

In re PARSONS.
STOCKLEY *v* PARSONS.

[1890 P. 956.]

KAY, J.

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June 21;
July 2.

Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 5—*Contingent Title*—*Spes successionis*—*Nemo est hæres viventis*—*Contingent Interest or mere Expectancy*—*Gift to possible Next of Kin of a Person who is supposed Die at a future Time.*

A *spes successionis* is not a title to property by English law. A woman, married before the *Married Women's Property Act*, 1882, who has a mere *spes successionis* to property, as one of a class of possible next of kin, has not a "contingent title" within the meaning of sect. 5 of that Act.

A testator, who died in 1879, bequeathed a sum of money to trustees, upon certain trusts, and subject thereto in trust for "such person or persons as at the time of the failure of the preceding trusts would be my next of kin, and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, if I had then died intestate." The preceding trusts failed on the 21st of May, 1886. A woman, married in 1857, was one of the persons who would have been next of kin of the testator if he had died on the 21st of May, 1886. She made a will, dated in 1889, and died in the same year, leaving her husband surviving:—

Held, that the property of the married woman under the gift in favour of the testator's next of kin first accrued to her in title and interest on the 21st of May, 1886, and that, therefore, under sect. 5 of the *Married Women's Property Act*, 1882, she was entitled to it for her separate use, and it passed under her will.

In re Beauprè's Trusts (1) discussed and dissented from.

The difference in legal effect between a gift to the "children" or "nephews," or "kindred" of A. who shall be living at his death, and a gift to the persons who shall then be his statutory next of kin, considered and explained.

JOHN STOCKLEY, by his will, dated in February, 1877, left £1600 to trustees, upon trust for his daughter, *Eliza Bird*, for life, and after her death for her husband, if any, for life, and subject thereto for her children and issue, and the testator then continued as follows:—

"And if there shall be no child or other issue of my said daughter who shall attain a vested interest in the said trust moneys, funds, and securities, then the same shall be in trust for

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such person or persons as at the time of the failure of the preceding trusts would be my next of kin, and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, if I had then died intestate, and in the proportions in which they would be so entitled."

John Stockley died on the 12th of July, 1879. *Eliza Bird* died on the 21st of May, 1886, without leaving any husband or having had any issue.

Elizabeth Parsons would have been one of the next of kin of *John Stockley*, if he had died on the 21st of May, 1886, and entitled, if he had then died intestate, to one-third of his personal estate under the *Statutes of Distribution*.

Elizabeth Parsons was married to *John E. Parsons* in 1857. Without the knowledge of her husband, she made a will, dated the 5th of August, 1889, whereby she gave all her property whatsoever and wheresoever to her two nephews, *J. H. Ward* and *W. S. Ward*, and appointed the Plaintiff sole executor. She died on the 10th of September, 1889, and on the 19th of March, 1890, probate of the will was granted to the Plaintiff in general form, according to the practice introduced by the Probate Rules of March, 1887, rr. 15 and 18.

An originating summons was taken out by the Plaintiff against the husband and nephews of *Elizabeth Parsons*, asking for the decision of the Court whether the one-third of the legacy of £1600 bequeathed by the will of *John Stockley*, to which *Elizabeth Parsons* was entitled at the time of her death, formed part of her estate which was disposed of by her will, and to which the Defendants, *J. H. Ward* and *W. S. Ward*, were entitled by virtue of her will, or whether the Defendant, *J. E. Parsons*, was entitled to such one-third share by virtue of his marital right.

Townsend, for the Plaintiff, stated the case, and submitted that the question could be determined on originating summons, the husband not objecting.

[KAY, J., referred to *In re Hargreaves* (1), and said that the fund being in the hands of the executor, who did not know what to do with it, the application might be entertained.]

Ingle Joyce, for the husband :—

Mrs. *Parsons* had a “contingent title” to this money before the commencement of the *Married Women’s Property Act*, 1882, and the right of her husband is, therefore, preserved by the provisions of sect. 5 of the Act, as interpreted by the Court of Appeal in *Reid v. Reid* (1). The exact point has in fact been decided in *Ireland* by the Court of Appeal, affirming a previous decision of the Master of the Rolls, in *In re Beaupré’s Trusts* (2) That case is not distinguishable from the present one. From the death of the testator, *John Stockley*, in 1879, until that of *Eliza Bird*, on the 21st of May, 1886, the next of kin of the testator were contingently entitled to the £1600.

[KAY, J. :—It has been decided in many cases that possible next of kin have no interest in law. This is a gift to an artificial class, no single member of which can be ascertained until the supposed event takes place.]

No doubt the class cannot be indefeasibly ascertained. One of them might die and his children come in in his stead. But they are ascertained at the testator’s death as his presumptive next of kin, and at that date there is a contingent interest in each member of the class so ascertained. Although according to the modern practice (see *In the Goods of Amelia Price* (3)) probate of the will of Mrs. *Parsons* has been granted to the Plaintiff in general form, yet as the will was not assented to by her husband with full knowledge of its contents, it is inoperative as against his marital right, and his title is paramount to that of the Plaintiff as executor: *Willock v. Noble* (4); *Smart v. Tranter* (5).

Upjohn, for the Defendants claiming under the will of Mrs. *Parsons* :—

Previously to the 21st of May, 1886, Mrs. *Parsons* had no right or interest in the fund in question, but only a mere expectancy. Consequently no “title” accrued to her until after the

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(1) 31 Ch. D. 402.

(3) 12 P. D. 137.

(2) 21 L. R. Ir. 397.

(4) Law Rep. 7 H. L. 580.

(5) 43 Ch. D. 587.

KAY, J. commencement of the *Married Women's Property Act*, 1882, and the property was therefore her separate property and passed under her will. *Clowes v. Hilliard* (1) shews that a person having such an expectancy cannot even maintain an action to protect the fund, though a very remote interest has been deemed sufficient to entitle a person so to sue.

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[KAY, J., referred to *Joel v. Mills* (2).]

*Lord Dursley v. Fitzhardinge* (3), citing *Smith v. Attorney-General* (4), is an authority that the next of kin of a lunatic, even though he has made no will and his recovery is hopeless, have no interest whatever in his property. On the same principle, in *Meek v. Kettlewell* (5), it was held that an assignment by deed of the mere expectancy of one of a class of next of kin was only a contract, and, being voluntary, not enforceable in equity. To the like effect is *Carleton v. Leighton* (6). The decision in *In re Beaupré's Trusts* (7) is not binding on this Court, and the attention of the learned judges in that case was not called to the line of English authorities.

[He referred also to *Kekewich v. Manning* (8); *In re Tucker* (9); *In re Hobson* (10); *Baynton v. Collins* (11); and *In re Thompson and Curzon* (12).

*Townsend* referred to *In re Cuno* (13).]

*Ingle Joyce*, in reply :—

*Clowes v. Hilliard* was a startling decision. The reasoning in that case would apply to a gift to such of the nephews of *A.* as should be living at a certain time—a gift which clearly confers a contingent interest. In the present case the title arises under an effectual instrument, and not merely by operation of law. I is impossible to distinguish the Irish case.

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| (1) 4 Ch. D. 413.                  | (7) 21 L. R. Ir. 397.             |
| (2) 3 K. & J. 458.                 | (8) 1 D. M. & G. 176.             |
| (3) 6 Ves. 251, 260.               | (9) 52 L. T. (N.S.) 923; 54 L. J. |
| (4) Cited 6 Ves. 260; 15 Ves. 133, | (Ch.) 874.                        |
| 136.                               | (10) 34 W. R. 195.                |
| (5) 1 Ha. 464; 1 Ph. 342.          | (11) 27 Ch. D. 604.               |
| (6) 3 Mer. 667, 671.               | (12) 29 Ch. D. 177.               |
|                                    | (13) 43 Ch. D. 12.                |

[KAY, J.:—The *Married Women's Property Act* was intended to have a wide operation, and the decision in the Irish case tends to narrow its operation.]

So then also did the decision of the Court of Appeal in *Reid v. Reid* (1).

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July 2. KAY, J.:—

In this case an originating summons has been taken out by the executor of the will of *Elizabeth Parsons*, asking for the decision of the Court whether one-third of a legacy of £1600, to which the testatrix was entitled under the will of *John Stockley*, was disposed of by the will of Mrs. *Parsons* or belongs to her husband in his marital right.

[His Lordship then stated the facts of the case, and continued:—] *Elizabeth Parsons* was therefore married before the passing of the *Married Women's Property Act*, 1882, and sect. 5 would make the interest which she took after the passing of that Act as one of the next of kin of *John Stockley*, supposing him to have died at the same time as *Eliza Bird* in May, 1886, her separate property, unless she had a “contingent title” to it before the passing of the Act.

The question is whether she had then a contingent title.

It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property.

The law is the same where there is a limitation by will or settlement of real or personal property to the heir or statutory next of kin of a living person. During his life no one can say, “I have a contingent estate or interest as possible heir or next of kin;” just as in the first case no one can have more than an expectation or hope of being heir or next of kin.

It makes no difference that the limitation is not to the actual heir or next of kin, but to the persons who would be heir or next

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of kin if the ancestor were to die at some future time. Until that time arrives there is no one who can say he has anything beyond a hope or expectation.

For this reason in a suit to administer the estate you could not make such possible heir or next of kin a party, nor is there any case in which he has been allowed to sue to protect the estate, or has been recognised as having an interest, except that in proceedings in lunacy against the ancestor he is permitted to be before the Court. The reason for that is thus stated by Lord *Eldon* in *Ex parte Clarke* (1): "The principle which leads the Court to call for the next of kin and the heir at law of lunatics, is to receive from the persons probably entitled, that assistance in the protection of the property which persons having such expectant rights will be likely to afford; but the inquiry is not considered to be binding."

The object of the *Married Women's Property Act*, 1882, was to benefit women who had married before the passing of the Act by giving them a separate estate in property to which they might become entitled during the coverture after the passing of the Act. It excepts all property their "title to which whether vested or contingent" accrued before the Act. To give a wide meaning to "contingent title" would narrow the operation of the statute. But without straining the words in either direction, can a possible next of kin of a person who is to be supposed to die at a future time be said to have a "contingent title," or is not the proper view that he has no title at all, nothing but an expectation or hope which is not recognised in law as any title? While the *propositus* is living every relative he has in the world is a possible next of kin. Can each one say that he has a contingent title? He may have sons, brothers, and nephews. Can the nephew, living the sons and brothers, say, "I have a 'title'?" If he cannot, then the brother cannot, nor the son. A *spes successionis* is not a title to property by English law. Why should this meaning be given to it in the statute in order to deprive a married woman of her right to separate property? I suppose the object of excepting a title accrued before the Act was in order not to take from the husband any advantage which he might

(1) Jac. 589, 595.

then have. Possibly the exception goes further than is necessary for this purpose; but if that is its main object, it would be contrary to the spirit of the enactment to construe the words so as to include an expectation of the wife in which the husband could not have any interest.

Now let me see how far this view of the law is supported by authority. In a note at p. 219 of the 8th edition of *Watkins* on Conveyancing, it is said in effect that there are two classes of possibilities—namely, possibilities coupled with an interest “such as contingent remainders, executory devises, springing or shifting uses; the other bare or naked possibilities, such as the hope of inheritance entertained by the heir. . . . The former class may, perhaps with more propriety, be denominated contingent interests, and the latter mere expectancies; for a possibility coupled with an interest is more than a possibility—it is a present interest, and may be devised: *Perry v. Phelps* (1). On the other hand, the expectancy of an heir apparent, during the lifetime of his ancestor, is less than a possibility, being but a mere hope or anticipation.”

The statute 8 & 9 Vict. c. 106, s. 6, made a possibility coupled with an interest assignable at law, but not a mere possibility.

In *Smith v. Attorney-General* (2), it was decided that an heir apparent, during the life of his ancestor, though the ancestor is a lunatic who cannot recover, could not have a bill to perpetuate testimony in order to prove that he was heir apparent, and could not, as the *verus hæres* might, have the writ *de ventre inspiciendo*.

In *Lord Dursley v. Fitzhardinge* (3), Lord Eldon said: “The case of *Smith v. Attorney-General* went upon this; that the next of kin of the lunatic had no interest whatever in the property. Put the case as high as possible; that the lunatic is intestate; that he is in the most hopeless state, a moral and a physical impossibility, though the Law would not so regard it, that he should ever recover, even if he was *in articulo mortis*, and the bill was filed at that instant, the plaintiff could not qualify himself as having any interest in the subject of the suit. The case of an heir apparent was very properly put by Lord

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(1) 17 Ves. 173, 182.

(2) Cited 6 Ves. 260; 15 Ves. 133, 136.

(3) 6 Ves. 251, 260.

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Chief Justice *De Grey* in his most luminous judgment. Upon that occasion he said, he never liked equity so well as when it was like law. The day before, I heard Lord *Mansfield* say, he never liked law so well as when it was like equity; remarkable sayings of those two great men, which made a strong impression on my memory. Lord Chief Justice *De Grey* said, that at law the heir apparent cannot have the writ *de ventre inspiciendo* in the life of his ancestor; as for that purpose he must be *verus hæres*. If the ancestor was in a fever, a delirium, having made no will, and it was not possible for him to recover, still the law would look upon him as a mere heir apparent, having nothing but an expectation, which is different from an expectancy in the legal sense, and as having no interest whatever upon that ground. In *Smith v. Attorney-General* (1) it was held, that the bill would not lie. It is not to be taken upon the single *dictum* of any of the learned judges, who assisted upon that occasion: but the whole judgment went upon distinguishing between that expectation, which the next of kin have in that case, and any sort of right, which the law allows to be an interest. A contingent interest is not the less a present interest. It was not doubted in that judgment, that a vested interest, though in possibility the least valuable that could be conceived, is yet of some value in consideration of Law; and gives a right to preserve testimony. In the course of that cause cases were cited, which go to this, that though the next of kin could not file a bill, or the heir apparent in the case put, yet they might respectively enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate. The Law would frame an interest in respect of the contract, and with reference to that they would have a right to perpetuate testimony, though they could not qualify themselves as to any interest in the subject itself."

Nothing can be more clear and emphatic than these words of Lord *Eldon*, and I know of no case in which the law so laid down has been departed from or doubted.

Then has an expectant heir or next of kin any greater interest under a limitation to the heir or statutory next of kin of a living person? In *Meek v. Kettlewell* (2) it was held that an assignment

(1) Cited 6 Ves. 260; 15 Ves. 133, 136.

(2) 1 Ha. 464; 1 Ph. 342.



by deed of a mere possibility was only a contract, and being voluntary could not be enforced in equity. The possibility there was the hope of succession as one of the next of kin of *Hannah Meek* under a limitation by will in trust for her next of kin, according to the statute, in case she left no issue. While *Hannah Meek* was living, one of her possible next of kin made this assignment. *Hannah Meek* died without issue, and the suit was instituted after her death to enforce the assignment. Vice-Chancellor *Wigram* (1) said that the assignor "at the time of the assignment, had nothing but an expectancy in the fund in question (like that of an heir in the lifetime of the ancestor)," and he dismissed the bill. This was affirmed by Lord *Lyndhurst*, who said: (2) "The assignment of an expectancy, such as this is, cannot be supported unless made for a valuable consideration."

This is a direct decision that the expectant next of kin take no greater interest under a limitation to next of kin than they would by the hope of an actual succession.

In *Clowes v. Hilliard* (3) Sir *G. Jessel*, M.R., had before him a case in which the limitation was identical with that which I have to deal with. A testator had left his residuary estate for the benefit of his three daughters and their issue, with an ultimate gift, if all of them died without issue, "in trust for such person or persons as would have been entitled to the residue of my trust estate under and according to the *Statutes of Distribution* in case I had then died intestate." The testator died in 1869. While the daughters were living and unmarried, some of the persons who would be next of kin of the testator, if they had all died unmarried, brought an action for administration of the estate as possible and presumptive next of kin entitled under the ultimate limitation. A demurrer was allowed, on the ground that they had not sufficient interest to maintain the suit. Yet the veriest scintilla of interest will entitle a person to maintain such a suit, as is shewn by such cases as *Joel v. Mills* (4); *Cosser v. Radford* (5). The Master of the Rolls said (6): "These plaintiffs, who claim to be some of the testator's possible next of kin, are in the

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(1) 1 Ha. 475.

(2) 1 Ph. 347.

(3) 4 Ch. D. 413.

(4) 3 K. &amp; J. 458.

(5) 1 D. J. &amp; S. 585.

(6) 4 Ch. D. 416, 418.

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same position as persons claiming to be next of kin of a living person. *Ex hypothesi* the testator is to live on. Whether, therefore, you attempt to ascertain the next of kin of a living person or of a person dying at a future period, it is the same thing; there is no difference. You cannot predicate of anyone that he will be a member of the class." Later he criticizes *Roberts v. Roberts* (1), where Lord *Cottenham* made a difference between a widow and next of kin, and, noticing *Davis v. Angel* (2), he says, "it is a decision that nothing less than an interest will allow a man to maintain a suit."

That decision follows what was laid down in *Meek v. Kettlewell* (3), that possible next of kin have no greater interest during the life of the *propositus*, under a limitation to his statutory next of kin, than they would have in property which they hoped to take by succession to him, and shews that the same law applies where a time is fixed for the supposed death of the *propositus*, not the date of his actual death.

I have referred to this very familiar law, and the authorities upon it, because I am asked to follow a decision of eminent judges in *Ireland*, which, it is said, governs the case now before me: *In re Beauprê's Trusts* (4).

The facts in that case were as follows: By marriage settlement in 1830, £10,000 was settled in trust for wife for life, then husband for life, then children of wife by any husband, and in default of such children "in trust for such person or persons as according to the statutes for the distribution of the estates and effects of intestates in *Great Britain*, would, at the time of such failure of issue as aforesaid, have been the next of kin of" the wife, "if she had departed this life intestate and without having been married." The husband died in 1862, the wife in 1885, without having had issue. One of her next of kin, Lady *Nugent*, had married in 1860 without settlement, and her husband was adjudicated bankrupt in 1881. The contest was between Lady *Nugent* and the assignees in bankruptcy of her husband, the question being whether or not the share which belonged to Lady *Nugent* had become her separate property under the

(1) 2 Ph. 534.

(2) 4 D. F. & J. 524.

(3) 1 Ha. 464; 1 Ph. 342.

(4) 21 L. R. Ir. 397.

Married Women's Property Act, 1882, or whether her title had accrued before that Act, in which case the share belonged to her husband's assignees. It was decided first by the Master of the Rolls in *Ireland*, and on appeal by the Lord Chancellor of *Ireland*, with the concurrence of the Lords Justices *FitzGibbon*, *Barry*, and *Naish*, that Lady *Nugent's* title had accrued before the *Married Women's Property Act*, 1882, and that accordingly she had no separate estate, but that her share of the fund belonged to the assignees in bankruptcy of her husband.

The Master of the Rolls said that it was argued there could be no next of kin of a living person, and that the title of the next of kin and his right to payment arose at the same moment, namely, the death; therefore, till 1885, no one could predicate that he was or ever would be next of kin of the wife, and no title vested or contingent accrued prior to the passing of the Act. "Till the class is ascertained, it was argued, there was no title in any one, not even a contingent title within the statute. No authority for this proposition was referred to, which is a startling one. If it be well founded, it would apply to many cases besides the present—cases in which no question of next of kin would arise—such as where property is left to or settled upon the children of *A. B.*, living at a particular time, answering a particular description or the like, since the class cannot be ascertained till the event happens." He then cites the language of Lord Justice *Cotton* in *Reid v. Reid* (1); "there must be an accruer of title after, and not before, the passing of the Act; and the title must be considered as accruing when the married woman first acquires her interest in the property, whether such interest is at that time in possession, reversion, or remainder," "and of course also" the learned Master of the Rolls adds, "whether vested or contingent."

The Master of the Rolls then considers whether Lady *Nugent* had a contingent title to the fund before the Act, the policy of which he states to be, in the case of a previous marriage, to oust the marital right only in respect of property acquired after the Act in such a manner that it could not have been contemplated as part of the consideration of the marriage, or dealt with by

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husband and wife, or either of them, before the Act. He seems to consider that if the instrument under which the title accrued had been executed after *Vice-Chancellor Malins' Act*, Lady *Nugent's* title would have come within the description in that statute, "every future or reversionary interest, whether vested or contingent."

The Lord Chancellor on appeal treats *Reid v. Reid* (1) as having decided that if a woman married before the commencement of the Act had, before that time, acquired a title of any kind to any property, such property is not made her separate property by sect. 5 of the Act, though it falls into possession after the passing of the Act. His Lordship then says (2): "The title of the next of kin under the settlement of the 4th of June, 1830, was a title in contingency and in remainder. Their right to a contingent interest was hardly disputed"; and later on, after dealing with the maxim, "*Nemo est hæres viventis*," he says, "the settlement of the 4th of June, 1830, created a contingent limitation in favour of a class of persons who are of kin to the tenant for life, and capable of being ascertained. In my opinion, they had a right contingent on their surviving the tenant for life, under the marriage settlement, which is the foundation of their title."

Lord Justice *FitzGibbon* concurs in the conclusion, "though not without doubt." Lady *Nugent*, he says, "could have parted with her title by assignment, or dealt with it as she pleased as an existing and accrued title, though contingent as to its actual enjoyment. Her title deed is now the settlement of 1830." The word "title," in sect. 5, he treats as including "every kind of property," and he concludes by saying that Lady *Nugent's* title "accrued when the settlement was executed." Lord Justice *Barry* agrees, and Lord Justice *Naish* also, the latter saying, "It appears to me as much a contingent title as if the limitation had been to such of the nephews and nieces of *Sophia Southwell* as shall be living at her death."

If this were an English authority, I could do nothing but follow it; but decisions of the Irish Courts, though entitled to the highest respect, are not binding on English Judges. If,

(1) 31 Ch. D. 408.

(2) 21 L. R. Ir. 407.

therefore, I cannot agree, I am bound to decide according to my own judgment.

I confess I am unable to come to any conclusion except one, which is contrary to this decision. I cannot help feeling great hesitation in opposing my opinion to that of so many eminent Judges; but I must say that, if it were not for this authority, I should have no doubt whatever about the right conclusion according to the English cases I have referred to. After all, the opinion I express is not so much mine as that of the Judges who decided those cases.

The point of difference, to state it shortly, is this: "*Nemo est hæres viventis*" should be construed literally. There is no such character in law as the heir of a living person or as his statutory next of kin. There is a wide difference, for this reason, between a gift to such of the "children" or "nephews" or even "kindred" of *A.* who shall be living at his death, and a gift to those who shall then be his statutory next of kin. During *A.*'s life there may be children, nephews, or kindred. Each of them has probably sufficient interest, though contingent, to take proceedings to protect the fund: see *per* Lord *Hatherley* in *Joel v. Mills* (1). Some or all of them might be made defendants in an action to administer the trusts. Neither of these things can be done where the gift is to statutory next of kin. They have no existence whatever in law while the *propositus* is living. No one can as possible next of kin even bring an action to perpetuate testimony as to his kinship during that period. I am unable to agree with the judgments which consider these cases as parallel.

As I have pointed out, the learned judges in *Ireland* treat the word "title" in sect. 5 as equivalent to "interest," citing Lord Justice *Cotton's* words in *Reid v. Reid* (2), to the same effect. With this I respectfully agree. One who has no interest whatever in property can hardly be said to have a title. But I have mentioned abundant authority to prove that no one can have any "interest" as heir or next of kin in the ancestor's lifetime. The familiar cases to which I have referred were not quoted; but I cannot suppose that they were not present to the minds of the learned judges whose judgments I have been considering.

(1) 3 K. & J. 474.

(2) 31 Ch. D. 408.

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In *Reid v. Reid* (1) the Court of Appeal refused to accept the decisions upon the ordinary covenant in a marriage settlement to settle other or after-acquired property of the wife as a guide in determining what should be excluded under the word "title" from the operation of the 5th section of the *Married Women's Property Act*, 1882. Lord Justice *Cotton* adopted Vice-Chancellor *Wickens'* remark in *In re Clinton's Trusts* (2), that cases of that class must be approached with the presumption that the object of that covenant was to exclude the husband, whereas the object of the peculiar language of sect. 5 was to confine its operation to property in which the husband at the commencement of the Act had not any interest. Every one must, I think, agree in the reasonableness of this view, and it follows that if under a covenant to settle any property to which the intended wife "is contingently entitled" at the time of the marriage such a possibility as this which I am considering were included, it would not necessarily be within the words "contingent title" in sect. 5. But so far as I know no such possibility has ever been held to be included in such a covenant, and I confess I should have no difficulty in deciding that it could not be. For suppose the trust to have been declared before the marriage for the statutory next of kin of *A.*, and that *A.* did not die till after the determination of the coverture by the death of the husband subsequently to the passing of the Act, and that the widow was one of *A.*'s next of kin under the statute at his death, I should imagine it would be held without hesitation that the intended wife had not at or before the coverture any interest whatever, and therefore her husband could have none by reason of the coverture, and consequently the words of such a covenant, though they might include all property to which the intended wife had a contingent title at the date of the settlement, would not comprise such a possibility as this.

In *Atcherley v. Du Moulin* (3), a marriage settlement contained a covenant to settle which the Court held included all property to which at the date of the settlement the wife was "entitled." At that date the wife was contingently entitled under a bequest to all the daughters of her father living at his death who should

(1) 31 Ch. D. 406.

(2) Law Rep. 13 Eq. 295.

(3) 2 K. &amp; J. 186.

attain twenty-one or marry. The father died in 1854. This daughter had married in 1846, and her husband had died in 1851. Lord *Hatherley* (1) held, that "although she had the transmissible contingent interest, she had nothing during the marriage which could be called property to which she was entitled." . . . "The word 'entitled' might be large enough to include a contingent interest"; but upon regarding the whole of the settlement, he thought in that case it did not.

In *In re Mackenzie's Settlement* (2), where the covenant included anything to which the wife was entitled at its date, and she was then entitled in reversion after the death of her mother to a share of Consols, and her mother died during the coverture, Lord Justice *Turner* said in effect (3), "that if she was entitled contingently the covenant would reach it," *à fortiori* as she had a vested reversionary interest.

This was followed in *Cornmell v. Keith* (4), where the interest was in remainder expectant on the death of the wife without issue; this contingent reversionary interest was bound.

It appears, therefore, that the Courts have hesitated to hold the word "entitled" in such a covenant to include a contingent reversionary interest under such a limitation as "to the children of A. living at his death," though now that would probably be held to be included. But this, so far as I know, is the furthest extent to which the construction of that familiar covenant has gone.

I am bound to follow the English decisions to which I have referred.

I must hold that the property in this case first accrued in title and interest to *Elizabeth Parsons* on the death of *Eliza Bird* on the 21st of May, 1886, and that by sect. 5 of the *Married Women's Property Act* she was entitled to it for her separate use, and that it passed by her will dated in 1889.

Solicitors: *Samuel Price & Son; Ullithorne, Currey, & Villiers*, agents for *C. B. Roche, Daventry*.

(1) 2 K. & J. 193.

(2) Law Rep. 2 Ch. 345.

(3) Law Rep. 2 Ch. 348.

(4) 3 Ch. D. 767.

KAY, J.

1890

*In re*  
PARSONS.  
STOCKLEY  
v.  
PARSONS.