1944 *Present:* **de Kretser and Jayetileke JJ.**

FAN EYRE, Appellant, *and* THE PUBLIC TRUSTEE *et al.*, Respondents.

7,071—D.C. Galle, No. 7,385

Last will—Interpretation of will—Paramount rule is to find out intention of the testator—Inconsistent clauses and words must be sacrificed to intention—Provision for maintenance and education—No legacy.

In the interpretation of a will the paramount rule is to look for the intention of the testator as it is expressed and clearly implied in the general terms of the will. When the intention is found on satisfactory evidence, to that must be sacrificed inconsistent clauses and words.

A provision for the education and maintenance of children without any definite sum being mentioned with respect to each does not amount to a legacy.

APPEAL from an order of the District Judge of Galle.

E. F. N. Gratiaen (with him *G. E. Chitty*) for the first to fourth respondents, appellants in S. C. No. 70, and the first to fourth respondents, respondents in S. C. No. 71.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *D. W. Fernando*), for the fourth, fifth and sixth respondents (seventh, eighth and ninth respondents) in the original petition in S. C. No. 70, and appellants in S. C. No. 71.

M. T. de S. Amerasekera, K.C. (with him *N. K. Choksy*), for the Public Trustee in both appeals.

M. T. de S. Amerasekera, K.C. (with him *H. W. Jayawardene*), for the tenth to fourteenth respondents in both appeals.

Cur. adv. vult.

December 18, 1944. DE KRETSER J.—

This appeal concerns the interpretation to be placed on the last will of the late A. W. Winter of Pillagoda Valley, Baddegama, who died on December 22, 1931, leaving a last will dated October 9, 1931. The will affected only certain specific assets and left untouched other assets

and investments made by him for the benefit of his children. He left legitimate issue by his wife, the first respondent, viz., two daughters and a son, the second, third and fourth respondents, and natural children by three mistresses, viz., the fifth respondent, Violet Dagmar, married to Hermon, the sixth respondent Hilda, married to Vander Poorten, and three sons Norman, Sydney and Rioty, the seventh, eighth and ninth respondents, by a mistress Hinnihamy, deceased; by one Asilin deceased, Harold, Irene, Edith and Lionel, the eleventh, thirteenth, fourteenth and twelfth respondents; and by one Podihamy, still alive, the tenth respondent Mary, since married.

He appointed his brother and nephew executors and trustees of his will and they applied for probate in January, 1932. They resigned in a few months and the Public Trustee, named as a substitute, was appointed in their places. He applied for directions of Court from time to time, and from one of his applications it appears that the deceased married in 1928 and that his natural children were older than his lawful children. From papers filed in September, 1933, it appears that Mary was then 17, Harold 11, Irene 9, Edith 8, and Lionel 6 years of age. They would then now be 28, 22, 20, 19 and 17 years of age respectively. It is also stated that Sydney was born on March 17, 1912, and Rioty on July 3, 1915. They are now, therefore, 32 and 29 years old respectively. Sydney and Rioty were alleged to be in England. From an application made by their mother, the first respondent, in 1937, it appears that the second respondent Evelyn was then 8 years old, and the third respondent Ailine 7 years. From an application made by one Rudd on their behalf it appears that the ages given in 1933 to Harold, Irene and Edith were correct but Lionel Roger would be now 19 years old. Rudd was appointed their guardian *ad litem*. In the present applications the Public Trustee says the youngest child will not be 25 till 1948. Then he was born in 1923 and is now 21 years old. This is probably a mistake due to an allegation made by the widow in ignorance.

In 1942, the Public Trustee asked for directions as to an amicable partition of Pillagoda Valley estate, as to the period during which the natural children were to be maintained and educated, and as to whether the half share devised to the seventh, eighth and ninth respondents were liable to meet half the cost of such maintenance and education, and if so how provision should be made for this charge when the half is transferred to them.

The matter came up for inquiry before the District Judge and all the parties appeared and stated their views. It is from his order that the present appeals have been made by the first to fourth respondents and by the seventh, eighth and ninth respondents.

Every aspect of the will has been canvassed at great length by Counsel and I am deeply obliged to them for the fulness, skill and moderation with which they presented their cases. I was rather puzzled as to the attitude of the Public Trustee for Counsel appeared both for him and for the tenth to fourteenth respondents. If I understand the position aright the Public Trustee is neutral but his is a benevolent neutrality with regard to these respondents and must not be considered to be one of non-belligerency, to adopt a subtle distinction made in recent times.

The will is long and somewhat complex and there are indications that as the draft progressed omissions were supplied. It is suggested that fresh ideas were also imported into it, inconsistent with its earlier provisions. It was attested by a Proctor, who was also a Notary Public. It was alleged to have been executed a fortnight before the testator's death but this does not appear to be correct. There was, however, some haste probably in its preparation. The will must be construed as a whole and apparent contradictions must be reconciled, if possible. If that cannot be done, then only will a later provision prevail. But the main thing is to get at the intention of the testator from the whole will. If authority be needed for this well-known proposition, I would refer to Burrows on Interpretation of Documents, p. 71. Beale's Cardinal Rules of Legal Interpretation, p. 607, gives many interesting dicta, *e.g.*, " the paramount rule is that before all things we must look for the intention of the testator as we find it expressed and clearly implied in the general terms of the will; and when we have found that on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words, whether standing first or last, indifferently " per Coleridge J. in *Morrall v. Sutton*[1].

It seems to me that a careful study of the will shows that there was a scheme on which it was based.

The testator distinguished carefully between his wife and her children and his natural children. For some reason Mary is not mentioned in the will. It is urged that the 7th clause includes her and parties have proceeded hitherto on the footing that it does and are willing to continue to do so. It is this clause which will be found eventually to be the centre of contention.

We are concerned only with Pillagoda Valley Estate, which alone is the concern of the natural children. The testator divided it into two equal portions and dealt with each separately. Clauses 2 (*a*) and 2 (*b*) are devoted to directions regarding his wife and children. Clauses 5 (*a*) and 5 (*b*) regard his natural children. He appears to have desired one-half to be the property of his son Anthony and the other half to be the property of his natural sons Norman, Sydney and Rioty, and to have contemplated that a necessary qualification should be that they should be 25 years of age. But he also carefully made provision for the others claiming attention. He took his wife first and in clause 2 (*a*) made careful provision for her. If she remained unmarried, or re-married and was again widowed, she was to have the income from the half destined for Anthony. She had other assets too and was expected to maintain and educate her children. If she married then the trustee was to pay her a sufficient sum for the maintenance of her children and for their education in Ceylon or elsewhere " in a manner suitable to their condition in life ", after consulting the testator's wife. Any balance was to be deposited in a bank or invested on security. It was only after her death that the property was to go to Anthony. But the whole provision was subject to the carrying out of a scheme he had in his mind regarding certain natural children, to which I shall refer later. Accordingly the trustee

[1] *14 L. J. Chan. 266 at p. 272.*

was directed to " hold back " the income from this half " till the payment of legacies hereinafter provided ". It will be noted that he was to " hold back " and that she was some day to get this income.

In clause 2 (*b*) he dealt with the situation created by his wife dying before the children reached the age of 25. The trustee was to hold both capital and income until each child reached that age or, in the case of the girls, married earlier. Thereupon each was to get his or her share " free of the trust and the trustee shall pay, convey, or deliver the share of each child after making an equal division ", but half of Pillagoda Valley Estate was not to enter into the distribution and was to be given to Anthony, " free from any trust whatsoever and absolutely ". He provides for substitution in the case of a child dying and again makes it clear that no child would have a vested interest till his wife died.

It is agreed that Anthony could not get this half as long as his mother was alive, unless she surrendered her rights, even though he had attained the age of twenty-five.

The first respondent has in fact married again. There is apparently no conflict between her and her children and her objection to the proposed partition was based on the fact that Lionel Roger had first to become 25 years of age. The 10th to 14th respondents agree with her.

The provisions regarding this specific half are complete in themselves down to detail. It would seem that—

(*a*) The income was to be held back till the legacies had been paid.
(*b*) That the widow was to have the income in the manner specified.
(*c*) That Anthony was to have the property after his mother's death but provided he had attained the age of 25.
(*d*) No specific instructions were given regarding the maintenance and education of the children and these were left to their mother mainly but if she re-married the trustee had a special duty with regard to both maintenance and education.
(*e*) The cost of that came out of the income of this half and the other property devised to them.
(*f*) When the mother died the trustee was obliged to transfer to the children, if they had qualified, and his trust would end.

There could be no liability cast on him thereafter to maintain or educate them or any one else since the trust had passed from him.

Having dealt with this half the testator devised the other to the trustee on trust for his natural children, viz., the seventh, eighth, and ninth respondents, but again with provision for others having claims on him. It would seem that the testator did desire that these sons of his should have half Pillagoda Valley Estate on their attaining the age of 25 but this desire was subordinate to his desire to seeing the others provided for. He seems to have contemplated that the legacies he gives in clause 5 (*a*) would roughly correspond in value to one-fourth of this estate for he provides that if the value of ¼ fall below the value of the legacies they were to abate proportionately. He was indebted in a sum of about Rs. 80,000, Rs. 30,000 we are told being on a mortgage of the estate. There would be death duties and testamentary expenses and he did not lose sight of

these facts for he directed his trustee to sell the estate, if need arose, in order to pay his debts. It was for this reason no doubt that he made the payment of the legacies a first duty of the trustee and empowered him to keep back the income from his widow and children. Having provided for the legacies for his married daughters and his children by Asilin, and ignoring Mary, in clause 5 (*b*) he starts with the words " After the payment of the legacies ". These words would correspond to " after the death of my wife " in clause 2 (*b*). In both cases the mere fact that the devisees had qualified by attaining the age prescribed was not enough, the devisees were deferred until a certain event. Counsel were agreed that " after the payment of the legacies " here referred to the legacies mentioned in clause 5 (*a*). In clause 1, however, he bequeathed to his wife £200 or its equivalent in rupees to be paid in priority to any other legacies. In clause 5 (*b*), introduced with these words, after saying that in that event the trustee was " to deliver over " to his three sons, the seventh, eighth, and ninth respondents, their half share on their all attaining the age of 25, in the very same sentence he said " but this half share as well as the other half share shall always be subject to the legacies bequeathed to my natural children ".

On one side it is argued that this provision only emphasizes that the legacies provided in clause 5 (*a*) should be paid and on the other it is urged that these having been paid already as stipulated in the opening words some other legacies must have been intended, and there are only the provisions for maintenance and education in clause 7. On a careful consideration I do not think the latter is the meaning to be attached to the sentence and that it is only a way of emphasizing the need for paying the legacies already referred to and described expressly as " legacies " in clause 5 (*a*). The testator thought of maintenance and education as involving " expenses " and not as legacies to be paid. Undoubtedly a provision for maintenance and education may be a legacy but the interpretation would vary according to the facts of each case. A number of cases were cited to us but I find nothing in them contrary to what I have just said. In most of them specific legacies had been provided and these were interpreted as being in effect legacies for their benefit, and so payable as long as they lived. In the present case there is only a direction to the trustee to maintain with no specific sum mentioned. It was conceded that the trustee had a discretion but it was argued that he would be obliged to maintain whenever circumstances necessitated his doing so, *i.e.*, he would devote varying sums at varying periods in each life. It seems to me that the decision of the question raised really depends on another question, viz., whether the maintenance provided in clause 7 was to continue for life or not. As we indicated at the hearing it seemed to my brother and me impossible so to construe the provisions of the will without disregarding the rule that one should contrive to reconcile the clauses of the will and so give effect to what we can gather therefrom to have been the probable wish of the testator.

It seems clear that Anthony was to have his half share free of any trust whatsoever on his attaining the age of 25, if his mother had predeceased him. Similarly it is clear that the seventh, eighth, and ninth respondents were to have their half share provided the legacies had been paid. To

defer the devises until all the natural children had died would be contrary to these provisions. It seems clear also that the testator did not provide for the maintenance of his lawful issue beyond a certain stage, if their mother were dead or unable to provide for them. So also with the seventh, eighth, and ninth respondents. It seems most unlikely that he would provide for the tenth to the fourteenth respondents for the whole of their lives at the expense of those he had specially taken the trouble to provide for, including his wife. The terms of his will indicate plainly that on the girls marrying he considered his obligations to them to cease and presumably it would be the duty of their husbands to provide for them. In the case of the sons he seems to have considered that on their reaching the age of 25 they should be able to fend for themselves, with such assistance as he had specially given to them. It seems to us impossible to infer that he intended to make a larger provision for the tenth to fourteenth respondents. It seems to us that the provision in 5 (*b*) can be explained otherwise. He had just said that the seventh, eighth, and ninth respondents were to get half on all attaining the age of 25 and it probably struck him there was some risk of misunderstanding and he remembered that he had perhaps assumed too much when he had said in clause 2 (*b*) that Anthony was to have his half at the age of 25 for the legacies may not have been paid by then and if the trustee conveyed that half to Anthony free of any trust whatever he might not be able to levy on the income in order to pay the legacies; he, therefore, makes the provision clear, viz., that the legacies mentioned in 5 (*a*) were first to be paid before any of the sons got their devises.

Clause 7 is in the following terms:—" I also direct my trustees to maintain and educate my natural children from the income of the entirety of Pillagoda Valley and that my two sons Sydney and Rioty be allowed to continue their education at the expense of the entire estate till they attain the age of 21 years and these expenses shall also be a first charge on the half share of Pillagoda Valley devised to my natural children. "

Mary came under the term " natural children " and the other legatees were not opposed to her being maintained and educated and it is to be hoped that their generosity will extend to their making further provision for her, if they consider it necessary. She is now married.

It is to be noted that no specific bequest is made either to the mother or to the children for their maintenance or education but a direction is given to the trustee to be exercised at his discretion. It is the trustee who is directed and whose discretion is trusted and not any one or more of the legatees or devisees. He would have to keep the estate in his trust much beyond the prescribed ages of the devisees if he were under the obligation to maintain the natural children during their lives, whenever the occasion arose. It is much more reasonable to interpret the testator as saying that he should hand over at an ascertainable period earlier. The meaning of the sentence " these expenses shall also be a first charge on the half share of Pillagoda Valley Estate devised to my natural children " was much canvassed. It seems to us the word " expenses " is not confined to the education of Sydney and Rioty till they were 21 for that is already amply provided for, but such expenses are

the expenses of maintenance and education of the natural children generally. The word " also " cannot mean that the expenses of the education of Sydney and Rioty were to be a charge on the entire estate, *i.e.*, not Pillagoda Valley alone, and yet be a charge on Pillagoda Valley for the one provision includes the other, but the word " also " relates back to clause 5 (*b*) and adds the expenses of maintenance and education of the natural children to the charge created for the payment of the legacies in clause 5 (*a*). The scheme is thus rendered coherent, viz., the maintenance of the lawful issue from one half of Pillagoda Valley and the maintenance of the natural children from the other half, with a special provision for Sydney and Rioty at the expense of his entire estate.

Mr. Amarasekera very generously conceded that the words introducing clause 5 (*b*) referred to the legacies in clause 5 (*a*) but only in order to be able to raise the argument that the immediately following provision related to some other legacy. To be consistent he should have argued that the words refer to all the legacies mentioned, including those which he contends clause 7 created for life. His next argument was that that clause was a provision inconsistent with clause 5 (*b*) and should prevail. We have reconciled the two and I believe done so in a way which will satisfy the testator's intentions. We are not concerned with the pleas urged on humanitarian grounds and not obliged to give effect to these pleas as reflecting the supposed views of the testator. We must gather these views from the terms of the will itself. It may assuage Mr. Amarasekera's conscience to know that there is in the record a document in the testator's writing which indicates that he was then aware of the position in which he might place Asilin's children and regretted he could do no better. We, of course, take no account of that document and expressed our views during the argument in ignorance of its existence. It only confirms our view that it is dangerous to speculate on the intention of the testator and be influenced by humanitarian grounds when we are in ignorance as to all the conditions.

The next question is whether the time for maintenance should be limited to the age of 25 or earlier marriage in the case of the females. The trustee reports that the legacies mentioned in clause 5 (*a*) have been paid. Mr. H. V. Perera argues that, therefore, the half share is now due for transfer to the seventh, eighth and ninth respondents, and therefore, the period of maintenance necessarily comes to an end.

Two lines of argument have been advanced against him. The testator considered marriage or the age of 25 as the period for his legitimate children and for the seventh, eighth and ninth respondents. The limitation was fixed for some good reasons and the only reason seems to be that they would then be able to look after themselves or be looked after, in the case of females, by their husbands. Is it likely he made a different rule for the other children, the minors getting their legacies only at 25 and being presumably unprovided for till then? This is an attractive line of argument but may not be sound. Rioty would be twenty-five in 1940 and by then Lionel Roger would be 13 years of age or a little more. It might just be possible the testator thought that maintenance till then would be enough, or did not think about it at all.

The next argument centres round the word " payment " at the beginning of clause 5 (*b*). When would all the legacies be paid ? It is argued that Lionel Roger would not be paid till he was twenty-five and, therefore, till then the trustee could not hand over to the seventh, eighth and ninth respondents. Mr. Perera argues that the legacies were paid immediately the executor paid them by making suitable investments though he would hold them thereafter as trustee and the legatees would receive them on their attaining the age of twenty-five. Much argument followed on the terms in clause 5 (*a*) which required the testator to pay Rs. 15,000 to Violet Dagmar and Rs. 10,000 to Hilda and invest Rs. 5,000 in favour of each of the children of Asilin and " to pay the investments " on their marrying (in the case of females) or reaching the age of twenty-five whichever was earlier. Emphasis was laid on the expression " pay the investments ". Now, in the case of the Rs. 15,000 and Rs. 10,000 there is only the direction to pay, and then they are not called legacies. Later it is provided that the trustee shall not be compelled to " *pay* any of these legacies " till 10 years have elapsed but that the trustee shall pay the legacies in reasonable instalments in " his " discretion and if ¼ be not enough to pay the legacies in full they were to abate. It is urged that the trustee might invest in instalments and might be compelled after 10 years to invest the sums mentioned and once he invested he had paid. But I think this is not all. The will contemplates a legatee in a position to compel payment after 10 years. The minors who married might be in such a position but not an unmarried minor or a male who was not twenty-five years of age. I do not lose sight of the fact that a next friend might act on their behalf. It cannot be that the trustee could be compelled to invest for the testator contemplated the position of the trustee not being able to act for want of funds and only enjoined him to invest " as early as circumstances permit ". He called upon him to " invest " and not to " pay ". In the case of Violet and Hilda he requested that they be paid as early as circumstances permitted. There was no order prescribed for the payments or investments, but presumably the payments would have a prior claim. I do not think the words " pay the said investments " mean anything more than " pay the money invested ". This meaning would be in accord with the direction which follows that " if any of the four legatees who are to receive Five thousand rupees (Rs. 5,000) die before they receive the same the same shall be paid to the brothers and sisters of the one so dying but if all of them die before the said legacies of any part of them is *paid* these legacies to the extent remaining unpaid shall lapse ". Now, here the death is to take place " before they receive the same ". That the word " receive " is not intended to be different from the word " paid " seems clear from what follows, which is that if all die before the legacies are " paid " the legacies lapse. Here the death is before the legacies are " paid " *i.e.*, the " received " of the earlier sentences. The trustee pays and the legatees receive. Clause 5 (*a*) ends with this clause for *payment* of the monies invested and then clause 5 (*b*) begins with " after the payment of the legacies ".

Besides what would happen if one of the investments proved to be bad ? I think that the testator meant that the monies invested should

be paid to each legatee and until that was done the legacy was not paid.

The effect would result in the will working harmoniously throughout. Maintenance and education till 25 or earlier marriage and then conveyance to the devisees, who, of course, might be allowed the income which was in excess of the requirements of the trustee. Mary is now married and her case presents no difficulty. The other four must be maintained and educated till each reached the age of 25 or the females marry sooner. They will then be paid and will receive their legacies. The result is that the 1st to 4th respondents succeed in their contention but not quite on the ground urged on their behalf; respondents 11 to 14 succeed but not to the extent urged by them, and 7th, 8th and 9th respondents also succeed partially. The costs of the Public Trustee should come out of the total income of Pillagoda Valley. The 1st to 4th respondents will receive their costs from the other half of the income. The 7th, 8th and 9th respondents, appellants, will bear their own costs or if they prefer it, draw them from their half of the income. The 10th to 14th respondents will receive their costs out of the income coming from the half devised to the 7th, 8th and 9th respondents.

With regard to partition I think there are many valid reasons why that should not be attempted at present. Quite clearly the testator has not directed any such partition but on the contrary has contemplated that the trustee would conrol the whole income for certain purposes. He has directed that his widow should be free to occupy the bungalow whenever she chooses and has permitted one of the natural sons to be appointed as an Assistant Superintendent only if the widow did not occupy the bungalow. He here indicated that he did not desire to force on her a situation unpalatable to her and this situation would arise if the 7th, 8th and 9th respondents took control of a devised portion of the estate. Further, Anthony cannot be more than about 13 years of age and he cannot now be consulted as regards the propriety of any partition. The costs of partition might seriously affect the rights of parties. Any surplus income from Anthony's half was to be banked, but this surplus would be drawn upon for the costs of partition. The trustee would be administering the trusts for the 11th to 14th respondents and these expenses must be provided for.

It may be that at some later date a full and detailed scheme of partition amply securing all interests may be submitted to Court for its approval but until that is done I think it risky and unwise to merely authorise a partition.

JAYATILLEKE J.—I agree.

Judgment Varied.