Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Macpherson.

1894
March 16.

HALIBURTON *v.* THE ADMINISTRATOR-GENERAL OF BENGAL AND OTHERS.*

Will—Construction of Will—Joint tenancy in fee—Life estate—Intention of testator—Restricted enjoyment, Direction as to.

A testator devised his estate, should his wife remain his widow, for the general benefit of his wife and her child then living, and any other children to be born to him of his said wife before or after his death. He also provided that should his wife remain his widow, she should have a full life-interest in the estate, and should not be annoyed with any vexation about shares during her lifetime, but that after her death her children and their descendants should take *per stirpes;* and in the event of his wife not remaining his widow and her child or children being living, then the estate should go for the general benefit of his children in equal shares when of the age allowed by law. And in the event of his said wife contracting a second marriage, and his children dying before marriage and without children and under age, his wife should take half of his estate and the testator's brother the other half, and in the event of the brother dying without children, the testator's wife should take the whole estate.

The testator's wife remained his widow until her death, her children having all predeceased her without being married.

Held, that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift.

SUIT for the construction of the will of Henry Adams, deceased, and for a declaration of the plaintiffs' rights thereunder.

Henry Adams, an inhabitant of Calcutta, died on the 17th May 1845, possessed of considerable property in the 24-Pergunnahs, and leaving him surviving his widow Mary Henrietta, a half-brother Frederick Broadhead, and two children by his said wife, named respectively Mary Harriet and Emily Frances; and having made his last will and testament on the 30th April 1844, the material parts whereof are as follows:—

1. "I devise my estate contained in potta No. 2 called Dampia Abad as follows:—Firstly, in the event of my wife, Mary Henrietta, remaining my widow, that the estate shall be for the general benefit of herself and my child

* Original Civil Suit No. 66 of 1893.

Mary Harriet, and any other child or children which may be born of my body through her either before or after my death, and also that my wife Mary Henrietta, should she remain my widow, shall have the full life-interest in my estate, and shall not be annoyed with any vexation about shares during her lifetime, but after her death any child or children which she may have, born of my body and who shall be surviving at the time of her death, or should any of them have been married and died leaving children lawfully begotten, shall share in this manner, *viz.*, my children male and female shall have equal shares, and in the event of the before-mentioned occurrence happening, *viz.*, any of these children dying previously to my wife Mary Henrietta, their children, if they leave any lawfully begotten, shall enjoy their parents' share (meaning that one child's share)."

2. "In the event of my wife Mary Henrietta not remaining my widow but marrying again, and my child Mary Harriet shall be living, and any other child or children which my aforesaid wife Mary Henrietta may bear of my body either before or after my death, then the estate is to be for the general benefit of my children born through her, male and female, to be entitled to equal shares when of the age allowed by law. And as I propose making my wife Mary Henrietta an executrix, her power after her second marriage shall wholly and entirely cease over this property, and that power shall solely remain with the Registrar of the Supreme Court."

3. "In the event of my child or children dying before marriage and without children and under age, and my wife Mary Henrietta should have contracted a second marriage, then I will that the aforesaid Mary Henrietta shall have one-half of my property, and Frederick Broadhead, now a Master in the Pilot Service, or in the event of his death his children lawfully begotten, who may survive, shall have the other half; and in the event of his dying without issue prior to such occurrences taking place, then my present wife the aforesaid Mary Henrietta shall have the whole."

Probate of the will was taken out by the widow and the Registrar of the Supreme Court on the 23rd May 1845.

The testator's daughters Mary Harriet and Emily Frances died on the 25th May 1846 and on the 10th February 1862, respectively, neither of them having been married.

In 1852 the potta referred to in the will was surrendered to the Government, and a fresh potta was granted to Mary Henrietta, her heirs, executors, administrators and assignees. Subsequently the property included in the potta was disposed of, and at the time of suit stood represented by a sum of Rs. 1,30,000 in the hands of the Administrator-General of Bengal.

Frederick Broadhead, the half-brother of the testator, died in the year 1846, having on the 29th June 1844 made and published

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his last will, whereof he appointed his widow Mary Sophia (who had been his second wife, and who at the time of suit had intermarried with one J. S. Sherman,) executrix, and leaving him surviving by her two sons Juba Theodore Broadhead and Edward Harriss Broadhead, and by his first wife a daughter named Eleanor, who was living at the date of suit and who had issue, a daughter and two sons, one of whom and the daughter were also said to be alive at the time of suit.

Juba Theodore died on the 6th November 1891, and on the 21st January 1892 the Administrator-General obtained letters of administration to the estate.

Mary Henrietta died in England on the 14th April 1892, without having intermarried with any person after the death of the testator, and having made her last will, whereby she disposed of all property of which she died possessed or entitled to, to one Arthur Lawrence Haliburton, the plaintiff in this suit.

The suit was one on the Original side of the Court, a special Bench of two Judges having been appointed for the hearing. The question arising in it was what was the nature of the estate given to Mary Henrietta by the first 3 paragraphs of the will of Henry Adams, the plaintiff claiming that upon its true construction the sum of Rs. 1,30,000 formed part of the estate of the said Mary Henrietta Adams at the time of her death, and that by her will she had disposed of the same in his favour.

The *Advocate-General* (Sir *Charles Paul*) and Mr. *O'Kinealy* for the plaintiff.

Mr. *Phillips* and Mr. *Graham* for the Administrator-General as representing the estate of Juba Broadhead.

Mr. *Pugh* for E. H. Broadhead.

Mr. *Henderson* and Mr. *Peacock* for the Administrator-General as representing the estate of the testator.

Mr. *Evans Pugh* for Mrs. Sherman.

Mr. *O'Kinealy*.—It is the case of all parties that the pottas formed part of the estate of Henry Adams after they were renewed. The first part of paragraph 1 of the will gives an estate to his widow and children as joint tenants, and widow takes by survivorship. The second part of that paragraph is said to cut

down the first part, but by that part he merely intended that his widow should not be bothered with shares and accounts. He did not thereby intend to exclude the children; it merely provides for the administration and management of the estate during her lifetime. If it meant a life estate only to the widow, it excludes the children during her lifetime; the testator intended that if the children should survive, they should take, but if the widow should survive the children, she should take. By the 2nd paragraph if the widow re-marries during the lifetime of his children and their issue she is to get nothing at all, but by the 3rd paragraph if she survived the children and their issue and married again she was to get half, or the whole if she survived the half-brother. I submit that the first clause of paragraph 1 is sufficient to dispose of the absolute interest in favour of the widow and children as joint tenants and to prevent an intestacy in every event not expressly provided for by the superadded provisions depending upon particular contingencies, and consequently as she has not re-married she is entitled to the whole estate by reason of her having survived her children; this construction is confirmed by the use of the words "and also," which introduces the clauses of modification, and by the fact that the testator provides for no other contingency but her re-marriage, and even in that event she is to take half the estate; it cannot be supposed he intended she should take more, if she married again, when there were no issue, than she would if she remained his widow. I submit the words "and also" mean that the previous gift is to stand.

The construction contended for has been put upon similar wills, *Whittell* v. *Dudin* (1) where the introductory words are "subject nevertheless;" in the present case the words are "and also," as though the testator contemplated hardly making a difference with the clause before them. See also *Mayer* v. *Townsend* (2), *Winckworth* v. *Winckworth* (3), *Hulme* v. *Hulme* (4), *Campbell* v. *Brownrigg* (5), *Lassence* v. *Tierney* (6).

Mr. *Phillips* for the Administrator-General.—The will is not expressed with exactitude. Provision is not made for every

(1) 2 J. & W., 279.
(2) 3 Beav., 413.
(3) 8 Beav., 576.
(4) 9 Sim., 644.
(5) 1 Phill, 301.
(6) 1 M. & G., 551.

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contingency that might take place. If the will is to be construed as the other side suggest, the widow would have a preference to the half-brother. The widow has a full life interest, and nothing more. The words "general benefit" mean nothing more than "as I am about to describe"; the words "and also" are merely equivalent to the word "namely." Even if all the children died, what is there to give the widow a larger estate? The interest given her cannot be a joint tenancy in fee with the children, because each of them might have severed their shares, and in such case the widow would have been "annoyed about shares." I submit the widow has an estate for life with remainder to the children; the testator has not provided for all his children not dying in the lifetime of the widow and his widow not re-marrying; he did not contemplate his children would die before his wife in the early part of the will. In the 3rd paragraph, he did not contemplate the death, but the re-marriage, of the widow. There is no more reason for supposing that the widow had the whole of the estate before the devise given by the 3rd paragraph than there is for considering that the half-brother had the whole in him. The 3rd paragraph merely puts the wife and half-brother on an equality. There is nothing in 2nd and 3rd paragraphs inconsistent with the wife having a life interest only. Nor is there anything to guide us as to the intention of the testator in the events which have happened. The rule as to avoiding intestacy does not mean that you are to introduce a new disposition which goes beyond the testator's disposition, but the meaning of the rule is that testacy is only preferred to intestacy when there are two doubtful constructions to be put on a will, and in no case could it be applied in determining whether the testator meant to give his property to his wife or to his half-brother. *Lett* v. *Randall* (1) is the case as to this rule.

Here there is no doubt as to the words of the disposition, and there is no such gift to the widow solely as would give rise to rival constructions; there is a direct gift to wife for life and remainder to children. The gift to the children's children in the 1st paragraph is fatal to the contention that the widow and children took a joint estate in fee. Nor does the 3rd paragraph

(1) 10 Sim., 112.

favour the view that she had the full estate given her by the 1st paragraph. The only case in which the widow is to take the whole estate is that under paragraph 3. In *Newill* v. *Newill* (1) the words "for use and benefit" of wife and children are used, and it was held that the wife and children took as joint tenants, but Lord Hatherley laid it down that although the ordinary construction of a gift to a wife and children would give a joint tenancy, yet if there is anything in the will which can indicate a different intention it must be followed. One of such indications is when the children are to take shares in the fund or when the fund is secured. Here the will gives indications that a joint tenancy was not intended. The cases cited by the other side do not apply. They are all cases in which it was found that the testator wanted to separate a fund or share from his estate, something to go out, and not come back. In the present case the words referring to the children's shares and the gift to children's children would have to be cut out, if the 1st paragraph gives a joint tenancy in fee. The gift to the widow and children was not a gift for the benefit of the widow; the children would appeal to the testator most, as shown by the clause as to wife's re-marriage. The cases cited by the other side assist me so far as to there being a direct gift to the children; and early vesting is favoured; these interests were to be vested at latest at marriage or majority, and all the subsequent provisions are for the enjoyment of the shares. I submit the will gives a direct gift to the wife of a full life interest with a remainder to the children as tenants in common. There was an immediate vesting in the child that was alive at the time.

It is impossible for a man to give a joint tenancy in fee and to say that there is to be no vexation about shares, as this would be contradictory, but it is possible if a life interest only is given. I submit there is no intestacy, and the widow took only a life estate. The expression regarding age refers not to vesting, but to enjoyment. The cases on this subject are all collected in 2 Jarman on Wills, 5th Ed., 1239.

Mr. *Pugh* for E. H. Broadhead.—*Newill* v. *Newill* (1) shows that where there is an indication of an intention to give a widow an

(1) L. R., 7 Ch., 253.

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estate for life, the Court will not on a gift to her and her children give more to her than a gift for life. *Dungannon* v. *Smith* (1) shows how wills of this description should be construed. A joint tenancy is no more favoured by law than an intestacy; it cannot be invoked if the context shows it was not intended. The gift here is one to the widow for life only. The cases cited for the plaintiff are gifts of funds separated, gifts to individuals, not to a class, as in this case. As to the alleged ultimate remainder to widow, see *Lassence* v. *Tierney* (2), *Joslin* v. *Hammond* (3), *In re Richards* (4), and *Houghton* v. *Brown* (5).

Mr. *O'Kinealy* in reply.

The Court (PETHERAM, C.J., and MACPHERSON, J.) delivered the following judgments:—

PETHERAM, C.J.—The plaintiff is one of the executors of Mary Henrietta Adams, who died in the month of April 1892; the defendants are the Administrator-General of Bengal and the surviving relatives of Henry Adams, who died in 1845, and who was the husband of Mary Henrietta Adams; and the action is brought to construe the will of Henry Adams, and to obtain possession of his estate from the Administrator-General, on the ground that in the events which have happened the whole of his estate became the absolute property of his widow, and passed by her will to the plaintiff, who is her executor and the residuary devisee under her will.

Henry Adams made his will on the 30th of April 1844, and died on the 17th of May 1845, leaving a widow and two infant daughters, both of whom died infants and unmarried, the first on the 25th of June 1846, the second on the 10th of February 1862. The widow lived until the 14th of April 1892, but never married again.

The will of Henry Adams provides for three events. First, that of his wife remaining his widow; second, that of her marrying again and his children being alive; and third, that of her marrying again and his children being dead. The event which did happen

(1) 12 Cl. & Fin., 546.
(2) 1 M. & G., 551.
(3) 3 My. & K., 110.
(4) 50 L. T., 22.
(5) 53 L. J. Ch. (N. S.), 1018.

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was the first, *i.e.*, his wife remained his widow until her death; but in order to ascertain what was the intention of the testator in this event we must look at the whole will.

The will commences:—I devise my estate, &c., as follows:—

First, in the event of my wife "Mary Henrietta remaining my widow, that the estate shall be for the general benefit of herself and my child Mary Harriet, and any other child or children which may be born of my body through her, either before or after my death." It then goes on to provide that the testator's wife, should she remain his widow, shall have the full life-interest, and shall not be annoyed with any vexation about shares during her life-time, but that after her death his children and their descendants shall take the estate between them *per stirpes*. The question is whether this was an absolute gift of the estate to the widow and children jointly, with restrictions as to their mode of enjoyment of the gift, in which case the widow not having married, and having survived her children, all of whom died unmarried, took the whole estate, and it passed by her will to the plaintiff, or whether it was a gift of a life estate only to the widow, with remainder to her children and their descendants, in which case in the events which have happened the whole estate has not been disposed of by the will, the estate on the death of the widow passed to the heir-at-law of Henry Adams, and the suit must fail: *Lassence* v. *Tierney* (1). If we look at the portion of the will which I have already quoted above, it may no doubt be contended with much force that it indicates no intention on the part of the testator that his widow should take more than a life-estate, and that he was not when he wrote this portion of his will contemplating the extinction of his own descendants in the life-time of his widow; but when we look at the subsequent provisions of the will, and as I have said before we must look at it all to ascertain what his intentions were, it is, I think, apparent that he did contemplate the extinction of his descendants in her life-time, and did intend that in that event she should take more than a life-interest in his estate. The third event for which he provides is that of his widow having re-married and her children being all dead, and in

(1) 1 M. & G. 551.

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that case he gives half the ultimate interest in his estate to his half-brother Frederick Broadhead, and his children, and the other half to his wife, and if his half-brother is dead without issue, he gives the whole to his wife. It is, I think, impossible to suppose that he intended to give the ultimate estate to his widow if she married again and to deprive her of it if she remained his widow, and consequently I think that, reading the will altogether, it appears that it was his intention by the first devise to give the estate to his wife and children jointly, and that what follows was merely intended to restrict the mode in which they should enjoy it.

For these reasons I am of opinion that the plaintiff's suit must be decreed, but as the meaning of the will is obscure the costs of all parties, including costs of applications which have been reserved, should be paid out of the estate.

MACPHERSON, J.—I agree as to the construction of the will. The Administrator-General as representing the estate of Henry Adams will get his costs out of the estate as between attorney and client.

Attorneys for plaintiffs: Messrs. *Sanderson & Co.*

Attorney for Mr. Sherman: Mr. *A. E. Harris.*

Attorneys for the Administrator-General: Messrs. *Morgan & Co.*

T. A. P.

PRIVY COUNCIL.

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*P. C.** 1893 *Nov.* 15, *Dec.* 9.

ABDUL WAHID KHAN (DEFENDANT) *v.* SHALUKA BIBI AND OTHERS (PLAINTIFFS).*

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Pre-emption—Pre-emption among co-sharers under the Oudh Laws Act, (XVIII of 1876), ss. 9 to 13—Pre-emptor's right, as such, dependent on the intending vendor's right to sell—Accounts between co-sharers—Contribution, right to, for expenses of suit.

Pre-emption, as declared in the Oudh Laws Act, 1876, is not applicable where the co-sharer claiming it denies the title of the co-sharer proposing

* *Present:*—LORDS HOBHOUSE, MACNAGHTEN, and MORRIS, and SIR R. COUCH.