1921.

*Present :* Bertram C.J. and De Sampayo J.

SOYSA *v.* CECELIA *et al.*

*88—D. C. (Inty.) Kandy, 3,166.*

*Last will—Bequest of all properties to executor—Conditions that executor should pay certain sums of money to widow and to children on their attaining 18 years of age—Does obligation attach to the properties, or are they personal?—Trust—May the obligations be enforced against executor by application in testamentary action, or must it be by a separate action?*

W bequeathed all his property to his brother J, subject to the following conditions :—

(*a*) The payment of debts ;

(*b*) Payment to widow of Rs. 50 monthly ;

(*c*) Education and maintenance of his children, of whom J was to be guardian ;

(*d*) Payment of Rs. 5,000 to the children on their attaining 18 years of age ;

(*e*) In the event of any children dying, his share was to go to the survivor ;

(*f*) If no child lived so as to become entitled to the gift, all the moneys so to be apportioned were to go to a High Priest.

*Held* (1) that the will did not make an absolute gift of the properties to J, the executor ; (2) and that J's obligations to the widow and children were not purely personal obligations, but that the obligations were attached to the properties which were devised by W. The will in effect created a trust.

"The present case does not seem to me a case of a legacy, subject either to a *conditio* or *modus* . . . . The properties accorded to the executor by the testator are not accorded to him as a free gift, but only subject to the liberalities accorded to his wife and children. Until these are satisfied, the administration of the estate is not concluded."

The beneficiaries can apply to the District Court from time to time to enforce the "conditions" imposed upon the executor by application in the testamentary action (or, if necessary, in any guardianship action which may have supervened), and are not compelled to institute a separate action every time they have occasion to complain of any default on the part of the executor. This no doubt may have the effect . . . . of greatly protracting the testmentary action . . . . But the plain terms of the Courts Ordinance authorize and require such a protraction in such cases as this, and the Court can always see in such cases that the ordinary business of administration is brought to a conclusion, and that the action is only prolonged for the purpose of supervising the execution of the continuing trusts.

THE facts appear from the judgment.

*M. W. H. de Silva, for appellant.*

*Pereira, K.C.* (with him *D. B. Jayatilake*), for respondent.

*Cur. adv. vult.*

November 7, 1921. BERTRAM C.J.—

This appeal arises out of a will made by one Vidanalage William Soysa, by which he demised and bequeathed all his property, movable and immovable, to the appellant, his brother, Vidanalage Juwanis Soysa, "subject, however, to the following conditions." These conditions were :—

(1) The payment of his funeral and testamentary expenses and all his debts ;

(2) The payment to his widow for her maintenance of a sum of Rs. 50 monthly during her natural life or widowhood ;

(3) The education and maintenance of his two children, of whom he constituted his brother the guardian, and of any child who might be subsequently born to him ;

(4) The payment to each of his children on their attaining the age of 18, if sons, and on the attaining of that age or on marriage, if daughters, of the sum of Rs. 5,000 ;

(5) In the event of any children dying, the share of the child was to devolve upon the survivors, and if only one child attained the age of 18 years, or if a daughter attained that age or married, this surviving child was to be entitled to the entire share or shares of the child or children who died ;

(6) If no child lived so as to be entitled to this gift, then all the moneys so to be apportioned were to go to the High Priest of the Sumanarama Vihare at Galkissa in Colombo for the use and benefit of the said Vihare.

The District Court of Kandy has already ordered the executor to give security for the portions apportioned to the children, and that security has already been given by way of a mortgage in favour of the children, including a posthumous child. The widow, however, has had considerable trouble in securing the payment of the monthly allowance due to herself ; and the direction that the executor should maintain and educate the children has not been complied with. The widow accordingly moved the Court for a notice to the executor to appear and show cause—

(1) Why execution against his property and person should not issue for the recovery of the arrears of the allowance due to the widow ;

(2) Why he should not give the widow possession of such a portion of the testator's lands as would enable her to maintain herself and her children, and to defray the cost of the education of the children out of the income of the lands of which she might be given possession.

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The learned District Judge, having carefully examined and severely criticised the conduct of the executor, has ordered him within one month to give security in the sum of Rs. 20,000 for the due discharge of his obligations under the will, and has ordered that in the event of his failing to comply with the order of the Court that he be removed from office, and that the Secretary of the Court be appointed administrator. Against this order the executor has appealed.

Counsel for the appellant contended that the will made an absolute gift of the lands and other property to the executor, and that his obligations to the widow and children were unconnected with his title to the property and were purely personal obligations, to be enforced, if necessary, by separate and successive actions as occasion might require. This view of the will seems to me unarguable. There are only two ways in which such obligations could arise, that is to say, they could arise either out of a contract, or in connection with some property to which they are attached. They cannot exist, so to speak, in the air. There is no contractual relationship between the executor and the widow and children, and if these obligations are enforceable at all, it can only be in connection with the property dealt with by the will.

The word used in the will to describe these obligations is "conditions." Are these obligations, then, in the nature of a condition attached to the ownership of the bequeathed property, on the breach of which the property is to revert to the natural heirs? English law knows such conditions under the name of "conditions subsequent," that is, "such as by the failure or non-performance of which an estate already vested may be defeated." (*Stephen's Commentaries on the Laws of England (15th ed.), vol. 1, p. 191.*) But Roman-Dutch law knows nothing of the English doctrine of "estates upon condition," or, indeed, of the doctrine of "estates" at all.

It may be observed that Roman (and Roman-Dutch) law is familiar with the idea of conditions attached to legacies, but not with the idea of "conditions subsequent." A distinction was drawn between "*conditio*" and "*modus*." "*Conditio proprie et stricte dicta est casus additus, actum suspendens, propter incertum futurum eventum*" (*Voet 28, 7, 1*), or, as Van Leeuwen puts it (*III., 8, 29*), "*Conditio est causa apposita legato, qua existente debetur legatum, deficiente perimitur; interim pendente conditione suspenditur.*" Thus, a condition suspended the vesting of the legacy.

"*Modus*," on the other hand (*Voet 35, 1, 12*), was simply an indication of the purpose for which a legacy or inheritance was to be employed, as, for example, the erection of a monument to the testator. "*Modus est adjectio, indicans, quid defunctus post acceptum legatum aut heriditatem fieri velit, veluti, ut monumentum exstruat.*" A legacy subject to a *modus* vests at once, subject to the

legatee giving security to the heirs for the carrying out of the testator's wishes. (*Sed de implendo post acceptum legatum modo præstanda est cautio heredi, datis fideiussioribus.*) *Conditio* and *modus* are frequently confused (*Voet 35, 1, 13*).

The present case, however, does not seem to me a case of a legacy subject either to a *conditio* or *modus*. This is a gift of the whole inheritance. The appellant is really in the position of the *instituitus heres*. He is not a legatee. It is the widow and the children who are the legatees, and, what is the important point, the legacies are charged upon the inheritance. The properties accorded to the executor by the testator are not accorded to him as a free gift, but only subject to the liberalities accorded to his wife and children. Until these are satisfied, the administration of the estate is not concluded.

The Roman law was also familiar with the conception of legacies, *quae tractum atque permanentiam temporis desiderant*—such as legacies in the form of an annuity (*veluti, si, mater filio herede instituto, Sempronio decem annua legaverit*) (*Voet 28, 7, 22*). In such cases the heir was made to furnish security. (See *VanLeeuwen III., 8, 40*) "*Pro legatis . . . . tractum temporis habentibus inventarii conficiendi cautionisque præstandæ necessitas heredi imponitur.*"

But we have received into our legal system a principle which is of a more far-reaching character and of more convenient application, that of the trust, a principle which our system had assimilated long before the enactment of the Trusts Ordinance, the main object of which was to define the law already in force. Although the obligation binding upon the executor is in the will described as a condition, it is in effect a trust. It is, indeed, in exact accordance with the very words of the definition of a trust in the Trusts Ordinance (No. 9 of 1917) :—

> "A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner . . . . . for the benefit of another person, or of another person and the owner, of such a character that, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested or to be vested in such other person, or in such other person concurrently with the owner."

There can be no doubt, therefore, that the executor holds the testator's property to the extent necessary to give effect to the testator's directions, and that the principles of the law of trusts can be employed to reinforce the rights which the widow and children already possessed under the Roman-Dutch law.

If there could be any doubt as to whether these obligations were personal to the executor, or were attached to the property, this doubt would be set at rest by the provisions of paragraph 6 of the

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will above referred to. The gifts to the children are spoken of as their share and as devolving upon the survivors. Such language would be wholly inappropriate to a personal obligation undertaken by the executor. It is true there is one phrase in the will which does seem to suggest that the obligation is a personal one. It says that the children are to be maintained and educated at the expense of the said Vidanelage Juwanis Soysa; but, taking the whole will together, I can have no doubt that the intention of the testator was that the obligation in question was to be attached to the property which he devised to his brother, and was, in fact, a trust annexed to the ownership of that property.

The materiality of this is as follows: Under section 69 of the Courts Ordinance (No. 1 of 1889) every District Court is empowered "to take proper securities from all executors . . . . . of the last wills and testaments of any deceased persons . . . . . for the faithful performance of such trusts" (that is, the trusts declared in the will), "and to call them to account . . . . and to charge them with any balance which may from time to time remain in their hands applicable for the performance of such trusts, and to enforce the payment thereof." The "condition" imposed upon the executor in this case being, therefore, in effect a trust, the beneficiaries can apply to the District Court from time to time to enforce it by application in the testamentary action (or, if necessary, in any guardianship action which may have supervened), and are not compelled, as counsel for the appellant seems to suggest, to institute a separate action every time they have occasion to complain of any default on the part of the executor. This, no doubt, may have the effect where the trusts are trusts which *tractum atque permanentiam temporis desiderant* of greatly protracting the testamentary action. It is most desirable that testamentary actions should be brought to a conclusion, and their accounts wound up as speedily as possible. But the plain terms of the Courts Ordinance authorize and require such a protraction in such cases as this, and the Court can always see in such cases that the ordinary business of administration is brought to a conclusion, and that the action is only prolonged for the purpose of supervising the execution of the continuing trusts.

The question, therefore, arises, what is the form of relief which should be given to the widow? In the first place, I think there should be a declaration that the property devised to the executor under the terms of the will is trust property to the extent necessary for the purpose of satisfying the directions of the testator contained in paragraphs numbered 1 to 6 in the said will; in the second place, I think that the executor, in view of his numerous lapses, ought to be required to give additional security for the discharge of his obligations. The property left by the will would appear to be amply sufficient, if properly administered, after paying all the debts of the

deceased, to discharge the monthly allowance due to the widow, and to maintain and educate her children with a surplus to spare. It has already been hypothecated for the purpose of securing the portions allotted to the children. The executor himself claims a personal interest in the property. I do not desire to anticipate any questions . . . which may arise between the beneficiaries and the executor when the specific trusts have been fully accomplished, but it may possibly be that, after paying the monthly allowance to the widow and providing for the maintenance and education of the children, the executor is entitled to any surplus income which may be available. I do not desire to give any decision on that question at present. No doubt, before sanctioning such a use of the surplus, the District Judge would in any case require to be satisfied that the *corpus* of the property would be sufficient to provide the portions ultimately due to the children, and that there was no necessity to accumulate any surplus revenue for that purpose. But I think that the executor may be justly called upon further to mortgage by way of security for the fulfilment of his obligations under the will any interest which he himself may have in the property of the testator under the will. I do not think that at present it is necessary that he should be called upon to mortgage any of his own property. The latter part of the order of the District Judge that in the event of the executor failing to execute such security in the manner approved by the Court he should be removed from his office and the Secretary substituted, and the directions consequential thereon, may, I think, be allowed to stand. Subject to this variation of the order of the learned Judge, the appeal should, in my opinion, be dismissed, with costs.

DE SAMPAYO J.—I agree.

*Appeal dismissed.*