Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Juttendromohun Tagore and another v. *Ganendromohun Tagore, and Cross Appeal, from the High Court of Judicature at Calcutta; delivered 5th July,* 1872.

Present:

Sir James W. Colvile.
Lord Justice James.
Lord Justice Mellish.
Mr. Justice Willes.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THESE were consolidated cross-appeals from a decree of the High Court of Judicature in Bengal (Appellate side), disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Honourable Prosonocoomar Tagore, a Hindoo inhabitant of Calcutta, who died on the 30th of August, 1868, leaving his only son, the Plaintiff, and two widow daughters, with six grandchildren, the children of daughters him surviving.

The Defendants are three of the trustees and executors under the will of Prosonocoomar, dated the 10th of October, 1862, together with the persons in existence who claim a beneficial interest under the will, other than legacies and annuities (which are not disputed). The trustees and executors are Opendromohun Tagore, Juttendromohun Tagore and Doorgapersaud Mookerjee.

Juttendromohun Tagore is named as the first tenant for life, and he had, and has, no son.

The Defendant Sourendromohun Tagore (named in the will Shooshendromohun Tagore) is also named as tenant for life.

The Defendant Promodecoomar Tagore (a minor), is the son of Sourendromohun Tagore, and was born in the lifetime of the testator. He is described as tenant for life.

The remaining Defendant, Suteendurmohun Tagore (a minor), is the grandson of Lullitmohun Tagore, who was dead at the date of the will. He was born in the lifetime of the testator. His father and grandfather died before the testator. If the will be valid he is entitled to an estate in tail male.

It does not appear that any other person beneficially interested is in existence. The fourth trustee has not acted, though he does not appear to have renounced. No question as to parties has been raised except as to the alleged want of any description of the capacity in which Juttendromohun Tagore has been sued. This latter point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly overruled it.

The will provided for the testator's daughters and grandchildren, but made no provision for the Plaintiff, stating that he had been already provided for in the testator's lifetime. That provision was made by nuptial gift on the occasion of the Plaintiff's marriage in the year 1843, when there was settled upon him absolutely, by his father, a zemindary, which then fetched 7,000 rupees per annum, and the present value of which the Plaintiff does not state. Upon the death of the Plaintiff's first wife his father also paid him the value of her jewels, to which he laid claim.

The explanation of the exclusion of the Plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. Nor does any such question arise as was discussed in Abraham *v.* Abraham (9 Moore P. C. 195), as to the law applicable to the convert's own property or as to the personal relations of him and his family. The Act XXI of 1850 appears to their Lordships to be conclusive to show that this change of religion does not affect the Plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the will, it will be convenient to state its effect,

citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the testator had acquired in severalty large estates, both real and personal, partly ancestral, but for the most part by his personal industry, and that the testator had already made such provision for his son Ganendromohun Tagore (the Plaintiff) as he considered sufficient, and that Ganendromohun Tagore would "take nothing whatever under the will," it purports to give all the testator's property to four trustees, of whom Juttendromohun Tagore was one, "their heirs, executors, administrators, representatives, and assigns," upon trust,

As to the personalty (except jewels, &c., in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real estate or the income, or surplus income thereof, shall wish to retain for his and their own use"), to pay funeral expenses, debts, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the trustees, with power to change the securities,

To pay annuities afterwards given (except 1,000 rupees a-month afterwards given for worship) and legacies payable after the investment, and:

"After payment of such annuities and legacies do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall, under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all of the said annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust, monies, and securities, and the interest, dividends, and annual proceeds thereof, in trust absolutely for the person or persons entitled under the limitations and directions hereinafter contained and expressed, to the beneficial or absolute enjoyment of my said real property:"

And as to "realty or immovable property," or of the nature of realty, "to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities:

To pay 1,000 rupees a-month for the worship of idols:

And the residue "to the person or persons" for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the will "for the absolute use of such person or persons respectively," and the will desires that the "trustees or trustee shall hold the said real estate generally for the use and benefit of such last mentioned person or persons for the time being, so far as is consistent with the trusts and provisions" of the will; that, after payment of expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real property, or of the income or surplus thereof, should receive 2,500 rupees a-month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent. The will then directs as follows:—

"And so soon as all the legacies and annuities (save and except the said sum of 1,000 rupees, for the worship of the said idols), given by this my will, shall have fallen in or been paid and fully satisfied, then in trust forthwith, to convey the said real estate and premises unto and to the use of the person who shall under the limitations and directions herein contained be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions and directions as are hereinafter contained and expressed, of and concerning the said real estate, so far as the then conditions of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringeing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

All the gifts, &c., in the will are declared to be subject to the bequest to the trustees, and to the provisions and declarations with reference thereto.

The will, then, after reciting that the testator's father had established certain idols at Molla Johur, and had given a talook to supply the means for their worship, and that such provision was insufficient, gives the 1,000 rupees, before mentioned, per month, for the purposes of the worship.

Provisions follow for the members of his family, other than the Plaintiff, by annuities and legcaies, to vest upon the testator's death. Then follow provisions for servants, for charities, and for founding the Tagore Law Professorship.

The will then disposes of the real property as follows :—

"And whereas I am, amongst other property, possessed of and entitled to a zemindary or talook called Pergunnah Patleadah, and Kismut Patleadah, in Zillah Rungpore, subject to an annual consolidated jumma, payable to Government of rupees 40,555 : 13 : 3, and I am also possessed of and entitled to other estates and property in Zillah Rungpore and other districts, and also to a ghaut, which I have erected and built on the river bank side of the Strand Road in Calcutta, and also to land and buildings opposite thereto, abbutting on and near to the said road, and also to the Boitakhannah House, land and premises, where I usually reside, and also to various other parcels of real estate. And whereas the frequent division and subdivision of estates in Bengal is injurious alike to the families of zemindars and to the ryots, who are in consequence oppressed by numerous and needy landlords having conflicting interests, whence arise disputes and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the ryots and tenants thereof, and I am desirous that such improvements should continue to go on, and should not be interrupted by any division of the said estates or disputes concerning the same: Now, therefore, I give and devise (subject always to the devise to the said Ramanauth Tagore, Woopendromohun Tagore, Juttendromohun Tagore, and Doorgapersaud Mookerjee hereinbefore contained) all the real property of what particular tenure, nature or kind soever, and also library, horses, carriages, farmyard, furniture of the Boituckhannah, jewels, gold and silver plates, &c., which I shall, at the time of my death, be possessed of or entitled to, to and for the following uses, and subject to the following provisions and declarations, that is to say:—Unto and to the use of the said Juttendromohun Tagore for and during the term of his natural life; and from and after the determination of that estate, to the use of the eldest son of the said Juttendromohun Tagore, who shall be born during my life for the life of such eldest son; and after the determination of that estate, to the use of the first and other sons successively of the said eldest son of the said Jutterdromohun Tagore, according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of the said Juttendromohun Tagore, who shall be born during my life successively, according to their respective seniorities, for the life of each such sons respectively; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of the said Juttendromohun Tagore and the heirs male of their respective bodies issuing, so that the elder of the sons of the said Juttendromohun Tagore born in my lifetime, and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and taken before the younger of the sons of the said Juttendromohun Tagore born in my lifetime, and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the sons of

the said Juttendromohun Tagore, who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and take before the younger of such sons and the heirs male of their and his respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, then to the use of Shooshendromohun Tagore, the second son of my brother, Hurrucoomar Tagore, for the term of his natural life; and after the failure or determination of that estate,—"

Then to the sons of Sourendromohun Tagore and their sons and the heirs male of their body respectively, in like manner as for Juttendro's, and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their body of Lullitmohun Tagore successively, and respectively in like manner as in the case of the sons of Juttendro and Sourendro. Like limitations as to other persons as to which no further question arises.

Then follows a provision that adopted sons shall be deemed sons of the body within the will, but be postponed to actual issue of the body.

The will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create as follows:—

"And I declare that in the construction of this my will, sons by adoption shall always be deemed younger than and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and, failing descent, by adoption, and his issue or heir males by descent, and, failing descent, by adoption, shall be preferred to every younger son and his or heir male by descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate."

It next provides that such estates of inheritance shall not be alienable as follows:—

"And I declare my will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindoo born and resident in Bengal may give or control the inheritance of his estate, or a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of England whereby an entail may be barred, affected, or destroyed."

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance,

in case of any part of them being permitted by any holder "to be sold for arrears of Government revenues, or in case of failure to keep up in a due state of repair, and to use as his residence in Calcutta," the testator's house and furniture, &c., in which case the person next in succession is to take as in case of death.

There follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the will consists in directions to the trustees as to management and a power of appointment of new trustees in case of death, refusal, or incapacity; and it appoints the trustees to be executors, and gives certain powers to "the acting executors or executor."

There are two codicils. The first makes further provision for the children of a daughter. It speaks of the testator's "trustees or trustee." The second revokes that portion of the will which relates to worship and charity, which it states to have been otherwise provided for by the testator.

The Plaint, after stating these facts, alleges that the trustees and executors have, against the directions in the will, improperly sold or disposed of a portion of the corpus of the personal estate, consisting of Company's paper, and that there is danger of future waste.

The Plaint prays in substance that it be declared:—

1. That the Plaintiff, as only son and heir-at-law, is entitled to represent the estate.

2. That the testator had no absolute power of disposition, especially of ancestral estate.

3. That the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities, are void, or at least void save so far as they give Juttendromohun Tagore a life interest, and that Plaintiff is entitled, after Juttendromohun Tagore's death.

4. That the Plaintiff is entitled to an account of the property, and a declaration of the rights of the parties, and incidental relief by receiver, injunction, and otherwise for securing his interest, and an adequate maintenance, if he be not declared entitled to an immediate interest, and

5. For further relief.

The answer of the trustees and executors, and that of Sourendromohun Tagore, admit the main facts, with some qualifications not at present material; and that of the trustees and executors denies that they have improperly disposed of the estate. They submit that the will is valid, and ask for proper declarations and directions.

The infant Defendants respectively pray that their rights, if any, may be protected by the Court.

The following issues were settled by the High Court :—

"*First.* Does the plaint disclose any cause of action ?

"*Second.* Did the testator die intestate with respect to any and what portion of his estate ?

"*Third.* Was any and what part of the immovable property of the testator ancestral estate, and, if so, had the testator power to dispose thereof by will ?

"*Fourth.* Are any and which of the gifts or limitations contained in the will and codicils of the testator void in law ?

"*Fifth.* What are the rights of the parties respectively under the will and codicils ?

"*Sixth.* Whether the Plaintiff is entitled to any and what maintenance out of the estate of the said testator ?

"*Seventh.* Whether the executors, Defendants, have misapplied any and what portion of the testator's estate ?

At this stage, the cause was heard before the High Court (ordinary original civil jurisdiction), and the learned judge, Mr. Justice Phear, dismissed the plaint.

Upon appeal before the High Court (Appellate Jurisdiction), present Chief Justice Peacock, and Mr. Justice Norman, it was decreed—

(*a.*) That the Decree of the Lower Court be reversed.

(*b.*) That the plaint in this suit does disclose a cause of action.

(*c.*) That Prosonocoomar Tagore, the testator in the pleadings, did die intestate as to certain portions of his property.

(*d.*) That part of the immoveable property of the said testator was ancestral estate, and that he had a right to dispose thereof by will.

(*e.*) That the Plaintiff is not entitled to any maintenance.

(*f.*) That the devises and gifts to Juttendromohun Tagore for life are valid, and that (subject to debts, legacies, and annuities), he is entitled during

his life to the beneficial enjoyment of the real property, and that he is entitled until the legacies and annuities shall fall in, and be satisfied, to receive the sum of 2,500 rs. a month out of the net rents of the immovable property, and also the surplus rents of the said immoveable property, and the unexpended surplus of the interests, dividends, and annual proceeds of the moveable property which shall, from time to time, remain unexpended.

(*g.*) That the said Juttendromohun Tagore is entitled for life to use and enjoy the library, jewels, and other personal property directed to go with the real estate.

(*h.*) That it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immoveable property or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied.

(*i.*) That the trust as to the personal estate, after the annuities and legacies given by the will shall have fallen in and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the Plaintiff, as the heir and representative of the said testator.

(*k.*) That the executors and trustees are bound to render to the Plaintiff an account.

(*l.*) And after disposing of the costs it was ordered and decreed,

(*m.*) That the case be remanded to the Lower Court, with a request that it will try the sixth* issue and return its finding thereon, with the evidence to the Appellate Court.

Thereupon appeals were preferred to Her Majesty in Council by the Plaintiff, by Juttendromohun Tagore and by Sourendromohun Tagore respectively, which have been consolidated, and the case was argued before this Board, when their Lordships adjourned the hearing in order to allow the Defendant, Suteendurmohun Tagore, who was not represented on the argument, the opportunity of being heard. Of that opportunity he has not availed himself, and the case is ripe for judgment.

The questions presented by this case must be

* Intended for the Seventh.

dealt with and decided according to the Hindu law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England, are wholly inapplicable to the Hindu system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty a distinction not known in Hindu law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property (Tyler *v.* Walford 5 Moore, P. C. 304). In the Hindu law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

Whilst, however, rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy. (Domat, 2413).

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs.

This was well expressed by Lord Justice Turner in Soorjomonee Dossee *v.* Denobundo Mullick (6 Moore, I. A., 555): "A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is, that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) an estate of inheritance. If, there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize.

If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest

nephew, and the eldest nephew of such eldest nephew, and so forth, for ever to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that state of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance are void as such, and that by Hindu law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates tail.

It remains however to be considered whether the persons described as heirs in tail or heirs of inheritance not recognized by law, are sufficiently designated to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs in tail, or whether the language of the will is such as to show that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law.

This makes it necessary to consider the Hindu Law of Gifts during life and Wills, and the extent of the testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during life is of the simplest character. As to ancestral estate it is said to be improper that it should be aliened by the holder, without the concurrence of those who are interested in the succession, but by the law as

prevailing in Bengal at least* the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect so as to fall within the principle expressed in the Daya Bhaga, chapter i, v, 21, by the phrase "relinquishment in favour of the donee who is a sentient person."

By a rule now generally adopted in jurisprudence this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children (so much relied upon during the argument) it is distinguishable because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both here and in India, proceeding upon the assump-

* As to Madras see to the same effect Valinayagum Pillai v. Paehche 1, Madras High Court, R. 3:26, 1 Norton L. C., 334 S. C.

tion that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman Law, as pointed out by Mr. E. C. Clark in his interesting treatise upon "Early Roman Law," 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his life-time, is, until revocation a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if he had given the property to them in his life-time. There is no law expressly and in terms applicable to persons who can so take. The law of will has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wenleysdale in the opinion delivered by him as a Judge in the House of Lords, in the case of Mirehouse *v.* Rennell (1 Clark and Finnelly, 546) in accordance with principles generally recognized.* "This case," said Lord Wensleydale, "is in some sense new, as many others are which continually occur, but we have no right to consider it because it is new as one for which the law has not provided at all; and because it has not yet been decided to decide it for ourselves, according to our judgment of what is right and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity,

* See this well stated in the introductory disposition of the Civil Code of Italy, Article 3, "Qualora una controversia non si possa decidere con una precisa disposizione di legge, si avrà riguardo alle disposizioni che regolano casi simili o materie analoghe; ove il caso rimanga tuttavia dubbio, si deciderà secondo i principii generali di diritto."

consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appe rs to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science." The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The Judgment delivered by the Lord Justice Knight Bruce in the case of Sreemutty Soorgeemoney Dossee *v.* Denobundoo Mullick (9 Moore, I. A. 135), was much relied upon to show that the English law as to executory devises ought to be applied in dealing with Hindu succession, and Mr. Justice Phear, upon the authority of that case, held that, "there is nothing in Hindu law to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council) if at all, immediately on the close of a life in being." The expression in the Judgment of the Lord Justice thus relied upon, was as follows:—"We are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu 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, and 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." A consideration of the subject-matter to which these remarks were applied, will, however, at once show that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person

not in existence, but, whether a person in existence, and capable of taking under the will when it had effect might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of Bhoobun Moyee Dabia *v.* Ram Kishore Acharj Chowdhry (10 Moore, I. A. 279), in which the testamentary power of disposition by Hindus in Bengal was fully recognized, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindus in India. It is obvious, therefore, that the conclusion arrived at in the lower court as to the result of the judgment in the former case was erroneous.

Their Lordships, for the reasons already stated, are of opinion, that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law, be in existence at the death of the testator.

Their Lordships, adopting and acting upon the clear general principle of Hindu law that a donee must be in existance, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu law or usage.

These general preliminaries being laid down, it will be proper next to examine in detail the various questions raised upon the discussion of the particular will, in their natural order, first disposing of those which would apply equally to a gift as to a will, and next, to those which affect the will in question.

It was argued on behalf of the Plaintiff, in the first place, that the will is void by reason of its

being founded upon the creation of an estate in trustees, absorbing the whole interest in the property, and out of which the interests of the beneficiaries are to be fed. It was maintained that an estate, to be held in trust, can have no existence by the Hindu law, and that, as the foundation of the will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument, that the legacies and annuities to be paid by the trustees, and which are equally founded upon the trust, are unassailable. The Plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the Plaintiff also gives the go-by to the consideration that if the trusts be void, they are not illegal, and that if they are struck out as void, the estates capable of being created by the will, and which the trusts were introduced to secure and maintain, would thereby become impressed directly upon the estate, subject to the charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a will to receive and pay A an annuity, and subject thereto in trust for B.; if the trust be void, it should simply be struck out, and B would have the property, subject to the annuity.

Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law which has grown up in England of a legal estate which is paramount in one set of courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu law. But it is obvious that property, whether moveable or immoveable, must for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases.

Implied trusts were recognized and established here in the case of a Benamee purchase in Goopeekist Gosain *v.* Gungapersaud Gosain (6 Moore, I. A., 53); and in cases of a provision for charity or for other beneficent objects, such as the professorship

provided for by the will under consideration, where no estate is conferred upon the beneficiaries and their interest is in the proceeds of the property (to which no objection has been raised) the creation of a trust is practically necessary.

If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that under the guise of an unnecessary trust of inheritance the testator could not indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that after the determination of those interests the beneficial interest in the residue of the property remains in the person who, but for the will, would lawfully be entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails.

As for the argument that the trust failed because one of the trustees had renounced or more correctly speaking had not acted, their Lordships think this criticism unfounded in law and wholly inapplicable to the will in question which distinctly provides for the case of a trustee not acting, and gives a directory power to fill up the number of trustees when required.

Having disposed of the question, whether there can be a trust estate, and shown that the distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one for the convenience and benefit of another, the next subject for consideration involves the objections raised on behalf of the Plaintiff to every beneficiary interest or estate created by the will, except the legacies and annuities. A summary of the provisions and limitations in the will, so far as they affect the parties to this suit, and limited for the present to the real estate and the personalty settled therewith, is as follows:—

2,500 rupees per month to the "*person or*

persons for the time being entitled," under the will, "to the beneficial enjoyment of the said real property;"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible;"

And so soon as the legacies and annuities shall have fallen in or been satisfied, then the trustees or trustee are to convey to the person entitled to the beneficial interest, subject to the subsequent limitations "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "if any such law there shall be;"

The limitation referred to was as follows in the present tense, and therefore to operate at the moment the will took effect, though "subject always to the devise to" the trustees.

1. To the Defendant, Juttendromohun Tagore, for life;

2. To his eldest son born during the testator's lifetime for life;

3. In strict settlement upon the first and other sons of such eldest son successively in tail male:

4. Similar limitations for life and in tail male upon the other sons of Juttendromohun Tagore, born in the testator's lifetime, and their sons successively:

5. Limitations in tail male upon the sons of Juttendromohun Tagore, born after the testator's death:

6. "After the failure or determination of the uses and estates hereinbefore limited" to (the Defendant) Sourendro-mohun Tagore for life:

7. Like limitations for the sons of Sourendro-mohun Tagore and their sons as for the sons of Juttendromohun Tagore. Under these limitations the Defendant, Promodecoomar Tagore, who was alive at the death of the testator, is (if the will be valid) entitled for life, subject to the life estates of Juttendromohun Tagore and of his father:

8. Like limitations in favour of the sons of Lullit-mohun Tagore, who was deceased at the date of the will, and their sons in tail male, as for the sons of Juttendromohun Tagore. Under these

limitations (if the will be valid), the Defendant, Suteendurmohun Tagore, as the son of a son (*his father* having died during the testator's lifetime) would take an estate in tail male. He is the only Defendant in that situation:

The will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement showing that the testator desired to dispose of his estate "as fully and completely as a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of England whereby an entail may be barred."

This clause shows an intention that each tenant though of inheritance should be prohibited from alienation, a restriction which in England could only be imposed by Act of Parliament, as in the case of the settled Abergavenny estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence or allowing any part of the property to be sold for Government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the will, with a due regard to the principles already laid down, shows that upon the face of it the will contains a variety of limitations which are void in law, as, for instance, the limitations in favour of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male which is a novel mode of inheritance inconsistent with the Hindu law.

The first life interest in Juttendromohun Tagore next requires attention. It was objected to on two grounds. First, because it was said that Hindu law recognizes only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life estate, reversion, remainder, and so forth. Secondly, it was said that the life interest was void because of the contingency aud uncertainty of the period at which it

was to commence, because of the preference given to the legacies and annuities, and to their being payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of 2,500 rupees per month, so that it is said this life estate may never come into existence, because the legacies and annuities, and interest on arrears, may never be completely satisfied.

As for the first objection, it amounts to this: that because there is, as was contended, only one estate technically known to Hindu law, and that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because in the law we are dealing with the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the Plaintiff that annuities given and charged upon land are valid; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that there is no objection to a similar interest being given by will.

As to the second objection to the life interest, namely, the uncertainty of the period at which it was to commence, that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life interest was to begin at once. It was subject to the devise to trustees who were to receive the rents, allow the life-holder 2,500 rs. per month out of the net proceeds, apply the remainder in aid of the interest of the personalty, to pay off the legacies and annuities, and, when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession

to enjoy the whole. If the trust is not to be read to make estates valid which otherwise would be void, so neither is it to be read to defeat interests which without the trust would be valid. Their Lordships read this will alike according to its words and substance, as giving a life interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above 2,500 rs. per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a state of things. There is not a single estate or interest in question which would not be valid within the English law of perpetuity, assuming that upon the ground of public policy such law ought to extend to India, which the character of the law of gifts there seems to render unnecessary.

Whether Juttendromohun Tagore took not merely an interest for life, but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favour of any of his successors must next be considered. Upon this point it is unnecessary to repeat what has been already said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the testator has attempted to create in each series of limitations, is not authorized by Hindu law. It could not exist with the terms of non-alienation attempted to be annexed to it, even in England. These would be rejected here as repugnant to a valid estate in tail male, created by sufficient words. The general intention to create a known estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents, would be disregarded as an attempt to legislate. Accordingly it has been argued in support of the will, that as it shows an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created, ought to be rejected, and such an estate of inheritance as the law would uphold and sanction ought to be read out of the will, and con-

ferred either upon Juttendromohun Tagore, whose family was intended, so long as it produced males descended of males, to represent the estate described by the testator, by treating his life estate as converted or expanded into an estate of inheritance, according to Hindu law, or, at least upon his son to be begotten or adopted, as the first tenant in tail male, whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow, and to some extent. In order, however, to arrive at this conclusion, we must find a general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process; and we are not at liberty to invent for him a will which will have the effect of creating an estate at variance not merely in details but in substance and effect with what he has said.

The proposed construction would contradict the will in every particular expressed therein. It would give the father a right of inheritance and a power of disposition when the will says that he shall only hold for life. (Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by Nichols *v.* Nichols, 2 W. Bl. 1159.) The proposed construction would give the succession from him to all his sons equally, where the will says that the eldest shall be preferred and have a separate estate of inheritance, and that until that estate fails, the second and so forth shall not succeed. (Testing this alone by English precedents it might plausibly be maintained by Pitt *v.* Jackson, 2 Brown, c.c. 51.) The proposed construction would give succession to women, whom the will excludes. It would let in rights of maintenance, which the will negatives. It would let in the power of alienation, which the will forbids. It would defeat the limitation in case of non-residence. It would disregard the provisions as to leasing and improvement, which show, in common with the rest of the will, that the intention of the testator was to give and to give only such an inheritance as would keep together the property inalienable so long as a male descended in a male line from any of the indicated sources of inheritance should be in existence, and should keep up state in the family mansion. There is no trace to be found in the will of an intention to create any other sort of estate; and the will, as clearly as lan-

guage can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guesswork as to what the testator might have said if he could be asked his meaning; for it would be to contradict in every article what he has intelligibly expressed.

These observations dispose of the case of Humberston *v.* Humberston (1 P. Wms. 1), so much relied upon by Sir Roundell Palmer in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which show that in order to give effect to the general intention of the testator estates of inheritance will be inferred against the particular expression, in order to benefit as nearly as may be in a lawful way all whom the testator intended to benefit. To infer a general estate of inheritance in this case would at the same time defeat the testator's general intention, and benefit persons other than those he intended to benefit, against established principles of construction, and (again to refer for illustration to English law) against the authority of Monypenny *v.* Dering (2 DeGex, Macnaghten, and Gordon, 145). Their Lordships are of opinion that no estate of inheritance other than the void estate in tail male, can be read or deduced from the will.

There is, however, another point of view in which the estates in tail male may be regarded, namely, as intended, at all events, to confer an estate for life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life estate to the first taker is clear, and if an estate in tail male stood first in the will, effect might perhaps be given, to that intention. There was, however, no person in existence to take an estate in tail male at the testator's death except Suteendurmohun Tagore and the validity of his claim to a life interest in succession stands upon the same ground as that of Sourendro-mohun

Tagore and his son, whose position must next be discussed.

Upon this the question arises whether Sourendromohun Tagore, Promodecoomar Tagore, and Suteendurmohun Tagore take life interests successively after that of Juttendromohun Tagore, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. This may be considered in reference to Sourendromohun Tagore, as these other claimants in this respect stand upon a like footing. It may be urged that, as there was at the death of the testator no person to take under the first series of limitations except Juttendromohun Tagore, and no person who came into existence afterwards could in point of law so take, there was in law a "failure" of the estates at the death of the testator, which no subsequent event could affect, and that the interest for life after the death of Juttendromohun Tagore then became vested in Sourendromohun Tagore. The answer is that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law, as if the testator contemplated that his will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the will for supposing that he suspected. The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances, to be conferred.

If Juttendromohun Tagore should beget or adopt a son, and die leaving the son and Sourendromohun Tagore both surviving, either Sourendromohun Tagore (and after him his son) must take at once and enjoy, to the exclusion of the son of Juttendromohun Tagore, in spite of the will; or the heir-at-law (who, though in terms excluded from benefit "under the will," cannot be excluded from his general right of inheritance, without a valid devise to some other person) must enter and

enjoy during the life of Juttendro's son, and of his issue male, actual, or adopted, and Sourendromohun Tagore (or his son), if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law whose intervention was not contemplated by the testator.

If Juttendromohun Tagore were to die leaving power to adopt a son who was afterwards, in fact, adopted, Sourendromohun Tagore would either enjoy absolutely to the exclusion of the son in spite of the will, or the heir-at-law would enter as before stated.

Many other cases might be supposed, in which the rights of Sourendromohun and those who claim after him, instead of forming part of a series of estates in successive devisees to fulfil the testator's intention by keeping up the estate and handing it on from one to another whilst there was a male representative of the selected line of limitation and descent, would become a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or was not any person in existence who would, if by law he could, have been a prior taker under the will.

Their Lordships reject the conclusion either that the testator meant to give an uncertain interest of so strange and shifting a character, or that there was an intention to give an absolute estate to precede the prior estates, in the event not appearing to have been contemplated by the testator of the prior estates being void in law. Their Lordships understand "failure or determination" to mean "failure or determination" in fact of an estate or estates which the testator considered sufficient in law, and that these limitations over were in the scheme of this will intended to follow the creation of the prior estates of inheritance and must fall therewith.

Their Lordships are thus of opinion that a life interest has been created in Juttendromohun Tagore and that the estates of inheritance and subsequent estates or interests attempted to be created by the will have failed.

The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark. There is, however, left the

question how far the personalty not settled with the realty but to be made into a distinct fund by the will after the legacies and annuities had been disposed of, ought to be dealt with. Whether the bequest of the corpus is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (Appellate Jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time, and he treated the gift of the fund of money and securities for money as a gift of the corpus to an uncertain person who might be one of those who for failure of the estate in tail male cannot take the realty. Mr. Justice Norman declined to reject the words "or persons," and he suggested amongst others the construction that the person then in possession and his successors should take the entire income and profits without deduction, but he leant to the alternative, that it was uncertain whether the testator meant to make an absolute gift or only to give the interest in succession, *reddendo singula singulis*, and upon this ground he concurred in holding the gift to be void. The decree gives Juttendromohun Tagore the surplus of the interest remaining in the hands of the Trustees after payment of the legacies and annuities, and excludes him and his successors from any right to the subsequently accruing interest, which is hardly consistent. The intention of the testator, however, appears sufficiently clear to give effect to all the words as follows, viz., that the surplus in the hands of the Trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty in the same manner as the rents of the realty. The words "or persons" instead of being rejected as inconsistent with a gift of the corpus, ought rather to be taken as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest.

The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all. The words "or persons" in the plural were proper in the clause directing the Trustees, not to convey, but to stand "possessed of and interested in the trust moneys and securities, and the interest, dividends, and the annual proceeds thereof in trust" absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shows that one person was not to take all, but that several persons were to take, and they could only take in succession under the limitations in the will. The words "absolutely" and "absolute" are used not to indicate that the whole was to go over together but that it was to be enjoyed free from the charges in respect of legacies and annuities. No person could be entitled to the "absolute" enjoyment of the real property under the will in the largest sense, and "absolute" is classed by the will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion, is, that after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund, consisting of money and securities, the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the corpus remaining otherwise undisposed of.

In this respect the Decree ought, in the opinion of their Lordships, to be varied and a declaration made of the right of Juttendromohun Tagore, not only to the surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also to the interest of the personalty after such falling in or satisfaction.

As to the Plaintiff's claim to maintenance their Lordships adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testamentary power as to ancestral property can supersede the claim to maintainance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the

marriage gift ought to be rejected. The Plaintiff admits a marriage gift of his father of real property, producing at the time 7,000 rs. per year, which, *primâ facie*, is an adequate maintenance. He does not state the present income. His averment of its insufficiency is not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said Prosonocoomar Tagore's property."

The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion Other circumstances, and even the position or conduct of the claimant (speaking generally and not of the particular claimant), may reduce the maintenance. If the plaint were considered well founded in this respect, a son not provided for might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and than children living as part of his family must be content with. The only question raised, therefore, is, whether the obligation, moral or legal, of the father to provide a reasonable maintenance for his son, is satisfied by a marriage gift of a *primâ facie* adequate income, and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which in this case must be regarded as sufficient, and in respect of which the Plaintiff has laid no foundation for further inquiry, either in law or fact.

The Plaintiff's claim to an account must next be considered. He takes nothing under the will. As heir-at-law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact, until he comes into its enjoyment He has averred upon information and belief that the trustees "against the directions, contained in the will" sold securities for money consisting of Government paper, "out of the corpus of the estate of the said testator and have improperly applied the proceeds thereof." Issue was taken by the trustees upon this averment. In the High Court (original ordinary civil jurisdiction) Mr. Justice Phear considered this statement of the Plaintiff

insufficient because "the trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personalty and the selling of the Government paper of which the Plaintiff complains may, as far as anything goes which is stated by the Plaintiff, have been effected for that purpose." The High Court (Appellate Jurisdiction) however directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the Defendants' knowledge and not within the Plaintiff's, and that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was inconsistent with a due performance of the trust. In this latter view their Lordships concur, and hold that the Plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration, beyond a mere expression of opinion, as to the rights of the parties after the life interest of Juttendro-mohun Tagore, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from Lady Langdale *v.* Briggs (8 De Gex Macnaghten and Gordon, 391), where it was laid down that, generally speaking, it is not according to the course of the Courts in England to declare future rights, and it falls within the exceptions there contemplated as possible, in the Judgment of the Lord Justice Turner, page 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose, or may dispose of the rights of those parties, ought to be incorporated in the Decree.

As to costs, considering that the important questions litigated have arisen from the novelty and difficulty of the will, their Lordships are of opinion that the costs as between attorney and client of all parties in the Lower Court upon appeal to the High Court (Appellate Jurisdiction) and of the appeals to Her Majesty in Council ought to be paid out of the

estate, taking first the corpus of the personal or moveable estate, and that future costs ought to be reserved until the taking of the account, and be then disposed of by the High Court.

Their Lordships will therefore humbly recommend to Her Majesty that the Decree of the High Court (Appellate Jurisdiction) be in part affirmed, and in part varied, and that additional declarations of the rights of the parties should be made as follows, that is to say, that the said Decree be affirmed, so far as it orders that the Decree of the Lower Court in its ordinary civil jurisdiction be reversed, and that the plaint in this suit does show a cause of action, and that the testator died intestate as to certain portions of his property, and that part of the testator's immoveable property was ancestral estate, and that he had a right to dispose thereof by will, and that the Plaintiff is not entitled to any maintenance from the estate of the testator, and that the Plaintiff is entitled to an account as directed by the Decree of the High Court (Appellate Jurisdiction), and that as to the residue of the said Decree that the same be varied, and the following Order and Decree substituted for the same, that is to say, that the Defendant Juttendromohun Tagore is beneficially entitled to a life interest under the said will in the real or immoveable property, and also in the personal or moveable property vested in the trustees therein mentioned, and directed to be conveyed or converted into a fund respectively, subject to the payments therein directed to made, and to the provisions of the will not hereby declared to be void, and also until the legacies and annuities fall in and are satisfied to receive 2,500 rupees per month out of the net rents of the real or immoveable property, and also the surplus rents of the same and the unexpended surplus of the interest, dividends, and annual profits of the personal or moveable property which from time to time remain unexpended after the payments by the will directed to be made thereout, and also that subject to the trusts for payment of the legacies and annuities, the said Juttendromohun Tagore is beneficially entitled for his life to use and enjoy the library, carriages, horses, farmyard, furniture, jewels, gold and silver plates, and other articles belonging to the said testator, except the jewels, household furniture, and other articles

which, at the time of the testator's death, was or were in the personal use of any member of the testator's family, which by the will are not, or were not to be collected, or got in, or sold by the said trustees and executors, and that the limitations in tail male and subsequent limitations in the said will respectively have failed, and are void, and that, upon the failure or determination of the life interest of the said Juttendromohun Tagore, the Plaintiff, subject to the provisions in the said will not hereby declared to be void, is entitled, as heir-at-law of the said testator, to the real and personal property in respect of the receipt and enjoyment of which the said life interest is declared, and that upon the expiration of the said life interests, and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the Plaintiff as such heir-at-law; and that the case be remitted to the Lower Court, with a direction that it shall try the seventh* issue, and return its finding thereon, with the evidence to the High Court (Appellate Jurisdiction); and that the costs of the parties respectively in the Lower Court, of the appeal to the High Court (Appellate Jurisdiction) and the costs of the several Appeals to Her Majesty in Council, be taxed as between attorney and client, and paid out of the estate, taking first the corpus of the personal or moveable property, and that the future costs, if any, be reserved and disposed of by the High Court (Appellate Jurisdiction) upon the taking of the account by that Court directed.

* In the Decree, as printed, erroneously called the sixth issue.

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