Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ganendro Mohun Tagore v. *Rajah Juttendro Mohun Tagore and Others, from the High Court of Judicature at Calcutta; delivered 24th July,* 1874.

Present :

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE questions in this Appeal arise upon a clause in the will of the late Honourable Prosono Coomar Tagore, making provision for the cesser of the estate of the persons entitled under the limitations of the will in the event of non-residence in his Boitokanah house.

The will, by which the testator devised his estates, after the determination of the life estate given to Juttendro Mohun Tagore (the first Respondent), to Juttendro's sons successively in tail male, with subsequent limitations over, according to English forms of limitations, underwent much consideration in the Courts in India and in this Tribunal.

The final decision, speaking generally, was that the limitations in tail and subsequent limitations were contrary to Hindoo law, and void, and that upon the expiration of the first life interest the Appellant, the testator's only son, was entitled, as heir, to the estate.

It will be necessary, before considering the questions arising upon the clause of residence, to refer shortly to the scheme of the will and to some of its provisions.

The testator expressly declared that his son, the Appellant, should take nothing under his will.

He devised all his real and personal property to four trustees (of whom Juttendro was one) in trust to get in *the personalty,* with an exception thus expressed :—" save and except the jewels, household furniture, and other articles in the personal use of the members of my family, and save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use." Upon trust, after paying debts and legacies, to invest the residue and pay out of the income divers annuities and the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of his real property or the profits of it. And as to the *realty* upon trust until his debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities, if the personalty should be inadequate, and subject thereto, to pay the residue to the person for the time being to whom he had devised his real estate under the limitations thereinafter contained "for the absolute use of such person;" and he further directed that the trustees should hold the estate generally for the use and benefit of such person, so far as was consistent with the trusts and provisions of the Will.

The testator directed that out of the income, after paying the necessary costs of managing his estate, "including the expense of the establishments in the Mofussil and Calcutta," the person for the time being entitled to the beneficial enjoyment or surplus income of his real property should receive 2,500 rupees a month, or 30,000 rupees a year.

As soon as the legacies and annuities were paid, and had fallen in, the trustees were directed to convey the real estate unto and to the use of the persons who should be intitled to the beneficial interest therein.

The Will, after mentioning numerous legacies and annuities, contains the specific limitations of the

realty which are introduced by a preamble, stating, amongst other things, that the testator was possessed of a Talook in Zillah Rungpore, subject to a Jumma of 40,555 rupees, and of the Boitokanah house, land, and premises where he usually resided. He then devises (subject to the devise to the Trustees) his "real property," and "also library, horses, carriages, farmyard, furniture of the Boitokanah, jewels, gold and silver plate, &c., unto and to the use of Juttendro (the Respondent) for his natural life, with the limitations over which have been already referred to.

The clause in question as to residence is as follows:—

"Provided always, and I hereby declare that if any devisee or tenant for life or entail or otherwise, or any person entitled to take as heir by descent or adoption or otherwise, or in any manner under the limitations hereinbefore contained, shall permit or suffer the said property so devised and limited as aforesaid or any portion thereof, to be sold for arrears of Government Revenue, or shall after attaining his majority, cease to keep up in a due state of repair and to use as his residence in Calcutta, the said Boitokanah houses and premises where I now reside, and make use and enjoy my library, horses, carriages, farm-yard, furniture in the said house, and jewels, gold and silver plates, &c., in my use and possession, then and immediately thereupon, the devise and limitations in this my will contained and declared, shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed as if the said person so permitting or suffering the said property or any portion thereof to be sold for arrears of Government revenue, or so ceasing to keep up in a state of repairs, and to use as his residence my said Boitokanah house, had then died."

It was contended in the former suit by the Appellant that Juttendro's life estate was void, owing to the uncertainty of the period at which it was to commence. But it was held by this Tribunal that there was no uncertainty, for his interest was to begin at once. It is said in the judgment:—

"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 rupees per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid."

The testator died on the 30th August, 1868. This suit was brought by the Appellant on the

18th November, 1872, to have it declared that the interest of Juttendro had ceased by reason of his non-compliance with the clause relating to residence, and that the Appellant, as heir, was entitled to the estate, subject to the legacies and annuities.

Three distinct grounds of answer were argued at the Bar. (1.) That the limitations to take effect on the determination of Juttendro's interest having been declared to be void, the condition was not binding, and the heir could take no advantage of a breach of it. (2.) That the condition would not attach until Juttendro became entitled to a conveyance from the Trustees on the death of the last annuitant: and (3) That, if this were not so, there had been in fact no breach of the condition.

On the first point their Lordships, as they intimated during the argument, find no difficulty in holding that, as the clause provides for the cesser and determination of the life interest of the Respondent in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over have been declared void, would cease when that event happened, and the Appellant would be entitled to succeed as heir.

On the second point, it was contended for the Respondent that, having regard to the other causes of forfeiture, and especially that for non-payment of the Government jumma, which far exceeded in amount the annual payment of the 30,000 rupees, to which alone he was entitled before there was a surplus income, the testator could not have intended that the clause should come into operation until the trusts were at an end and the donee's estate was perfected by a conveyance.

It was urged, on the other hand, by the Apellant's Counsel, that the clause should be read distributively. They contended also that Juttendro, according to the language and substance of the decision of this Tribunal, had a present life interest subject only to the charge for payment of legacies and annuities. It was pointed out that the testator, in requiring the library and furniture to be used with the house, contemplated an immediate residence in it. And it was observed that Juttendro had actually recovered the possession of the Boitokanah house in a suit against the Trustees, so that if the Respondent's

contention were correct, he might, it was said, hold the house, and be in the enjoyment of all the rents and profits of the estate, except what might be required to pay the last annuitant, without being subject to the condition of residence until that annuitant died. Their Lordships would be reluctant to put a construction on the clause which would have the effect of virtually defeating it, nor is it necessary for them to do so, since they agree with the judgment of the High Court in favour of the Respondent on the third point, viz., that there has been no breach, in fact, of the condition.

Boitokanah appears to mean a house, or the part of a house, used for sitting or reception rooms, where entertainments are usually given, and business transacted. The ladies of the family do not commonly enter these rooms, which, when in the same house with the Zenana, are usually the outer rooms.

The manner in which the testator himself used the Boitokanah house, is thus found by the High Court:—

"It appears from the evidence that the testator possessed a family dwelling-house as well as the Boitokanah, the two houses being completely distinct, and, indeed, situated on different sides of the same street: that sometime before his wife's death, he ceased to sleep in the family dwelling-house after having complained of defective ventilation in his sleeping chamber there; that, thenceforth, he slept at the Boitokanah; that subsequently, during his wife's life, he took his mid-day or principal meal in the family dwelling-house and his evening meal in the Boitokanah; that, after his wife's death, he took both meals in the Boitokanah, but the mid-day meal was taken in native fashion and was cooked at the family dwelling-house, and the evening meal was taken in European fashion and was cooked at the Boitokanah; that he gave his native, or strictly Hindoo, entertainments in his family dwelling-house, and his European entertainments at the Boitokanah; that the testator's family idols were always lodged and worshipped at his family dwelling-house and never at the Boitokanah; and that, at the Boitokanah, all the affairs of his estate were conducted and the necessary establishment kept up and lodged."

The opinion of the High Court on the nature of the residence imposed by the condition, is thus expressed:—

"We think it is to be gathered from the will that the testator never intended the Boitokhanah to be occupied as a dwelling-house in the ordinary sense of a Hindoo dwelling-house." And again, "We are of opinion that the residence intended by him

was an occupation for the purposes of transacting business and of receiving male friends and visitors, and if the occupant of the house for the time being so desired (but not otherwise), for entertaining male friends with hospitality: and we are further of opinion that such an occupation does not require that either the occupant or the ladies of his family should sleep in the house."

Their Lordships think, that in the main, the High Court have properly construed the clause; and they understood the Appellant's Counsel not to dispute this construction, but to contend that the evidence showed that the clause, so construed, had not been complied with.

Several English decisions were cited during the argument, as to the meaning of the word "residence." The principle, if any can be said to result from them, seems to be that where in a condition of residence no manner or period of residence is prescribed, but residence simply and without definition, exclusive residence is not supposed to be meant; and that in such cases the occasional use of the house, and keeping an establishment in it, with the intention of again using it as a residence, is a sufficient compliance with the condition.

In one case Lord Eldon seemed to think a condition imposing residence generally, was so vague, that it was doubtful whether it could be enforced; and he held that, at all events, slight and rare instances of actual residence by the donee were, when the house was kept open by servants living in it, sufficient to satisfy so general a direction.—(Fellingham *v.* Bromley, T. and R., 530.)

In a case (Rex *v.* Sargent 5 T. R. 466) where residence was a necessary qualification for the office of Bailiff of a Borough, Lord Kenyon said:—

"It never can be contended that in order to constitute a residence in any place, it is necessary to reside any given number of days, or even any great part of the year. It happens perpetually that persons have different places of abode, in some of which they reside more or less, as suits their convenience."

The words of the present clause are, "*cease to use* as his residence in Calcutta." It was not disputed that a reasonable time must be allowed to the donee after the testator's death for the commencement of the residence, before it could be imputed to him that he had ceased to reside. The testator died on the 28th August, 1868, and the

Respondent did not, it would appear, use the Boitokanah in any sense as a residence, until some large repairs were completed in October 1872. During this interval of time, he visited the house, and transacted the business of the estate there as one of the trustees, and durwans paid by the trustees were kept in it.

The first question is, whether in the interval referred to, the Respondent could reasonably be required to commence using the house as a residence. The circumstances relied on by his Counsel to justify the delay are (1), The pendency of the great suit brought by the Appellant to defeat his title altogether, which was begun in August 1868, and finally disposed of on Appeal to Her Majesty in July 1872; (2), His inability to get possession of the entire house from the trustees, which he only succeeded in obtaining by a suit commenced in May 1870, and ended in March 1872; and, (3), The unfit state of the house for residence, owing to the want of repairs.

With regard to the first ground, it is certainly little in accordance with reason that the Appellant who disputed in the suit referred to the Respondent's right to possession, and would, if his suit had been successful, have ejected the Respondent from the house with the loss of any money he might have expended on it, and with the liability to account for mesne profits, should now be heard to claim the estate on the ground that the Respondent did not take possession during the time covered by this litigation. But, without saying that the Appellant is estopped by his own conduct from taking advantage of the condition, their Lordships think that the delay is justified by the other two grounds referred to.

It seems that in the testator's lifetime the lower part of the house was used for the transaction of the business of the estate, and a small room on the upper and principal floor of the house was also used as an office. The Respondent, whilst willing to allow the lower part of the house to be used as before, objected to the retention of the upper room by the Trustees. The result of the suit he brought against the Trustees was that he was declared to be entitled to the possession of the whole house. Their Lordships cannot but think he might reason-

ably object to use it as a residence until this question was settled. The testator might have found no inconvenience in having the room occupied as an office when the manager was his own servant, but the inconvenience to the Respondent might be great when a clerk appointed by the trustees was installed within the precincts of the residential part of the house.

But a stronger ground to justify the delay existed in the state of the house and its want of repair.

Mr. Allan the surveyor, who saw the house two or three months before the testator died, says it was much in want of repairs at that time. Soon after his death, it was necessary to take down and rebuild a portion of the east wall at a cost of 6,200 rupees. But further extensive repairs were required. The trustees having hesitated to do them, the Respondent requested Mackintosh and Co. to survey the house, who made a Report to him that "the building throughout is urgently in need of repair." This Report he sent to the trustees with a request that the repairs should be executed. The trustees declined to do them on the ground that the obligation lay upon the Respondent, who, upon this refusal, commenced in December 1871, a suit against them, and in March 1872, obtained a Decree ordering the trustees to repair. The repairs so ordered were commenced in July, and completed in November 1872, at a cost of 14,000 rupees. Mr. Allan, the surveyor, says "the 14,000 rupees was necessary to make the house safe. The house was entirely out of repair, and some portion of it very dangerous."

The Respondent entered into possession in October 1872, before the repairs were entirely completed, and their Lordships agree with the High Court in finding that up to this time there had been no unreasonable delay on the part of the Respondent in commencing to reside, and that no breach of the condition had then occurred.

The conclusion at which, on this point, their Lordships have arrived, is sufficient to dispose of this suit, which was brought on the 18th November, 1872, immediately after the completion of the repairs, in favour of the Respondent; but as evidence was given of the subsequent use of the house, and the High Court expressed an opinion upon it, their Lordships, to prevent future litigation, desire to

state that on this point also they think the view of the High Court is correct.

The Respondent, who appears to adhere more strictly than the testator to Hindoo usages, has no doubt continued to take his meals and sleep in the family house, where the other members of his family live; but this mode of living is not of itself inconsistent with such a residence in the Boitokanah house as the testator, in imposing the condition on his Hindoo descendants, must be supposed to have contemplated. It appears upon the evidence that, since the Respondent entered upon possession the house has been constantly kept open, new furniture has been added to the old, the library taken care of, and not only durwans but menial servants have lived in the house. The Respondent himself frequently, if not daily, went to the house and usually spent several hours there. It appears also that he transacted all affairs of business there, and on some occasions received visitors in rooms properly furnished for their reception.

These acts appear to their Lordships, having regard to the nature of a Boitokanah house and to Hindoo usages, to amount to a use of it as a residence.

It was strongly urged by the Appellant's Counsel that any entertainments the Respondent might give ought to take place in the Boitokanah, and it was said he had always given them at his family dwelling-house.

The omission, however, to use the Boitokanah for this purpose may be accounted for and excused by the condition of the house up to the bringing of this suit. With regard to future entertainments, their Lordships cannot hold that the Respondent is in any way obliged to give them, although, in case he thinks fit to do so, he would best comply with the testator's will by using the Boitokanah house on some, at least, of these occasions.

Some stress was laid on the fact that a part of the furniture and jewels had been removed from the Boitokanah to the family dwelling house. But it seems this was done during the repair of the house, and the furniture was brought back or replaced, and afterwards used in it. The jewels were always kept at the family house, and were so kept there for greater safety; but the language of the condition in

no way confined the use of the jewels to the residence in the Boitokanah.

Their Lordships observe with satisfaction that this suit has been brought to a conclusion with commendable expedition. It was commenced in November 1872, and within twenty months from that date their Lordships are able to report upon this Appeal to Her Majesty. This instance shows that Appeals from India, if prosecuted with vigour, may now be speedily determined.

In the result, their Lordships will advise Her Majesty to affirm the Decree of the High Court, and to dismiss this Appeal, with costs.

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