[HIGH COURT OF AUSTRALIA.]

HURLEY . . . . . PLAINTIFF;

AND

HURLEY . . . . . DEFENDANT.

H. C. OF A. 1947.

BRISBANE, *June* 20.

RICH J.

Will—Construction—Devise and bequest of land and live stock—Subject to right of testator's niece to live thereon, whilst unmarried and use certain chattels and stock—Niece residing with testator during his lifetime—Continuity of residence—Abandonment—Whether trust tenancy for life or personal right.

A testator by his will devised and bequeathed his land and stock thereon to his nephews subject to the right of his niece "to live there while unmarried." He further directed that she was "to have the full use of the horse sulky and the harness and saddle horse she chooses to ride and to be allowed to milk whatever cow she liked and to be provided with beef while my two said nephews are killing and they are to cut wood for her." The niece, who resided with the testator during his lifetime, continued for fifteen months after his death to live in a dwelling house on the land but in 1930 bought a home in Killarney where she has resided ever since.

In an action by the niece for a declaration that she was entitled to reside on the lands,

Held, (1) that the property had been devised directly to the nephews and that the will conferred on the niece a mere personal right to live on the lands which amounted neither to a trust nor a tenancy for life in her favour;

(2) that by living elsewhere she had abandoned this right.

TRIAL OF ACTION.

Katherine May Hurley of Killarney, Queensland brought an action in the High Court in its original jurisdiction against Jeremiah James Hurley, as trustee under the will of Jeremiah Hurley deceased, of New Koorelah, New South Wales. The plaintiff, a niece of the deceased and sister of the defendant, claimed a declaration that under the will she was entitled to reside in a dwelling house on certain lands at New Koorelah forming part of the estate of the

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testator. For about fifteen years prior to his death the plaintiff resided with the deceased in a dwelling erected on the lands. She continued to reside there fifteen months after his decease and then went to live with her mother and later acquired her own home at Killarney, where she now resided.

The action was heard by *Rich* J. in whose judgment the relevant facts and the provisions of the will are sufficiently set forth.

Allen, for the plaintiff.

Draney, for the defendant.

June 20.

RICH J. delivered the following judgment :—

The controversy in this case arises out of a provision in the will of Jeremiah Hurley, in which attempts are made to secure certain benefits for his niece. She had resided with her uncle in one of the "dwelling-houses" erected on the land. His nephew (the defendant) resided in another "dwelling-house" on the land. The provision in question is as follows :—The testator gave, devised and bequeathed the whole of his land and stock "thereon at New Koorelah aforesaid" to his nephews, the defendant and the said Thomas John Hurley in equal shares, subject to the right of his niece, the plaintiff, "to live there while unmarried," and further directed as follows, that is to say :—"She" (meaning the plaintiff) "is to have the full use of the horse sulky and the harness and saddle horse she chooses to ride and to be allowed to milk whatever cow she liked and to be provided with beef while my two said nephews are killing and they are to cut wood for her." This devise and bequest are, to say the least of it, ambiguous and contain rather queer provisions. After the death of the testator the defendant acquired from his brother the whole of his interest in the estate of the testator. Hence the action is brought against the defendant alone. In it the plaintiff claims, *inter alia*, "a personal right during her spinsterhood of residence and occupation in and of the dwelling-house."

Counsel for the plaintiff contended that the provision in question created either a trust or a tenancy for life. This contention cannot be adopted. In my opinion the right conferred was merely a personal right or option which the plaintiff might exercise or not: cf. *May* v. *May* (1). In the first place, as counsel for the defendant has pointed out, the land is devised directly to the testator's nephews. The right attached is "the right to live there." No

(1) (1881) 44 L.T. N.S. 412, at p. 413.

express mention is made of the "dwelling-house." And the plaintiff has never asked the defendant for liberty to live on the land. Her claim is for the right to live in one of the dwelling houses erected on the land. However, I shall assume in favour of the plaintiff that there is an implication that it was the testator's intention that the plaintiff should personally have the right to enjoy the amenities which during his lifetime arose from her living with him. The testator specified what they were, but it is quite clear that he intended that she was to continue the personal enjoyment of them, assuming that she did not marry. The personal character of the right is emphasised by the words "the right to live there" and by the phrase "the full use of the horse sulky and harness and saddle horse she chooses to ride and to be allowed to milk whatever cow she liked and to be provided with beef while my two nephews are killing and they are to cut wood for her." It would be absurd to suggest that she could let the house and pass on to the tenant these amenities, and the testator did not mean that she could relinquish her right to live in the house after his death and reassert her right after the lapse of some long period. The testator did not contemplate the possibility of his niece abandoning her residence and then, perhaps, at the end of many years, returning and demanding to be reinstated in the use of the house and of a jinker, the supply of the milk of a cow and of beef and firewood. The continuation of personal residence was plainly intended. I think it should be implied that the benefits specified in this will are to continue until the niece abandons her residence in the "dwelling-house", when her rights would cease. This does not mean that she had always to be physically present at this house. It merely means that she must continue to treat it as her usual dwelling place. It is consistent with absence from the place itself, provided that the absences are of a temporary nature, such as characterize absences of an ordinary householder from his place of residence. As to the cow, firewood and beef, it is difficult to see how she can obtain any specific rights with regard to them. The condition imposing personal labour in cutting firewood and killing and supplying meat can hardly be enforced in equity, and it does not appear that she was intended to appropriate one cow for her exclusive use. Her right to go into the herd from time to time and obtain milk from any milking cow is hardly a right of property even in equity.

Giving this construction to the will, the question of fact which emerges is whether the plaintiff did not abandon her residence. On this question the evidence admits of only one conclusion. The

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plaintiff left the dwelling house in question in 1929 or 1930, bought for herself a house in Killarney, where she resided with her mother and sister until their respective deaths, and is still living there. In the words of *Sargant* J., in *In re Anderson*; *Halligey* v. *Kirkley* (1): "She has left it" (the dwelling house) "empty and unoccupied ever since; she has resided elsewhere." She did not choose to avail herself of the right of personal residence. Upon the abandonment of the right the house and its contents reverted to the defendant. The evidence as to her ownership of other furniture is unsatisfactory. Even if it is properly the subject of this action I could not on the evidence give effect to it.

For these reasons the action must be dismissed, and with costs.

Judgment for defendant with costs.

Solicitors for the plaintiff, *R. J. Leeper*, Warwick, by *McSweeney & Leeper*.

Solicitors for the defendant, *Neil O'Sullivan & Neville*, Warwick, by *Neil O'Sullivan*.

B. J. J.

(1) (1920) 1 Ch. 175, at p. 182.