5,1968

IN THE PRIVY COUNCIL No.23 of 1967

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

1. DERWENT PEIRIS
2. IVAN STEWART PEIRIS
3. SRIKANTHA PEIRIS
4. SITA LUCILLE WEERASINGHE
5. CARL WINSSON PEIRIS
6. JOYCE WINIFRED PEIRIS
7. DAVID RAGLAN PEIRIS

(Plaintiffs)
Appellants

- and -

ABEYSIRI MUNASINGHE LAIRIS APPU
(Defendant)
Respondent

CASE FOR THE APPELLANTS

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1. The appellants above named appeal from the judgment of the Supreme Court dated 25th August 1965 whereby it allowed the appeal of the respondent from the judgment of the District Court of Kurunegala of 18th January 1962 and dismissed the appellants' (plaintiffs') action with costs in both Courts.

p.52, lns: 25-30.
p.73, lns: 22-31.

2. The action was instituted by plaint in the District Court of Kurunegala on the 18th March 1959. It is a rei vindicatio whereby the appellants claim that they are owners of and are entitled to a declaration of title to certain land known as Raglan estate, the subject-matter of the action, to an order ejecting the respondent from the said land and placing the appellants in quiet possession thereof, and to damages

pp. 23-26.

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at the rate of Rs. 50,000/- per annum for a period from two years prior to the action until the restoration of possession to the appellants, together with costs and such other relief as the Court may deem meet.

3. The appellants claim to be entitled to the land in question as fideicommissaries under the will of their grandmother Adeline Winifred Peiris executed on 3rd June 1910 before A. Alwis, Notary Public. The material portions of the will are as follows :-

pp.99;100, lns: 30. numbering of clauses of the will added)

(i) This is the Last Will and Testament of me Adeline Winifred Peiris wife of Richard Steuart Peries (sic) of "The Alcove" Turret Road, Cinnamon Gardens, Colombo.

(ii) I hereby revoke all former wills and other testamentary dispositions heretofore made by me.

(iii) I nominate and appoint my husband the said Richard Steuart Peiris the sole executor of this my will.

(iv) In the event of his death I appoint George Theobald Peiris, the Reverend George Benjamin Ekanayake and my eldest son Richard Louis de Fonseka Peiris the executors of this my will.

(v) (not material)

(vi) I hereby will and direct that on the marriage of each of my daughters (with the sanction and approval of my said husband) my executor shall set apart and convey to her immovable property of the value of one hundred thousand rupees subject to the conditions following: viz.

(a) That such daughter shall not sell, mortgage or otherwise alienate such property or properties but shall be entitled during the term of her natural life only to take enjoy and receive the rents income and produce thereof.

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(b) She shall not be at liberty also to lease or demise such property or properties for any term exceeding four years at any one time or to receive in advance the whole of the rents for such period and subject to the further condition that on the death of such daughter such property or properties so given to her shall go to and devolve on her children in equal shares.

(c) Should such daughter die without leaving issue then I will and direct that the properties so given to her shall devolve on her surviving sisters and the issue of such sister as shall then be dead. Such issue taking only amongst themselves the share to which another could have been entitled to or have taken if alive.

(vii) So long as my daughters or any of them shall remain unmarried and shall prove dutiful and obedient to my husband my executer shall pay to each of them monthly a sum of Two hundred and fifty rupees for her sole absolute use and benefit.

(viii) (a) I give devise and bequeath all the rest residue and remainder of my property and estate and immovable movable unto my sons in equal shares subject to the express condition that my said husband Richard Steuart Peiris shall be entitled during the term of his life to take receive enjoy and appropriate to himself for his own absolute use and benefit all rents income produce and profits of all the said property and estate with full liberty to expend for the management cultivation and upkeep thereof all such sums of money as he on his absolute discretion shall think fit and with full power and authority to my said husband should

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he deem it necessary to mortgage the said properties or any of them for the purpose of raising and borrowing money for any purpose whatsoever and upon such terms and conditions as he shall deem fit and proper and also subject to such conditions and restrictions as my said husband shall according to his absolute discretion and wish think fit to impose when conveying such property or properties to my sons.

(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 taking only 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.

(e) 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.

pp. 102-107 at 105, ln. 7 f.
p.49, lns. 8-26.
p.66, lns. 10-34.

4. By a Deed of Indenture dated 31st May 1917 the testatrix agreed with her husband, inter alia, to convey the Moragolla Group of estates in Kurunegala district (including Raglan Estate) to the appellants' father Richard Louis. She died, however, on 20th December 1918 without having done so.

5. Though the testatrix's title to the above estates was disputed by her husband the Deed of Indenture contains a clear acknowledgement that the estates in dispute, and in particular the Moragolla Group, were hers. They therefore formed part of her estate at her death.

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p.102, lns. 11-13 & 19-23
p.105, ln.7.
p.106, ln.7.

6. The Deed of Indenture contained a promise by the testatrix to donate the Moragolla Group of estates to her son Richard Louis (clause 11) and the Thorawetiya estate to the other two children (clause 12). The terms of the Deed of Indenture, clauses 11 and 12, were incompatible with those of the will (clause viii), since the fideicommissary conditions differ in the two cases.

p.105, ln.7.
p.106, ln.17.
p.100, lns. 1-30.

7. A will can only be revoked by a later inconsistent will. The testatrix's will was not therefore revoked by the Deed of Indenture.

The Deed of Indenture contained (i) a contract between the testatrix and her husband whereby their disputes as to the ownership of their respective properties were settled (ii) offers by the testatrix to certain of her children to donate certain properties to them.

pp.102-107
p.109,ln.35.
p.110,ln.1.

The executors and estate of the testatrix were bound by the Deed of Indenture so far as (i) is concerned but not so far as (ii) is concerned, since the donees were not parties to the Deed and there is no evidence that they accepted the donations during the testatrix's lifetime.

Contractual offers are revoked by the death of the offerer.

In particular, unaccepted donations are revoked by the death of the donor.

The reason is that 'things donated and never accepted before the decease of the donor cannot be made to fall into the ownership of him to whom they have been given, because after his death that ownership starts to depart from him who made the gift, starts to be that of the heir, and cannot thereafter be taken away from him against his will under pretext of a

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donation made by the deceased which is only accepted after his death'.

Digest: 33. 3. 9. 1.

Voet: 39. 5. 13. (Gane's translation Vol. 6 p.100 para. 2).

This reasoning is not weakened by the fact that the testatrix in the Deed of Indenture purported to bind herself 'her heirs executors and administrators' that her property should be settled in the manner provided in the deed 'and in no other manner'. Such a provision neither revoked her will nor prevented the beneficiaries under the will from obtaining rights under the will which could not be taken from them by any agreement to which they were not party.

pp.109-113 at p.110, lns. 1-3 and 33-34.

8. Nevertheless in Testamentary Cases Nos. 6569 and 6571 in the District Court of Colombo an Award was given, and was on 17th December 1925 made a Rule of Court, whereby the Deed of Indenture was declared to be binding on the children of the testatrix and it was held that 'the two testaments (of the testatrix and her husband) do not deal with the properties dealt with by the Indenture'.

9. This Award was erroneous in law because the heirs of the testatrix and her husband, not being universal successors to them, were not bound by the agreement they had entered into and, not having accepted the promised donations during the lifetime of the testatrix, were not entitled to sue under the Deed of Indenture.

p.68,lns.28 p.69, ln.1.

10. The Award had nevertheless the effect in law of binding the parties to it, namely the children of the testatrix and her husband. It did not bind the appellants, who were not parties to it, and the appellants are entitled to and do rely on the true legal position, viz. that the Moragolla Group of estates passed to the appellants' father Richard Louis as his share of the estate of the testatrix under clause viii (a) of her will.

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11. The appellants rely on the terms of the Indenture and the Award only in so far as the latter serve to identify the one-third shares in the residue of the estate which were to pass to each of the testatrix's sons under clause viii (a) of the Will. They respectfully adopt the reasoning of Fernando SPJ on this point. p.69, lns. 1-26. p.69, lns. 1-26.

12. Subsequently in November 1951 Richard Louis Peiris purported to sell Raglan estate to one U.B. Senanayake whose title, if any, the respondent acquired on 9th August 1952. p.67,lns.5-9 pp.121-123.

13. The purported sale was invalid or valid only to the extent that it passed to U.B. Senanayake and to the respondent no more than the fiduciary interest of Richard Louis Peiris in Raglan estate.

14. Richard Louis Peiris died in December 1954. The appellants claim to be owners of Raglan estate from the date of his death. p.66, lns. 35-36.

15. The appellants contend that the effect of clause viii of the will is to impose on their father Richard Louis Peiris (the eldest son of the testatrix) a fideicommissum in their favour over the lands in issue. p.100, lns. 1-30.

16. In particular they rely on the words of clause viii (c) of the will:

> 'if any of my said sons shall die leaving children and also a widow then 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 <u>would be entitled to under this my will</u>'. p.100, lns. 26-30.

17. From these words it is clear that if one of her sons died leaving children the testatrix intended the children to be entitled to certain property under her will. If the son's widow also survived him she was to be entitled to a one fourth share of the income from that property.

18. Since there is no gift of property to the

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children of a deceased son in any other part of the will the property referred to can only be the share of the testatrix's estate which devolved or would have devolved on such deceased son.

19. It is submitted that it is the clear implication of clause viii (c) that if one of the testatrix's sons dies leaving children those children succeed as fideicommissaries to the property (i.e. the one-third share under clause viii (a) which went or would have gone to their father).

There are a number of English and South African decisions in which the institution of an heir has been implied from indications in the will and from a consideration of the circumstances.

20. If the words 'if any of my said sons shall die leaving children' were restricted to death before the testatrix the anomalous position would arise that, if a son survived the testatrix and thereafter died, leaving a widow, that widow would be entitled to no support from the estate of the testatrix, whereas if the son had predeceased the testatrix, she would be entitled to support. It is most unlikely that the testatrix intended such a result, especially as she took care under clause viii (b) to provide for the support of such a widow whether her husband died before or after the testatrix without leaving children.

21. In their natural meaning the words 'if any of my said sons shall die leaving children' refer to death whether before or after the testatrix.

p.100, Ins. 17-25

22. The appellants further rely on the opening words of clause viii (b) of the will whereby 'should any of my sons die unmarried or married but without leaving issue' certain fideicommissa are imposed. They contend that these words give rise to an implication that if any sons die leaving issue those issue are to succeed.

23. The words of clause viii (b) of the will furnish an example of what in Roman-Dutch Law

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is called a si sine liberis decesserit clause. Various views were held by the Dutch writers about the effect of such a clause:

(i) Some, following the Roman Law, held that such a clause without more created a fideicommissum in favour of the children mentioned in the condition if the person whose death was in question was a descendant of the testator.

(ii) Others rejected the view that a fideicommissum was automatically created in this case. Their view has been accepted in some modern Ceylon and South African cases.

(iii) Of the writers who rejected the view that a fideicommissum was automatically created in this case, some held that, apart from the fact that the de cujus was a descendant of the testator, only slight indications were required from other parts of the will or from the surrounding circumstances to support the inference that a fideicommissum was created in favour of the children mentioned in the condition.

Sufficient indications were found by the Courts to be present to support the implication of a fideicommissum or direct substitution as the case may be in a number of Ceylon and South African decisions.

(iv) Van Leeuwen in his Censura Forensis (but not in his later Roman-Dutch Law) argued that, besides the relation of an ascendant and descendant, very clear indications aliunde are needed in order to support the inference of a fideicommissum (certae et evidentissimae conjecturae).

Van Leeuwen Censura Forensis 1.3.7.16.

24. If the view referred to in paragraph 23 (iii) above is accepted by the Board it is submitted that the appellants are entitled to

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succeed since (i) the testatrix made a gift by will to a descendant subject to a si sine liberis decesserit clause and (ii) there is the additional indication in clause viii (c) of the will that the grandchildren are to succeed if they survive their father.

25. A fortiori the appellants are entitled to succeed on the first view of the law, which had a great deal of support from the Dutch writers and cases. Even on the fourth view it is submitted that clause viii (c) of the will contains the certae et evidentissimae conjecturae which Van Leeuwen required in this passage.

26. Even in English Law the appellants would be entitled to succeed on the facts of the present case.

27. H.N.G. Fernando SPJ held for the respondent on the ground that no fideicommissum was created in favour of the appellants. He reached this conclusion because:-

p.71,lns.1-6 (i) he held that the property to which the testatrix's grandchildren would be entitled under clause viii (c) of the will meant the property to which they would be entitled as substitutes for their uncle or uncles under clause viii (b) and not property to which they would be entitled as substitutes for their father.

p.71,ln:19 p.72,ln:8 (ii) he declined to infer from the si sine liberis decesserit provision in clause viii (b) of the will an intention on the part of the testatrix to impose a fideicommissum in favour of her son's children and in reaching this conclusion pointed to the recent decisions of the Supreme Court of Ceylon in de Silva v. Rangohamy (62 N.L.R. 553) and Rasammah v. Govindar Manar (65 N.L.R. 467)

p.72,lns: 20-37. (iii) from the fact that clause vi of the will imposes an express fideicommissum in favour of the children of the testatrix's daughters he inferred relying on the

principle of construction "Expressio unius est exclusio alterius", that the testatrix would have imposed an express fideicommissum in favour of the children of her sons had she intended one.

(iv) he relied on the experience and reputation of the notary who drew the will as showing that he had not been instructed to subject the son's portions to a fideicommissum in favour of their children. p.72,ln:38. p.73,ln:7.

28. The appellants respectfully submit that the reasoning of the learned Judge was incorrect because:-

(a) with regard to the reason set out in paragraph 27 (i) above the property to which the testatrix's grandchildren 'would be entitled' under clause viii (c) of the will cannot be the property to which they might be entitled as substitutes for their uncle or uncles under clause viii (b). This is so because the grandchildren might not be entitled to any property as substitutes for their uncles, for example, if their uncles were still alive or had died leaving issue. In that case, on the construction adopted by Fernando SPJ, the testatrix's widowed daughters-in-law would receive no income, whereas it was clearly the testatrix's intention to make provision for her widowed daughters-in-law. Furthermore, on the learned Judge's construction, the phrase 'would be entitled' is inappropriate and should read 'might be entitled' in view of the fact that the grandchildren might, on that construction, be entitled to nothing.

(b) with regard to the reason set out in paragraph 27 (ii) above the cases cited by the learned Judge (Rasammah v. Govidar Manar 65 N.L.R. 467 and de Silva v. Rangohamy 62 N.L.R. 553) and the earlier Ceylon case which was followed in these cases (Asiathumma v. Alimanchy 1 A.C.R. 53) are not against the appellants for the following reasons:-

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(i) in none of them was there any indication, apart from the si sine liberis decesserit clause of an intention to benefit the grandchildren, whereas here clause viii (c) of the will contains such an indication;

(ii) in Rasammah's case there was no si sine liberis decesserit clause, but merely a permission given to the children of the settlor to make a gift or dowry in favour of their children;

(iii) in de Silva's case Fernando SPJ gave three reasons, apart from the authority of decided cases for not inferring an intention on the testator's part to impose a fideicommissum:

> firstly, that the ascendant might suppose that, apart from any fideicommissum, the grandchildren would benefit under the will of the deceased child or on his intestacy and was content that they should be provided for in this way.
>
> de Silva v. Ragohamy 62 N.L.R. 553, 556.

This reasoning is inapplicable to the present case. Here the testatrix intendent to benefit her widowed daughters-in-law underclauses viii (b) and viii (c). In order to achieve this, it was necessary that the children of her deceased sons should take under the testatrix's will (clause viii (c), last words) and not merely on their father's intestacy or under his will:

> secondly, that the ancestor may have intended that his child should be entitled to sell the property subject to the si sine liberis decesserit clause in the confident belief that he would be survived by children and that in that event no fideicommissum would take effect.

De Silva v. Rangohamy 62 N.L.R. 553, 556. Record

It is respectfully submitted that this reasoning is incorrect. However unlikely it may be that a fideicommissum will take effect, the holder of property subject to a fideicommissum can sell no more than his fiduciary interest in the property and cannot sell the property itself:

> thirdly, that the law is reluctant to disturb titles to land. In the present case, however, the most perfunctory investigation would have shown the purchaser of the land that it was subject to a fideicommissum either under clause viii of the will, or, if the purchaser thought that the title was derived from the Deed of Indenture and Award, under clause 11 (d) of the Deed of Indenture. The purchaser could not reasonably have supposed that he was obtaining a clean title and any policy in favour of protecting apparently clean titles to land is inapplicable to his case.
>
> De Silva v. Rangohamy 62 N.L.R. 553, 557.

(c) with regard to the reason set out in paragraph 27 (iii) above, one possible explanation of the different phraseology adopted in clauses 6 and 8 of the will is that in the case of the daughters the will directs the executor to convey to each of them on the occasion of their marriage property of a certain value by a gift inter vivos subject to a fideicommissum, whereas in the case of the sons there is a testamentary gift to them of the rest and residue of the estate in equal shares subject to one single fideicommissum (and not as many fideicommissa as there are sons) under which the children of the sons are beneficiaries - and the ultimate beneficiaries - so that in the event of the

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death of a son leaving children the share of that son is not freed from the bond of fideicommissum but passes to his children. This is a necessary implication from the fact that the testatrix has created a single fideicommissum in respect of the whole estate devised to the sone jointly. Otherwise on the death of each of the sons leaving children the property would be wholly freed from the fideicommissum and the children of the sons would get nothing under the fideicommissum.

Another possible explanation of the different phraseology adopted in clauses vi and viii of the will is that clause vi, relating to the testatrix's daughters, contains a restraint on alienation. According to a well-established principle of Roman-Dutch law a restraint on alienation is void unless the persons in whose favour it is to operate are clearly indicsted. For this reason too it was necessary for the draftsman of the will to create an express fideicommissum on the death of the daughters leaving children in clause vi, and unnecessary for him to do so on the death of the sons leaving children in clause viii, whichcontains no express prohibition on alienation.

(d) with regard to the reason set out in paragraph 27 (iv) above it is submitted that the Board should not speculate as to whether the notary in question had read the most recent decisions prior to 1910 and appreciated that there was a doubt as to the legal effect of a si sine liberis decesserit clause. Since an intention to benefit the children of sons clearly emerges from clause viii (c) it is profitless to inquire whether the notary in question also thought that such an intention would sufficiently be declared by clause viii (b) standing on its own.

29. The appellants humbly submit that the said judgment of the Supreme Court of Ceylon dated

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25th August 1965 should be set aside and the decree of the District Court of Kurunegala dated 18th January, 1962 restored for the following (amongst other)

R E A S O N S

1. BECAUSE the words of clause viii (b) of the will furnish an example of what in Roman-Dutch law is called a si sine liberis decesserit clause and that such a clause without more creates a fideicommissum in favour of the appellants who are the children mentioned in the condition, since the person whose death is in question was a descendant of the testator; or, in the alternative,

2. BECAUSE, apart from the fact that the de cujus was a descendant of the testator, only slight indications, which are present in this will, are required from other parts of the will or from the surrounding circumstances to support the inference that a fideicommissum was created in favour or the appellants who are the children mentioned in the condition; or, in the alternative,

3. BECAUSE, if very clear indications aliunde are needed in order to support the inference of a fideicommissum, such indications are present in this will;

4. BECAUSE, on the true construction of the will, it is clear that the testatrix intended her sons' children to be the ultimate beneficiaries of the properties devised to her sons;

5. BECAUSE, in reaching the conclusion that clause viii (b) of the will did not manifest an intention on the part of the testatrix to impose a fideicommissum in favour of her sons' children, the Supreme Court relied on cases which were wrongly decided or, in the alternative, inapplicable to the facts of the present case;

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6. BECAUSE the Supreme Court has misconstrued certain provisions of the will and failed to consider other indications in the will which support the inference that the testatrix intended to create a fideicommissum in favour of her sons' children;

7. BECAUSE the Moragolla Group of Estates (including, Raglan Estate) passed to the appellants father Richard Louis as his share of the estate of the testatrix under clause viii (a) of her will and the appellants are entitled to the said estate as fideicommissaries;

8. BECAUSE the purported sale of Raglan Estate by Richard Louis to one U.B. Senanayake in November 1951, whose title, if any, the respondent acquired on 9th August, 1952, was invalid or valid only to the extent that it passed to U.B. Senanayake and to the respondent not more than the fiduciary interest of Richard Louis in Raglan Estate which interest ceased on the death of Richard Louis in December 1954;

9. BECAUSE the judgment of the Supreme Court was wrong and ought to be reversed;

10. BECAUSE the judgment of the District Court was right and ought to be restored.

H.V. PERERA.

L. KADIRGAMAR.

A.R.B. AMERASINGHE

No. 23 of 1967

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

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- and -

A.M. LAIRIS APPU
(Defendant)
Respondent

C A S E

FOR THE APPELLANTS

Lodged the October, 1967.

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