1934 *Present :* **Dalton and Akbar JJ.**

SELLIAH PILLAI *v.* RUPASINGHE.

157—D. C. Colombo, 36,280.

Trust—Property devised to trustees under last will—To take charge of and improve—Property to devolve on sons after the happening of certain events—Sale by son before the event—Right of legatees to ask for title.

Where a person, by last will, appointed four of his sons as executors, to hold in trust all his moveable and immovable property, to take charge of and improve the same, and out of the income to support the wife and minor children in the manner therein directed; and where, by clause 5, it was further provided as follows : "that after my said two daughters are given in marriage and my said son Charles Albert attained his age of majority, my said executors shall divide all the remaining property, movable and immovable, into five equal shares and each of such shares shall devolve on the five sons",—

Held, that, after the events mentioned in clause 5 had taken place, the remaining property vested in the executors for the purpose of division among the five sons and that each of them became entitled to ask that a one-fifth share of the remaining estate be conveyed to him.

Held, further, that until the events had taken place none of the sons had any beneficial interest in any part of the estate.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera (with him *N. E. Weerasooria* and *D. W. Fernando*), for defendant, appellant.

A. E. Keuneman (with him *Nadesan*), for plaintiff, respondent.

Cur. adv. vult.

August 20, 1934. DALTON J.—

This appeal (No. 157) arises in a partition action relating to two lands called Pelawatta and Kongahawatta and together also called by the latter name. For convenience I will refer to them by that latter name. The plaintiff claims to be entitled to an undivided 1/5 share, allotting the remaining undivided 4/5 to the defendant, Edward Peter Rupesinghe.

A second appeal (No. 156) in the action D. C. Colombo, No. 36,279, between the same plaintiff and other defendants, relating to a land called Ketakellagahawatta, was before us to be heard at the same time, and the same questions arising for decision in this second appeal, it was agreed that the conclusions of the court in appeal No. 157 should be accepted as deciding the appeal in No. 156 also. The defendants in D. C. Colombo. No. 36,279, are (1) Richard Jacob Rupesinghe, (2) Charles Albert Rupesinghe, (3) Nancy Catherine Rupesinghe, and (4) Lloyd Daniels, a mortgagee of the first defendant. In that action also plaintiff claimed to be entitled to an undivided 1/5 share of the land, the subject of the action.

The ground upon which plaintiff's claim in D. C. Colombo, No. 36,280, to an undivided 1/5 share of Kongahawatta was based, was that this interest which he claimed was the 1/5 share of one Alfred Martin Rupesinghe. The plaint set out that one Simon Rupesinghe had been the owner of the whole land. He died on December 11, 1919, leaving a last will which was duly proved. It is pleaded that, amongst other provisions, by his will he devised this property to his five sons, Richard Jacob, Alfred Martin, John William, Charles Albert, and Edward Peter the defendant, in equal shares. This is repeated in the abstract of title attached to the plaint.

On April 9, 1927, Alfred Martin mortgaged a 1/5 share of the land, the subject of this partition action, together with a similar share in other properties, by deed No. 348 of that date, to one Don Walter Walpola. The latter on October 6, 1927, put the bond in suit and obtained a decree thereon on November 25, 1927. At the sale held in execution of the decree the 1/5 share was purchased by the plaintiff, and he obtained a transfer from the Court, dated December 21, 1928, for all the estate, right, title, and interest of Alfred Martin Rupesinghe in the said property.

The defendant pleads that at the time of the execution of the mortgage bond no part of, or share in, the land had vested in Alfred Martin personally as an heir of his father or devisee under the will, and that by his deed plaintiff obtained no title to the share he claims. Defendant further pleaded that this 1/5 share had come to him, but his counsel before us stated it was very doubtful if defendant could maintain that part of his plea in view of the provisions of section 50 of the Trusts Ordinance, 1917. He urged, however, that plaintiff could not succeed in his action and stated he would be satisfied if his action was dismissed.

The case turns upon the construction of the will of Simon Rupesinghe, about which there seems to have been a considerable amount of confusion. The will seems to be plain enough, so far as the question arising in this case is concerned. How the trustees were to carry out the trust with regard to the widow and invalid daughter, when the division of the estate provided for in clause 5 of the will was to take place, is another matter.

Simon Rupesinghe died on December 11, 1919, leaving property worth Rs. 70,000 (exhibit P 12), almost all immovable property. By his will (exhibit P 1 and probate P 2 produced by plaintiff) he appointed his four sons, Richard Jacob, Alfred Martin, John William, and Edward Peter as his executors. Clause 2 was as follows:—

> "I, the said testator, will and desire that after my death the whole of my property both movable and immovable whatsoever and wheresoever situate shall take charge of and be held by my said executors in trust and improve the same, and out of the income, rents, profits, and issues thereof they shall support and maintain my wife and my minor children as hereinafter mentioned and directed."

The original will is in English, but the slight errors in expression in this clause have given no difficulty; the words "shall take charge of" were doubtless meant to be "shall be taken charge of by"; "and improve" was meant to be "to improve" or "and to improve".

By clause 2 (*a*) the executors were directed to take care of the testator's widow and provide her with necessaries during her life. By clause 2 (*b*) they were directed to take care of and maintain the two minor daughters, Jose Charlotte and Emelia Grace, and provide a sufficient dowry for each at the time of their marriage out of the movable and immovable property of the estate. Claus 2 (*c*) directed them to provide for the maintenance, support, and keeping of Catherine, another daughter, who was an invalid and not expected to marry, during her lifetime, whilst by clause 2 (*d*) they were directed to maintain, support, and educate the minor son, Charles Albert, out of the income of the estate until he attains the age of majority.

The testator further stated that he left nothing to his daughter, Cecilia Mary, as he had otherwise provided for her on her marriage, but he left a small cash legacy to a niece for services and assistance she had rendered to the family.

By clause 5 the testator then went on to provide as follows:—

> "It is my will and desire that after my said two daughters are given in marriage as hereinbefore stated, and my said son Don Charles Albert Rupesinghe attained his age of majority, my said executors shall divide all the remaining property, movable and immovable, into five equal shares and each of such shares to be devolved and taken by each of the said five sons, Richard Jacob Rupesinghe, Alfred Martin Rupesinghe, John William Rupesinghe, Edward Peter Rupesinghe, and Don Charles Albert Rupesinghe, in shares and shares alike."

Clause 6 directed that the executors should not sell, mortgage, or in any other way alienate or encumber the landed property until they have divided and taken their share as provided. This provision would of course be subject to the direction to provide dowries for his daughters out of the movable and immovable property. There was some suggestion in the course of the argument before us that the provisions of this clause were of no force or effect, since, applying the law applicable to *fidei commissa*, there was here merely a bare prohibition without it being indicated

for whose benefit the prohibition was imposed in the clause. No other ground was advanced, however, to show that in the case of a trust, a trustee may not be bound by such conditions as have been imposed by the testator in this clause, and I am not satisfied that there is any foundation for the suggestion made.

It is material to note that at the time of the making of the will, of the four executors and trustees three were professional men and presumably making a living for themselves. Richard Jacob was a notary public, John William was a municipal inspector, and Alfred Martin was a proctor. The fourth executor, Edward Peter, the defendant in this case, is also a proctor and notary, but there is no evidence to show when he was admitted. This probably explains why the testator devised the whole estate to them as executors and trustees and gave them no interest in any other capacity until the happening of the events mentioned in clause 5, when the principal provisions of the trust had been carried into effect, although they were authorized as trustees to spend the income on the improvement of the properties.

The minor son, Charles Albert, is stated to have come of age in the year 1920 or 1921. The daughter, Jose Charlotte, was married in 1924, and, it is conceded, obtained a dowry of immovable property as provided in the will out of the estate. The dowry deed is not produced, but it is not suggested it was not a conveyance by the four executors and trustees under the will. Emelia Grace was married on August 4, 1927, and she and her future husband received a dowry consisting of immovable property from the four executors and trustees, the dowry deed being exhibit D 1 dated June 30, 1927. The deed recites that the marriage had been arranged and was to take place shortly, but the deed was to take effect after the solemnization of the marriage. The executors are sometimes described in the deed as executors and at other times as donors, and they convey the whole of the property dealt with, and not only an undivided share.

From these facts it will appear that the earliest date for the division, provided for in clause 5 of the will of the property then remaining belonging to the estate of the testator, was August 4, 1927. The executors were responsible, however, even after that date, for carrying out the terms of the trust, so far as they were required to provide for the care and maintenance of the widow and invalid daughter of the testator, who were still living at the time of the trial in the lower Court and are, so far as we are aware, alive to-day. The evidence does disclose some attempt amongst the sons of the testator to arrive at a division of the remaining property after August 4, and the whole of the remaining property, with the exception of some small shares, is stated to have been dealt with. The evidence on this point is not, however, very satisfactory, for there never seems to have been any statement drawn up setting out what movable and immovable property actually remained at that date, nor do the four executors seem fully to have understood either the conditions of the trust or their position under the will, in spite of the fact that at least two of them were proctors.

On October 12, 1927, three of the executors, John William, Alfred Martin, and Edward Peter, after reciting the will of their father but not

always correctly, executed the deed D 2 in favour of Charles Albert and his sister Catherine, the invalid. Why Robert Jacob did not join is not stated. The deed sets out that the conditions set forth in the will have been fulfilled and performed. This probably refers to the happening of the events provided for in clause 5. The three transferors, calling themselves donors, then state they are desirous of conveying a 3/5 share in the immovable property, the subject of the deed, to Charles Albert and his sister. Of this 3/5 share, 2/10 is declared to be the share of Charles Albert and 4/10 the share of Catherine. There is no definite explanation in the evidence as to why only 3/5 of the property in question was dealt with in this deed, but the explanation can, I think, be gathered from the position that seems to have been taken up at any rate at one point of time by the executors, to be as follows. They seem to have regarded themselves and the fifth son Charles Albert as being entitled after August 4, 1927, each to a 1/5 share in his estate. They did not deem any conveyance by the executors was necessary to give effect to that position. Since Richard Jacob did not join in the deed D 2, his supposed 1/5 share in this piece of property is not dealt with. Charles Albert himself, on this supposition, was entitled to a 1/5 share under the will, hence it would not be necessary to convey it to him in the deed. The inclusion of Catherine in the deed is not explained, for it is no part of plaintiff's case that she had any vested interest in the property under the will. It is suggested to us, however, that the conveyance of a share in this property to her is an attempt by the executors to carry out the trust imposed on them in the will, so far as she is concerned, by giving her an interest in the land, whence she could be maintained during her life.

A second transaction, which is also stated to be an attempt by the executors to give effect to the division they are said to have made after the happening of the events referred to in clause 5 of the will, is the conveyance to the present defendant, upon which he relies in this case. By the deed D 3 of January 12, 1928, three of the executors, namely, Richard Jacob, John William, and Alfred Martin, and the other son Charles Albert, purported to convey 4/5 of the land Kongahawatta, the land in dispute in this action, to Edward Peter. Charles Albert was not one of the executors, and hence it cannot be said he appeared in the deed in that capacity. It is noteworthy to observe in this connection that prior to August 4, 1927, the four executors, and they alone, had joined as transferors in the deeds that had been executed. Clause 5 of the will states the division is to be by the executors. In the recital to D 3, however, after reference to the will, it is stated that the testator bequeathed and devised all his property, movable and immovable, to the four transferors to D 3 (called therein donors) and to Edward Peter, subject to the conditions set out in the will. Sometimes they seem to have taken up the position that each of the five sons named had a vested interest under the will on the death of the father, at other times they take up the position that this interest vested in them on the happening of the events mentioned in clause 5. Even in this action when giving evidence, Edward Peter, the defendant, states that by this deed his four brothers conveyed to him their interests in the land, and being himself entitled to the remaining 1/5 share,

apparently under the will or by virtue of the provisions of clause 5, he was entitled to the whole land. His claim to the whole is put upon that basis, although that position is not now maintained.

I will now turn to the transaction by Alfred Martin Rupesinghe, as a result of which the plaintiff came to purchase the interest in the land which he now claims.

Alfred Martin was in financial difficulties, having borrowed money from Don Walter Walpola, also a proctor of this court, in the sum of Rs. 7,000 or Rs. 8,000. To secure this amount borrowed prior to the execution of the deed he mortgaged an undivided 1/5 share of Kongahawatta along with other lands on April 9, 1927. He consulted none of his brothers in respect of this transaction; in fact he seems to have intentionally kept them ignorant of it at the time, although they came to know of it later, after the action on the bond was filed by the mortgagee. His evidence is not very straightforward. He tried to make out, for instance, that the dowry deed D 1 was for a 4/5 share in the land dealt with, which was untrue. His explanation that he kept his brothers ignorant of his mortgage was because he had hoped to be able to pay it off. That certainly tends to show he had some idea that he had no right to mortgage any property at all. That the five brothers were, however, under the impression that the remaining estate vested in the five of them, each for an undivided 1/5, after the happening of the events provided for in clause 5, seems clear. These events had not, however, happened on April 9, 1927; hence probably the conduct of Alfred Martin in keeping his act from the others. There is evidence also to show that the mortgagee was qually secretive, although Edward Peter states that they had implicit confidence in him. Being himself a proctor in practice, he must of course have examined the alleged title of his mortgagor, and he was doubtless aware of the terms of the will, but he was not called to give evidence, although he was on the plaintiff's list of witnesses.

It is also somewhat remarkable that the mortgage was executed just before the marriage of the second daughter, although the loans had been made at earlier dates. It is probable that in April, 1927, negotiations had already commenced for giving the remaining marriageable daughter, Emelia Grace, in marriage. These negotiations, as a rule, take some little time, and they were concluded by June when the dowry deed D 1 was executed. The four executors seem to have at least appreciated their position at that date, for the four of them effected the conveyance as executors. The land was, however, one of those that had already been mortgaged on April 9, so far as an undivided 1/5 share was concerned, by Alfred Martin. He states in his evidence that the dowry deed was subject to the mortgage, although he admits it is not mentioned in the deed. There is, I think, no reason at all to doubt that the other executors were at that time ignorant of the mortgage by their brother.

After the execution of the mortgage to Don Walter Walpola, within six months the latter instituted an action on the bond. The plaint was filed on October 6, 1927, and summons ordered for November 25. On that latter date summons was reported served, the mortgagor consenting to judgment as prayed for with costs, and decree was issued in terms of the plaint. Defendant stipulated in his consent that writ of execution

should not issue for two months from the date of judgment, and to this th mortgagee agreed. On February 2, 1928, he applied for execution of his decree by the sale of the mortgaged properties, which was allowed, and the property was eventually sold on October 31, 1928, to the present plaintiff. He obtained transfer from the secretary of the Court (exhibit P 14) dated December 21, 1928, for all the right, title, and interest of Alfred Martin in the property sold. Upon the strength of that deed plaintiff claims in this action to be entitled to an undivided 1/5 share of the land he seeks to partition.

The plaintiff's case, as stated in the judgment of the lower Court, is that at the date of the mortgage, April 9, 1927, and in fact at the date of the testator's death, each of the five sons of the deceased was entitled to an undivided 1/5 share of the estate, that interest having vested in each of the five sons. The trial Judge seems to have accepted this construction of the will, for he states that at the time of the mortgage in favour of Walpola, Alfred Martin was "vested with the legal title as one of the executors, and he had a beneficial interest in one-fifth of the property as one of the sons, subject to the right of the executors to provide out of it the dowry of Emily Grace". He does not, however, decide the question of plaintiff's rights on this basis, as it seems he might have done on his view of the will, but he holds that the defendant is estopped from denying Alfred Martin's title. The reasons he gives for that conclusion are as follows. After the marriages of Jose Charlotte and Emilia Grace three of the five sons, including Alfred Martin and Edward Peter, as donors by the deed D 2 of October 12, 1927, and four of them as donors by the deed D 3 of January 12, 1928, purported to convey their rights as devisees under the will. As a result he holds that Alfred Martin and his donees under the two deeds (in D. C. Colombo, No. 36,280, the donee is Edward Peter, the defendant) are estopped from denying Alfred Martin's title at the date of the mortgage. I understood that counsel for plaintiff on the appeal did not support this latter conclusion, although of course he supported the judgment on other grounds.

I regret I am unable to agree with the trial Judge either upon his conclusion upon the question of estoppel, or his construction of the will.

By the first clause the whole of the estate of the deceased vested in the four executors, as trustees for the improvement of the property and to carry out the terms of the will. The legal ownership vested in them, and they were to hold it on the trusts set out. By clause 5 they were directed, on the happening of certain events, the last of which happened on August 4, 1927, to divide all the remaining property, movable and immovable, into five equal parts, an equal share to be taken by each of the five sons named. The vesting of a beneficial interest in the five sons is there provided for at a later date, and at that date they acquired the right of compelling, if necessary, the trustees to carry out in their favour the conditions of the trust. One reason for this doubtless was that until that date arrived, it was impossible to know what property remained for division amongst the five sons. The will is not clear, in the event of the division taking place, how the trustees were still to carry out the trust with regard to their widowed mother and invalid sister. This is a matter on which they might well have obtained the directions of the Court.

However that may be, even after the happening of the events mentioned in clause 5, and until the division did take place, the whole of the remaining estate was vested in the four trustees, who, subject to what I have said about the trust in favour of the widow and invalid daughter, held the remaining estate for the purpose of division amongst the five sons, and each of them became entitled to ask that a 1/5 share of the remaining estate be conveyed to him. Until these events at any rate had happened, it was impossible to say what property remained to be divided; and as I construe the will, none of the sons had any beneficial interest in any part of the estate of their father.

In the result, then, Alfred Martin, except as executor and trustee, had no interest at any time in the land now sought to be partitioned, and he had no interest in the land to mortgage. Even on the division of the estate amongst the five brothers of which he speaks, he makes it plain, I think, that he obtained only cash and no interest in any immovable property. The conveyance upon which plaintiff relies therefore conveyed no interest in this land to him, and therefore plaintiff has failed to establish his title upon which his action is based.

There was an alternative claim urged before us on behalf of the plaintiff, on the footing that since the grant of probate to the executors of the deceased had not been registered, the estate must be dealt with as on an intestacy, in which event Alfred Martin's share to the estate would vest in him at the date of the death of his father.

This question was not raised in the lower Court, until at the end of the trial, when counsel were addressing the Court, defendant's counsel for some reason or other suggested that the probate had not been registered. One infers from the judgment that it was then argued on behalf of the plaintiff that if that suggestion was correct, an intestacy would result. There is, however, no evidence on the point. An extract of encumbrances (exhibit P 3) was produced for the purpose of showing that the mortgage of April 9, 1927, was registered. That extract does not show any registration of probate, but it is not conclusive on the point, for it was not produced for this purpose. There is further no evidence to show how many children the deceased left, although he certainly left more than five, whilst plaintiff's claim, as made and fought in the lower Court, was that Alfred Martin obtained a 1/5 share under an alleged devise in his father's will, which 1/5 share he mortgaged to Walpola. There is no evidence before us to enable us to deal with this alternative claim, and I do not see that plaintiff has made out any case to enable him to have an opportunity to call evidence on this point now, assuming that it is available. There is nothing before us, however, to show it is available.

For these reasons the appeal must be allowed, and plaintiff's action must be dismissed with costs in both Courts.

AKBAR J.—I agree.

Appeal allowed.