The Time of Vesting of the Fideicommissary's Rights

THE distinction is well recognised in the Roman-Dutch texts between an express fideicommissum, (such as that created by a gift " to A for life and on A's death to B"), where the prohibition on alienation by the fiduciary is not expressly declared by the testator but is implied by law[1] and a tacit fideicommissum implied by law from a prohibition on alienation expressly declared by the testator (such as that created by a gift " to A subject to the condition that he may not alienate, and if he alienates to B " or " to A subject to the condition that he may not alienate out of his family "). In the former case, the rights of the fideicommissary B vest on the death of A, while in the latter case the rights of the fideicommissary (B in the first example of a tacit fideicommissum or A's intestate heirs in the second example) vest only in the event of breach (*in casum contrafactionis*[2]) of the testator's wishes by a prohibited alienation being attempted.[3]

With regard to so much the law is clear. But what is to happen if to an express fideicommissum a testator has added an express prohibition on alienation—for example, where there is a gift " to A, subject to the condition that he may not alienate, and on his death to B "? Is the express prohibition or that implied by the law from the express fideicommissum to determine the date of vesting of the fideicommissary's rights ?

It is, of course, possible that the testator may have intended both the express and the implied prohibition to be given effect to. For example, where there is a disposition " to A subject to the condition that he shall possess the property only during his life, and that he shall not be at liberty to sell, mortgage (except for the purposes specified below) or otherwise alienate it, and that on his death or in the event of the property being seized in execution for any debts other than those specified below, the property shall devolve on his children " (*Nadarajan Chettiar v. Sathanadan*, 41 N.L.R. 1), it is clear that

1. Sande De Prohibita Rerum Alienatione, 3.1.1., *Ex. p. Coetzee*, 1931 O.P.D. 156, 159-160, per Botha, J., *Vyramuttu v. Mootatamby*, 23 N.L.R. 1, 4, per Schneider, A.J.

2. Voet Comm. 36.1.4.

3. Sande, 3.4.11., *Kirthiratne v. Salgado*, 34 N.L.R. 69, 73-4, per Macdonell, C.J. If the person prohibited from alienating dies intestate without having broken the prohibition, the property will pass to his intestate heirs. Pothier. Substitutions, 3.3.3., *Sinnan Chettiar v. Mohideen*, 41 N.L.R. 225, 231, per Wijeyewardene, J.

two alternative events have been specified as marking the date of vesting of the fideicommissaries' rights[4].

But where it is clear that two alternative dates for the vesting of the fideicommissaries' rights was not intended, it must always be a matter of construction whether the date of vesting is that suggested by the express prohibition—namely, the date of breach of the prohibition—or that suggested by the express fideicommissum—usually, the date of the fiduciary's death. The question cannot be resolved by any merely mechanical rule—such as that the " tacit prohibition of the law is removed by the express prohibition of the testator, just as in other cases anything implied gives way to anything expressed, and a provision made by the law gives way to a provision made by a man ". (J. Decker, Dissert. II, 16.7, cited by Sande, 3.6.30).

Thus, where land is bequeathed subject to the condition that the legatee is prohibited from selling, exchanging or mortgaging it, and that he is bound to dispose of it by will to his eldest son in any lawful marriage which he might contract (*Ex. p. Engelbrecht*, 1916, C.P.D. 732), it may safely be concluded that the express " prohibition against alienation adds nothing to the (express) fideicommissum " (*Juanis Appuhamy v. Juan Silva*, 11 N.L.R. 157, 159, per Hutchinson, C.J.), that " the express prohibition (is) mere surplusage, inserted perhaps *ex abundanti cautela* " (*Fonseka v. Babunona*, 11 N.L.R. 333, 336, per Wendt, J.), and that the date of vesting of the fideicommissary's rights is the date of the fiduciary's death. The same may be said of the dispositions in *Ex. p. Nel*, 1929, N.P.D. 240, and in *Jayewardene v. Warnasuriya*, 49 N.L.R. 97, where clause D of the will ran " as devolving according to the above devises of the property belonging to me is to occur only after and not until the demise of (the fiduciary), none of the property may be mortgaged, sold, gifted or given away in any other manner by (the fiduciary) during the lifetime of (the fiduciary)".

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4. *Nadarajan Chettiar v. Sathanadan*, 41 N.L.R. 1, 6, per Wijeyewardene, J., cf. *Exp. Est. Rabinowitz* 1946 C.P.D. 757, 763-4, per Steyn, J., and the dispositions in *In re Est. Swanepoel*, 1929 O.P.D. 98, and *Van Dyk v. Van Dyk's Executor* 7 s.c. 194.

Such cases where there is only one fideicommissum but two alternative dates have been indicated for the vesting of the rights of the single set of fideicommaries must be distinguished from cases where there are really two fideicommissa with an indication of two different dates of vesting in two different sets of fideicommissaries.

For example, in a disposition " to A, subject to the condition that if he requires to alienate he shall do so only to B, C or D but not to anybody else, and if A dies without so alienating, to C ". (*Kirthiratne v. Salgado*, 34 N.L.R. 69), there are two different fideicommissa, the fideicommissaries not being the same in both. The express prohibition on alienation creates a tacit conditional fideicommissum in favour of B, C or D (*vide* the present writer's article " A Wrong Turning in the Law of Fideicommissum " in 1948, Ceylon Law Students' Magazine 41), the time of vesting of their rights being the date of breach by A of the prohibition, while there is also a separate express fideicommissum in favour of C in the event of A's death without his having broken the prohibition.

On this point reference may also be made to *Sinnan Chettiar v. Mohideen*, 41 N.L.R. 225, 231-2, per Wijeyewardene, J., and *de Saram v. Kadijar*, 45 N.L.R. 265, 284, per Keuneman, J., 295, per Wijeyewardene, J., differing from *Sabapathy v. Yoosoof*, 37 N.L.R. 70, 83, per Akbar, S.P.J.

In *Juanis Appuhamy v. Juan Silva*, 11 N.L.R. 157, the question whether the express or the implied prohibition was to determine the date of vesting was not decided. It is submitted that the express " prohibition against alienation adds nothing to the (express) fideicommissum " (*ibid*, 159, per Hutchinson, C.J.) and that the date of the fiduciary's death was that of the vesting of the fideicommissary's rights, in spite of the provision that " all persons who shall act against these stipulations " (i.e. the express prohibition on alienation) " shall be deprived of the inheritance "—a provision which was nugatory, a mere *nudum praeceptum*, in the absence of a gift over to anybody else.

In *Santiagupillai v. Chinnappillai*, 9 S.C.C. 33, Burnside, C.J. and Clarence, J. left open the question of the time of vesting of the fideicommissaries' rights, although Dias, J., thought the breach of the express prohibition determined the date of vesting. It is submitted that there was no sufficient reason for holding that the express prohibition was inserted with a view to accelerating the vesting of the fideicommissary's interest to a time prior to the fiduciary's death.

Although, then, the question of the time of vesting of the fideicommissaries' rights where an express prohibition has been added to an express fideicommissum must always be one of construction, yet, where there is no indication to the contrary, it may be presumed that the fideicommissaries' rights vest only at the time suggested by the express fideicommissum—usually the date of the fiduciary's death—and not on breach of the express prohibition, which is superfluous. In this connection, it is interesting to note that the old French law, (which was founded on the Roman Law), and the present codified law of the Canadian Province of Quebec (which has, with some modifications, followed the French Law), arrived at the same conclusion.

Thus, Burge (Colonial and Foreign Laws, 2nd ed. 1914, Vol. 4, Part I, p. 828) states the law of Quebec on this point as follows : " Where the intention of the grantor to create a substitution is not express, but is implied from a prohibition to alienate, inserted, apparently, in the interest of third parties, the substitution is conditional. It does not open unless there is a breach of the prohibition to alienate . . . It is otherwise when there is an express substitution. This takes effect on the death of the party receiving, and does not depend on whether or not there has been a breach of the prohibition. Thus, e.g., where a testator bequeaths property to A, and provides that after A's death it shall pass to A's children, the addition of a prohibition to alienate is

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interpreted as merely confirming the substitution. These solutions are given by the old (French) law, and are probably intended to be covered by the somewhat indefinite terms of arts, 968 and 971 " of the Civil Code of Lower Canada. Burge refers on the point to Mignault Le Droit Civil Canadien, 1895-1902, Vol. 5, p. 137.

Burge then continues: " Where there is an express substitution accompanied by a clause prohibiting alienation, it seems that the clause of prohibition adds nothing. It does not even prevent the institute from alienating the property, subject always to the resolution of such alienation if and when the substitution opens ; for pending this event no one has an interest to attack such alienations. The substitution is made in the interest of the substitutes, and their contingent rights can be in no way prejudiced by alienations or charges which will be resolved as soon as these rights open ". Burge here cites *Compagnie de Pret et Credit Foncier v. Bouthillier* (1892) R.J.Q. 1 S.C. 347 (C.R.) ; *Turcot v. Charters* (1900) R.J.Q. 18 S.C. 24 (Belanger, J.) ; and Mignault, *op. cit.* vol. 5, p. 141.

Professor Marcel Faribault of the University of Montreal has been kind enough to inform me that the law of Quebec on this point remains unchanged since 1914, the date of publication of the second edition of Burge's work (from which the above extracts were taken), and that Burge's statement of the law may still be taken as correct for Quebec so far as the vesting of the fideicommissaries' rights is concerned.

To sum up,

(1) in a disposition " to A for life and on his death to B ", B's rights vest on A's death ;

(2) in a disposition " to A subject to the condition that he may not alienate and if he does to B ", B's rights vest only if A breaks the prohibition by alienating ;

(3) in a disposition " to A for life subject to the condition that he may not alienate and on A's death to B ", the time of vesting of the rights of the fideicommissary B must depend in the last resort on the interpretation of the will ; but, where the testator's intention on the point is not otherwise clear, the presumption is that the fideicommissary's rights vest on A's death, and not on breach by A of the express prohibition, which is superfluous.

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