1939 *Present :* **Keuneman and Wijeyewardene JJ.**

HAWKE *et al. v.* SABAPATHY *et al.*

202—D. C. Kandy, 45,395.

Fidei commissum—*Gift to mistress and children—Prohibition against alienation—No designation of persons benefited—Prohibition void—Partition of land—Not of a permanent character—Partition not expedient.*

By a deed of gift H donated an undivided one-fourth share to his mistress R and the remaining three undivided shares to the children begotten by her and, also, the children to be borne by her to him, to be held by them for ever and for their own use and benefit absolutely. The gift was made subject to the following among other conditions :—

" (1) That in case of the death of all the said children their shares shall devolve to me.

" (2) That the said donees or any of them shall not under any pretences whatsoever sell, mortgage, or alienate the said estate or any portion thereof or any of their right, title, or interest therein and thereto during my lifetime without my consent thereto first had and obtained. "

One of the children sold her interests in the land to the plaintiff without the consent of H.

[1] *13 N. L. R. 284.*

[2] *(1817) 1 Barn. & Ald. 29.*

Held, that the prohibition against alienation contained in clause 2 was void and that the share vested in the plaintiff subject to a *fidei commissum* in favour of H or his estate.

Held, further, that, on the death of any of the children, his or her share did not accrue to the surviving children.

Where, in view of the manner in which the undivided shares are held by the parties, a partition effected would not be of a permanent character but might have to be superseded by a consolidation of the divided lots and by a fresh subdivision, it is not desirable or expedient to order a partition. In such a case the Court may order a sale.

Fernando v. Fernando (*1 C. W. R. 46*) followed.

THIS was a partition action for the partition of a land called Kurugala *alias* Maryland. One J. T. Hawke was the original owner of the land, who by deed of gift P 2 donated the land to Rakoo, his mistress, and his children begotten by her and also to be borne by her. The gift was subject to the conditions set out in the head-note.

By deed P 3 one of the said children conveyed her interests to Suppiah Pulle, who sold them to the plaintiff. By deed D 3 another child conveyed her interests to the first defendant. Neither P 3 nor D 3 were executed with the consent of J. T. Hawke.

The interests of Rakoo and some of the other children were sold in execution against them and have devolved on the defendants and the added-defendants.

Three questions were argued in appeal on these facts :—

(1) Whether any interest vested in plaintiff by virtue of deed P 3 ?

(2) Whether on the death of any child of Hawke the share or shares of such child would devolve on the heirs of such child or accrue to the surviving children to be held by them subject to the *fidei commissum* in favour of Hawke's estate ?

(3) Whether the action for partition was maintainable as the partition effected would not be of a permanent character ?

H. V. Perera, K.C. (with him *S. W. Jayasuriya*), for the appellants (6th-17th added-defendants). Two questions have to be considered, viz :— (1) Whether the plaintiff has any right at all, (2) even if he has any right, whether he has such an interest as to entitle him to bring a partition action ?

In the deed of gift P 2, we have a class of beneficiaries definitely described and when they all die the property is to go back to the donor. They take it jointly, and the property is owned jointly till they all die. A deed like P 2 creates a gift to a class—*Kingsbury v. Walter*[1]. The class or group is an entity by itself although the individuals who constitute it may change from time to time. Where there is a gift to a class with a prohibition against alienation, the prohibition is good and must be regarded as for the benefit of that class—*Robert v. Abeywardene*[2]. The deed of transfer to plaintiff, therefore, conveyed no title. Further, where there is a gift to a class, the principle of *jus accrescendi* will operate. The provisions of Ordinance No. 11 of 1876 will not apply in this case; it is the general Roman-Dutch law which is applicable. Vide *Sande on*

[1] *(1901) A. C. 187 at 192.*

[2] *(1912) 15 N. L. R. 323.*

Restraints, Art. 20 at p. 308 (1892 ed.) and Part 3, Ch. 6, Art. 14 at p. 229; *Perezius on Donations,* tit. 55, Arts. 1-5.

To come to the second question, the plaintiff is not entitled to bring a partition action even if it can be regarded that he has some title under the deed in his favour. The plaintiff has co-ownership for only a limited time; it is not co-ownership in the strict sense. If the plaintiff in a partition suit has an interest in the property not of a permanent character, he is not a co-owner within the meaning of the Ordinance, and cannot bring an action—*Fernando v. Fernando* [1]; *Carry v. Carry* [2].

N. Nadarajah, for the plaintiff, respondent.—Whatever the Roman-Dutch law may be on the subject, the law relating to prohibition of alienations is now confined within definite limits by sections 2 and 3 of Ordinance 11 of 1876—*Hormusjee v. Cassim* [3]. Prohibition against alienation is ineffective in the absence of an express penalty—*Saidu v. Samidu* [4], *Sitta Naima v. Gary Bawa* [5]. The plaintiff, therefore, has secured valid title.

Fidei commissum properties can be partitioned at the instance of fiduciaries—*Jayawardene on Partition pp. 38-46.* There is a reported case where the facts were similar to those of the present case—*Dassenaika v. Tillekeratne* [6]. *Fernando v. Fernando* (*supra*) is not applicable as there was only one fiduciary in that case and he had split up his life-interest.

The provisions of the Entail and Settlement Ordinance 11 of 1876 and of the Partition Ordinance have been jointly considered in various cases and, except for the principle of *jus accrescendi,* there is no difference between joint and single *fideicommissa—Sathianaden v. Matthes Pulle et al* [7]; *Baby Nona et al. v. Silva* [8]; *Abeyesundere v. Abeyesundere* [9]; *Marikar v. Marikar* [10]; *Usoof v. Rahimath et al.* [11]; *De Livera et al. v. Amarasekere* [12].

A gift to a class does not necessarily involve *jus accrescendi—Usoof v. Rahimath et al.* (*supra*). There is no question of lapse of *fidei commissum* in the present case. P 2 is a deed *inter vivos,* and right of accrual should not be lightly presumed—*Carlinahamy v. Juanis et al.* [13]; *Winstanley et al v. Barrow et al.* [14]

E. F. N. Gratiaen, for second to eighth respondents (the defendants and first to fifth added-defendants).

H. V. Perera, K.C., in reply.—*Jus accrescendi* is not the same as accrual; the latter term has a larger meaning than the former—*Carlinahamy v. Juanis et al.* [15]; *Usoof v. Rahimath et al.* [16]

It is a fallacy to separate interests gifted to a class. Distinction should be drawn between a gift to a class and a gift to individuals—*Winstanley et al. v. Barrow et al.* (*supra*). In a gift to a class, no part of

[1] (1915) 1 C. W. R. 46.
[2] (1917) 4 C. W. R. 50.
[3] (1896) 2 N. L. R. 190.
[4] (1922) 23 N. L. R. 506.
[5] (1930) 32 N. L. R. 155.
[6] (1917) 4 C. W. R. 334.
[7] (1897) 3 N. L. R. 200.
[8] (1906) 9 N. L. R. 251.
[9] (1909) 12 N. L. R. 373.
[10] (1920) 22 N. L. R. 137.
[11] (1918) 20 N. L. R. 225.
[12] (1938) 3 C. L. J. R. 98.
[13] (1924) 26 N. L. R. 129.
[14] (1937) A. D. 75.
[15] (1924) 26 N. L. R. 129, at 141.
[16] (1918) 20 N. L. R. 225, at 234.

the *fidei commissum* fails as long as there are in existence any members of that class. The intention of the donor in P 2 was that the property should go as a whole to a class and to revert as a whole to the donor. Vide *Tillekeratne v. Silva et al.*[1]; *Vansanden et al. v. Mack et al.*[2]

The Partition Ordinance cannot be used as a temporary expedient. *Fernando v. Fernando* (*supra*) is exactly in point. The *ratio decidendi* of that case is discussed in *Carry v. Carry* (*supra*).

Cur. adv. vult.

March 25, 1939. WIJEYEWARDENE J.—

This is an action for the partition of a land called Kurugala *alias* Maryland. One James Thomas Hawke was admittedly the original owner of the land. By deed of gift P 2 of 1893 Hawke donated "an undivided ¼ part or share" to his mistress Rakoo and the remaining "three undivided parts or shares to the children begotten by her and also the children to be borne by her to him, to be held by them for ever and for their own use and benefit absolutely". The gift was made subject to certain conditions and limitations which are set out in the deed as follows:—

1. That in case of the death of all the said children their said shares shall devolve to me the said James Thomas Hawke.
2. That the said donees or any of them shall not under any pretences whatsoever sell, mortgage or alienate the said estate and premises or any portion thereof or their or any of their right, title, and interest therein and thereto during my lifetime without my consent thereto first had and obtained.
3. That the said donees or any of them shall be allowed to take possession of the said estate and premises or any of their respective shares at any time, that I the said James Thomas Hawke may be minded or desirous of giving over possession of the same to them in writing.
4. That on no account shall the right, title and interest of the said donees or any of them be liable or subject to any debt or debts incurred by the said donees or any of them or to be liable to be seized, sequestered or sold in execution for the debt, default or miscarriage of the said donees or any of them during my lifetime.

J. T. Hawke had eight children by Rakoo, namely, Agnes, Eleanor (6th added-defendant), Arthur (7th added-defendant), Alice, Beatrice, Mary Cecilia, Emily (8th added-defendant) and Winifred (12th added-defendant). Four of these children—Agnes, Alice, Beatrice and Mary Cecilia—predeceased J. T. Hawke who died in 1933. Rakoo died in 1935. The 9th added-defendant is the husband and the 10th, 15th, 16th and 17th added-defendants are the children of Mary Cecilia. Robert Macdonald married Alice and, on her death without children, married Beatrice and had by the latter one child, the 11th added-defendant. Robert Macdonald has not been made a party to this action. The 13th and 14th added-defendants are the children of Agnes.

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

[2] (*1895*) *1 N. L. R. 311.*

The interests of Rakoo, Agnes, Eleanor, Arthur, Beatrice and Mary Cecilia were sold against them at Fiscal's sales and these interests have now devolved on the first and second defendants and the 1st, 2nd, 3rd, 4th and 5th added-defendants. By a deed D 3 executed in 1926, Emily conveyed her interests to the 1st defendant. A certain portion of the interests of Alice is also claimed by the first and second defendants under deed D 6 of 1927. By deed P 3 of 1927, Mary Winifred conveyed her interests to Suppiah Pulle who in turn conveyed these interests to the plaintiff. There is no evidence to show that either the deed D 3 or the deed P 3 has been executed with the consent of J. T. Hawke as required by the deed of gift P 2. In fact, the evidence shows that J. T. Hawke never visited Ceylon after he left for New Zealand in 1910.

On the facts as stated by me, the Counsel for the appellants argued—

(i) That no interest in the property vested in the plaintiff by virtue of deeds P 3 and P 4.

(ii) That the present action for a partition of the land is not maintainable, as any partition that may be ordered will not be of a permanent character.

(iii) That on the death of any child of J. T. Hawke the share of such child does not devolve on the heirs of such child but accrues to the surviving children of J. T. Hawke to be held by them subject to the *fidei commissum* in favour of the estate of J. T. Hawke.

In support of his first argument, Mr. H. V. Perera stated that the alienation by Emily was invalid as the deed of gift P 2 contained a prohibition against alienation by Emily without the consent of the donor, and he contended that the prohibition had been imposed for the benefit of a class, to wit, the children of J. T. Hawke by Rakoo. It was argued by him that the deed P 2 contained a gift to a class of persons composed of the children of the donor and that it was the intention of the donor that the three-fourths shares given to his children should remain vested in that class to the exclusion of the heirs and assigns of the children until the death of the last survivor of the donees when the three-fourths shares were to vest in the estate of the donor. On these arguments, Mr. Perera put forward the proposition that the deed of gift created a *fidei commissum* in favour of the group of children of the donor and that, in spite of an alienation by one of the children, the property would continue to vest in the group including the alienor and that the alienee would get no interest. If this proposition is given its full effect, it follows that, if all the children of J. T. Hawke convey their undivided ¾ shares to a third party, they will still continue to own the shares in spite of the alienation by them, until the death of the last survivor of them.

This proposition has to be considered, no doubt, according to the principles of the Roman-Dutch Law, but it should not be forgotten that these principles have been modified considerably by the provisions of the Entail and Settlement Ordinance, 1876. There are also several local decisions in which our Courts have considered whether a transfer executed by a grantee under a Crown Grant in violation of a prohibition

against alienation contained in the Crown Grant operates to pass good title. These decisions however are not applicable to the present case, as, in these cases, the rights of the parties had to be determined independently of the provisions of the Entail and Settlement Ordinance, 1876, which were not binding on the Crown.

Section 3 of the Entail and Settlement Ordinance, 1876, enacts that, if a deed executed after the proclamation of the Ordinance contains a prohibition against alienation but does not name, describe, or designate the person or persons in whose favour or for whose benefit the prohibition is provided, then such prohibition shall be absolutely null and void. It is, therefore, necessary to examine the language of the deed P 2 to ascertain whether the prohibition contained in it is valid. The deed states first that the shares have been given by the donor to his children "absolutely" and "for ever". It then proceeds to create a *fidei commissum* in favour of J. T. Hawke on the death of all the donees. The creation of this *fidei commissum* has hardly any bearing on the present question. The deed then prohibits any alienation by the donees without the consent of the donor. The prohibition contained in the deed P 2 does not differ from the prohibition in a simple deed of gift by which the donor gifts a property to a single donee and burdens the gift with a prohibition against alienation without mentioning the person for whose benefit or in whose favour such a prohibition has been made. There is no clause in the deed P 2 which names, describes or designates, the persons for whose benefit the prohibition has been provided. It is very probable that the donor inserted the clause containing the prohibition in an endeavour to protect this group of children against the consequences of their own improvidence. But such a prohibition is of no effect in our law. (Vide *Saidu v. Samidu*[1] and *Boteju v. Fernando.*[2]) In his Laws of *Ceylon (1904 ed., vol. II., p. 320)* Walter Pereira sets out the position with regard to prohibitions against alienation as follows:—

> "When anything is alienated against the express prohibition of the testator, those persons in whose interest the prohibition has been made are immediately called to the *fidei commissum* (*Sande de Proh. AL. 3.6.1*). This proposition is liable to be misunderstood. The *fidei commissum* here referred to is a *fidei commissum* induced by a prohibition against alienation coupled with an indication of a person to benefit in the event of such prohibition being disregarded. Ordinarily there need be no prohibition against alienation for the purpose of constituting a *fidei commissum* although in the creation of *fidei commissa* in Ceylon such prohibitions are usually inserted. If I give my property to A subject to the condition that it is to become B's property after the death of A, I create a complete and effectual *fidei commissum.* In such a case a prohibition against alienation is a mere superfluity, because A cannot interfere with B's rights and he cannot therefore alienate the property. All that he can alienate is his own interest in it which terminates at his death. In such a case if A executes a deed purporting to alienate the property, B may recover it from the purchaser as soon as his right accrues, that is after the death of A."

[1] *(1922) 23 N. L. R. 506.*

[2] *(1923) 24 N. L. R. 293.*

I hold that the prohibition against alienation contained in the deed P 2 is void and that Emily's share is now vested in the plaintiff, subject, however, to the *fidei commissum* created in favour of J. T. Thomas Hawke or his estate.

In support of his second argument, Mr. Perera contends that the partition effected under a decree in the present action will have to be superseded when on the death of all the children these undivided three-fourths shares will vest in the estate of J. T. Hawke. In order to appreciate the force of this argument, it is best to consider in detail the nature of the undivided shares of each party to the present action. For convenience of reference I shall describe the undivided ¼ share which was given to Rakoo as "Rakoo's share" and the remaining ¾ shares as "children's share". The parties to this action will be entitled, more or less, to the following shares :—

Plaintiff—24/192 of "children's share".

First defendant—35/192 of "children's share" plus 8/24 of "Rakoo's share".

Second defendant—46/192 of "children's share" plus 8/24 of "Rakoo's share".

First added-defendant—20/192 of "children's share" plus 4/24 of "Rakoo's share".

Second. third, fourth, fifth added-defendants each 5/192 of "children's share" plus 1/24 of "Rakoo's share".

Unallotted—12/192 of "children's share".

It will thus be seen that each of the 7 divided lots given to the first and second defendants and first, second, third, fourth and fifth added-defendants will be allotted in lieu of certain parts of "Rakoo's share" and certain parts of "children's share". Moreover, the parts of "Rakoo's share" will not bear the same proportion to the parts of "children's share" in each of these 7 divided lots. On the death of the four remaining children of Hawke, the "children's share" will have to be separated off from "Rakoo's share" and given to the estate of Hawke. This would necessitate the consolidation of all the lots into one lot and a fresh division of the entirety into a number of lots—at least 7 lots representing "Rakoo's share" to be given to the first defendant, the second defendant and the first, second, third, fourth and fifth added-defendants and a number of separate lots representing the "children's share" to be given to the several beneficiaries who may become entitled to claim the "children's share" under the deed of gift P 2, on the happening of the contingency referred to in that deed. It will thus be seen that any partition ordered in the present action ceases to be of any benefit on the death of the last surviving child of Hawke. Such a partition will moreover cause serious inconvenience to those becoming entitled to possess shares in the land as the beneficiaries of Hawke's estate, and it will become absolutely necessary to ignore the partition and consolidate the various lots and subdivide them according to a fresh scheme of partition.

I feel that the reasons against the entering of a decree for partition in the present action are even more cogent than in *Fernando v. Fernando* [1],

[1] *(1915) 1 C. W. R. 46.*

where the Supreme Court refused to allow a decree for partition, on the ground that any partition decreed will not be of a permanent character. The facts of that case may be briefly summarized as follows :—A land was gifted in 1862 to one Maria subject to a *fidei commissum* in favour of her descendants and ultimately in favour of a certain church. In 1865 Maria gifted a three-fourth share of the land to her brother and two sisters. The remaining one-fourth share was sold against her in execution and purchased by the plaintiff in 1914. The plaintiff filed an action for partition making those claiming interests under the brother and two sisters of Maria parties to the action. De Sampayo J., with whom Wood Renton A.C.J. agreed, stated in the course of his judgment,—

" Moreover, and this to my mind is the greatest objection—any partition of the land at the present time will not be of a permanent character, for on the death of Maria the division would come to an end and those taking after her would be entitled to and possess the property in its entirety as an undivided land. I cannot think that such a case was contemplated by the Ordinance ".

It is no doubt well settled law that a property subject to a *fidei commissum* may be partitioned under Ordinance No. 10 of 1863. The subject matter of the cases, however, in which our Courts have allowed a partition of *fidei commissum* property has been generally a land owned by several *fiduciarii,* each with a separate set of *fidei commissarii.* In such cases, a partition was not only practicable but beneficial. On the termination of the *fidei commissum* the lot allotted to each *fiduciarius* would devolve on a separate set of *fidei commissarii* who could then possess such lot in common or divide it among themselves. In such cases, no necessity arises for consolidating all or some of the divided lots and then effecting a fresh subdivision. In fact, the partition of *fidei commissum* property has been permitted by our Courts on the basis that the decree for partition entered in an action to which the *fiduciarii* were parties would be binding on the *fidei commissarii,* even if they were not parties to the action. But any insistence on the binding nature of the decree entered in the present action on the ultimate beneficiaries of Hawke's estate will be so detrimental to their interests as to amount almost to a denial of their rights. In view of the terms of the deed of gift P 2 and the manner in which the undivided shares are now held by the various parties, any partition that may be ordered in the present action will have to be superseded as soon as the *fidei commissum* in favour of the estate of J. T. Hawke takes effect.

The view I have expressed as to the inexpediency of the property being partitioned does not involve a finding by me that the plaintiff is not entitled to maintain an action under Ordinance No. 10 of 1863 for the sale of the land. I wish to add that no argument was addressed to this Court by any Counsel in favour of a sale of the property. Such a sale and a deposit in Court of the proceeds of sale of the three-fourths shares donated to the children, to be retained subject to the terms of the *fidei commissum* in favour of the estate of J. T. Hawke, will not give rise to the difficulties indicated by me as likely to arise in the case of a decree for partition. Sections 2 and 4 of the Ordinance show clearly that a Court could enter a decree for sale if it appears to such Court that " on account of the number

or poverty of the owners, the nature, extent, or value of the land and *other causes"* a partition is impossible or inexpedient. It is open to the plaintiff in this case, if he is so advised, to apply for the sale of the property.

I am unable to accept the third proposition put forward by the Counsel for the appellant. I think that, on the death of each of the children of J. T. Hawke referred to in the deed of gift P 2, his or her share devolved on his or her heirs and did not accrue to the surviving children mentioned in the deed of gift. To hold otherwise would be to ignore the provisions of section 20 of Ordinance 21 of 1844. The heirs of a deceased child or a transferee obtaining title from a child of J. T. Hawke and Rakoo will hold such share subject to the *fidei commissum* in favour of the estate of J. T. Hawke.

I set aside *pro forma* the judgment of the learned District Judge. On a date to be fixed by the Judge after notice to the parties, the District Judge will inquire into the question whether a decree for sale should be entered in respect of the property, if the plaintiff makes an application for such a decree within a reasonable time to be allowed by the Court. If the plaintiff fails to make such an application or the District Judge decides on such application that a decree for sale should not be entered, then the plaintiff's action will stand dismissed. If the District Judge decides on such inquiry to enter a decree for sale, the necessary orders will be made by him to give effect to the decree. Any party dissatisfied with any such decree or order will, of course, have the usual right of appeal to this Court.

The plaintiff respondent will pay the costs of this appeal to the appellants. All other costs incurred up to date in respect of the proceedings in the District Court will be in the discretion of the District Judge.

KEUNEMAN J.—I agree.

Set aside ; case remitted.