ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

THE ADMINISTRATOR-GENERAL OF BENGAL *v.* APCAR.

1878
April 4 & 9.

Will, Construction of—Absolute Gift—Interest drawn by subsequent provision for enjoyment of such gift—Intention of Testator.

Where a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee, and where such objects fail, the absolute gift prevails and does not fall into the residue of the testator's estate. Therefore, where a testator gave legacies to certain of his grandsons and granddaughters, but nevertheless declared that such legacies should be held upon trust (as to the legacies to the grandsons) to invest the same and to apply the income during the minority of the legatee towards his maintenance and education, and upon his attaining the age of 21 years to pay him the income during his lifetime, and after his death to pay such income unto the widow of such grandson, and after the death of both of them to transfer the capital unto the child or children of such grandson as being a son or sons should attain the age of 21 years, or being a daughter should attain that age, or marry in equal shares as tenants-in-common; and where the testator especially provided as to the legacy left to one grandson that upon the happening of certain events it should be paid to his other grandchildren, *Held*, that the gifts to the grandsons were absolute, and that the subsequent provisions were simply a qualification of the gifts for the benefit of the legatees; and that, therefore, upon the death of one of the grandsons unmarried, his legal representative was entitled to the legacy left to him.

Lassence v. *Tierney* (1) and *Kellett* v. *Kellett* (2) followed.

IN this case the Administrator-General of Bengal, as legal representative of Paul Apcar, who had died intestate and unmarried in June 1877, sued the defendants as executors of the will of Aratoon Apcar. The testator had died many years ago, and the plaintiff claimed payment of a legacy of Rs. 20,000, to which he contended the estate of Paul Apcar was entitled under his will. The defendants, however, stated that, as the will in question did not direct how the legacy bequeathed to Paul Apcar was to be disposed of in the event of Paul

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dying without issue and without leaving a widow, they were advised not to make over the same to the plaintiff without a decree of Court.

The clause of the will relating to the matters in question was as follows:

"I give to each of my grandsons and granddaughters (sons and daughters of my deceased son Apcar Arratoon Apcar) *viz.*, Arratoon Apcar, Gregory Apcar, Alexander Apcar, Paul Apcar, Cachtick Apcar, Johannes Apcar, Sarah Amelia Apcar, and Hanudi or Anne Apcar, now the wife of Mr. G. A. Bishop, the sum of Rs. 20,000. Nevertheless, I declare that the said shares or legacies of each of my said grandsons and granddaughters shall be held by my trustees upon the trusts hereinafter declared concerning the same respectively, that is to say, as to the legacies of each of my grandsons upon trust to lay out and invest the same in the purchase of Government or Parliamentary stocks or funds in India, or Great Britain, or in Bank of Bengal shares or in or upon any mortgage of freehold estate in Great Britain or within the Town of Calcutta or on loan to the firm of Messrs. Apcar & Co., on their own personal security, with power from time to time to vary such investments and during the minority of such grandson in the discretion of my said trustees to apply all or any part of the annual produce and income arising from the said investment in or towards his maintenance or education or otherwise for his benefit and to accumulate the unapplied income. But such accumulations are nevertheless to be paid and applied to or for the future benefit of such grandson, and, after such grandson shall have attained the age of 21 years, to pay the income arising from the said investment to him, during his lifetime (subject nevertheless as to the legacy of my said grandson Arratoon Apcar, to the proviso hereinafter contained), and after the decease of such grandson, to pay the said income unto any wife of such grandson who may survive him during her life, and after the decease of both of them the said grandson and any wife of his who may survive him upon trust to transfer the capital of the said share, and the funds and securities whereon the same may be invested,

unto such child or children of such grandson, as being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age or marry, in equal shares, as tenants-in-common, for the absolute use and benefit of such child or children respectively. The testator then made a limitation over of the legacy to his grandson Arratoon Apcar, and also provided that the trustees should be at liberty if they thought fit to transfer the legacies left to the granddaughters to separate trustees.

Mr. *J. D. Bell* (with him Mr. *Ferguson*) for the plaintiff, contended, on the authority of *Lassence* v. *Tierney* (1), that the legacy to Paul Apcar was an absolute gift, and that therefore on his death it did not revert back to the testator's general estate. That the provisions relating to this legacy only showed how it was to be enjoyed by the legatee and in no way cut down the previous absolute gift. The following cases were cited: *Campbell* v. *Brownrigg* (2), *Martin* v. *Martin* (3), *Randfield* v. *Randfield* (4), *Crozier* v. *Crozier* (5).

Mr. *T. A. Apcar*, for the defendants, argued that Paul only took a life-estate in the Rs. 20,000 and, as he died without leaving a widow, the legacy had now lapsed unto the testator's general estate. He further argued that the case of *Lassence* v. *Tierney* (1) did not apply, as that was a case relating to females, whereas the present was one concerning males; and that a testator might well provide that a legacy to a woman should rest in trustees, but there would be no need for such precaution in case of legacies to males. He cited the following cases: *Scawin* v. *Watson* (6), *O'Mahoney* v. *Burdett* (7), *Whittell* v. *Dudin* (8), *Joslin* v. *Hammond* (9).

Pontifex, J.—I think that the gift of this legacy of Rs. 20,000 to Paul Apcar, deceased, falls within the rule that, if

(1) 1 M. and G., 551.
(2) 1 Phillips, 301.
(3) L. R., 2 Eq., 404.
(4) 8 H. L., 225.
(5) L. R., 15 Eq., 282.
(6) 10 Beav., 200.
(7) L. R., 7 H. L., 388.
(8) 2 Jac. and W., 279.
(9) 3 M. and K., 110.

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a testator leaves a legacy absolutely as regards his estates, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee upon failure of such objects, the absolute gift prevails—*Lassence* v. *Tierney* (1). In that case, however, Lord Cottenham qualified the rule by adding that the intention of the testator was to be collected from the whole will and not from words, which, standing alone, would constitute an absolute gift, and in that case he found words in other parts of the will which made him decide that the gift in that case was not an absolute one. In *Kellett* v. *Kellett* (2) the rule referred to cases approved and confirmed. In the present case the gift in the first instance is an absolute one, and the subsequent provisions are simply a qualification of the gift for the benefit of the legatee; and so far from finding in any other point of the will any indication of intention on the part of the testator that the gift should not be an absolute gift, I think, on the contrary, that the fact that the testator does make a limitation over of one of their legacies, namely, the legacy to his grandson Arratoon, shows that he intended the other legacies to be absolute, and I think such intention is further indicated by the provision respecting the legacies to the granddaughters under which the executors are empowered to transfer the granddaughter's legacies to separate trustees, which shows that it was the intention of the testator to separate the legacies from his general estate. The Administrator-General is therefore entitled to the legacy of Rs. 20,000 left by the testator to his grandson Paul. Costs of all parties, as between attorney and client, to be paid out of the Rs. 20,000.

Attorney for the plaintiff: Mr. *Carapiet.*

Attorney for the defendants: Mr. *Dover.*

(1) 1 M. and G., 551. (2) L. R., 3 H. L., 160.