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1958 *Present :* **Basnayake, C. J., and de Silva, J.**

RAJAKARUNA, Appellant, *and* GUNAWARDENA and others, Respondents

S. C. 179—D. C. Gampaha, 2853/P

Fideicommissum by will—Share acquired from a co-heir by survival—Is prohibition against alienation applicable to it ?

Where a husband and his wife devised by a joint will certain immovable property to their children share and share alike and subject to a fideicommissum with a condition that on failure of any lawful issue being born to any of the children the property should devolve on the surviving children and the issue of such of them as may be dead—

Held, that the prohibition against alienation imposed on the children did not apply to shares devolving on the survivors on the death of one of them.

"If a number of persons have been forbidden to alienate, each one is only understood in doubt to have been forbidden as regards that share which he himself has from the testator, and not as regards the share which he has from a co-heir or conjoined person who was forbidden at the same time, unless a different wish on the part of the testator is clear."—Voet 36.1.27.

APPEAL from a judgment of the District Court, Gampaha.

H. V. Perera, Q.C., with *K. Herat* and *S. D. Jayasundera*, for 40th Defendant-Appellant.

H. W. Jayewardene, Q.C., with *F. W. Obeyesekere* and *P. Ranasinghe*, for Plaintiff-Respondent.

Cur. adv. vult.

2——J. N. B 24544—1,995 (6/60)

March 27, 1958. BASNAYAKE, C.J.—

The question for decision on this appeal is whether the prohibition against alienation imposed on their children by the testator and testatrix in their joint will P1 applies even to the shares devolving on the survivors on the death of one of them.

Shortly the facts are as follows : Conrad Peter Dias Bandaranayake, Maha Mudaliyar, and Eliza Dias Bandaranayake, husband and wife, made a joint will on 11th August 1888. The material clause of that will provides as follows :—

> " Subject to the payment of the above income to me the Testatrix we give and devise the said Podopille Mookalane Estate at Podopille and Bandàrawatte Estate at Heneratgoda or any lands that may be hereafter purchased adjoining these properties or added thereto to all our children share and share alike and we direct that the above mentioned two properties or any portion thereof respectively shall not be sold or mortgaged or otherwise alienated or encumbered by any of our children but shall devolve on their lawful issue and in failure of any lawful issue being born to any of them the said two properties shall devolve on our surviving children and the issue of such of them as may be dead. And we direct that upon the death of either of us all debts that are due by us shall be paid from the income derived from the two properties by the survivor of us and after the death of both of us if any debts are still due the same shall be paid from the said income by our children. And we further direct that after the debts are fully paid and if I the Testatrix be the survivor the whole of the income derived from these two properties shall be enjoyed by me until my death and after the death of me the Testatrix should I be the survivor the income from these two properties shall be equally divided amongst our children and the issue of such of them as may be dead the child or children of the latter taking what his her or their parent or parents would have been entitled to if living but these two properties shall not be sold or mortgaged or otherwise alienated or encumbered as stated above so long as any one of our children is living, and for the upkeep of these two properties a sufficient portion shall be applied of the income thereof the amount whereof shall be decided according to the majority of the votes of the devisees being there of age who shall in like manner decide whether the properties should be leased out or managed by Superintendents. "

In 1917 the land was partitioned among the eight children and each child was allotted a divided lot. Lot F, in extent 19 acres and 33 perches, which is the subject-matter of the present suit, was allotted to Cecilia who died without issue. Her share devolved on her brothers and sisters and one of them Johannes sold the share he derived from Cecilia. The present contest is between the 40th defendant who is the successor in title of the purchaser of that share from Johannes and the children of

Johannes who contend that the fidei-commissum attaches to the share Johannes received on Cecilia's death. An examination of P1 shows that its authors intended—

(*a*) that the two properties they gave their children or any portion thereof shall not be sold or mortgaged or otherwise alienated or encumbered by any of their children.

(*b*) that the two properties shall devolve on the lawful issue of their children, and

(*c*) that in failure of any lawful issue being born to any of their children the two properties shall devolve on their surviving children and the issue of such of them as may be dead.

The question is eminently one that has to be decided according to the principles of Roman-Dutch Law. In Book XXXVI, Title I, Section 27, Voet states the rule that applies in a case such as this. (I quote the Latin also because there is a difference between McGregor's translation and Gane's translation of this passage.)

"*Sed & si plures alienare prohibiti sint, quisque tantum prohibitus in dubio intelligitur ratione partis illius, quam ipse habet a testatore, non, quam habet a coherede vel conjuncto simul prohibito, nisi alia appareat voluntas testatoris.*"

McGregor translates this passage thus (p. 68) :—

"But where several persons are prohibited from alienating, each one, in a case where there is any doubt, is only understood to be prohibited in respect of the share he has acquired from the testator, not in respect of what he has acquired from a co-heir, or one who was restrained at the same time as he was, unless the intention of the testator appear to have been otherwise."

Gane translates it as follows (Vol. 5, p. 372) :—

"Then again if a number of persons have been forbidden to alienate, each one is only understood in doubt to have been forbidden as regards that share which he himself has from the testator, and not as regards the share which he has from a coheir or conjoined person who was forbidden at the same time, unless a different wish on the part of the testator is clear."

According to Gane the testator's contrary intention must be clear, according to McGregor it is sufficient if the "intention of the testator appear to have been otherwise". With the greatest respect to the two erudite and eminent scholars both of whom have held high judicial office, I wish to say that I agree with Gane's translation for two reasons. Firstly because it would appear from his introduction to the translation of Book XXXVI that he considered McGregor's translation when he translated this Book and that any material departure from McGregor's rendering of the Latin must have been deliberate. Secondly because on reference to Lewis & Short's Latin Dictionary I find that it supports the view that in a context such as this the true meaning of *apparet* is "evident, clear, manifest, certain". I do not think that it is out of place to state here

that Gane's own view of McGregor's translation is that it is " somewhat periphrastic in method ". I am not insensible to the fact that Gane's translation itself has been the subject of discussion in South Africa. In this connexion it is noteworthy that Voet's view finds support in the Digest 32.38.5—

> " A certain testatrix left a small tract of land, together with a shop, to fifteen of her freedmen, whom she mentioned by name, and added the following :—'I wish my freedmen to hold this land under the condition that none of them will sell or give away his share, or do anything else which will cause it to become the property of a stranger. If anything is done, contrary to this provision, I desire their shares, together with the land with the shop, to belong to the people of Tusculum '. Some of her freedmen sold their shares to two of their fellow freedmen, who were included in their number, and the purchasers having died, appointed as their heir Gaius Seius, a stranger. The question arose whether the shares which were sold would belong to Gaius Seius, or to their surviving fellow-freedmen who had not disposed of theirs. The answer was that, according to the facts stated, they belonged to Gaius Seius.
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> " It was also asked whether the shares which were sold would belong to the people of Tusculum. I answered that they would not. Claudius: Because the person of the actual possessor, who is a stranger, is not to be considered but those of the purchasers, who, in accordance with the will of the deceased, were of the number of those to whom she had permitted the property to be sold, the condition under which the land was granted to the people of Tusculum by the terms of the Trust has not been fulfilled. "

Voet's view also finds support in Burge (Vol. 2, p. 113) wherein he says

> " If the terms in which the prohibition is expressed admit of any doubt respecting its extent, such construction is to be made as will impose the least burthen on the heir and the least restraint on the freedom of alienation. "

Having regard to the opinion of the Roman and Roman-Dutch Jurists I have quoted above and to the fact that fidei-commissa and prohibitions against alienation are not favoured in Roman-Dutch Law where the rule is " *In dubio regulariter pronuntiandum est contra fidei-commissum* " (the presumption where there is any doubt is against a fidei-commissum) I am of opinion that the prohibition against alienation imposed by P1 does not extend to the shares that passed to her heirs on Cecilia's death. The appellant is therefore entitled to succeed. Johannes was free to alienate the share he derived from Cecilia and 40D1 (Deed No. 7354 attested by M. T. Basnayake, Notary Public, on 16th July 1949) is a valid conveyance. I therefore set aside the order of the learned District Judge that no rights pass on that deed.

The appellant is entitled to the costs of this appeal.

DE SILVA, J.—I agree.

Appeal allowed.