1948 *Present:* **Wijeyewardene A.C.J., Canekeratne and Windham JJ.**

CATHERINE PERERA *et al.*, Appellants, *and* THE MISSIONARY APOSTOLIC OF HALPATOTA *et al.*, Respondents.

S. C. 91—D. C. (Inty.) Galle, 8,151 Testy.

Last Will—Legacy conditional on marriage—Amount deposited by executor in Court—Application by legatees before marriage to draw the interest—No right.

A last will contained the following clause: "I further direct the executor of this my last will to pay a sum of Rupees Five thousand to the two daughters of Mary at home on the occasion of their marriage as dowry provided by me and a sum of One thousand rupees to each of her two sons". The executor deposited the sum of Five thousand rupees in Court in lieu of giving security.

On an application by the daughters of Mary still unmarried to draw the interest which had accrued to this sum—

Held, that there was no vesting of the legacy till the marriage of the legatees and that they were not entitled to draw the interest.

APPEAL from a judgment of the District Judge, Galle.

F. A. Hayley, K.C., with *H. W. Wanigatunga*, for the appellants.—In this case the sum of Rs. 5,000 which forms the bequest of the testator to these appellants has been paid into Court with the consent of the executor. The appellants claim to be entitled to be paid the interest which has accrued in respect of that sum. The question in this case is whether the appellants are entitled to that interest or whether such interest should form part of the residue of the estate.

Here there is a sum of money separated from the estate. The question that has to be decided is whether this sum of Rs. 5,000 is a conditional legacy and that there has been no vesting and may be no vesting at all or whether the legacy is vested. It is submitted that under the Roman Dutch Law this legacy is an unconditional legacy. See Walter Pereira's Laws of Ceylon (Second Edition), pp. 468 and 469; also Van Leeuwen, Kotze's Translation (Second Edition), Vol. I., Book 3, Chapter 9, section 34, p. 399. *Fonseka v. Fonseka*[1] has no bearing in this case.

[1] *(1938) 40 N. L. R. 539.*

It is clear from the nature of the will that the testator made no general trust and it is also clear that the testator had no intention to tie up this money. Under the English Law also this legacy must be treated as an absolute gift. In a case such as this a benignant interpretation is given and the interpretation should be the one which is in favour of preserving the legacy. See *Lang v. Pugh* [1]; *In re Panter, Panter-Downes v. Bally* [2]; Williams on Executors, Eleventh Edition, Part 3, Book 3, Chapter 4, p. 1158.

On the question of vesting see Walter Pereira's Laws of Ceylon (Second Edition), pp. 463, 464. In this case the Court has intervened and the executor has deposited the money in Court. It is submitted that this setting apart of the money by the executor must be held to have the same effect as if the testator had set the money apart for this legacy. In such a case interim interest is payable to the legatees. See *In re Medlock*; *Ruffle v. Medlock* [3]. Counsel also cited *In re Dickson, Hill v. Scott* [4], and *Dundas v. Murray* [5].

E. B. Wikramanayake, K.C., with *E. S. Amarasinghe*, for the respondents.—On the wording of the particular clause in the will there is no legacy at all by the testator to these appellants. The testator in the same will uses the words " give and bequeath " with respect to sums of money given to other persons but the words in this particular paragraph are " I direct my executor ". So that this paragraph contains only a direction to the executor and not a legacy to the appellants.

Further, even if such a direction is to be construed as a legacy it can never be held to be a vested legacy but a contingent legacy based on a condition which might not occur at all so that it is possible that the legacy might not vest at all. See Van Leeuwen, Kotze's Translation, 2nd edition, Bk. 3, Chap. 9, sections 35 and 36. See also *Estate Balston v. Estate Balston* [6]; McGregor's Voet 36.1.2.

Cur. adv. vult.

August 23, 1948. WIJEYEWARDENE A.C.J.—

This matter has been referred to a Bench of three Judges by my brothers Dias and Basnayake under section 775 of the Civil Procedure Code.

The question for decision depends on the contruction of the following clause in the last will of one F. A. Gunasekere :—

> " I further direct the executor of this my last will and testament to pay a sum of Rupees Five thousand to the two daughters of Mary at home on the occasion of their marriage as dowry provided by me and a sum of Rupees One thousand to each of her two sons ".

F. A. Gunasekere died in 1945, leaving him surviving his widow and two daughters by a previous marriage, Mary and Martha. Mary is married and has two sons and four daughters, two of whom have entered a religious Order. The appellants are the two remaining daughters of Mary and are referred to in the above clause as the " two daughters of

[1] *(1842) 6 Jurist Part I., 939.*
[2] *(1906) 22 T. L. R. 431.*
[3] *(1886) 55 L. J. R. (Ch.) 738.*
[4] *(1885) L. R. 29 Ch. D. 331.*
[5] *(1863) 32 L. J. R. 151 at 153.*
[6] *S. A. L. R. (1920) C. P. D. 184 at 191.*

Mary at home ". The respondents are the executor, a Roman Catholic priest, and the residuary legatee, the Roman Catholic Bishop of Galle.

When the executor produced the last will in Court and asked for probate, the two daughters of the testator objected to the Court dispensing with security from the executor under section 541 of the Civil Procedure Code. The Court did not, however, order the executor to give security but directed him to deposit in Court " legacies " due to Mary and Martha and " Mary's family " as soon as probate was issued to him. The executor deposited in Court in June, 1946, a sum of Rs. 19,000 which included the sum of Rs. 5,000 referred to in the above clause of the will. In making the deposit the executor moved that " it be minuted of record " that the sum of Rs. 5,000 " be not paid without the consent of the executor ". The Judge made a note accordingly in his record.

The present appeal arises on an application by the appellants, who are unmarried, for an order of payment in respect of a dividend of Rs. 75 that has accrued on the investment of the sum of Rs. 5,000 in the Loan Board. The District Judge refused the application.

It was argued for the appellants that—

(*a*) there was a legacy of Rs. 5,000 created by the clause in question in favour of the two appellants ;

(*b*) that the legacy vested in the two appellants at the death of the testator, though the time of payment was postponed until their marriage ;

(*c*) that the appellants were entitled to receive payment of the dividends even before their marriages.

In support of his argument the appellant's Counsel referred us to Walter Pereira's Laws of Ceylon (1913 Edition) at pages 468 and 469 and Van Leeuwen [Kotze's Translation (second edition)] Book 3, Chapter 9, Section 34. Walter Pereira says in the passage referred to :—

" Where a bequest is made subject to a mere usufruct, the property in the thing bequeathed passes to the legatees on the death of the testator, and those of them who may be alive at the termination of the usufruct take their shares as a matter of course, and the shares of those who die meanwhile go to their heirs . . . . So, too, where, for instance, a testator bequeaths a certain sum of money to his grand daughter to be paid to her by the heir after she has attained majority, or has celebrated her nuptials. The legacy here is an unconditional one, and it is only the payment of it and the right to demand it that have been postponed until majority or marriage ; and therefore, if the grand daughter die before the date of payment has arrived, the legacy passes to her heirs (Cens. For. 1. 3. 8. 34). "

The passage from Kotze's translation is :—

" If the testator has said, ' I bequeath 1,000 guilders to my niece, which my heir shall pay her on attaining majority or marriage : ' which bequest, even if the niece die unmarried and a minor, must be paid to her."

Under this last will, the testator " gives and bequeaths " some cash legacies to his widow, his two daughters, certain charitable institutions and the Bishop of Galle. But, when he comes to make provision for the

appellants, he does not use the words "give and bequeath" but says "I direct the excutor . . . . to pay a sum of Rs. 1,000 . . . . on the occasion of their marriage as dowry . . . . ". These words do not indicate a direct gift to the grand daughters but a mere direction to the executors to pay on a future event. In such a case, the vesting will be postponed till after the event has happened, unless of course a contrary intention could be gathered from the surrounding circumstances. There is no evidence of such a contrary intention in this case. The position would have been different, if the words directing payment had been followed by words such as "to whom I give and bequeath the same accordingly" (Williams on Executors and Administrators, Tenth Edition, Volume 1, pages 979 and 980). It will be seen that the passages from Walter Pereira and Kotze (*supra*) speak of testators "bequeathing" sums of money to their grand daughter and niece.

I do not think the clause in question could, in any event, be considered as creating anything more than a conditional legacy. In discussing the question whether a legacy is vested or contingent when a future time for the payment is defined by the last will, Voet says, "where the time (*dies*) is uncertain, the nature of the uncertainty is not the same in each case; for either it is uncertain *when* the day will arrive though it is certain that the day will arrive during the lifetime of the legatee, or it is certain that the day will arrive, but uncertain whether that will be so during the lifetime or after the death of the legatee, or, finally it is quite uncertain whether and when the day will arrive". He says that the rule that the legacy is contingent will apply mostly to the third case "since it is evidently wholly uncertain whether the day which has been attached to the legacy will arrive at all; and an uncertain day is treated as equivalent to a condition". He then proceeds to say, "Under this category of a *dies incertus* (an uncertain day) ought clearly to be brought the matter of a specified age—the age at which the testator desired that the legacy should be paid over to the legatee, for example, on his attaining the age of puberty, of majority, on his marrying in the family . . . . unless the uncertain day has merely been put in to defer the time for giving effect to the bequest". (Voet 36. 1. 2. Mc Gregor's Translation.)

The same view as to the effect of a *dies incertus* is expressed in Williams on Executors and Administrators (Tenth Edition at page 975) where it is stated that, in the absence of a contrary intention to be gathered from the will, the legacy is to be regarded as a conditional legacy "if the event upon which the legacy is directed to be paid be uncertain as to its taking place".

In view of the reliance placed on a passage from Van Leeuwen by the appellants it is interesting to note that the passage cited in their behalf is followed immediately (*vide* Kotze's Translation, Book 3, Chapter 9, Section 35) by the following statement:—

> "Whatever has been bequeathed as marriage property is, in case of doubt, considered subject to a condition, which must first be fulfilled before the bequest becomes vested, so that in the meanwhile it would lapse by death."

Under the English Law a contingent pecuniary legacy carries no interest until the contingency happens except where the testator is the father of the legatee or stands *in loco parentis* and no other provision is made in the will for the maintenance of the legatee [vide *In re Pollock, Pugsley v. Pollock*, (1943 Chancery Division 338]. In the present case the testator is the grandfather of the appellants. He had contracted a second marriage and was living with his second wife. The appellants, the daughters of a child of the testator by the first bed, were living separately with their parents. A grandfather is not considered to be *in loco parentis* unless he intended to assume the office and duty of a parent. No evidence has been led to shew that the testator " meant to put himself in the situation of the lawful father " of the appellants " with reference to the father's office and duty of making provision " for them (Williams on Executors and Administrators (Tenth Edition), pages 1076 and 1077). It depends on certain technical rules and the terms of the particular will whether the interest accruing on a pecuniary legacy forms part of the residue or goes with the principal to the legatee [vide *In re Dickson, Hill v. Grant* [1] and *In re Pollock, Pugsley v. Pollock* (*supra*).] No authority was cited to us to show that in the case of a contingent pecuniary legacy the legatees would be entitled to claim the interest on the legacy in every case before the happening of the event. The decisions in the English Courts regarding the appropriation of the income for the maintenance of minors depends on certain Statutes (*e.g.* 23 and 24 Victoria 145, 44 and 45 Victoria c. 41 and 15 George V. c. 19).

It was argued somewhat tentatively that the deposit of the money in Court by the executor might be regarded as " a severance of the fund " which resulted in creating a vested legacy entitling the legatees to the dividends in question (*vide* Williams on Executors and Administrators, (Tenth Edition), page 1167). But the " severance " which has such an effect is a severance by the direction of the testator and cannot include " a mere arrangement for the more convenient dealing with the estate " made by an executor [vide *In re Dickson, Hill v. Grant* (*supra*).] I may add that the law in England with regard to the last wills of persons dying after 1925 is governed by the Law of Property Act, 1925.

For the reasons given by me I would dismiss the appeal with costs.

CANEKERATNE J.—I agree.

WINDHAM J.—I agree.

Appeal dismissed.