1931

Present : **Lyall Grant J. and Maartensz A.J.**

GOONERATNE *v.* BISHOP OF COLOMBO.

135—*D. C. Matara*, 4,918.

Partition—Decree entered without investigation of plaintiff's title—Not conclusive—Property subject to fidei commissum—*Devise under last will—Probate not registered—Deed of partition among heirs unregistered—Absolute sale by transferee—Adverse interest—Registration—Ordinance No.* 10 *of* 1863, *s.* 9.

By their last will, probate of which was not registered, husband and wife devised all their immovable property to their six children subject to a *fidei commissum* in favour of their children, After the death of the parents, the children by an indenture, also unregistered, conveyed to each other entire lands in lieu of the undivided shares given them, subject to the terms of the will. The property in dispute fell to the shares of two sons, W and D.

In a partition action instituted by W against D, a decree was entered, without any investigation of the title of the parties, declaring each of them absolutely entitled to a half share of the land. The property was sold under the decree and brought by W, who sold it to the defendant. The defendant duly registered his deed. D died unmarried, and the plaintiff, who was one of the fidei commissary heirs under the last will, sued the defendant for declaration of title to 1/30 share of the land.

Held, that the decree for sale entered in the parition action without investigation of the title was not conclusive.

Held, further, hat the registration of the defendant's conveyance did not defeat the right of the plaintiff.

THIS was an action for declaration of title to 1/30 share of a land called Alutwalauwewatta. The land belonged to William Dionysius Tillekeratne and his wife Cornelia, who by their last will, No. 15,140, dated January 26, 1867, devised their immovable property in equal shares to their children subject to a *fidei commissum*. The children who inherited were Francis, Dionysius, Emily, Richard, Lambert, and Walter. They, by an indenture No. 1,507 dated December 20, 1889, conveyed to each other entire lands in lieu of their undivided shares subject to the terms of the will. By this deed the land in question fell to the share of Walter and Dionysius. On September 8, 1891, Walter filed a partition action against Dionysius and they were declared absolutely entitled, each to a half share of the land. A decree for sale was entered and the property was purchased by Walter, who sold it to the defendant's predecessor in title. Dionysius died unmarried.

The plaintiff, who was one of the three children of Emily, sued the defendant for declaration of title to 1/30 share of the land.

The learned District Judge held that the defendant had acquired prescriptive title to the land.

H. V. Perera (with him *Soertsz*), for plaintiff, appellant.—It is admitted that the last will created a *fidei commissum* over the entire property. If the respondent cannot rely on the certificate of sale in the partition action or on registration the appellant's title is superior. The decree for partition is clearly bad. It is of consent. There was no investigation of title. There is a *cursus curiae* that such a decree is bad. It then follows that the certificate of sale gave no title in respect of the share of Dionysius William. Counsel cited the following cases :—*Manchohamy v. Andris* [1], *Wickremaratne v. Fernando* [2], *Peris et al. v. Perera et al.* [3], *Batagama Appuhami v. Dingiri Menika* [4], *Fernando v. Perera* [5], *Fernando et al. v. Mohamadu Saibo et al.* [6], *Silva v. Paulu* [7], *Nagamuttu v. Ponnampalam et al.* [8], *Punchi Appu v. Sanara*

[1] (1890) 9 *S. C. C.* 64.
[2] (1895) 1 *Matara Cases* 19.
[3] (1896) 1 *N. L. R.* 362.
[4] (1897) 3 *N. L. R.* 129.
[5] (1898) 1 *Tambyah* 71.
[6] (1899) 3 *N. L. R.* 321.
[7] (1898) 4 *N. L. R.* 174
[8] (1903) 4 *Tambyah* 29.

Sewa[1], *Visvalingam v. Thampoo*[2], *Chelliah v. Tamber*[3], *Mather v. Thamotharam*[4], *Ferreira v. Haniffa et al.*[5], *Ukku Banda v. Kiri Banda and Dingiri Menika*[6], *Fernando v. Shewakram*[7], *Siwanathan Chetty v. Talawasingham*[8].

If the certificate of sale gives not title, no question of registration arises. The interests are not adverse—the non-registration of the probate is immaterial. Deed No. 1,507 gave a half share to Dionysius William subject to the terms of the last will and the respondent's title in regard to that share is subject to the terms of the will.

Hayley, K.C. (with him *N. E. Weerasooria*), for the defendant, respondent.—Where the plaintiff's title is admitted and there is no dispute, an in vestigation is unnecessary and a decree of consent is good. Section 4 of the Partition Ordinance nowhere provides for an investigation in such a case. The words of the statute are clearly otherwise and judicial interpretations cannot override the statute, if the statute is clear. The cases cited proceed on the assumption that an investigation is necessary. See *Jayewardene on Partition, pp.* 79–81. The decree for sale was good and the certificate of sale gave title. The probate of the last will was not registered. The interests are adverse. The respondent's deeds are registered and the probate is not registered. Respondent's title clearly prevails (see *Fonseka v. Cornelis*[9], *Elapata v. Rodrigo*[10]). The respondent is a *bona fide* purchaser for value upon a decree that was not set aside and his title is superior (*Perera v. Lebbe*[11]).

[1] (1904) *S. C. Minutes of January* 1, 1904
[2] (1905) 5 *Tambyah* 49
[3] (1904) 5 *Tambyah* 52
[4] (1903) 6 *N. L. R.* 246
[5] (1912) 15 *N. L. R.* 445
[6] (1917) 4 *C. W. R.* 39
[7] 1917) 20 *N. L, R.* 27
[8] (1927) 28 *N. L. R.* 502
[9] 20 *N. L. R.* 97
[10] 24 *N. L. R.* 175
[11] 19 *N. L. R.* 308

H. V. Perera, in reply.—The *cursus curiae* should be followed in any event. The partition decree is bad as there was no application under the *Entail and Settlement Ordinance, No.* 11 *of* 1876.

June 19, 1931. LYALL GRANT J.—

The plaintiff, appellant, sued the defendant, respondent, to be declared entitled to 1/30 of the premises described in the plaint. The original owners of the land in question were William Dionysius Tillekeratne and his wife, Angenetta Cornelia Philips Panditaratne, who by a joint last will dealt with this and other properties creating a *fidei commissum* in respect of them in favour of their children and children's children and beyond.

They had six children, Dionysius William, Walter Clement, Amelia Cornelia and three others. The fatehr died in 1857 and the widow in 1889. The will was duly proved. The said six children entered into a deed of partition and exchange and entered into the posession of their respective shares subject to the *fidei commissum* imposed by the testators and, by the deed I have referred to, the premises in question devolved on Dionysius William and Walter Clement, who were two of the said heirs.

The will was the subject of a case which came before this Court in 1907, *Tillekeratne v. Silva*[1], where it was held that the will created one single *fidei commissum* over the whole estate, and that on the death of one of the children his share devolved on the surviving children according to the rule of *jus accrescendi*.

The deed of exchange was dated December 20, 1889, soon after the death of the widow. Dionysius William died unmarried in 1897 and his share devolved in equal shares on his brothers and sisters.

In 1891 Walter Clement instituted a partition action against his brother Dionysius William in respect of this land. The proceedings in that case are made an exhibit in the present case and it appears that the only parties to the partition

[1] 10 *N. L R.* 214

action were the two brothers. That case was filed on September 8, 1891. On November 11 there is a journal entry that the defendant was present and admitted the correctness of the libel and the sale of the land.

A Commissioner was appointed to sell the land ; it was bought by Walter Clement, the plaintiff in the partition action, and certificate of sale under section 8 of the Partition Ordinance was issued to him. Walter Clement thereafter sold the land to the Right Reverend R. S. Copleston, the defendant's predecessor in office, by a deed of December 18, 1893. That deed was registered.

It may here be noted that neither the probate of the will nor the deed of exchange had been registered. It is upon this registered deed that the defendant's title is based and he says that by it he is the present owner of the property. The plaintiff on the other hand contends that the partition action was a collusive one ; that the District Judge omitted to take the essential preliminary step of investigating the title of the claimants of the land and that in consequence of this omission his decree cannot prevail against the *fidei commissarii* whose rights to the land emerged at a subsequent date.

The plaintiff is a son of Amelia Cornelia and the plaintiff's case is that when Dionysius William died the plaintiff's mother, his sister, got 1/10 of the land subject to the *fidei commissum* and that on her death in March, 1920, the plaintiff as one of the three children became entitled to a 1/30 share. The present action was brought on July 12, 1929, and it is therefore within the prescriptive period.

The issues tried were :—

(1) Does the last will and testament No. 15,140 create a valid *fidei commissum* ? If so, in favour of whom ?

(2) If so, was the property in question liable to be sold under the provisions of the Partition Ordinance ?

(3) If so, was there a compliance with the requirements of the said Ordinance such as would result in a valid sale ?

(4) Did the interests of Dionysius William pass on the sale held under the Partition Ordinance to Walter Clement ?

(5) Did Amelia Cornelia become entitled to any share on the death of Dionysius William issueless ?

(6) If so, to what share ?

(7) What share is the plaintiff entitled to ?

(8) Have the defendants acquired a prescriptive title ?

(9) Is the defendant entitled to claim compensation in respect of improvements from the plaintiff ?

(10) Is the defendant entitled to *jus retentionis* in respect of these improvements ?

(11) Are the last will and probate, not being duly registered, void as against the claim of the defendant to be absolutely entitled to the said property on the deeds pleaded in the answer and duly registered ?

and there is a footnote to the last issue that if the plaintiff is entitled to damages, it is agreed that such damages be Rs. 20 per year, and that it was further agreed that the total value of the improvements be assessed at Rs. 3,600 for the purpose of issue No. 9 and that the plaintiff's liability be calculated on that basis.

The learned District Judge made a preliminary finding after hearing counsel, and after some formal evidence was recorded, a final order was made and the issues were answered in detail.

The answers to the issues were as follows :—

(1) Yes. In favour of the children of the testators and their children's children.

(2) Yes. Properties subject to *fidei commissum* can be dealt with under the Partition Ordinance.

(3) There was no proper investigation of title, but under the circumstances mentioned in the body of the judgment, I am of opinion that the sale is binding on the heirs of the defendant in the partition case.

(4) Yes, they did. Even if it be held that the interests did not pass to Walter Clement, the defendant will be entitled to them by virtue of prescriptive possession.

(5) No.

(6) Nil.

(7) Nil.

(8) Yes, the defendant has acquired prescriptive title.

(9) Yes. If the plaintiff were declared entitled to the share claimed by him.

(10) Yes. Even according to the plaintiff he is the owner of a half share. On his deeds he could honestly believe that he is the owner of the land.

(11) This issue has been discussed in the body of the judgment. The deeds of the defendants are duly registered while the last will and the probate are unregistered. The defendant can ignore the *fidei commissum* and claim title to the land by virtue of prescriptive possession alone.

The main contention of counsel for the appellant was that the judgment on the third and fourth issues was wrong. The argument to a considerable extent rested on the construction to be placed on section 4 of the Ordinance.

Counsel for the respondent admitted that he could not support the reasoning of the learned District Judge who had treated the plaintiff as an heir of Dionysius.

He admitted that the plaintiff was the heir, not of Dionysius William, but of the original testators who created the *fidei commissum*.

He, however, defended the conclusion arrived at on the ground that there is no provision in the Partition Ordinance compelling the Court to make inquiry into the title of the corpus where the defendant appears and consents to judgment.

Section 4 provides that the Court shall, where the defendant makes default in appearance, hear evidence in support of the plaintiff's title, and it further provides that if the defendant or any of them appear and dispute the title of the plaintiff, the Court shall proceed to inquire in to the claims of all the parties interested.

The section makes no provision for a case such as here arises. Mr. Hayley's argument was that in such a case the procedure laid down by the Civil Procedure Code should be followed and that a judgment should be entered by consent without any necessity of examining title.

He referred us to the case of *Nonohamy v. De Silva*.[1] There it was held by Burnside C.J. and Dias J. that a partition decree is conclusive against all persons whomsoever, and a person owning an interest in the land partitioned, whose title has by fraudulent collusion between the parties been concealed from the Court in the partition proceedings, is not entitled on this ground to have the decree set aside, his only remedy being by an action for damages. It is not clear from the report of this case whether the Court had made any inquiry into the title of the parties to the suit.

Counsel referred to *Jayewardene on Partition, p.* 79, where Mr. Jayewardene argues that according to section 4 of the Ordinance partition decrees can proceed on admissions. Mr. Jayewardene however admits that there is a series of decisions laying down principles to be followed by the Court in respect of partition suits, and that one of the principles which these decisions lay down and which has become a fundamental principle in the working of the Ordinance is that " no decree in a partition suit should proceed on admissions. . . . . "

[1] 9 *S. C. C.* 198.

If decree can be entered by consent, it seems to me that the purpose for which the Ordinance was passed would be defeated. The purpose of the Ordinance undoubtedly is to partition land among its true owners. It seems to follow that it is the duty of the Court before entering up decree to satisfy itself that the parties appearing before it have a title to the land. The Ordinance is not intended for the purpose of vindicating title to land.

Where title is disputed, the proper course is to bring an *actio rei vindicationis*. Apart however from the way in which one might be disposed to interpret the Ordinance, if the matter came before the Court for the first time, one has to consider what has been the course adopted by the Courts in this matter for nearly seventy years.

Counsel for the appellant has referred us to a long series of cases commencing soon after the date of the Ordinance in which this Court has consistently held that it is the duty of the District Court in every case of partition to inquire into the title of the parties before it. It is difficult to think that if the Court had interpreted section 4 in the narrow sense now contended for by the respondent, the law would not ere now have been amended.

The Partition Ordinance creates a special jurisdiction. It gives the Court powers which it would otherwise have. The Court is empowered to take away from a man his divided share in land and in lieu thereof to give him a piece of land which he may not desire. If it is the law that the Court can give to parties land on their mere assertion that they between them are entitled to it, and if it be the case under the Partition Ordinance that the title so given is good against the whole world, it is obvious that grave injury may be caused to innocent third parties.

Mr. Perera referred to a long series of decisions on the precise point now before us. In *Peris v. Perera*[1] Bonser C.J. stated at page 367 as follows :—

> It is to be observed that no conveyances are required as in the case of partitions made by the English Court of Equity. The party gets his title from the decree of the Court awarding him a definite piece of land. So Justinian lays down :—*Quod autem istis judiciis* (i.e., *Judiciis Communi Dividundo*) *Alicui adjudicatum sit, id statim ejus fit, cui adjudicatum est.* (*Institutes IV.*, 17, 7.)
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> Whether or not the judgment be binding on the true owner who is not a party to the suit, it is obvious that the Court ought not to make a decree, except it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The Court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties.

The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for unless he makes out his title, his action cannot be maintained ; and he must prove his title strictly, as has been frequently pointed out by this Court . . . .

Collusion between plaintiffs and defendants is always possible in these cases, and therefore the District Judge should take care that the inquiry is not a perfunctory one. It is only after he is reasonably satisfied that all the owners who can be found are parties to the action, using, if necessary, the power given him by section 18 of the Civil Procedure Code, that he should make his decree declaring that the parties are entitled to certain aliquot shares, and directing a partition or sale, as the case may be . . . .

In *Mather v. Thamotheram Pillai*[2] it was held that a partition suit is not a mere proceeding *inter partes* to be settled of consent, or by the opinion of the Court

[1] 1 *N. L. R.* 362. [2] 6 *N. L. R.* 246.

upon such points as they chose to submit to it in the shape of issues. It is a matter, in which the Court must satisfy itself that the plaintiff has made out his title and unless he makes out his title his suit for partition must be dismissed. In partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land as collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loop-holes should be allowed for avoiding the performance of the duty so cast upon the Judge. That was a Full Bench case in which the leading judgment was delivered by Layard C.J.

In *Manchohamy v. Andris*[1] it was held by Burnside C.J. and Lawrie J. that in a partition suit it is the duty of the Court carefully to investigate the titles of the parties in whose favour it passes a decree, and not permit a mere paper title to become good against the world in virtue of such a decree. The circumstance that the defendants admit plaintiff's title is not of itself sufficient to entitle the plaintiff to a decree.

In *Fernando v. Perera*[2] it was held by Lawrie J. and Withers J. that where judgment of consent has been entered in a partition suit, or a person claiming the whole land applied t be added as a party, but had been refused on the ground of being too late, that he was not too late, the judgment of consent not being a final judgment under the Partition Ordinance.

In *Fernando v. Mohamed Saibo*[3] the same Judges held that the Court must in all cases, agreeably to section 4 of the Partition Ordinance of 1863, carefully investigate all titles, and must refuse to make title on admission or on insufficient proofs, and abstain from declaring any right in land except on the best proof.

[1] 9 *S. C. C.* 64. [2] 1 *Thambyah* 71.
[3] 1 *Thambyah* 75.

In *Nagamuttu v. Ponnampalam*[1] it was held by Layard C.J. and Wendt J. that it is the duty of the Court in every case instituted under the Partition Ordinance to first satisfy itself that the plaintiff and the persons whom he alleges to be his co-owners have an actual right and title to the lands sought to be partitioned It was further held that an *interim* decree entered by consent is bad but that parties may agree, after adjudication of title by the Court, as to their shares.

In *Cooke v. Bandulahamy*[2] it was held that the plaintiff must prove absolute title and that a partition suit should not be used for the purpose of testing title.

The same point was considered in the case of *Caronchi Appuhamy v. Manikhamy*[3].

In the case of *Ukku Banda v. Kiri Banda and Dingiri Menika*[4] Wood Renton C.J. remarked that the partition decree was obnoxious for three fold objections, one of which was that it was one by consent.

In *Fernando v. Shewakram*[5] it was held by de Sampayo J. that a decree in a partition action entered without investigating into title, as required by the Partition Ordinance, but upon mere consent of parties, does not have a conclusive effect as a decree under the Ordinance. It was further held that a *fidei commissum* is not extinguished by a partition under Ordinance No. 10 of 1863, but remains attached to the property allotted in severalty to the fiduciary.

The case of *Neelakutty v.* Alvar[6] dealt with a partition decree entered by the Court of Requests with reference to a piece of land exceeding Rs. 300 in value, the parties to the action having agreed on value below Rs. 300.

It was held that the Court of Requests had no jurisdiction and that the value of the land could not be limited by agreement of parties.

[1] 4 *Thambyah* 29. [4] 4 *C. W. R.* 39.
[2] 4 *Thambyah* 63. [5] 20 *N. L. R.* 27.
[3] 4 *Thambyah* 120. [6] 20 *N. L. R.* 372.

It was further argued that, even if it be the case that mere consent without investigation of title will not avail against third parties, there is a presumption that the case was properly conducted according to law and that this presumption is strengthened by the time which has elapsed since the decree was passed. We have, however, before us all the journal entries in the case, and there is no note that the Judge made any inquiry into title. The interlocutory decree shows that the decree passed on the defendant's admission and no evidence has been led to show that the journal entries or the decree are not correctly entered.

Mr. Hayley had however another line of argument which I understood to be as follows. The deed of exchange by which the brothers and sisters conveyed to each other the respective properties agreed to be taken by each of them was a valid deed so far as it affected their own rights, and therefore so far as those rights were concerned, the two brothers correctly set out their rights to the property, the subject of the partition action.

They were entitled to partition and sell the property, and when they did so the rights of the *fidei commissarii* which were at the time only latent would when they emerged attach not to the property sold but to the sum received as payment.

There have been various decisions of this Court on the question of how far lands subject to *fidei commissum* are subject to a partition action. At first it was thought that no such land could be partitioned but more recently it has been held that a *fiduciarius* can partition his interests in the land.

The following cases dealing with the effect of partition decrees on *fidei commissarii* were cited :—

In *Tillekeratne v. Abeysekere*[1] the decision of the Privy Council was that neither the Partition Ordinance nor Ordinance No. 7 of 1871 had in any way altered the law of *fidei commissum* and could not be construed as having that effect.

The Partition Ordinance, their Lordships held, did not profess to deal with or alter the law of *fidei commissum*, and it could not be construed as having that effect. The enactment appeared to them to be limited to cases where the persons interested, whether as joint tenants or as tenants in common, are full owners, and are not burdened with a *fidei commissum* ; and even if they were not held to be so limited the partition which they authorized would not necessarily destroy a *fidei commissum* attaching to one or more of the shares before partition. They further held that the Ordinance of 1871 has no bearing upon the point, its enactments really being intended to prevent a lapse of trust, title, and administration in the event of the death of one or a body of trustees holding equal undivided shares, although their title may not be that of joint tenants.

In *D. C., Colombo, No.* 67,169[1] it was held that land held under a fiduciary trust could not be partitioned. Later decisions, however, have affected this judgment.

In *Sathianaden v. Mathes Pulle*[2] it was held that a Court of competent jurisdiction may proceed under the Partition Ordinance in respect of land subject to a *fidei commissum*. That case referred to the case reported in *Ramanathan's Reports* which was an action brought before June 17, 1877, when Ordinance No. 11 of 1876 came into operation.

In *Babey Nona v. Silva*[3] Lascelles C.J. and Middleton J. held that property burdened with a *fidei commissum* may be partitioned under the provisions of Ordinance No. 10 of 1863, but such partition has not the effect of destroying the *fidei commissum*.

[1] 2 *N. L. R.* 313.

[1] (1877) *Ram. Rep.* 304.
[2] 3 *N. L. R.* 200.
[3] 9 *N. L. R.* 251.

It only sets apart a specific portion of the common estate to which the rights of the *fidei commissarii* attach in severalty. It was here held that a partition effected between the *fiduciarii* whether by judicial decree or by mutual agreement, binds the *fidei commissarii*, and cannot be reopened by them when their interests accrue.

In *Marikar v. Marikar*[1], a case decided by a Full Bench, it was held that 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 trustees. In that case the previous decisions were reviewed by Bertram C.J.

The respondent cited *Poowatchy Umma v. Cassim Maricar*[2], a judgment of Lascelles C.J. That was a case on a sale in execution of property which was held by executors. There appears to have been some doubt whether that property was subject to a *fidei commissum*, and the purchasers were held to have acquired full title.

In *De Saram v. R. Mathes Perera*[3] Lawrie J. made an *obiter dictum* in the following words :—

> " I will not say that a land or house subject to a *fidei commissum* may not be sold and the money re-invested under the same conditions and restrictions, nor will I say that such a land held in *fidei commissum* may not be partitioned. The decree for partition could be so expressed that the shares in severalty would be held under the same conditions as the undivided shares were held."

The case of *Perera v. Lebbe*[4] was also referred to. That was a sale of a property by an order of Court without notice to the petitioner that the property was subject to a trust. There was no issue of fraud. It was held that the purchaser could not be deprived of the property on the ground of any irregularity in the order for sale, or in the procedure by which the order was obtained, if he purchased the property *bona fide* for value and without notice of the trust.

In the case of *The Government Agent, Western Province v. Alphonso*[1] it was held by Wood Renton C.J. and de Sampayo J. that where a land subject to a *fidei commissum* is sold under a decree of sale in a partition action, and the decree does not direct it to be sold subject to such *fidei commissum*, the purchaser at such sale will get an absolute title to the land free from *fidei commissum*, which will however attach to the proceeds of the sale.

The nett result of the cases seems to be that no partition can affect the rights of a subsequent *fidei commissarius* except to the extent of attaching his rights to a divided portion of the land instead of to an undivided share and also perhaps to the extent of substituting money for land, the latter only in exceptional circumstances and under safeguards.

It is however unnecessary to consider this point further as for the reasons previously given I have come to the conclusion that the decree of partition and sale was invalid.

It was further argued for the respondent that, even assuming that the partition decree was of no effect, the fact that the deed under which the defendant claims title has been duly registered enables it to prevail over any title claimed by the plaintiffs under the will or under the deed of exchange neither of which was registered.

Section 17 of the Registration Ordinance provides that :—

> Every deed, judgment, ... unless so registered shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent deed . . . . which shall have been duly registered as aforesaid. Provided . . . .

[1] 22 *N. L. R.* 137
[2] 9 *N. L. R.* 336
[3] 3 *Brown Rep.* 188
[4] 19 *N. L. R.* 308

[1] *C. W. R.* 220

that nothing herein contained shall be deemed to give any greater effect or different construction to any deed, &c., registered in pursuance hereof save the priority hereby conferred on it.

In *De Silva v. Wagepedigedera*[1] it was held that where a deed of gift creating a *fidei commissum* was unregistered and the fiduciary who was also the intestate heir of the donor sold the property to the defendant who registered his deed, the defendant's title was superior to that of the fideicommissary heirs. This case followed *James v. Carolis*.[2]

If the vendor to Bishop Copleston had been entitled to the whole land as an heir in intestacy to William Dionysius, it is evident from the cases that, inasmuch as he was entitled to the land independently of the will or the deed of exchange, neither he nor anyone else claiming under him could resist the title claimed by the defendant.

It is equally clear that if Walter Clement had had no right in the land except the rights which he had acquired at the partition sale, then on the partition sale turning out to be nugatory, the defendant's title could not prevail against a claim by those, who, apart from the deeds in question, were the true owners of the land. In other words, if the earlier deeds—the will and the deed of exchange —are to be held null and void, we have to consider the state of affairs which then arises. We are thrown back upon the state of affairs which would have arisen had William Dionysius and his wife died intestate.

Their estate went to their six children and Walter Clement was only entitled to 1/6.

Consequently, apart from subsequent transactions, he could only transfer 1/6 of the property. The defendant cannot claim more without referring to the deed of exchange and subsequent transactions under which the other five children of the testators may be barred from asserting their claims.

In order to make good his title to a larger share he has to refer to the deed of exchange. On reference to that deed of exchange, we find that although four of the children purported to convey their shares of the land in question to the brothers Dionysius William and Walter Clement, they did so with express reference to the joint will of their parents. The will itself is annexed to the deed and although the deed does not in itself make any reference to a *fidei commissum*, yet the annexure of the will to the deed, accompanied by the reference in the deed to the will, makes the latter an integral part of the deed. That deed would prevent any of the children of William Dionysius disputing the transfer, but it will not bar a subsequent fidei commissary who is not an heir of either Walter Clement or Dionysius from the benefit of the *fidei commissum*.

In other words, although the children purported by the deed of exchange to convey the whole land to the two brothers, they incorporated in the deed a document which clearly shows that they were entitled to no more than a life interest.

The plaintiff is not an intestate heir of either Dionysius William or of Walter Clement. He claims from an independent source, namely, as an heir of the original testators.

His mother, Amelia Cornelia, who was one of the signatories to the deed of exchange, did nor more than convey her life interest, and the plaintiff's rights are unaffected.

It was conceded that the plea of prescription could not succeed, inasmuch as the plaintiff's rights emreged less than ten years before the date of action.

The judgment in the Court below must be set aside and decree will be entered for the plaintiff declaring him entitled to 1/30 of the premises with costs in both Courts.

[1] 30 *N. L. R.* 317. [2] 17 *N. L. R.* 76

The questions of damages and improvements have been agreed upon between he parties.

MAARTENSZ A.J.—

This is an action for declaration of title to 1/30 of a labd called Alutwalauwewatta situated at Kadeweediya in Matara.

The land admittedly belonged to William Dionysius Tillekeratne and his wife Agenenetta Cornelia Philips Panditaratne. They, by their last will, No. 15,140, dated January 26, 1867 (P1), which was proved in testamentary action No. 645 of the District Court of Matara, devised their immovable property in equal shares to their children subject to the condition that they " shall not sell, gift, nor mortgage such property so becoming entitled to them, but the same shall devolve on their generation of children and grandchildren ".

It was held in the case of *Tillekeratne v. Silva*[1] that the will created one *fidei commissum* over the entire estate, and that on the death of one of the children his share devolved on the surviving children according to the rule of *jus accrescendi*. We were not asked to reconsider this construction of the will.

The children who inherited under he will were Emily Cornelia, Francis William, Dionysius William (hereinafter referred to as Dionysius), Edwin Richard, Harry Lambert, and Walter Clement (hereinafter referred to as Walter). They, by indenture No. 1,507 dated December 20, 1889 (P3), conveyed to each other entire parcels of land in lieu of the undivided 1/6 share of each in all the lands. By his deed Alutwalauwewatta was conveyed to Walter and Dionysius. The habendum provided that their executors, administrators, and asigns should hold the property for ever subject to the terms of the last will I have referred to.

On September 8, 1891, Walter filed action No. 259 in the District Court of Matara against Dionysius to have the land partitioned. The plaint merely stated that the plaintiff and defendant were each entitled in common to a half share of the premises by right of deed of division No. 1,507 dated December 20, 1889.

On November 11, 1891, the defendant Dionysius appeared in Court and admitted the correctness of the libel and consented to the land being sold ; and, without any investigation into the title of plaintiff and defendant to the premises sought to be partitioned, a decree was entered declaring the plaintiff and the defendant each absolutely entitled to half the land and buildings and directing a sale of the land and a distribution of the proceeds between plaintiff and defendant. In pursuance of this decree, the land was sold and purchased by the plaintiff and the Court granted him a certificate of sale (P2) dated April 2, 1892, which was registered on February 18, 1893.

On December 18, 1893, by deed No. 2,310 registered on December 21, 1893, Walter sold the land to Reginald Stephen Copleston, Bishop of Colombo, and his successor or successors in office. The defendant is the transferee's successor in office.

The plaintiff is one of the three children of Emily Cornelia who died intestate on March 20, 1920, having survived her brother Dionysius who died intestate and unmarried.

The plaintiff alleged that the sale ordered by the Court in the partition action No. 259 and the subsequent sale by Walter to the Bishop of Colombo did not extinguish the *fidei commissum* created by the will No. 15,140 and claimed a 1/30 share as a child of one of the children of the testators.

The defendant filed answer claiming an absolute title to the whole land by virtue of the certificate of sale and the registration of his documents of title against the will, probate of which has not been registered. The defendant in the alternative claimed compensation for improvements.

[1] (1907) 10 *N. L. R.* 214

The trial proceeded on eleven issues which were treated as issues of law as no evidence was led by either of the parties. The learned District Judge dealt with all the issues and entered judgment for the defendant. From this decision the plaintiff appeals.

The argument on appeal was confined to the following questions :—

(1) Was the decree of sale entered in partition action No. 259 given as provided in the provisions of the Partition Ordinance so as to have the conclusive effect given to decrees of sale by section 9 of the Ordinance ?

(2) Even if it was given as provided by the Ordinance, does section 9 of the Ordinance have the effect of giving the purchaser a title free from any *fidei commissum* to which the land was subject ?

(3) Does the registration of the defendant's title deeds have the effect of extinguishing the *fidei commissum* created by the will ?

The appellant's contention on the first question that the decree in partition action No. 259 was not a decree to which conclusive effect was given by the Ordinance was two-fold. It was first argued that the decree was given without any investigation to ascertain whether the plaintiff and defendant were in fact owners in common of the land, and secondly, that the decree having been entered without any investigation into the title of the plaintiff and defendant was not a decree given in accordance with the provisions of the Ordinance.

The first branch of the argument is based on section 2 of the Ordinance for the partition or sale of lands, No. 10 of 1863, which provides that when any landed property shall belong in common to two or more owners it is and shall be competent to one or more of such owners to compel a partition of the said property, or . . . . a sale thereof.

It was urged that this section imposed on the Court the duty of ascertaining, after investigation, that the land was in fact held in common. I am not convinced that the section has the effect attributed to it. The purpose of the section is, in my opinion, to give a co-owner the right to have the land owned in common partitioned, whether the other co-owner or co-owners desire it or not. It will of course be incumbent on the Court to determine whether the plaintiff is a co-owner if his right to describe himself as such is disputed, but if it is not disputed the Court may, in my opinion, proceed under the provisions of the Ordinance without investigating the question whether the plaintiff is a co-owner.

The second branch of the argument that the Court must investigate the title of the parties in a partition suit was founded on a series of decisions of this Court which laid down that as the final decree in a partition suit wipes out the rights and interests of all parties not deriving any rights or interests it is the duty of the Court before which the suit is brought to see that the titles of the parties are strictly proved, that no share or interest is allotted to any party unless he proves his title thereto, and that no judgments are passed on admissions.

The first case in which this rule was laid down was the case of *Manchohamy v. Andris*[1]. This was an appeal from an order made in the partition suit itself. So were the appeals in the cases of *Wickremaratne v. Fernando*[2], *Peris et al. v. Perera et al.*[3], *Batagama Appuhami v. Dingiri Menika*[4], *Fernando v. Perera*[5], *Fernando et al. v. Mohamadu Saibo et al.*[6], *Silva v. Paulu*[7], *Nagamuttu v. Ponnampalam et al.*[8], *Punchi Appu v. Sanara*

[1] (1890) 9 *S. C. C.* 64.
[2] (1895) 1 *Matara Cases* 19.
[3] (1896) 1 *N. L. R.* 362.
[4] (1897) 3 *N. L. R.* 129.
[5] (1898) 1 *Tambyah* 21.
[6] (1899) 3 *N. L. R.* 321.
[7] (1898) 1 *N. L. R.* 174.
[8] (1903) 4 *Tambyah* 29.

Sewa[1], *Visuvalingam v. Thampoo*[2], *Chelliah v. Tamber*[3], *Mather v. Thamotharam Pillai*[4], and *Ferreira v. Haniffa et al*[5]. The only cases other than the partition suits in which the rule was approved of were those of *Ukku Banda v. Kiri Banda and Dingiri Menika*[6] and *Fernando v. Shewakram*[7].

In the former case it was held that the partition decree was bad because (*a*) it was entered of consent, (*b*) it threw no clear or satisfactory light on the identity of the lands in suit in the two actions, (*c*) it was impossible to ascertain from the decree itself or otherwise what rights were acquired under it, and (*d*) the decree being 20 years old other rights may have grown up in the interval. It is impossible to say from the judgment what would have been the result, if the only objection to the decree was, that it had been entered of consent.

In the latter case de Sampayo J. observed that the decree in the partition action pleaded by defendant was one entered of consent and had no conclusive effect. But the conclusive character of the decree did not fall for decision as it was held that notwithstanding the decree the *fidei commissum* attached to the land partitioned by the decree.

It was contended that a decree entered of consent is not a decree entered in accordance with the provisions of the Ordinance and did not have the conclusive character conferred on such decrees by section 9 of the Ordinance. In support of this argument we were referred to the cases in which it was held that the words " given as hereinbefore provided " meant a decree given in accordance with the provisions of the Ordinance. The last case in which it was so decided was the case of *Siwanadian Chetty v. Talawasingham*[8]. The reply to this contention was that the investigation of title where the defendant appears in the action and admits plaintiff's claim and raises no other dispute is not a statutory duty imposed upon the Court by the provisions of the Partition Ordinance.

This contention is discussed by the late Mr. Justice Jayewardene in his commentary on the Partition Ordinance at pages 79, 80, and 81. Section 4, which is the relevant section, enacts that—

> " If the defendant . . . . shall make default in appearance as directed by the summons, the Court shall fix a day to hear evidence in support of the application of the plaintiffs and on that day, or any other day to which the Court may adjourn the hearing shall hear evidence in support of the title of the plaintiffs and the extent of their shares or interests, as also the title of the defendants and the extent of their respective shares or interests in so far as may be practicable by any *ex parte* proceeding, and shall, if the plaintiff's title be proved, give judgment by default, decreeing partition or sale as to the Court shall seem fit. If the defendants or any of them shall appear and dispute the title of the plaintiff's or shall claim larger shares or interests than the plaintiffs have stated to belong to them, or shall dispute any other material allegation in the libel, the Court shall in the same cause proceed to examine the titles of all the parties interested therein, and the extent of their several shares or interests, and to try and determine any other material question in dispute between the parties, and to decree a partition or sale according to the application of the parties, or as to the Court shall seem fit : Provided however that it shall be competent to the Court to decree the sale of the common property, though such sale be not prayed for by the parties in the original libel, if in any suit for a

[1](1904) *S.C. Minutes* of *January* 1, 1904.
[2](1905) 5 *Tambyah* 49.
[3](1904) 5 *Tambyah* 52.
[4](1903) 6 *N. L. R.* 246.
[5](1912) 15 *N. L. R.* 445.
[6](1917) 4 *C. W. R.* 39.
[7](1917) 20 *N. L. R.* 27.
[8](1927) 28 *N. L. R*, 502.

partition it shall appear to such Court that on account of the number or poverty of the owners, the nature, extent, or value of the land, or other causes, a partition would be impossible or inexpedient.

Mr. Jayewardene analyses section 4 and points out that the section omits to state what the Court should do when a defendant appears in the action and amits the plaintiff's claim and raises no dispute. He was of opinion that in such a case the Court ought to follow the procedure prescribed for ordinary cases and enter judgment according to the admissions of the parties. In support of this opinion, he observes that the Ordinance itself must have contemplated the same procedure, for if it desired to depart from the ordinary rule, it would have expressed itself in clear terms, as it has done in certain other cases under this section.

He also observed that this view seems to be supported by the previous legislation on the subject as no provision whatever was made in the repealed Ordinance No. 21 of 1844 for the hearing of evidence, although, as in the Ordinance of 1863, the decree was conclusive against the world.

He concludes, however, by saying that the principles laid down by the Supreme Court should be strictly observed as, otherwise, final decrees are liable to be disregarded as being null and void.

There is no doubt that there is no definite provision in the Ordinance of 1863 which requires investigation into title in a case where the defendant appears and admits plaintiff's title and raises no other dispute. But in view of the conclusive character given to decrees for partition or sale by section 9 of the Ordinance, I cannot avoid coming to the conclusion—a conclusion which is in accordance with the opinions expressed in the cases I have referred to—that the Ordinance intended the Court to investigate the title of the parties to every partition suit which came before it, before entering a decree either for partition or sale. I am, therefore, of opinion that the decree for sale in pursuance of which the land was sold has not the conclusive character ordinarily conferred upon such a decree, by section 9 of the Ordinance, and that the plaintiff is not bound by the decree.

In view of my decision regarding the effect of a decree for sale in partition suit No. 259, it is unnecessary for me to discuss the question whether the sale carried out in pursuance of it gave the purchaser a title free from any *fidei commissum* to which the land was subject.

There remains the question whether the defendant's title is by reason of the registration of his deed entitled to prevail over the will which created the *fidei commissum*.

It is now settled law that a probate of a last will is an instrument within the meaning of section 17 of the Registration Ordinance, 1891, and that the non-registration of the probate of a will affecting immovable property renders it void as against a person claiming adverse interests under a duly registered deed of subsequent date. It was held in the case of *Fonseka v. Fernando*[1] that the plaintiff, who was entitled to an annuity under his father's will and had a tacit hypothec over the testator's residuary estate for payment of the annuity, could not enforce his right against a land which the defendant purchased on a deed, which was registered, from the residuary legatee, as probate of the will had not been registered. This decision was followed in the case of *Fonseka v. Cornelis*[2]. The facts of the case are not material to this appeal but a passage in the judgment of de Sampayo J. is of importance on the question as to whether the registration of an adverse deed had the effect of extinguishing the *dei commissum* created by a will, probate of which had not been registered. I refer to his observation that if a probate is

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

a registrable instrument within the meaning of section 17 of the Registration Ordinance, 1891, the devisee of a land devised subject to a *fidei commissum* in favour of unborn children of the devisee would be able to defeat the *fidei commissum* by failing to register the probate and selling away the land on a registered deed.

Such a case arose for decision in the case of *Elapata et al. v. Fernando*[1]. The competition was between a *fidei commissum* created by a will, probate of which was not registered, and a mortage by a devisee under the will which was registered. The devisee was a child of the testator, and it was held that the mortgage had priority over the will in regard to so much of the property as belonged to the mortgagor by inheritance from her father, by intestate succession, and by subsequent acquisition, if any, from other members of the family.

The case of *De Silva et. al. v. Wagapadigedera*[2] is an analogous case. The competing deeds were a deed of gift creating a *fidei commissum*, which was unregistered, and a registered transfer by the donee, who was also the intestate heir of the donor, after the donor's death. It was held that the title under the registered deed was superior to that of the fideicommissary heirs.

The principle laid down by these cases is that a registered transfer by an heir *ab intestato* of property which belonged to him by inheritance or by subsequent acquisition from the other heirs has priority over a will probate of which has not been registered or is subsequently registered. Therefore, if the deed of partition No. 1,507 was a transfer to Dionysius of property which the heirs were entitled to by inheritance *ab intestato*, the defendant's registered deeds would have priority over the claim set up by the plaintiff.

The appellant contended that the defendant could not rely on the deed of partition as it was a transfer to Dionysius subject to the terms and conditions of the will.

The two questions which fall for decision under this objection are (1) whether the deed No. 1,507 is a conveyance subject to the *fidei commissum* created by the will and (2) whether the defendant's predecessor in office acquired absolute title to the 2/6 conveyed to Dionysius, even if deed No. 1,507 was a transfer subject to the terms and conditions of the will.

The deed No. 1,507 is in form an indenture executed by the children of the testators. It recites that the testators by their last will, a copy of which is annexed, devised and bequeathed all their property to the survivor of them, subject to the condition that the property should pass on his or her death to the children of the testators; that the testatrix survived the testator and proved the will and also acquired other property and died without altering or revoking the will leaving her surviving (here follow the names of the children already mentioned); that the heirs have agreed that the property of the testators as well as the property acquired by the testatrix, subsequent to the testator's death, should be divided and partitioned with the view of allotting to each of them the said . . . . one defined 1/6 part or share of the said lands, &c., described in the schedule in terms of the said will; that a division has been accordingly made and effected and that it has been agreed that the property described in the third clause and conveyed to the said Dionysius William Tillekeratne should form the specific part or share of the said Dionysius William Tillekeratne.

In witness whereof: five of the children convey and assign to Dionysius William Tillekeratne, his heirs and assigns, *inter alia*, half of the garden called Alutwalauwewatta.

[1](1922) 24 *N. L. R.* 175.
[2](1929) 30 *N. L. R.* 317

The habendum is as follows :—" To have and to hold the said shares and premises unto the said Dionysius William Tillekeratne and his aforewritten for ever, subject to the terms of the said last will and testament of the said . . . . " (then follow the names of the testators) . . . ." hereinbefore in part recited ".

The operative clause is a conveyance to Dionysius, his heirs, executors, and assigns. If effect is to be given to the word " assigns " it is inconsistent with a conveyance subject to a *fidei commissum*. The habendum empowers Dionysius, his heirs, executors, and assigns to hold the land for ever.

The heirs by this deed clearly convey to Dionysius the property inherited by them under the will and not the property they were entitled to by inheritance *ab intestato*.

The rule that I have formulated above as the rule laid down by the cases I have cited does not apply to the defendant's registered deeds because deed No. 1,507 creates an interest subject to the terms of the will.

The rule which does apply is that laid down in the cases of *The Oriental Bank Corporation v. Naganader et al.*[1] and *Wijeyawardene v. Perera*.[2] It was held in those cases that the prior registration of a mortgage bond expressly secondary to a prior bond did not give it priority as the two interests are consistent with each other and the Ordinance did not apply.

I am of opinion that the appeal should be allowed with costs and the plaintiff declared entitled to an undivided 1/30 share of the premises in question with the buildings thereon, with damages as agreed on from July, 1927, and the defendant entitled to compensation as agreed on.

The plaintiff is also entitled to his costs in the District Court.

Appeal allowed.

[1] (1879) 2 *S. C. C.* 146. [2] (1880) 4 *S. C. C.* 9.