1948 *Present :* **Jayetileke and Windham JJ.**

PODIMENIKA *et al.*, Appellants, *and* ANTHONY APPUHAMY, Respondent.

S. C. 159—D. C. Chilaw, 12,261.

Fidei commissum—*Property donated to children to go over to grand-children—Power to children of alienation* inter se—*Sale of share by one donee to another—Does share pass free of* fidei commissum ?

One G gifted certain lands to his three children A, C and D subject to the following conditions :—

" that they shall be entitled to the said property on my death and shall enjoy the same during their lifetime without transferring, mortgaging or leasing the said property for over a period of four years or doing any such act with outsiders but may do such acts among themselves and on their death the same shall devolve on their lawful children ".

A and C sold their shares to D. Thereafter D sold her share to A. D and A then sold the entirety to the defendant.

Held, that the defendant obtained an absolute title to the land. Unless in these circumstances the language of the deed leads unambiguously to the conclusion that a donee who purchases a share from a co-donee must leave it to his lawful children, the alienee takes that share free from any restrictions.

APPEAL from a judgment of the District Judge, Chilaw.

E. B. Wikramanayake, for the plaintiffs, appellants.

N. E. Weerasooria, K.C., with *B. Seneratne*, for the defendant, respondent.

Cur. adv. vult.

[1] *(1939) 40 N.L.R. 265.*

May 11, 1948. JAYETILEKE J.—

This is an action for a declaration of title to an undivided $\frac{1}{3}$ share of two lands called Ketakalagahawatte and Ketakalagahamulawatte. The original owner of the lands was one Guruhamy who, by deed No. 3,800, dated January 5, 1912, (P1), gifted the said lands to his three children, Allis, Carohamy, and Dingirimenika subject to the following conditions :—

> " that they shall be entitled to the said property on my death and shall enjoy the same during their lifetime without transferring, mortgaging or leasing the said property for over a period of four years or doing any such act with outsiders but may do such acts among themselves and on their death the same shall devolve on their lawful children ".

By deed No. 1794 dated February 1, 1929, attested by T. P. M. F. Goonewardene, Notary Public (D1), Allis and Carohamy sold their shares to Dingirimenika. By deed No. 1795 dated February 1, 1928, and attested by T. P. M. F. Goonewardene, Notary Public (D2), Dingirimenika sold her share to Allis. By deed No. 1825 dated February 25, 1929, attested by T. P. M. F. Goonewardene, Notary Public (D3), Dingirimenika and Allis sold the said lands to the 1st defendant, and the latter, by deed No. 33177 dated June 17, 1944, attested by P. W. Amarasinghe, Notary Public, gifted the same to his minor children the 2nd and 3rd defendants. Allis died in the year 1944 leaving three children, the 1st, 2nd and 3rd plaintiffs. The plaintiffs alleged that their father's purchase on D2 was subject to the restrictions contained in P1.

The parties went to trial on the following issues :—

(1) Did Deed No. 3800 create a valid fidei commissum ?

(2) Did the transferee on deeds 1794, 1795 and 1825 receive their rights free from any restraint ?

(3) Are the paintiffs as heirs of Allis Appuhamy bound by the latter's warranty of title ?

The learned District Judge answered the 1st and 2nd issues in the affirmative and dismissed the plaintiff's action with costs. At the argument before us the only point raised by Mr. Wikramanayake was that Allis' purchase on D2 was subject to the restrictions contained in P1. He invited our attention to the following passage in Voet [1] :—

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

and contended that by providing that the property should pass on the death of the donees to their heirs, the donor has sufficiently indicated his intention that a donee who purchases a share from a co-donee should not have the unfettered right to sell or otherwise deal with that share.

[1] *Book XXXVI. Title 1, section 27. Mcgregor's translation p. 68.*

Mr. Weerasooria, on the other hand, contended that where no provision is made as to who is to succeed to the share in the event of a sale by one donee to another the alienee takes that share free from any restriction. He invited our attention to the following passage in Sande on Restraints [1] :—

> " where a testator bequeaths an estate to his fifteen freedmen, and forbids any one of them to alienate or to give away his portion or to transfer it to a stranger by any other means whatever ; and if anything is done in breach of this prohibition the testator wills that such portion, or the whole estate shall pass to the Tusculan estate. Now if some of these freedmen sold their portions to others of these freedmen the purchasers, according to the decision of Scaevola, could rightly leave an outsider as heir to these portions : for this prohibition provides that no one of the freedmen shall alienate his own portion to an outsider *but does not prevent him alienating* those portions which he has acquired from his fellow freedman. The wishes of the deceased are fulfilled when the property has once been alienated within the circle of these freedmen, and therefore if it is thereafter transferred to an outsider this is not against the wish of the deceased."

and to the following observations of Schneider J. in *Naina Lebbe v. Marikar* [2] and Buchanan A.J. in *re Estate Volk* [3].

Schneider J. said :—

> " But granting that the prohibition is one falling into the class of personal prohibitions, Mr. Samarawickreme's argument will fail for two reasons. When Mohamadu sold his $\frac{1}{3}$ share to his brother, the 1st defendant in 1912, the latter acquired this share free from any burden whatsoever, and when he resold it to Mohamadu, the latter also acquired absolute title, because the prohibition provides that no one of the donees shall alienate his share to a stranger, but does not prevent one of the donees alienating the share which he has acquired from a co-donee ".

Buchanan A.J. said :—

> " As the testators have placed no limitation on the right of alienation by any legatee who obtained such share by right of purchase a purchaser has the usual unfettered right of sale or otherwise dealing with what he has bought ".

According to these authorities it is fairly clear that, unless the language of the deed leads unambiguously to the conclusion that a donee who purchases a share from a co-donee must leave it to his lawful children, the alienee takes that share free from any restrictions. I am unable to say that there is any such provision in P1. It seems to me that the only provision the donee has made in P1 is that if the donees die without acting upon the power given to them the property shall devolve on their lawful children. I would accordingly dismiss the appeal with costs.

WINDHAM J.—I agree.

Appeal dismissed.

[1] *3.2.2.3. Webber's translation p 177.* [2] *(1921) 22 N. L. R. at p. 302.*
[3] *South African Law Reports (1928) C.D.P. 164.*