Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sreemutty Kristoromoney Dossee v. *Moharajah Norendro Krishna Bahadoor and others, from the High Court of Judicature at Fort William, in Bengal; delivered 24th November* 1888.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The question in this case arises from a rather obscure passage in the will of Raja Jadubindro Kristna, who disposed of the residue of his estate in the following terms:—

"I give devise and bequeath the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents issues profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay assign and convey the residue of my estate real and personal to my half brothers Rajas Nreepainder Krishna Bahadur and Nurrendra Krishna Bahadur in equal moieties and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of my said daughter."

The will is dated 25th March 1851. The testator died in 1852. His daughter, who was his only child, is the Plaintiff and Appellant in this suit. She has six sons, all born after the testator's death. His brothers both survived him. One of them Nreependro has died, leaving only two sons, both born after the testator's death. The other Norendro is living. He had

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three sons born in the lifetime of the testator, of whom one is dead and two are living, and four other sons born after the testator's death. The Defendants and Respondents in this suit are Norendro the surviving brother; his six surviving sons, and the representative of the one who has died; the two sons of Nreependro, who are also his executors; and the six sons of the Plaintiff. Every person therefore who could possibly claim an interest under the residuary gift is a party to the suit.

The Plaintiff contends that the residuary gift is invalid, except so far as it confers life interests on herself and her uncles, and that on the death of Nreependro the moiety of the estate designed for him or his heirs male became vested in her as her father's sole heir. The adverse contention is that the gift is made absolute to each of the testator's brothers, defeasible only in events which have not happened, viz., in each case, the death of the brother without leaving male heirs of his body then living. The High Court have adopted the latter view of the case, and have dismissed the suit. From their decree this appeal is brought.

The view of the High Court has been supported by the Counsel for the Respondents the brothers' families, who expressly stated that their argument, though endeavouring to amplify and illustrate the High Court's view, must be taken as not departing from it. The High Court considered that the true intention of the testator was "that in the event of his two half brothers "having at the time of their death male de- "scendants, they if alive, or their families as "representing them if dead, should take the fee "of this property; but that in the event of their "having no such descendants at the time of "their death, the estate should be divested and "go over to the son or sons of his daughter."

This conclusion is rested, first, on the direction to the trustees to "pay, assign, and convey," which, it is said, shows that the whole estate is to be dealt with; secondly, on the circumstance that no words of limitation or exclusion are attached to the expression "heir or "heirs male of his or their body;" and, thirdly, on a view of the law which is stated thus :—

"It appears from the Tagore case, as I said just now, that if that [the gift to the brothers] is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of Bhoobun Mohini Debi *v.* Hurrish Chunder Chowdhery, reported in L. R., 5 I. A., p. 138, and other cases besides, that although according to Hindu law it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law."

The rules of law thus stated do not bear directly on the decision of the High Court, because in their view the will does not, as events have turned out, purport to confer any interest on an unborn person, or any gift over on contingency, but it leaves gifts, made absolute in the first instance, undisturbed by subsequent events. But the whole construction of the will has been argued, quite properly, with reference to these rules. It is important to have them accurately stated. And their Lordships find that the statement of the High Court requires some qualifications.

The Tagore case decides not only that a devise to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid, which is more germane to the present case. There is no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough.

The rule is that if a Hindoo donor wishes to confer an estate of inheritance, it must be such a one as is known to the Hindoo law, which an English estate tail is not. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add; first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the Mullick case, 9 Moo. Ind. App., 123; and secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the Tagore case.

The case of Bhoobun Mohini conforms to all these rules. There was no gift over in that case. The donor made a gift to his sister Kasiswari in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known, and often used by Hindoo donors who intend to pass the whole inheritance, though they mention only children or issue. Then he said, "No other heir shall be entitled." This was held to mean that, if Kasiswari died leaving no issue then living, her interest was to cease. In effect the construction was that, if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent he or his heir would lawfully re-enter.

Upon the construction of this will their Lordships are unable to find anything which points to the death of the brothers as the time for ascertaining in what way the property is to be disposed of. The life of the daughter is the period for which the trust continues; it is on her death that the trustees are to pay, assign, and convey; and the question is, to whom? The

payment, &c., is contemplated as a single act to be performed at one moment of time, and that time is the death of the daughter. The expression "pay assign and convey" is important to show as much as that, but their Lordships do not enter upon any discussion, such as has taken place in England, as to the effect of such words upon the nature of the gift over. They treat the will in the same way as if the testator had said that, on his daughter's death, the property was to be held in trust for, or that it should go over to, his brothers and the other donees.

To whom then is the conveyance to be made? None is directed except to the brothers in equal moieties and to the heir or heirs male of their or either of their bodies (or, in simpler words, to the brothers and their heirs male respectively in equal shares), on failure of which to the sons of the daughter. Their Lordships cannot see where the absolute gift of the property to the brothers comes in. It is given, not to them, but to them and their heirs male. Why should the words "heirs male" be introduced at all, if an estate descendible to heirs general has previously been given? The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator.

The latter of these two alternatives can only be reached by reading the word "and" as if it was "or." Indeed one passage of the judgement looks as if this construction was in the minds of the learned Judges. They point out that no words of limitation are attached to the words "heirs, &c." And they add, "This shows "that the intention was that whenever the "estate was conveyed from his own trustees to "his half brothers who might be alive, *or* to "their or either of their male descendants, it

" was to be an absolute estate as soon as it " became vested in them." This cannot refer merely to the circumstance that in making the conveyance after the daughter's death it might be necessary, if the brothers themselves were dead, to convey to their heirs, because, on the hypothesis of an absolute interest in the brothers, the conveyance would be to the heirs general, or it might be to the alienees, not to the male descendants.

The absence of words of limitation after the words " heirs, &c.," does not appear to their Lordships to be of much significance; but, as far as it goes, it rather favours the Appellant's than the Respondents' construction, because if " heirs, &c." are themselves words of limitation, words of limitation attached to them would be inappropriate; otherwise they would be appropriate, and they would tend to show that the " heirs " were objects of direct gift.

But upon putting it to Mr. Rigby whether he claimed to read the word " and " in a disjunctive sense, he at once disclaimed any such contention; and indeed it is obvious that there are great difficulties in the way of such a construction, even if it would better the position of the Respondents.

Their Lordships therefore find that the first of the two alternative constructions is the only possible one. The will is composed in English; the draftsman seems to have had a smattering of English real property law; he clearly knew there was a difference between a son and an heir male of the body; and apparently he had English dispositions of property in his eye. This seems to be an attempt, of a kind not infrequent among Bengal zemindars of late years, to introduce English estates tail into Hindoo property, which the law will not allow. At all events their Lordships must con-

strue the words in their plain and obvious sense; and finding no gift to the brothers, except that which orders a conveyance to them and the heirs male of their bodies, they hold that the intention was to confer on them an estate of inheritance resembling an English estate in tail male. That cannot take effect. But the testator intended to benefit his brothers personally; and his gift to them and their heirs male would if valid have carried with it the enjoyment by each of his share during his life. They think that this intention, though it is mixed up with the intention to give an estate tail, may lawfully take effect, as was held in the case of Tarakeswar Roy, 10 Ind. App.

Whether the words which introduce the gift over, "in failure of which," import a general failure of the brothers' issue, is a point on which we need not speculate. It is possible that the draftsman, following English models, intended to give a remainder after an estate tail; it is also possible that he was only thinking of the contingency that at the daughter's death, when the trustees came to convey, they might find neither brothers nor issue of brothers in existence. In the first case the gift fails with the estate tail after which it is limited; and in either case the gift fails because the daughter's sons, being unborn at the testator's death, are incapable of taking anything from him.

It is suggested that a Court of construction may hold, in favour of the intention, that a fee simple or absolute interest is conferred by inapt words or dispositions, just as in English law an estate tail is often held to be conferred by inapt words or dispositions, because it comes nearest to effecting the actual intention of the testator. But if this testator intended not to give an absolute interest, which their Lordships

hold to be clear from his introduction of heirs male, it is impossible to say that his intention is more defeated by the law which cuts down his gift in tail to a life interest, than it would be by straining the will to give an absolute interest, in which case the property might pass away from the family to a mortgagee, or a general creditor, or a strange donee. Their Lordships would not be justified in taking any such liberty with the will.

The Plaintiff prays for a declaration of rights, for possession of a moiety of the property, for a partition, and for the appointment of a trustee. The decree, after declaring the rights, gives directions as to the appointment of a trustee and the continuance of a receiver. Except as aforesaid it dismisses the suit. Their Lordships are of opinion that the decree should be discharged so far as it declares the rights of the parties, and so far as it dismisses the suit. Instead of, the portion discharged there should be declarations that, according to the true construction of the will, the gift of the residue, so far as it purports to confer an estate of inheritance on the testator's half brothers and the heirs male of their bodies, is contrary to law and is void; that in the events which have happened the gift to the sons of the Plaintiff, the testator's daughter, is incapable of taking effect; that each of the testator's half brothers took an estate for his life in one moiety of the residue in remainder expectant on the death of the Plaintiff; and that, on the death of Raja Nreependro Krishna Bahadoor, the inheritance of his moiety devolved on the Plaintiff as her father's heir in remainder immediately expectant on her own life estate under the will, and she therefore became entitled in possession to one moiety of the residue. The High Court should place her

in possession of that moiety, and should take steps to effect a partition if either of the parties desires it.

As regards costs, the High Court thought it just that the several parties should bear their own. Their Lordships think that the rights of all parties under this perplexing will could not have been settled, as by this decree they will be, without bringing before the Court all parties for whom the will expressly designed gifts, or who by a reasonable construction could claim them. The suit, or some like suit, was absolutely necessary, and it is not too extensively framed. The case is one in which it is just to pay the costs of all parties out of the residue in dispute. The decree therefore should be varied on this point also. In all other respects it should be affirmed. Their Lordships will deal in the same way with the costs of this appeal.

They will humbly advise Her Majesty in accordance with this opinion.