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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

GOSAVI SHIVGAR DAYAGAR AND GOSAVI JAGDEVGAR SHIVGAR
(Plaintiffs), Appellants v. L. W. G. RIVETT-CARNAC
(Defendant), Respondent.* [1st September, and 12th
October, 1888.]

Will—Construction—Vesting—Postponement of enjoyment—Accumulation until the age of thirty.

The testator by his will constituted his two disciples, S. and J. (aged eighteen and eleven years respectively), his heirs, "subject to the conditions written below," and he directed that out of the net income of his estate, his trustees should expend Rs. 500 every year for the maintenance of each disciple, or pay that amount to each disciple every year, and that when J. should attain the age of thirty years the trustees should give to J. the net residue of his property remaining at that time, or, in case of J.'s decease, should give the same to S.

Held, that the property vested in J. on the testator's death, but only for a life estate.

Held, also (reversing the decision of Jardine, J.) that the directions for postponement of enjoyment after the coming of age of the devisee must be disregarded, and that (subject to the payment of Rs. 500 a year to S.) the income of the property, including all income accrued since his majority, must be paid to J., the respondent retaining the *corpus* until J. should attain the age of thirty years.

Gosling v. Gosling (1) followed.

[F., 24 C. 44 (52); Rel., 15 Ind. Cas. 575; R., 26 B. 319 (322).]

THIS was a suit for the purpose of having the will of one Gosavi Kasigarji Saigarji construed, and the rights and interests of the plaintiffs in his estate ascertained and declared.

[464] Gosavi Kasigarji Saigarji, a Hindu inhabitant of Bombay, died on the 21st March, 1878 leaving a will dated the 4th February, 1878, of which he appointed Gosavi Kasigarji Hiragarji and Sha Govindram Luchmidas executors and trustees. Probate of the said will was obtained on the 22nd June, 1878. The testator left him surviving no issue, but the plaintiffs were his disciples and heirs according to Hindu law.

The testator left property, moveable and immoveable, of the value of Rs. 90,000, or thereabouts.

On the 1st of December, 1880, the said trustees retired from the trusts of the said will, and made over the property, of the testator to the defendant, the Administrator General of Bombay, who continued to administer the same, and to pay to each of the plaintiffs a yearly allowance.

At the date of suit the plaintiff Gosavi Shivgar Dayagar was of the age of twenty-eight years, and the plaintiff Gosavi Jagdevgar Shivgar of the age of twenty-one years.

The material portions of this will were :—

"6. There are my sons (*i. e.* disciples) two persons; namely Gosavi Shivgar Dayagar and Gosavi Jagdevgar, the former of whom is now of the age of about eighteen years and the latter is now of the age of about

* Suit No. 259 of 1887; Appeal No. 597.

(1) Johns., 265.

eleven years. I have constituted them my heirs, subject to the conditions written below.

"7. Out of the net income of my estate my said vakils and trustees are to give both my said disciples a good education, and are to make an outlay, to the extent of Rs. 500 every year, for the maintenance of each disciple, or to pay that amount of money to each disciple every year.

"8. When my said disciple, namely Gosavi Jagdevgar, shall attain the age of thirty years, and at that time should my said vakils and trustees, in their opinion and view, find that my said disciple has become fit to manage all worldly affairs and to carry on business transactions, and should he observe my religious faith, in that case only my said vakils and trustees shall give to the said disciple the net residue of my property remaining at that time. But subsequently thereto should any of the following [466] events occur, namely, should the decease of my said disciple take place, should that disciple, behaving in a wicked manner, deteriorate or waste my property, or should he relinquish my religious faith and subject himself to another strange religious faith, then at that time my said trustees are to prevent him, as soon as practicable, from doing so, and are to get him to walk in the right path; but notwithstanding such measures being taken should that disciple walk in a bad path,—that is to say, act in an adverse manner, then my said trustees and their representatives are to recover from the said disciple the whole of my estate by means of the law, and Rs. 2,000 out of the same are to be paid to the said disciple as for a gift to him, on a release in all respects being obtained from him, and besides that no other claim of his of any kind whatever shall prevail against my estate, or my said vakils and trustees. And I hereby direct my said trustees as follows:—On my property coming back into their possession agreeably to what is written above, should they in their minds verily believe or think that my other disciple, named Gosavi Shivgar Dayagar has reformed his conduct in all respects, and that he has become fit to carry on and manage business in all respects, and that he observes my religious faith, then the said residue of my property remaining at that time is to be given to that disciple. But after their having acted in that way should the decease of that disciple take place, or should my trustees find the conduct of that disciple to be like the bad conduct of my said disciple named Gosavi Jagdevgar, then they are quickly to recover from him the remaining residue of my said property, and having obtained from him a release in full acquittance in all respects of his claims upon my estate, they are to pay him Rs. 2,000 as a gift, and in his place, that is, instead (of him), my said vakils and trustees are to appoint another good respectable disciple, such as they may see fit, for the purpose of perpetuating the memory of my name; and on his attaining the age of thirty years, and on his becoming and being found to be fit to carry on all business, and to observe my religious faith, the remaining residue of my property is to be given into his possession; and until he shall attain the said age he is to be educated out of the net income of my estate, and for his maintenance Rs. 500 every year are to be spent out of the [466] net income of my estate, or the same are to be paid to him if they should see fit, and on his attaining the said age he may enjoy the said property."

The suit came on for hearing before Jardine, J., who on the 10th September, 1887, found that the second plaintiff was not entitled to possession until he should attain the age of thirty years, as provided in cl. 8 under which he would then be entitled to the possession of the whole

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property and accumulations, provided he followed the testator's religion, and that until the second plaintiff attained the age of thirty years each of the plaintiffs was entitled only to receive from the defendant Rs. 500 a year as maintenance.

From this decision the plaintiffs appealed.

Telang and *Davar*, for the appellants.

Scott and *Chitty*, for the respondent.

Telang:—The question is as to the construction of the testator's will, and whether or not the plaintiffs, or either of them, are or is entitled to present possession of the property. The effect of Mr. Justice Jardine's judgment is that the estate is vested, but the possession is deferred until the second plaintiff attains the age of thirty. The estate in the interval would be in no one, and this will not be allowed by law. We say that the gift is good as an immediate gift, but that the condition as to postponement of possession is repugnant and, therefore, void. Two constructions are open to us: (1) The property vested in the second plaintiff on the testator's death, and the condition as to postponement of possession being void, he was entitled to immediate possession; or (2) if the estate did not vest in the second plaintiff, it remained in abeyance, and the whole will is, therefore, void, in which case there is an intestacy, and the plaintiffs take as the testator's heirs.

Scott:—We take no contentious part; we say there is no intestacy; and we agree with the appellants that the estate vested in the second plaintiff on the testator's death. Possession of the estate may be postponed till the second plaintiff attains the age of thirty, but the income must be paid to him after majority. We submit that he ought to receive the whole income, subject to the [467] annual payment of Rs. 500 to the first plaintiff—*In re Bunn*; *Isaacson v. Webster* (1); *Gosling v. Gosling* (2). But the words of cl. 8 seem to show that the second plaintiff was only intended to take a life estate: see *Jarman on Wills* (4th ed.), Vol. II, 75; *Theobald on Wills* (3rd ed.), 450. In that case there would be an intestacy as to the residue.

Telang, in reply:—You must read cl. 8 as a whole. It gives an absolute estate, subject to being divested in certain events.

Cur. adv. vult.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C.J.:—The plaintiffs in this case seek to have their interests under the will of the Gosavi Kasigarji declared, and that the Administrator-General may be directed to make over to them, respectively, such portion of the estate as they may be entitled to. After appointing certain persons executors and trustees of his will, the testator in the 6th clause mentions that there are his two disciples, Gosavi Shivgar and Gosavi Jagdevgar (the plaintiffs in the suit), of the age of eighteen and eleven years respectively, and "appoints them to be his heirs subject to the conditions written below." By the 8th clause, after having by the 7th clause directed his trustees to pay each of his disciples Rs. 500 a year for maintenance, he directs that when Gosavi Jagdevgar shall attain the age of thirty, and in case his trustees should, in their opinion, find

(1) L. R. 16 Ch. Div. 47.

(2) Rep. 265.

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him fit to carry on business transactions, and he should observe his religious faith, they are then to give to him the net residue of his property remaining at that time. He then proceeds to certain events which might subsequently happen, one of which is Jagdevgar's death, and directs his trustees to give the property to the plaintiff Shivgar, if he should have reformed his conduct and be fit to manage worldly affairs, and after his decease, and also in other events, he directs them to appoint a good respectable disciple, as they may think fit, for perpetuating his memory. The first question is as to the nature of the gift to Jagdevgar, which depends on the construction to be placed on the appointment of him as heir "subject to the [468] conditions written below" one of which is that the net residue of the property is to be given over to him when he should attain the age of thirty and be fit to carry on business transactions. We think this amounts to an immediate gift of the property on the testator's death to the person so designated, whilst postponing the period for the enjoyment of it (except as provided for his maintenance) until he was thirty, or even later, if not fit to manage it, and, therefore, that, according to the well-established rule of construction, the property vested in Jagdevgar on the testator's death, but only we think for a life estate, as the will expressly provides for the other disciple Shivgar succeeding on his death.

The important question therefore arises, whether under these circumstances the Court should give effect to the testator's direction postponing the enjoyment to thirty years, or even later. The rule in the case of English wills is stated by Vice-Chancellor Sir W. Page Wood in *Gosling v. Gosling* (1), where the immediate devisee took a life estate, as Jagdevgar, in our opinion, did under the present will. "The principle of this Court has always been, to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment,—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold, that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the [469] will any direction that the devisee shall not enjoy it in full until they attain the age of twenty-five years." This practice of the English Courts in thus disregarding the direction for postponement of enjoyment after the coming of age of the devisee, when there is a clear devise, is one which, we think, may be applied with equal propriety in this country. Here, with the exception of the Rs. 500 a year which are given out of the income to Shivgar until he succeeds, the rent, up to Jagdevgar's attaining thirty years are not given to any other person, and there is no indication of an intestacy being intended as to that income, as he gives the net remainder of the property to Jagdevgar on his attaining thirty.

(1) Johns. 265 (272).

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We are of opinion, therefore, that the income of the property (after deducting Rs. 500 to be given to Shivgar) should be paid to Jagdevgar, supposing him to be of age. The property, however, will remain with the Official Trustee as directed by the will—at any rate until Jagdevgar attains thirty years of age.

Other questions will probably arise on this will, but these are the only questions which the Court can properly dispose of at the present moment.

We must, therefore, reverse the decree of the Court below, and direct that accumulations of income since the plaintiff Jagdevgar attained eighteen years of age, and also the income to become henceforth due (subject to the pay of Rs. 500 a year to Shivgar), be paid by the Official Trustee to Jagdevgar.

The costs below and in this appeal of all parties to come out of the estate. The Administrator-General's costs to be taxed between attorney and client.

Attorneys for appellants:—Messrs. *Wadia and Ghandy*.

Attorneys for respondent:—Messrs. *Little, Smith, Frere and Nicholson*.

13 B. 470=Chitty's S. C. C. R. 216.

[470] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

MAHOMEDALLY EBRAHIM PIRKHAN (*Plaintiff*) v. SCHILLER,
DOSOGNE & Co. (*Defendants*).* [3rd May and 21st June, 1889.]

Principal and agent—Goods ordered through commission agents—Contract of agency—Contract of sale—Form of action.

The defendants traded in Bombay as merchants and commission agents under the style of S. D. & Co., being a branch of a French firm trading in Paris under the same name, of which firm also the defendants were members. The Paris firm were agents for certain manufacturers of zinc. The plaintiff, a Bombay merchant, ordered out 48 casks of zinc sheets through the defendants' firm in Bombay by an indent in the following form:—"I hereby request you to instruct your agents to purchase for me (if possible) the under mentioned goods on my account and risk upon the terms stated below." Such terms, *inter alia*, limited the price of the goods and the time within which the shipments were to be made. Later the plaintiff consented to increase his limit of price. The defendants having communicated with their Paris firm wrote to the plaintiff as follows:—"We have the pleasure to inform you that our home firm has reported by wire concerning your esteemed order as follows:—'Placed at your increased limit.'" Subsequently the plaintiff was informed by the defendants that the manufacturers being full with orders, the zinc sheets would not be ready for shipment as soon as had been expected; and he was asked whether he agreed to give an extension of time, or desired to cancel the indent. Simultaneously the plaintiff wrote that the contract time had been exceeded, and that he would buy similar goods in Bombay on the defendants' account. This the plaintiff did, and brought this action to recover the difference in price as damages "on account of the defendants having failed to perform their contract for the delivery of 48 casks of zinc sheets."

Held that neither the defendants, nor their Paris firm, had entered into any contract of sale on which they were liable to the plaintiff. They had only substituted themselves his agents to 'place' his order—*i.e.* to effect a contract of purchase on his account with the manufacturers of zinc—and consequently the action as brought would not lie.

* Small Cause Court Suit, No. 32367 of 1887.