

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chiam Josef and others (Plaintiffs-Appellants) v. Maria Susanna Mulder and others (Defendants-Respondents), from the Supreme Court of the Cape of Good Hope ; delivered the 10th February 1903.

Present at the Hearing :

LORD MACNAGHTEN.

LORD LINDLEY.

SIR FORD NORTH.

SIR ARTHUR WILSON.

SIR JOHN BONSER.

[*Delivered by Sir John Bonser.*]

This is an Appeal from a Judgment of the Supreme Court of the Cape of Good Hope dismissing the Plaintiffs' action.

The only question involved arises on the construction of a document in the Dutch language. The facts are not in dispute and are as follows:—On the 24th of September 1881 J. J. Mulder and his wife (who were married in community) executed the document above referred to of which the following is the translation annexed to the Plaintiffs' declaration:—

“ On the 24th September 1881 we the
“ undersigned declare to have bequeathed to our
“ son Willem Gerhardus Mulder one-sixth share
“ in Lot No. 53 of the farm Armoed
“ We bequeath the said share for the sum of
“ 300*l.* sterling with interest at 6 per cent. per
“ annum, but after the death of the first dying
“ of us the interest shall be decreased to 3 per
“ cent. The said ground shall never be sold or
“ parted with in favour of a stranger but shall
“ permanently remain among legal heirs. This

“ bequest shall be attached to the deed of
“ transfer.”

The Acting Chief Justice states in his judgment that the penultimate clause might be more correctly translated: “The said ground shall “ never be sold or disposed of to a stranger but “ shall continue to remain among the legal “ heirs,” but, as he observes, the difference between the translations is not very material. Although the document uses words appropriate to a will, it seems to have been always treated as a contract for sale. In March 1882 J. J. Mulder and his son Willem G. Mulder made the declaration required by law to be made by purchasers and sellers respectively and paid the transfer duty, and a portion of land representing one-sixth of the farm was demarcated and taken possession of by Willem G. Mulder. J. J. Mulder died on the 2nd of June 1890 and in the following month his testamentary executors executed a transfer deed conveying the land to Willem G. Mulder, and containing a recital that J. J. Mulder had sold the land to the transferee in his lifetime and an acknowledgment that the estate had received the purchase money. A contemporaneous arrangement of the same nature was made by J. J. Mulder with each of his other three sons by which like portions of the farm were made over to them respectively. What the object of these arrangements was does not clearly appear. They may have been made with a view of avoiding payment of legacy duty; but whatever the object, it is clear that the transaction was in the nature of a family arrangement for value, and not a gift nor an ordinary case of sale and purchase. It seems to have been intended that the sons should have immediate possession of their shares subject to annual payments to be made by them to their parents, but that they should not get a title until the death of their surviving parent.

Willem G. Mulder executed a mortgage bond dated the 11th of August 1894 to one Richard Gavin to secure 500*l.* and interest, and again on 15th of August 1896 to one Anna Catharina Hester Mulder to secure 100*l.* and interest, and thirdly on the 26th of April 1897 to the Defendant James Alexander Foster to secure 305*l.* and interest. It is admitted that the mortgagees took their securities with notice of the document of the 24th of September 1881.

Willem G. Mulder died on the 8th of July 1899 leaving him surviving seven children one of whom, Anna Maria, is the wife of the Plaintiff Olivier, and having by his will disposed of his immovable property in favour of his wife and children. Since his death two of his sons Johannes Jacobus and Mattheus have become insolvent and their interests (if any) in the property described in the document of the 24th of September 1881 have been purchased in the insolvency proceedings by the Plaintiff Chiam Josef subject to a mortgage created by Mattheus before his insolvency in favour of the Plaintiffs M. Josef & Co.

In this state of things the present action was instituted. The Plaintiffs Chiam Josef and M. Josef & Co. represent between them the interests of the two insolvent sons of Willem G. Mulder, and the Plaintiff Olivier represents his wife, one of Willem G. Mulder's children. The Defendants are the testamentary executrix of Willem G. Mulder and the persons in whom the three mortgages created by Willem G. Mulder in his lifetime are now vested.

The action was framed on the theory that the heirs of Willem G. Mulder took vested interests in the property subject to a life interest in Willem G. Mulder, and the Plaintiffs accordingly claimed a declaration that the Plaintiff Chiam Josef was entitled to two-sevenths as the

purchaser of the interests of the two insolvent sons, and the Plaintiff Olivier to another one-seventh in right of his wife. They also asked for an order declaring that the mortgages were null and void and a direction for their cancellation. It is obvious that the latter part of the claim could not be supported, for the utmost the Plaintiffs could possibly be entitled to in any event would be to have the shares claimed by them transferred to them free from and unencumbered by the mortgages.

Their Lordships are of opinion that the effect of the document of the 24th of September 1881 followed by the transfer deed of 1890 was to vest the property in Willem G. Mulder subject to a prohibition against its alienation either by act *inter vivos* or by will to any person not a member of his family, and that in the absence of such alienation no person had any cause of action or any right to complain. The prohibition created what is termed a "*fideicommissum conditionale*," that is to say, a *fideicommissum* conditioned to come into existence on a breach of the prohibition (Sande, "De prohibita rerum alienatione" iii. 4. 11). The question whether or not the prohibition was a perpetual one was not discussed and cannot be decided in the present proceedings. It was not suggested that Willem G. Mulder's will was a contravention of the prohibition, but Counsel for the Appellants contended that the mortgages made by Willem G. Mulder were alienations and breaches of the prohibition and gave an immediate right of action to his nearest heirs, which would support the present action as far at all events as regards the Plaintiff Olivier. They relied on certain passages in the treatise just cited (iii. 4 §§ 8 and 11), which state in effect that if the person who is prohibited from alienation alienates in breach of the prohibition, the *dominium* of the property so alienated

passes forthwith out of him into the person or persons in whose favour the prohibition was imposed, who can sue at once to vindicate the property without waiting for his death. Although no doubt Sande considers that a mortgage, as being an inchoate and potential alienation, cannot validly be made by a person prohibited from alienation (*op. cit.* iii. 3. 18), yet it does not follow that a mortgage (which is a mere charge not passing the *dominium*) is a breach of the prohibition of the same nature and entailing the same consequences as an act by which the *dominium* passes, *e.g.*, a sale, donation or testamentary bequest. Their Lordships have not been referred to any express authority for such a proposition and they are not inclined so to hold in the absence of such authority. Indeed it would appear that if the person prohibited from alienation sells the property with an option of repurchase which he afterwards exercises, that is not a breach of the prohibition, though it is otherwise where the property is sold absolutely, even though he subsequently repurchase it (Sande, *op. cit.* iii. 4. 9). The charge imposed by a mortgage can only be enforced by a judicial sale, and until such a sale has been effected the property charged cannot be said to have been "sold or disposed of to a stranger." In the present case no attempt has been made to enforce the mortgages against the property and such an attempt may never be made, for it may be that the mortgages have already been or may hereafter be satisfied out of the assets of the mortgagor.

For these reasons their Lordships are of opinion that the action was rightly dismissed and will humbly advise His Majesty that the Appeal ought to be dismissed. The Appellants must pay the costs of the Appeal.

It was suggested that Mrs. Olivier at all events was entitled to a share under Willem G. Mulder's

will ; but this action was not brought to assert any such claim.

Their Lordships however think it right to add that the dismissal of the action is to be without prejudice to the Plaintiffs' rights whatever they may be under the will of Willem G. Mulder.
