[244] ORIGINAL CIVIL.

The 7th August, 1879.

PRESENT:

MR. JUSTICE MUTTUSAMI AYYAR.

The Administrator-General of Madras............Plaintiff

and

Lazar Stephen Lazar and others...........Defendants.*

Indian Succession Act, Sections 54, 86—Bequest to attesting witness—Release of debt to attesting witness—Trust for education of children.

A legacy to the attesting witness of a will is void under Section 54 of the Indian Succession Act, whether or not the attestation of the witness is indispensable to the validity of the will.

Where a testator directed that a debt due to him by an attesting witness of his will should not be claimed, demanded, or enforced, but that his wish was that the sum should be specially devoted to the education of the children of such attesting witness:

Held that there was no release of the debt or legacy to the attesting witness, but a valid trust in favour of the children.

THE facts and arguments in this case appear from the **Judgment** of the Court (MUTTUSAMI AYYAR, J.).

Mr. *Johnstone* for the Plaintiff.

The Advocate-General (Hon. *P. O'Sullivan*) for the first and second Defendants.

Mr. *Spring Branson* for the third Defendant.

Judgment:—This is a suit by the Administrator-General to have the estate of one Moses Kerakoose administered in this Court. The matters in respect of which directions are specially sought are—

I. Whether the legacy to Mrs. Joseph, the fourth defendant, is void.

II. Whether the debt of Rs. 18,000, due by the third defendant, Dr. *Joseph*, is released by the testator or bequeathed in trust for the education of his children.

III. Whether it is the interest of all parties concerned that the life policies, held by the testator as collateral securities for repayment of moneys lent by him and now in the hands of the Administrator-General, should be sold at once, and the necessity of keeping them up at the expense of the estate obviated.

[245] As to the first question. The testator died on the 12th January 1876 and made his last will and testament on the 7th May 1874, appointing the Administrator-General of Madras as its executor. Among others, the third defendant, who had married one of the testator's sisters, the fourth defendant, prior to January 1866, attested the will. In reference to the residue, the will directs that it be divided into three equal shares, that one of such shares be given to his (testator's) sister, the second defendant, one of such shares to his sister, the fourth defendant,and one of such shares to his executor, in trust, for the children of his brother, H. Kerakoose, and that such last-mentioned share be divided equally among the said children. It being conceded that the case is

*Civil Suit No. 208 of 1878 on the Original Side of the High Court.

governed by the Succession Act, the question for decision is—Whether the bequest to Mrs. Joseph is void. Section 54 declares that though a will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or appointment, to any person attesting it or his wife, the bequest or appointment shall be void so far as concerns the person so attesting or the wife of such person. This section is apparently taken from 1 Vic., Ch. 26, Sec. 15, which contains a similar prohibition, though under the Succession Act, witnesses who may attest a codicil may legally claim the legacy which they cannot do under the English Statute. On referring to the history of legislation in England on this subject, I find that the last-mentioned Statute is almost a copy of the Stat. 25, Geo. II, Ch. 6, except that the earlier Statute did not contain the words "to whose wife or husband," and apply to wills of personal estate.

In *Doe* v. *Mills*, 1 Mood. and Rob., 288, *see* Williams on Executors, vol. 2, p. 1054 (ed. 73), which was decided upon the earlier Statute by the Court of Common Pleas, Lord *Denman* held that the Statute made void a devise to an attesting witness, although there were three other attesting witnesses to the will. This case is an authority for the position that the prohibition is operative, whether or not the attestation of the witness is indispensable to the validity of the will.

Again, in *Wigan* v. *Rowland* (11 Hare, 157), which was a decision upon the Statute of Victoria, Vice-Chancellor Wood held in the case of a will, which was attested by two marksmen and signed also by **[246]** two other persons as witnesses, that the signatures of the latter must be deemed to have been affixed in attestation of the will, and, therefore, that a legacy to the wife of one of them failed.

This decision seems to be exactly in point. The reason of this prohibition is not the incompetency to give evidence on the ground of interest which has ceased both in England and India to be a disqualification, but it is, I think, the suspicion or rather the chance of possible collusion which is favoured by the prospect of benefit. The extension of the prohibition to the wife seems to rest on the unity of interest or temptation between the husband and the wife. Whether I look to the wording of the Section 54, or to the cases decided in England under similar statutes, or to the reason of the rule, I feel bound to say that the bequest to the fourth defendant is void. It may be that this will does not need the third defendant's attestation to its validity, and that Dr. Joseph has attested it more from oversight than in contravention of the law, and that the rule of law may be a hardship in this particular case; but it should be remembered that the rule is based on public policy which regards the balance of aggregate good and evil in the largest number of cases than the justice of particular cases. The only further direction that is necessary in connection with this bequest is that it should be dealt with under Section 95 as if it were not disposed of by the testator.

As to the second question. It is directed by the will that the debt due and owing to the testator by his brother-in-law, the third defendant, amounting to Rs. 18,000 or thereabouts, shall not be claimed, demanded, or enforced, but that his (the testator's) wish is that that sum should be specially devoted by the said third defendant to the education of his children. It is argued by the learned Counsel for the first and second defendants that this clause creates no trust in favour of the third defendant's children—first, because the term 'wish' is not sufficient for the purpose; second, because the words 'education and children' are too vague to render the trust, if any, capable of execution; and

third, because the clause in the will amounts upon its true construction to a release by will. From the cases cited in *Knight* v. *Knight*, 3 Beav. 148 it will be seen **[247]** that, as a general rule, when property is given absolutely to any person and that person is by the giver recommended, entreated, requested, or wished to dispose of that property in favour of another, the recommendation, entreaty, request, or wish is held imperative, and, therefore, to create a trust. But this rule does not apply when it appears clearly from the context that the first taker is in any way to have an option to control or defeat the desire expressed [*Malim* v. *Keighley*, 2 Vesey J., 333)]. The principle is that the question is one of construction as to the intention of the testator, and that the term 'wish' imports a trust, unless the context shows (which is not the case in this suit) that a discretionary power is given to withdraw any part of the fund from the object of the wish. As regards the term 'children,' I need only refer to Section 86 of the Succession Act, which gives the expression a precise meaning. It is also proved that the third defendant had, at the testator's death, several children, who were not past the age for education. In *Foley* v. *Parry* (5 Sim., 138) where the testator expressed it to be his particular wish that his wife together with another should superintend and take care of the education of his grand nephew, the Vice-Chancellor held that the words of request were as much words of legation as a direct gift, and that they amounted to a gift to the person in whose favour the bequest is made of the expenses of his education. In this case the will contained the additional words "so as to fit him for any respectable profession or employment," but this does not seem to me to make any difference, inasmuch as the testator in the case before us may be reasonably presumed to have intended that the third defendant's children should receive such education as is usually given by a parent in Dr. Joseph's social position. As to the contention that the words amount to a release by will, I do not think that it is at all well-founded. The debt is not released in terms, nor are the words 'it shall not be claimed, demanded, or enforced' inconsistent with a gift intended for the benefit of the third defendant's children. Far from these being any intrinsic evidence clearly expressive of an intention to release, I think that there is a clear indication of an intention to convert it into a fund for the education of the fourth defendant's children.

[248] It is true that a release by will is a legacy, and that a legacy to an attesting witness is void; but there is no release in this case. I am therefore clearly of opinion that the clause in dispute creates a trust in favour of the third defendant's children.

As to the third question, it appears that at his death the testator left several policies of insurance on the lives of persons who were indebted to him and are still indebted to his estate. These policies were held by him as security for debts due by such persons, and they amount, in the aggregate, to Rs. 1,38,500; and it is stated that some of them are on the lives of persons who are now of considerable age. The plaintiff has realized the greater part of the estate of the testator, which consisted of moveable property and outstandings, and has paid all legacies payable under the will, and has now in his hands belonging to the estate the sum of Rs. 33,700 in securities of the Government of India, while the premium payable half-yearly out of the estate amounts to Rs. 2,800. It is urged for the first and second defendants that it would be a ruin it keep them up, and that the estate may be lost in six or seven years. It is urged for the plaintiff, who is also trustee for the minor children of the testator's brother, that it is expedient to sell them. On the other hand, it is urged for the third defendant that it is doubtful whether adequate price can be had at Madras; that the state of the accounts should be

ascertained, the age of the children of the testator's brother should be considered; that Rs. 30,000 have fallen into the estate by the policies being kept up; and that a sale *ought to be directed, if a reasonable price* can be secured. It is also stated in the plaint that these policies may have to be returned to the debtors if they should pay their debts and claim back the policies. In this state of facts and arguments the question for decision is whether the sale of the policies is manifestly a benefit to all the parties interested in the will.

I think that it is expedient to sell the policies, save those which are on the lives of persons who are of considerable age. The premium which has to be paid amounts to Rs. 5,000 odd per annum, and unless a sale is directed there is the risk of the estate being lost in seven or eight years. Of the parties interested under the will the second defendant suggests the sale, the plaintiff considers it expedient, and the third defendant has no interest in his own right. In the case of policies on the lives of men advanced in **[249]** age, the prospect of their falling in is not remote, and when they fall in, the gain may be considerable, and it may not be desirable that this should be lost to the estate. It is also necessary that in selling the policies a special arrangement should be made as to the place and mode of sale so as to secure the best price. For this purpose it will be necessary to take an account, in view to determine which of the policies it is more a benefit than a loss to keep up, and to direct an inquiry as to the arrangements to be made regarding the place and mode of sale.

Declare, therefore, that according to the true construction of the will, the debt of Rs. 18,000 or thereabouts due to the testator by the third defendant was given to the said defendant in trust for the expenses of the education of his children, and that the children he had or has were and are entitled thereto from the date of the decease of the testator until they attain the age of 18, the education being such as is usually given to children in their position in life; that in the case of daughters their education is to cease on their marriage if it takes place before they are 18 years of age.

Declare, also, that the bequest of one-third share of the residue to the fourth defendant, Mrs. Joseph, is void, that it should go to the next-of-kin of the testator as if undisposed of. Declare, further, that it is beneficial to all the parties concerned to sell some of the policies of insurance on the lives of persons who are indebted to the estate, subject to the arrangements to be made as regards the place and mode of sale, in view to secure adequate price for them.

Refer it to a Judge in chambers to inquire who are the next-of-kin of the testator entitled to the one-third share of the residue given by the testator to Mrs. Joseph, the fourth defendant, and declared herein to be void, and in what shares it is to be distributed among such next-of-kin if there are more than one.

Refer it further to a Judge in chambers to inquire which of the policies it is beneficial to the estate to keep up and what arrangements ought to be made regarding the place and mode of sale, so as to secure the best price for their taking such accounts as may be necessary for that purpose.

Costs of all parties to come out of the estate.

Solicitors for Plaintiff, *Barclay* and *Morgan*.

Solicitors for first and second Defendants, *Tasker* and *Wilson*.

Solicitors for third Defendant, *Branson* and *Branson*.