that it presupposes a freedom either to take or refuse the water. We are aware of no usage whereby a raiyat's land can be held to be lawfully inundated every year. We are unable to concur in the opinion of the Judge that the appellant used the canal water within the meaning of Madras Act VII of 1865.

It is then urged that the Collector was at liberty to claim wet assessment on the ground that a wet crop was raised, that a wet assessment was due by virtue of the right of the Crown to a share of the produce, and that any assessment imposed or levied in the exercise of the prerogative of the Crown is not open to be revised by a Court of Justice. But it is not denied that the water-cess was levied under the color of the Act in the case before us, and it is not therefore a case in which either a share of the wet crop has been claimed or a wet assessment has been demanded as an equivalent by virtue of the prerogative of the Crown. When a special cess is demanded in the professed exercise of a special power conferred by a legislative enactment and when that enactment directs when and how it is to be collected, Courts of Justice are bound to see that the power is exercised in accordance with the provisions of the Act, unless their jurisdiction is expressly or by necessary implication taken away by the Act.

We set aside the decision of the Judge and restore that of the District Munsif with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

SRINIVASA (PLAINTIFF), APPELLANT,

v.

DANDAYUDAPANI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. April 24. May 1.

Hindu law—Will—Gift to class—Vested and contingent interest.

A will, made by a Hindu, contained the following clause: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands . . shall enjoy the produce . . and shall transmit the *corpus* intact to her male descendants."

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* Appeal No. 165 of 1888.

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Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently, leaving the plaintiff, her husband, but no male issue her surviving. The plaintiff sued as heir of his son to recover the amount of the above bequest:

Held, that as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed.

APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge at Tanjore, in original suit No. 22 of 1887.

The plaintiff sued as the heir of one Chinnasami deceased, to recover Rs. 25,000 and interest from the estate of N. Subramanya Ayyar deceased, under his will and codicil dated respectively 24th October and 1st November 1884.

The testator died on 1st November 1884, leaving his widow, two daughters, and an adopted son named Sundram, who was joined as defendant No. 3 in this suit. The elder daughter Subbalakshmi Ammal, the wife of the plaintiff, on the 20th November 1884, gave birth to a son, who died on 15th July 1885; and on 14th May 1886 Subbalakshmi Ammal died, leaving no male issue surviving her. The plaintiff claimed as heir to Chinnasami, the infant son mentioned above.

By the will referred to above the testator appointed defendants Nos. 1 and 2 to be executors, and made bequests (among others) in the following terms:—

"1. The jewels of my house, excepting my personal ornaments, shall be divided equally between my two daughters, and they shall absolutely enjoy their respective shares.

"2. I bequeath to my second daughter the lands I own in the village of Malathukuruchy, Kombakonam taluk, the bungalow in Govinda Row's Street, Kombakonam, and the site I bought of one Ramachandra Ayyar in the same street, to be enjoyed by her during her life-time without power of alienation, and to be transmitted to her male descendants on her death.

"3. I bequeath to my elder daughter Rs. 25,000 (twenty-five thousand), subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* intact to her male descendants.

"4. The lands held by me in the village of Thennalore, Kombakonam taluk, have been already gifted to my elder daughter, and those in the village of Nazahudy, Kombakonam taluk, to my

younger daughter, and they shall enjoy their respective donations absolutely."

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The will further provided for the payment of Rs. 3,000 to the testator's sister as stridhanam; and the residue of the testator's property was bequeathed to Sundram.

The question raised in the present suit was whether the plaintiff was entitled to the sum of Rs. 25,000 disposed of in clause 3 of the will as heir to his son Chinnasami. The Subordinate Judge answered this question in the negative, saying:—

"It is clear from the words used that the testator intended to "create a life estate in favour of his daughter and a remainder to "her male descendants, and whether he intended to create a "vested remainder or contingent one is the sole question for "consideration. If the bequest in question created a vested "remainder, the residuary estate became vested in Chinnasami at "the death of the testator, and upon his death it passed to the "plaintiff. If on the other hand a contingent remainder alone "were created, it could not take effect till after the death of the "life-tenant, and Chinnasami having predeceased her, took no "interest whatever and passed none to the present plaintiff..... "Subramania Ayyar could have hardly intended to create a vested "remainder in favour of persons who were not then in existence. "It is true that Chinnasami was then in existence in contempla- "tion of law, but the bequest is not made to a single descendant "of Subbalakshmi Ammal, but to her descendants as a class. "The use of the plural shows that one person of a class was not to "take the whole, but all the members thereof were to enjoy it "equally. If the remainder be regarded as a vested one, this "intention of the testator to benefit them equally would have been "completely defeated, seeing that, in that case, the male descend- "ant, who was in existence at the death of the testator, will alone "become the remainder man, and that the after-born sons of "Subbalakshmi Ammal will altogether be excluded. This the "testator never intended. He himself was a good lawyer and "cannot therefore be expected to have made a disposition to which "no effect can be given in the manner he intended. He must "have known that a bequest to a class of persons, some of whom "were at least incapable of taking as they were not in existence, "would be wholly invalid under the Hindu law of gifts. If it be "shown, on the other hand, that he intended to create a contingent

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"remainder, it would precisely be the same as the estate of a "daughter's son under the Hindu law. During the life-time of "the daughter, the daughter's sons have no vested interest in the "property, and upon her death they take it jointly, and as a "general rule she is to transmit the *corpus* intact to them. This "is precisely what the testator directed in his will, and this is "rendered more clear by the preceding disposition in favour of "the younger daughter, and I am therefore of opinion that he "intended to create a mere contingent remainder, which was to "take effect only upon the death of the life-tenant. Chinnasami "having predeceased her, he acquired no right whatever, and "consequently the plaintiff, as his heir, has no right to ask for "the legacy, and upon this ground I dismiss the suit with costs."

The plaintiff preferred this appeal.

Ramachandra Rau Saheb (with Mr. *N. Subramanyam*) for appellant.

Though Chinnasami was not actually in existence at the time of the testator's death, he was at any rate in contemplation of law in existence at such time, and was therefore not debarred from taking the benefit of any devise in his favour. *Juttendromohun Tagore* v. *Ganendromohun Tagore*(1).

The next point is whether Chinnasami was prevented from taking by reason of the provisions of section 102 of the Indian Succession Act under the rule that where a devise is made to a class of persons and it fails in regard to a portion of the class it fails in regard to the whole.

The Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(2) regret the extension of the provisions of sections 100, 101, and 102 of the Indian Succession Act to Hindu wills. In any case section 102 applies only where the devise fails with regard to a part of the class by reason of the violation of the rules contained in the preceding sections. The present case does not fall within either of those sections and therefore section 102 does not apply. Moreover the Hindu Wills Act is made applicable only to wills made in the Presidency town, whereas the will under consideration is a mufassal will. *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(2) and *Ram Lal Sett* v. *Kanai Lal Sett*(3) (which merely follows the

(1) 9 B.L.R., 377; s.c. L.R., I.A., Sup. Vol., 133.
(2) I.L.R., 6 All., 560; s.c. R.L., 11 I.A., 164.
(3) I.L.R., 12 Cal., 663.

former case) are authorities for the proposition that the intention of a testator must be given effect to so far as is possible, and that though a part of a class to whom a devise is made could not take, the rest, if otherwise competent, could take the benefit of the devise.

The third question is whether Chinnasami took a vested interest capable of being transmitted to his heirs so as to give the present plaintiff a right to sue. If Chinnasami was capable of taking, and did take, a beneficial interest in the devise, the mere fact of his enjoyment being postponed to a prior life interest, could not make his interest a contingent one. The words, at or after the death of the person, do not denote the condition that the legatee shall survive such person, but only mark the time at which the legacy shall take effect in possession. The bequest should, therefore, be construed to mean a vested remainder. Chinnasami's interest being thus a vested remainder, the plaintiff is entitled to succeed. See *Rewun Persad* v. *Mussumat Radha Beeby*(1), *Hallifax* v. *Wilson*(2), and *Blamire* v. *Geldart*(3). The Subordinate Judge has failed to draw the distinction between vesting in possession and vesting in interest, and hence all the confusion in the judgment between vested and contingent remainders. The possession alone was postponed, but the interest accrued immediately. Williams on Real Property, 241, 244, 252, and 7th edition of Williams' Executors, Vol. II, pp. 1239, 1244-5, 1247-8.

Reference was also made to Sugden's Law of Property, pp. 286, 287 and to *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Achar'j Chowdhry*(4), *Visalatchi Ammal* v. *Annasamy Sastry*(5), *Raikishori Dasi* v. *Debendra Nath Sircar*(6).

Bhashyam Ayyangar for respondents.

As to the Rs. 25,000 the intention of the testator was either (1) to create a daughter's estate or (2) to create an estate unknown to Hindu law. But reading clauses 3 and 4 of the will together it would appear that having already given stridhanam to his daughter he desired to make a further provision of the same nature. See *Lakshmibai* v. *Hirabai*(7), on appeal *Hirabai* v. *Lakshmibai*(8) where it is laid down that no further departure

(1) 4 M.I.A., 137.
(2) 16 Ves. Jun., 168.
(3) 16 Ves. Jun., 314.
(4) 10 M.I.A., 279.
(5) 5 M.H.C.R., 150.
(6) I.L.R., 15 Cal., 409.
(7) I.L.R., 11 Bom., 69, 72.
(8) I.L.R., 11 Bom., 573, 579.

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from Hindu law is to be presumed than is clearly expressed. See also *Mahomed Shumsool* v. *Shewukram*(1), *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(2), *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(3), *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*(4).

It is enough for me to show that there is not a devise to the son such that the plaintiff as his representative could take under it. But I go further and show that the gift to the daughter conferred on her a daughter's estate. Taking together the two principles, that the testator can make a valid devise, and that he cannot create an estate unknown to Hindu law, it follows that in spite of the existence of his widow and his adopted son he can make for his daughter, either a daughter's estate or an absolute estate, but in neither case can he prescribe a peculiar mode of succession on her death, so as to preclude the ordinary rules of stridhanam descent. If the attempt was made to prescribe a novel mode of descent I say the daughter would take a life estate, and as to the reversion no question need arise here because the adoptive son is the residuary legatee.

It is erroneous to suppose that a daughter's son's son is no heir under Hindu law. *Rewun Persad* v. *Mussumat Radha Beeby*(5) proceeded on a different set of facts. There was definite devise to definite persons. *See* Succession Act, section 106. Both parties proceeded on the assumption that the devise was vested, and the decision went on the ground that there was division between the two brothers. *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(6) was a case of a devise to a class: specific members of a class may take although a gift to a class as such would fail. *Soudamineey Dossee* v. *Jogesh Chunder Dutt*(7), *Kherodemoney Dossee* v. *Doorgamoney Dossee*(8), *Ram Lal Sett* v. *Kanai Lal Sett*(9). After-born sons would not take. *Raikishori Dosi* v. *Debendra Nath Sircar*(10).

The passage in II Williams on Executors, pp. 1247-8, referred to for appellant shows that even assuming the *corpus* went

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(1) L.R., 2 I.A., 7, 14. (2) 9 M.I.A., 123. (3) 10 M.I.A., 279.
(4) 9 B.L.R., 377; s.c. L.R., I.A., Sup. Vol., 133.
(5) 4 M.I.A., 137. (6) I.L.R., 6 All., 560; s.c. L.R., 11 I.A., 164.
(7) I.L.R., 2 Cal., 262. (8) I.L.R., 4 Cal., 455.
(9) I.L.R., 12 Cal., 663. (10) I.L.R., 15 Cal., 409.

to the daughter only, her children alive at the death of the testator would take after her.

To sum up:—(i) There was no devise to Chinnasami. It would be absurd to take it that the testator wished to make the daughter's children legatees with a life estate interposed, because the one alive at the testator's death would take, and if he died either before or after the daughter, and he left a widow, the widow would take in preference to all others of the daughter's sons. (ii) The testator could make daughter's estate prescribing a line of succession to be construed as a reasonable limitation in conformity with Hindu law; he wanted only to make it plain that it was not to be stridhanam. (iii) Taking it at the worst for the respondents it was on the appellant's case a devise of the income to the daughter and of the *corpus* to her children after her death.

Ramachandra Rau Saheb in reply.

The words are plain, "to enjoy for life and transmit to descendants." The argument for the respondents is that only the sons of Subbalakshmi should take: but the word descendants include son's sons, and the testator's intention was clearly that an interest should vest on the birth of each of the daughter's children, thus there would be a deviation from Hindu law. The case is governed by *Rewun Persad* v. *Mussumat Radha Beeby*(1), which proceeded on two grounds, one of which was because the gift was a vested gift (*see* especially at p. 173 of the report) and not by *Sreemutty Soorjeemoney Dossee* v. *Denobundo Mullick*(2) and *Mahomed Shumsool* v. *Shewukram*(3), which was decided with reference to a very different set of facts.

The rule that the whole bequest fails on failure of a part is new and foreign to Hindu law, and section 102 of the Succession Act only applies when the provisions of sections 100 and 101 are contravened. See *Ram Lal Sett* v. *Kanai Lal Sett*(4), and also *Manjamma* v. *Padmanabhayya*(4).

This appeal having stood over for consideration, their Lordships delivered the following judgments:—

WILKINSON, J.—It is argued in appeal that exhibit A, the will executed by N. Subramanya Ayyar, has been misconstrued

(1) 4 M.I.A., 137.
(2) 6 M.I.A., 526.
(3) L.R., 2 I.A., 7.
(4) *Ante*, p. 393.

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and that the Lower Court ought to have held that Chinnasami took a vested interest under the will.

The portion of the will which has to be interpreted runs thus: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* intact to her male descendants."

The will bears date 24th September 1884. It was confirmed by a codicil executed on the day of the testator's death, 1st November 1884. The testator's elder daughter, on 20th November 1884, gave birth to a son, Chinnasami, who died on 15th July 1885. The daughter herself died on 14th March 1886, and the plaintiff, her husband, now claims the estate purchased as the heir of his son Chinnasami.

It is argued on behalf of the appellant that Chinnasami was a legatee under the will and that the right to receive having become vested in him on the testator's death, it passed to his representative, he having died without receiving the legacy. There might be force in the argument if the testator had in any way specified Chinnasami as the legatee, but what he did was to bequeath certain money to his daughter subject to the condition that she should invest the same and transmit the *corpus* intact to her male descendants if she had any. The ascertainment of the persons to whom the estate was to descend in succession to the daughter was postponed until the death of the daughter. Now on the death of the daughter there were no male descendants of hers capable of taking, and the bequest therefore was void and the property reverted to the family of the donor.

Moreover, it is contended on behalf of the respondents that the will of a Hindu must not only be construed consistently with Hindu law, but that in the absence of express words showing such an intention, a devise to a daughter does not confer an estate of inheritance, but only carries a daughter's estate as understood by Hindu law. The testator made three bequests to each of his two daughters. In the first place he directed his household jewels to be divided equally between them and to be taken by them as their absolute property. He also confirmed certain gifts of land already made to them, declaring the property to be theirs absolutely. Thirdly, to his eldest daughter he bequeathed as above

noted Rs. 25,000 to be invested by her in land or Government paper with remainder over to her male descendants, if any; and to his younger daughter he bequeathed certain land to be enjoyed by her during her life without power of alienation and to be transmitted to her male descendants. If the testator by these provisions did not intend to create a daughter's estate as known in Hindu law, then he must have intended to create an estate which is unknown to Hindu law, and so far his devise would be null and void. The testator left a widow and an adopted son who was appointed residuary legatee. He left certain property to his daughters absolutely which property would descend as stridhanam. But the property which he left to his daughters for their life would on the death of the daughter revert to her father's heirs. As remarked by the Privy Council, "if a private individual attempts by will to make property heritable otherwise than the law directs, the gift must fail," and it is well established that the estate of a daughter exactly corresponds to that of a widow, both in respect of her restricted power of alienation and to its succession after her death to her father's heirs and not her own—*Sengamalathammal* v. *Palayuda Mudali*(1), *Kattama Nachiar* v. *Dorasinga Tevar*(2), *Ram Lal Mookerjee* v. *Secretary of State*(3). The devise of the daughter's estate to her male descendants was therefore contrary to law and as such void.

On these grounds I would affirm the decree of the Lower Court and dismiss this appeal with costs.

SHEPHARD, J.—The plaintiff claims, as the heir of one Chinnasami, deceased, property in which Chinnasami is alleged to have acquired an interest under the will of his grandfather, N. Subramanya Ayyar.

The latter's will was made on the 24th September 1884, and by it the defendants are appointed executors. The testator died on the 1st November 1884. The clause of the will under which the plaintiff claims is as follows:—"I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* intact to her male descendants." His case is that inasmuch as the testator's elder daughter, Subbalakshmi, was delivered of a

(1) 3 M.H.C.R., 312. (2) 6 M.H.C.R., 310. (3) L.R., 8 I.A., 46.

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son on the 20th November 1884, and that son, named Chinnasami, was in the eye of law alive at the testator's death, he then became entitled to the legacy subject only to the life interest of his mother and that inasmuch as Chinnasami took a vested interest in the property on his birth, it is immaterial that he predeceased his mother. In support of this contention it was argued that the words referring to male descendants should be treated as creating a gift in favour of a class and that, as Chinnasami was a person answering the description and ready to take at the testator's death, the Subordinate Judge was wrong in holding that his interest was a contingent one only. The case for the plaintiff assumes that there are words in this will, as in the cases reported in *Rewun Persad* v. *Mussumat Radha Beeby*(1) and *Mahomed Shumsool* v. *Shewukram*(2), indicating persons ascertainable at the testator's death, to whom Subbalakshmi should transmit the property on her death. The persons indicated are her "male descendants." In the event which happened, viz., in the case of Subbalakshmi surviving the testator, it is evident that it could not at the time of his death be said who were her heirs or descendants. *Nemo est hæres viventis.* As long as she lived, Chinnasami had indeed a presumptive claim to be called her legal descendant; but in my opinion, he never acquired a vested interest inasmuch as it was uncertain whether he would be the actual heir of his mother, and in fact he did not live to become so. In my view, therefore, it is a mistake to suppose that there was here any gift to persons designated as belonging to a class in such sense that they could be ascertained and take at the date of the testator's death. To construe the will as creating such a gift would, moreover, as it seems to me, involve consequences which would be wholly foreign to the probable intentions of the testator. In construing a will it is right to have regard, among other circumstances, to the law under which the will is made, and if the language of a will made by a Hindu is susceptible of a meaning which will make it consonant with the principles of Hindu law, that meaning is generally to be adopted in preference to any other. See *Mahomed Shumsool* v. *Shewukram*(3), *Hirabai* v. *Lakshmibai*(4). According to the plaintiff's construction, if Subbalakshmi's son had died sonless,

(1) 4 M.I.A., 137. (2) L.R., 2 I.A., 7. (3) L.R., 2 I.A., 14.
(4) I.L.R., 11 Bom., 573.

leaving a widow, that widow, and, for the same reason, a widow of any other son who was alive at the testator's death and died in Subbalakshmi's life-time, would on her death have been entitled to the property; or, it might be that a surviving son and the widow of a deceased son might have claimed. On the principle that every possible male descendant acquired a vested interest, any person who could claim to be heir of a male descendant of Subbalakshmi, alive at the testator's death, could substantiate his or her claim to the exclusion of any sons that might be born after that date. Had the testator, who was a Vakil of learning and great experience, desired to bring about such a result, it is reasonable to suppose that he would have used apt language for that purpose. His daughter was pregnant at the time when he made his will, and, if his intention had been that imputed to him by the plaintiff, it is reasonable to suppose that he would have made special reference to the son or sons of that daughter and would not have used general words like "male descendants" which he must have known might be taken merely to indicate his intention that the property should not on his daughter's death devolve as her stridhanam. If it is necessary to put a construction on the words referring to male descendant, I think that suggested by the Subordinate Judge and maintained in the argument by Mr. Bashyam Ayyangar is the most reasonable one. An intention that the property should be held by his daughter for life, and after her death, devolve after the manner of daughter's estate, seems to me as probable as the intention that it should pass exclusively to any one or more sons of his daughter who happened to be alive at the date of his own death is improbable. This construction puts the testator's disposition on a footing familiar to Hindu law and does not involve the idea that he desired to prescribe a new mode of devolution of his property. For these reasons, I would dismiss the appeal with costs.