1962 *Present:* Basnayake, C.J., and H. N. G. Fernando, J.

MALLIYA and others, Appellants, *and* ARIYARATNE, Respondent

S. C. 486/59—D. C. Gampaha, 5611/P

Executors and administrators—Powers of an executor—Scope of applicability of English law—Payment of testator's debts—Sale, by executor, of fideicommissary property in which minors are interested or of property specially devised to minors—Requirement of sanction of Court—Entail and Settlement Ordinance.

An executor is not entitled to sell, for the payment of the testator's debts, any fideicommissary property in which minors are interested, unless sanction of the Court has been obtained. Nor can he sell, without the authority of the Court, property specially devised to minors. In such cases, a sale by the executor without the authority of the Court is invalid as against the minor, who can, therefore, while he is still a minor, institute a partition action if the property sold was his undivided share of a land owned in common.

Scope of the applicability in Ceylon of the English law of executors and administrators considered.

APPEAL from a judgment of the District Court, Gampaha.

H. A. Koattegoda, with *N. R. M. Daluwatte*, for 3rd and 4th Defendants-Appellants.

W. D. Gunasekera, for 7th Defendant-Appellant.

Ananda Karunatileke, for Plaintiff-Respondent.

Cur. adv. vult.

March 16, 1962. BASNAYAKE, C.J.—

The question that arises for decision on this appeal is whether the sale of the land called Godakumbara of about 10 kurunies paddy sowing extent described in the Schedule to the plaint by the executrix of the last will of one Charlis Silva without the authority of the District Court is valid. As it will be helpful to the discussion of the question to set out the material portions of that will and the probate issued to the executrix I set them out below.

The relevant parts of the will read—

"I, the said Kurugamage Charlis Silva do hereby will and desire that all property movable and immovable now belonging to me or that may hereafter belong to me wherever in this Island of Ceylon situated devolve on my wife and two children, Wanigasuriya Aratchige Somel Nona, Kurugamage Piyasena and Kurugamage Ariaratne all of Pattalagedera aforesaid in equal shares subject to the conditions and orders hereinafter contained.

" The conditions and orders above referred to—

1. The said Wanigasuriya Aratchige Somel Nona out of the aforesaid three persons Wanigasuriya Aratchige Somel Nona, Kurugamage Piyasena and Kurugamage Ariaratne shall not during her life time sell, mortgage, execute, donate or otherwise alienate but possess the just one-third share that may devolve on her out of the immovable property, and after her death the said share of immovable property devolve on her said two children Kurugamage Piyasena and Kurugamage Ariaratne in equal shares who shall have the right to possess and do any act deed pleased by them to do with the same.

2. The said Wanigasuriya Aratchige Somel Nona shall receive from the Colombo Electric Tramways Company the pension and gratuity due to me therefrom and out of same pay the principal and interest due from me the said Kurugamage Charlis Silva upon Mortgage bond No. 25541 dated 10th November 1939 attested by John S. Gunawardena of Talgasmote, Notary Public, and the two notes to Seena Sinnaiyapillai of Hiripitiya in Veyangoda and obtain a discharge of the property mortgaged thereby and if there is any balance left that may be expended towards the purposes of educating the said two children Kurugamage Piyasena and Kurugamage Ariaratne.

3. The said Wanigasuriya Aratchige Somel Nona, the mother of the said Kurugamage Piyasena and Kurugamage Ariaratne shall be in charge of the income and produce of the two-third shares of the said immovable property till they attain their lawful age and expend the same towards their meals, drink, clothes et cetra and if there is any balance left have the same deposited in the post office Savings Bank in their names."

The material portions of the probate are as follows :—

" Be it known to all men that on the 17th day of November 1942, the Last Will and Testament of Kurugamage Charlis Silva of Pattalagedara, deceased, a copy of which is hereunto annexed, was exhibited, read and proved before this Court, and administration of all the property and estate rights and credits of the deceased was and is hereby committed to Wanigasooriya Aratchige Somel Nona of Pattalagedara the executor in the Last Will and Testament named ; the said Wanigasooriya Aratchige Somel Nona being first affirmed faithfully to execute the said Will by paying the debts and legacies of the deceased Testator as far as the property will extend and the law will bind, and also to exhibit into this Court a true full and perfect Inventory of the said property on or before the 23rd day of March 1944, and to file a true and just account of her executorship on or before the 22nd day of June 1944.

" And it is hereby certified that the Declaration and Statement of Property under the Estate Duty Ordinance have been delivered, and that the value of the said estate on which estate duty is payable as assessed by the Commissioner of Stamps, amounts to Rs. 360/-."

It would appear from a comparison of mortgage bond No. 25541 of 10th November 1939 and the inventory dated 1st November 1944 filed by the executrix that two of the lands left by the deceased were subject to mortgage. From the description one of them appears to be the land in suit and the other is an undivided 1/4 share of the field called Godakumbara at Hiripitiya in extent 12 kurunies of paddy sowing extent. The present action for a partition of the field called Godakumbara in extent 10 kurunies is instituted by Kurugamage Piyasena, a minor son of the deceased Charlis Silva. He claims that he is entitled to an undivided 4/27 share of the land. The action is brought on the footing that the sale of the land in suit by the executrix is invalid. That land and three others left by the deceased were sold by the executrix for a sum of Rs. 1,700/- by deed No. 5496 of 27th October 1944 to Notary Gunawardena who by deed No. 6619 of 16th May 1948 sold it and another for Rs. 5,000/- to the 2nd, 3rd and 4th defendants.

Those defendants resisted the action and claimed that they were the sole owners of the land by right of purchase. The 2nd defendant died in the course of the action and his elder brother Malliya was appointed as his legal representative. The learned District Judge held that as the authority of the District Court had not been obtained for the sale of their shares the deed of sale by the executrix did not pass the title of the plaintiff and his brother Ariyaratne who is named as the 5th defendant to this action. The present appeal is from that judgment.

To decide the main question involved in this appeal it is necessary to ascertain the powers of an executor in Ceylon. It has been repeatedly stated in judgments of this Court that the law that governs executors and administrators in this country is the English law ; but I have not been able to find any satisfactory statement of how the English law was introduced and whether by English law is meant the English law which obtained in England at the particular date or the English law both common and statute which obtains in England at the corresponding date at which the question arises for decision in this country. In the case of subjects to which the English law is made applicable by the Civil Law Ordinance there is no difficulty as that enactment is explicit. The material portion of it runs thus :

> " . . . . the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Island or hereafter to be enacted."

On account of the vagueness attending the introduction of the English law of executors and administrators it is necessary to examine at length the relevant judicial *dicta* in order to ascertain how much of the English law obtains in Ceylon. What appeared at the outset to be a simple matter has in the course of time proved to be full of difficult problems.

Even at the risk of overburdening this judgment with well known judicial pronouncements I shall set them out in chronological order so that the process of judicial evolution of the law of executors may be seen. The relevant portions of the Charters of 1801 and 1833 which are cited in them as the instruments by which the English law was introduced are reproduced in full in Appendix 'A' to this judgment as they are not readily available in many provincial libraries.

The first of the line of decisions is *Staples v. De Saram et al.*[1]. In that case the Court proceeded to expound the law of executors and administrators—

"We think it right, however, to add some remarks of our own as to our law of executors and administrators being entirely a graft of English law, and not a mixture of the old laws of Holland and those of England. We take it that the Charter of 1801 introduced the English law on the subject here as to Europeans other than the Dutch inhabitants. Executors and administrators were to be appointed with respect to such Europeans' estates, and the testamentary law was to be followed, as is prescribed in the Diocese of London, in England. The same Charter provided that the Dutch inhabitants should, in such matters, retain their old laws and usages. Then came, in 1833, the Royal Charter, which is still in force, and which, by its 27th clause empowers the district courts generally to appoint administrators to the estates of intestates, to grant probates to executors, and to exercise other powers in matters connected with such officers. The last-mentioned charter is not, in this respect, limited to any class of persons here; but it applies to the estates of all and any persons dying within any of the respective districts of the district courts of the Island. We think that these charters introduced—the first as to one class of our population, the last as to the whole population of the Island—an entirely new law, and one that could never be blended, or co-exist, with the old Roman Dutch Law, which dealt with heirs *ex testamento* and heirs *sine testamento*. This old system was, in our opinion, entirely abrogated, as being quite incompatible with the English which was ordained.

"There was no such office as that of Administrator under Roman Dutch Law.

"In cases of intestacy, the heir by descent (or heir appointed by law, *heres legitimus*, as he was sometimes called) came in as heir; and proceeded to 'adiate' purely, or under benefit of inventory, or to take out the act of deliberation, just as the heir nominated by will. All this has ceased to exist, and the English forms and practices as to administrators are copied. So as to executors. Such an office was not wholly unknown to the Roman Dutch Law in its later times; but the Roman Dutch executor was a very different functionary from the

[1] *Ramanathan's Reports 1863–68, p. 265 at 275–276.*

one who bears that name under the English system. He was little more than the agent of the heir appointed by the will. He could not alienate or sell without the heir's consent, and if the heir would not accept the inheritance the executorship became a nullity.

"It has been said that the English law as to executors and administrators could not be fully adopted here, on account of the peculiar distinctions which the English law makes as to real and personal property.

"But that has never been found to cause any difficulty or inconvenience. We recognize the same power of executors and administrators over land and other immovable property here which the English law gives them over chattels real ; and thus an entire estate, landed as well as personal, is administered."

It will be seen from what has been said in the last paragraph of the above quotation that, at the very outset, the English law obtaining at that time [The English law itself has undergone change since then (vide Land Transfer Act 1897 and Administration of Estates Act)] in its application to our country underwent a very important modification in that immovable property was regarded as vesting in the executor in the same way as movable property. *Staples v. De Saram* (*supra*) is followed by *Ondaatjie v. Juanis* [1] wherein Clarence J. explained how the property of the testator is transmitted :

"Under our law here, land passes to an executor exactly as personal property passes to an executor in England, and the same considerations will apply as would apply to the case of a bequest of a chattel real or a movable article under English Law. Now the law is, that the subject-matter of all such gifts vests in the executor ; and not until the executor has assented to the bequest—that is assented to the legatee's assuming and enjoying the gift, on the ground that the subject-matter is not required by the executor for any other purpose—can the legatee assume the gift. After that assent the legatee may recover the subject-matter by action, even from the executor himself. Until that assent has been given, he cannot retain it against the will of the executor, and the executor could recover it from him."

The view expressed in the above two cases that the property both movable and immovable left by the testator vested in the executor underwent a significant change in 1892 when a full bench of this Court in *Cassim v. Marikar* [2] expressed the opinion that the title to immovable property specially devised passed not to the executor but to the devisee by virtue of the will subject to the testator's debts and that, only in due order of administration. Burnside C.J. observed in that case—

"It is only in my opinion when specially devised land is required by the executor for the purpose of administration that he acquired

[1] *(1888) 8 S. C. C. 192.* [2] *(1892) 1 S. C. R. 180.*

an interest in it, and that interest is an interest in land, which can only be divested in the way that the law requires. So that it is always safer that the executor should recognise the title of the special devisee, and join him in any conveyance he may make; yet if property be not required for the purpose of administration, then the special devisee of it would take a clean title unburdened by any right of executor or creditor."

Lawrie J. in the same case said—

"The devise of this land to the plaintiff was made by the testator by a deed executed before a notary and witnesses. It fulfilled the requirements of the Ordinance No. 7 of 1840. That devise in my opinion passed the title to the land to the devisee, taking it away, on the one hand, from the heirs at law, and on the other, from the executor of the will. Holding this opinion I differ from part of the opinion of my brother Clarence reported in the 8th volume of the Supreme Court Circular p. 192. But though the title passed to the devisee, the land so devised, like the whole property of the testator, was primarily liable for payment of his debts. The title of the devisee was liable to be defeated by the creditors or by the executor in the course of realizing the estate for the payment of debts.

"Until these were paid, the devisee might be required either to relinquish the land or, if he preferred to keep it, to contribute to the payment of the debts to the extent of its value.

"As between himself and the executor the devisee might terminate the suspense by obtaining assent to the devise.

"In my opinion such assent need not be signified by deed notarially executed; it need not be an express assent, for in some cases the assent may be presumed from the conduct of the executor. In other cases (and this is said to be one) the assent may be expressly given either verbally or in writing.

"The question, in what way an executor can legally give his assent is a totally different question from whether, assuming the title to the land to be in the executor, he can pass that title in any other way than by notarial deed. It must at once be considered that if the title be in the executor, a deed is necessary; but as my opinion is that the title passed by the will to the devisee, no transfer is necessary from the executor."

Withers J., the third member of the Bench, in the course of his judgment in the same case, referring to an observation in an earlier case that the Privy Council itself had accepted the view that all property vested in the executor observed that the words—

"It is stated in the Judgment in Ceylon (and the form of the probate and all the proceedings in this case and in the other cases with which

they have been furnished show their Lordships that it has been correctly stated) that an executor in Ceylon has the same power as an English executor with this addition, that it extends over all real estate just as in England it extends over chattels personal. "

in the judgment of the Privy Council in *Gavin v. Hadden* [1] do not mean that the title to all property passes to the Ceylon executor in the same way as it does to the English executor, and went on to point out the difference.

" By the English law the executor's assent is necessary to give title to even a special legatee, and if our law is the same, the executor's assent, in order to give title to a special devisee, can only be given in the way required by our law, that is, by a duly executed notarial instrument. So it really comes to this, that if a man specifically devises parcels of land to several children, and there are no claims against the testator's estate, the executor is bound to assign each parcel to a particular devisee by a notarial instrument. What burden is thereby laid upon the inheritance ? "

and summed up his opinion in the following words :—

" I humbly conceive that no assent of the Ceylon executor or administrator is necessary to pass title to the heirs appointed in the will or the heirs at law ; for they have this title on the death of the testator or intestate subject to suspension of enjoyment pending administration and subject to the limited estate or title of the executor and administrator which I have spoken of before. An executor's duties concluded, his powers and estate disappear, and what remains after liquidation is left free for enjoyment by the heirs."

Further difficulties in ascertaining the extent to which the English law of Executors obtained in Ceylon soon arose. In *Kulendoeveloe v. Kandeperumal* [2] it was sought to call in aid section 6 of 3 & 4 William IV. c. 27, an Act enacted in the very year of our Charter of Justice, described as " an Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto ". That section provided :

" And be it further enacted, That for the Purposes of this Act an Administrator claiming the Estate or Interest of the deceased Person of whose Chattels he shall be appointed Administrator shall be deemed to claim as if there had been no interval of Time between the Death of such deceased Person and the Grant of the Letters of Administration."

[1] *8 Moore P. C. N. S., p. 90 at 122; 17 E. R. 247 at 258.*
[2] *(1905) 9 N. L. R. 350.*

In rejecting the argument Layard C.J. sought to explain to what extent the English Law had undergone modification in its application to Executors in Ceylon thus :

"I understand that what has been introduced into Ceylon is the English Law as regards executors and administrators, subject however to the provisions of our local statutes, and I find that our Ordinance of Prescription is silent in respect to executors and administrators, and no mention is made of them. For questions of prescription and of limitation we must look to our own Ordinance, and with regard to executors and administrators we are bound to administer the general law of England which affects them, or any Statute Law dealing generally with the rights of executors or administrators or treating of the manner in which property is vested in them. We are however not bound by the English Law, which lays down the limitation of causes of action in England, unless the Statutes dealing with them have been introduced into this Colony.

"Now 3 and 4 Will. IV, c. 27, is not in force in this Colony, and none of the provisions for the limitation of actions laid down in that statute are binding on us; consequently section 6 of that statute will not be operative in this Colony, unless it in any way affects the English Law with respect to executors and administrators outside the provisions of 3 and 4 Will. IV, c. 27."

But his explanation does not solve the difficulties. He says :

"With regard to executors and administrators we are bound to administer the general law of England which affects them, or any statute law dealing generally with the rights of executors or administrators or treating of the manner in which property is vested in them."

With the greatest respect to so eminent a Judge as Layard C.J. I find it difficult to see how it is possible to say that the English Law of Executors and Administrators was introduced to Ceylon by the Charter of 1833 and, at the same time, exclude a provision such as section 6, a provision affecting administrators, enacted in that very year. English law is not a static legal system and the law governing executors has undergone change since the Charter of 1833 and is now largely statute law. The latest legislation on the subject is the Administration of Estates Act 1925 (15 Geo. 5 c. 23) which makes detailed provision as to the estates of deceased persons and their administration. It is sufficient to quote therefrom the following section which makes special provision in regard to the payment of the debts and liabilities of a deceased person :—

"32. (1) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for payment of

his debts (whether by specialty or simple contract) and liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors, and the court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities.

This sub-section takes effect without prejudice to the rights of incumbrancers.

(2) If any person to whom any such beneficial interest devolves, or is given, or in whom any such interest vests, disposes thereof in good faith before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process. "

Several questions arise for answer. What is the general law of England which affects executors and administrators ? Is it the common law ? Where may one find a statement of that law ? What are the statutes dealing generally with the rights of executors and administrators ? How do they become applicable to Ceylon ? Are the statutes that are applicable those dealing with the rights of executors and administrators obtaining at the time of the Charter of 1833 or those for the time being in force ? Is the Administration of Estates Act 1925 (*supra*) applicable ? If the statutes introduced from time to time are to apply, to what extent is the prohibition in section 1 of the Ceylon Independence Act 1947 in the way of such statutes being applicable ? If the English common law and statute law are replaced by a composite enactment enacted after 1947 what will our law be ?

With this brief digression I shall resume the examination of our judicial decisions. In 1906 in *Cantlay v. Elkington* [1] it was sought to call in aid the English Land Transfer Act 1897 as being part of our law of Executors and Administrators. It would appear that Moncrieff J. at the hearing of the appeal was inclined to favour the view that the English statute applied ; but at the hearing in review the argument was rejected. Lascelles A.C.J. said :

" With regard to Moncrieff J.'s reference to the English Land Transfer Act, I desire only to state that I do not concur in the view that the English statutes relating to executors and administrators are in force in Ceylon. "

Wood Renton J. said :

" Again I cannot follow Moncrieff J. in his references to the Land Transfer Act, 1897. If his remarks are intended only as a *reductio ap absurdum* of the argument of Burnside C.J. in *Perera v. Silva* (1893) 2 C. L. R. 159 as to ' walking abreast with the law as it now exists ', I think he has misapprehended Sir Bruce Burnside's meaning. If they imply anything more, I can only respectfully dissent from them.

[1] *(1906) 9 N. L. R. 168 at 173.*

" When we speak of the introduction into Ceylon of the English law of executors and administrators we refer to the general law alone—to the English conception of executorship and administratorship as contrasted with that of the heir under the Civil and the Roman Dutch Law. It does not follow—and in my opinion it is not the case—that every English statute dealing with executors and administrators and especially a statute so closely associated with the incidents of English real property law as the Land Transfer Act, 1897, have been incorporated into the law of the Colony. "

Now the Land Transfer Act makes special provisions relating to the vesting of a deceased person's property as would appear from the provisions of the Act set out in Appendix " B " to this judgment.

The provisions of the Act deal with very important aspects of the law of Executors and Administrators and if we are not to turn to them for the law on those matters we shall have to resort to our common law as the English Law is to be found in English Statutes which have no application here. When Wood Renton J. says in *Cantlay v. Elkington* (*supra*) that it is not the case, " that every English statute dealing with executors and administrators and especially a statute so closely associated with the incidents of English real property law as the Land Transfer Act, 1897, have been imported into the law of the Colony ", does he mean that there are English Statutes which would be applicable ? If so what are they ?

Having regard to the trend of decisions the answer is not easy to find and has not been given since that decision. Have any English statutes dealing with Executors and Administrators been incorporated in our law ? I, for one, know of none. Lascelles A.C.J. was more critical than Wood Renton J. of the situation caused by the introduction of the English law by a side wind as it were. He said :

" The difficulty of adapting the English system of administration to the principles of the Roman-Dutch Law has led to considerable confusion."

I have cited the earlier dicta *in extenso* in order to show the development of the law. The net result of the decision is—

(*a*) that the executor has power over both movable and immovable property and may sell the property left by the testator in accordance with the directions in the will.

(*b*) that the immovable property specially devised vests not in the executor but in the heir to whom it is devised subject to the executor's right to have recourse to it in its due order for the payment of the testator's debts.

(*c*) that the executor's assent or a conveyance by him is not necessary to pass title to heirs appointed in the will or the heirs at law.

(*d*) that the executor has power to sell the property left by the testator for the payment of his debts, but that power must be exercised with due regard to the provisions of our law.

I now come to the executor's power to sell fideicommissary property for the payment of the testator's debts. As that power has to be exercised with due regard to the provisions of our law we must turn to Roman Dutch Law in order to ascertain in what circumstances, in what manner, and by whom fideicommissary property may be sold, especially as *fideicommissa* have no place in English law. When the executor has to resort to the sale of the property of minors he must observe the law relating to the sale of such property. The District Court by virtue of its jurisdiction over the persons and estates of minors has a supervisory power over the sale of their property, and an executor cannot sell the property that has vested in minors on the death of the testator without submitting his decision to the scrutiny of the Court, even where he is authorised by the will to sell the property left by the deceased to pay his debts, as would appear from the cases that I shall refer to later in this judgment.

The general rule is that property subject to a *fideicommissum* cannot be alienated by the fiduciary. There are recognised exceptions to it. Fideicommissary property may be alienated—

(*a*) to pay the testator's debts and the legacies left by him provided that no other funds are available for the payment of these. (Voet 36.1.62) Vander Linden Institutes 1.9.8. Sande Restraints (Part 3 Ch. 8 secs. 2, 8).

(*b*) if all those who are interested give their consent.

(*c*) *ob causam necessariam.*

(*d*) to prevent destruction of the property.

(*e*) in exchange for the benefit of the fideicommissary.

(*f*) where the fideicommissary is expressly authorised by the fiduciary.

For the purpose of this judgment I shall confine myself to the exception for the payment of the testator's debts. On this topic Voet (*supra*) says (Bk. 36 Tit. 1 s. 62 Gane, Vol. 5 p. 430):

> " So often however as goods are liable to be handed over on the cause of fideicommissum, they cannot be alienated except to pay debts of the founder of the trust and legacies granted by him, when no other funds are found from which the payment of these things may be made ; or unless all those who have an interest in regard to the fideicommissum give their consent. "

Van der Linden summarises the position thus (1.9.8.):

> " The person in possession of any fideicommissary property has, however, no power to pledge or alienate that property as he pleases, except for the payment of the debts with which the property itself is

charged, or with the consent of all the remaindermen, or for reasons of pressing necessity. In which case, however, the previous authority and release of the court ought to be obtained."

Sande states the law in this wise [3.8.2. (8)]:

"A necessary cause for alienating arises from the testator, if an hereditary creditor distrains, according to the right of creditors, goods pledged to him by the deceased, or if, on account of debts contracted by the testator, the inheritance is, under the Praetor's edict, sold by auction, owing to the impatience of creditors; and among these goods the property prohibited from alienation outside the family is also sold. Such an alienation is binding, nor can it be set aside on account of the fideicommissum."

The matters that arise for decision before fideicommissary property can be legally sold are such as can only be decided by a Court. It would appear that from the earliest times the sale of fideicommissary property was subject to the authority of the Praetor, the State or a State Agency.

Apart from the provisions of Act No. 2 of 1916, which provides for the removal or modification of restrictions on immovable property imposed by Will or other Instrument and is the South African counterpart of our Entail and Settlement Ordinance, the practice in South Africa as would appear from the decided cases has been to seek the authority of the Court whenever it became necessary to mortgage or sell fideicommissary property. It is sufficient to refer to the decisions of *Ex parte Blomerus*[1] and *Ex parte Strauss and another*[2]. In the latter case De Beer J.P. after a review of all the available sources stated the conclusion that the Court has power to permit an alienation or mortgage of fideicommissary property only if such power is conferred by Statute or Common Law.

In our country too the practice has been the same and comes down from the earliest times. In the case of *Cassim v. Dingihamy* (3 Judges)[3] which affirmed the earlier decision in *Marikar v. Casy Lebbe*[4] Middleton J. stated:

"The law regulating *fidei commissa* is laid down by the Dutch jurists and collected by Burge, and it seems that property in *fidei commissum* can only be sold in cases of proved special circumstances rendering it necessary (Burge Vol. II, p. 129), and in Ceylon by the authority of the Court (*Marshall's Judgments*, p. 191).

"It has not been proved here to the satisfaction of the District Judge that any of these special circumstances existed or that the leave of the Court has been obtained.

[1] *(1936) C. P. D. 368.*
[2] *(1949) 3 S. A. L. R. 929.*
[3] *(1906) 9 N. L. R. 257 at 274.*
[4] *1863–68 Ramanathan 283.*

" The executor who in Ceylon has power to deal with immovable property in my opinion would only have a right to act according to the law in Ceylon affecting the property with which he was empowered under the will to deal.

" If that property was saddled with a *fidei commissum*, it would be the executor's duty in dealing with it to observe the special rules of the Roman-Dutch Law which apply to *fidei commissa* in substance and in practice so far as his office is compatible therewith, and by English Law a purchaser from an executor is affected with notice of the contents of the will ".

In answering the precise question that arose for decision in the case Middleton J. stated :

" On the first point, as to whether the sale by an executor of a property burdened with a *fidei commissum* is good without the leave of the Court on proof of special circumstances according to the blend of English and Roman-Dutch Law administered in Ceylon, I am of opinion that it would not be good."

The passage in Marshall's judgments referred to above is as follows :

" Thus, where, for want of other property, it becomes necessary to dispose of the fidei commissum in order to pay debts or legacies of the testator, etc. or the public taxes, Or, where the property would be deteriorated by being kept, Or, where it might be exchanged for other property, with advantage to the estate. Other circumstances may arise, which may make it necessary or beneficial to the estate, to dispose of the property so tied up. But in all instances, application should, in Ceylon, be made to the District Courts for authority so to dispose of it. "

Apart from the requirement of the sanction of the Court laid down in the decisions above quoted we have had since 1876 the Entail and Settlement Ordinance under which the District Court is empowered to authorise the sale, lease or exchange of fideicommissary property. When it comes to the sale of fideicommissary property in which minors have interests the law is still more strict. It has been so in the times of the early Roman-Dutch Law and later in both Ceylon and South Africa. On this topic Sande says (1.1.4.51—Webber, p. 30) : (I quote *in extenso* as this work is not available in most libraries.)

" 55. If the matter is one of the sale, or exchange, or giving in payment to a creditor, or incurring any obligation over the property of a pupil or minor, the ground for alienation should be one of necessity. A necessary ground for alienating is defined in the oration of Severus Divus thus, that the debt is so great that it cannot be paid from the remaining property.

65. Again, a careful inquiry into the reason for alienation is required. And in this inquiry the Judge will observe the precepts laid down by Ulpian. ' For, first, the Judge should inquire who watches

over the fortunes of the pupil, and he should not too readily rely upon tutors and curators, who sometimes, for the sake of their own gain, are wont to assert that it is necessary that the pupil's property should be sold. He should therefore seek for the kinsmen of the pupil, or his parents, or someone else who has knowledge of the pupil's affairs; or if they cannot be found, or those who are found are not trusted, he ought to order the reasons to be set forth and a *synopsis*.' i.e., a short statement in writing and inventory of the pupil's property, to be made out. And on the authority of the same Ulpian ' It comes within the duty of a Judge to make careful inquiries whether money to pay the debt can be procured from any other source. He ought therefore to inquire whether the pupil has money, either in cash or in bonds, which can be sued upon, or in expectation of rents and income. Moreover, he should inquire whether there is any other property besides the landed property which can be sold, and with the price of which the debt can be paid. If then it shall be found that in no other way can the debt be paid, than by the sale of the landed property, then he will allow it to be sold, only if the creditor presses or the rate of interest should favour the payment of the debt '.

" 66. In an inquiry into the cause of alienating he should also consider in what order the things are sold, namely, the movables, the less valuable, and the useless things first ; then rents from land ; and, lastly, the landed property ; and a large sale should not be made to pay a small debt, as the same Jurisconsult says. And Charondas bears witness that decrees have often been reversed by the Supreme Court, because an inquiry as to the movable property has not been held, the minor being allowed to refund the purchase price. "

Now in regard to the sale itself Sande says (1.1.5.72 Webber p. 38) :

" 72. After the sanction of the Court has been obtained, and the decree has been granted, the property of the pupil ought to be sold at public auction, and be put up to bidding ; nor should private sales be allowed, lest it should be in the power of the tutor to cheat the pupil, for it is well known that some tutors are not inclined to act in good faith. "

and the effect of a sale without good ground and an order of Court is stated thus :

" 79. If the immovable property of a pupil, minor, or madman, or that movable property which can be safely kept, is sold without good grounds for alienation, and without an order of court, the alienation is *ipso jure* void ; nor does the dominium pass from the pupil or minor. "

The same author says as to the minor's remedy :

" 80. A pupil or minor, whose landed property has been alienated in spite of a prohibition, retains an *actio in rem*, that is, a vindication, which he can maintain not only against the purchaser, but also against any third person who has possession. "

The view expressed by Sande has been adopted by the Courts both here and in South Africa. First as to the latter country. In *Ex parte Blomerus* [1] the Court held that :

> " The principles upon which the Court will assent on behalf of minors to the mortgage or sale of property subject to a *fideicommissum* are the same as those upon which the Court will allow the property of minors to be sold. Before the Court will grant such assent it must be fully satisfied beyond all reasonable doubt that a mortgage or sale is to the advantage of such minors. "

The position should not be different where the minor is only a fideicommissary heir to the property. The South African view is that no sale or mortgage of fideicommissary property by which minors are likely to be affected can take place without good ground and the authority of Court. In *Odendaal's* case [2] De Villiers, J.P. said :

> " Now I take the position to be that when there is a *fideicommissum* on property, then the fidei commissaries, if they are actually in existence, can consent to the property being mortgaged by the fiduciary. Indeed they can consent to the alienation of the property if they choose, and they can even extinguish their own fideicommissary rights altogether. Such consent can be given by the fideicommissaries themselves, if they are majors. If, however, the fideicommissaries are minors, their consent can only be given on their behalf by their guardians, if any, and, in addition to the consent of the guardians the authority of the Master, as upper guardian, and of the Court as uppermost guardian, is necessary, but in spite of that it remains a matter of consent. The position in law is still that the land is mortgaged by consent of the fideicommissaries, major or minor. "

In *Ex parte Blomerus* (*supra*) Davis J. in considering the question of the right of the Court to consent on behalf of minors and those yet unborn to the sale or mortgage of fideicommissary property said :

> " As a general rule, of course, the mortgage or alienation of fideicommissary property is prohibited (Voet 36.1.62) but there are exceptions. All the authorities, e.g. Voet (*ibid*) ; Sande, *Restraints on Alienations* (3.8.27) ; van der Linden, *Institutes* (1.9.8), agree that the consent of those interested can make the mortgage or alienation valid. In a long and uninterrupted line of cases the Court as upper guardian of minors, when all the major heirs have consented, and where it has thought it right to do so, has interposed its consent also on behalf of the minors. Though, as far as I have been able to find, the Roman-Dutch authorities do not refer to the power of the Court to authorise the mortgage or sale of fideicommissary property where the fideicommissary heirs are minors this seems to follow from its power to authorise the guardians of minors to deal with the property actually

[1] *(1936) C. P. D. 368.*

[2] *(1928) O. P. D. 218.*

belonging to them. The Court has evidently felt that the minor cannot be in a different position where he is only a fideicommissary heir to the property, that is to say when it may some day belong to him, from that which he is in when he in fact already owns the property himself."

The principles which govern the Court in giving its consent are the same as those governing the alienations of the immovable property of minors. But on this point there is no unanimity in South Africa for De Beer, J.P. says in *Ex parte Strauss & another* (*supra*) at p. 944 :

"There is no express Roman Law authority which permits the removal of a *fideicommissum* in which minors are interested on consent being given by the Court on their behalf, and if the Court is to exercise this power it would seem that it should be conferred by the Legislature by an amendment of Act 2 of 1916. For the purpose of this application it is, however, not necessary to express a definite opinion on this point."

De Beer, J.P., proceeds to sum-up his review of the authorities thus :

"On a review of the Roman-Dutch authorities and the decided cases in our Courts I am of opinion that the Court's power to authorise the mortgage of fideicommissary property *ob causam necessariam* is limited to the following :—

(*a*) to pay the debts of the testator and to make provision for the legacies bequeathed by him, when there is no other property available for these purposes.

(*b*) To discharge statutory burdens imposed on the fideicommissary property where the fiduciary has not the means to do so.

(*c*) To provide necessary maintenance for the children of the fiduciary where the latter is indigent. I have grave doubt whether in view of *Voet's* and *Van der Kessel's* statement above referred to this is a good ground to-day. . . . .

(*d*) To pay expenses which are necessary for the preservation and protection of the property."

Now turning to our law I find that the Courts have always maintained that the property of minors cannot be sold except on good grounds and then only with the sanction of the Court. The fact that it is the Executor that wants to sell does not affect that inflexible rule. The Executor in our country, even when exercising the rights of an executor under the English law, cannot do so in disregard of our law. If any of his rights *qua* executor under English law are in conflict with our law, they must yield to our law. In *Cassim v. Peria Tamby*[1], where the sale by an executor of immovable property devised by a Muslim

[1] *(1898) 2 N. L. R. 200.*

to his minor children was challenged, the Court sent the case back for ascertaining the laws and usages of the Muslims. In doing so Bonser C.J. observed :

> " The principal questions, it seems to me, on which it will be necessary to ascertain what the Mohammedan Law is, are, (1) as to whether, under the circumstances of the case, the executor had power to sell this property : it is quite clear that had it been a will governed by the Roman-Dutch Law the executor would not have had power ; (2) to what extent, if any, the clause restricting alienation binds this property. "

It would appear from the above remarks that an executor cannot exercise his powers without regard to our common law.

In the instant case we have not only to consider whether an executor may sell fideicommissary property in which minors are interested without the authority of the Court, but also whether an executor has power to sell property specially devised to minors without such authority. As indicated above an executor cannot do so even where there is good ground without the sanction of the Court. In the instant case the sale is not by the minor but by a third person. The greater is the need therefore for the sanction of the Court. Voet says of such a sale (Bk. IV Tit. 4 s. 16) :

> " But take the case where it is not the minor who has himself sold off his property, but another who has sold it and delivered it as his own. If the sale has indeed been made privately or even indeed by public action, but has been followed by delivery made privately in free will without previous order of a judge and the formalities of such order, there appears to be no doubt that the minor does not even need restitution. An ordinary vindicatory action for the property will have to be raised against the buyer as the person in possession ; since my property cannot without act of mine be transferred to another at the mere whim of some other private person.
>
> " But take the case where after a sale made publicly or privately the property (as for greater security is by present-day custom frequently wont to happen) has been delivered with the prefaced formalities of judicial orders, after the calling upon everyone who deems himself to enjoy a right of stopping the delivery to gainsay it if he can, and thus an order of Court has been passed. It is indeed certain nowadays that ownership has then been transferred to the buyer because of the weight given to the formal order of Court. But it is also certain that through the hazards of his youth the minor could have missed intervening against the passing of the judge's order. There is therefore no reason why in this case too he should not have the assistance of the relief due to youth and, his ownership being restored, possession of the property also go back to him. "

For the above reasons I am of opinion that the sale of the land called Godakumbura by the executrix of the last will of Charlis Silva without the authority of the District Court is not valid.

I would accordingly dismiss the appeal with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.

APPENDIX 'A'

Charter of 1801—

"LV. And We do hereby further grant, ordain, establish, and appoint, That the said Supreme Court of Judicature in the Island of *Ceylon*, shall grant Probates under the Seal of the said Court, of the Wills and Testaments of such Persons as are herein-before in that Behalf described, dying within the said Island of *Ceylon*, and commit Letters of Administration under the Seal of the said Supreme Court, of the Goods, Chattels, Credits, and other Effects whatsoever, of such Persons as hereinbefore in that Behalf described, who shall die intestate within the said Island of *Ceylon*; or who shall have left Goods, Chattels, Credits, and Effects within the said Town, Fort, or District of Colombo; or who shall not have named an Executor resident within the Jurisdiction of the said Supreme Court; or where the Executor, being duly cited according to the Form now used for that Purpose in the said Diocese of *London*, shall not appear, and sue forth such Probate; annexing the Will to the said Letters of Administration, where such Persons shall have left a Will without naming any Executor who shall then be alive and resident within the said Island of *Ceylon*, and who, being duly cited thereto, will appear and sue forth Probate thereof; and to sequester the Goods, Chattels, Credits, and other Effects whatsoever of such Persons so dying, in cases allowed by Law, as the same is and may now be used in the said Diocese of *London*; and to demand, require, take, hear, examine, and allow and if occasion require, to disallow and reject the Account of them, in such Manner and Form as is now used in the said Diocese of *London*, and to do all other Things whatsoever needful and necessary in that Behalf.

"LVI. Provided always, and We do hereby authorize and require the said Supreme Court of Judicature, in the Island of *Ceylon*, in such Cases, as aforesaid, where Letters of Administration shall be committed with the Will annexed, for want of an Executor appearing in due Time to sue forth the Probate, to reserve in such Letters of Administration full Power and Authority to revoke the same, and to grant Probate of the said will to such Executor whenever he shall duly appear and sue forth the same.

"LVII. And We do hereby further authorize and require the said Supreme Court of Judicature in the Island of *Ceylon*, to grant and commit such Letters of Administration according to the Form now used, or which lawfully may be used, in the said Diocese of *London*, to the lawful next of Kin of such Persons so dying as aforesaid, being then residing within the jurisdiction of the said Court, and of the full Age of Twenty-one Years: And in the case no such Person then be residing within the Jurisdiction of Our said Supreme Court of Judicature in the Island of *Ceylon*, or being duly cited, shall not appear and pray the same and make out such their Claim to the Administration of the Effects of the Intestate deceased, to the Satisfaction of the said Court, it shall and may be lawful for the Registrar of the said Supreme Court of Judicature in the Jurisdiction aforesaid, and he is hereby required to apply for, and such Court is hereby required and directed to grant such Registrar, such Letters *ad Colligenda* or of Administration, as to such Court shall seem meet; by virtue whereof such Registrar

shall collect the Assets of the Deceased, and shall, under the Direction and subject to the Control of the said Supreme Court, bring in such Assets, or where it shall be necessary, shall sell and convert the same into Money, and from Time to Time, as often as the same shall amount to the Sum of Five hundred Rix Dollars of Current Money of *Ceylon*, or Fifty Pounds of lawful Money of *Great Britain*, shall pay the same into our Treasury in the said Island, in which proper and distinct and separate Books and Accounts thereof shall be regularly kept, and such Registrar shall regularly account for such Assets, and the Disposal thereof to the said Supreme Court of Judicature, at such Periods, and in such Manner, as the said Court direct; and the said Supreme Court is hereby authorized and required to assign to the said Registrar, and the said Registrar shall be entitled to retain out of and from the Amount of such Assets, such Allowance or *per* Centage, as the said Court shall in their Discretion think reasonable for his Trouble, in the Collection and Administration of the Estates of such Persons dying Intestate as aforesaid: Provided always, That when any next of Kin, who, at the Time of the Return of the above mentioned Citation, shall have been absent in *Europe* or elsewhere, shall make and establish his or their Claim to the Administration of the Assets of such Intestate, the Letters *ad Colligenda* or of Administration, so granted by virtue hereof to the said Registrar shall be recalled, and Administration in due Form granted to such next of Kin respectively."

Charter of 1833—

"27. And We do further give and grant to the said District Courts respectively in their said respective Districts full power and authority to appoint Administrators of the Estates and effects of any Perons dying within such respective Districts Intestate or who may not have by any Last Will or Testament appointed any Executor or Trustee for the Administration or execution thereof, and like power and authority to enquire into and determine upon the validity of any Document or Documents adduced before them as and for the Last Will and Testament of any Person who may have died within such Districts respectively, and to record the same and to grant Probate thereof with like power and authority to appoint Administrators for the Administration or execution of the trusts of any such Last Will or Testament as aforesaid in cases where the Executors or Trustees thereby appointed shall not appear and take out Probate thereof, or having appeared and taken out such Probate shall by Death or otherwise become incapable to carry any such trusts fully into execution. And We do further authorise and empower the said District Courts in their said respective Districts to take proper Securities from all Executors and Administrators of the Last Wills and Testaments of any deceased Persons or of the Estates and Effects of any Persons who may have died intestate for the faithful performance of such trusts and for the proper accounting to such Courts respectively for what may come to their hands or be by them expended in the execution thereof, with like power and authority to call all such Executors and Administrators to account and to charge them with any Balances which may be due to the Estates of any such deceased Persons, and to enforce the payment thereof and to take order for the secure investment of any such Balances, and such Executors and Administrators from time to time to remove and replace as occasion may require."

. . . . . .

APPENDIX 'B'

Land Transfer Act 1897—

"1. (1) Where real estate is vested in any person without right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

"(2) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

" (3) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

" (4) The expression 'real estate', in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

" (5) This section applies only in cases of death after the commencement of this Act.

" 2. (1) Subject to the powers, rights, duties, and liabilities herein-after mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

" (2) All enactments and rules of law relating to the effect of probate or letters of administration as respect chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estates, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate.

" (3) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate ; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

" (4) Where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate,

" 3. (1) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge ; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

" (2) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the court may, if it thinks fit, on the application of that person and after notice to the personal representatives order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

" (3) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

" (4) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the registrar to register the person named in the assent as proprietor of the land.

"4. (1) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that

legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the court, and such valuation and appropriation shall be conclusive save as otherwise directed by the court.

"(2) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

"(3) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorise the registrar to register the person to whom the property is appropriated as proprietor of the land."

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