1948 *Present:* **Dias and Basnayake JJ.**

JAYAWARDENE, *et al.*, Appellants, *and* WARNASURIYA, Respondent.

S. C. 241—D. C. Tangalla, 4,888.

Fidei commissum—*Created by last will—Rule of interpretation—Conflicting provisions—Intention of testator.*

One Dona Johanna by her last will of 1874 devised her properties to her grand-daughter Eliza and her husband David subject to the following conditions :—

"That during my lifetime I may possess according to pleasure . . . . and that after my demise my grand-daughter Eliza (provided she gets children and one of those children be living) and her husband David should inherit all my said property, but in case the said Eliza be not blessed with any children or, after getting children, none of them should survive and she happens to die, then her husband David should inherit a first $\frac{1}{3}$ share of all the property which they inherited from me, and my brothers and sisters or their descendants should inherit the remaining $\frac{2}{3}$ shares.

That in case the said two persons, Eliza and David, be blessed with children and while such children are living both or one of them should die, my relations will not be entitled to the above-mentioned $\frac{2}{3}$ shares but the same should devolve on any one of the said two persons that may be living and their children.

That as the devolving according to the above devises of the property belonging to me is to occur only after and not until the demise of Eliza, none of the property may be mortgaged, sold, gifted or given away in any other manner by the said Eliza or David, or be subject to the debt or writ of execution of anybody, or be sold on such account during the lifetime of the said Eliza."

David died in 1895, and Eliza, for the payment of his debts, conveyed the property in question to the defendant's predecessor in title in 1900, and possession since then was with the defendants. Eliza died in 1933, and plaintiffs who are her children and grand-children, brought this action for declaration of title. Defendant contended that title vested in the plaintiffs on the death of David and that he had acquired title by prescription.

Held, that on a proper construction of the will the property was not alienable during the lifetime of Eliza and that the rights of the pliantiffs became vested in them only on the death of Eliza.

Per BASNAYAKE J.—The cardinal principal in construing a will is to ascertain therefrom the true wishes of the testator and give effect to his intention, conflicting provisions, if any, being reconciled as far as possible in accordance with the true intent of the testator.

Saibo v. Jayawardene (1944) 46 N. L. R. 20, not followed.

APPEAL from a judgment of the District Judge, Tangalla.

H. V. Perera, K.C., with *K. Herat* and *J. M. Jayamanne*, for plaintiffs, appellants.

N. E. Weerasooria, K.C., with *Vernon Wijetunge*, for defendant, respondent.

Cur. adv. vult.

February 9, 1948. DIAS J.—

This appeal truns on the construction of the last will, P 4, and the question whether the defendant has acquired title by prescription against the plaintiffs.

The lands in question were the property of one Dona Johana Ekanaike Lama Etani who by her last will P 4 of 1874 devised them to her only grand-daughter Eliza Weerasinghe Obeysekera and her husband David Obeyesekera Mudaliyar of Tangalla. The plaintiffs are the children or grand-children of Eliza. The defendant is claiming title through a conveyance D 1 of May 12, 1900, executed by Eliza for the payment of the debts of her husband David, and through deeds D 2 of 1919 and D 3 of 1932.

It is not in dispute that the defendant has been in exclusive and adverse possession since 1900, *i.e.*, since the execution of the deed D 1. He therefore claims that he has acquired title by prescriptive possession to these lands.

David Obeysekere died in the year 1895 and Eliza departed this life on August 29, 1933. This action was filed on February 10, 1943, that is to say, within ten years of the death of Eliza (August 29, 1933). The appellants contend that if on a proper construction of the will P 4 legal title vested in the plaintiffs only on the death of Eliza, the defendant could not have acquired title by prescription. The appellant's submission is that the title vested in them on August 29, 1933.

On the other, the defendant-respondent's contention is that the title vested in the plaintiffs on the death of David in 1895. If that is so it is common ground that the defendant's claim is entitled to prevail.

It must be remembered that we are called upon to construe not a deed *inter vivos* but a last will. In the case of *Dias v. Jansen* [1] it was laid down by Pereira J., that no words expressed in a last will should be treated as superfluous if they could be given a meaning not inconsistent with the avowed intentions of the testator. In *Seneviratne v. Candappapulle* [2] Lascelles C.J. and Wood Renton J. stated : " It is well settled that the general rules for the interpretation of wills are unsafe guides ; and that the only true criterion is the intention of the testator to be gathered from the terms of the will and from the surrounding circumstances ". In *Jayawardene v. Jayasinghe* [3] Pereira and Ennis JJ. held that where the language of a will is not strictly grammatical, the meaning to be given to it should be consonant with what the context shows the testator intended. In *Fan Eyre v. The Public Trustee* [4] de Kretser and Jayetileke JJ. said : " 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 the 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

[1] *(1913) 16 N. L. R. 502.*
[2] *(1912) 16 N. L. R. 151.*
[3] *(1914) 18 N. L. R. 91.*
[4] *(1944) 46 N. L. R. 61.*

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] ".

I have cited these authorities at some length because this will has come before this Court on two previous occasions for interpretation. In the unreported case, 24 C. R. Tangalla, 16,183, this will was considered by Soertsz J. It would appear that one Sempo, a son of Eliza, had predeceased his mother Eliza leaving certain heirs. Soertsz J. said : " I agree with the learned trial Judge that the will . . . . created a *fidei commissum*, but I do not agree that because Sempo predeceased his mother Eliza his heirs could take nothing. The will states quite clearly that on the death of either Eliza or her husband David Obeysekera, the property should vest in the survivor of them and their children. David died before Eliza, and therefore Eliza and her children became entitled to the property ". What that means is that, in the opinion of Soertsz J., on the death of David the title vested in the survivor Eliza and her children in the year 1895. Soertsz J., however, did not consider it necessary to consider this question any further because " the plaintiffs who are the widow and children of Sempo, have quite clearly on the admission made in the case lost whatever interest they had in consequence of the prescriptive title acquired by the defendant who bought the property at a sale held in 1899 in the course of administration of David's estate and who has been in possession since ". That decision would appear to be adverse to the contention now advanced on behalf of the plaintiffs-appellants, but Soertsz J. really decided that case on the admissions made at the trial.

In *Saibo v. Jayawardena*[2] the same will came up for consideration before Keuneman J., who held that the decision of Soertsz J. was not *res judicata* because there was no issue raised between the present plaintiffs and the present defendant in the case decided by Soertsz J. Keuneman J. however pointed out that the decision of Soertsz J. " is of importance because it contains a decision as to the meaning of the last will, which I should ordinarily be disposed to follow ". Counsel who argued that appeal had raised a new point, namely, that Soertsz J. had not taken into account a further clause in the will in question. With regard to that further clause Keuneman J. held that there was no imperative direction in that further clause that the property should only devolve on the death of Eliza. He was of opinion that the words relied upon were only added as an explanation of the direction against alienation. He did not think there was an intention to override the clear words occurring earlier, and that the explanation was not accurate, or rather was not complete. Keuneman J. further held that had there been any imperative force in the words of the clause relied upon, a repugnancy would have arisen in the will, but he did not think the words were intended as an imperative direction. In the result, therefore, Keuneman J. held that the title vested on the death of David and that the defendant

[1] *14 L. J. Chan. at p. 272.* [2] *(1944) 46 N. L. R. 20.*

had acquired title by prescription. If that decision is correct, then obviously the contention advanced on behalf of the appellants is unsound and must be rejected.

It has, however, been submitted that as this Court consists of a bench of two Judges it is open to us to reconsider the question *de novo*.

By agreement of parties the original will, which is in Sinhalese, was read to us in Court. It is to be noted, however, that that document is not the original will, and is an uncertified copy. I am satisfied that the translation of that will, which is the exhibit P 4, is substantially an accurate translation of the Sinhalese. The relevant words are as follows :—

> " That during my lifetime I may possess according to pleasure all the movable and immovable property belonging to me and do whatever I may please with them, and that after my demise my only grand-daughter Eliza Weerasinghe Obeyesekera (provided she gets children and one of those children be living) and her husband David Ferdinandus Atadahewatte Obeyesekera Mudaliyar of Tangalla should inherit all my said movable and immovable property ; but in case my said grand-daughter Eliza Weerasinghe Obeyesekera be not blessed with any children, or after getting children none of them should survive and she happens to die, then her husband David Ferdinandus Atadahawatte Obeysekera Mudaliyar should inherit a just $\frac{1}{3}$ share of all the property which they inherited from me, and my brothers and sisters or their descendants should inherit the remaining $\frac{2}{3}$ shares in such proportionate shares as they are entitled to by law.
>
> That in case the said two persons, Eliza Obeysekera my grand-daughter, and David Ferdinandus Atadahewatta Obeysekera, her husband, be blessed with children, and whilst such children are living both or one of them should die, my relations will not be entitled to the above-mentioned $\frac{2}{3}$ shares which was allotted to them, but that the same should devolve on any one of the said two persons that may be living and their children.
>
> That as (*nissa*) the devolving according to the above devises of the movable and immovable property belonging to me is to occur only after and not until the demise of Eliza Weerasinghe Obeysekera, none of the property (movable and immovable) belonging to me may be mortgaged, sold, gifted, or given away in any other manner by her the said Eliza Weerasinghe Obeysekera or her husband David Ferdinandus Atadahewatte Obeysekera Mudaliyar or any other person, or be subject to the debt or writ of execution of any body, and be sold on such account during the life time of the said Eliza Weerasinghe Obeysekera."

With great respect I am unable to agree with the view expressed in *Saibo v. Jayawardene*[1], that this clause is not an imperative direction that the property should only devolve on the death of Eliza or that this clause is repugnant to the words which preceded it. Applying the principles which I have already referred to, the will must be construed as a whole and apparent contradictions must be reconciled if possible, and the intention of the testator must be ascertained by a perusal of the

[1] *(1944) 46 N. L. R. 20.*

whole will. Any apparent inconsistent clause or words, whether standing first or last, should be sacrificed to the true intention of the testator which is manifest on a reading of the whole will. Applying that principle it seems to me to be quite clear that the words " the same should devolve on any one of the said two persons that may be living and their children " must be qualified by the later clause in which the testatrix clearly indicates that the foregoing devise is to occur only after and not until the death of Eliza. That being so I am of opinion that the title of the plaintiffs only came into existence on August 29, 1933, that is, within ten years of the filing of this action, and that therefore the defendant has not acquired a title by prescription.

I, therefore, would allow the appeal and enter judgment for the plaintiffs for the damages agreed on at Rs. 50 per annum with costs both here and below.

BASNAYAKE J.—

I have had the advantage of perusing the judgment of my brother Dias, and I am in entire agreement with the order proposed by him. As our construction of the will in question is at variance with the opinion expressed by two eminent Judges of this Court I think I should say more than record my bare concurrence with the judgment of my brother.

This is an action instituted on 10th January, 1943, in respect of two adjoining allotments of land situated at Siyambalagoda in the West Giruwa Pattu of the Hambantota District, known as Ihala Daranda Kumbura and Wilakumbura *alias* Wilmulla, of a total extent of 14 acres 2 roods 6 perches valued for the purpose of this action at Rs. 2,000.

The plaintiffs are thirteen in number. The first plaintiff is the daughter and the other plaintiffs are the grand-children of Eliza Obeysekera who died on August 29, 1933. They claim the land by devolution from the said Eliza Obeysekera and seek to obtain an order declaring them entitled to this land, ejecting the defendant therefrom, and mesne profits at Rs. 100 per annum for the three years preceding the date of action. In the course of the trial which proceeded mainly on admissions and arguments of counsel it was agreed that the amount of mesne profits should be Rs. 50 per annum. No oral evidence was recorded, but certain documents on which the parties relied were tendered by counsel.

The defendant resists the action on the ground that he is entitled to the lands by right of purchase from the true and lawful owners and also by right of prescriptive possession. He traces his title through one Don Juwanis who purchased these lands in 1900 from Eliza Obeysekera (D 1). Don Juwanis' heirs conveyed them in 1919 (D 2) to Simon Silva who sold them to this defendant in 1932 (D 3).

It is admitted that one Dona Johana Ekanayake was at one time the owner of these lands and that she executed a last will bearing No. 5,321 of September 23, 1874, admitted to probate in D. C. Tangalla Testamentary case No. 209, in which she left all her property to her granddaughter Eliza Obeysekera and her husband David Obeysekara subject to certain stipulations which will be discussed later. Of these persons the former lived till August, 1933, while the latter died in 1895.

Twenty issues were suggested at the trial. The judge held in favour of the defendant and dismissed plaintiff's action holding that the defendant was entitled to the land in dispute both by right of purchase and prescriptive possession.

The main question argued at the hearing of this appeal was whether any part of the property dealt with under the will of Dona Johana Ekanayaka was alienable during the lifetime of Eliza Obeysekara.

The will under consideration reads as follows :—

" I, the signor hereof, Dona Johana Ekanayake Lama Etani, widow of Don Andiris Wijegunawardene Wijesinghe Muhandiram, late of Nalagama, being at present though old and infirm in the full possession of my sound mind and senses, do hereby declare to have caused without the compulsion or persuasion of any body this my last will to be made with my free will in the following manner, viz. :—

1. I the testatrix do hereby wholly abrogate any such Last Will or Testament as had been caused to be made prior to this by me.

2. Whereas I, the testatrix, am entitled to (so that I may do whatever therewith according to pleasure) all the property belonging to the estate by virtue of the joint will caused to be made touching the same by me and the above-named Muhandiram and filed in the Testamentary Case No. 105 of the District Court of Tangalla the following are therefore the devises I make by this Testament regarding the said property as well as the movable and immovable property which I have since acquired and may hereafter acquire, viz. :—

That during my lifetime I may possess according to pleasure all the movable and immovable property belonging to me and do whatever I may please with them, and that after my demise my
A only grand-daughter Eliza Weerasinghe Obeysekera (provided she gets children and one of those children be living) and her husband David Ferdinandus Atadahewatte Obeysekara Mudaliyar of Tangalla should inherit all my said movable and immovable property, but in case my said grand-daughter Eliza Weerasinghe Obeysekara be not blessed with any children, or after getting children none of them should survive and she happens to die,
B then her husband David Ferdinandus Atadahewatte Obeysekera Mudaliyar should inherit a just $\frac{1}{3}$ share of all the property which they inherited from me, and my brothers and sisters or their descendants should inherit the remaming $\frac{2}{3}$ shares in such proportionate shares as they are entitled to by law.

That in case the said two persons, Eliza Obeysekara, my grand-daughter, and David Ferdinandus Atadahewatte Obeysekara, her husband be blessed with children, and whilst such children
C are living both or one of them should die, my relations will not be entitled to the above-mentioned $\frac{2}{3}$ shares which was allotted to them, but that the same should devolve on any one of the said two persons that may be living and their children.

That as the devolving according to the above devises of the movable and immovable property belonging to me is to occur only after and not until the demise of Eliza Weerasinghe Obeysekara none of the property (movable and immovable) belonging to

D me, may be mortgaged, sold, gifted, or given away in any other manner by her, the said Eliza Weerasinghe Obeysekara, or her husband David Ferdinandus Atadahewatte Obeysekara Mudaliyar or any other person, or be subject to the debt or writ of execution of anybody, and be sold on such account during the lifetime of the said Eliza Weerasinghe Obeysekara.

That a list of the property at present belonging to me at present is hereto annexed.

That in order to carry out according to my wishes the devises contained in this testament, which I the abovenamed Don Johana Ekanayake Lama Etani have caused to be made, I do appoint Messrs. David Ekanayake Secretary Mudaliyar of the District Court of Tangalla and the abovenamed David Ferdinandus Atadahewatte Obeysekara Mudaliyar as executors.

This Last Will or Testament having thus been caused to be written is signed by me, the first-named Dona Johana Ekanayake Lama Etani, on this 23rd day of September, 1874, at my residing house."

Clauses A and B provide that David Obeysekara should if he survives get $\frac{1}{3}$ of all the property in the event of Eliza Obeysekara dying childless or with no surviving children. Similarly the bequest of $\frac{2}{3}$ to the brothers and sisters of the testatrix does not come into operation if Eliza Obeysekara has children surviving her. As David Obeysekara died in 1895 while Eliza Obeysekara was alive clause B of the will never become operative, and the occasion for the division of the property contemplated therein never arose. Clause C is a mere elaboration of clause B that the devolution of the property as prescribed therein is not to take place in case Eliza Obeysekara has children surviving her. The occasion for the operation of this clause too never arose as the condition precedent to its operation, viz., Eliza Obeysekara dying childless or with no children surviving never came into existence. Clause D is designed to place beyond doubt the intention of the testatrix which runs through every clause of the will that no part of the property devised by her is to pass until the death of Eliza Obeysekara.

In short the will reduces itself to this. I leave all my property to Eliza and David Obeysekara and their children : provided that no part of it shall pass to the children or to the others designated in the will in the absence of surviving children until the death of Eliza who is prohibited during her life from selling, mortgaging, or alienating any part of the property whatsoever. If Eliza dies childless or with no children surviving her and her husband is then alive $\frac{1}{3}$ of the poperty is to go to him and $\frac{2}{3}$ to the brothers and sisters of the testatrix.

The cardinal principle in construing a will is to ascertain therefrom the true wishes of the testator and give effect to his intention, conflicting provisions, if any, being reconciled as far as possible in accordance with the true intent of the testator.

On a proper construction of this will I cannot escape the conclusion that the testatrix intended that no part of the property movable and immovable should pass under the will or be in any way encumbered or

alienated during the life of Eliza Obeysekera. I can find no authority for the construction that on David Obeysekara's death during the lifetime of Eliza Obeysekara ⅛ of the devised property would pass to the children free of all restraints against alienation.

With great respect I find myself unable to share the view taken by Keuneman J. in regard to Clause D of the will, the original of which I have examined carefully. Even the translation P 4 which the appellants claim is superior to the translation filed in D. C. Tangalla Testamentary case No. 209 does not bring out its full force, which when rendered literally reads as follows :—

> " Further, because my movable and immovable property will pass according to the above directions only after the demise of the above-named Eliza Obeysekara it is hereby enjoined that no part whatsoever out of all my movable and immovable property shall, except after the death of Eliza Obeysekara and not while she is alive, be mortgaged, sold, gifted or disposed of in any other manner by the said Eliza Obeysekara or her husband or sold in execution or permitted to be seized or sold in execution for the debt of any one whomsoever."

Counsel for the respondent contended that this clause did not operate as a prohibition against alienation. He based his contention on the word " (nisā) නිසා " occurring in the original and claimed that it can only refer to a prohibition imposed earlier in the instrument. As there was no such earlier prohibition he said that the clause was ineffective.

I am unable to reconcile this argument with the precise language of this clause. It was also suggested that the prohibition was bad as it was a nude prohibition and no penalty for its disobedience had been stated. The failure to impose a penalty does not affect a prohibition made in a will such as this where the clear intention is to benefit the children (*Sande*—Webber's translation Ch. IV. section 3, p. 206). The learned trial Judge has made a point of the fact that the lands in question were sold with the authority of court and with the knowledge of the plaintiffs to defray David Obeysekara's testamentary expenses. These circumstances do not validate the sale contrary to the prohibition. Sande's opinion on this question is quite definite. He says :

> " But if the prohibition is founded on some good ground (*justam causam habeat*)—if , for instance, the testator wishes thereby to provide for his children, his descendants, or his family, &c.—such prohibition is sanctioned by law, and is effective, and is generally thought to be so valid that if anything is done contrary to it, and the property is alienated by the heir or legatee, the alienation is not valid, no is the dominium transferred ".

The authority of the Court given in the testamentrary proceedings does not give the sale any validity (*Sande*—Webber, p. 316). It is only a disposition under the authority of the Entail and Settlement Ordinance that can pass title.

For the reasons I have given I am of opinion that the plaintiffs are entitled to succeed in their action.

Appeal allowed.