1934 *Present :* **Dalton J.**

PERERA *et al. v.* PEIRIS *et al.*

214—C. R. Panadure, 2,852.

Partition action—Owelty—Equalization of shares—Payment of compensation—No tacit hypothec.

An order for the payment of compensation, made for the purpose of equalizing shares in a partition action, does not create such a charge over the portion of land allotted to the person liable to pay the compensation as to attach to it in the hands of a transferee for value.

APPEAL from a judgment of the Commissioner of Requests, Panadure.

E. B. Wickramanayake, for plaintiffs, appellants.

L. A. Rajapakse (with him *Kariappar*), for defendants, respondents.

March 23, 1934. DALTON J.—

This was an action under section 247 of the Civil Procedure Code for a declaration that lot No. 4 of a land called Dawatagahawatta was liable to be seized and sold for the recovery of the sum of Rs. 77.95.

The land Dawatagahawatta had been partitioned in D. C. Kalutara, No. 10,614, the final decree being dated August 25, 1927 (exhibit P 1). By that decree lot No. 4 was allotted to Selestina and Haramanis Perera, wife and husband, the plaintiffs in the partition action, subject however *inter alia* to the sum of Rs. 155.90 being paid by the plaintiffs to Simon and Mailentina Perera, the first and second defendants in the partition action. This sum was ordered to be paid as compensation for the purpose of equalizing and apportioning the valuation of the allotments made in the decree.

Selestina and Haramanis Perera by deed No. 8,135 of September 6, 1927 (exhibit 1 D 3) sold lot No. 4 to M. D. H. Perera, citing therein the final decree in the partition action as their title. M. D. H. Perera sold the lot to Simeon Perera on deed No. 8,230 of October 12, 1927 (exhibit 1 D 4), and Simeon Perera sold the lot to the present first defendant upon deed No. 9,791 of June 26, 1929 (exhibit 1 D 1).

The plaintiffs in this action are Mailentina Perera and her husband, W. F. S. Jayasuriya. Mailentina Perera claimed that by the decree in the partition action she was entitled to recover the sum of Rs. 77.95 (half the sum of Rs. 155.90 awarded as compensation in the decree) from Selestina Perera and Haramanis Perera, second and third defendants, and they further sought to obtain a declaration in this action as against the first defendant, the purchaser under deed 1 D 1, and against Selestina and Haramanis Perera as second and third defendants, that lot No. 4 was liable to be seized and sold under a writ issued in case No. 10,614 to satisfy the claim.

The Commissioner of Requests came to the conclusion that the payment of compensation ordered in the decree was secured on lot No. 4, and that it was not merely a personal liability for which Selestina and Haramanis Perera were responsible. In view, however, of the fact that the decree was dated August, 1927, and writ was not taken out until January 26, 1933, and for other reasons, he came to the conclusion that Mailentina Perera had been guilty of great negligence in recovering the amount, for which reason the present action must be dismissed. The plaintiffs now appeal.

The question to be decided is whether the order in the final decree for payment of compensation for the purpose of equalizing and apportioning the valuation of the lots creates a charge on lot No. 4. Counsel for respondents agrees that if it is so, the question of laches or negligence does not arise, apart from the question of prescription of the right of action.

I have been referred to the decision in *Rapiel v. Peiris*[1], in which it was held that where in a partition decree the Court ordered compensation

[1] *34 N. L. R. 157.*

to be paid for equalizing the value of the lots partitioned, the compensation due from an allotment was to be preferred to a claim for costs against the person ordered to pay compensation in respect of lots decreed to him. On a sale of the allotment for costs, it was held that the claim for compensation was entitled to preference.

In the case before me now Mr. Wickramanayake asks me to go much further. To succeed in his present claim, assuming that the procedure adopted to enforce it is correct, he has to establish that the order for the payment of compensation creates a tacit hypothec over the lots decreed to the person ordered to pay compensation, and attaches to those lots until discharged. He asks me to so hold. In support of his argument he refers me to a sentence in the judgment of Drieberg J. in the above cited case where he says, "The thirteenth defendant's right to the lot assigned to him is good and conclusive against all persons whomsoever, and there is no reason why his right to the sum allotted to him to equalize the division should be any less". This would seem to go further than was necessary for the purposes of that case, if the words be taken alone, but the learned Judge in the next sentence would seem to make it clear that what he had in mind was a right of preference such as was there contended for on behalf of the thirteenth defendant.

On consideration I have come to the conclusion that Mr. Wickramanayake's argument here cannot be upheld. There is no doubt as to the competency of a Commissioner, in carrying out a partition decreed by the Court, to award owelty in adjusting the values of the divided portions, but there is nothing in the Partition Ordinance, so far as I can see, to support the argument that a charge is thereby created over any of the divided portions. No authority has been cited to show that the common law recognizes any such tacit hypothec, and I am unable to find that any such hypothec arises by operation of any local statute. In South Africa the tendency of modern legislation has been opposed to them (*vide* Maasdorp's *Institutes, vol. II., 1st ed., p. 243 ; 5th ed., p. 272*), and in Ceylon also the tendency has been since 1871 to restrict rather than extend the provisions of the common law in respect of mortgages. One should, I think, be satisfied that there is some explicit provision in the Partition Ordinance or some other statute before holding that any such new charge had been created as is now urged in this case.

I might point out that the common law does draw a distinction in certain circumstances between certain privileged claims and tacit hypothecs (*vide* Van der Keesel's *Theses, 418*). Funeral expenses and medical fees rank as privileged claims and rank before mortgage creditors, but it would seem they do not create any tacit hypothec. It was suggested during the argument before me that the logical conclusion of the decision in *Rapiel v. Peiris (supra)* must be to support the position for which Mr. Wickramanayake contends, but I do not think that is so. A right of preference does not necessarily imply a charge over property.

I would for these reasons hold that the partition decree created no tacit hypothec over lot No. 4, and therefore the appeal must fail.

The appeal is dismissed with costs.

Appeal dismissed.