*Present :* Bertram C.J. and De Sampayo J. 1921.

SIVACOLUNDU *v.* NOORMALIYA.

*334—D. C. Colombo, 53,774.*

*Municipal Council—Default of payment of taxes—Movables must be sold before immovable property—Disregard of rule renders sale invalid—Sale of land subject to* fidei commissum*—Does purchaser get land free of* fidei commissum *?—Is* fidei commissum *an "encumbrance" ?—Effect of certificate under s. 143 of the Municipal Councils Ordinance.*

Under section 143 of the Municipal Councils Ordinance, 1910, immovable property should not be sold for default of payment of taxes if there are movables available. A disregard of this rule renders the sale invalid.

A certificate issued under section 143 is nothing more than *primâ facie* evidence that the requirements of the law have been complied with. It is open to a party interested to rebut the presumption arising from the issue of the certificate.

A certificate issued under the section has not the effect of wiping out a *fidei commissum* existing at the time.

*Query,* whether *fidei commissum* is an encumbrance.

THE facts appear from the judgment.

*H. J. C. Pereira, K.C.* (with him *Cader*), for appellants.

*E. W. Jayawardene,* for respondents.

*Cur. adv. vult.*

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July 14, 1921. BERTRAM C.J.—

The case argued before us is one of considerable importance, and relates to the effect of sales of property for the non-payment of Municipal rates.

It is alleged in this case that a person who had purchased what is only a fiduciary interest in a valuable shop in Main street, subject to a *fidei commissum*, and who had stood by and allowed that property to be sold under the provisions of section 137 of the Municipal Councils Ordinance, No. 6 of 1910, and had himself purchased the property in conjunction with another person in a similar situation for Rs. 65, had thereby converted his fiduciary interest into an absolute one, and had extinguished the rights of the *fidei commissaries* interested.

With regard to the facts of this particular case, the *fidei commissum* was a very old one, dating back to 1859. Various arrangements had been made at different stages between the fiduciaries which had the effect of a partition of the *fidei commissum* property, and it may be that questions will arise at a future date as to the effect of these arrangements. We need not go into them in this action. We are only concerned with a particular house in Main street which was treated as belonging to Ahamado Alia Marikar, and a half of which was by him transferred on July 3, 1905, to his daughter, Ayesha Umma. Ahamado Alia Marikar's interest being only a fiduciary interest, it is unnecessary to say that the right acquired by Ayesha Umma was of this character also. She proceeded to borrow money from the plaintiff on the title thus acquired by a mortgage bond. The plaintiff in due course put the bond in suit, and had the property seized and sold, and bought it in himself. He thus became the owner of Ayesha Umma's interest in the property, whatever that interest may be. Ahamado Alia Marikar is now dead, and the interest of Ayesha Umma, in view of the fact that she had children, was a limited one. Ahamado Alia Marikar has several other children. They also are now interested as fiduciaries. Therefore, all that Ayesha Umma acquired and all that is ultimately transmitted to the plaintiff was a fiduciary interest in a fractional share.

The rates on this property fell into arrear. It was under a lease, and was used as a shop. On July 13, 1918, a seizure was effected in respect of the arrears. The arrears were payable in respect of the first quarter of the year 1918, and at that date the plaintiff had not acquired Ayesha Umma's interest, or, at any rate, his title had not been perfected by the Fiscal's transfer, but inasmuch as the Fiscal's transfer was executed in August, 1918, it may be assumed that he had, at any rate, purchased the interest. The seizure was in due course followed by a sale on October 16, 1918, and it is plain from the facts, which have been proved in the case, that the sale was entirely irregular. It is required by section 140-

of the Municipal Councils Ordinance that in carrying out such sales the order prescribed by Ordinance No. 6 of 1873 shall be observed, and it is an essential feature of the scheme of that Ordinance that before any immovable is sold any movable property which is subject to sale shall be first disposed of. This condition was not observed in the present case, and it appears from the evidence that it is no longer customary for those acting on behalf of the Colombo Municipal Council to observe it. The forms themselves which we have looked at in this case show that it is a condition which is in practice disregarded. But it is a most essential feature of the scheme contemplated by the Municipal Councils Ordinance and Ordinance No. 6 of 1873, which that Ordinance refers to.

Only two persons were presented at the sale, one was the plaintiff and the other one Majeed, who is the guardian *ad litem*, the defendant in this case, and who was his uncle and curator. The representative of the Municipal Council tendered a bid for the property on behalf of the Council, but the property was finally knocked down to the plaintiff for Rs. 65. The plaintiff has now taken action against the defendant, nominally for the purpose of partitioning the property, but really for the purpose, one may conjecture, of obtaining the advantage of a title under the Partition Ordinance. It is in this partition action that the questions we have to decide arise. The learned District Judge, although obviously sympathizing with the intervenients who have impugned the sale as *fidei commissaries*, has felt himself unable to give them the relief which he would have liked to give. He considers that the previous decisions of this Court have laid it down that a certificate of sale, issued under section 143 of the Municipal Councils Ordinance, carries with it an irrebuttable presumption that all the antecedent directions of the Ordinance have been duly observed. The learned Judge appears to have been under a misapprehension on that point. The leading case in which all previous authorities have been discussed is *Gunasekere v. Toberis*.[1] It appears from an examination of the exhaustive judgment of Wendt J. in that case that the certificate under section 143 is nothing more than *primâ facie* evidence that the requirements of the Ordinance have been complied with. It is open, therefore, for the intervenients to rebut that *primâ facie* presumption, and in this case there can be no question that they have done so.

Mr. Jayawardene, on behalf of the respondents, contends that the particular provision which I have referred to, namely, the provision requiring that the movables liable shall be first sold, is only directory and not imperative. I cannot read the provision in that light. It seems to me a most important and essential provision. It is most important for property owners that immovables shall not be sold if there are movables available. It is, indeed, the very

[1] (*1906*) *10 N. L. R. 18.*

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foundation of the whole proceeding. It seems most unfortunate that it should have been overlooked in practice, and I think this case, by drawing attention to it, will have a most salutary effect. The failure to carry out this provision is, in my opinion, fatal to the sale.

It would be sufficient to stop there and allow the appeal to be disposed of on that ground, but as further important questions have been discussed, I think it right to give my opinion upon them.

The first is as to the operation of section 143, the provision which declares that a certificate signed by the Chairman shall be sufficient to vest the property in the purchaser free from all encumbrances. Mr. Jayawardene has contended that the effect of those words is to obliterate any *fidei commissum* which is attached to the property. This would be an extremely violent provision, if that be the meaning of it. I should be reluctant to believe that the Legislature ever so intended. The same opinion is expressed by Cayley C.J. in a somewhat similar case, namely, the case of a certificate under Ordinance No. 5 of 1866. (See *3 S. C. C. 103.*) The learned Chief Justice there observed: "It could not be the intention of the Legislature to empower a Government Agent to sell property of a third party for the debt of a commutation defaulter and transfer it to the purchaser with an indefeasible title without any security being given by way of compensation or otherwise to the party deprived."

Similarly, I should be reluctant to believe that the Ordinance intended that, in respect of the default of the fiduciary, property of the *fidei commissaries* should be confiscated without compensation.

Mr. Jayawardene relied upon three authorities. The first was a decision of Pereira J., *Cassim and another v. Devendere*,[1] which was a decision under Ordinance No. 21 of 1867. We always treat with the utmost respect any decision by that very learned Judge, but we ourselves sitting here together have had, perhaps, a fuller opportunity of examining the position than was open to him sitting alone. The other cases are two decisions in regard to covenants of title reported in *17 N. L. R. 164* and *19 N. L. R. 473*. If those decisions are carefully examined, it will be seen that their significance is not quite so great as was here contended. In the first case, Lascelles C.J. made an interesting observation, which has been since quoted, that a *fidei commissum* is "the most troublesome of all encumbrances." It appears, however, that this observation was only *obiter*, and that both Judges decided that case independently of that consideration. In the second case, I would point out that the judgment of my brother De Sampayo was expressly limited to the particular context. In that case, in the document in which the words appeared, the *fidei commissum* itself is recited, and a particular view was expressed as to the effect of that *fidei commissum*. It was

[1] *2 Matara cases 28.*

considered that by the covenant that the share of the land thereby sold was "free from all encumbrances," it was intended to guarantee the view thus expressed as to the effect of the *fidei commissum*.

It seems to me, therefore, that even in covenants for title the effect of the words "free from encumbrances" may some day have to be considered. It is unnecessary for us to express an opinion on that question now, but I cannot help thinking with regard to a *fidei commissum*, which is a limitation of a title at its very inception, that the word "encumbrance" is hardly an appropriate word for the purpose of describing it. When one speaks of encumbrances upon a title, one does not think of a limitation which is an essential element of that title, but of something independent superimposed upon the title. I should like to reserve my opinion as to whether the words "free from encumbrances" are apt to describing the limitation of ownership which a *fidei commissum* imposes on a fiduciary.

But what we have to do is to consider this particular Ordinance. For that purpose we must begin with section 137, and the first question with which we are confronted is, What is directed to be sold under that section? Now, the property which is directed to be sold under the section is emphatically not the property which is liable to the rate. If that had been said, the position no doubt would be simple. What is sold is not the property itself, but the interest of a particular proprietor of that property. This is quite clear, if the words are carefully examined. The direction is to levy the rates or taxes and costs of recovery by seizure and sale "of all and singular the movable or immovable property of the proprietor, or of any joint proprietor, of the premises on account of which such rate or rates may be due." Therefore, it is not only this property, but all the immovable properties of the proprietor or any of the joint proprietors of the premises that may be sold. The position, therefore, in regard to the right of a proprietor of the property rated, must be exactly what it would be in regard to any of his other properties, that is to say, that what is put up for sale is his interest in that immovable property. This is laid down in another case, the case which I have already quoted, *Seneviratne Ranhami Mohandiram and others v. Karavita Koralalaya Mudianse and others*.[1] The question there at issue was whether the interest of other persons passed by the sale, and it was laid down by the Court that what passed was only the interest of the defaulter. Similarly, where the proprietor in question has only a limited interest, it can only be that limited interest which is sold.

That is the first step. We have now to proceed to section 143. It is there said that a certificate signed by the Chairman shall be sufficient to vest the property, that is, the property sold, in the purchaser free from encumbrances. Now that provision may be

[1] *(1880) 3 S. C. C. 103.*

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interpreted in various ways. What Mr. Jayawardene contends, as I understand his contention, is that though what was sold under section 143 was a limited interest, yet the effect of section 143 is to convert that interest into an unlimited one, by freeing it from all encumbrances. That is, indeed, one way of construing it. It means in effect, if it is correct, that a life interest is sold, but an absolute interest is acquired by the purchaser, and that the rights of the *fidei commissary* are confiscated without compensation. But there are two other ways of construing the section which have to be considered. The first is that in the case of a *fidei commissum* the meaning is that it is a life interest that is sold, and that all encumbrances superimposed upon that life interest are extinguished. That is a way of construing it, and one which would seem to be entirely justified by the words of the Ordinance. But there is a third way, which I am very much disposed to adopt. The word "encumbrance," indeed, may have a very wide significance, but it may also have a limited one. When we look at the scheme of this Ordinance, and in particular the proviso to section 143, I am very much inclined to suspect that what was really in the mind of the draftsman when he used the word "encumbrances" was simply "mortgages." The section says that "the property shall vest in the purchaser free from encumbrances," but it immediately goes on to say: "Provided, however, it shall be lawful for a mortgagee of such land or immovable to pay and discharge the amount of the rate or tax and costs due under and by virtue of the warrant." It would be very singular if the section used the word "encumbrance" in its wide sense so as to include restrictions on alienation, leases, servitudes, &c., as well as mortgages, but provided the necessary equitable relief only in respect of one form of encumbrance, *i.e.*, mortgages. That mortgages were what in the mind of the draftsman is shown by the provision made under section 148 for the registration of mortgages and for notice of sale to mortgagees. Either of these two interpretations is, in my opinion, preferable to that contended for by Mr. Jayawardene. In any case, whichever we adopt, it is clear that there was no intention on the part of the Legislature to confiscate the interest of *fidei commissaries*.

There is a third point mentioned, which I will deal with briefly, and that is, the effect of section 92 of the Trusts Ordinance, No. 9 of 1917. It is there provided that "Where a co-owner, mortgagee, or other person with a qualified interest in any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such person, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained."

The illustration appended to that section is very much on all fours with this case. As I understand the matter, the plaintiff

realizing that he had only bought a fiduciary interest, and that his title was liable to be impugned by the *fidei commissaries*, knowing that a sale was taking place in respect of the rates for which he had himself become liable, and having money in his pocket with which he could have discharged that liability, and it being open to him at that very time to discharge it, preferred, instead of paying the money for the purpose of discharging the liability, to pay it for the purpose of purchasing the property.

Mr. E. W. Jayawardene said that the question of the rights of *fidei commissaries* as against the fiduciary as a qualified owner were not considered in the Court below, but I think all the facts are before us. It appears to me that a transaction so described comes precisely within the principle of the section, and that if, indeed, the plaintiff had acquired a valid title, he would have held that title in trust, not only for the intervenients, but also for the other defendants in this action.

For the reasons I have explained, I think that the appeal should be allowed, with costs.

DE SAMPAYO J.—I agree.

*Appeal allowed.*