent, independent of his own one-third share. The District Judge ordered a partition as prayed for, subject to the *fidei commissum ;* the decree further directed that each divided one-third should be liable to pay to the first defendant Rs. 100 monthly by way of salary for the management.

The first defendant appealed.

Bawa (with him *H. A. Jayewardene*), for the appellant.—The Full Court has held that a *fidei commissum* property cannot be partitioned or sold under the Partition Ordinance (*Ramanathan, 1877, 304*).

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The Ordinance No. 11 of 1876 was in operation at the time of the decision of that case. That decision is binding. The first case to indicate the opinion that *fidei commissum* property may be partitioned is *Sathienader v. Mathes Pulle.*[1] That case converted a partition action into an application under Ordinance No. 11 of 1876. *Baby Nona v. Silva*[2] could not have the effect of over-ruling Full Court case reported in *Ramanathan, 1877.* In *Baby Nona v. Silva*,[2] Voet appears to have been misunderstood. The Privy Council has expressly held in *Tillekeratne v. Abeysekera*[3] that the Partition Ordinance is "limited to cases in which the persons interested, whether as joint tenants or tenants in common, are full owners, and are not burdened with a *fidei commissum.*" Section 18 of Ordinance No. 10 of 1863 refers to property "held in common." This land is not held in common, there is a right of survivorship created by the instrument. Counsel also cited *De Saram v. Perera,*[4] *2 Burge 677, 678,* and *1 Nathan 391.*

Walter Pereira, K.C., S.-G., for the respondent (plaintiff).—The case reported in *Ramanathan, 1877,* was instituted before Ordinance No. 11 of 1876 was proclaimed (see *3 N. L. R. 200*). Section 18 of the Partition Ordinance has no application. *Baby Nona v. Silva*[2] has reviewed all previous authorities, and is a binding decision. Voet has been wrongly printed in the report of *Baby Nona v. Silva*,[2] but the original passage in Voet bears the construction put upon it by Lascelles A.C.J.

Bawa, in reply.

Cur. adv. vult.

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The question which has been argued on this appeal is whether the land, to the possession of which the plaintiff and the defendants are entitled, subject to a *fidei commissum* in favour of their issue, can be partitioned under the Partition Ordinance, No. 10 of 1863.

The District Judge having held that, under the will under which the parties claim, each of them is entitled to one-third of the land, subject to a *fidei commissum* in favour of their children and grandchildren, allotted the land and ordered partition accordingly. The will also contains a direction that the management of the estate should be left entirely in the hands of the first defendant Bennett, and that he be allowed a salary as superintendent, independent of his one-third share; and the decree directs that each divided one-third shall be liable to pay to the first defendant Rs. 100 monthly

[1] *(1897) 3 N. L. R. 200.*
[2] *(1906) 9 N. L. R. 251.*
[3] *(1897) 2 N. L. R. 313.*
[4] *(1899) 3 Br. 188.*

from the date of partition, his salary having been agreed upon at Rs. 300 a month.

The first defendant appeals, and contends that there is no jurisdiction to order a partition of land which is thus subject to a *fidei commissum*. His counsel also urged that there would be great practical difficulty about the management if the land is partitioned, because he has a right to manage the whole of the land, and a partition would necessitate his keeping three sets of books. I do not, however, see how effect can be given to the latter objection, for if there is jurisdiction to order partition or sale, the plaintiff has a right to compel it. But the objection that there is no jurisdiction is not so easy to dispose of.

The Ordinance enacts that "when any landed property shall belong in common to two or more owners," one or more of such owners may compel a partition or sale of it. The plaint is to state "the names and residence of all the co-owners ..... and the extent of their respective shares or interests."

Apart from authority, I should have said that the Legislature in this enactment was thinking only of cases where all the persons who were together entitled to the entire dominium of the whole of the land were in existence, and capable of being cited to appear, and of receiving their shares of the land, if it were partitioned, or of the purchase money of it, if it were sold. It did not provide for the case where there is a *fidei commissum* in favour of persons not yet ascertained or not yet in existence, because it did not think of it; if it had thought of such cases, it would have either expressly excluded them, or expressly provided for them by directing, for example, how the purchase money of land sold should be disposed of in such cases, and by explaining whether persons who are only entitled in remainder and not in possession can institute proceedings under the Ordinance.

It may be, however, that the Legislature has enacted a law whose terms are wide enough to cover a case which was not contemplated. And the words which I have quoted, "when any landed property shall belong in common to two or more owners," are wide enough to cover *fidei commissa*. Where A and B are entitled to a land for life, with remainder to C and D, it belongs to those four persons in common, although their interests are not equal. That is so if we take the ordinary meaning of the words "belong" and "owner," although the Ordinance makes no provision for the case of *fidei commissa* such as would have been natural if it had thought of them.

In a case which is very shortly reported in *Ramanathan, 1877, 304*, a Full Court held that land which is subject to a *fidei commissum* could not be partitioned or sold under the Ordinance. In *Sathianader v. M. Pulle*,[1] Lawrie A.C.J. and Browne A.J. said that the

[1] *(1897) 3 N. L. R. 200.*

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difficulty felt by the Court in the case in *Ramanathan* had been removed by Ordinance No. 11 of 1876, and they held that land which was subject to a *fidei commissum* could be sold under the Partition Ordinance. In *De Saram v. Perera*,[1] Bonser C.J. and Lawrie J. affirmed a decree dismissing a claim for partition—the report does not show upon what grounds—and Lawrie J. remarked that he would not say that property subject to a *fidei commissum* may not be sold or partitioned. In *Appuhamy v. Hudu Banda*,[2] Middleton J. held, although this was not the main question in the case, that a life owner was not entitled to partition under the Partition Ordinance. He does not refer to any of the authorities, but merely says : " In my opinion he is not entitled, as the land does not belong to him in common with other owners, according to section 2." *Baby Nona v. Silva*[3] was an action claiming title to land and to recover possession. The Court, Lascelles A.C.J. and Middleton J., held that the land was subject to a *fidei commissum*. There had been a partition decree in a former action, by which the land had been partitioned amongst the several limited owners, and it was argued that this decree had destroyed the *fidei commissum*. The Chief Justice reviewed the authorities, and held that property which is subject to a *fidei commissum* may be partitioned, and that the partition decree did not destroy the *fidei commissum*. And Middleton J. appears to think that in such a case there was power to order partition.

In this state of the authorities, I feel bound to hold that land which is subject to a *fidei commissum* may be partitioned or sold under the Partition Ordinance. The power is very useful where it is practicable to partition the land ; where that is not practicable, and a sale is ordered under the Partition Ordinance, it might be right—this is only a suggestion, for the question does not arise in this case—to have a petition presented under Ordinance No. 11 of 1876 and to make the order under both the Ordinances, so that the purchase money may be dealt with in one of the ways directed by the latter Ordinance.

So far I have dealt with the case on the assumption that the District Court was right in deciding that this will creates a *fidei commissum*. But it does not seem to me to be quite clear that there is any *fidei commissum*. The material words of the will are as follows: " We give and devise to our three sons, Frederick, Bennett, and Samuel, all that tea, coconut, and citronella estate now known as Freds Ruhe, ... share and share alike ; ..... in the event of our minor son Samuel dying without issue, his one-third share of the estate should devolve in equal shares on our two sons, and the children and other descendants of our two sons if our sons be dead at the time ; subject, however, to the conditions that they

[1] *(1899) 3 Br. 188.* [2] *(1903) 7 N. L. R. 242.*
[3] *(1906) 9 N. L. R. 251.*

or their issue shall not sell, mortgage, or otherwise alienate the above-named estate, but shall possess the same during their lives." So that with regard to the shares of Frederick and Bennett, there is an absolute gift to them, and no gift to their issue, but only a condition that " they or their issue " shall not alienate, but shall possess during their lives. The will does not say what is to become of their shares if they die without having had issue, or any issue who survive them ; in that case the absolute gift to them would probably remain, and the prohibition against alienation, which is inconsistent with it, would be disregarded. With regard to Samuel, if he dies " without issue," the devolution of his share is provided for, if his two brothers or perhaps any of their issue survive him ; but if he should leave any issue surviving him, or perhaps if he should ever have a child, or if his brothers should both die childless before him, there is an absolute gift to Samuel (with a condition against alienation, if the word " they " in the last sentence above quoted includes him as well as his brother).

I think that the best way to deal with the shares allotted to each of the three brothers is not to attempt to define now, in the absence of persons who may possibly hereafter become entitled to any of the shares under the will, what is the precise effect of the *fidei commissum*, if any, but to declare that each one-third is to be held by the party to whom it is allotted, subject to the *fidei commissum*, if any, created by the will. The decree should be amended accordingly. And I think that the order that the first defendant should pay the plaintiff's costs of contention should be struck out, but that the appellant should pay the plaintiff's costs of this appeal.

GRENIER J.—

The testator had three sons, Frederick Emmanuel, Bennett Joseph, and Samuel John Christopher. The last-named was a minor at the date of the execution of the will, and the first two were presumably of full age. The testator seems to have contemplated, for what reason it is difficult to say, the death of Samuel John Christopher, and he made the following disposition, in case such an event happened, in regard to the estate in question. He desired and directed by his will that Samuel John Christopher's one-third share should go to his two brothers. If the two brothers were dead at the time of Samuel John Christopher's death, and he died without leaving issue, his one-third share was to go to his two brothers and their children and " other descendants,"—meaning I suppose descendants *ad infinitum*,—subject to the condition that neither the two surviving brothers during their lifetime, nor their children and " other descendants " after their death, should sell, mortgage, or alienate the estate left jointly to the three brothers. The testator,

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as far as I can gather his intention from the rather obscure language employed in the will, made a special disposition in regard to Samuel John Christopher's share in case of his death, directing how it should devolve, in the first instance, on his two brothers, and if they were dead, on their children and "other descendants"; and then he proceeded to tie up indefinitely the whole of the property, whatever might happen, by enjoining a prohibition against alienation indiscriminately on his two sons, Frederick Emmanuel and Bennett Joseph, and their children and "other descendants," Samuel John Christopher being apparently left out of account altogether. It is difficult to say who were to be the *fiduciaries* and who the *fidei commissaries*.

I humbly think that, whatever may have been the intention of the testator, the words of the will are not sufficiently clear and precise to impose a valid *fidei commissum* under the Roman-Dutch Law on the property in question, and the presumption in favour of a free estate must therefore prevail.

The case was, however, presented to this Court on the footing that the property was subject to a valid *fidei commissum*, and the chief question argued was whether it could be partitioned or sold under the provisions of the Partition Ordinance. The weight of the authorities referred to by my Lord is in favour of the affirmative proposition. I agree to the order amending the decree, as also to the order as to costs.

Appeal dismissed; decree amended.