ORIGINAL CIVIL.

Before Mr. Justice Wilson.

BALLIN *v.* BALLIN AND OTHERS.

1881
May 3.

Will—Gift to Children on their attaining twenty-one—Contingent Gift.

Where words of contingency form part of the description of the class of persons to take, as in the case of a gift to those "who shall attain the age of twenty-one," the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. In such a case there must be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction.

In the case of words of contingency occurring in the description of the class of persons to take, a mere gift over is not sufficient to change their meaning.

THIS was a suit brought on the 17th February 1879 for the construction of the will of one Anna Maria Ballin.

It appeared from the plaint that the testatrix died on the 18th July 1863, having made a will bearing date the 19th May 1863, and that her will was proved by the Administrator-General of Bengal, and contained, amongst other directions, the following clause providing for setting apart a portion of the rents of No. 30 Theatre Road towards satisfying a mortgage, and "after satisfaction thereof upon trust to pay the rents to my daughter Mary Margaret for life, with remainder to the use of the children of my said daughter, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares in fee-simple. But in the event of there being no child of my said daughter Mary Margaret, or no such child being a son or sons who shall attain the said age, or being a daughter or daughters who shall attain that age or marry and leave issue, to the use of the children of my daughter Esther Handley Eliza, the wife of William Hamilton Bartlett, hereinafter named, and the children of my son John James Graham Ballin, who being a son or sons shall attain the age of twenty-one years, or being

a daughter or daughters shall attain that age or marry, in equal shares in fee-simple." Mary Margaret Ballin, the tenant-for-life, died unmarried on the 13th March 1867, leaving the defendant Samuel H. G. Ballin (a lunatic), the plaintiff, and the defendant E. H. E. Bartlett, then the wife of the said William H. Bartlett, her next-of-kin, her surviving. At the time of the death of the tenant-for-life, the plaintiff had one child alive. Two others were born subsequently, and these children represented three of the infant defendants. Esther Handley Eliza Bartlett had two children, both alive on the date of the death of the tenant-for-life, *viz.*, the two remaining infant defendants.

Since the death of the tenant-for-life the Administrator-General had received the rents of the house No. 30 Theatre Road, and applied part of such rents to the maintenance of the children of the plaintiff and of Mrs. Bartlett, leaving the remaining portion to accumulate.

The plaintiff then brought this present suit against S. H. G. Ballin (the lunatic), Esther H. E. Bartlett and her infant children, one of whom had married in 1881, and his own infant children and the Administrator-General of Bengal, for the construction of the will, alleging an intestacy in respect of the rents of the said house between the date of the death of the testatrix and the date at which it might be held that the house became vested in any of the devisees under the will.

The lunatic defendant, by his guardian *ad litem*, alleged the intestacy before mentioned, and submitted his rights to the Court.

The defendant E. H. E. Bartlett, for herself and her children, alleged, that, on the death of the tenant-for-life, all the infant defendants took vested interests under the will, subject to their interests being divested, should they or neither of them being a son attain the age of twenty-one, or being a daughter attain that age or marry, and submitted that there was no such intestacy as alleged.

The children of the plaintiff, by their next friend, submitted their rights to the Court. The Administrator-General stated that his predecessor in office had applied the rents to the maintenance of the infant children as alleged, and that no other

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claim had been advanced, and submitted the construction of the will to the Court.

Mr. *Trevelyan* for the plaintiff stated, that the plaintiff was only interested as far as his children were concerned, and cited the following case—*Festing* v. *Allen* (1)—to show that the gift was contingent. [WILSON, J.—The judgment in *Festing* v. *Allen* (1) does not mean that the children must attain twenty-one during the lifetime of the tenant-for-life.] He further cited *Browne* v. *Browne* (2), *Brackenbury* v. *Gibbons* (3), *Mushett* v. *Eaton* (4), and *Newman* v. *Newman* (5).

Mr. *Allen* for the lunatic, the heir-at-law.—The gift is to a contingent class, and is very near to *Festing* v. *Allen* (1).* Where the time of payment is the essence of the gift, the bequest is contingent; he also cited *Hanson* v. *Graham* (6), *Lloyd* v. *Lloyd* (7), and 2 Jarman, pages 149, 157, as showing the construction to be given where the period of vesting is the period of distribution; and *Haughton* v. *Harrison* (8), as to the disposition of income before the contingent legacy vests; and *Shawe* v. *Cunliffe* (9), as showing that where a legacy depends on a contingency, the intermediate interest between the death of the tenant-for-life and the contingency happening, does not follow the principal, but falls into the residue, and if there is no residuary legatee as in the present case, then the heir-at-law will take.

Mr. *T. A. Apcar* for Mr. Bartlett and children.—These children were all born during the lifetime of the tenant-for-life, the class was therefore ascertained at the death of the tenant-for-life; but the distribution was postponed. *Festing* v. *Allen* (1) is now no authority; it has been disapproved of in *Jull* v.

(1) 5 Hare, 573.
(2) 3 Sm. & G., 568.
(3) L. R., 2 Ch. D., 417.
(4) L. R., 1 Ch. D., 435.
(5) 10 Sim., 51.
(6) 6 Ves., 239.
(7) 3 K. & J., 20.
(8) 2 Atk., 329.
(9) 4 Bro. Ch. Cases, 142.

Jacobs (1) and in *Browne* v. *Browne* (2). In *Riley* v. *Garnett* (3), the children were held to take vested equitable estates subject to be divested. This was long after *Festing* v. *Allen* (4). See also *Phipps* v. *Ackers* (5) and 2 Jarman, page 143, to show that children born before period of distribution are let in; and page 148, as to children born after that period. I submit that the interests were vested at the time of the death of the tenant-for-life.

Mr. *Sale* for the children of the plaintiff.—One of my clients was born before the death of the tenant-for-life, the other two after. I rely on the rule laid down in *Maseyk* v. *Fergusson* (6). That case was decided under the Succession Act; but Pontifex, J., held, that the Succession Act was nothing but English law codified. He further cited *Leake* v. *Robinson* (7), *Whitbread* v. *Lord St. John* (8), *Hoste* v. *Pratt* (9), *Gilmore* v. *Severn* (10), as showing that all the children were entitled.

Mr. *Stokoe* (with him Mr. *Collinson*), for the Administrator-General, cited *Bullock* v. *Stones* (11), *Glanvill* v. *Glanvill* (12), as to whether a future general devise carries income—*Gibson* v. *Montfort* (13), and contended that the implied trust was in favor of the children.

WILSON, J.—This is a suit brought to determine the construction of the will of Mrs. Anna Maria Ballin.

The will is prior to the Succession Act; and has, therefore, to be construed according to the rules of English law without reference to that Act.

The will is somewhat informally framed. It commences by

(1) L. R., 3 Ch. D., 703.
(2) 3 Sm. & G., 568.
(3) 3 De G. & Sm., 629.
(4) 5 Hare, 573.
(5) 9 Cl. & F., 583.
(6) I. L. R., 4 Calc., 670.
(7) 2 Mer., 363.
(8) 10 Ves., 152.
(9) 3 Ves., 730.
(10) 1 B. C. C., 581.
(11) 2 Ves., 521.
(12) 2 Mer., 38; 1 Jarman, 617, 618.
(13) 1 Ves., 485.

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certain specific bequests and devises. It proceeds: — "I bequeath the residue of my personal estate to the Administrator-General, upon trust, to stand possessed of my dwellinghouse and premises situate No. 30 Theatre Road," and another dwellinghouse, and the residue of the personal estate, upon trust, till a mortgage-debt was paid off, to pay a monthly sum to the testatrix's daughter Mary Margaret, and subject to that payment to apply the rents and profits in satisfaction of the mortgage. "And after satisfaction of the said mortgage-debt as to my said house and premises situate No. 30 Theatre Road, upon trust, to pay the rents and profits thereof to my said daughter Mary Margaret during her life, with remainder to the use of the children of my said daughter Mary Margaret, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares in fee-simple. But in the event of there being no child of my said daughter Mary Margaret, or no such child being a son or sons who shall attain that age, or being a daughter or daughters who shall attain that age or marry and have issue, to the use of the children of my daughter Esther Handley Eliza, the wife of William Hamilton Bartlett, and the children of my son John Graham Ballin, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares in fee-simple." Mary Margaret, the testatrix's daughter, died about 1860 unmarried. Mrs. Bartlett has had two children, both still living: William Pigott, born the 8th of February 1860; and Maud Mary, born the 23rd February 1862, and married the 26th January 1881.

John Ballin has had three children who are still living: Florence, born the 5th December 1865; Herbert Askin, born the 1st June 1867; and Cecil James, born the 18th October 1868.

The heir-at-law of the testatrix was her eldest son, the defendant Samuel Ballin, a lunatic. The plaint in this suit was filed on the 17th of February 1879.

The points for decision are, whether the gifts to the children of Mrs. Bartlett and John Ballin were vested or contingent

upon their attaining twenty-one; and in the latter case, who is entitled to the rents and profits in the meantime. 1881 BALLIN v. BALLIN.

A number of cases were referred to, in which words apparently importing a contingency have been held not to prevent the vesting of the estate; cases of gifts to a class of persons "on their attaining twenty-one," or when they shall attain twenty-one, or "if they shall attain twenty-one," in which, by reason of the context, the words, apparently of contingency, have been held only to apply to the period of enjoyment, not to the vesting, or else to create a condition subsequent, divesting the estate if the age be not reached. The earliest of these was *Boraston's case* (1). Among the latest are *Andrew* v. *Andrew* (2) and *Mushett* v. *Eaton* (3).

On the other hand, a series of cases have decided that where the words of contingency form part of the description of the class of persons to take, where, as in this case, the gift is to those "who shall attain the age of twenty-one," the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. Of this class of cases, *Festing* v. *Allen* (4) and *Bull* v. *Pritchard* (5) are leading cases. It is true that in *Browne* v. *Browne* (6), Stuart, V. C., refused to follow *Festing* v. *Allen* (4); and in *Jull* v. *Jacobs* (7), Malins, V. C., expresses disapproval of the same case. I think it clear, however, upon all the authorities, that in such cases there must, at any rate, be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction. This seems to be the view taken by Lord Hatherley in interpreting analogous words in *Williams* v. *Haythorne* (8). In the present case, looking only at the actual devise in question, that to the children of Mrs. Bartlett and of John Ballin, there is no gift over, and nothing in the context which can in any way control the natural meaning of the words of contingency.

The only doubt I felt during the argument arose in this way.

(1) 3 Rep., 19.
(2) L. R., 1 Ch. D., 410.
(3) L. R., 1 Ch. Div., 435.
(4) 5 Hare, 573.
(5) 5 Hare, 567.
(6) 3 Sm. and G., 568.
(7) L. R., 3 Ch. D., 703.
(8) L. R., 6 Ch., 782.

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The prior gift to the children of Mary Margaret Ballin is in the same terms. And in the case of that devise there is a gift which, it was argued on the authority of *Browne* v. *Browne* (1), is sufficient to vest the prior gift. And it was argued that the testatrix, using the same words twice in her will, must be presumed to use them in the same sense. I do not think this reasoning sound. If words acquire a special meaning by reason of their context, I do not think that meaning can safely be given them when used in a different context. Moreover, in my judgment the foundation of the reasoning fails. For I think the weight of authority is strongly in favor of the proposition, that in the case of words of contingency occurring in the description of the persons to take, a mere gift over is not sufficient to change their meaning.

I hold, therefore, that the gift to the children of Mrs. Bartlett and John Ballin was contingent, and that no son takes any interest till he attains twenty-one, and no daughter till she attains that age or marries. That being so, it is clear that, after the death of Mary Margaret Ballin, and so long as no child had reached twenty-one and no daughter was married, the rents and profits of the house in question belonged to the heir-at-law by reason of intestacy. The rule is clearly laid down by the House of Lords in *Countess of Bective* v. *Hodgson* (2). Upon Mr. Bartlett's daughter marrying, she became entitled to the rents. On the son attaining twenty-one, he became entitled to an equal share, and each of the children of John Ballin who reaches twenty-one, or in the case of a daughter, who marries, will become entitled to share equally with those already in enjoyment.

The costs of all parties will come out of the estate; and may be paid out of the estate which has been accumulated.

Attorney for the plaintiff: Mr. *Orr*.

Attorneys for the defendant, the Administrator-General: Messrs. *Sanderson & Co.*

Attorney for the defendant Mrs. Bartlett: Mr. *Harris*.

Attorney for the infant defendants: Mr. *Simmons*.

(1) 3 Sm. and G., 568. (2) 10 H. L. C., 656.