Present: Garvin A.J. and Jayewardene A.J. 1923.

CHARLES *v.* NONOHAMY *et al.*

100—D. C. Galle, 9,167.

Prescription—Testator dying after possessing property for eight years—Last will creating fidei commissum*—Does possession of fiduciary or executor enure to the benefit of* fidei commissary *?—Prescription.*

A property of which C was the owner was sold in execution against him and purchased by O, who died before he obtained a Fiscal's transfer and before he could acquire prescriptive title to it by possession for ten years. By his last will O directed his executor to sell such lands as may be necessary for the payment of debts, and thereafter to convey the remaining properties to his son W subject to a *fidei commissum* by which after the death of W the properties were to pass to his children. The executor entered on the land in question and possessed it for over ten years. W, who did not himself possess the property during his lifetime, died leaving a son, B.

Held, that B had title by prescription to the property.

Per JAYEWARDENE A.J.—"For the purposes of the Prescription Ordinance the *fidei commissary* must be considered as succeeding to the fiduciary."

Obiter "Under the Roman-Dutch law a *fidei commissary* is treated as a privy of the fiduciary or a person claiming under him for the purposes of the law of *res judicata*."

A fiduciary can acquire rights for the *fidei commissum* property, and free it from burdens and any increase in the value of the *fidei commissary* property while it is in the hands of the fiduciary, whether due to his industry or not, would enure to the benefit of the *fidei commissary*.

THE facts are set out in the judgment.

H. V. Perera, for defendants, appellants.

E. J. Samarawickreme (with him *Soertsz*), for plaintiff, respondent.

Cur. adv. vult.

October 3, 1923. GARVIN A.J.—

The land which is the subject of this action admittedly was once owned by one Carolis. It was sold in execution against Carolis and was purchased by his brother, Odiris, who does not appear to have obtained a conveyance from the Fiscal. Odiris, who at the date of his death had only been in possession of this land for about eight years, left a last will by which he directed his executor to sell, such land or lands as may be necessary for the payment of debts, and thereafter to convey the remaining lands to his son, Udenis, and his

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daughter, Babunhamy, in equal shares. He further declared that the interests to be passed to Babunhamy were to pass on her death to Udenis, and placed all the lands which Udenis took under his will under the burden of a *fidei commissum* in favour of his children.

The intention of the testator would appear to have been that his entire estate should vest in his executor for the purposes of administration and the payment of debts, and when these purposes had been accomplished, that he should pass the residue to the legatees. This explains the circumstance that the executor entered upon this land on the death of the testator. Udenis never entered into occupation of this land, but why he did not do so is not known. The executor continued in possession, and was in possession in 1913, when Udenis died. The District Judge has found that the executor did not change the character of his possession. He entered as executor under the will, and must, therefore, in the absence of evidence to the contrary, be presumed to have continued in possession in that capacity.

Now, whatever may be the circumstances under which it happened that Udenis did not enter into occupation of this land, immediately on his death the right accrued to his son Bastian to compel the executor to hand over the premises to him. Bastian, therefore, became entitled to a land of which the testator had had eight years' adverse possession, and which had thereafter been in the possession of the testator's executor for over ten years to the exclusion of all others.

The plaintiff is a purchaser from Bastian, and has, I think, clearly established that his predecessors in title had acquired a prescriptive title to the premises.

The appeal is accordingly dismissed.

JAYEWARDENE A.J.—

This case raises an interesting question under section 3 of the Prescription Ordinance, No. 22 of 1871. The action is one to recover damages, under section 9 of the Partition Ordinance, from the defendants, by whose act the plaintiff says he has lost his rights to a land worth Rs. 4,000. The land in question admittedly belonged to the defendants' father, Carolis. It was sold in execution against him, and purchased by his brother Odiris in the year 1889. No Fiscal's conveyance was obtained. About seven or eight years later Odiris died before he had acquired a title by prescription to the land. He left a will appointing another brother, Thambihamy Arachchi, his executor, and devising the property to his son, Udenis, subject to a *fidei commissum* in favour of the latter's children. Thambihamy obtained probate of the will and inventoried this land among the assets of the testator. Udenis died in 1913, leaving a son, Bastian, who became entitled to the property under the will. Bastian by deed No. 32 of June 5, 1920, sold it to the present plaintiff.

Shortly after this sale, the defendants, as the heirs of Carolis, instituted a suit, No. 18,049, to partition the land, and obtained a final decree in their favour on June 16, 1921. The plaintiff alleges that the title to the land is in him, and that the defendants acting fraudulently and collusively obtained partition of the land among themselves. He sues to recover the value of the land by way of damages. The defendants allege that they are owners of the land by virtue of Carolis's title, of which he was never divested by adverse possession for the prescriptive period, and that they were entitled to bring the partition action. The learned District Judge has found that on the execution sale Odiris took possession of the land, and that after his death, his executor, Thambihamy, was in possession of the land until about the time of the institution of the partition suit. He held, therefore, that Odiris and his successors in title have acquired a title by prescription to the land, and that Carolis and his heirs, the defendants, have been divested of their title. He decreed the plaintiff's claim. The defendants appeal.

On the Judge's findings on the facts, it is clear that Carolis and the defendants have not been in possession of the land for about thirty years, and that the possession has been in Odiris and the executor of his will. But assuming this to be so, it is contended for the appellant that such possession is not a prescriptive possession, within the meaning of section 3 of the Ordinance. The argument is put in this way. Odiris himself had not acquired a title by prescription. The fiduciary, Udenis, possessed through the executor for about fifteen years. Thereafter the executor possessed without admitting the title of Bastian, the *fidei commissary*, but adversely to him. As Bastian derived title to the property under the will of Odiris, he is not a successor in title to the fiduciary, and does not, and cannot, claim under the latter. Bastian, the *fidei commissary*, can only claim the benefit of the testator's possession, which, however, was not for the statutory period. Bastian had no possession of his own which he could add to this period to complete possession by prescription.

Two questions are, therefore, presented for decision: Does a *fidei commissary* claim under the fiduciary within the meaning of section 3 of the Prescription Ordinance so as to enable the former to tack the possession of the fiduciary to the possession of the testator? And must the possession of the executor, after the death of Udenis, be deemed to be in possession on behalf of Bastian until by some overt act he changed the character of the possession?

The first question is not free from difficulty. To establish a title by prescription to land, section 3 of the Ordinance requires proof of undisturbed and uninterrupted possession for a period exceeding ten years by the plaintiff, defendant, or intervenient (as the case may be), or *by those under whom he claims*. Mr. Perera relies upon these words, and contends that a *fidei commissary* does not claim

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under a fiduciary. He cites in support of his contention the case of *Usoof v. Rahimath*,[1] where this Court (Bertram C.J. and Shaw J.) held (see pages 240 and 243) that a judgment obtained against a fiduciary does not operate as a *res judicata* against the *fidei commissary*. The learned Chief Justice said :—

> "The seventh and last of the suggested obstacles to the free interpretation of the instrument was the judgment recovered against Abdul Cader (fiduciary) by Mohamadu Usoof (husband of the first fiduciary) in 1895 (that is, after the death of his wife), in which the interpretation now contended for by the appellant was adopted by the Court ; it was argued that this judgment was *res judicata* as against Abdul Cader's children. But this is clearly untenable. These children (the *fidei commissaries*) are not claiming through Abdul Cader (the fiduciary), but on the deed. It is certainly singular that it should be open to successive generations of persons claiming under the same *fidei commissum* to litigate questions already the subject of a judicial decree. But it is clear that, just as no agreement of Abdul Cader could affect the rights of his children, they are equally unaffected by any judgment against him to which they were not parties."

That a *fidei commissary* does not claim under a fiduciary is strictly speaking correct, but the question arises whether, for the purpose of the Prescription Ordinance, this strict construction should be adhered to. No direct authority can be cited in favour of or against appellants' contention. It was, no doubt, held in *Usoof v. Rahimath* (*supra*) that a decree against a fiduciary does not bind the *fidei commissary*, the latter not being a privy of the former ; but no authority was cited in support of it, except the general principle that a *res judicata* binds only parties and their privies. But this ruling seems to be opposed to what is laid down in the Roman-Dutch law. Voet in *bk. 2, 15, 8*, of the *Pandects*, which treats of "transactions" or compromises, discussing the question whether a *fidei commissary* is bound by a compromise entered into by the fiduciary concerning the *fidei commissum* property, says that a compromise entered into *bona fide* by a fiduciary ought to be binding :—

> "*Eo modo, quo et lis ante restitutionem fiduciario mota nocet fidei commissario, non item ea, quae post restitutionem demum coepta est* " ;

and again in the same paragraph he says :—

> "*Denique etiam in fiduciarium lata sententia fidei commissario nocitura est ; nisi culpa fiduciarii condemnatio intervenisset, sive de re singulari, sive de tota haereditate fiduciario lis ante restitutionem mota esset, idque, ne alioquin dominia rerum*

[1] *(1918) 20 N. L. R. 225.*

in incerto essent, incertaeque rerum indicatarum auctoritates ut plenius exsequitur. Peregrinus de fidei commissis, art. 53, num. 49 et seqq. *Si ergo et solutione, et impensa bona fide facta, et lite bona fide agitata, et denunciatione sibi facta, fiduciarius fide commissario nocere possit ; non est, cur non et transigendo bona fide sine gratia aut sordibus eidem posset praejudicare, praesertim, si meminerimus, transactionem aeque, ac rem iudicatam, ad lites finiendas comparatam esse, nec minorem eius, quam rei judicatae auctoritatem.*"

In this passage Voet states that a judgment against the fiduciary binds a *fidei commissary* if there has been no fault (*culpa*) on the part of the fiduciary, and if the case has been fairly conducted (*lite bona fide agitata*). It is, therefore, clear that under the Roman-Dutch law a *fidei commissary* is a privy of the fiduciary where the law of *res judicata* is concerned, and he must be considered as claiming under the fiduciary. I may here point out that judgment obtained against persons in the position of a fiduciary in England and India have been held to bind their reversioners. In England, in the case of successive remaindermen, a decision against a remainderman is admissible in evidence against a subsequent remainderman in a suit brought against him for the same land, though he cannot be said to claim any estate under the first remainderman, because they claim under the same deed. (See *Everest and Strode's Law of Estoppel, 2nd ed., p. 60*).

In India, where a Hindu widow's position is almost exactly similar to that of a fiduciary, it has been held that a judgment against her binds the reversionary heirs of her husband. Thus in *Katama Katchiar v. Srimat Raja Moothoo* [1] the Privy Council said :—

> "The whole estate would for the time being be vested in her absolutely for some purposes, though in some respects for a qualified interest, and till her death it would not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts in this country as to tenants-in-tail representing the inheritance, would seem to apply to the case of the Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and squarely obtained against the widow."

The same principle was held applicable where a Hindu widow was granted the estate under a will which gave her the power to nominate a successor. *Pertabnarain Singh v. Triloknath Singh.*[2] Caspersz says that this principle has now been established by numerous decisions. (*Caspersz on Estoppel, part II., p. 164, 3rd ed.*) It is on this same principle that it has been held locally that

[1] *(1863) 9 Moo. I. A. 563 (604).*

[2] *(1884) 11 Cal. 186.*

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a partition effected between the *fiduciarii* or the *fiduciarii* and other co-owners of a land, whether by judicial decree or by mutual agreement, binds the *fidei commissarii*, and cannot be re-opened by them when their interests accrue. (*Babey Nona v. Silva.*[1]) This decision adopted the law as laid down by Voet in *bk. 10, 2, 38*, where he refers to his *Title on Compromises, para 8.* Therefore, under the Roman-Dutch law a *fidei commissary* is treated as a privy of the fiduciary or a person claiming under him for the purposes of the law of *res judicata.* The question is, whether he should not also be considered as holding a similar position with regard to the law of prescription. The rights and duties of the fiduciary and *fidei commissary* heirs are discussed by Voet in *book 36, title 1*, particularly in paragraph 63. A consideration of these titles show that a fiduciary has somewhat wide powers with regard to the *fidei commissum* property, and that he can acquire rights for it and free it from burdens, and any increase in the value of the *fidei commissary* property while it is in the hands of the fiduciary, whether due to his industry or not, would enure to the benefit of the *fidei commissary.* So much so, that according to Voet (see his *Title of Compromises, para. 8*) it is a matter of common dispute whether the *fidei commissary* succeeds the testator or the fiduciary :

> " *Ius fidei commissarii plane idem sit cum iure fiduciarii, ac simpliciter onera omnia ac commoda a fiduciario in fidei commissarium transeant, quantacumque fuerint, sic ut disputetur vulgo, au gravanti au gravato succedatur ex fidei commisso : ut proinde fiduciarius de suo iuro transigens, non possit non videri transegisse simul de iure fidei commissarii, ius summ omne ex iure, quod fiduciario competebat, habentis ac metientis.*"

There he says that the right of the *fidei commissary* heir is the same as that as the fiduciary, all the advantages and disadvantages pass to him, and that the *fidei commissary* has and measures all his rights from and by the rights which the fiduciary had. Hence it is a matter of dispute whether he succeeds to the person imposing the burden (*gravanti*) or to the person on whom the burden has been imposed (*gravato*).

For the purpose of the Prescription Ordinance, the *fidei commissary* must, in my opinion, be considered as succeeding to the fiduciary. Otherwise, the consequences would be very anomalous, and the fiduciary would be able to obtain the *fidei commissum* property by prescription. For instance, to take the facts of the present case, the testator only possessed the property for seven or eight years the fiduciary possessed it for a period exceeding the statutory period for prescription. If the real owner claimed the property at the death of the fiduciary, the *fidei commissary*, who claims under the testator, cannot get the benefit of the fiduciary's possession, and would not be

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

able to establish a title by prescription, and the owner would be entitled to the property, but his right might be contested by the heirs of the fiduciary who has had possession for the prescriptive period. So that, as between the *fidei commissary*, the owner, and the heirs of the fiduciary, the last named would be entitled to the property. But the fiduciary or his heirs cannot set up a claim adverse to the will, where the fiduciary has obtained possession of the property under the will. The law of estoppel stands in the way of his doing so. Thus in *Board v. Board*[1] a testator made a will leaving property which he had no right to device (but which devolved on his heir-at-law) to his daughter Rebecca with remainder to his grandson. The daughter entered into possession under the will, and remained in possession for over twenty years (the statutory period for prescription), and then conveyed the land to the defendant. The rights of the heir-at-law had been extinguished by the daughter's possession for over twenty years. In a contest between an assignee of the remainderman and the defendant, it was held that as the daughter had entered under the will, the defendant claiming through her was estopped as against all those in remainder from disputing the will, Mellor J. saying :—

> "The only person who could dispute the possession of Rebecca under the will was the heir-at-law. He never disputed the possession, and his title to the estate is barred by the operation of the Statute of Limitations. Whatever his motive was, whether he received advantages under the will or not, or whether he chose to abstain from making any claim or not, is wholly immaterial, because the effect of the statute is absolutely to bar him at the end of twenty years. That being so, Rebecca enters into possession under the will, taking a life estate, and during the continuance of that estate effects a sale adversely to the interests of the remainderman under the will. Now, Rebecca having accepted the estate under the will, and having acted under the will, treating the will as a perfectly valid will, cannot defeat the title of the remainderman under the will by alleging that the devisor had no title. It would be contrary to the wholesome doctrine of estoppel to allow a person who takes a limited interest under the will, after she has been in possession for twenty years under the will, to convert her limited interest into a fee."

See also *Dalton v. Fitzgerald*,[2] where this case was followed.

On the principle laid down there the fiduciary is barred from claiming the property, the fiduciary's possession bars the true owner from succeeding in his claim. Therefore the title to the property must be in the *fidei commissary*.

[1] *(1873) 9 Q. B. 48.*

[2] *(1897) 1 Ch. 440 ; also 2 Ch. 86.*

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Furthermore, in the present case, Bastian, the *fidei commissary*, is also the heir of the fiduciary, his father, and is entitled to claim the property by intestate succession from him, if he cannot claim it as *fidei commissary* under the will. In my opinion the fiduciary must be considered as having acquired certain rights in the property. He has completed the period of prescription which the testator's possession had begun, and has divested the real owner of his rights. He has thereby gained an advantage which must accrue to the benefit of the fiduciary and to the extent of that advantage, at least, the *fidei commissary* succeeds to the fiduciary, just as servitudes acquired by the fiduciary for the benefit of the *fidei commissium* property, pass to the *fidei commissary*. *Voet 36, 1, 63.*

Section 3 of the Ordinance does not enact any new law when it says that a party can tack to his possession the possession of the persons under whom he claims. It merely declared a well known principle of our common law (*Voet 4, 3, 16*) which seems to obtain in all countries where title to immovable property can be acquired by adverse and continuous possession for a prescribed period. *Halsbury's Laws of England, vol. 19, p. 157; Rustomjee's Law of Limitation in India, p. 504 (2nd edition)*; and *Angell on Limitation, para. 413.* Under these laws, as under our law, the possession of two or more independent trespassers adverse to one another, not claiming through one another, and unconnected as of right, cannot be tacked. I do not think it could be said that persons in the position of a fiduciary and a *fidei commissary* can be treated as independent trespassers, adverse to one another, or that their titles are wholly unconnected. The plaintiff is, therefore, entitled to tack the possession of the fiduciary to the possession of the testator. Udenis, and to say that when Bastian succeeded to the property in 1913 he had acquired a title by prescription to it.

In view of this decision it becomes unnecessary to consider the second point arising in the case, as to whether the executor's possession was on behalf of Bastian.

I have no reason to disagree with the learned District Judge's findings on the facts, that Odiris got into possession of the land after his purchase at the execution sale, and that thereafter the executor under his will possessed it on behalf of the fiduciary, Udenis. The circumstances pointed out in his judgment strongly support this view. It is also clear that defendants have had no possession of the land from the date of the execution sale, until shortly before the institution of the partition action.

I would, therefore, dismiss the appeal, with costs.

Appeal dismissed.