

ORIGINAL CIVIL.

Before Mr. Justice Candy,

BECHAR AKHA' AND OTHERS (PLAINTIFFS) v. P. DE CRUZ AND OTHERS
(DEFENDANTS)*

1894.
September 18.

*Will—Construction—Gift of life interest or corpus—Discretion of executors
to hand over corpus—Costs.*

Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died in April, 1884, leaving three sons, Michael, Silveiro, and Joaquim (defendant No. 3), and two daughters, Rose and Caroline. By her will she directed that her daughter Rose should enjoy the rents and profits of certain immovable property for her life, and that after her death the said property should be sold, and the sale-proceeds (after payment of two legacies thereout) be divided equally between her two sons Silveiro and Joaquim (defendant No. 3). She further, however, directed that Joaquim's share of such proceeds should be held in trust by her executors and invested in Government securities, the interest of which should be applied to Joaquim's maintenance, and that in case Joaquim should die leaving a widow or issue, his share should go to them as he should devise or bequeath. The will then continued:—"Should my said son Joaquim Amador Bocarro reform himself, and shake off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (c) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

Silveiro died in 1885, unmarried and intestate, leaving his two brothers, Michael and Joaquim, and his two sisters, Rose and Caroline, him surviving. Michael died in 1889, leaving a widow and children.

In 1891 Joaquim (defendant No. 3) mortgaged all his interest under the said will to the plaintiffs to secure a loan of Rs. 6,100. In 1893 Rose died, and in 1894 Caroline died.

Subsequently the executors were proceeding to sell the property mentioned in the will when the plaintiffs filed this suit praying for a declaration that they had a valid charge upon Joaquim's interest therein, and that his interest should be ascertained and declared, and he himself ordered to pay the amount of their claim; that the property should be sold and their claim paid out of the funds; that the executors should be restrained from selling, save subject to their (plaintiffs') rights, &c.

The plaintiffs and Joaquim contended that he (Joaquim) in the events that had happened was entitled to the whole of the proceeds of the property absolutely and that the gift in the sixth clause of the will could not be cut down by the provisions of the seventh clause.

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Held:—(1) That the defendant Joaquim had no interest in the house mentioned in the will. He was only entitled to a share of the proceeds after it had been sold.

(2) That his interest in his share of such proceeds was merely a life interest, with power to appoint to his widow or issue, and that he was not entitled to be paid the *corpus* of such share; but that the executors might under certain circumstances and at their discretion hand over to him the said *corpus*.

(3) That neither the plaintiffs nor Joaquim could interfere in the sale of the said property.

(4) That the plaintiffs had a valid charge upon Joaquim's interest in the sale proceeds of the said property to the extent of their mortgage.

(5) That Joaquim's interest was (after deducting the legacies given by the sixth clause) an absolute interest in one-fourth share of Silveiro's moiety and a life interest in his (Joaquim's) moiety subject to the contingency of the executors in their discretion, handing over the *corpus* of the share, or part thereof, for his absolute use, in which event the plaintiffs had the right to the same so far as their debt was unsatisfied.

(6) As to costs, the plaintiffs and third defendant Joaquim should pay their own costs; that the executors and defendants Nos. 4 to 12 should have their costs paid out of Joaquim's share in Silveiro's moiety of the sale-proceeds, and, if that fund were not sufficient to pay such costs, the plaintiffs and the third defendant Joaquim to pay the deficiency.

ONE Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died on the 19th April, 1884, leaving three sons (Michael, Silveiro Joseph, and the third defendant Joaquim), and two daughters, Rose Maria and Caroline.

Anna Maria Bocarro, at the time of her death, possessed both moveable and immoveable property. She left a will dated 12th March, 1884, and a codicil of the same date, and the first and second defendants were the executors. With reference to certain immoveable property belonging to the testatrix the will contained the following directions:—

4. "If my daughter Rose Maria Bocarro should survive me, I direct that so long as she lives, my large house No. 57 and such of my smaller buildings Nos. 55, 56 and 71 as may not be sold should be rented, and the rents which may be received therefrom should, after deducting such sums as may be necessary for the payment of all kinds of tax on property and for whitewashing and repairing the said houses, be applied for the maintenance of my aforesaid daughter Rose Maria Bocarro."

5. "But should my said daughter Rose Maria Bocarro predecease me, or should she die after me, then I direct that my executors herein named should sell within a reasonable time, either privately or by public auction, my large house No. 57 and such of my smaller houses Nos. 55, 56 and 71 which may not be sold, preference being given to any of my sons and heirs hereafter named who may desire to purchase any or all of the said houses."

6. "After the houses, referred to in the preceding paragraph 5, are sold, I direct that, out of the proceeds of the sale (a) a sum of Rs. 500 (five hundred) should be made over by my executors to my daughter-in-law Anna Joaquina Bocarro, wife of my eldest son Michael Bocarro, to be assigned by her in such proportion and in such manner as she may deem proper for the benefit of her four daughters, namely, Anna L. Bocarro, Cecilia Bocarro, Rosalind Bocarro and Catherine Bocarro; (b) that a sum of Rs. 1,000 (one thousand) should be given to my daughter Caroline Britto, wife of Julius Lucas Britto, for her own and absolute use; and (c) that the remainder should be divided among my two sons Joaquim Amador Bocarro and Silveiro Joseph Bocarro in equal proportions."

7. "I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (c) of paragraph six above should be held in trust by my executors hereinafter named and converted by them into Government securities, the interest accruing wherefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son Joaquim Amador Bocarro die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim Amador Bocarro reform himself, and shake off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (c) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

The testatrix died, as above mentioned, on the 19th April, 1884.

Silveiro died in 1885, unmarried and intestate.

Michael died, in June, 1889, leaving a widow and seven children (defendants Nos. 5 to 12).

Rose Maria died in June, 1893.

Caroline died on the 19th February, 1894, leaving a will of that date, of which defendant No. 4 was executor.

On the 12th February, 1891, (while Rose Maria was still living and in receipt of the rents and profits of the property mentioned in the above clauses of the will) the third defendant Joaquim, the son of the testatrix, executed a mortgage to the plaintiffs for Rs. 6,100. The property assigned by him as security for the said sum was as follows:—

"All that the right, title, interest, benefit, reversion, claim and demand of him the said defendant into and upon all and singular the estate, effects and property left by the said Anna Maria Bocarro, or any part thereof, to which the said defendant was then or might thereafter be entitled under and by virtue of the directions, provisions and bequests contained in the said will of the said Anna Maria Bocarro dated the 12th

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March, 1884, and the said codicil thereto or to which the said defendant was then or might thereafter be entitled to as one of the heirs of the said Anna Maria Bocarro, deceased, under the said will or codicil thereto or otherwise howsoever. And the stocks, funds and securities for the time being representing the same, and the dividends, interest and annual produce thereof, and all the right, title, interest, claim and demand whatsoever of the said defendant into and upon the same. And all that piece or parcel of land, &c." (Here followed the assignment of the houses.)

The executors (defendants Nos. 1 and 2) subsequently proposed to sell the said houses and informed the third defendant (Joaquim) of their intention. The plaintiffs (the mortgagees), however, hearing of the proposed sale wrote to the executors informing them of their charge on the third defendant's interest in the property, and stating that they would have no objection to join in a sale, provided that the amount due to them was paid out of the proceeds. The third defendant also wrote to the executors asking them to pay off the plaintiffs out of the proceeds. The executors replied that they knew nothing of the mortgage. Whereupon the plaintiffs filed this suit.

The plaint stated that the executors had advertised the properties for sale, and unless restrained would sell them, and distribute the proceeds without regard to the plaintiffs' claim. The plaintiffs, therefore, prayed (1) for a declaration that they had a valid charge upon the interest of the third defendant in the said properties; (2) that the third defendant's interest therein should be ascertained and declared; (3) that the third defendant should be ordered to pay the amount of their claim and costs, and in default of payment by a fixed date, the interest of the third defendant might be sold and the proceeds applied in satisfaction of their claim; (4) that the defendants should be restrained from selling the properties, save subject to the plaintiffs' right, or from parting with the proceeds of the property, if sold, until the plaintiffs' claim was satisfied; (5) that such of the defendants as contested the plaintiffs' claim should pay the costs of suit.

The executors (defendants Nos. 1 and 2) filed a written statement, submitting the construction of the will and the question as to the interest taken by the third defendant to the determination of the Court. They alleged that the suit was unnecessary, and that the plaintiffs had no right to restrain the sale.

The third defendant (Joaquim) contended that under the will, and in the events that had happened, he was absolutely entitled to the whole of the proceeds of the property after satisfying the plaintiffs' claim, and he asked for a declaration to that effect.

The fourth defendant, who was the executor of Caroline, (daughter of the testatrix) who died in February, 1894, contended that on the death of Silveiro in March, 1885, his surviving brothers and sisters became entitled to his estate, and that he, as Caroline's executor, was entitled to her share. He also claimed an interest in the share intended for Silveiro under clause 6. He submitted that the third defendant should pay the costs of suit and not the estate.

Defendants Nos. 5 to 12 also filed a written statement setting forth their claim.

Lang (Advocate General) and *Inverarity* for the plaintiffs.

Kirkpatrick and *Lowndes* for defendants Nos. 1 and 2.

Scott and *Raikes* for defendant No. 3.

Melsheimer and *Robertson* for other defendants.

The following authorities were cited:—*Mills v. Johnston*⁽¹⁾; *Brook v. Brook*⁽²⁾; *Green v. Spicer*⁽³⁾; *Gough v. Bult*⁽⁴⁾; *Young-husband v. Gisborne*⁽⁵⁾; *Theobald on Wills* (3rd Ed.), 353; *Indian Succession Act* (X of 1865), sec. 106.

22nd September, 1894. CANDY, J.:—The decision in this case depends upon the construction of the will of Anna Maria Bocarro, who died on 19th April, 1884, leaving (1) a son Michael, who died in 1889 and who is represented in this suit by his widow and children defendants Nos. 5 to 12; (2) a son Silveiro, who died unmarried and intestate in 1885; (3) a son Joaquim, who is third defendant in this suit; (4) a daughter Rose Maria, who died unmarried in 1893 and is represented in this suit by the Administrator General; (5) a daughter Caroline, who died in February, 1894, and is represented in this suit by her husband (defendant No. 4), who has obtained probate of her will. Defendants Nos. 1 and 2 are executors of Anna Maria Bocarro's will.

(1) 42 W. R., 616.

(2) 3 Sm. and Giff., 280.

(3) 1 Russ. and Myln., 395.

(4) 16 Sim., 45.

(5) 1 Coll., 400.

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Plaintiffs are mortgagees of certain interest of Joaquim (the third defendant) under the said will. They ask for a declaration that they have a valid charge upon the interest of the third defendant in certain properties and the sale-proceeds thereof to the extent of Rs. 6,100 *plus* interest and costs, and that, in default of payment of such by third defendant, the properties may be sold and applied in satisfaction of such debt.

The plea of the defendants (except the third defendant, who supports the claim of his incumbrancers) is generally that the interest of the third defendant in the properties in question is of a very limited nature.

The clauses of the will, which for the purpose of this suit it is necessary to consider, are paragraphs 4 to 7. They run as follows: (His Lordship read the clauses above set forth (*supra* p. 222) and continued:—)

Now it is admitted that the executors are taking steps to sell houses Nos. 57, 55 and 71; and the first question is, whether under the will Joaquim has any interest in those houses. The answer must be in the negative. The executors are directed by the will to sell the said houses on the death of Rose Maria. After the houses are sold, two legacies (Rs. 500 and Rs. 1,000) are to be paid out of the proceeds, and the "remainder" is to be "divided among Joaquim and Silveiro in equal proportions." Joaquim's interest, therefore, is limited to a moiety of the sale-proceeds after payment of the two legacies.

It is asserted for the plaintiffs that Joaquim is entitled to the *corpus* of that money which belongs absolutely to him, and counsel contend that in the sixth paragraph of the will there is an absolute gift of the said moiety to Joaquim, with an attempt by the testatrix in the seventh paragraph to fetter the enjoyment of the said moiety, an attempt which on the authorities of certain cases the Court will not permit. I have perused the cases quoted by the learned counsel and also nearly all of the long list given in Theobald (3rd Ed.), page 353; but it seems unnecessary to burden this judgment with my notes of the various and interesting points which arose in those cases, because

in the present case there are no express words of absolute gift; and to hold that the testatrix must have intended to make in any case an absolute gift to Joaquim of the *corpus* of the moiety of the sale-proceeds of the houses in question would be inconsistent with certain clear expressions in the will. She does not in the sixth paragraph direct the money to be paid over to Joaquim; she directs that the remainder should be divided among Joaquim and Silveiro in equal proportions. That direction simply prescribes the shares in which the two brothers are to enjoy the sale-proceeds. Having prescribed the method of division, testatrix goes on in the seventh paragraph to prescribe the interest which Joaquim was to enjoy in his "share." It was to be a life interest, with power to appoint to his widow or issue. And then follows a direction empowering the executors in the exercise of their discretion under certain circumstances to give the whole or part of the *corpus* of the moiety of the sale-proceeds to Joaquim for his absolute use. There are only two ways in which those directions can be read. Either testatrix meant to say:—"I direct my executors to invest Joaquim's share of the sale-proceeds and pay him the interest, with power, under certain circumstances, to give him for his absolute use the whole or part of the *corpus*, and on his death to pay the *corpus* (or such part as shall not have been given over to Joaquim for his absolute use) to Joaquim's widow or issue according as he shall have so appointed." That seems good sense. Or testatrix meant to say:—"I give to Joaquim absolutely the moiety of the sale-proceeds. And I further direct that under certain circumstances the executors may give to him for his absolute use the whole or part of the said moiety which I have already given him absolutely." That hardly seems sense.

There are two and apparently only two arguments which can be raised in favour of the latter construction:—(1) Delete the seventh paragraph of the will, and there can be no doubt that both Silveiro and Joaquim took an absolute interest in the *corpus* of their moieties of the remainder of the sale-proceeds. Silveiro is not mentioned in the will except in the sixth paragraph. There is no doubt that under section 106 of the Succession Act of 1865 there was vested in Silveiro on the death

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of testatrix a right to receive at once the moiety of the remainder of the sale-proceeds which would arise on the death of Rose. That vested right passed on Silveiro's death to his representatives, and Joaquim as one of these representatives will be entitled to receive his share of Silveiro's moiety. But, it is contended, Joaquim's "share" is given in the same words as Silveiro's; therefore there is as much an absolute gift of the *corpus* in the one case as in the other. The answer to that argument is that no doubt, if the seventh paragraph is deleted, the fund will be rightly taken as absolutely bequeathed to both sons. But, as was said by Lord Cottenham in *Lassence v. Tierney*⁽¹⁾, "the intention that the gift should be absolute as between the legatee and the estate is, as in all cases of construction, to be collected from the will and not from there being words which standing alone would constitute an absolute gift." Here, as shown above, the only way in which to construe with sense the sixth and seventh paragraphs together is to suppose that testatrix gave a life interest in the fund to Joaquim, with power to the executors under certain circumstances to hand over the *corpus* to Joaquim for his absolute use.

(2) The other argument is that, if testatrix did not intend to give the *corpus* of the fund absolutely to Joaquim, then there is no gift over, and an intestacy as to this part of the estate may ensue, a contingency which the testatrix could not have contemplated. If, for instance, Joaquim died to-morrow without having appointed to his widow or issue, it is said that his share in this fund would revert to Anna Maria Bocarro's estate; and under these circumstances the Court must incline to the view that the testatrix intended to bequeath Joaquim's share absolutely to him. The answer to that argument is that the fact that Joaquim's share may fall back into the estate of the testatrix, and that the testatrix may not have contemplated such an event, is not enough to outweigh the clear words of the will. And, indeed, the argument assumes what is not shown to be a fact. Testatrix may well have hoped, and contemplated, that the executors would be able under the certain circumstances specified to hand over to Joaquim his share for his absolute use. It is, moreover,

(1) 1 M. and G. 551 at p. 562.

premature to say that there was no gift over. I understand that Joaquim has now a wife and children, though he had not in 1884. They are not parties to the suit, but it is possible that, if Joaquim died without exercising his power of appointment, the widow and children may contend that the fund passes to them under the will, such being the intention of the testatrix. I do not say that they would succeed in such a contention. Possibly the power given to Joaquim to appoint is not imperative, and there is no expression sufficiently clear and strong to amount to a trust in favour of Joaquim's widow and children—*Brook v. Brook*⁽¹⁾. And in truth, if the case be regarded still further in this light, it will be seen that the contentions of the plaintiffs and third defendant are altogether premature. For the case falls under section 126, and not under section 125 of the Succession Act (X of 1865). Testatrix did not simply bequeath Joaquim's share to him for his maintenance and there stop, but she bequeathed him his share and directed that the mode of enjoyment by the legatee should be restricted to a life interest, with power to the executors under certain circumstances to give him the *corpus* for his absolute use and with power to Joaquim to appoint to his widow or issue. If Joaquim's wife and issue predecease him, and the executors have not exercised their power, then it is quite possible that Joaquim's representatives will on his death be entitled to the fund. But all this is premature. Admitting that Joaquim's share is a fund absolutely bequeathed so as to sever it from the estate of testatrix, the mode of enjoyment directed by the will has not failed. Joaquim is still alive. The interest can be paid to him; the executors can in the exercise of their discretion pay him the *corpus*. Nothing has yet happened which makes the fund belong to Joaquim as if the will had contained no such directions as are found in the seventh paragraph of the will.

For these reasons I find—

On the first issue that third defendant is not now absolutely entitled to the *corpus* of a half share in the sale-proceeds, but is at present entitled to a life interest in the said share, after

(1) 3 Sm. and Giff., 280.

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deduction of the legacies referred to in the 5th paragraph of the will.

On the second issue that on the death of Silveiro his share became vested in his representatives, and third defendant as such is entitled to the one-fourth of such share.

On the third issue that plaintiffs have no right to restrain the defendants Nos. 1 and 2 from selling the properties. They have simply a charge on Joaquim's share in the sale-proceeds. I notice that the plaintiffs' mortgage-deed purports to cover certain premises, but it is impossible from the description to say whether these are the properties which are now being sold, and which are referred to in schedule (C) attached to the plaint. The prayer of the plaint is concerned with these only; and regarding them there is no dispute.

On the fourth issue that the plaintiffs are so entitled. That point has never been disputed.

I decline to find on the issues raised by the learned counsel at the last hearing, and numbered by me 6, 7 and 8. They do not arise from the pleadings.

The relief, therefore, which the plaintiffs are entitled to is—

Declare that plaintiffs have a valid charge upon the interest of the third defendant in the sale-proceeds of the properties in question to the extent of Rs. 6,100 *plus* interest at 12 per cent. per annum from 12th February, 1891.

Declare that interest to be, after deducting the legacies of Rs. 500 and Rs. 1,000, one-fourth share of Silveiro's moiety; to this Joaquim is absolutely entitled; also that interest includes a life interest in Joaquim's moiety of the said sale-proceeds, subject to the contingency of the executors in the exercise of their discretion under certain circumstances handing over to Joaquim the *corpus*, or part thereof, of the said share for his absolute use; in such event the plaintiffs will have the right to receive the same to such extent as their debt is unsatisfied.

Decree payment of the debt as shown above. I decline to order sale of Joaquim's interest in the houses. He has none, nor have his incumbrancers, except so far that they and he can insist

on the executors selling within a reasonable time according to the directions in the will. But the executors have shown that they are complying with the directions of the will and selling within reasonable time.

Let the moneys, if realized, be handed over to defendants Nos. 1 and 2, and enjoin them to hold and pay such subject to the above directions.

I have carefully considered the question of costs.

I note that the third defendant in his letter of 15th January last to the executors claimed the whole of the proceeds of sale, both under the will of Mrs. Bocarro and also independent of such will. Similarly the plaintiffs in their letter of 16th January alleged that the third defendant is the residuary legatee and heir of the testatrix and entitled to the properties in question both under the will and otherwise. They also claimed to joint in any sale, a claim which is not well founded. The executors in their reply of 19th January speak of the third defendant having at the utmost a life interest in a part of the estate, but that evidently was with reference to Joaquim's share of the residue of the sale-proceeds, and was not intended to deny that Joaquim had an interest in Silveiro's share. This is made clear by the written statement of the executors. It is true that in a subsequent letter of 27th January the executors speak of being desirous of having the opinion of the Court as to whether Joaquim was entitled to the bulk of his share of the proceeds of sale, or only to the interest thereof, for his life, a question which, in my opinion, hardly admits of doubt. But in any case it was the plaintiffs and the third defendant who caused the litigation, and I see no reason why the executors should not have their costs taxed as between attorney and client out of the estate, that is, out of Joaquim's share in Silveiro's moiety of the residue of the sale-proceeds. And defendants Nos. 4 to 12 are entitled to their costs out of the same funds, for it would not be right that their shares in that moiety should be diminished owing to this litigation into which they were unwillingly brought. Let the plaintiffs and the third defendant bear their own costs. Let defendants Nos. 1 and 2 pay their own costs as directed above and the costs of

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defendants Nos. 4 to 12 out of the fund, as just shown. Of course, if the fund just described is not sufficient to pay the costs of defendants Nos. 1 and 2 and of defendants Nos. 4 to 12, then plaintiffs and defendant No. 3 must pay the deficiency. Let the decree so direct.

Attorneys for plaintiffs :—Messrs. *Little, Smith & Co.*

Attorneys for defendants :—Messrs. *Bicknell & Co.* and Mr. *M. H. Khan.*

INSOLVENCY JURISDICTION.

Before Mr. Justice Farran.

1894.

October 3.

IN THE MATTER OF C. M. J. DONAGHUE, AN INSOLVENT.

Insolvency—Insolvent Act, Stat. 11 and 12 Vict., C. 21, Secs. 7 and 27—After acquired property of insolvent—Salary—Pension—Personal earnings of insolvent.

After acquired property of an insolvent, whether it consists of salary, personal earnings or property of a different kind, is property which vests in the Official Assignee, but subject to the provision of section 27 of the Indian Insolvent Act⁽¹⁾ as to salary and pension and subject to the unwritten law as to personal earnings sufficient for the maintenance, according to his position in life, of the insolvent and his family. Accordingly the Official Assignee is not entitled to claim such salary or income except by means of an order obtained under section 27 of the Act, nor such personal earnings at all unless and until in either case the insolvent has accumulated a margin beyond what has been required for his adequate support.

An attachment upon the salary of a railway servant ceases to be operative after he has filed his petition in insolvency, and should be withdrawn on notice being given of the making of the vesting order.

THE insolvent, who was an engine-driver in the employment of the G. I. P. Railway Company, filed his petition in the Insolvent

(1) Statute 11 and 12 Vict., c. 21, secs. 7 and 27 (Indian Insolvent Act) :—

“And be it enacted, that upon the filing of such petition as is aforesaid, it shall be lawful for the said Court and the said Court is hereby authorized and required to order that all the real and personal estate and effects of such petitioner, whether within the territories within the limits of the charter of the East India Company, or without, except the wearing apparel, bedding and other such necessaries of such petitioner and his family, not exceeding in the whole the value of Company's Rupees three hundred for each petitioner with his family, and all debts due to him, and all the future estate, right, title, interest and trust of the said petitioner in or to any real or personal estate or effects within or without the said territories, which such petitioner may purchase,