Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Harriss and Another v. *Brown and Others, from the High Court of Judicature at Fort William in Bengal; delivered the 22nd June* 1901.

Present at the Hearing :

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD ROBERTSON.
SIR RICHARD COUCH.
SIR FORD NORTH.

[*Delivered by Sir Richard Couch.*]

Thomas Paul D'Silva, who died in February 1857, made a will dated the 5th January 1857, of which he appointed the Respondent, Edward Brown, sole executor.

After leaving various legacies, he disposed of the residue of his estate by Clause 11, which is as follows :—

"After carrying out all the directions and "paying the legacies specified in the above-"mentioned paragraphs, all my ancestral and "self-acquired movable and immovable properties "that shall remain, as also the movable and "immovable properties left by Domingo Manuel "Anthony D'Silva, and which I have inherited, "shall descend in equal shares to the eldest son "to be born to each of the daughters of my late "brother Janni Manuel D'Silva (namely) "Mrs. Cecilia Proby and Miss Flora D'Silva, "who are now alive. The sons of those "daughters (of my brother) shall after their "birth remain under the control and guardian-"ship of the Executor Saheb until they attain

" majority at the expiry of 21 (twenty-one) " years, and whenever the eldest son of any of " the ladies shall attain majority, the executor " will make over his share to him to his " satisfaction. Of my two brothers' daughters I " give to the elder (namely) Cecilia Proby, the " Bharpasha Tofelbari dwelling-house inherited " by me, and to the younger (namely) Miss Flora, " the house at Shibpore. But if for the purposes " of management of my properties it should be " necessary for the executor to stay in any one of " the said two houses, there shall be raised no " objection to his doing so.

" And as regards the ornaments and tables " and almirahs and other articles that I have in " my custody and under my control I give the " same to the said daughters (of my brother) in " equal shares.

" The elder of them is married. Immediately " upon my death she will get her half share of " the same from the executor. The younger " one has not been married yet. She is under " age. When she arrives at marriageable age " she will be given in marriage to a suitable " person with the consent and according to the " views of the executor. At the time of her " marriage the executor will give her the half " share she is entitled to, and as regards the sum " of Rs. 50 (fifty) a month, which has been fixed " for the maintenance of each of the said two " daughters (of my brother) the elder of them " will be paid her monthly allowance month " after month. The younger shall be sent to " school, and her necessary expenses at the " school will be met from her fixed monthly " allowance. Finis."

The will is in the Bengali language, and this is the translation which has been transmitted by the High Court to the Registrar as an official translation of it.

Cecilia Proby had a son born on 17th May 1858, who lived to be 21, and to whom on his attaining his majority, one moiety of the estate was handed over by the executor.

Flora married George Williams in 1878. She had an infant son born on 23rd August 1883, who only lived a few hours. Subsequently, she and her husband had differences and lived apart. George Williams died after the assignments next spoken of, and no further issue was born to them.

On the 31st March 1892, Flora Williams sold half of her interest in the second moiety of the testator's estate to the third, fourth and fifth Respondents.

On the 12th August 1892, Flora Williams executed a deed to Amrita Lal Banerji by which after reciting her previous assignment to the above three Respondents she assigned to him for Rs. 3,000 the residue of her interest in the half-share of the residue of the testator's estate and also the allowance to her of Rs. 50 per month. On the same day George Williams executed a deed by which after reciting that upon the birth of the eldest son of Flora Williams by him the moiety of the residuary estate became as he was advised and believed vested in the said eldest son and upon his death he George Williams became entitled to it as his heir he assigned to Amrita Lal Banerji all his interest in it for Rs. 4,000 and Amrita Lal Banerji on the same day assigned to Alfred Edmund Harriss all his interests under those two deeds for Rs. 9,000.

The suit in this Appeal was brought by Harriss who has since died and the Appellants are his administrators against Brown the executor and the other Respondents. The plaint prayed that the will might be interpreted and the rights of the respective parties declared by the Court, that it might be declared that the moiety of the

remaining estate vested in a deceased son of Flora Williams and after his death it devolved upon George Williams and the Plaintiff was entitled to recover this as purchaser; that if the Court held that Flora Williams was entitled to anything then the Plaintiff was entitled to recover it as purchaser, that Flora Williams had sold her monthly allowance of Rs. 50 to the Plaintiff and he was entitled to it. The Respondent Brown by his written statement alleged that nothing vested in the infant son of Flora Williams and that there was an intestacy under which that moiety passed equally to Flora and Cecilia. Flora Williams in her written statement alleged that she had transferred half of her interest to the third fourth and fifth Respondents and that the deed in favour of Amrita Lal Banerji was obtained from her by fraud.

The first question for consideration is what is the construction of the will as to the shares of the residue. The suit was first heard by the Officiating Second Subordinate Judge of Backergunge on the 12th September 1896. In his judgment (Rec. 77) he states the paragraph of the will in the same words as are stated in the translation in the transmitted record of proceedings with one exception. Instead of the words being as in that "the executor will make over his share to him" it is "the executor will make over *charge of* his "share to him." Then after a paragraph which need not be noticed the Judge refers to the contention of the Plaintiff's Counsel that the words "eldest son" meant the first born son and that the estate vested in him as soon as he was born, and says that the will is in the Bengali language and there are words and expressions in paragraph 11 which as it seems to him indicate that the construction suggested cannot be accepted as correct. The learned Judge then says "The passage I rely upon is (quoting the Bengali

" original) the words mean the eldest son living " and not the first born, the words in the passage " denote whoever may be the eldest son living to " complete the age of 21 years." Now an eldest son to be born is not the same as an eldest son who shall live to attain the age of 21 years and who may be a second, third or fourth born son. The correctness of the translation " eldest son to " be born " does not appear to be questioned but the words are held not to have their ordinary meaning apparently because they are followed by the direction to the executor to make over the share to the son on his attaining majority. Then he says "*Again there is not a single word in the " will to indicate that the estate bequeathed would " vest in the son as soon as he would be born.*" This is a serious error. The words " descend to " the eldest son," mean to go down to him, to belong to him in succession to the testator and refer to his birth. It will be seen that the High Court translates the Bengali by " devolve or go " which has the same meaning.

The learned Judge proceeds to say " *On the " contrary* the testator directed that the share " bequeathed would be made over to him by " the executor on his attaining and completing " the age of 21 years and not before." This is another error. The will is not to the contrary when it says that the sons of the daughters shall after their birth remain under the control and guardianship of the executor until they attain majority at the expiry of 21 years and whenever the eldest son of one of them shall attain majority the executor will make over his share to him. It will be seen that the High Court also relies upon the direction to the executor to make over the share as showing that it was not to be vested until the attaining the age of 21 years. The Subordinate

Judge had a translation with the word "charge" in it which it seemed to him ought not to be there and he says that "if the word 'charge' "be retained it might mean that the estate "would vest in the son on his birth and the "executor would remain in charge of the same "till he would attain majority when merely the "charge of the same would be made over to "him." This is really what is intended by the direction that the sons shall remain under the control and guardianship of the executor until they attain majority and whenever one of them does the executor "shall make over "his share to him." The executor as guardian would have charge of the share vested in the son and these words merely point to the possession or enjoyment of it.

Upon the question whether the assignment by Flora Williams to Amrita Lal Banerji was valid and that effect should be given to the purchase by Harriss the Judge held that it should and accordingly made a decree in his favour only for a fourth share of the accumulations of the income of the half share bequeathed to the son of Flora Williams and for the monthly allowance of Rs. 50 and dismissed the suit as to the rest of the claim.

Harriss having died the present Appellants as his representatives appealed to the High Court and Flora Williams made a cross-appeal on the ground that her sale to Amrita Lal Banerji was not binding on her. After noticing in its judgment that the will is in the Bengali language and character and that the Subordinate Judge who is a Bengali himself was fully conversant with the language in which the will is written, the High Court states the passage in the judgment of the Subordinate Judge which their Lordships have commented upon. Then

having stated in Roman characters the Bengali words of the material part of the clause, they say "we had this passage translated by one of the "Court translators who has chosen to translate "the words 'parjyapta haibek' by the English "words 'will become vested.'" We regret that in our opinion his version is entirely incorrect. The translation made by the sworn interpreter on the original side of the Court accords in the interpretation of the words "prajyapta haibeck" with the translation in the paper-book. The technical meaning conveyed by the English expressions "shall vest" "shall become vested" are not in our opinion conveyed by the Bengali words "parjyapta haibek" which really mean "shall devolve or go" and indicate the line of devolution." This appears to their Lordships to be a misconception of what words are necessary for the vesting of a bequest or legacy. A bequest in favour of a person simply (that is without any intimation of a desire to suspend or postpone its operation) confers a vested interest. It must be remembered that it is within a comparatively recent period that Indian testators have adopted English modes of creating interests in their estates. There is no line of precedents attaching to Bengali terms meanings which make them understood as terms of art by Bengali lawyers. It is not suggested in this case that the meaning affixed by the Courts to the testator's language is a sense required by a course of practice known to vahils. The only safe course is to give to his words their plain ordinary meaning. The official translation in the Record, that by the sworn interpreter of the High Court, and that of the Judges agree regarding the critical words. They are words of direct and simple gift to the eldest son. The learned Judges appear to find in the appointment of an executor and guardian to the minors with a

direction to make over the property to them on their attaining majority something contrary to an intention that the gift should vest in the object at once. It is new to their Lordships to hear that these ordinary directions have any effect in suspending the ownership of the property and it seems to them that such a ruling is calculated to disturb settled principles. The judgment continues " It will be observed that " the testator goes on to add that the sons of his " brother's daughters not merely the eldest born " shall after their birth remain under the control " and guardianship of the executor until they " attain majority at the expiry of 21 years " *showing* that it was not the eldest or firstborn " who would take the property but the eldest " among them who shall attain 21. The learned " Counsel for the Plaintiff contended that the " sons of those daughters who were to remain " after their birth under the control and " guardianship of the executor meant the two " eldest sons in whom the estate had already vested. " But the original 'putragan' clearly refers to " all their sons the intention of the testator " evidently being that during their minority " his nieces' sons should be maintained out of " his residuary estate and only when the two " eldest among them should attain majority " were their respective shares to be made over to " them." In their Lordships' opinion the contention of the Plaintiff's Counsel is right. The words " the sons of those daughters " following immediately the bequest plainly refer to the sons to whom it is made. The 15th clause of the will to which the learned Judges refer as confirming their opinion is consistent with the contention of Counsel and their Lordships do not see any reason for the opinion that all the sons were during their minority to be maintained out of the residuary estate. The result is that their

Lordships are of opinion that on the birth of the son of Flora Williams the half share in dispute became vefted in him and oh his death it passed to his father as his heir. The learned Judges say that in the construction of the clause they have had the advantage of the opinion of Mr. Justice Gupta who is fully conversant with the Bengali language which is his mother tongue and who agrees with them in the meaning to be attached to it. Their Lordships remark upon this that Judges who have heard the arguments and who are responsible for the decision can hardly with propriety rest it on the authority of one who has not heard the arguments and is not responsible for the decision though he also may be a Judge of the High Court. It is true that this case is a peculiar one in which Judges have to interpret a language which seems to be imperfectly known to themselves and to be familiar to a colleague. But then their Lordships are not informed how Mr. Justice Gupta translates the Bengali words. It is only said that he agrees with the meaning which the other learned Judges below attach to the clause in question. He does not appear to have thrown any new light on the rendering of the words into English. It must be taken that on this point he agrees with his colleagues of the High Court and with their sworn interpreter and with the official translation in the record. If so, the agreement with the decision must be on account of that further reasoning which has led the Courts below to inferences from which their Lordships dissent.

The learned Judges say that, as the Subordinate Judge is a Bengali, it would require very cogent reasons to induce them to place a different construction on the clause in question. Certainly, it is impossible to be too careful in ascertaining the exact effect of the Bengali

terms. But that has been done after an unusual amount of testing, and there is no disagreement about it. The decision of both Lower Courts rests on principles of construction common alike to English and Indian documents; and that is the point on which their Lordships differ from them.

The second question is whether the deed of sale to Amrita Lal Banerji by Flora Williams of the 12th August 1892 was valid, she having in her written statement alleged that it was fraudulently obtained. The Subordinate Judge held that the fraud was not proved and that Harriss's purchase from Amrita Lal Banerji "must stand and be given effect to." The High Court in the appeal to it did not decide this question but considering the amount of the accumulations which Flora Williams would be entitled to receive upon their construction of the will as well as the monthly allowance of Rs. 50 they were of opinion that the bargain was of an unconscionable character and could not be sustained. According to their Lordships' construction of the will Amrita Lal Banerji obtained only the monthly allowance by his purchase and there is no ground for holding that this was an unconscionable bargain.

Their Lordships will humbly advise His Majesty to reverse the decrees of both the lower Courts and to make a decree declaring that a moiety of the residuary estate was vested in the deceased son of Flora Williams and at his death it devolved upon George Williams and the Appellants are entitled to it as representing Harriss the purchaser. And ordering that an account of the estate since the death of the testator be taken and that any money found due from the Respondent Brown on adjustment of the account shall be paid to the Appellants. Also declaring that Flora

Williams sold her monthly allowance of Rs. 50 and that the Appellants are entitled to it and ordering all the money that is due for it from the 12th August 1892 with interest at Rs. 6 per cent. per annum to be paid to them.

Their Lordships think that the Appellants and the executor Edward Brown are entitled to take their costs of all the proceedings in India out of the portion of the estate of Thomas Paul D'Silva in the hands of the executor but that all other parties should bear their own costs of those proceedings and they will humbly advise His Majesty accordingly. The Appellants will likewise have their costs of this Appeal from the same source.

Their Lordships have already directed that the Appellants' costs of opposing the petition of the Respondent Cecilia Proby to be heard after the hearing had concluded shall be paid by her.