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IN THE MATTER OF THE PETITION OF MOHESH CHUNDER KHAN.

as the one to be maintained in possession under s. 530, although such possession has never been acquiesced in, and the struggle for it is in fact that which caused him to interfere. This is an error. The Magistrate must look to possession which may be termed peaceful. He must go back to the time when the present dispute originated, and not to the result of the dispute itself.

The Magistrate's course in this case was a very simple one, but unfortunately he has misapplied the power given by the law, and given support to a deliberate attempt by Khethernath to enforce his own claims by the high hand.

The order of the Deputy Magistrate must be set aside.

Order set aside.

ORIGINAL CIVIL.

Before Mr. Justice White.

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Nov. 20.

IN THE MATTER OF THE WILL OF C. M. HUNTER (DECEASED)

AND

IN THE MATTER OF ACT XXVIII OF 1866.

Will—Vested Interest—Divesting—Executory Trust.

H., by his will bequeathed to his daughter *A. M. H.* "on her attaining her 18th year, the sum of company's rupees 10,000, with any interest that may have accrued thereon, if she marries, to be settled upon herself and children solely; should she die unmarried, her money to be equally divided between her brothers; and if either of them die, the whole of deceased's money to go to the survivor."

Held, that *A. M. H.* (who had attained her 18th year) had a vested interest in the legacy subject to be divested upon her dying at any time unmarried, and further, subject to an executory trust in favour of her children in the event of her marrying at any time, and therefore that she was not entitled to have the capital of the legacy paid to her.

THIS was an application by the Administrator-General of Bengal, under Act XXVIII of 1866, s. 43, for the opinion of the Court.

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The facts of the case appear sufficiently from the judgment.

Mr. *Agnew* for the Administrator-General.

Mr. *Jackson* for Anne Margaret Hunter.

WHITE, J.—The Administrator-General of Bengal, who is the executor of the will of Charles Marley Hunter, applies, under s. 43 of Act XXVIII of 1866, for the opinion and direction of the Court touching the following bequest contained in the will:

"I bequeath to my daughter, Anne Margaret Hunter, on her attaining her 18th year, the sum of Co.'s rupees 10,000, with any interest that may have accrued thereon, if she marries, to be settled upon herself and children solely; should she die unmarried, her money to be equally divided between her brothers; and if either of them die, the whole of deceased's money to go to the survivor."

The daughter was a minor at the date of the will and also of the testator's death. She is now about 24 years old, and unmarried. She claims to be entitled to the legacy absolutely, and to have the same, both principal and arrears of interest, paid into her own hands by the Administrator-General.

If I may read the bequest, affixing to the words employed their natural and ordinary sense, there are two obstacles in her way: *first*, the gift over in the event of her dying unmarried; and *2ndly*, the direction that the fund shall be solely settled upon herself and her children in the event of her marriage.

Her counsel, however, contended, that the law did not permit me to carry out what appeared to be the plain and obvious meaning of the testator.

There was, he urged, a hard-and-fast rule of construction adopted by the Courts at home, by force of which the gift over did not take effect unless the death of the daughter, whilst unmarried, occurred before she attained her 18th year,—that is to say, before the legacy vested. The rule referred to is that mentioned in Jarman on Wills, 2nd volume, page 626 (2nd edition), *namely*,—"where a bequest is simply to A, and in case of his death, or if he die, to B, A surviving the testator takes absolutely." The gift over in the present case is not upon the sim-

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ple contingency of the daughter dying, but the double contingency of her dying and also not being married at the date of her death. The reason given for the rule in Jarman does not apply to a double contingency; and although some of the Courts at home at one period were inclined to extend the rule to such a case, the House of Lords in two recent decisions have authoritatively laid down the law otherwise. The decisions are *O'Mahonoy* v. *Burdett* (1) and *Ingram* v. *Soutten* (2). It is there decided that words introducing a gift over in case of the death, unmarried or without children, of a previous taker, indicate, according to their natural and proper meaning, death, unmarried or without children, at any time, and that this ordinary literal meaning is not to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper. In the bequest before me there is no context which renders it either necessary or proper to depart from the ordinary and literal meaning of the language employed.

As regards the direction to settle the fund, the legatee's counsel argued, *first*, that the direction is only to apply in case the daughter married before attaining her 18th year. The natural sense of the words points to a marriage at any time in the same way as the words introducing the gift over point to a dying unmarried at any time; and I can find nothing in the language used which would restrict the natural sense of the words. Again, the limited construction contended for supposes that the testator intended that the legacy should vest in his daughter if she married before she reached her 18th year. There are no words in the bequest from which such an intention can be inferred, and to give to it such a construction would require the addition of words to the testator's language, and the bequest to be read as if the legacy had been directed to vest at the age of 18 or marriage. It is in the *second* place argued, that the direction to settle was nugatory, and in no way affected the interest which the daughter took in the legacy. For this position a case was cited—*Samuel* v. *Samuel* (3)—decided in 1846 by the Vice-

(1) 44 L. J., Ch., 56 (note), S. C., L. R., 7 H. L., 408.

(2) 44 L. J., Ch., 55; S. C., L. R., 7 H. L. 388.

(3) 9 Jurist, 222.

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Chancellor of England. The testator there willed his property to be divided among his four children,—two of whom were daughters,—and, after various instructions to the guardians of his children, wound up by directing that all monies inherited by his daughters under the will should be placed in the hands of trustees appointed by the guardians, to be settled on them for the sole use of themselves and their lawful issue. The Vice-Chancellor held that one of the daughters, who was a petitioner before him, took an absolute interest in her share. I own that I do not quite understand the decision, or the ground on which it proceeded. As far as I can gather it, the Vice-Chancellor appears to have considered that the word "issue" was a word of limitation, and merely descriptive of the quantity of the interest which the legatee took. If that be the *ratio decidendi*, the case does not apply, for in the bequest before me the term is "children" and not "issue," and moreover the word "use" is not introduced. The report, however, of the judgment is extremely brief, consisting only of a few lines, and the decision is not easy to reconcile with others that have preceded and followed it. In *Young* v. *Mackintosh* (1), where a testator left to his daughter Jane £2,000 to be settled on her when she married, "or to be paid to her on her attaining 21, should she die not leaving issue, the £2,000 to fall into the residue," the same Vice-Chancellor in 1843 directed a proper settlement to be made on the daughter and her children. He remarks in his judgment that "the proviso, should she die not leaving issue, is incapable of being taken in connexion with the direction to pay the legacy to the daughter on her attaining 21, but it may be taken in connexion with the direction to settle it; and in my opinion it means that the issue of the daughter shall be objects of the settlement." This case does not appear to have been cited in *Samuel* v. *Samuel* (2). In *Loch* v. *Bagley* (3), where a testator had left his personal estate to his wife for life, with remainder to his children equally, and a direction that "the girls' shares should be settled strictly," the Master of the Rolls ordered a settlement to be made on a daughter of the testator and her children, although the direction to settle contained no reference to children, but only to a strict settlement.

(1) 13 Sim., 445. (2) 9 Jurist, 222. (3) L. R., 4 Eq., 122.

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On the other hand, in a case before Bacon, V.-C.—*Magrath* v. *Morehead* (1)—where a testator divided his property into nine shares, and gave to each of his two daughters 1½ shares, with a simple direction that the latter should be settled on themselves at marriage, the Vice-Chancellor held that it was an absolute gift to the daughter. In the judgment he says:—"I do not find any gift over, any reference to grandchildren, or any intimation in the language of the will of an intention to restrict the gift to a life-interest." In the bequest with which I have to deal, there is a reference to grandchildren, and a decided expression of intention to restrict the gift to the daughter in certain events; and her children were, I think, intended to benefit by the bequest in the event of her marriage. There seems to be no good reason why the direction of the testator, as regards a settlement, should not be carried out if the legatee marries, and the weight of authority is in favour of effect being given to the direction.

It results that, in my opinion, the daughter has a vested interest in the legacy, subject to be divested upon her dying at any time unmarried, and further subject to an executory trust in favor of her children in the event of her marrying at any time, and that consequently the daughter is not entitled to have the capital of the legacy paid to her.

The legacy appears, by the petition of the Administrator-General, to have become reduced in some way or other, and to be now represented by Rs. 6,800 in Government securities.

I direct the Administrator-General, subject to the provision I am about to make for the costs, to retain these securities in his hands, and not to part with them or any of them without the order of Court, but he will pay half-yearly to the legatee the annual income of the securities.

The taxed costs of the Administrator-General, and of the legatee who appeared before me, will be paid out of the fund in the hands of the Administrator-General, and I authorise him to sell so much of the Government securities as are necessary for the payment of these costs.

Attorney for all parties: Mr. *Fink*.

(1) L. R., 12 Eq., 491.