1965 *Present :* **H. N. G. Fernando, S.P.J. and Abeyesundere, J.**

A. M. LAIRIS APPU, Appellant, *and* D. PEIRIS and 7 others, Respondents

*S. C. 36 (F) and 44 (Inty.) of 1962—D. C. Kurunegala, 403/L*

*Fideicommissum—Last Will—Devise to testator's children*—Si sine liberis decesserit *clause—Interpretation—Effect when a devisee dies leaving issue.*

A *si sine liberis decesserit* clause in a Will devising property to the testator's children nominates the persons who will take in the event of the death without issue of a devisee. But the mere fact that the children of one deceased devisee are nominated as heirs after the death of another devisee is no indication of an intention to fetter the property in the hands of a devisee who in fact has issue.

By her Last Will a testatrix devised property in equal shares to her three sons A, B and C, all of whom survived her. One clause in the Will read as follows :—

> " Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go and devolve upon his surviving brothers and the children of any deceased brother such children only taking amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder."

The plaintiffs were the children of A, who died in 1954. A had transferred his share of the property in 1951 to a person whose title passed subsequently to the 1st defendant-appellant.

*Held*, that the Will did not create a fideicommissum in favour of the plaintiffs operative on the death of their father.

APPEAL from a judgment of the District Court, Kurunegala.

*H. W. Jayewardene, Q.C.* with *L. C. Seneviratne, Sepala Moonesinghe* and *B. Eliyatamby*, for the 1st defendant-appellant.

*H. V. Perera, Q.C.*, with *A. C. Goonewardene*, for the plaintiffs-respondents.

*Cur. adv. vult.*

August 25, 1965.—H. N. G. FERNANDO, S.P.J.—

The plaintiffs brought this action for a declaration of title to a land called Raglan Estate stated to be of an extent of two hundred and seventy-one acres. Their case was that the Estate formed part of the property of one Adelene Winifred Peiris (who will be referred to as " the testatrix ")

who died in December 1918 leaving a Last Will bearing No. 4188 dated 3rd June 1910. By this Last Will she made certain bequests to her daughters, and then bequeathed the residue of all her property to her sons in equal shares subject to certain conditions to which I will later refer. The plaintiffs' case was that Raglan Estate was one of the properties covered by this residuary bequest to the sons of the Testatrix, who were three in number and who all survived their mother. However, on 31st May 1917, she and her husband entered into an Indenture by which she agreed to bind herself, her heirs, executors and administrators that her properties shall be distributed and settled in the manner mentioned in the Indenture. Paragraph 11 of this Indenture provided that, within three months of the date of the Indenture or whenever thereafter called upon by her husband, she shall convey by way of gift to her eldest son Richard Louis her Moragolla Group of estates stated to be about one thousand acres, subject again to certain conditions. It was the plaintiffs' case that the Moragolla Group of estates included Raglan Estate. The agreement in this Indenture was apparently not carried out and the husband who had the right to call for performance of the agreement died a few weeks before his wife.

The plaintiffs in the present action are the children of Richard Louis, who died in December 1954. They claim that the combined effect of the Last Will and of the Indenture was that the Moragolla Group of estates passed on the death of the testatrix to Richard Louis, and that, by reason of the conditions contained in the residuary bequest in the Last Will, Richard Louis held the Moragolla Group, which included Raglan Estate, under a fideicommissum in favour of his children. On this basis the title to Raglan Estate vested in the plaintiffs on the death of their father Richard Louis in 1954.

In November 1951 Richard Louis sold Raglan Estate to one U. B. Senanayake. By virtue of certain subsequent transactions of Senanayake the title he acquired from Richard Louis passed on 9th August 1952 to the person who is now the Appellant in this appeal, and who was in possession of the Estate at the time of the institution of this action.

The claim of the plaintiffs that the Last Will and the subsequent Indenture had a combined effect is an unusual one.

It would appear that after the death of Adelene Winifred Peiris and her husband, disputes arose among the heirs, presumably because of the provisions in the Indenture by which she had agreed to distribute her property in a specified manner. All matters in dispute were apparently referred to arbitration. The award of the arbitrator was subsequently made a rule of Court in the Testamentary proceedings in which the will was declared proved. This award declared that, although the agreement in the Indenture of 1917 had not been implemented during the life of Adelene Peiris, it was nevertheless binding on her heirs. Although the matter was not clarified in any way at the trial of this action, counsel for the plaintiffs in Appeal has argued that certain assumptions may now be made upon the pleadings. One such assumption is to be that the

three sons of the Testatrix, who were entitled under the Last Will to the whole residuary estate in equal shares, each took instead properties which their mother agreed by the Indenture to transfer to each of them. There is no evidence whatever of any actual division of property nor of any conveyance by executors. Nevertheless in disposing of this appeal I can accept the correctness of this assumption. In doing so I should point out that in the pleadings, the defendant (i.e. the present Appellant), while claiming that Richard Louis was absolute owner of Raglan Estate, did not present as a ground for that claim any basis different from that relied on by the plaintiffs, viz., that Richard Louis took the entirety of Moragolla Estate because of the Indenture of 1917 and the award of the arbitrator and that his two brothers took other properties in lieu of shares in the residuary estate. If, as the appellant claimed, Richard Louis became the owner of Raglan Estate, then on the evidence in this case he could have become owner of the entirety through some such arrangement as was suggested in the argument of plaintiffs' counsel.

The learned trial Judge held that " the Last Will created a fideicommissum in favour of the plaintiffs, but the disposition of the property was by the Indenture ". But the position of the appellant has been that the Last Will does not affect the property which is the subject of this action. This position was based upon a finding of the arbitrator in his award P3 that the Indenture of 1917 " is binding on the heirs " of the testatrix and her husband, and that, " the two testaments do not therefore deal with the properties dealt with by the Indenture. ". (I should state that the second testament here mentioned is the Last Will of Adelene Winifred's husband, which also was a subject of the arbitration, although nothing is known as to its terms.) In the result the first contention for the appellant has been that, even if the Last Will of the testatrix created a fideicommissum, the property which Richard Louis took by virtue of the Indenture and award is free of that fideicommissum. The effect of the Indenture, it was argued, was to render the earlier Last Will inoperative, at least in respect of the properties specifically dealt with in the Indenture. An alternative contention (taken for the first time in appeal) was that even if the fideicommissum attaches, it can affect only a one-third share of Raglan Estate, for that was the only interest in Raglan Estate which was devised to Richard Louis by and under the conditions of the Last Will.

In my understanding, Counsel for the plaintiffs in appeal furnished what might be an effective answer to these contentions. His position was that so soon as the Last Will was admitted to probate its provisions became immediately operative, and Richard Louis became entitled to a one-third share of the residuary estate subject to the conditions set out in the Will. If those conditions created a fideicommissum in favour of Richard Louis's children, then born or unborn, the rights of those fideicommissaries could not thereafter be prejudiced by any act or compromise on the part of Richard Louis, except a bona fide compromise concerning the division or distribution of the estate among the three devisees. The question whether the Will created a fideicommissum,

being one which principally affected the rights of the contemplated fideicommissaries, could not be resolved to the detriment of those rights in any proceeding or agreement between the three devisees *inter se*. Even therefore, if the arbitrator intended to decide that the conditions of the residuary devise did not apply to the property which Richard Louis actually took, that decision does not bind the fideicommissaries on the question whether or not that property was subject to the fideicommissum. But in so far as the award can be regarded as a scheme of division of properties in accordance with the Indenture in substitution for the division of residuary property in three equal shares to Richard Louis and his two brothers, the award was made in furtherance of a bona fide agreement for a settlement by arbitration of disputes concerning an equitable mode of distribution. There being no plea in this case that the division was sought or secured in bad faith, the division itself binds the fideicommissaries who are now plaintiffs. The division also binds Richard Louis and his brothers because it was made a rule of Court, and it also binds Richard Louis's successor in title to Raglan Estate who is the appellant in this case.

In brief, the position taken by counsel for the plaintiffs is that the original one-third share of the residue devised to Richard Louis by the Will became converted by reason of the award into the Moragolla Group of estates, of which Raglan Estate is one, and that his title to Raglan Estate was subject to the same conditions as were imposed by the Will is respect of the one-third share. If then those conditions created a fideicommissum in favour of the plaintiffs, title to Raglan Estate passed to them on the death of Richard Louis as claimed in the plaint. I have stated my acceptance for present purposes of this position and have referred to certain other matters in order to record briefly the arguments presented in appeal. But I do not find it necessary to refer to the authorities upon which counsel relied, or to decide whether or not Raglan Estate did devolve on the plaintiffs' father under the Last Will. For even if so, in any event the conditions in the Last Will did not create a fideicommissum in favour of the plaintiffs.

The clauses of the Last Will upon which the plaintiffs rely are the following :—

(*a*) " I give devise and bequeath all the rest residue and remainder of my property and estate movable and immovable unto my sons in equal shares subject to ....."

(*b*) " Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children only taking amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder."

(*c*) " If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be *entitled to* and receive one fourth of the nett income of the property to which her children would be entitled to under this my will."

It is useful to set out the events and consequences contemplated in the above clause which has been for convenience lettered (*b*); and I will do so in the context of the actual fact that Adelene Winifred's three sons all survived her :—

(1) If of the three sons, A, B and C, A dies unmarried, the share of A will devolve upon B and C.

(2) If A dies married but issueless, leaving a widow, the share of A will again devolve on B and C, but subject to the widow's right to one fourth of the income of the property or share to which A was entitled.

(3) If B had predeceased A and left children surviving him, then on A's death the share (in this context better described as " the interest ") which would devolve on B if he were to have been then living would devolve instead on his children.

(4) In the event contemplated at (3) above, then on the subsequent death of C unmarried or issueless, the one-third share devised to C by the Will will devolve on B's children.

This analysis of the events contemplated in clause (*b*) is not exhaustive, but it suffices for present purposes. So also, it is not necessary to consider whether the interest which would on A's death devolve on B and C in terms of (1) and (2) above, would or would not continue to be governed by the conditions in clause (*b*).

Passing now to clause (*c*), it provides :

(5) That if A, B or C dies leaving issue and a widow, then the widow will be entitled to one fourth of the income of the property to which her children would be entitled under the Will.

Having regard to the provisions in clause (*b*) which entitle the children of a deceased son to certain interests as may devolve on those children upon the death issueless of an uncle (which have been referred to at (3) and (4) above), clause (*c*) has a plain meaning, namely, that such interests will be subject to the right of the mother of those children to receive one fourth of the income therefrom.

The clauses therefore expressly provide for two matters : firstly the imposition of a fideicommissum upon the share of each son, conditional upon his death without issue, in which event the fideicommissaries will be the surviving brothers, the children of a deceased brother taking by representation in his place ; and secondly that the widow of a son dying childless will have a right to a part of the income of the property or share which that son had, and that the widow of a son dying with children surviving him will have a similar right to income from any property which may devolve on those children under the Will. So far

as these express provisions go, the children of a son who dies leaving issue will not on the death of their father succeed him as fideicommissary substitutes.

The argument for the plaintiffs depends on the fact that clause (*b*) is a *si sine liberis decesserit* clause. That argument was rejected in two recent decisions of this Court in *de Silva v. Rangohamy* [1] and *Rasammah v. Govindar Manar* [2]. I need not here re-capitulate the reasons for that rejection which are stated in my judgment in the former case. But counsel for the plaintiffs has urged that the testatrix in the present Will has indicated her intention to make a gift-over to the children of her son Richard Louis upon his dying leaving issue. This indication, it is argued, is shown by the fact that, under the clause which I have lettered (*b*), the children of a deceased son B are designated as fideicommissaries in the event of the subsequent death without issue of the son A. But it has to be noted that in the case thus contemplated the children of B only take the place of their deceased father. Every *si sine liberis* clause has the effect of nominating the persons who will take in the event of the death without issue of a donee. But the mere fact that the children of one deceased donee are thus nominated as heirs after the death of another donee is no indication of an intention to fetter the property in the hands of a donee who in fact has issue.

It should not be supposed that the judgments in the two recent cases evince any special readiness of the Courts to uphold the existence of a fideicommissum when property is subject to a *si sine liberis* clause. Such a clause is only one circumstance, taken with the others, which may together suffice to establish an intention to make a gift-over to the children of a donee who does not die issueless. Any readiness to assume such an intention from the mere existence of the clause would be in conflict with the principle of construction " Expressio unius est exclusio alterius ".

The conclusion I have reached, that the two relevant clauses of the Will do not create a fideicommissum in favour of the plaintiffs operative on the death of their father, is confirmed by other considerations.

For instance, it is at least doubtful whether if Richard Louis predeceased the testatrix but left children surviving him, those children would by representation have taken their father's one-third share upon the death of the testatrix. If she failed to provide for her grand-children in that event, there is little room to suppose that she intended that the property which Richard Louis actually took under her Will should be subject to a gift-over to those grand-children after their father's death.

Again when invited to infer such a gift-over from the clause lettered (*b*), I think it prudent to compare this clause with the earlier clause in the same Will applicable to the gifts which the Testatrix directed for her daughters. That clause is easily summarised. It contains :

(1) A prohibition against alienation and a restriction of the enjoyment of the gift to the life time of each donee.

[1] *(1961) 62 N. L. R. 553.* [2] *(1963) 65 N. L. R. 467.*

(2) A condition that after the death of a donee, the property will devolve on her children in equal shares.

(3) A *si sine liberis* clause, in favour of the surviving sisters of the donee and of the children of a deceased sister.

The provision mentioned at (2) quite clearly and simply creates a fideicommissum in favour of a donee's children operative on the death of the donee. Equally clearly, the third provision provides for a fideicommissum operative in the alternative event of a donee dying childless. It is only this third provision of the devise to daughters that corresponds to the clauses providing for the devise to the sons, the only difference being that in the latter case the widow of a deceased son can take certain interests.

To accept the arguments of the plaintiffs upon the clause lettered (*b*) would be to assume that the notary, who had carefully provided for the object to be secured by the second provision of the earlier clause, thought at a later stage of his work that the same object could have been secured by the third provision alone. Plaintiffs' counsel himself referred to the experience and reputation which the particular notary had enjoyed. The significant difference between the earlier clause and the clause lettered (*b*) makes it apparent that, in the case of the devise to the sons of the testatrix, the notary had no instructions that the devise should be subject to the fideicommissum for which the plaintiffs contend.

One matter which arose only at the stage of appeal was whether probate of the Last Will had been duly granted. We permitted the plaintiffs to produce relevant material with regard to this question. The record of the testamentary case is apparently incomplete and parts of it are missing, but there was produced the original of a grant of probate by the District Court of Colombo of the Will dated 3rd June 1910 of Adelene Winifred Peiris. This grant of probate bears stamps to the value of over Rs. 19,000 and specifies the value of the total estate. The Will was not attached to this grant, but there is a copy of the Will No. 4188 of 3rd June 1910, certified on behalf of the Secretary of the District Court of Colombo, to the effect that it is a true copy of the Will filed in Court in an action bearing the same number as does the probate. This and other material sufficed to establish that the probate of the Will now propounded was in fact granted.

I hold that even if Raglan Estate or any share thereof devolved on the father of the plaintiffs under the Last Will of the testatrix, the terms of the Will did not create a fideicommissum in favour of the plaintiffs operative on the death of their father. The appeal is allowed and the plaintiffs' action is dismissed with costs in both Courts.

ABEYESUNDERE, J.—I agree.

*Appeal allowed.*