1945 *Present:* **Wijeyewardene and Rose J.J.**

SOYSA *et al.*, Appellants, *and* **MISKIN** *et al.*, Respondents.

222—D. C. Kalutara, 23,585.

Fidei commissum—*Partition*—Fiduciarius *allotted defined lot under partition decree—Transfer by* fiduciarius *to purchaser who buys without notice of the* fidei commissum—Fidei commissarii *have no rights against such purchase—Deed of gift to two donees "in equal undivided shares" with reservation of life interest—Parties Muslims—Separate* fidei commissa.

The applicability of the doctrine established in *Babey Nona et al. v. Silva* [1] should be limited to the following case:—Where a *fidei commissum* property is partitioned and a defined lot is allotted under the decree either to a *fiduciarius* or a person deriving title from a *fiduciarius* by way of gift, sale, &c., the *fidei commissarii* could in a subsequent action set up their claims against (*a*) such *fiduciarius* or such person to whom the lot was decreed or (*b*) any one deriving title from either of them after the decree provided that neither he nor his predecessors in title, if any, is a purchaser for value without notice of the *fidei commissum*.

A deed was executed by N reserving a life interest in her favour and gifting a property to two donees, H and O (husband and wife), "in equal undivided shares" subject to the condition that they should not sell, mortgage or otherwise alienate the property and that the property should "after their death devolve on their lawful issues". O died leaving a daughter. His widow, H, married again and left three children by her second marriage:—

Held, that, though the parties to the deed were Muslims, it was a valid gift and that it created separate *fidei commissa*, one in favour of the lawful issue of H and the other in favour of the lawful issue of O. The first *fidei commissum* was to take effect on the death of H and the other, on the death of O.

APPEAL from a judgment of the District Judge of Kalutara. The questions involved were (1) whether the deed referred to in the head-note created one *fidei commissum* in favour of the issue of H by O or two separate *fidei commissa* in favour of the issue of H and the issue of O. (2) whether a partition decree allotting a defined portion to a *fiduciarius* destroys a *fidei commissum* when the *fiduciarius* subsequently sells the defined portion to a purchaser who buys it without notice of the *fidei commissum*.

H. V. Perera, K.C. (with him *Kingsley Herat* and *Dodwell Gunewardene*), for the defendants, appellants.—The plaintiffs as *fidei commissarii* under deed P2, brought this action for declaration of title to lots A and B of a land which originally belonged to Uduman Lebbe Marikar. Marikar gifted the northern half of the land to Natchia. By deed P2 of 1887 Natchia reserved a life interest in her favour and gifted the northern half to her adopted daughter, Hadjie Umma, and Omer on the occasion

[1] *(1906) 9 N. L. R. 251.*

of their marriage, subject to the condition that they shall not sell, mortgage or otherwise alienate the property and that the property shall " after their death devolve another lawful issues ". Omer died in 1902 leaving a daughter Hamidu Umma. Hadji Umma then married Amala Marikar and died in 1933, leaving by this second marriage three children, the first and the second plaintiffs and a daughter who died without issue. Hamidu Umma married Rahiman and died in 1913, leaving a son Abdeen, the third plaintiff. Hadjie Umma, Amala Marikar and Rahiman mortgaged 79/128 shares of the northern half in 1913. These shares were sold in satisfaction of a mortgage decree and purchased by Peiris who conveyed the interests to Fonseka. In 1918 Fonseka filed a partition action in respect of the entire land. In that action the District Judge held that Fonseka's title based on P2 failed as P2 was void in consequence of the reservation of the life-interest in what purported to be a Muslim deed of gift. This view was based on the then existing decisions which were later overruled by the Privy Council in *Weerasekere v. Peiris* [1]. The Judge, however, adjudicated on the prescriptive rights of the parties and in the interlocutory decree Fonseka and Abdeen were declared entitled to undivided 79/256 and 49/256 shares respectively of the entire land. In the final decree entered in 1925 lot A was allotted to Fonseka and lot B to Peer Mohamedu who had bought Abdeen's share at a Fiscal's sale. These lots were purchased by David Peiris who then conveyed them to the first defendant in the present action.

The main question is whether the rights of the *fidei commissarii* under P2 were wiped out by the partition decree. The rights of a *fidei commissarius* are rights annexed to the title of a fiduciary and if the fiduciary's title is effectively extinguished what is annexed to that title is also destroyed. As to whether a fideicommissary can intervene in a partition action to protect his interest see *Aysha Umma v. Pathumma* [2]. In the partition decree the allotments were made not on the basis of the deed creating the *fidei-commissum* but on prescriptive title. *Fidei-commissum* is a burden on title. If the title is not recognized the *fidei-commissum* cannot be recognized. This applies whether the allotment is made to a stranger or to the fiduciary. In the alternative, defendant being a purchaser for value without notice holds the property free from the *fidei commissum—Kusumawathi v. Weerasinghe* [3]; *Anees v. Bank of Chettinad* [4].

N. Nadarajah, K.C. (with him *C. Renganathan*), for the plaintiffs, respondents.—Section 9 of the Partition Ordinance contemplates existing persons only. What is concluded by a partition decree is the title an existing person claims to have. The partition decree can wipe out the right of the fiduciary only and not the right accruing to a *fidei commissarius several years hence—Voet* X—2—14, 38. Further, prescription does not run against a *fidei commissary* before the accrual of his rights—*Abdul Cader v. Habibu Umma* [5].

A fideicommissary cannot bring an action under section 2 if his rights have not accrued, since he has no present interest in the common

[1] *(1932) 34 N. L. R. 281.*
[2] *16 Ceylon Times L. R. 143.*
[3] *(1932) 33 N. L. R. 265.*
[4] *(1941) 42 N. L. R. 436.*
[5] *(1926) 28 N. L. R. 92.*

property—*Jayawardene on Partition, p 44.* Our Courts have consistently held that a title given under a partition decree is a new title and not a mere confirmation of the old title—*Bernard v. Fernando* [1], *Mudalihamy v. Dingiri Menika* [2], *Suwaneris v. Mohamed* [3]. There are also decisions which hold that *fidei-commissa* and equitable interests are not wiped out by a partition decree—*Babey Nona v. Silva* [4], *Abeyesundere v. Abeyesundere* [5], *Weerasekere v. Carlina* [6], *Galgamuwa v. Weerasekere* [7], *Marikar v. Marikar* [8].

A *fidei-commissum* is a real right attached to the property. For the distinction between *fidei-commissa* and trusts see *Lee: Introduction to Roman Dutch Law*, 3rd ed. p. 372. The doctrine of "notice" does not arise in *fidei-commissa* because of *fidei-commissum* " runs with the land " and is attached to the land. That doctrine, which is alien to the Roman Dutch Law, was brought into consideration by Macdonald C.J. in *Kusumawathi v. Weerasinghe (supra)*. See also *Anees v. Bank of Chettinad (supra)*. As to the right of a beneficiary to follow trust property see *Pilcher v. Rawlins* [9]. In the present appeal, however, it is submitted that there was no proof of absence of notice.

H. V. Perera, K.C., in reply.—In the cases cited the instrument creating the *fidei commissum* was regarded as the source of title of the fiduciary. In the present case the property alleged to be subject to the *fidei commissum* was allotted to a stranger on a title adverse to the title of the fiduciary. Further, the position of the defendant as a purchaser for value without notice was not question in the pleadings or at any stage of the proceedings.

Cur adv. vult.

September 13, 1945. WIJEYEWARDENE J.—

This is an action for declaration of title. One Uduman Lebbe Marikar was admittedly the original owner of the entire land comprised of Katuwekurunduwatta and Osellawatte. He gifted the northern half of it to Natchia and the southern half to Packeer. By P2 of 1887 Natchia gifted the northern half to her adopted daughter, Hadji Umma, and Omer on the occasion of their marriage. Omer died in 1902 leaving a daughter Hamidu Umma. His widow, Hadji Umma, married Amala Marikar, and died in 1933 leaving three children by her second marriage, namely, the first and the second plaintiffs and a daughter who died without issue. Hamidu Umma married Rahiman and died about 1913 leaving one son, Abdeen, the third plaintiff. Hadji Umma, Amala Marikar and Rahiman mortgaged 79/128 shares of the northern half in 1913. These 79/128 shares were sold in satisfaction of a hypothecary decree entered on that bond and purchased by one Peiris who conveyed those interests to Fonseka. An action was filed in 1918 by Fonseka for the partition of the entire land. Abdeen, the third plaintiff in the present case, and one Peer Mohamadu were two of the defendants in the partition action. The defendants in that case sought to get the action

[1] *(1913) 16 N. L. R. 438.*
[2] *(1926) 28 N. L. R. 412.*
[3] *(1928) 30 N. L. R., 11 at p. 18.*
[4] *(1906) 9 N. L. R. 251.*
[5] *(1909) 12 N. L. R. 373.*
[6] *(1912) 16 N. L. R. 1.*
[7] *(1919) 21 N. L. R. 108.*
[8] *(1920) 22 N. L. R. 137.*
[9] *(1872) L. R. 7 Ch. App. 259 at p. 268.*

dismissed on the ground that Fonseka's title based on P2 failed, as the deed P2 was void in consequence of the reservation of the life interest. The District Judge upheld that view following the then binding decisions of this Court which were subsequently overruled by the decision given by the Privy Council in *Weerasekere v. Peiris*.[1]. The District Judge proceeded, however, to adjudicate on the prescriptive rights of the parties and entered interlocutory decree declaring Fonseka and Abdeen entitled to undivided 79/256 and 49/256 shares of the entire land. Abdeen's rights under that decree were bought at a Fiscal's sale by Peer Mohamadu. The final decree entered in the partition action in 1925 allotted lot A to Fonseka for his 79/256 shares and lot B to Peer Mohamadu for the 49/256 shares to which Abdeen was declared entitled. Fonseka and Abdeen sold their lots A and B to David Pieris by D1 and D5. David Pieris sold the two lots to the first defendant in the present action by D6 of 1936. The plaintiffs claim lots A and B as *fidei commissarii* under P2.

The points in dispute between the parties may be stated briefly as follows:—

(*a*) Is the deed P2 a valid deed ?

(*b*) Does P2 create one *fidei commissum* in favour of the issue of Hadji Umma by Omer or two separate *fidei commissum* in favour of the issue of Hadji Umma and the issue of Omer ?

(*c*) What is the effect of the partition decree on the rights of the plaintiffs ?

By deed P2 the donor, Natchia, reserved a life interest in her favour and gifted the northern half to the *two donees* " in equal undivided shares " subject to the condition that they shall not sell, mortgage or otherwise alienate the property and that the property shall " after their death devolve on their lawful issues " Though the parties to that deed were Muslims it was a valid gift (vide *Aliya Marikar Abuthahir v. Aliya Marikar Mohammed Sally* [2]). I hold that it created separate *fidei commissa*, one in favour of the lawful issue of Hadji Umma and the other in favour of the lawful issue of Omer. The first *fidei commissum* was to take effect on the death of Hadji Umma and the other, on the death of Omer.

There remains for decision the important question as to the effect of the decree in the partition case on the rights of the plaintiffs under P2.

It was more than thirty years after the passing of the Ordinance No. 10 of 1863 that this Court held that *fidei commissum* property could be the subject of proceedings under that Ordinance (vide *Sathianaden et al. v. Mathes Pulle et al.*[3]). That case was followed in *Abeyesundere v. Abeysundere* [4]. In the former case one of the Judges said, " in view of the antiquity of the alleged creation of the *fidei commissum* I would suggest it may be a question whether its restrictions have not now expired ". In the latter case this Court doubted whether the will in question created a *fidei commissum*. In neither of these cases, moreover, the Court appears to have considered the effect of section 9 of the Ordinance before reaching the decision that the Ordinance permitted a partition action

[1] *(1932) 34 N. L. R. 281.*
[2] *(1942) 43 N. L. R. 193.*
[3] *(1987) 3 N. L. R. 200.*
[4] *(1909) 12 N. L. R. 373.*

to be filed in respect of *fidei commissum* property. However, the view expressed in these and similar decisions was regarded as settling the law and actions came to be filed for the partition of *fidei commissum* property, and then arose the question, naturally, as to the effect of a decree in a partition action where the property was subject to a *fidei commissum* but the decree itself made no reference whatever to the instrument creating the *fidei commissum*. The difficulty experienced in answering that question today is not so much the difficulty of construing the relevant provisions of the Ordinance as the difficulty of determining whether we should extend the application of certain principles underlying some previous decisions of this Court by affirming further principles which are said to be the logical corollaries of the earlier principles.

Section 9 of the Ordinance lays down that " the decree for partition . . . . given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property . . . . and shall be good and sufficient evidence of such partition . . . . and of the titles of the parties to such shares or interests as have been thereby awarded in severalty ". The Ordinance takes particular care in sections 12 and 13 to make express provision to safeguard the rights of mortgagees and lessees, even though these rights are not mentioned in the decree. The Ordinance does not make a similar provision for preserving the rights of *fidei commissarii*. This appears to indicate that either the Legislature did not intend the Ordinance to apply to *fidei commissum* property and thereby altered the Common Law which permitted the partition of *fidei commissum* property or intended, at least, that the decree for partition should wipe out any *fidei commissum* not expressly reserved by the decree. The earliest case dealing with this question is *Babey Nona et al. v. Silva* [1]. In that case the property was owned by three brothers Diyonis, Manuel and Bastian under a deed of gift creating a *fidei commissum* in favour of their descendants. These three brothers succeeded in getting the land partitioned without any reference to the *fidei commissum* and the decree gave a defined lot B to Diyonis. Manuel purchased lot B which was sold in execution against Diyonis. On the death of Diyonis, some of his children claimed lot B as *fidei commissarii* and it was held that Manuel could not defeat their title by pleading the partition decree. It will be noted that though Manuel might have been a purchaser for value he was well aware of the existence of the deed creating the *fidei commissum*. In the next case, *Weerasekere v. Carlina et al.* [2], Christian the *fiduciarius* under a last will obtained under the decree in a partition case a defined lot absolutely. He gifted a share of that lot to Teadoris, a son of his. On the death of Christian it was held that Teadoris could not defeat the right of the *fidei commissari*. Though the report does not show that Teadoris had notice of the *fidei commissum*, the fact remains that he was not a purchaser for value. The opinion expressed in *Fernando v. Shewakram* [3] was in the nature of an *obiter dictum* as the partition decree which the Court had to consider was a decree entered

[1] *(1906) 9 N. L. R. 251.* [2] *(1912) 16 N. L. R. 1.*
[3] *(1917) 20 N. L. R. 27.*

" upon mere consent of the parties " and would not, therefore, be a decree as contemplated by section 9 of the Ordinance. In *Kusumawathi et al. v. Weerasinghe* [1], Gimara donated by a duly registered deed an undivided share of a property to Andris subject to the conditions—(1) that the gift was to take effect after her death (2) that Andiris was not to alienate the property, (3) that on Andiris' death the property should " descend " to the children of Andiris. Gimara filed a partition action later making Andiris a party and obtained a divided lot under the decree without any reference to the *fidei commissum*. On the death of Gimara and Andiris the children of Andris claimed the lot as *fidei commissarii* against a purchaser for value from Gimara. In dismissing that claim, Macdonell C.J., said:—

> " *Babey Nona v. Silva* (*supra*) decides definitely enough that the *dominus* under a partition decree title being himself a *fiduciarius*, must hold the land acquired by that title for the *fidei commissarii*, but it does not decide that the *dominus* under such a title not being a *fiduciarius* must hold it for them, still less that the purchaser from him must do so . . . . As I understand the decision of *Babey Nona v. Silva* (*supra*) it does not decide that a *fidei commissum* attaches to a lot sold by a *fiduciarius*. All it decides is that a purchaser from such a *fiduciarius* with knowledge of a *fidei commissum* cannot hold the land purchased as against a *fidei commissarius*. It affirms the principle that a man cannot hold what in conscience he knows he has no right to."

In the recent case of *Anees v. Bank of Chettinad* [2] the *fidei commissum* property had been the subject of a partition action and a *fiduciarius* had obtained a defined lot under the decree which did not mention the existence of the *fidei commissum*. It was held that a *bona fide* purchaser without notice from the *fiduciarius* held the lot free from the *fidei commissum*.

The effect of the decisions which I have examined is to confine within very narrow limits the doctrine which is generally assumed to have been established by *Babey Nona v. Silva* (*supra*), namely, that the decree under secton 9 does not extinguish the rights of the *fidei commissarii* but merely sets apart a specific lot to which the rights of the *fidei commissarii* attach in place of the share which was originally burdened with the *fidei commissum*. I think that, in view of the clear words of section 9, the applicability of the above doctrine should be limited to the following case:—Where a *fidei commissum* property is partitioned and a defined lot is allotted under the decree either to a *fiduciarius* or a person deriving title from a *fiduciarius* by way of gift, sale, &c., the *fidei commissarii* could in a subsequent action set up their claims against (*a*) such *fiduciarius* or such person to whom the lot was decreed or (*b*) any one deriving title from either of them after the decree if neither he nor his predecessors in title, if any, is a purchaser for value without notice of the *fidei commissum*. I may observe that such a limitation would be consistent

[1] *(1932) 33 N. L. R. 265.*

[2] *(1941) 42 N. L. R. 436.*

with the guarded observation made by the Privy Council in *Tillekeratne v. Abeysekere et al.* [1] that the partition "would not necessarily destroy a *fidei commissum.*"

The present case is clearly a case which is not governed by the above doctrine, as will be seen from the facts set out earlier in this judgment. It is sufficient to point out that the position of the defendant as a purchaser for value without notice of the *fidei commissum* was not questioned in the pleadings or at any subsequent stage of the proceedings.

For the reasons given by me I would allow the appeal with costs and direct decree to be entered dismissing the plaintiffs' action with costs.

ROSE J.—I agree.

Appeal allowed.