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Present: Wood Renton C.J. and De Sampayo J.

VYRAVAN CHETTY *v.* FERNANDO.

466—D. C. Kandy, 22,981.

Legacy to a mistress, subject to the condition that she should not marry again—Is condition void?

A condition in restraint of marriage is against public policy, and is therefore void. But a condition against a second marriage imposed upon a surviving spouse should be observed, in order to prevent a forfeiture; the condition affects only a widow or widower, and not a mistress.

A deserted his lawful wife and kept M as his mistress. By his last will A devised certain lands to M, subject to the condition that should M "take a husband after my death, or behave in any way disgraceful in the family, she shall thereupon forfeit all right to any share of my estate. . . . . ."

After A's death M began to live with J, and subsequently married J.

Held, that M did not forfeit her rights to the property bequeathed to her.

THE plaintiff-appellant sued to be declared entitled to certain lands, on the footing that he had bought them at a Fiscal's sale against eighth added defendant, Ukku Menika.

The defendant and the added defendants, who are Ukku Menika's children, claimed the said lands on the footing that the said lands were bequeathed to Ukku Menika for her use and benefit, till she married, and that Ukku Menika having married she had forfeited her interests thereto.

The property in question was bequeathed to M by her paramour, subject to the following condition:—"It is my further will and desire that should the said Ukku Menika take a husband after my death, or behave in any way disgraceful in the family, she shall thereupon forfeit all right to any share of my estate, and the property hereby bequeathed to her shall sink into my residuary estate."

The learned District Judge (F. R. Dias, Esq.), in the course of his judgment, said:

Although this clause appears to contain a condition which was to defeat Ukku Menika's vested interest in a certain event. I think the defendant's counsel is correct in contending that it was a clause of conditional limitation only, that is to say, the lands were to be vested in Ukku Menika until she takes a husband or misconducts herself, and then they were to go over to the children.

The testator did not impose an absolute injunction to celibacy on this woman, but left her free to do as she pleased. He only expressed

his will that the lands should go over to his children when the woman did a certain thing. There was nothing reprehensible in that, and a Court, I think, is bound to give full effect to his unambiguous language, and protect the interest of the ultimate beneficiaries. That such limitations are valid is covered by authority. See the cases of *Morley v. Rennoldson*[1] and *Jones v. Jones*.[2]

The District Judge decided that the plaintiff, who had bought the interests of Ukku Menika after she had forfeited her rights under the will by her misconduct with, and subsequent marriage to, her testator's (paramour's) brother, got no interest in the disputed lands.

The plaintiff appealed.

Bawa, K. C. (with him *Arulanandam*), for plaintiff.—The will amounts to a general prohibition against marriage, and is therefore illegal and void. *Voet, 28, 7, 12* and *13; 2 Burge 154* and *155; Cen. For., Part 1., Book 3, Ch. 5, Note 29; 2 Nathan 552.* Ukku Menika is in no sense the widow of the testator. The testator was admittedly living in concubinage with her. It is against public policy to permit a man to tie down a concubine and thereby prevent her from ever becoming an honest woman. The testator lived in the Kandyan Provinces for a long time, and "misconduct" ought to be interpreted in the sense it is understood among the Kandyans. Living with a husband's brother is not misconduct among them.

A. St. V. Jayewardene, for the defendants, relied upon *2 Johnson and Hemmings 356; L. R. 1 Q. B. D. 279; L. R. 1 Ch. D. 399; Voet, 28, 7, 13; South African L. R. (1914) Natal 257; Jarman on Wills 1541.*

Bawa, K.C., in reply.

Cur. adv. vult.

February 28, 1916. DE SAMPAYO J.—

The plaintiff claims title to certain lands, which he purchased in execution against the eighth added defendant, Walimuni Mudiyanselage Ukku Menika, in November, 1913. The defendant and the first to the seventh added defendants are the children of the said Ukku Menika by one Arnolis Fernando, and they claim the lands adversely to the plaintiff under the will of Arnolis Fernando. The question involved in this case turns upon the legal effect of certain conditions attached to the devise of the said lands in favour of Ukku Menika.

Arnolis Fernando, who was a low-country Sinhalese man of Galle, was lawfully married to a woman who is still alive, and there are some children of that marriage. He appears to have deserted his lawful wife some twenty years before his death, and to have settled in Kandy, where he acquired considerable property. During his residence in Kandy he kept Ukku Menika as his mistress, and he

[1] *2 Hare 420.*

[2] *1 Q. B. D. 279.*

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died in 1905, having made a last will dated December 7, 1904. Some time after his death Ukku Menika began to live with his brother, James Fernando, by whom some children have also been born to her, and she has now married James Fernando. They lived, and still continue to live, in James Fernando's house. The defendant and the added defendants have also lived with them on cordial terms, and up to this action there has been no question as to Ukku Menika having forfeited her right to these lands in consequence of her association or marriage with James Fernando.

By the will, Arnolis Fernando, in the first place, gave certain pecuniary legacies to his legitimate daughter Engeltina, to his four sisters, and to his brother, the said James Fernando. He next devised to Ukku Menika all the lands situate at Dumbara, among which are included the lands now in question. He then disposed of the residue by giving a one-eighth share to his brother Bastian Fernando, and the remaining seven-eighths share to his children. the defendant and the added defendant, subject to the condition that should any of the children die before attaining majority his or her share should go to the remaining children, and tha should they all die before that age one-half of the bequest to them should go to his said brother Bastian Fernando, and the other half to his daughter Engeltina. This is followed by the following provision:—"It is my further will and desire that should the said Walimuni Mudiyanselage Ukku Menika take a husband after my death, or behave in any way disgraceful in the family, she shall thereupon forfeit all right to any share of my estate, and the property hereby bequeathed to her shall sink into my residuary estate."

The District Judge has held that under the circumstances above stated Ukku Menika violated the condition of the legacy and forfeited her right to the lands. It is not, however, clear whether in his view the forfeiture was due to the association with James Fernando or her subsequent marriage with him. But counsel for the defendants felt himself unable seriously to contend that her association with James Fernando constituted "disgraceful behaviour in the family" within the meaning of a testator, who, though a married man, had himself kept her as his mistress, and I need only say that under all the circumstances of the case counsel acted rightly in not pressing that point. The forfeiture, if any, must therefore be confined to the condition which prohibits Ukku Menika from taking a husband.

The law applicable to the subject, I take it, is the Roman-Dutch law. *Burge, vol. 2, p. 155*, states it as a general proposition that "a condition which, either in terms or in its effect, operates directly or indirectly as an absolute or general prohibition of any marriage would be void." There is no doubt that the condition in the present case is of that description. It is, however, necessary to consider the application of the authorities which have been referred to at the

argument further. The old Roman law entirely reprobated any provision in a husband's will by which the wife was prohibited from contracting a second marriage as the condition of her taking a legacy, but the *lex Julia Miscella* introduced a modification, by providing that the widow might have the legacy within a year upon taking an oath that she would not marry again *nisi liberorum procreandorum causa*, or after a year upon giving security not to marry. Justinian first considered these restrictions to be oppressive and undesirable, and allowed the widow to take the legacy absolutely, without any oath or security (*Code 6, 40, 2*), but later, by *Novell 22, cc. 43 and 44*, he repealed his previous legislation, and reciting various reasons for the change, he enacted that if a husband or wife should leave a legacy to the other on condition that she or he should not marry again, the legatee should elect either to marry and renounce the legacy or to take the legacy and abstain from contracting a marriage. He further provided that in the latter case the legacy should be taken only upon security being given for the restoration of the property in the event of a marriage. I have thus briefly stated the Roman law, in order to make clear the opinions of the Roman-Dutch jurists on the subject. *Peckins, de test. conjug, 1, 24, 1 and 2*, controverts the reasons given by Justinian for his latest legislation, and states the law in Holland to be that the condition in restraint of marriage imposed upon a widow or widower need not be observed, while he allows as good and equitable a provision for the surviving spouse during widowhood or celibacy. He thus recognizes the distinction between a condition annexed to the legacy and a limitation. *Van Leeuwen, Cen. For., 1, 3, 5, 29*, lays down broadly: "*Conditio viduitatis, sive mari sive feminæ imposita, quasi non adjecta remittitur*," and he specially points out that Justinian's *Novell 22* made an alteration only in regard to second marriage of spouses, and not to other marriages. He repeats that "*hodie* (*i.e.*, under the Roman-Dutch law) *viduitatis conditionem rejici aut remitti constat: excepto quod superstiti conjugi ad tempus secundarum nuptiarum aliquid testamento relinqui possit.*" The excepted case here, as in Peckins, is that of a provision during widowhood or celibacy, which therefore is no restraint on marriage. *Groenewegen, De Leg, Abrog., ad cod. 6, 40, 2*, is to the same effect. On the other hand, *Voet, 28, 7, 12 and 13*, differs from Van Leeuwen and Groenewegen in their comments on Justinian's *Novell 22*, and is of opinion that a condition against the second marriage imposed upon a surviving spouse should be observed in order to prevent a forfeiture, though he is at one with all the jurists as to the general rule that a condition in restraint of marriage is against public policy, and therefore inadmissible. The controversy, however, need not concern us in this case, for taking the above passage in *Voet* as the more correct exposition of the Roman-Dutch law, the party to be affected by the condition must be a widow or widower who is

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prohibited from entering upon a second marriage. Ukku was not in that position, and I think that under the Roman-Dutch Law the condition was in her case void and inoperative.

The English law does not appear to compel us to a different conclusion. There, too, conditions *in terrorem* are considered contrary to public policy, and as such void. In *Newton v. Marsden* [1] Vice-Chancellor Page-Wood stated that "the law must be taken to be settled as to males and unmarried females, that you cannot impose on them a condition in restraint of marriage," and he proceeded to consider, with reference to both English and Civil law authorities, and to decide in the negative, the question whether the law should be extended to a restraint on the marriage of a widow. There is also a distinction in the English law, in the application of the rule, between a legacy of personal estate and a devise of real estate; but for the present purpose it is not necessary to notice it further than to say that, as there is no distinction with us in regard to such questions between personal and real property, the English rule of law which in respect of a gift of personal estate regards restraints as *in terrorem* and void, derived as it is from the principles of the civil law, appears to me to be more relevant on the present question. *Jones v. Jones*,[2] which was cited to us, is no real authority on behalf of the respondents. For what the Court decided there was that on the construction of the particular will the intention on the part of the testator was not to restrain any marriage, but to provide for the devisee while she was unmarried. In *Allen v. Jackson*[3] it was held that a condition in restraint of the second marriage, whether of a man or a woman, was not void, and the Court extended the principle to the case of a legatee other than in the testator's wife or husband. It will thus be seen that in the English law, as much as in the Roman-Dutch law, there are two settled principles: (1) that a general restraint of marriage is against public policy and void, but a provision in restraint of marriage, not as a condition annexed to the gift, but as pointing out the limit of the legatee's interest, is good; and (2) that the doctrine does not apply to a restraint on the second marriage of the legatee. It is clear in this case that the will contained not a mere limitation, but a condition in general restraint of marriage. It was contended, however, that the provision against marriage was in the interests of the testator's children by Ukku Menika, and was not a condition *in terrorem;* but that argument can hardly be maintained, in view of the fact that the residuary estate, into which the lands devised to Ukku Menika were to fall in the event of her taking a husband, was devised and bequeathed not only to those children, but also to the testator's brother Bastian Fernando, and (on a certain contingency) to his legitimate daughter

[1] *(1862) 2 J. & H., at page 366.* [2] *(1876) 1 Q. B. D. 279.*
[3] *(1875) 1 Ch. D. 399.*

Engeltina. Further, Ukku Menika never having been married, the law which allows restraints on second marriages is not applicable to her.

For these reasons I think the judgment appealed against is erroneous, and I would allow the appeal. There is no proof of damages, and I would therefore give judgment for the plaintiff for the lands and for possession, with costs in both Courts, but without damages.

WOOD RENTON C.J.—I agree.

Appeal allowed.