1971 *Present :* G. P. A. Silva, S.P.J., and Wijayatilake, J.

P. A. SILVA and 2 others, Appellants, *and* R. J. G. DE MEL, Respondent

S. C. 71/68 (Inty.)—D. C. Panadura, 453/T

Administration of estates—Will—Clause purporting to deal with residuary estate—Construction when such clause contains also provisions for certain special bequests—Judicial settlement of accounts—Residuary estate—Its liability to be utilised firstly for payment of the debts and liabilities of the estate—Rule of abatement.

Where a clause of a Will purports to deal with the rest and residue of the movable and immovable property of the testator but in fact makes a number of specific bequests (in addition to certain specific bequests already made in the earlier clauses of the Will), the residue would be the property remaining after the specific bequests mentioned in the clause are eliminated.

Where a Will is silent as to the proper destination of certain liquid assets of the testator's estate, such residue should be utilised in the first instance for the payment of testamentary expenses, debts, funeral expenses and estate duty. Where there are outstanding debts and other liabilities of the estate to be met, it would be wrong to distribute such residue among the heirs as on intestacy with a direction that the debts and liabilities of the estate should be met *pro rata* by the heirs in proportion to the value of the interest of each of them in the estate. "Such a procedure will necessarily have the effect of abating specific or even general legacies before the abatement of the residue of liquid assets and will conflict with the legal principles bearing on the question."

APPEAL from an order of the District Court, Panadura.

C. Ranganathan, Q.C., with *S. Sharvananda, S. Ambalavanar, T. Thuraiappa* and *K. Kanagaratnam*, for the 1st and 2nd respondents-appellants.

S. Nadesan, Q.C., with *J. V. M. Fernando* and *V. Jegasothy*, for the 2nd respondent-respondent.

Cur. adv. vult.

February 12, 1971. G. P. A. SILVA, S.P.J.—

When the 1st and 2nd respondents-appellants, being two of the executors of the Last Will of the deceased, submitted their accounts for a judicial settlement of accounts in this case, the 2nd respondent-respondent to this appeal filed certain objections to the statement of

accounts. On the date of inquiry into these objections, however, the respondent accepted the statement of accounts subject to certain modifications. The acceptance of this statement resulted in the inquiry being confined to a contest as to the proper destination of certain liquid assets aggregating to Rs. 611,43S/- regarding which the Last Will was silent. The learned District Judge held that the said sum should devolve in equal shares on all the four heirs as on intestacy and that the debts and liabilities of the estate should be met *pro rata* by the four beneficiaries in proportion to the value of the interest of each in the said estate. He held further that the computation of the value of each share would be on the basis of the division of the said sum of Rs. 611,43S/- equally among the four heirs. The present appeal is against this order of the District Judge.

The limited question which has to be decided in this appeal therefore is whether the said liquid assets of the estate of the testator amounting to Rs. 611,43S/- should be distributed among the heirs as on intestacy or whether they should be utilised for the payment of testamentary expenses, debts, funeral expenses and estate duty. The contention of the appellant s that they should be utilised in the first instance to meet the testamentary expenses and debts, etc., while the contention of the respondents is that they should be distributed among the heirs as on intestacy. The answer to this question depends on the further question as to what forms the real and substantial residuary estate in terms of the Last Will left by the testator in this case. The ascertainment of the actual residue therefore assumes considerable importance.

On a perusal of the Last Will it would appear that, after the usual preliminary clauses, the testator has by clauses 4, 5, 6, 7 and 8 made certain specific bequests to some of his children either directly or on the happening of certain events. By clause 9 he purported to bequeath to his trustees named in clause 2 of the Will what may be described briefly as all the rest and residue of his movable and immovable property, enjoining them however to administer and dispose of them in the manner indicated later on. Although it would appear *ex facie* that the specific bequests of the testator are contained in clauses 4 to 8 and all the rest of the testator's properties formed the residue, a closer examination of clause 9 shows that a number of specific bequests has been made in that clause. The directions given in this clause have elevated the bequests embodied therein to the category of specific bequests. This fact becomes apparent if one poses the question whether the trustees, to whom what is referred to as the residue was devised by this clause, could have refrained from carrying out either the directions to convey the properties mentioned therein to the respective legatees or any of the other directions. On this construction of the Will, which we feel convinced is the reasonable construction, what is described in the Will as the rest and residue of

the estate ceases to form the actual residue for the purpose of deciding the question which was in issue at the inquiry which resulted in this appeal. The residue for this purpose would be the amount which was admittedly not dealt with by the testator, namely, the sum of Rs. 611,438.

The main reason why the testator chose to vest what he described as the residue in the trustees in clause 9 seems to be to protect the interests of the substantial beneficiaries under this clause, namely, the two minor children, to whom the trustees were directed to convey a number of large and valuable properties. Had these children attained the age of discretion the properties given to them would no doubt have been devised in the same way as those enumerated in clauses 4 to 8 as specific legacies. I am fortified in this view by the wording used by the testator in clause 3 of Part Four of the Will where he expressly takes away the power of the trustees to deal with the property called " Kusum Sri ", Panadura, devised to his son Ranjit or to diminish the legacy of Rs. 100,000/- given to his minor daughter. These words would appear, if at all, to raise the stature of these bequests even beyond that of the specific legacies enumerated in clauses 4 to 8 of the Will. There would therefore be no justification to treat what is vested in the trustees by clause 9 as the residuary estate of the deceased for the purpose of deciding the question before us.

Counsel for the appellant cited before us in support of his argument the case of *Malliya v. Ariyaratne* [1] reported in 65 N. L. R. 145. In a characteristically erudite and exhaustive judgment in this case Basnayake C.J. has covered a very wide field of law relating to executors and administrators applicable to Ceylon, their powers and duties in regard to the payment of the testator's debts, the sale by executors of property in which minors are interested and such other allied matters. In his most illuminating judgment, in which the present Chief Justice has concurred, he has traced the history and the scope of the applicability of the English law of executors in this country and has set out for our guidance a number of judicial pronouncements which show the process of judicial evolution of the law of executors. From this judgment with which we are in respectful agreement, even though the questions at issue were not the same as in the instant case, it is possible to extract some principles which assist us to decide the question before us.

The law applicable to us in this field being the English law, we have naturally to consider the position of the residuary estate, vis-a-vis the specific or general legacies under English Law in regard to the payment of any liabilities of the estate. As we have pointed out earlier, some of the legacies given by clause 9 of the Will are in the nature of specific legacies while some others can be considered as general legacies. Even though the executors appointed by the Last Will have been directed to

[1] *(1962) 65 N. L. R. 145.*

distribute the properties in a certain way, the properties in question would be vested in the legatees upon the death of the testator subject of course to any restrictions which arise by operation of law or in terms of the Will.

The principle of English law on the subject of Abatement as expressed by Mustoe (Executors and Administrators—4th Edition, page 116) is that, if the assets are sufficient to answer the debts and the specific legacies, but are insufficient to meet the general legacies, the latter must, be reduced. This process of reduction, which is termed abatement, follows a certain order. "The residue must always be used for the purpose of making up any deficiency in the amount available for debts and prior legacies. Next follow the general legacies; and then the specific legacies. The rule of abatement is that all property not specifically bequeathed must be exhausted before recourse is had to property which is so bequeathed". A similar view has been expressed in Williams on Executors and Administrators in the passages cited to us by counsel for the appellant. This view of the matter which we feel inclined to follow compels us to the conclusion that the learned District Judge was in error in holding that the liquid assets must be distributed as on intestacy and that it would devolve on the four children in equal shares. If of course there was a residue of undevised liquid assets which remained after payment of all the liabilities of the estate, the general principle that it would devolve on the heirs as on intestacy would be unexceptionable. But when there were outstanding debts and other liabilities of the estate to be met, it would in our opinion be wrong to distribute such residue among the heirs as on intestacy so that the entire estate will be chargeable with debts and other liabilities. Such a procedure will necessarily have the effect of abating specific or even general legacies before the abatement of the residue of liquid assets and will conflict with the legal principles bearing on the question. In the instant case, it will also militate against the general principle that properties devised to minors should not be diminished or adversely affected unless no other funds are available for the payment of liabilities.

For the reasons stated above we set aside the order of the learned District Judge dated 29th March, 1938, and hold that the executors acted correctly in applying the sum of Rs. 611,438/- for the payment of the debts and testamentary expenses of the deceased and make order directing a judical settlement of accounts on that basis. The case will be forwarded to the District Court for the purpose of complying with this direction. The appellants are entitled to their costs of this application before the District Court as well as the costs of appeal from the 2nd respondent-respondent.

WIJAYATILAKE, J.—I agree.

Appeal allowed.