1961 *Present:* **Gunasekara, J., and Sinnetamby, J.**

S. SRIKANDAN (Trustee of the Trust created under the Last Will of Francis Scobell Hill), Appellant, *and* **M. K. ABILIN NONA** (Executrix of the Estate of the late Jimmy Hill, deceased), Respondent

S. C. 581/58—D. C. Gampaha, 5692/M

Will—Creation of trust—Date of vesting of property in the ultimate legatees—Mode of determination—Devisee a minor—His right to claim title to devised propsrty on attaining age of majority—Effect of direction to trustee to maintain a third party from the income—Trusts Ordinance, ss. 57, 58.

Where a testator has made it clear in his will that not only are the ultimate legatees not to have the full enjoyment of the devised property until they attain a specified age exceeding twenty-one years, but also that some other third party is to be paid an annuity out of the income from the property, then, the Court will not give the legatees enjoyment of the property as absolute owners on their attaining majority, unless the third party dies earlier.

APPEAL from a judgment of the District Court, Gampaha.

A person died in 1924 leaving behind three mistresses and several children by two of them. By his will, which was made in 1917, he created a trust in their favour. The mistresses were to be paid a sum of Rs. 50 each every month out of the income of the trust property. The trust in favour of the children was not restricted to income, but extended, if necessary, to a portion of the principal or capital. It was also provided that, after the death of the mistresses, the trust property was to be divided equally among the children when they attained the age of twenty-one years.

The present action was instituted by the trustee after the death, in 1944, of one of the sons of the testator. It was admitted that two of the testator's mistresses were still alive. It was also admitted that all the children were over twenty-one years of age. The question for decision was whether on the death of the testator the trust property vested in his children or whether such vesting was postponed till after the date of death of the last of the three mistresses.

H. V. Perera, Q.C., with *V. A. Kandiah* and *D. S. Wijeyewardene*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke* and *L. C. Seneviratne*, for the defendant-respondent.

Cur. adv. vult.

2—J. N. B 20097—2,033 (10/61)

July 13, 1961. SINNETAMBY, J.—

One Francis Scobell Hill, by his last will dated 26th February, 1917, created a trust and directed his trustee to sell and convert all his real and personal property into money; and after payment of debts, testamentary and funeral expenses, to hold the balance proceeds "in trust both as to principal and income" for the benefit of certain persons designated in the will. For the purpose of convenience and easy reference, I have numbered the paragraphs of this will. Paragraph 1 refers to the revocation of former wills and paragraph 2 appoints the trustee and creates the trust. The trustee has not yet sold a tea estate belonging to the estate of Francis Scobell Hill called Walawe estate.

Francis Scobell Hill died leaving behind three mistresses and several children by two of them. In paragraph 3 he directed that the trustee shall, out of the income from the trust funds, pay to Muthu Menika, one of the mistresses a sum of Rs. 50/- per month. Incidentally, in this paragraph, he refers to Muthu Menika as "now deceased" and it is not clear whether she predeceased the testator or not. In the 4th paragraph he directs the trustee to pay to Ango Nona a sum of Rs. 50/- per month also out of the income. In like manner, in the 5th paragraph he directs a payment of a similar sum of Rs. 50/- to Podi Nona. From these provisions in paragraphs 3, 4 and 5, it is clear that the author of the trust intended to make provision for his three mistresses during their life time by payment (out of the income) of a sum of Rs. 50/- per month to each of them. He does not therein state what is to happen if the income in any one year is insufficient to meet these payments, but it seems to me that his intention was that if in any one month or year the income of that particular month or year is insufficient to make the payments, the trustee should make good the deficiency from the income of a subsequent month or year or from the surplus of a previous month or year. That seems to me to be the only reasonable inference one could draw from the terms of this will.

Having thus provided for his mistresses, in paragraph 6 he directs his trustee to hold the trust property

> "from and after the death of the said Muthu Menika, Ango Nona and Podi Nona, in trust for all the children of the said Muthu Menika and Podi Nona, procreated by me the said Francis Scobell Hill to wit: May, Jack, Jimmy, Frank, Jane, Winnie, Robert, (children of the said Muthu Manika) and Edward (son of the said Podi Nona) who shall attain the age of twenty-one years in equal shares."

Then follows a proviso that in the event of the death of any one of these children, his or her child or children shall be substituted in his or her place. It cannot be disputed that the testator created two trusts one in favour of his mistresses to be paid out of the income and the other in favour of his children which is not restricted to income. Obviously, he did not intend any part of the principal or capital to be used in the payment of the monies specified, to his mistresses.

It would appear that the trustee, from time to time, filed accounts distributing the greater part of the income from the tea property, after payment to the mistresses, among the beneficiaries. In this way, various payments had been made to the children of Scobell Hill one of whom was Jimmy. In the last relevant account filed, there was shown a sum of Rs. 32,920/78 as due to Jimmy Hill out of the income of Walawe estate. That sum had been deposited in the testamentary case of Scobell Hill. Jimmy Hill died leaving no children, in 1944, as would appear from some of the documents filed ; and, in an application made by his executrix, this sum has been transferred to the testamentary case of Jimmy Hill, which was filed in the District Court of Gampaha and bears No. 238. The heirs of Jimmy Hill claimed this amount as part of his estate and the trustee says that he has been instructed by the other heirs of Scobell Hill to dispute the right of Jimmy Hill's heirs to this sum. The present action was, therefore, instituted by the trustee for a declaration that the sum of Rs. 32,920/78 forms part of Scobell Hill's trust and that the heirs of Jimmy Hill are not entitled to it. The learned District Judge held that the sum formed part of the estate of Jimmy Hill, and the trustee has appealed against that decision.

On a reading of paragraph 6 it is manifest that the testator intended the trust in favour of the children to take effect only after the death of his three mistresses. This is understandable, for if the property was distributed among the children prior to their death, there would be no property out of the income of which the trustee would be in a position to pay the monthly allowance to them. It is also reasonable to infer that by the use of the expression " who shall attain the age of twenty-one years" in paragraph 6, the testator did not intend to limit his beneficiaries only to those children who died after attaining twenty-one years in view of the provision for substitution contained in the same paragraph : the testator's intention, obviously, was to prevent his children from entering into possession of their shares until each attained the age of twenty-one years, and during the intervening period the trustee was to hold the property in trust for such of them as were minors. Paragraph 7 directed the trustee after the death of his three mistresses to continue as trustee for those children and grandchildren as the case may be, who had then not attained the age of twenty-one years and provided that the trustee may at his discretion, out of the income of the expectant share of such child or grandchild, provide for its maintenance and education. The trustee thus had to function in his capacity as trustee so long as the three mistresses were alive, and thereafter, until such time as each child or substituted grandchild attained the age of twenty-one years.

It was admitted in the course of the proceedings that Ango Nona and Podi Nona are still alive. It was also admitted that all the children of Francis Scobell Hill are over twenty-one years of age. Paragraph 7 further provides that after the payment of the whole or part of such income towards the maintenance education or advancement in life of the minors, the trustee shall invest the residue of the said income so as to accumulate

at compound interest. There is also provision that the accumulation shall follow the destination of the principal share. It is to be noted that this provision in regard to accumulation is limited to the share of a person who is a minor at the time of the death of the three mistresses.

Then comes paragraph 8 which is not restricted to income and is to the following effect :—

> " And I also declare that my trustee may at his discretion raise any part or parts not exceeding together one moiety of the expectant share of any child or grandchild under this my will and apply the same to his or her advancement preferment or benefit as my trustee shall think fit. "

Here, clearly, the trustee's right to raise any part not exceeding one half of the expectant share of any child or grandchild is not restricted to the period subsequent to the death of the three mistresses, and it seems to me, authorises the trustee even in their life time to raise any part of such share not exceeding one half. The testator presumably thought that if the right of the trustee is limited to one half of the expectant share, the income from the other half would be sufficient to make the payments specified, to the three mistresses.

On a reading of the whole will, the only conclusion possible is that the testator did not intend the trust in favour of his children to take effect until after the death of the three mistresses, subject, however, to the power given to the trustee in paragraph 8 to which I have already referred. No provision is made in the will in regard to any accumulation of the income which may exceed, in any one year, the amount required for the payment of the allowances to the mistresses. The ordinary rule in such a case is as stated by Lord Herschell, L.C. in *Wharton v. Masterman* [1]

> " income arising from the investment. . . . must, in the absence of any direction to the contrary, follow the destination of the investments from which it results. "

The accumulation, therefore, if not utilised to make good any underpayment in previous or subsequent years to the three mistresses would on their death pass with the principal sum to the heirs.

The will was made in 1917 and the testator appears to have died in 1924. The testator's intention was that the trustee, despite the provisions in paragraph 9 of the will empowering the trustee to postpone the sale and conversion of his real and personal estate, would convert all his assets into cash and invest it in the securities specified by him in paragraph 10 of the will. Although the testator died in 1924 one asset, namely Walawe estate, a tea property, has not yet been sold or converted as directed. The trustee was evidently acting under the power given to him by paragraph 9 and his conduct has no doubt accrued to the benefit

[1] *L. R. 1895 A.C. 186 at p. 192.*

of the estate. In ascertaining the intention of the testator, the fact that the sale of the tea estate has been postponed for so long a period of time, resulting in an accretion of a considerable amount of money as income, which at one stage is said to have reached Rs. 2,000,000 should, in my opinion, not be taken into account ; it should, however, be stated that this sum represents the gross income for a period of about thirty years. At the time of the testator's death, his entire estate according to the inventory file marked D2 amounted to Rs. 203,099·74. Walawe estate by itself was valued at Rs. 150,962·50. We do not know what has happened to the rest of the estate but the executor and trustee had to meet such expenses as estate duty and the cost of testamentary proceedings. It is well known that there was a severe depression at or about the time of the death of Francis Scobell Hill and tea properties were not bringing in as much income then as they did subsequently. The intention of the testator, obviously, was that the property should be converted into cash and invested in satisfactory securities. He evidently was of the opinion that the payment of the amounts due to his mistresses could not be satisfactorily secured except by charging the entire income with those payments and in any event he did not think that anything less than half the capital would be sufficient to produce that income.

Although the learned trial Judge has described the monthly payment of Rs. 150 to the three mistresses as a mere bagatelle compared to the income actually derived from the estate in subsequent years, one has to consider the intention of the testator not from what subsequently happened but from the state of things as they existed at the time of either the death of the testator or the date on which he made his will.

The question we have been called upon to decide in this appeal is, as stated by Counsel on either side, whether on the death of Scobell Hill the trust property vested in his children or whether such vesting was postponed till after the death of the three mistresses. If the former, the surplus income, after payment of what I shall hereafter describe as the annuities to the mistresses, would become the property of the children who would be the residuary beneficiaries ; if the latter, it would not, and the administrator of Jimmy Hill's estate would not be entitled to claim the sum of Rs. 32,920·78.

In deciding this question, the paramount consideration is the intention of the testator and although a gift may *prima facie* appear to give a vested interest only on the happening of a contingency, one has to consider all the provisions of the will in order to ascertain the real intention of a testator. At the same time, where a donor gives property to a minor and directs that the minor shall not enjoy the income of that property until he attains a specified age exceeding twenty-one years, the court will not, as a matter of law, prevent the enjoyment by the donee of the property and its income on his attaining twenty-one years for the reason that he would be the sole owner of both property and the income. This

doctrine was declared and firmly established in the leading case of *Saunders v. Vautier* [1] decided in May 1841 and was followed in the later case of *Gosling v. Gosling* [2] where the rule was expounded by Wood, V.C. as follows :—

> " The principle of this Court has always been, to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later stage—unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, . . . the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years. "

This rule has now become settled as evolving a method of ascertaining the intention of the testator on the question of vesting. Where, however, the testator makes it clear that not only are the ultimate legatees not to have the enjoyment of the property until they attain the age mentioned, but also that some other person is in the meantime to have the enjoyment, then, the court will not give the legatees enjoyment of the property as absolute owners on their attaining majority. In *Foster v. Usher* [3] Astbury, J. quoted with approval the observations of the Master of the Rolls in *Hanson v. Graham* where there was a gift of property which in itself would have been contingent, followed by a gift of the income until what otherwise would have been a vesting period occurred. Grant M.R. had stated :—

> " In this cause therefore I should have determined against the plaintiffs : if it stood merely upon the first words. But then it is contended, that they are entitled ; because interest is given ; and that they come within an established rule of the Court ; that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention, explanatory ; and denoting, that the testator meant the whole legacy to belong to the legatee. "

In *Foster v. Usher* (supra) the entire income was not expressly left to the beneficiary : instead, the testator left a discretion to the trustees to determine how much of the income should be appropriated towards the maintenance of the minors, but it was held that that circumstance will

[1] *1841 (4) Beav : 115.* [2] *(1858–1860) 1 Johnson's Reports p. 265 at p. 272.*
[3] *1938 (2) Chancery Division p. 321.*

not detract from the rule, as the surplus income would eventually go to the minors and the provision was regarded as a gift of the whole income followed by a discretion to apply less than the whole. It would have been otherwise if the trustees were directed that after payment of such sums as they considered necessary for the maintenance of the minors, they were to pay the balance to some third party.

In the present case, there has undoubtedly been a postponement of the date on which the trust property is to be divided among the children of Scobell Hill, that date being the date on which the last of the three mistresses dies. Does that also postpone the date of vesting ? If the entirety of the income from the date of Scobell Hill's death until the death of his three mistresses were to go to his children, then the rule in *Saunders v. Vautier* (supra) would apply and the property would vest in the children on the date of the testator's death ; and despite the fact that during the minority of the beneficiaries the trustee has a discretion as to the amount of the income he may utilise for their maintenance, on the strength of the authorities already referred to, I am of the opinion that on attaining majority, they could have entered into possession of the trust property. This is based on the principle that beneficiaries in a trust deed on attaining majority may determine the trust and ask for a transfer of the trust property from their trustees, a principle which is embodied in Sections 57 and 58 of the Trusts Ordinance.

In the present case, however, the income of the trust property is charged with the payment of the annuities to the three mistresses and is, therefore, not given wholely for the benefit of the beneficiaries. Mr. Jayewardene for the respondent contended, however, that after payment of the amount due to the annuitants, the balance income in any one year became the absolute property of the beneficiaries and, therefore, that in so far as the balance was concerned, it would vest immediately in them. In support of this argument he relied on the case of *Wharton v. Masterman* (supra). In that case, a trust was created by the testator in which the trustees were required to invest the trust monies in certain funds and securities and out of the income to pay certain annuities and after payment of such annuities, they were directed to invest the surplus income in stock funds of the Government or real securities and after the death of the last annuitant to convert those funds into cash and along with the accumulations pay them over to certain charities. The House of Lords held that the charities had an immediate vested interest in the balance annual income and could put an end to the trust and obtain beneficial enjoyment immediately. In that case, the next of kin of the deceased testator claimed the accumulations as against the charities. This claim was based on the ground that there was no immediate vesting of the accumulations in favour of the charities as they were charged with the payment of annuities. This contention was rejected in view of an express provision in the will that if the income from the trust for any one year was insufficient to pay the annuitants, there shall be a

proportionate abatement of the amount payable without any right on the part of the annuitants to resort to the surplus income of any future or past year for the purpose of making up the deficiency of any year during which the annuities were payable. Lord Macnaghten in the course of his judgment observed thus :—

> "I think the testator's will shows an anxious desire that the annuities should only be paid out of the income accruing from year to year on the corpus or capital of the testator's residuary estate as it subsisted at the time of his death. The intention seems to have been that the accounts should be closed at the end of each year. If there was a deficiency, the annuitants were to bear the loss, and the annuities were to abate rateably. If there was a surplus, the surplus was to be put aside for the benefit of the residuary legatees. Under no circumstances, as it seems to me, were the annuitants to be at liberty to resort to the income of a future year for the purpose of making good a past deficiency. At the same time it is clear on the face of the will that the testator did not mean the residuary legatees to receive any part of what the will gives them until the death of the last annuitant."

Then he proceeds to state :—

> "The charities alone are interested in the surplus income accruing from year to year. Their interest is vested and indefeasible."

Lord Davey in the same case observed :—

> "I am, therefore, of opinion that the annuitants have no charge upon the surplus income, or the investments of it, or the income derived from such investments, all of which, I think are included in the accumulations, and the charities have a vested title free from any claim by any other person to the surplus income ; but according to the directions of the will, their enjoyment is postponed to the death of the survivor of the annuitants, and an accumulation is directed in the meantime.
>
> This being so, the principle of *Saunders v. Vautier* would at once be applicable if this were the case of a gift to an individual . . . There is no condition precedent to happen or to be performed in order to perfect the title of the legatees, and there is no other person who has any interest in the execution of the trust for accumulation, or who can complain of its non-execution."

The facts in *Wharton v. Masterman* (supra) are entirely different to the facts in this case. It cannot be said that in this case the surplus income of any one year cannot be appropriated, if the occasion arises, towards the payment of any deficiency in the annuities of a previous year. The mere fact that actually there was always a surplus does not affect the

question. The testator's intention being that the trustee should convert his property and make certain investments, there was always the possibility of a deficiency in the event of investments proving to be bad or the income therefrom poor.

Wharton v. Masterman (supra) was considered in *Berry v. Geen* [1]. There the testator created a trust and directed the trustees out of the income to pay a large number of annuities which were to cease on the death of the last of the personal annuitants. He further directed that as long as the annuitants were living, the balance income of the residuary estate should be accumulated and invested, and he gave the whole of his property after the death of the last personal annuitant to the Congregation of the Union of England and Wales. The Secretary of the Charity brought the action asking for an order that the trust for accumulation should be determined and that either the surplus income in each year should be paid to the charity or that appropriate provision should be made for the payment of legacies and annuities and subject thereto that the residuary estate should be transferred to the charity. The court refused to do so and distinguished the case of *Wharton v. Masterman* (supra). In that case too the accumulations of the surplus income amounted to a very large sum not much less then half a million pounds sterling and the aggregate of the annuities amounted to only £2,274. Nevertheless, the court refused to grant the application although the nett income of the testator's estate was far more than was required to pay the annuitants and the legatees. Lord Chancellor Lord Maugham, dealing with the contention that *Wharton v. Masterman* (supra) applied, observed :—

> "There was, however, a vital difference between that case and the present one. The will of Mr. Duncan in the former case contained express clauses preventing the annuitants from having a deficiency of income in any year made good in any other year. If there was a deficiency the annuities had to abate. It was thus clear that when the period of distribution of the estate arrived according to the terms of the will the residuary legatees were entitled to the whole of the capital of the residue undiminished by any claim of the annuitants. Under those circumstances there was, it is true, a direction to accumulate, but not an effective one, since the residuary legatees were absolutely entitled under the rule in *Saunders v. Vautier* to the whole residuary estate subject only to the rights of the annuitants to be paid out of the yearly income. This House accordingly treated the case as one where the residuary estate was given absolutely to a person *sui juris* charged only with annuities payable out of the income."

In the present case, too, as I have pointed out earlier, the annuitants have a right to be reimbursed for any shortfall in their annuities in any one year or month out of the profits of any other year or month, past or future. The situation is no different to that which arose in *Berry v.*

[1] *L. R. 1938 A.C. 375.*

Geen (supra) and the mere fact that the accumulations happened to be enormous does not affect the question, the only consideration being to ascertain the intention of the testator.

I would accordingly hold that the accumulations after payment of the annuities of the three mistresses would not vest in the children of Scobell Hill until the death of the last of the annuitants. The judgment of the learned District Judge is accordingly set aside and judgment entered for the plaintiff as prayed for with costs both here and in the court below.

GUNASEKARA, J.—I agree.

Appeal allowed.

1959 *Present :* **Basnayake, C.J., and Pulle, J.**

S. DEERASOORIYA, Appellant, *and* B. VANDERPOORTEN, Respondent

S. C. 86 A-B—D. C. Badulla, 11329

Partition Act—Proceedings thereunder—Power of Court to issue an injunction in respect of movable property—Power of Court to appoint receiver—Objection to jurisdiction of court—Stage at which it should be taken—Courts Ordinance (Cap. 6), ss. 71, 86—Civil Procedure Code, s. 671 et seq.—Consent order—Application for writ—" Order of Court ".

In proceedings under the Partition Act the Court is entitled to issue an injunction in respect of movable property under section 86 of the Courts Ordinance. No is the Court precluded from making an order under Chapter L of the Civil Procedure Code in such proceedings.

Section 71 of the Court Ordinance precludes a party from objecting, for the first time in appeal, to the jurisdiction of the trial Court.

An application for writ in respect of a consent order or decree cannot be questioned on the ground that there was no order of the court, if the parties have acted on the footing that there was an order of the court.

APPEALS from a judgment of the District Court, Badulla.

C. Thiagalingam, Q.C., with *V. Arulambalam*, for 4th Defendant-Appellant in both Appeals.

H. V. Perera, Q.C., with *Sir Ukwatte Jayasundera, Q.C., C. G. Weeramantry* and *E. B. Vannitamby*, for Plaintiff-Respondent in both Appeals.