Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal and Cross Appeal of Kumar Tarakeswar Roy v. *Kumar Shoshi Shikhareswar, from the High Court of Judicature at Fort William in Bengal, delivered* 17*th March* 1883.

Present :

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR ARTHUR HOBHOUSE.

The question in these appeals arises upon the construction of a clause in a Hindoo will, which is in these terms :—

" My brother's sons, Kumar Jagadiswar Roy, Kumar Tarakeswar Roy, and Kumar Sibeswar Roy, shall receive, for defrayment of the expenses of their pious acts, the following out of the properties left by me, to wit, my one half share in pergunnahs Chowgaon and Khord Chowgaon, recorded as No. 278 in the Collectorate of Zillah Rajshahye, in dehi Dalil, and others, appertaining to tuppa Byas, and recorded as No. 456, and in mouzah Dehi Gobindpore, in pergunnah Santosh, recorded as No. 96 in the towzi or rent-roll of the Collectorate of Zillah Dinajpore. The said three nephews shall hold possession of the same in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale; but they, their sons, grandsons, and other descendants in the male line, shall enjoy the same, and shall perform acts of piety as they respectively shall see fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

The facts necessary to be stated are, that the three nephews of the testator were living at his

death; that two of them died before the institution of the present suit, one unmarried, the other leaving a widow but no issue; that the suit was instituted by Kumar Tarakeswar Roy, the survivor, against the infant son of the testator, represented by Hurgobind Bose, appointed manager of the estate by the Court of Wards, to obtain a declaration of title to and possession of half of pergunnahs Chowgaon and Khord Chowgaon. No question arises as to Gobindpore in this suit.

The Plaintiff based his claim on the clause of the will above set out, contending that by its terms an absolute estate was given in undivided shares to the three nephews; that upon the death of his brothers their shares devolved on him, and he was thus entitled to the whole.

The Defendant denied the execution and validity of the will, both of which issues have been disposed of by concurrent judgments of the Courts against him. He further contended that upon the true construction of the will, which is narrowed to that of the clause in question, the Defendant was entitled only to a life estate in one third of the property devised.

The Court of First Instance gave the Plaintiff a decree for his whole claim.

This decree was altered by the High Court, who gave him a life interest only in the whole of the property.

From the judgment of the High Court there are cross appeals.

The first by the Plaintiff, on the ground that he was entitled to an absolute estate in the whole.

The second by the Defendant, on the ground that the Plaintiff was entitled to a life estate in one third only.

It will be convenient to deal firstly with the first appeal.

The grounds of the judgment of the High Court

that the Plaintiff was entitled to a life estate only may be thus shortly stated.

They held, on the authority of Juttendromohan Tagore *v.* Ganendromohun Tagore,* commonly called "the Tagore case," that the testator, having attempted to create an estate of inheritance unknown to and opposed to Hindoo law, that estate of inheritance was void, and that the will operated only to confer on the Plaintiff an estate for life.

The Tagore case is so well known, and has been so often referred to by this Board, that it is unnecessary to cite it at length, and it is enough for the present purpose to refer to the following passage:—

"If 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 estate of inheritance which it confers is void."

It is true that the departure from Hindoo law in the present case is not as great as in the case supposed in this passage, or as in the Tagore case, where the attempt was to establish what would be called an estate in tail-male according to English law. But the attempt to confine the succession to males, to the entire exclusion of females, is, though not so great, yet a distinct departure from Hindoo law, "excluding," in the terms of the judgment quoted, "the legal course of inheritance."

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* Reported L. R., Supplemental I. A., p. 47.

It has been contended, on the part of the Appellant, that the present case is distinguishable from the Tagore case, on the ground that, in that case, the first estate given was in terms an estate for life ; that in the present case, if the words relating to succession, viz., "that their "sons, grandsons, and other descendants in the "male line shall enjoy the same, and shall per- "form acts of piety, as they respectively shall "think fit, for the spiritual welfare of our "ancestors," were struck out, the gift would be of an estate of inheritance ; and that the intention of the testator to confer an estate of inheritance may be effectuated by striking out so much of the clause above quoted as excludes females from the succession.

Their Lordships are unable to accede to this view.

Considering that the gift to the nephews is expressed as to be received for the defrayment of their pious acts, and that alienation is forbidden, they do not construe the gift, independently of the words prescribing the course of succession, as conferring an absolute estate. They are further of opinion that to alter the words prescribing the course of succession, so as to admit females, would be in effect to make a new will for the testator, and one which, so far from carrying his intentions into effect, would be in direct opposition to his intention, and indeed to his main object, expressed in other parts of his will, as well as in this clause, viz., to exclude females.

The case of Bhoobun Mohun Debia *v.* Hurrish Chunder Chowdhry* has been cited on behalf of the Appellant, in which the following words of a grant,—"You are my sister; I accordingly grant "you a talook for your support, . . . being "in possession of the lands, and paying rent,

* 5 L. R., I. A., p. 168.

"&c., to the tahoot jumma, do you and the "generations born of your womb successively "(Santán sreni kramé) enjoy the same, no other "heir of yours shall have right or interest,"—were construed as conferring an absolute estate, defeasible on the failure of issue living at the death of the donee. In that case the words of gift (of which the original in the native language are given) were held to have no technical meaning, signifying much the same as "children and grandchildren," and indicating an estate of inheritance, while the only words which created a difficulty, "no other heir of yours shall have "right or interest" were held to be satisfied, by giving them the effect of making the absolute estate defeasible in the event of the failure of issue living at the time of the death of the donee, in which event the estate was to revert to the donor and his heirs. This case has no bearing on the present.

For these reasons they are of opinion that the first appeal should be dismissed.

The second appeal arises on the construction of the concluding paragraph of the clause :—

"If any of them die without leaving a male child (which God forbid,) then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

Their Lordships construe this clause thus, in accordance with the construction put upon it by both the Indian Courts. "Any of them" means any of the three nephews, not any of their descendants; on the death of any of three nephews his share shall go to the surviving nephews or nephew, not to the descendants of a dead nephew; but on the estate getting into the hands of the surviving nephew or nephews, it is to descend; as had been before provided, to males only. This construction disposes of an ingenious argument of Mr. Mayne—based on the hypothesis that upon the death of the second

nephew, his share would go to his surviving brother, and to the "male descendants" of his dead brother—that this would be a gift to a class, some of whom, *i.e.*, the male descendants, could not take, and would therefore, by a well known rule of law, be altogether invalid.

According to the construction which their Lordships adopt, the gift over was to persons alive, and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent, according to the authority of Sreemutty Soorjeemony Dossee *v.* Denobundoo Mullick,* as explained in the Tagore case. For the reasons above given it could only confer an estate for life.

One point only remains to be considered, which was indeed not argued before their Lordships, but is suggested in the judgment of the High Court, viz., whether upon the death of the brother dying secondly, his original share only, or the share also of his deceased brother which had accrued to him, went over to the surviving brother. It is undoubtedly a rule of English law that, when a fund is given to a class of persons with a direction that, on the death of any of them, their shares are to go over, the original shares only and not the accruing shares, will go over. This rule, was stated by Lord Hardwick in Pain *v.* Benson,† and has been followed, not always without expressions of reluctance, by a long series of decisions.

But an intention that the accruing shall go over with the original shares has been inferred where there is what has been called "an aggregate fund" which the testator desires to keep unsevered (when the gift has been to several with benefit of survivorship),‡ when, in addition to the word

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* 9 Moore, Ind. App. 135.

† 3 Atk., 80.

‡ Worledge *v.* Churchill, 3 B. and C., 465. The Crawhall Trusts, 8 De. G., M. & G., 480.

"share," the word "interest" is used,* or where the words are his "or her share or *shares*,"† so that the application of the doctrine to English wills has sometimes given rise to questions of some nicety. What might have been the effect of the words in question had they been found in an English will, their Lordships think it unnecessary to decide, as they are of opinion that the rule, founded in a great measure on our peculiar doctrine, that the heir-at-law is not to be disinherited but by express words or necessary implication, has no application to the wills of Hindoos. It may be observed that such a course of devolution is the ordinary course for Hindoo property as between brothers inheriting from brothers, and would present itself most readily to the mind of a Hindoo testator; so that, even if the English rule should be applied anywhere beyond the domain of English law, it could hardly be applied to Hindoo wills without defeating the intention. Their Lordships feel constrained by no rule of law to read the words in any other than their natural sense, viz., that, on the death of the first brother, his share goes to his two brothers, and that, on the death of one of these, the share which he had at his death, made up of his original and his accrued share, goes to the surviving brother.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be affirmed, and that both appeals be dismissed.

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* Douglas *v.* Andrews, 14 Beavan, 347.

† Urland *v.* Fleurit, 11 Tur., N. S., 820.