1945 *Present:* **Soertsz A.C.J. and Canekeratne J.**

MANCHENAYAKE, Appellant, *and* PERERA *et al.*, Respondents.

357—D. C. Colombo, 2,801.

Partition action—Co-owner's transfer, pending action, of what would be allotted to him in the final decree—Conveys immediate interest in the property—Partition Ordinance (Cap. 56), s. 17.

A conveyance executed after the institution of a partition action, and before the entering of the final decree, purporting to " sell, assign, transfer, and set over " to the vendee " the interest to which the said vendor may be declared entitled to in the final decree to be entered into in the said case from and out of all that land " (*i.e.*, the subject of the partition suit) is valid and not obnoxious to section 17 of the Partition Ordinance. It passes an immediate interest in the property and is not merely an agreement to convey in the future.

Khan Bhai v. Perera (1923) 26 N. L. R. 204 and *Hewawasan v. Gunasekera (1926) 28 N. L. R. 33*, followed.

Fernando v. Atukorale (1926) 28 N. L. R. 292, not followed.

APPEAL from a judgment of the District Judge of Colombo. By deed No. 4,021 dated June 12, 1937, J and Y who were the first and second defendants in a partition action which was then pending sold and conveyed to one S the interest which the vendors would be declared entitled to under the final decree to be entered in the said case. Final decree was duly entered on March 2, 1938, and J and Y were declared entitled to lots A2 and B4. S by deed dated July 19, 1940, purported to sell and convey lots A2 and B4 to the plaintiff. In this action the plaintiff sought to be declared entitled to lot A2. The learned District Judge dismissed the plaintiff's action stating, as main reason, that in the absence of a conveyance from J and Y to S after the partition decree was entered it could not be contended that S could claim to have been lawfully entitled to lots A2 and B4.

H. V. Perera, K.C. (with him *S. R. Wijayatilake*), for plaintiff, appellant.—The question for consideration is whether a conveyance, executed after the institution of a partition action but before final decree, purporting to sell the interest which the vendor may be declared entitled to in the final decree, is obnoxious to section 17 of the Partition Ordinance. The District Judge held the document to be only an agreement to sell. It is submitted that the document was an actual conveyance of a future thing, an absolute sale of what would be allotted in the final decree at a future date. That being so no further conveyance would be necessary to pass title when the time arrives—*Berwick's Voet (1902 ed.) p. 18.* Such a sale would not be obnoxious to section 17 of the Partition Ordinance—*Louis Appuhami v. Punchi Baba* [1], *Rajapakse v. Dassanayake* [2], *Khan Bhai v. Perera* [3], *Hewawasan v. Gunasekera* [4], *Subaseris v. Prolis* [5], and *Salee v. Natchia* [6]. The contrary view stated by Maartensz J. in

[1] *(1904) 10 N. L. R. 196.*
[2] *(1928) 29 N. L. R 509.*
[3] *(1923) 26 N. L. R. 204.*
[4] *(1926) 28 N. L. R. 33.*
[5] *(1913) 16 N. L. R. 393.*
[6] *(1936) 39 N. L. R. 259.*

Fernando v. Atukorale [1] was *obiter*. It is submitted that immediately after the entering of final decree the title which vests in the seller automatically passes to the purchaser. The doctrine of *exceptio rei venditae et traditae* does not apply to future things sold. For that doctrine to apply the thing must have a present existence but the title vests later.

E. B. Wikramanayake (with him *H. A. Koattegodde*) for defendants, respondents.—The observations of Maartensz J. in *Fernando v. Atukorale* (*supra*) were not *obiter*. The specific question arising in the present appeal was dealt with in that decision. See also the judgment of Ennis A.C.J. in *Appuhamy v. Babun Appu* [2]. A conveyance of undivided shares would clearly be obnoxious to section 17 of the Partition Ordinance. A sale of a future thing, viz., the divided share to be allotted in the decree, is clearly good, but the effect of section 9 of the Ordinance must also be considered. That section operates to wipe out the rights conveyed. If the document was an agreement to sell the divided interest to be allotted after final decree then the agreement must be implemented by a conveyance after decree, because that agreement did not convey real rights.

H. V. Perera, K.C., in reply.—Section 9 contemplates existing rights. It does not wipe out rights arising on the entering of the final decree.

Cur. adv. vult.

October 30, 1945. SOERTSZ A.C.J.—

Section 17 of the Partition Ordinance has proved to be as prolific of difficulties as the serpent of Lernaea is said to have abounded with heads. You cut off one only to find yourself confronted with two others that arose in its place. Likewise, section 17, despite the laborious interpretations to which it has been subjected ever since it was enacted as far back as 1863, continues to vex us, and we do not seem to be within measurable reach of some weapon as effective as the firebrand with which Hercules destroyed his monster. It is time, I think, to abandon the quest for the absolute truth in regard to this section and at least for the sake of a quiet life undisturbed by fruitless speculation, to bow to the authority of the Bench of five Judges in the case of *Khan Bhai v. Perera* [3], and of the Bench of the three Judges in *Hewawasan v. Gunasekara* [4] who gave their unanimous ruling on the identical question that is involved in the present appeal. That question is whether a conveyance executed after the institution of a partition action, and before the entering of the final decree, purporting to " sell, assign, transfer, and set over " to the vendee " the interest to which the said vendor may be declared entitled to in the final decree to be entered in the said case from and out of all that land " (*i.e.*, the subject of the partition suit) is obnoxious to section 17.

Khan Bhai v. Perera, as it appears to me, gave an unequivocal answer to that question when the five Judges ruled that " persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be

[1] *(1926) 28 N. L. R. 292.*
[2] *(1923) 25 N. L. R. 370.*
[3] *26 N. L. R. 204.*
[4] *28 N. L. R. 33.*

ultimately allotted to them in the action ". Two years later, all the three Judges who considered an allied question in *Hewawasan v. Gunasekera* were, unanimously, in agreement with that view, and two of them went further and held that although a document executed before final decree is in the form of a conveyance " effecting an immediate transfer and out-and-out sale " of certain definite lots which, at the time of the conveyance, a tentative scheme of partition proposed for allotment to the vendor, would not offend against section 17 because the substance of the transaction as revealed on an examination of the deed was that " the respondent *intended* to sell and the appellant to buy the share to be allotted to the respondent." (Garvin J.). Dalton J. agreed and observed " There is not the least doubt as to what both parties *intended* and there is not the least doubt that neither *intended* to deal with any undivided interest in the land ". Jayewardene A.J. dissented strongly from that view and followed the view taken in the same connection in *Appuhamy v. Babun Appu*[1] by Ennis A.C.J., Garvin J. concurring. It is not necessary for the purpose of the present case to enter into that controversy or to see if the manner in which Garvin J. and Dalton J. distinguished their case from the earlier case is convincing. What is material here is that all the three Judges in *Hewawasan v. Gunasekera* had no doubt whatever that a conveyance, pending partition, of the share that would be allotted to a party is a valid conveyance. And yet, exactly four months after *Hewawasan v. Gunasekera* had been decided this question was raised again in *Fernando v. Atukorale*[2] before Lyall Grant J. and Maartensz A.J. and, curiously, there appears to have been no reference whatever to this case of *Hewawasan v. Gunasekara* and they did not follow the view expressed in *Khan Bhai v. Perera*, Lyall Grant J. observing that " the effect of that decision appears to me to be that a party to an action can enter into a binding *agreement* to dispose of the share which may ultimately be allotted to him. He confers upon the purchaser a personal right against himself. He does not however transfer any real right as at the time no real right had vested in him ". Maartensz A.J. while not saying that that was the meaning of the ruling in the Full Bench Case, adopted it as the proper effect of a conveyance, pending partition, of the share to be allotted and avoided the authority of *Khan Bhai v. Perera* by observing that " the statement of the law regarding persons desiring to charge or dispose of their interests during the pendency of a partition was *obiter* to the question at issue ". If I may say so respectfully, neither of these views appears to me to be tenable at all. The pronouncement in *Khan Bhai v. Perera* appears to me to be of the very essence of the *ratio decidendi* in that case and that was how the three Judges understood it themselves. In regard to the view that a conveyance of the share that would be allotted " remains merely an agreement to convey and would not operate as a conveyance or alienation ", the difficulty both these Judges appear to have found in accepting the plain meaning of the rule laid down by the five Judges is that they could not reconcile themselves to the idea of a forthright sale when, in the words of Lyall Grant J., " the fact is apparent on the face of the deed that the property did not at the time of the execution of the deed.

[1] *25 N. L. R. 370.* [2] *28 N. L. R. 292.*

belong to the vendor. All that belonged to the vendor at that date was an undivided share of the property." It was for that reason that he and Maartensz A.J., read what, on the face of it was an immediate sale, as an agreement to sell. But whether a transaction is a sale or an agreement to sell must depend not on the extent of the vendor's title but, in nearly every case, on the words of the document. As Jayawardene A.J. said when a document exactly in the same terms as the deed before us was sought to be construed as an agreement to sell—" P1 is clearly not an agreement to convey in the future but a completed transaction intended to pass an immediate interest in the property . . . . The operative words used ' grant, bargain, sell, assign, transfer, set over and assure ' are words appropriate to a conveyance tansferring property. Clearer and stronger words to effect an immediate transfer and out-and-out sale cannot be conceived ".

So much in regard to the question whether the deed is a present conveyance or an agreement to convey. The question whether although in form a conveyance, a deed operates to convey title is a different question and the answer to it would depend on the title of the vendor, the existence of a saleable thing, public policy, morality, statutory prohibitions and things like that.

In this instance Lyall Grant J. and Maartensz A.J. took the view that a vendor cannot convey *in praesenti* what he did not own at that moment. But, it is well established both in the Roman-Dutch law and in the English law that a vendor can sell property which, at the date of the sale, did not belong to him. Wessels, basing himself on Voet and other well-known authorities, sums up the law thus:—" If the object of the obligation does not exist at the moment the agreement is concluded but is capable of coming into existence, then the law regards such an obligation to be *in rerum natura*, and the contract is enforceable at law." As he goes on to point out, an obligation in respect of a thing not in existence but capable of coming into existence may result from a *conventio spei*—the mere chance of something coming into existence, or from a *conventio rei speratae*. In the former case, the parties stand bound from the moment the transaction is entered into, whatever the result; in the latter case, there is a tacit understanding that if there is no result the obligation will be without an object and therefore there will be no contract, but if there is a result the contract operates *jam tunc*. As stated in the Digest 18.1.8—" nec emptio nec venditio sine re, quae veneat, potest intelligi et tamea fructus et partus futuri recte ementur, ut cum editus esset partus, *jam tunc, cum contractum esset negotium*, venditio facta intellegitur.

The English law is substantially to the same effect. I am indebted to my brother Canekeratne J. for a reference to the case, *In re Lind*[1] in which it was said *in pari materia* " Directly the property comes into existence the assignment fastens on it and without any *actus interveniens* the property is regarded in equity as the property of the assignee ". It is the *jam tunc* rule in English garb.

Then in regard to the difficulty which Maartensz A.J. thought that section 9 created, section 9 extinguishes whatever right or title all persons *have or claim to have* in the property before the entering of the final decree,

[1] *(1915) 2 Ch. 345.*

that is to say all the pre-existing rights and titles. In the case of a conveyance such as we are dealing with here, the right or title conveyed comes into existence only upon the entering of the final decree in virtue of the *jam tunc* principle of the Roman-Dutch or the equitable principle of the English law that " when the property comes into existence, the assignment fastens on it ".

For these reasons, I would allow the appeal and direct that judgment be entered for the plaintiff as prayed for with costs in both Courts.

CANEKERATNE J.—I agree.

Appeal allowed.