1938 *Present :* **Maartensz and Keuneman JJ.**

DE SILVA *et al.* *v.* DE SILVA.

81—D. C. Galle, 36,337.

Bequest—Property subject to a mortgage—Duty of the executor to release the mortgage—Right of executor to claim prescription—Roman-Dutch law.

Where property subject to a mortgage is devised by last will it is the duty of the executor to release the mortgage, if the testator was aware of the existence of the mortgage and, the terms of the will do not either expressly or by implication show an intention to bequeath the property burdened with the mortgage.

The rights of the devisee will be determined by the Roman-Dutch law.

The executor is entitled to claim the benefit of the Prescription Ordinance unless he is an express trustee in terms of the will.

BY last will dated February 8, 1931, one Andris Silva devised a land called Bandarawatta to Nikohamy which was subject to a mortgage created by the testator a few days before the will. After the will was admitted to probate the mortgagee put the bond in suit against the defendant as executor and under the decree in the action the land was sold. The plaintiffs, who are the personal representatives of Nikohamy, brought the present action against the defendant as executor alleging that the defendant had failed and neglected to convey the land to them and claiming Rs. 1,000 as the value of the land. The learned District Judge held that it was not the intention of the testator to devise the property free of the mortgage and that it was not the duty of the executor to release the mortgage.

L. A. Rajapakse (with him *M. M. I. Kariapper*), for the plaintiffs, appellants.—The matter in dispute is about the construction of a last will, involving the rights of a legatee. It is a question of substantive law, and therefore the Roman-Dutch law is applicable. See *Cassim v. Hassen* [1].

Our law is different from the English law in respect of the legal position with regard to the estate of a deceased. See *Silva v. Silva* [2].

The Roman-Dutch law is clear on the point.

Where the legacy has a burden, which may endanger the ownership, *e.g.*, a mortgage, the estate will have to pay it off, where the testator was aware of the burden. *Grotius 2.22.16; Voet 30.27.* See *Buchanan's translation ; Van der Keesel's Theses 325.*

The position is succinctly stated in *1 Maasdorp (5th ed.), p. 207 ;* and *3 Nathan, s. 1864.*

The principle has been accepted in South Africa in *Ruthfelder v. Ruthfelder* [3], which has been followed in *Trustees, Lutheran Church v Estate* [4]. See also *Juta on Wills, p. 144,* and *Steyn on Wills, pp. 80-81.*

Even in the English law the position is favourable to the appellant. See *Williams (12 ed.) Executors, vol. 2, pp. 1099-1100.* No question of prescription arises as the executor is in the position of a trustee. *Eheliyagoda v. Samaradiwakara* [5].

[1] *29 N. L. R. 89 at pp. 92-93.*
[2] *10 N. L. R. 234.*
[3] *4 Buch 9.*
[4] *(1916) C. P. D. 376.*
[5] *22 N. L. R. 179.*

N. E. Weerasooria (with him *G. P. J. Kurukulasooria* and *A. E. R. Corea*), for the defendant, respondent.—This is a specific legacy, and it is the English law that should govern the matter.

Whether the Roman-Dutch law or the English law applies the cause of action is clearly prescribed.

The right to claim the legacy accrued either when the testator died April, 1931, or when probate issued 1932. The cause of action is prescribed in three years. Section 11 of Ordinance No. 22 of 1871.

The action is based on a tort. See the plaint. In that view of it, it is prescribed in two years. Section 10 of Ordinance No. 22 of 1871.

The executor is a trustee in a loose sense only. Unless he is an express trustee, prescription will run in his favour. *In re Jane Davis, Evans v. Moore*[1] and *In re Mackay, Mackay v. Gould*[2].

Cur. adv. vult.

June 22, 1938. KEUNEMAN J.—

In this case Andris Silva by last will P 1 dated February 8, 1931, made specific devises to five persons. One of these persons was Nikohamy to whom a land called Lunuheratota Bandarawatta *alias* Okadewatta was devised. The residue of the movable and immovable property was bequeathed to the defendant who was also appointed executor of the last will. The property devised to Nikohamy was subject to a mortgage, created by the deceased testator on February 2, 1931, a few days prior to the last will. The testator died on April 3, 1931. Thereafter the mortgagee of the land in question sued the defendant as executor on the mortgage, and under the decree in this action the land in question was sold in February, 1933.

The plaintiffs who are the personal representatives of Nikohamy who died after the testator about April 21, 1931, brought the present action against the defendant as executor alleging that the defendant has failed and neglected to convey the land in question to them and claiming Rs. 1,000 as the value of the land. The action was filed on October 26, 1937.

The learned District Judge held that it could not be inferred that it was the intention of the deceased testator to devise the property free of the mortgage, and that no duty was cast on the executor to redeem the mortgage. If there was such a duty, the learned District Judge held that there were ample funds of the estate, more than enough to satisfy the claim on the bond. The action of the plaintiffs was dismissed, and they appeal.

The position under the Roman-Dutch law is summarized in Maasdorp's *Institutes of South African Law (5th ed.), vol. I., p. 207,* as follows :—

"If the property bequeathed is found to have a burden of some kind upon it, it becomes a question of importance whether the legatee is bound to accept the property burdened as it is or whether it will be the duty of the executor or the person specially burdened with the legacy to release the property from the burden and to deliver it to the legatee free and unburdened. A distinction is drawn by some writers between burdens which may endanger the ownership of the property

[1] *L. R. (1891) 3 Ch. D. 119 at 124.*
[2] *L. R. (1906) 1 Ch. D. 25.*

and those which can have no such effect, and it is laid down by them that in the former case the duty of freeing the property will, as a general rule, fall upon the estate or person burdened with the bequest, but that in the latter the legatee will take the property burdened as it is. The real test, however, is what was the intention of the testator, judging from the nature of the property and from the terms of the will. In the case of a mortgage, for instance, which is one of the burdens which are calculated to endanger the ownership of the property, the duty of discharging the mortgage falls upon the estate, if the testator was aware of the existence of the mortgage, but not if he was ignorant of it, nor if it appears from the terms of the will either express or implied that the property was bequeathed to the legatee burdened with the mortgage."

The law is laid down in very similar terms in Nathan's *Common Law of South Africa (1906 ed.,) vol. 3, p. 1886, para 1864.* This is based on the authority of Voet's *Pandects XXX. 27* and *Grotius 2.22.16,* and has been accepted in South African cases—vide *Rathfelder v. Rathfelder*[1] and *Trustees Lutheran Church, Cape Town v. Estate Bam*[2].

If the Roman-Dutch authorities are applied, it is clear that the testator was aware of the existence of the mortgage, which in fact he created himself, and that the terms of the will do not, either expressly or by implication, show an intention on the part of the testator that the land in question should go to Nikohamy burdened with the mortgage. It was accordingly the duty of the executor to free the land in question from the burden, and hand it over unencumbered to the devisee. On his failure to do that, an action such as the present would lie.

It has been argued, but not very strenously, that the law applicable in this case in Ceylon is the English law and not the Roman-Dutch law. I cannot accede to this proposition, as the question with which we are concerned is the right of a devisee, a matter of substantive law, and not of procedure. In the Charter of 1833 clause 27 full power and authority was granted to District Courts to appoint administrators to the estates of intestates, to grant probate to executors and to exercise other powers in matters connected with such offices. In *Staples v. de Saram*[3] the effect of this clause was considered, and it was held that the old Roman-Dutch law relating to heirs *ex testamento* and heirs *sine testamento* had been entirely abrogated, as being incompatible with the English law which was ordained.

In the later Full Bench case of *Silva v. Silva*[4] the effect of clause 27 of the Charter was touched upon but not finally determined. It was held there that on the death of a person, his estate in the absence of a will, passes at once by operation of law to his heirs and the dominium vests in them, and further that a conveyance by the heir or devisee of his share of the immovable property of the deceased is not void. This principle appears to have been derived from the common law, *i.e.*, the Roman-Dutch law, although it appears that there was nothing to conflict with that view in the English law.

[1] *4 Buchanan's Reports 9.*
[2] *(1916) C. P. D. 376.*
[3] *10 N. L. R. 234.*
[4] *Ramanathan (1863 to 1868) 265 at p. 275.*

I am unable to see how clause 27 of the Charter can be said to have taken away from a devisee any substantive right which he previously had, nor has any authority been cited to us to that effect. I therefore think that the devisee is entitled to stand upon his rights under the Roman-Dutch law.

Further it is not clear in any event that the English law applicable in this particular case is different to the rule of the Roman-Dutch law. Under the Administration of Estates Act, 1925, section 35, it was enacted that where a person disposes by will of his interest in property, which at the time of his death is charged with the payment of money, and the deceased has not by will, deed or other document signified a contrary intention, the interest so charged, as between the different persons claiming through the deceased shall be primarily liable for the payment of the charge. This rule is however the creature of the statute. Prior to this by the Locke King Acts of 1854, 1867, and 1877 a similar rule had been applied to the case of estates or interests in land, including freeholds, copyholds, and leaseholds charged with the payment of money. As these Acts did not apply to pure personality, it was held that where a specific legacy was pledged or charged by a testator who died before 1926, the specific legatee was, in the absence of a contrary intention in the will, entitled to have his legacy redeemed or exonerated by the executor or if the executor failed to perform this duty, to claim compensation to the amount of the legacy out of the general assets of the testator (vide *Williams on Executors, 12 ed., pp. 1099 and 1100*).

It would appear therefore that the rule of the English common law was not dissimilar to the rule under the Roman-Dutch law, and this rule applied both to real and to personal property in 1833. If we are to apply the English law, I take it that we must have recourse to this law and not to the later English Statutes.

I think therefore that the learned District Judge was wrong in holding that in the absence of clear intention in the will to devise the property free of the mortgage, it could not be inferred that it was the testator's wish to devise the property free of the mortgage.

The learned District Judge had rested his judgment on this finding alone. In appeal, however, another issue, viz., that of prescription was pressed by counsel for the respondent. Counsel for the appellant relied on the case of *Eheliyagoda v. Samaradiwakara*[1] in which it was held that as the executor was a trustee prescription did not run. Counsel for the respondent referred me to *In re Jane Davis: Evans v. Moore*[2]. In this case Lindley L.J. said "The Statute of Limitations excepts only express trusts and there is no more an express trust under that order than under the will. A legacy does not cease to be a legacy because it is subject to some implied trusts. An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own, but such a trust does not take a case out of the Statute. An executor cannot be deprived of the benefit of the Statute by showing he is a trustee; it is necessary to make out that he

[1] *22 N. L. R. 179.*
[2] *L. R. (1891) 3 Ch. D. 119 at 124.*

is an express trustee ". This is a decision of the Court of Appeal, and accordingly should be followed by us, if it is applicable. It has been followed in *In re Mackay, Mackay v. Gould*[1].

This decision is in keeping with section 111 of our Trusts Ordinance, No. 9 of 1917, which mentions the cases where the Prescription Ordinance is inapplicable in respect of trusts, and adds in clause (5) " This section shall not apply to constructive trusts, except in so far as such trusts are treated as express trusts by the law of England ".

It is clear in the present case that the defendant was not an express trustee under the will, and he is entitled to claim the benefit of the Prescription Ordinance.

Unfortunately the parties appear to have lost sight of the issue regarding prescription and the learned District Judge has not dealt with that issue at all. It is not clear that we have before us all the facts necessary for the decision of the issue, and I think it will be unsatisfactory to decide this matter in appeal. In the circumstances, I set aside the judgment of the learned District Judge and send the case back for the determination of the issue of prescription No. 8. All parties will be entitled to produce further evidence on this issue, if they so desire. All the other issues are to be regarded as decided in favour of the plaintiffs. The plaintiffs will be entitled to the costs of this appeal, and all other costs will abide the final result.

MAARTENSZ J.—I agree.

Set aside, case remitted.