"by persons alleged by the contending respondents (plaintiffs) to "be their lessees or tenants under their lessees."

This second appeal coming on for final hearing upon receipt of the above finding the Court delivered judgment as follows :—

JUDGMENT :—The findings are against the plaintiffs. It is objected that the District Judge declined to issue a commission for the purpose of ascertaining whether there was any tree 50 years old on the spot in dispute. This application was not made until the re-hearing was closed, and the Judge observes that the Sheristadar and the Amshom. Menon, who inspected the locality, denied the existence of such a tree, and that none of the respondents' witnesses, except one, who is discredited, referred to its existence.

We accept the finding, and must accordingly reverse the decrees of the Courts below and direct that the suit be dismissed. The plaintiffs (respondents Nos. 1 and 2) must pay the costs of appellant throughout. The other respondents, who need not have appeared but have benefited by the appeal, will bear their own costs.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

ADMINISTRATOR-GENERAL OF MADRAS (PLAINTIFF),

1889. Dec. 19.

v.

WHITE AND OTHERS (DEFENDANTS).*

Will, construction of—Absolute gift—Repugnant gift over indefiniteness of gift—Reputed wife.

On the construction of a will which was as follows :—

"I hereby declare all former wills cancelled. I desire that my wife should "obtain possession of all my property and enjoy the benefit of all monies that "may accrue until her death, when I wish that whatever may remain shall be used "for the education of the children of the Eurasian and Anglo-Indian community. "I desire that this will be administered by the Official Trustee of Madras : "

Held,

(1) that the reputed wife should take under the will without strict proof of the marriage, no fraud being imputed to her in the matter of the marriage ;

(2) that the gift to the wife was absolute and the gift over bad for repugnancy.

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* Civil Suit No. 263 of 1889.

ADMINISTRATOR-GENERAL v. WHITE.

SUIT by the Administrator-General of Madras holding letters of administration (with the will annexed) to the estate of D. E. S. White, deceased, praying that the rights of the defendants under the will be declared and for directions.

The facts of this case and the arguments adduced at the hearing appear sufficiently for the purpose of this report from the judgment.

The *Advocate-General* (Hon. Mr. *Spring Branson*), for plaintiff.

Mr. *Johnstone* for defendant No. 1.

Mr. *R. F. Grant* for defendant No. 2.

Mr. *W. Grant* for defendants Nos. 3 and 4.

Cur. adv. vult.

JUDGMENT.—David Emanuel Starkenburgh White, a Eurasian inhabitant of Madras, made his last will and testament, dated 18th December 1888, in the following words :— "I hereby declare all "former wills cancelled. I desire that my wife should obtain "possession of all my property and enjoy the benefit of all monies "that may accrue until her death, when I wish that whatever "may remain shall be used for the education of the children of "the Eurasian and Anglo-Indian community. I desire that this "will be administered by the Official Trustee of Madras."

The testator died on the 1st February 1889. The Official Trustee declined to take out probate, and letters of administration with the will annexed were granted to the Administrator-General, who brings this suit to have the rights of the parties interested declared. Defendant No. 1 is the widow and defendants Nos. 2, 3 and 4 some of the next-of-kin of the testator. The question to be determined is whether, upon the true construction of the will, the widow takes an absolute interest in the whole of the testator's property, or only a life interest followed by a gift over for the charitable purpose indicated in the will. If the latter be the true construction, the gift over fails, because the provisions of section 105 of the Indian Succession Act as to charitable bequests were not complied with, and there is an intestacy as to the devolution of the property after the widow's death. For the widow it is argued that the words used amount to an absolute gift to her, and therefore the subsequent attempt to provide for the devolution of the property after her death is void as being repugnant to the absolute gift. For the next-of-kin the contention is that only a life interest is given to the widow coupled with a gift over to the charity, which

having failed by reason of non-compliance with the provisions of section 105 of the Succession Act, the next-of-kin take on the death of the widow. I am referred to English decisions upon the subject, amongst others, for the widow to *Henderson* v. *Cross*(1), *Bowes* v. *Goslett*(2), and *re Wilcocks' Settlement*(3), and for the next-of-kin to *Constable* v. *Bull*(4), *Bradly* v. *Westcott*(5), *Le Marchant* v. *Le Marchant*(6), *Bibbens* v. *Potter*(7). Some of these cases are rather difficult to reconcile, but I think the general principle of construction to be deduced from these and other cases —a principle intelligible and reasonable and which this Court should follow—is that where there is a gift which upon the face of it appears to be absolute, but subsequent provisions, either of the same will or by a codicil, show an intention to cut down the interest to a life interest, the Court reading the whole will or will and codicil together will allow the intention to prevail; but where there is an absolute gift in the first place and no subsequent words purporting to cut it down but provisions in favor of other objects purporting to limit or restrain the complete power of alienation or testamentary disposition of the first donee, or to compel the devolution of the property on the intestacy of the first donee otherwise than the law would prescribe, then such provisions are void as being inconsistent with and repugnant to the absolute gift to the first donee. Applying these principles to the present case, the first question to be determined is, do the words of the will purport to give an absolute interest in the property to the widow; for if they do, there is certainly nothing in the subsequent words to cut that interest down to a life estate, and I think that they do. The wife is to obtain possession of all the testator's property and enjoy the benefit of all monies that may accrue. The property consists chiefly of money with the testator's bankers, shares in various loan societies and companies, and money on deposit with them. Possession and enjoyment of the benefit of shares and money are equivalent, I think, to absolute ownership with full power of disposal and that such was the testator's intention is further manifested by the words following "until her death when I wish that *whatever may remain*;" what can these latter words

(1) 29 Beav., 216.
(2) 27 L.J. Ch. (N.S.), 249.
(3) L.R., 1 Ch. D., 229.
(4) 3 De G. & Sm., 411.
(5) 13 Ves., 445.
(6) L.R., 18 Eq., 414.
(7) L.R., 10 Ch. D., 733.

ADMINISTRATOR-GENERAL v. WHITE.

refer to except to the contingency that the wife might dispose of the whole or part of the property in her life time. It is true that in *Constable* v. *Bull* quoted above similar words were held not to imply a power of disposal in the donee, but in that case the property consisted partly of household leases held for terms of years and the Vice-Chancellor holding that without these words the gift was only of a life interest, considered that there were several meanings capable of being rationally attributed to those words which would be inconsistent with the construction giving to the widow the power of disposing of the property.

Here I can see no other rational construction of the words, but that they refer to the widow's power of disposal in her life time. It was pressed upon me in argument that the words "until her death" show an intention to give only a life interest. If they stood by themselves they doubtless would do so, but they must be read with the words following "when I wish that whatever may remain," and the preceding words "my wife should obtain possession of all my property after my decease and enjoy the benefit of all monies that may accrue." That the possession which the wife was to have was not merely possession for the purpose of administration of the estate is evidenced by the fact that testator intended the estate to be administered by the Official Trustee. I come to the conclusion that testator's intention was to give his wife absolute power of disposal over his property during her life time, but to provide that whatever she should not dispose of in her life time should go for the education of the Eurasian and Anglo-Indian community. This provision being repugnant to the absolute interest in the wife previously given is void, and the wife takes an absolute interest unfettered by any limitation of her power of disposal.

The attempted disposition of "whatever may remain," would I think also be void for indefiniteness.

I find that first defendant takes under the will of the testator an absolute interest in all his property with full power of disposal and issue that there is no valid gift over or residuary bequest after the death of the first defendant, and there will be a declaration to that effect. A question was raised as to the validity of the marriage of first defendant to testator as it appears she was married many years ago to a man named Jordian, who deserted her soon after the marriage and has not been heard of since. In the

view I take of the proper construction of the will it is necessary to consider this point. There can be no doubt that as testator's wife by repute first defendant is sufficiently indicated by the will, and the bequest to her is good in the absence of any suggestion that there was any fraud upon the testator in the matter of her former marriage. It is clear that he was fully cognizant of all the facts about it.

The costs of all parties to be taxed as between attorney and client will come out of the estate.

Branson and *Branson*—Attorneys for plaintiff.

Carr—Attorney for defendant No. 1.

D. Grant—Attorney for defendant No. 2.

Wilson and *King*—Attorneys for defendants Nos. 3 and 4.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

MADRAS BUILDING COMPANY (PLAINTIFFS),

v.

ROWLANDSON AND ANOTHER (DEFENDANTS).*

1890. April 30.

Transfer of Property Act—Act IV of 1882, *ss.* 78, 101—*Priority of mortgages—Gross negligence—Extinguishment of charges—Registration Act—Act III of* 1877, *ss.* 17(*d*), 48—*Notice by registration.*

In a suit for declaration of priorities of mortgages and for foreclosure, it appeared that the mortgage premises were mortgaged to defendant No. 2 in 1879 and to the plaintiff in 1883, and again in 1884, and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff and defendant No. 2 had no actual notice at the date of their mortgage and conveyance, respectively, of the previous incumbrances. The plaintiff received the title-deeds to the estate from the mortgagor on the execution of the mortgage of 1883; defendant No. 2 alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that previous to the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:

Held (apart from the question whether the mortgage of 1879 had been extinguished by the conveyance of 1886), that the conduct of defendant No. 2 in

* Civil Suit No. 8 of 1889.