1922
February, 17.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MRS. L F. MARTEN (DEFENDANT) *v.* HIRDE RAM (PLAINTIFF) AND T MARTEN (DEFENDANT).*

Will—Construction of document—Omission of words limiting the estate which the testatrix apparently intended to bequeathe.

The will, executed in 1901, of a Mrs. M. J. Marten, purported to give to her two sons Harry Kenneth and Frederick William all her estates and effects in equal shares for their own use and benefit absolutely and for ever, and then proceeded :—

"I further direct that on the death of either of my sons above-named his share of the property herein bequeathed shall go in the first instance to his children and grandchildren, etc., in the direct line, if there be any at the time, but not to the widow or any other person, but, failing his children and grandchildren as aforesaid, the property herein bequeathed shall revert immediately to the children and grandchildren, etc., in the direct line, of the surviving son, and, failing the children and grandchildren, etc., of the surviving son, to the surviving son himself, and then ultimately failing him it shall revert to the widow or widows of both of the deceased sons."

"I further direct that if the said Harry Kenneth Marten and Frederick William Marten cannot live jointly and enjoy the estates herein bequeathed to them jointly, they will divide the property bequeathed into two equal shares and will enjoy their respective shares absolutely and as full owners for their lives and after that the property shall revert to their heirs in the manner and order indicated hereinbefore."

Both the sons died—Harry Kenneth in 1915 and Frederick William in 1917—without issue.

Held that, whatever may have been the intention of the testatrix, Frederick William took an absolute estate in the share which came to him on the death of his brother. *Byng* v. *Lord Strafford* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor* and Munshi *Bhagwati Shankar*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondents.

MEARS, C. J., and BANERJI, J.:—The decision in this appeal turns entirely upon the view which we take of the proper construction of the will of a Mrs. Margaret Jane Marten.

* First Appeal No. 289 of 1919, from a decree of Nitya Nand Pande, Subordinate Judge of Dehra Dun, dated the 9th of April, 1919.

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The following table will make clear the relationship of the Marten family :—

Thomas Sinclair Marten = Margaret Jane Marten testatrix: died December 10th, 1915.

Harry Kenneth Marten, married, childless, died December 23rd, 1915.	= Lily F. Marten, Appellant (defendant in suit).	Frederick William Marten, died unmarried, August 20th, 1917.

The testatrix and her husband had been separated for many years. The will was executed on the 2nd of November, 1901. It at first purports to give to her two sons Harry Kenneth and Frederick William all her estates and effects in equal shares for their own use and benefit absolutely and for ever. Certain immovable property is then more specifically set out. Then the will proceeds :—

"I further direct that on the death of either of my sons above-named his share of the property herein bequeathed shall go in the first instance to his children and grandchildren, etc., in the direct line, if there be any at the time, but not to the widow or any other person, but failing his children and grandchildren as aforesaid, the property herein bequeathed shall revert immediately to the children and grandchildren, etc., in the direct line, of the surviving son, and failing the children and grandchildren, etc., of the surviving son to the surviving son himself and then ultimately failing him it shall revert to the widow or widows of both of the deceased sons . . ."

"I further direct that if the said Harry Kenneth Marten and Frederick William Marten cannot live jointly and enjoy the estates herein bequeathed to them jointly, they will divide the property bequeathed into two equal shares and will enjoy their respective shares absolutely and as full owners for their lives and after that the property shall revert to their heirs in the manner and order indicated hereinbefore."

Whatever interest the deceased may have thought she was conferring in the earlier part of the will, there can be no doubt that this later clause was the governing one and, therefore, cut down and defined the interest of her two sons as a life interest only. Neither Harry Kenneth nor Frederick William had children or grandchildren, and on the death of Harry Kenneth

on the 23rd of December 1915, the property bequeathed to him passed to his brother Frederick William.

That latter gentleman had in his life-time, namely, on the 8th of July, 1916, and the 23rd of June, 1917, mortgaged part of the property which came to him under the will. After his death the plaintiffs sued defendant No. 1 as administratrix and as being in possession of the property and defendant No. 2 as his heir.

If Frederick William obtained on his brother's death an absolute right to his brother's one-half share, then the plaintiffs would succeed in the action. If he got a life-interest only, then the property would be freed from the mortgage on the determination of his life-estate. The learned Subordinate Judge decided that the interest acquired was an absolute one. The appellants have laid emphasis on the fact that the husband and wife were not on good terms and that the whole structure of the will shows that it was the intention of the testatrix to carve out a series of life-estates so that under no assumable possibility could her husband come into any share of her property. On the other hand, Mr. *Sital Prasad Ghose* contended that the death of Harry Kenneth brought about a complete determination of any life-estate and that the next donee took absolutely. For this proposition he relied upon the use of the word "failing" and that passage in the will which says that "the property herein bequeathed" shall revert &c., and the case of *Byng* v. *Lord Strafford* (1) He argued that "failing" meant a skipping over of several successive classes if in pursuing the order of succession ordained by the will any should be found not to be in existence or to have ceased to exist. Thus in the actual circumstances the children of both Harry Kenneth and Frederick William were necessarily passed over as non-existent, the "property bequeathed", *i. e.* the absolute interest in the one-half share, came to Frederick William and the widow of Harry Kenneth only came in if there had been at the death of Harry Kenneth no one of the persons in existence who by the terms of the will took precedence of her.

Whilst we are aware that the construction of any particular document is rarely aided by referring to a judicial construction

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of another document, we are impressed by the case of *Byng* v. *Lord Strafford* (1).

In general outline it bears a striking similarity to the case under discussion and the same question, as to whether an absolute estate or a life-interest was taken after the determination, in that case of two life-estates, was considered.

The facts were that the Earl of Strafford gave by his will a life-interest in all his personal landed estates (apart from some absolute gifts) to the Countess of Strafford for life and then to Lady Anne Connolly for her life "and then to the eldest son of George Byng, Esq., of Wrotham Park and afterwards to his second, third or any later sons he may have by my niece Anne, Mrs. Byng, and then to the eldest son and other sons successively of the Earl of Buckingham by my niece Caroline."

The plaintiff was the eldest son of George Byng and, therefore, the first legatee. The court decided that the subject of the gift was the whole interest of the testator, there being no words directly limiting the extent of interest which the legatee was to take, and declared the plaintiff entitled absolutely to the property the subject of the previous life-estates. The next of kin argued that for the purpose of giving effect to the intended succession, the will ought so to be construed as to limit in some way the interest of Mr. Byng and those who were to succeed him and that that restriction must be by successive estates for life. At page 566 the Master of the Rolls said:—

> "If a testator uses words, which by their plain import give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees in a manner incompatible and inconsistent with the property plainly given to the first, will not authorize the court to alter the effect of the words by which that property is given."

The Master of the Rolls pointed out that the testator, when desiring to give to his wife and Lady Anne Connolly estates for life, stated the intention in plain terms. That the gift to Lady Anne Connolly was preceded by the word "afterwards," as was also the gift to the second, third or any later sons of George and Anne Byng. He added that the insertion of the words "for life" in the gift to Lady Anne Connolly showed that the testator did not consider that the words "afterwards" and "then" had of themselves sufficient force to limit the interest given to the eldest son to a mere life-interest.

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There is a clear analogy between the case now under our consideration and that of *Byng* v. *Lord Strafford* (1).

Mrs. Marten the testatrix created in clear words two life-estates in equal shares of the property bequeathed. After their determination she chose first the children or grandchildren of the deceased son; secondly the children or grandchildren of the surviving son, then the surviving son and, finally, the widows of both the sons. She, therefore, as in *Byng* v. *Lord Strafford*, (1) had in view a succession of legatees or interests after the first in the series.

In both cases the gift to the eldest son of George Byng and to Frederick William Marten was not limited as was the original bequest by the words "for life" or any equivalent words.

We are, therefore, of opinion that although the testatrix may have intended to create a succession of life-estates, she has nevertheless failed to use words imposing any restriction and, therefore, the ordinary rule in such cases must be implied and the share of the estate which came to Frederick William on the death of his brother, must be declared to be an absolute one.

We, therefore, affirm the decision of the lower court and dismiss the appeal with costs. From the costs incurred by the respondent in printing the paper book two-thirds should be disallowed on the ground that evidence irrelevant to this appeal was included.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.

EMPEROR *v.* O. DUNN.*

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Criminal Procedure Code, section 423—Revision—Powers of High Court—Power to order expunction of remarks from judgments of lower courts when such judgments are not directly before the High Court by way of appeal or revision.

The High Court has no power to expunge from the judgments of lower courts remarks reflecting unfavourably upon the credibility or the character of witnesses, in cases in which the effective orders of the courts are not before the High Court either in appeal or on revision. *Mehi Singh* v. *Mangal Khandu* (2)

* Criminal Reference, No 743 of 1921.

(1) (1843) 5 Beavan, 558. (2) (1911) I. L. R., 39 Calc., 157.