Present : Dalton and Drieberg JJ. 1928.

SOPINONA *v.* ABEYWARDENE *et al.*

357—D. C. Galle, 23,160.

Fidei Commissum—*Prohibition against alienation to outsider—Real prohibition—Intention of testator.*

Where a testator bequeathed certain property to three brothers, the children of a deceased grandson, subject to a *fidei commissum* in favour of their heirs, and where the last will contained a prohibition against alienation except among the co-legatees and heirs,—

Held, that the *fidei commissum* was a real one and that it attached to a share of the property purchased by one of the legatees from another.

THIS was a partition action in which two questions arose for decision, turning upon the construction of the terms of the last will of one Madalena Hamy. The relevant clauses were as follows :—

(1) I do hereby grant and bequeath out of ½ part of the movable and immovable property of my estate, 1/5 part to my grandson Andris Wijeyasekere, another ⅓ part to Edward, Henry, and Richard Wijeyasekere, and the other ⅓ part to David Perera Wijeyatunge . . . .

1928.

Sopinona v. Abeywardene

I do further direct that the property bequeathed to the parties named, who are the legatees of this last will and testament, are hereby authorized to possess among themselves and their descending heirs, and they are hereby prohibited from selling, mortgaging, or gifting to others, save and except among themselves and their descending heirs.

The first question was whether the will created a valid *fidei commissum*, which was answered in the affirmative. The second question was whether the *fidei commissum* attached to a share purchased by Edward from David or whether Edward was free to dispose of it outside. The learned District Judge held that Edward's alienation of that share to the plaintiff's predecessor in title was valid.

H. V. Perera, for appellant.—The intention of the testator was to keep the property in the family. The language used shows that he intended to benefit the descendants for four generations. The prohibition against alienation is a real one as opposed to a personal prohibition. It is meant to bind the property rather than the person. The legatees are permitted to alienate the property among themselves, but alienation to a stranger is specially prohibited. The provision that the legatees and their descending heirs are to possess indicates that the prohibition binds the future generation. The decision relied on by the learned District Judge (*Naina Lebbe v. Marikar* [1]) is only concerned with a case of pre-emption. There was no indication there that the property was to be preserved intact for the family.

Croos Da Brera, for respondent.—The legatees are permitted to alienate the property among themselves. This shows that the testator while imposing a *fidei commissum* intended to permit an alienation under certain conditions. Such a *fidei commissum* is not foreign to the Roman-Dutch law. Once a legatee sells to another legatee, the latter takes a free estate and a purchaser from him gets absolute title. That such was the intention is clear from the absence of a prohibition against alienation in respect of the legatee who buys. The policy of the law is in favour of a free and unfettered estate in the absence of a clear intention to impose an entail. The prohibition is a personal one and binds only a particular class. The fact that alienation ispermitted indicates that there was no intention to keep the property in the family. The fiduciary is allowed to alienate and thus defeat the expectations of the fideicommissary. The wishes of the testator have been fulfilled when once the property has been alienated

[1] *22 N. L. R. 295.*

within the particular circle contemplated by him. There is no penalty attached to the prohibition against alienation to strangers. A nude prohibition is worthless.

The share dealt with by the legatee was inherited by him from a co-legatee who died issueless. The *fidei commissum* has therefore lapsed. It cannot run outside an indicated degree. The rule of *jus accrescendi* does not apply as there were three separate *fidei commissa.*

[DALTON J.—You have not raised this point in the lower Court.]

That will not prevent me from raising it here. All the necessary facts are in the record. It is a question of law.

Counsel cited *1 Maasdorp 168 ; 2 Burge 104, 105, 114 ; 3 Nathan 122 ; Sande on Restraints ; Mcgregor's Translation of Voet, bk. XXXVI., tit. 1, sections 4, 5, 7, 27, 28, and 29 ; Carron v. Manuel*[1] *; Usoof v. Rahimath*[2] ; and *Piunwardene v. Fernando*.[3]

H. V. Perera, in reply.

December 21, 1928. DALTON J.—

Two matters arise in this partition case as it came before the lower Court. The first was whether or not a valid *fidei commissum* created by the will P 1. That question was decided by the trial Judge in favour of the *fidei commissum*, and it is not questioned by either side on the appeal. Alienation was prohibited save to members of the class mentioned in the will, that is, the legatees and their heirs.

The second point arises out of a conveyance by one of the heirs named Edward. He acquired an interest in the property under the will, but he in addition also acquired a share by conveyance from David, one of his co-legatees. Edward's interests passed by sale and conveyance eventually to the plaintiff. It is urged for him (plaintiff) that the share which Edward acquired from David by purchase is free of the *fidei commissum*, inasmuch as the prohibition against alienation was personal to the legatees mentioned in the will. The trial Judge has so decided on the footing that he is bound by the decision in *Naina Lebbe v. Marikar.*[4] That is a case of a deed of gift of land to three brothers, the deed providing that " if they like to alienate or encumber their share by any deed such as mortgage or transfer they shall do so between themselves and not with others." The Court held that the prohibition was personal to the donees and placed no burden on the land. The trial Judge has expressed some doubt in his judgment as to the applicability of this authority to the case before him. A somewhat similar case to that of *Naina Lebbe v.*

[1] *17 N. L. R. 407.*
[2] *20 N. L. R. 225.*
[3] *21 N. L. R. 65.*
[4] *22 N. L. R. 295.*

1928.

DALTON J.

Sopinona v. Abeywardene

Marikar (*supra*) arising out of a will is afforded by *Du Plessis v. Smallberger*,[1] although the exact point arising here was not decided there. The report is not available here, but it is referred to in detail in *Mcgregor's Translation of Voet, bk. XXXVI.*, in the note on page 70. There was there a bequest of land to three children who were prohibited from selling to strangers but were bound to sell to their co-legatees. In discussing this case the learned commentator goes on to discuss the very point now arising. He asks the question: "Where a legacy, say a farm, is left to three sons, subject to the proviso that they shall not sell to a stranger but only to a co-legatee, is this obligation binding on a legatee in respect of a share of the farm acquired by purchase from one of the co-legatees in terms of the obligation aforementioned, or has he free and unfettered ownership in that share even though all the co-legatees are still living?" He says the answer is supplied by Voet at the end of section 27 of the 1st title of this book. The prohibition only attaches to the share acquired from the testator and not to any share he acquired from a co-heir. And he adds these words "unless the intention of the testator appear to be otherwise."

It is quite clear that the terms of the will P 1 are very different to those in the will in *Du Plessis v. Smallberger* (*supra*). The property in question is not left to certain persons named, but to them and to their descending heirs. There is elsewhere also a very clear intention expressed that the shares bequeathed shall not go to an outsider. The questions of personal and real prohibitions in the case of *fidei commissa* have been considered in the authority followed by the trial Judge and might have afforded him help in coming to the conclusion that the doubt he expressed had very good foundation. The case is quite distinct from that before us on the facts. Both learned Judges carefully distinguish the case before them from a *fidei commissum*. De Sampayo J. points out that the provision in the deed has no analogy to the well-known form of *fidei commissum* which is created by prohibiting alienation outside the family. And that, it seems to me, is what the prohibition is in the case before us. Schneider J. citing *Voet* (*bk. XXXVI. 1 28*) points out if the *fidei commissum* is a single one, the prohibition is personal; if it is "recurring," the prohibition is real. "In the former case, where it has operated once, the *fidei commissum* is at an end, while in the latter the prohibition recurs from grade to grade of *fidei commisarii*." Whether or not the *fidei commissum* is "single" or "recurring" is a question to be answered by reference to the terms of the will and the intention of the testator expressed therein, for, as Voet points out, a *fidei commissum* left to a family may be one or the other, and in the case of doubt will be decided in favour of the lesser burden on the property. Having regard to the terms of the will here, it seems to

[1] *3 Searle 385.*

me that the fideicommissary obligation is not determined by one restitution to the family, but that the testatrix has in definite terms given expression to her intention to create, and has created, a recurring *fidei commissum* within the members of the family she names and their heirs. I am not able to find any intention to create, as was argued before us, three separate *fidei commissa* in respect of the three separate bequests set out in the fourth paragraph of the will.

The appeal must therefore be allowed with costs, the order of the trial Judge being set aside. The case will therefore go back for the shares of the parties to the action to be estimated on the basis of the conclusion now come to. Appellant is entitled to the costs of the contest on this point in the lower Court.

DRIEBERG J.—I agree.

Appeal allowed.