Judgment of the Judicial Committee of the Privy Council on the Appeal of Prawnkisto Chunder and others v. *Sreemutty Bamasoondery Dossee and another from the late Supreme Court at Fort William, in Bengal; delivered 16th December*, 1867.

Present:

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
SIR RICHARD TORIN KINDERSLEY.

SIR LAWRENCE PEEL.

THEIR Lordships are of opinion that the decree of the Court of Supreme Judicature at Calcutta is correct. It is a question upon the construction of the Will, and the meaning of the testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in India relative to these subjects.

It is important, in the first place, to consider what is the nature of the interest which he has given to his sons. He has directed his sons, using the words, "living jointly in respect of food," to take care of and look after his property, movable and immovable, and carry on his trading business. It is to be observed that this interest is not accurately represented by the words joint estate in England, for if he had given the property simply to the sons with no further direction than that they should live jointly in respect of food, and one of the sons had died, his share, with all the accretions, would have gone to his heir, to the person who was entitled to inherit according to the Hindu law, so that in point of fact the interest was, as regards succession, more analogous to the tenancy in common which prevails in England. It is also proper to observe that no analogy exists between the present case and that to which it was endeavoured to be likened, viz. where a testator in England has given the property to executors for the

purpose of carrying on his trade, in which case a trust is imposed upon the executors, who take no beneficial interest in it, and the question is, how the profits of that trade are to be divided amongst the persons who are pointed out by the testator. It is therefore in this case important to observe whether the testator has pointed out in his Will how the share of his property is to go, upon the death of any one of his sons, and also how far that direction extends. According to the Will, if one of the sons had died, leaving a son, the share of the son so dying would have gone to his son, or, in other words, the grandson of the testator. It is only in the event of his son not leaving a son that the testator has directed that the share shall go to the survivors. This is of the more importance, because their Lordships are of opinion that this construction is not lightly to be inferred, but that it is necessary that the testator should express distinctly what his intention is. This they think that he has done. It was argued that a considerable distinction existed between this case and the case in 6th Moore, because in that case one-fifth was given to each son, and if one died the fifth was given over; but their Lordships are of opinion that the effect of this Will is to direct that the share which each son took, and which would have gone to his heirs according to the Hindoo law, was, in the case of any one of his sons leaving no son, directed to go to the other sons if not in express words, still by a necessary inference to be drawn from the expressions used by him, and this is indeed the contention of the respondents, and was so held in the Court below, from which decision the appellants have not appealed. The question is, whether the share of profits made during the joint lives of the sons which belonged to the deceased son follows his share of the capital and goes over to the other sons. In the first place, it is to be observed that the testator has given no direction to accumulate; it remains therefore to be seen whether the Court can find, from the words of the Will, as counsel argued, an irresistible inference that such was the intention of the testator. This is the more important, because in the case in the 8th Moore, which is relied upon as governing this case, there is an express direction to accumulate.

It was there directed that the surplus was to be added to the capital. There is an absence of that in this case. It is admitted that the testator could not dispose of the property of his son, or prevent the heir of the son from inheriting his property; therefore the only question here is, whether the testator has directed the accumulations of the property to be added to and made part of his own property, because if he has not, it was the property of the son, and the testator had no power of disposing of it.

In this view of the case their Lordships think that this Will, on whichever translation it is taken, shows an absence of any direction to accumulate. The first direction is, that the sons should live joint in respect of food, and that they should carry on the trading business, and so forth. If the Will had stopped there, the only result would have been, that upon the death of this son his heir would have taken his share in the business; but the Will goes on to give a direction that should the sons disagree, then, after making certain directions as to the application of the income, the surplus was to be partitioned equally amongst them. That is directly opposed to any accumulation. Nor does the testator give any direction whatever in respect to what is to be done with the profits before they disagree and separate. It would follow therefore if the Will ended there, that the profits arising from the business would be the separate property of each of the five sons in fifths, after they had provided for the carrying on of the business. We find nothing in the subsequent parts of the Will which interferes with that. The second section is the only part of the Will which relates to this subject. The testator there directs that if any of the sons should die without a son, then that the daughters of that son should receive Rs. 100, and his widowed wife, if she lived, being included as a member of the family, should receive the expenses of brito neom, and the other religious acts and ceremonies which she should perform. Then he directs what is to be done, "if ungovernable, and not living in my house, she should go and live elsewhere, or not wish to live in the family, then she shall receive Rs. 2000." Besides this, he directs that "she shall not be able to make any demand or claim on my movable and immovable

property, trading business, and estate, etc., upon the allegation of her husband's proper share ;" that is to say, she is not to be at liberty to make any claim or demand upon the movable or immovable property of the testator, and there it stops. This brings it round exactly to the same question, whether the testator has in fact by these words disposed of anything more than the capital of the fund. The words he uses are: "my movable and immovable property, trading business, and estate, etc., upon the allegation of her husband's proper share," that is his share of the testator's property; that is the one-fifth of the trading business, which the testator had given to him. If their Lordships are right in coming to the conclusion that the testator has said nothing about what is to be done with the profits of the business, and has made no direction to accumulate, it necessarily follows, that those profits belong to each of the sons in fifths, and accordingly would be divided as such, and therefore, upon the true construction of the Will, their Lordships are of opinion, that the testator has not attempted to dispose of these profits, which are the property of the son; if he had, a question might have arisen whether such a direction could have been a valid one or not, but their Lordships are of opinion, upon a fair construction of the words he has used, that it was his intention not to touch the question of profits, but to leave them to go as they would go, according to law, in case there was no disagreement between the sons, the result of which would be that each would take a fifth of the surplus profits, that this fifth would be the property of each son, and would go to his heirs, exactly in the same manner as any other property that he might have acquired. It will be obvious that if the son had taken his share of the profits, and invested it in the purchase of any other property, no question could have arisen. It is a fair inference also that the view that he took in case they disagreed, viz. that they should divide the surplus profit, is a sort of guide for what he intended they should do in case they did not disagree at all.

Their Lordships also think that this case is exceedingly close upon the case in 6th Moore, and, although they would reluctantly allow, in the construction of a Will, the construction of one Will to

be an imperative guide for the construction of another, where the expressions were not identical, still they think that the principles laid down in that case govern the present; and they concur with the observations made by Sir Barnes Peacock in delivering judgment, that the testator has not attempted to dispose of, and, if he had, could not effectually have disposed of the property of his son.

There is another point relative to the property of the partnership, consisting of Company's paper. The facts of the case appear to be these: the partnership assets consisted in part of Company's paper, which were taken in the name of the deceased son, or in his name jointly with the names of the other brothers, and it was necessary that they should be indorsed. The result was that he indorsed the bills in blank, and gave them to his brothers. This was, in their Lordship's opinion, a mere ordinary partnership transaction for the purpose of enabling the partners to realize part of the assets of the partnership, which would not affect the right that each son had to his share of the profits, not giving to the son, who has died, the exclusive right to the Company's paper, which he so even indorsed, though taken in his name alone, but only making it a part of the assets of the partnership, in which he would be entitled to his share after the expenses of partnership were duly discharged.

Their Lordships, therefore, will humbly recommend Her Majesty that the decision of the Supreme Court of Judicature in Calcutta be affirmed with costs.