Proceedings and Judgment of the Lords of the Judicial Committee of the Privy Council on Appeal from the Equity Side of Her Majesty's Supreme Court of Judicature at Fort William, Bengal; Sreemutty Soorjeemoney Dossee v. *Denobundo Mullick and others;* 10*th February*, 1862.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JOHN T. COLERIDGE.

SIR LAWRENCE PEEL.
SIR J. W. COLVILE.

THE Solicitor-General and Mr. Rolt, Q.C., having been heard for the Appellant,—

Lord Justice Knight Bruce:—Upon one point, probably the principal point in this case, their Lordships do not consider it necessary to hear the Respondents. The chief question is, as to the meaning and effect of a certain provision contained in the will of the testator, Bustomdoss Mullick, first, what is the sense, and next, is the will (duly construed) at variance with Hindoo law? By the first clause of the will the testator, mentioning his five sons, one of whom has since died, and whose share of the property is now in dispute, gives them in effect all his property, in such a way as, if there were no more in the will, would make them absolute owners of it. But in a subsequent clause (No. 11) the testator says, "The Issore avert, but should, peradventure, "any among my said five sons die, not leaving "any son from his loins, nor any son's son, in "that event neither his widow nor his daughter, nor "his daughter's son, nor any of them, will get any "share out of the share that he has obtained of the

" immoveables and moveables of my said estate. In " that event, of the said property, such of my sons, " and my son's sons as shall then be alive, they will " receive that wealth according to their respective " shares. If any one acts repugnant to this, it is " inadmissible. However, if my sonless son shall " leave a widow, in that event she will only receive " Company's rupees ten thousand, for her food " and raiment."

A controversy has been raised whether, according to the true meaning of this 11th clause, the testator points to an indefinite failure of male issue of any one of his sons whose male issue should fail, or failure of male issue at the time of his death. Their Lordships, taking the will to have been translated accurately, as it seems admitted on all hands to be, consider it to be perfectly plain that that to which the testator here points is not an indefinite failure of male issue, but a failure of male issue of any of his sons at the time of the death of that son. This happened in the case of the son Surroopchunder, who died without leaving male issue living at that time. Accordingly, an event has happened that the testator pointed out. The question then is, whether the Hindoo law prohibits such a provision.

Whatever may have formerly been considered the state of that law as to the testamentary power of Hindoos over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognized in practice. The law of India, at least the law of Bengal, has long been administered upon that basis, and the very mode in which this suit has been

framed, and the manner in which it was conducted in India, are evidence, if evidence were wanting, that such is the general opinion entertained in Bengal. Their Lordships, therefore, being of opinion, as has already been stated, that according to the true meaning of this will the property was given over upon an event which was to take place, if at all, immediately on the close of a life in being at the time when the will was made, and seeing that that event has happened, consider that the testator, in making this provision, did not infringe or exceed the powers given him by the Hindoo law, and that the clause effectually gives the *corpns* of the property to the surviving sons immediately on the death of that son who died without leaving male issue. To that question, therefore, the Respondents' Counsel need not address themselves. The question or questions as to the accumulations, interest, and maintenance, they will be so good as to address themselves to.

Sir Hugh Cairns.—My Lords, I might, perhaps, respectfully beg to be informed whether by the word "accumulations" your Lordships referred to the same question as maintenance.

Lord Justice Knight Bruce.—Accumulations, interest, and maintenance; every question, in short, except as to the title to the mere corpus.

Their Lordships having heard Sir Hugh Cairns, Q. C., and Mr. Leith, for the Respondents, and the reply of the Solicitor-General,—

Lord Justice Knight Bruce.—Their Lordships are of opinion that the declaration in the Decree may be with propriety varied in the manner to be now read; as to which, however (though it is probably more a matter of form than of substance), their Lordships will readily listen to any observations that Counsel may wish to make. Their Lordships propose to report to Her Majesty that the declaration in the Judgment of the Supreme Court in Bengal, of the 25th of August, 1859, in the words following, namely:—

"This Court doth declare that the said Plaintiff, "as the widow and immediate heiress and repre- "sentative of Surroopchunder Mullick, deceased, "in the pleadings of this cause named, is entitled "for and during the term of her natural life to

" one equal fifth-part or share of and in the accu-
" mulations which accrued during the life-time of
" the said Surroopchunder Mullick from or in
" respect of the joint estate which was of Bustom-
" doss Mullick, deceased, the testator in the
" pleadings named, and to one equal fifth-part or
" share of the interest and other profits (if any)
" which have been made or received since the death
" of the said Surroopchunder Mullick from the accu-
" mulations which, as aforesaid, accrued during his
" life-time from or in respect of the said joint estate,
" to be held, possessed, and enjoyed by her as a
" Hindoo widow in the manner prescribed by Hindoo
" law," be omitted, and that it ought (instead) to be declared, that according to the true construction of the will of Bustomdoss Mullick, Surroopchunder Mullick became and was entitled to one equal fifth-part of the estate, moveable and immoveable, of Bustomdoss Mullick, but that such title was defeasible, nevertheless, upon the event of his death without leaving any son or son's son then living:

And that it ought further to be declared that Surroopchunder Mullick having died without leaving any son or son's son, his interest in the capital of the estate determined upon his death.

But that it ought to be also declared that Surroopchunder Mullick was at the time of his death entitled, and that the Appellant, as his widow, heiress, and representative, is now entitled, to one equal fifth-part of all accumulations which arose from the estate of Bustomdoss Mullick from the time of his death to the time of the death of Surroopchunder Mullick, the part to which the Appellant is so entitled to be held, possessed, and enjoyed by her as a Hindoo widow in the manner prescribed by Hindoo law.

And that it ought to be declared that the Appellant is entitled absolutely in her own right to all such interest and accumulations as, since the death of Surroopchunder Mullick, has or have arisen from the said one-fifth part of the said accumulations to which she is before declared to have been entitled.

There remains the question of maintenance. It may be that the Decree in its present shape, varied

only in the manner which has been mentioned, decides and settles that question, whether on the ground of the Appellant having received the 10,000 rupees given by the will, and taken the benefit of a residence and participation in the means of worship which the Decree mentions, or otherwise. If that *is* the effect of the Decree, their Lordships are not disposed to interfere with it. They see no ground on which the Appellant can claim that interference; and on the other hand, if the Decree leaves the point open, leaves room for an application which, upon the state of the accounts as they shall ultimately appear, or otherwise, it may be reasonable to make consistently with the Decree, their Lordships do not desire to interfere with that. They leave the matter as it is.

Then with regard to the costs. It is true that the Decree will be to some extent altered, but as to the main point of the contention the Appeal fails. It can hardly be said to succeed on any point, notwithstanding the slight alteration in language. And they see no reason why, in addition to the heavy costs which this lady heretofore has—their Lordships do not say improperly—occasioned to the estate, the costs of this Appeal should also be thrown upon it.

Their Lordships are of opinion that the costs of this Appeal must be borne by the Appellant. Does any observation occur to the Counsel upon the proposed alteration?

The Solicitor-General.—None occur to me, my Lord.

Mr. Leith.—None, my Lord, to me.

Lord Justice Knight Bruce.—The Counsel of course will understand that we leave the declaration as to the right of the Appellant to receive the legacy of 10,000 rupees to have such effect as it may. There is no doubt, we suppose, that the accounts directed by the Decree which we leave will bring out the whole condition of the estate, and enable the declarations to be carried into effect.

Mr. Leith.—I believe so. I believe that we take every account necessary to raise the question of maintenance.