

In re MUDGE.

[1899 M. 810.]

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Nov. 7.

Marriage Settlement—Covenant to settle after-acquired Property—"Interest in expectancy."

A testatrix by her will, dated in 1862, gave a fifth share of her residuary estate to her daughter W. for life, with remainder to her children, but if she should die without issue (which event happened) "her share to go to her next of kin as if she had not been married." In 1866 J., another daughter of the testatrix, married, and by her marriage settlement covenanted that any real or personal property to which she then was entitled for any estate or interest whatsoever in reversion, remainder, or expectancy should be settled upon the trusts of the settlement. W. died in 1912 without issue, and leaving J. her sole next of kin :—

Held, that the interest which J. had at the date of the settlement in the settled share of W. was either a mere spes successionis, or, having regard to the authorities, including *In re Parsons* (1890) 45 Ch. D. 51, must be treated as such, and therefore was not assignable at law.

Held, further, that inasmuch as the covenant did not relate to any defined spes successionis it was too vague to be enforceable in equity; and that consequently the property to which J. became entitled as next of kin of her sister was not comprised in the settlement.

Decision of Neville J. [1913] 2 Ch. 92, reversed.

APPEAL from a decision of Neville J. (1)

Mary Mudge, widow, by her will dated June 26, 1862, after making certain specific bequests, gave the residue of her property whatsoever and wheresoever (in the events which happened) equally amongst her four daughters and her son William, and directed that the share of her daughter Williamina should be for her separate use, the income thereof to be paid to her for life without power of anticipation, and after her decease to her children who should attain twenty-one or marry and in such manner as she should appoint, "and if she shall die without issue who shall live to attain a vested interest her share to go to her next of kin as if she had not been married."

The testatrix died in 1864 leaving her surviving four daughters, namely, Rosdew Mary, Jane Isabella, Katherine Mary, and Williamina Caroline, and a son William.

In June, 1866, Jane Isabella Mudge intermarried with Robert

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C. A. Martin, and their marriage settlement contained the following
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“And it is hereby agreed and declared that if the said Jane Isabella Mudge now is, or if during the said intended coverture she or the said Robert Martin in her right at one and the same time and from one and the same source shall become seised or possessed of or entitled to any real or personal property of the value of 50*l.* and upwards for any estate or interest whatsoever in possession, reversion, remainder or expectancy” (except jewels, &c.) “then and in every such case the said Robert Martin and Jane Isabella Mudge and all other necessary parties shall at the cost of the said trust estate” convey the said real and personal property to or otherwise cause the same to be vested in the trustees of the settlement.

Robert Martin died in 1871.

Katherine Mary Mudge, William Mudge, and Rosdew Mary Mudge died unmarried in the years 1876, 1892, and 1899 respectively.

Williamina Mudge married Edwin Selby in 1865. She survived her husband and died in December, 1912, without issue, leaving her sister Mrs. Martin her sole next of kin.

Part of the share of Williamina Selby in the residuary estate of the testatrix was represented by a sum of 1189*l.* 9*s.* 5*d.* India 3½ per cent. Stock in Court, and Mrs. Martin presented a petition for payment out of that sum to herself on the ground that it was not caught by the covenant in her marriage settlement to settle after-acquired property.

Neville J. held that under the will of the testatrix there was upon the death and failure of issue of Williamina Mudge a contingent gift of her share to a class of whom the petitioner Mrs. Martin was one, and the benefit she took under that gift was an “interest in expectancy” to which she was entitled at the date of her marriage and which was caught by the covenant in the settlement.

From this decision Mrs. Martin appealed.

Norton, K.C., and Iselin, for the appellant. At the date of her marriage settlement the appellant had with reference to

the property now in question a mere spes successionis. The gift in the will to the next of kin of Williamina was a contingent gift to an artificial class, the members of which could not be ascertained until the happening of the event upon which the gift was contingent. The chance which the appellant had, at the time of her marriage, of becoming a member of that class was not an "interest in expectancy" within the meaning of the covenant. It was not an interest in law at all.

The older authorities were examined by Kay J. in *In re Parsons*. (1) That case decides that no one can have any estate or interest at law or in equity 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. He cannot have more than a spes successionis.

In re Simpson (2) and *In re Green* (3) are later cases on the subject. See also *Allcard v. Walker*. (4) In *Clowes v. Hilliard* (5) a testator gave his residuary estate in trust for his three daughters and their issue, with an ultimate trust, if all of them died without issue, for the persons who would have been entitled to the residue under the Statute of Distributions in case the testator had then died intestate. It was held (the daughters being living and unmarried) that persons who would have been the testator's next of kin if the daughters had all died unmarried had only an expectation and not an interest which would enable them to maintain a suit for administration of the estate. That was followed by Chitty J. in *Fussell v. Dowding*. (6) See also *Molyneux v. Fletcher*. (7)

There is no distinction between this case and those in which there is a reference to statutory next of kin. Next of kin means next of kin at the death of the propositus: *Gundry v. Pinniger*. (8) In *In re Michell's Trusts* (9), where a wife at the time of her marriage was entitled under a will to a contingent reversionary interest in personalty which during the coverture became vested,

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(1) 45 Ch. D. 51.

(5) (1876) 4 Ch. D. 413.

(2) [1904] 1 Ch. 1.

(6) (1884) 27 Ch. D. 237, 240.

(3) [1911] 2 Ch. 275.

(7) [1898] 1 Q. B. 648.

(4) [1896] 2 Ch. 369.

(8) (1852) 1 D. M. & G. 502.

(9) (1878) 9 Ch. D. 5, 10.

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but did not come into possession until after the determination of the coverture, it was held that the property was not within a covenant to settle future property of the wife. Jessel M.R. there said: "The husband could not effectually settle, either by himself or with his wife, property in expectancy, that is, property which they had not got." A mere expectancy cannot be conveyed. The person who has it can covenant to convey it when it ripens into an interest.

The words "in expectancy" seem to have been taken from the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 1. *In re Johnson* (1) affords an interpretation of the words as used in that section. They are to be found in Key and Elphinstone's Precedents in Conveyancing, 9th ed. vol. ii. p. 577. In this case the words are mere redundancy.

Further we submit that the covenant in this respect is too vague to be enforced by a Court of Equity. It does not deal with any defined spes successionis, but with one which would apply to any succession to the estate of anybody in which Mrs. Martin might be interested as one of the next of kin: *In re Clarke* (2); *Tailby v. Official Receiver*. (3)

Romer, K.C., and *A. L. Morris*, for the respondents. We do not dispute the law as to a mere spes successionis, but we submit that this is an interest in property which does not come within it.

In *In re Parsons* (4) Kay J. draws a distinction between a gift to such of the kindred of A. as shall be living at his death and a gift to those who shall then be his statutory next of kin, and says that he is unable to agree that the cases are parallel. The distinction is recognized in *In re Gray's Settlement*. (5) This is more than a mere spes successionis; it is an interest in a definite property.

The reasoning in *In re Parsons* (6) is based upon this, that in such a limitation to the next of kin of a person no one is able to say "I must if I live be a member of that class." Here Mrs. Martin was in a position so to say.

(1) [1891] 3 Ch. 48.

(2) (1887) 36 Ch. D. 348, 355.

(3) (1888) 13 App. Cas. 523, 529.

(4) 45 Ch. D. 63.

(5) [1896] 2 Ch. 802.

(6) 45 Ch. D. 51.

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The mode of expression here has not the effect of giving a mere spes successionis. It would be an extension of *In re Parsons* (2) so to hold.

Iselin in reply.

[COZENS-HARDY M.R. We only wish to hear you upon the question that the covenant being for value ought to be held binding: *Meek v. Kettlewell*. (3)]

The covenant is too vague in this respect to be enforceable. In *In re Ellenborough* (4) Buckley J. said that the point of *Meek v. Kettlewell* (3) was that the assignment was not of property, but of a mere expectancy. It is not, of course, disputed that the interest of Mrs. Martin would have been bound if it had fallen into possession during the coverture.

COZENS-HARDY M.R. This is an appeal from the decision of Neville J., and it raises the question whether a fund which has been paid into Court is or is not caught by a covenant in a marriage settlement. Neville J. has held that it is. From that decision the appeal is brought.

The material facts may be very shortly stated. Mrs. Mudge by her will dated in 1862 gave her residue, in certain events, amongst her four daughters and a son, and she directed that the share of her daughter Williamina should be for her separate use, the income to be paid to her for life without power of anticipation, and after her decease to her children who should attain twenty-one or marry in such shares as she should appoint, and "if she shall die without issue who shall live to attain a vested interest her share to go to her next of kin as if she had not been married." The testatrix died in 1864. Jane Isabella, one of the daughters, married in 1866, and in her marriage settlement there was a clause for the settlement of after-acquired property which is in these words: "It is hereby agreed and declared that if the said Jane Isabella Mudge now is . . . seised or possessed of or entitled to any real or personal property of the value of 50*l.* and upwards for any estate or interest whatsoever in possession,

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(1) (1862) 4 D. F. & J. 524, 529.

(2) 45 Ch. D. 51.

(3) (1843) 1 Ph. 342.

(4) [1903] 1 Ch. 697, 701.

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reversion, remainder or expectancy" (with certain exceptions) "then and in every such case the said Robert Martin and Jane Isabella Mudge and all other necessary parties shall at the cost of the said trust estate convey the said real and personal property to or otherwise cause the same to be vested in the said trustees or trustee."

The husband died in 1871, and during the coverture no property was acquired by the wife, and that is why I omitted to read that portion of the covenant which relates to property to which during the coverture she might become entitled. Williamina married and died in 1912 without issue, and Mrs. Martin is in the events which have happened her sole next of kin, and she claims that the fund in Court should be paid out to her. The settlement trustees, doing what they are bound to do, assert that this money is caught by the covenant, and so Neville J. has held.

Three points have been raised in this case. In the first place, what was the nature of the interest which Mrs. Martin the married woman had at the date of the settlement? It was merely a *spes successionis*, or, if that is not an accurate term (and perhaps in the circumstances it is not), it was an interest which, by a long series of authorities which it is impossible for us to question, has been treated as equivalent to a *spes successionis* and subject to all the same incidents. At the moment of the marriage nobody could say who would be the next of kin of Williamina when she died. Nobody could tell. In the events that have happened no doubt Mrs. Martin happens to be that person. Just as it has been held that an interest under a limitation to what is often spoken of as an artificial class of next of kin, namely, the persons who would have been next of kin under the statute if there had been an intestacy, is a kind of *spes successionis*, so I think this is. I cannot draw any distinction between the case in which statutory next of kin are referred to and the present case where it is provided that Williamina's share is to go to her next of kin as if she had not been married. I think, therefore, that whatever might be said in principle in support of Mr. Romer's contention, it is too late for us to act upon any other rule than that which has

been settled by a very long series of authorities, which are summed up in Kay J.'s elaborate judgment in *In re Parsons*. (1) Mrs. Martin's interest was not property that could be assigned at law; there was nothing to assign; it was not property; it was not a contingent interest in property, and it was not a future interest in property. It could only be dealt with, if at all, by means of a contract for value in the instrument, and must be dealt with on that footing.

Then the question arises, is her interest caught by the covenant in the settlement? It is said that although a spes successionis cannot be assigned it can be dealt with by contract, and it is contended (and there is a good deal of force in this argument) that the word "expectancy" in the covenant must have some meaning and effect given to it. In other documents and under other circumstances an "expectancy" may well mean a future interest either in remainder or reversion, but it is said that in this case both "remainder" and "reversion" are mentioned and that the word "expectancy" must have some other meaning given to it. I think the better view on this part of the case is that the word "expectancy" is mere redundancy and that no meaning whatever ought to be attached to it. It is not necessary to express a conclusion on that because I think there is a further difficulty in the way of supporting the decision of Neville J. This was a covenant entered into in 1866, and we must remember that it is not dealing with any defined spes successionis; it would apply to the estate or interest of any person in the world in which this lady might be interested as one of the next of kin. Is not a covenant of that kind too vague and too uncertain to have any effect given to it? Nothing happened, of course, during the coverture in relation to Mrs. Martin's interest. Williamina survived Mr. Martin, and the interest in question did not accrue during the coverture at all. I think the better view is to hold that the covenant really is of such a nature that it cannot be regarded as enforceable, and ought not to be enforced by a Court of Equity. I am impressed with *Meek v. Kettlewell* (2), a decision of Lord Lyndhurst affirming *Wigram V.-C.* That was a case of a definite expectancy, an

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expectancy on the death of a particular individual, and all that was said there was that an assignment by a voluntary deed of such an expectancy has no force or effect at all, there is no property which it would pass, but that if it is an assignment for value then equity will help it, as it will help almost any transaction which though in form an assignment of property yet is regarded as containing or importing a covenant to do that which is necessary to effect the validity of the assignment. Upon the whole, therefore, with great respect to the learned judge, I think he has taken a wrong view and that Mrs. Martin is now entitled to the fund which has been paid into Court. It is really quite unnecessary to say that the trustees were bound to come to the Court, and in fact I think they were told to come to the Court to defend the interests of the beneficiaries. The costs in the Court below and the costs of this appeal must, therefore, be paid out of the fund.

SWINFEN EADY L.J. I am of the same opinion. It appears in this case that under the will of Mrs. Mudge her residuary property was given between her four daughters and her son William. Williamina was one of the daughters, and Williamina's share was settled by the will. The income was directed to be paid to Williamina for her life and after her death to her children who should attain twenty-one or marry in such manner as she should appoint. Then comes this clause, "And if she shall die without issue who shall live to attain a vested interest her share to go to her next of kin as if she had not been married." That event ultimately happened. Williamina died without issue, and, therefore, the persons there designated as her next of kin as if she had not been married ultimately became entitled to the share under the will. The lady who thus became entitled was her sister Mrs. Martin, who had married Mr. Martin and covenanted to settle her property in 1866. At that time Mrs. Martin, her mother being then dead, would, if she survived her sister Williamina and that sister died without issue living to attain a vested interest, become the next of kin, or one of the next of kin, of her sister Williamina, and as such entitled to all or part, as the case might be, of Williamina's share. That

being her interest or expectancy it is not in terms mentioned in the settlement, but the settlement contains a provision that if Mrs. Martin then was or if during the said intended coverture she should become "seised or possessed of or entitled to any real or personal property of the value of 50*l.* and upwards for any estate or interest whatsoever in possession, reversion, remainder or expectancy," then that property was to be settled.

The first point made by the respondents was that this was an interest in personal property and was settled by the settlement; that it was an interest as distinguished from a mere hope of succeeding—a mere *spes successionis*. I think the authorities to which the Master of the Rolls has referred make it too late now to raise such a question. It may be that technically it is not quite in the same position as a *spes successionis*, because if there were a failure of issue and the lady were to survive her sister she must ultimately become entitled to all or part of that sister's share, which was of a definite amount. The answer to the argument is that it is concluded by a long series of authorities that where a gift is made in terms of reference to the next of kin of a person it must be treated in the same light as if it were technically a *spes successionis*. The authorities, and particularly the case of *In re Parsons* (1), where Kay J. went through all the previous cases, really conclude the question.

Then there is the further point as to whether this was an interest in "expectancy" within the meaning of the covenant. The short answer to this part of the case is that the settlement is not sufficiently definite to comprise this interest. The interest is not referred to specifically in any part of the settlement, and without throwing any doubt upon the well-established rule that a mere expectancy is assignable in equity for value, on the construction of this instrument I think it is not sufficiently definitely referred to so as to be included within it. There was no change in this case during the coverture, and this decision throws no doubt at all on the efficacy of the ordinary covenant to settle after-acquired property where, during the coverture, further property is acquired and can be definitely ascertained

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as coming within the language of the covenant. In the leading cases of *Meek v. Kettlewell* (1) and *In re Ellenborough* (2) the expectancy was specifically described and the only reason why the covenants were not enforced was that the assignment was voluntary. In this case it was for value. The true answer to the respondents' argument on this part of the case is that the interest is not sufficiently defined by the settlement to be caught by its provisions. For these reasons I agree that the appeal should be allowed.

PHILLIMORE L.J. I agree. Although it is the law that by apt words such an expectancy as the chance of succeeding to a dead man's estate by reason of his dying intestate may be assigned, yet the cases have established that any one of the ordinary forms of covenant to settle after-acquired property in a marriage settlement does not catch such a spes successionis where there has been no accruer during the coverture. The cases have further established that although the chance of being one of the statutory next of kin under limitations in default of other interests is more hopeful than a mere spes successionis, still it is to be treated as a spes successionis; and the cases have gone further still and have said that if there is a limitation to an artificial class of next of kin, such as the persons who would be entitled as the statutory next of kin if the wife died unmarried, the same principle applies. I am of opinion that in the absence of the necessary special words in this covenant this interest has not been caught. It has been contended that it is caught by the word "expectancy," but with regard to this second point I have nothing to add to what the other members of the Court have said.

Solicitors: *J. Child; Coote & Richards.*

(1) 1 Ph. 342.

(2) [1903] 1 Ch. 697.

G. A. S.