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might not be entitled to demand that the certificate should be given over to him. But in any case, it is a certificate granted for a particular purpose, *viz.*, to entitle the holder of it to register himself. It is not a certificate of sale, but a certificate after the sale is made, showing that the purchase-money has been paid. It is in fact a receipt showing payment of the purchase-money, the sale being an act of the Collector under the Regulation, in consequence of an arrear having taken place. We think there is no authority for holding that such a certificate, or that any paper purporting to be evidence of a sale under that Regulation, requires to be registered. We are not inclined to lay down such a rule ourselves, and we think the Subordinate Judge was wrong in rejecting this document. That being so, the document must be received in evidence, and must be taken into consideration. The case is remanded in order to its trial upon the evidence. If it shall appear that all the evidence which the parties had to give has been produced, then the lower Appellate Court will determine the case itself. If not, the case will have to go back to the Court of first instance. The costs of this appeal will follow the result.

Case remanded.

Before Mr. Justice Jackson and Mr. Justice McDonell.

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HORI DASI DABI (ONE OF THE DEFENDANTS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF).*

Will, Construction of—Putro Poutradi, Meaning of, not confined to Heirs male—Absolute Estate—Contingent Gift—Charitable Endowment—Trustee, Appointment of, to Charitable Endowment.

A Hindu *B. L. M.* died in 1874, leaving a widow *K. K. D.*, a daughter's daughter *H. D. D.*, and a brother *R. L. M.*, with whom he was on bad terms. By his will, which was made on the 9th of August 1870, and at a time when there was no reason to abandon all expectation of his leaving male issue of his own, *B. L. M.* directed that, in the event of his dying without leaving a son, grandson, or son's grandson, his widow *K. K. D.* should take the whole of his estate *according to the shastras*, and enjoy the profits thereof for her life, and that on her death, in the event of a daughter or daughters having been born to him, then she or they, and on the death of her or them, then her or

* Regular Appeals, Nos. 238, 242, and 245 of 1877, against the decree of H. T. Prinsep, Esq., Judge of Hooghly, dated the 29th March 1877.

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their son or sons (the testator's daughter's sons) should in like manner take and become the owner or owners of the estate *according to the shastras*; and that in the event of there being no daughter or daughter's son of the testator living at the time of the death of his widow, then his grand-daughter (daughter's daughter) *H. D. D.* should take the whole estate absolutely from generation to generation (*puttro poutradi*); and, that, in the event of no son or daughter being born to the testator after the execution of his will and of his grand-daughter (daughter's daughter) *H. D. D.* dying childless, or being a barren or childless widow, or otherwise disqualified, then the whole of his property should go to the Government to be employed by it for charitable and philanthropic purposes. The main object of the testator *B. L. M.* in making this disposition of his property was admittedly to exclude *R. L. M.* from the inheritance.

Held, that *H. D. D.*, if she survived the testator's widow *K. K. D.* and was not then a barren or childless widow or otherwise disqualified, would take not a life-interest, but an absolute estate to the exclusion of *R. L. M.*

Held also, that the words *puttro poutradi* had generally the effect of defining the estate given as an estate of inheritance, and did not by themselves necessarily denote that the estate given was to be one descendible to heirs male only.

Held also, that in case of *H. D. D.* not surviving *K. K. D.*, or of her being at the time of the death of *K. K. D.* for any reason disqualified from taking the estate, then upon the death of *K. K. D.* the gift to the Government of the reversion to the exclusion of *R. L. M.* would take effect, and was a good and valid gift.

Where a testator had made a bequest for charitable purposes, and had made no express provision for the management of the charitable trust so created, except by directing that in the event of his heirs failing to carry out his wishes in respect of the trust fund, the Civil Court should take the fund and the management of the trust summarily into its own hands.

Held, that in the absence of misconduct, the widow and not the Collector was the proper person to be appointed trustee.

ON the 9th of August 1870, Behari Lall Mookerjee of Boinchee (who appears then to have been a man not much, if at all, past middle age, and quite capable of having further issue, but having at the time no child or other descendant living, except a daughter's daughter, the defendant Hori Dasi Dabi, who was then a child of five years of age) made the will, which was the subject of this suit. At this time Behari Lall Mookerjee had a wife, the defendant Komola Kamini Dabi; a daughter's daughter, the defendant Hori Dasi Dabi; and a brother, the defendant Roop Lall Mookerjee, between whom and Behari Lall Mooker-

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jee feelings of strong ill-will had for some time prevailed. If Behari Lall Mookerjee had then died intestate, his whole estate would, on his death, have gone to his widow Komola Kamini Dabi, and upon her death to his brother Roop Lall Mookerjee. Hori Dasi Dabi, his daughter's daughter, not being capable of inheriting from him according to Hindu law. To avoid this contingency, and to defeat the expectations of Roop Lall Mookerjee, as well as to benefit Hori Dasi Dabi, was apparently the main, if not the sole, object of Behari Lall Mookerjee in making his will. By this will he left a sum of Rs. 1,50,000 for the establishment and endowment of a school and dispensary, and directed that, in case of his heirs and representatives neglecting to establish or keep up the school, &c., in pursuance of his will, the Civil Court should take summarily into its own hands the Rs. 1,50,000, and the establishment and management of the said school, &c. Subject to this charge, and a further charge for certain religious purposes, he directed that, in the event of issue having been born to himself, his son or sons, or son's sons, or son's grandsons surviving him, should take the whole of his estate *according to the shastras*. On failure of sons, son's sons, or son's grandsons, he directed that his wife should take *according to the shastras*, and upon her (his widow's) death, then if a daughter or daughters should have been born to him, she or they, and on their death their sons, were to take *according to the shastras*. On failure of the heirs above-mentioned, the testator directed that the estate should go to his daughter's daughter Hori Dasi Dabi, the disposition being in these words:—"Sreemutty Hori Dasi Dabi shall be owner of my property, and without dispute shall enjoy and possess the same, from generation to generation (or literally, to her sons and son's sons in succession), *puttró poutradi*." If, however, at the death of his widow, the said Hori Dasi Dabi should be barren, or a widow with no living son, *avira*, or otherwise disqualified, she was not to become the owner, but was to receive Rs. 300 per mensem for her life. In the event of the failure of the heirs previously mentioned, and of the disqualification or the predecease of Hori Dasi Dabi, the whole of the property was to pass to the Government for charitable purposes.

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Behari Lall died on the 12th of August 1874, without having altered his will, leaving him surviving his widow, the defendant Komola Kamini Dabi; his daughter's daughter, the defendant Hori Dasi Dabi; and also his brother, the defendant Roop Lall Mookerjee.

On the 16th of September 1874, the defendant Komola Kamini Dabi filed a petition for a certificate under Act XXVII of 1860, claiming expressly under the will. This application of hers was opposed by the defendant Roop Lall Mookerjee, who impugned not only the legal validity but the *factum* of the will. The certificate case was heard by the District Judge of Hooghly, who after going very fully into the evidence as to the making of the will, found in favour of it, and granted the application for a certificate. On appeal by Roop Lall Mookerjee to the High Court, it was held, that as the application for a certificate was made by the widow of the alleged testator, and as she would have been entitled to have a certificate granted to her as widow in preference to her husband's brother Roop Lall Mookerjee, even if her husband had died intestate, the inquiry as to the *factum* of the will was unnecessary, and the widow Komola Kamini Dabi was entitled to the certificate as the next heir of her husband. While these proceedings in the certificate case were still pending, and shortly before their determination by the judgment of the High Court, which was delivered on the 25th of May 1875, the Collector of Hooghly called upon the widow Komola Kamini Dabi to give immediate effect to the dispositions contained in her husband's will as to the Rs. 1,50,000 left for charitable purposes; and after some correspondence of an entirely amicable character, the present suit was instituted, at the instance of the defendant Hori Dasi Dabi herself, by the Collector of Hooghly, in the name of the Secretary of State for India as trustee under the will of Behari Lall Mookerjee, against the defendant Hori Dasi Dabi and the other parties to the suit, to obtain the moneys left for charitable purposes, after establishing the execution and validity of the will, and also to obtain a declaration of the rights of all parties to the suit. The plaintiff also prayed the Court to propound a scheme for the due administration of the trust.

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Roop Lall Mookerjee again disputed and denied the alleged will, and put the plaintiff to strict proof thereof. He further contended that, even if the will had been duly executed by the testator, no part of the will was effectual, except that which gave the estate to the widow for her life.

The Court of first instance held, that the making of the will was fully proved; and that, subject to the payment of the legacy of Rs. 1,50,000 for charitable purposes, the widow Komola Kamini Dabi took a life-interest in the estate, and that, on her death, Hori Dasi Dabi, if alive, and not disqualified, would take a life-interest only; the absolute gift to Hori Dasi Dabi was thus cut down, on the ground that the direction that she should enjoy the estate given from generation to generation, or to her sons and son's sons, *puttro poutradi*, was an attempt to create an estate-in-tail male, which is an estate unknown to, and unrecognized by, Hindu law. It was held further that this attempt to create an estate-in-tail male in favor of the male descendants of Hori Dasi Dabi having been held to be ineffectual, the ultimate reversion to Government upon failure of such issue to Hori Dasi Dabi was also defeated. The Court declined to propound any scheme for the management of the fund directed to be vested in the Collector, and ordered that the costs of all parties to the suit should be paid out of the estate.

Against this decision appeals were preferred to the High Court by all the principal parties to the suit.

Hori Dasi Dabi appealed against so much of the decision as deprived her of the absolute estate, to which she claimed to be entitled upon the death of Komola Kamini Dabi.

Roop Lall Mookerjee's appeal was on the ground that no operation whatever should have been allowed to the bequest in favor of Hori Dasi Dabi.

The Secretary of State (plaintiff) appealed against the portion of the decision by which Hori Dasi Dabi's estate was limited to a life-estate and the gift over to Government invalidated; and the widow Komola Kamini Dabi, the respondent, also filed objections urging that she had not been guilty of misconduct or laches, and ought not to have been deprived of the management of the trust; and also that the costs of the pro-

ceedings ought to have been charged upon Roop Lall Mookerjee, and not upon the estate.

Mr. *Woodroffe*, Baboo *Aushootosh Dhur*, and Baboo *Umbica Churn Bose* for the appellant.

The Advocate-General (the Hon'ble *G. C. Paul*) and Baboo *Unnoda Pershad Banerjee* for the Secretary of State.

Mr. *J. D. Bell* and Baboo *Umbica Churn Banerjee* for Komola Kamini Dabi.

Mr. *Montriou*, the Hon'ble *G. L. P. Evans*, Mr. *Trevelyan*, Baboo *Nemy Churn Bose*, Baboo *Umbica Churn Bose*, and Baboo *Kisto Komul Bhuttacharjee* for Roop Lall Mookerjee.

Mr. Woodroffe.—The Court of first instance was wrong in supposing that there was any intention on the part of the testator to create an estate or to impose a rule of succession contrary or repugnant to Hindu law. The effect of the will is simply this, that if, on the death of Komola Kamini Dabi, there should not then be in existence a daughter or daughters, or a son or sons of a daughter, of the testator, and if Hori Dasi Dabi should then be alive and be neither a childless widow, nor otherwise disqualified to inherit, then she, Hori Dasi Dabi, should become the absolute owner of the residue of his estate, after satisfaction of the legacies and charges made and created by his will. The words *puttro poutradi* were not words intended to limit her estate or to impose any rule as to the succession to the estate which he had already declared his intention to confer upon her absolutely, but were the usual formula denoting that the estate conferred was an absolute one.

Mr. *J. D. Bell.*—The Court below was wrong in appointing the Collector to be the trustee for the purpose of giving effect to the intentions of the testator as to the trust fund. From the words of the proviso in the will:—"If my heirs and representatives neglect to establish the school, &c., directed by this will, or to keep up the same, then the Civil Court

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shall take summarily into its own hands the Government securities for Rs. 1,50,000, as well as the establishment and the management of the said school, &c., and shall do all things according to law," it is evident that the intention of the testator was, that the carrying out of the trusts created by him was to be entrusted to his heirs and representatives, and that the Civil Court was only to intervene on their neglecting to carry out his directions.

The Advocate-General.—This case depends, so far as the Secretary of State is concerned, on the construction to be placed on the gift to Hori Dasi Dabi, and the true meaning of the expression *puttro poutradi.* These words are of common occurrence in Bengalee deeds-of-gift, and have invariably been construed as indicating that the donee is to take an absolute estate, and not that any reversionary rights were thereby created in any particular class of the donee's heirs. On the contrary, if an absolute gift is made to a man followed by a declaration that he is to enjoy it from generation to generation, or *puttro poutradi,* the donee immediately after the completion of the gift to him is at once, though he may have no issue, competent to make a valid alienation of it.

Mr. *Montriou* for Roop Lall Mookerjee.—The testator had obviously two main objects in the framing of this document, *viz.*, first, to exclude his collateral heir, his brother, at all events; secondly, to introduce into the line of heirs one who has no place in the Hindu canon of inheritance, *viz.*, his daughter's daughter, to introduce her as a *quasi*-daughter, under the same special conditions as could apply to a female *sapinda* only. The excluded brother contends, that such a gift is invalid; the result being, that the estate is, after the widow's death, undisposed of, except as to the Rs. 1,50,000 endowment, and minor legacies. We contend, that the gift to Hori Dasi cannot stand. It has been often asserted, that the Hindu system admits of conditional gifts, and in support of that proposition an old case—*Ram Narayun Dutt* v. *Musst. Sut Bunsee* (1)—is

(1) 3 Sel. Rep., 377.

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quoted: but that case was not one of conditional gift; it was a positive gift charged with maintenance of the donor and performance of his *shrad.* In the *Tagore Will case* (1), the Privy Council dealt with one implied condition, *viz.*, existence of the donee at the date of gift, which, here, would be the testator's death. No case, as far as I am aware, decides, that a Hindu can make contingent executory gifts, and it is certainly opposed to the teaching of the Smritis. The result of the authorities quoted in the *Vyavastha Darpana* is, as laid down by the editor:—"Although the donor's right may cease by relinquishment, yet, as the gift is incomplete without acceptance by the donee and as, in such case, it is said to be void, the donor's right again accrues" (2). And this consists with the *Dattaka Mimansa,* sec. iv, para. 3, *viz.*:—"Since the word 'gift' means the establishing another's property, after the previous extinction of one's own; and another's property cannot be established without his acceptance." Now, these several extracts can, none of them, be reconciled with the notion of a vague, contingent, wholly executory gift, such as the one now in question purports to be. The 7th, 8th, 9th, and 20th clauses of the will are, collectively, the gift, and must be read together. It is impossible to read this will and not perceive that there are several states and conditions under which the gift does not at all take effect, or (to use the English term) does not vest. Here there is no question of interruption or divesting of property once given; there is no life-estate in Hori Dasi; there is one description of an estate, to be taken upon inadmissible conditions and contingencies. Until the widow's death, supposing Hori Dasi then alive, nothing could be settled. Then, the conditional bequest is to operate. The reason of a daughter's succession is, her contributing to perpetuate her father's race; therefore, unless the daughter be in a condition so to contribute, she cannot claim. It is expected she will have such issue as is competent and will live to offer *pindas.* The sole ground and argument is spiritual benefit. An unmarried daughter is preferred; for while the married is a source of future spiritual benefit to be conferred by her son, the former possesses another attribute, *viz.*, that of prevent-

(1) 9 B. L. R., 377. (2) Vyavastha Darpana, 601.

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ing her father's falling into *put*. By remaining unmarried at the age of puberty she would cause her father to fall: to facilitate her marriage, her father's wealth goes to her. A daughter's son gives *pinda* to his maternal grandfather; but the son of a daughter's son, or a daughter's daughter, cannot do so. Therefore, it is only a daughter who has, or who is likely to have a son, that succeeds; but a barren daughter, or a widowed one, is not entitled to succeed. Now, how can this reasoning in any wise apply to a daughter's daughter? To place her in a daughter's position, under the same ostensible conditions as a daughter, is a mere futile whim, having no meaning or significance, a caricature of the religious scheme of the spiritual benefits. If for no other reason, the conditional gift is void for thus dealing with the *shastras*.

The conditions, if my daughter's daughter be barren or a sonless widow, or in any otherwise disentitled, she cannot become entitled to my estate, 7th clause, &c.; if my daughter's daughter die before she have a son or be barren or a sonless widow, or in any otherwise disentitled, then, &c., 28th clause, clearly point to a disability to take, not to a divesting. They are negative conditions, "as soon as the time for the events happening has expired, or the event has become impossible, the right becomes unconditional and effective" (1). There can be no right, *i. e.*, succession, before the wife's death, and if the granddaughter live, her capacity to take may be then determined. Probably there could be no divesting—*Aumirtolall Bose* v. *Rajonecchant Mitter* (2). We say, she cannot take because of the character of the gift. The 8th clause of the will is declaratory merely, and cannot move or affect the Court of Wards: it does not change or hasten the period of taking; it rather affirms that period to be the death of the wife.

With regard to the limitation or expression as *puttro poutradi*, as a description of the heritable estate which the donee is to take, if she take at all; all that can be said is, the etymology and literal construction clearly refer to a lineal agnate succession merely; but it was open to the donee to show, by evidence of experts and usage, or by judicial authority and precedent,

(1) Lindley's translation of Thibaut, § 40. (2) L. R., 2 I. A., 113.

that those words have a technical and wider signification. No such proof, no such authority, has been brought forward.

With regard to the remote contingent claim of Government, why should the Court now make any declaration—*Tekait Doorga Persad Singh* v. *Tekaitni Doorga Konwari* (1).

Mr. *Evans* on the same side.—Subject to this gift of a life-interest to the widow, the estate of the testator is undisposed of. By Hindu law in Bengal, the whole interest of a testator must, on his death, devolve on, and vest in, some living person or persons at once, and cannot, it is submitted, be divested, except by an express gift over on the happening of a certain event within a life in being. If the testator does not provide some person by his will in whom the estate is to vest at once, it will pass to his heir. In this case the testator does not intend any estate to vest in Hori Dasi till the widow's death; and even at that time he intends it only to vest in case Hori Dasi fulfils certain conditions or shall answer a particular description at that date. This gift is void, because it leaves the *corpus* undisposed of, and not vested in any one till the widow's death. It is as though a Hindu testator by will gave an estate for life to A, and after his death to B, but B is to take only, provided at the death of A, B's hair shall be a yard long, or he shall have grown to a stature of seven feet.

The judgment of the Court was delivered by

JACKSON, J. (who, after shortly stating the facts of the case, the previous proceedings, and the position and interest and contention of each of the parties to the appeal, continued as follows) (MCDONELL, J., concurring):—

Before disposing *seriatim* of the several appeals, it may be convenient to state our opinion of what the testator intended by his will to effect.

When Behari Lall made the will in question, he was a man scarcely past the prime of life, quite capable of having further issue, but for the moment having no living child, nor any

(1) L. R., 5 I. A., 149.

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living descendant except a daughter's daughter of very tender years.

If he then died intestate, his estate would go to his widow, and on her death, his daughter's daughter would not take, but his brother Roop Lall if then living would be the heir. This he was determined to prevent by the exercise of testamentary power.

In carrying out this purpose, he provided firstly for the possible case of issue being born to himself.

In that event, he directed that such sons, son's sons, or son's grandsons surviving him, should take according to Hindu law (cls. 2 and 4).

On failure of them, he directed that his wife should take according to Hindu law and enjoy the profits for life (cl. 5).

If daughters should be born, they, or on their death, their sons were to take, after the death of the widow, according to Hindu law (cl. 6).

Here on failure of the heirs above-mentioned, the brother, if he survived, would have come in, had the testator so willed, according to Hindu law, the daughter's daughter being no heir but a stranger.

But at this point the testator interposes his will, and directs that the estate shall go especially to his daughter's daughter Hori Dasi Dabi, the disposition being literally in these terms:—"Sreemutty Hori Dasi Dabi shall be owner of my property, and without dispute shall enjoy and possess the same to her sons and son's sons in succession" (cl. 7).

If, however (at the death of the widow), Hori Dasi should be barren, or a widow with no living son (*avira*), or otherwise disqualified (referring evidently to the circumstances in which a daughter would not take by the Hindu law), she was not to become the owner, but was to receive Rs. 300 per mensem for her life (cl. 9).

In the event of the failure of heirs previously mentioned, and of the disqualification of Hori Dasi, the whole of the property was to pass to the Government for charitable purposes (cl. 20).

The District Judge, upon the 7th clause above referred to, says, that he finds "no difficulty in giving effect to the succes-

sion of Hori Dasi under 'the will' (page 31);" and a little lower down he says:—"It seems, however, to have been the intention of the testator that Hori Dasi should have only a life-interest in his estate, for he sets forth in his will that she shall at her death transmit the estate to her descendants, *puttro poutradi* being the expression used. This term, in my opinion, refers to male descendants, and in thus attempting to regulate the succession, it appears to me that the will is bad, and opposed to the rule laid down in the *Tagore case*. This provision is, therefore, of no effect and void."

Having decided as to that point, he proceeds to consider the effect of cl. 20, and having set out the terms of it, he says:—"That is to say, that in the event of failure of any male heir to whom Hori is to transmit the estate at her death, the Government is to become the trustee for certain charitable purposes. Inasmuch, however, as it has been held that the will so far as it goes beyond the gift of the life-interest to Hori Dasi is bad, this further provision is also null and void."

Now, in the first place, the Government was not to take only or at all, in the event of failure of any male heir of Hori, but in certain circumstances, was to take instead of her. There is no direction whatever that the Government should take on failure of Hori Dasi's line, but only that the estate should go to Government in the event of her being disqualified. The words of the original literally mean, as we understand them:—"If no son or daughter be born to me, *and* if my daughter's daughter's (*i. e.*, Hori Dasi's) decease occurs before she brings forth a son, or she be (when the succession falls in) barren (*avira*), or otherwise disqualified, then my whole estate shall go to the Government." The words in parenthesis are not in the original, but we consider them to be meant, because this view harmonizes with the 9th clause; the word *become*, which the translation in the paper book contains, is not used, and we see no reason to suppose that Behari Lall, who in general desired to follow the law, would have departed from the established rule as to a daughter, that an inheritance once vested would not be afterwards divested by reason of her becoming *avira* or otherwise.

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The only case not clearly provided for in the will seems to be this—If Hori Dasi had a son who survived her, but herself died before the widow, was it intended that the Government should take, or was that son to take. On the one hand, neither of the further events contemplated in the 20th clause would have arisen, *i. e.*, Hori Dasi would not have died without giving birth to a son, nor would she be disqualified at the death of the widow, unless we say that death itself is included in disqualification: nor, on the other hand, could Hori Dasi's son easily succeed, being a stranger, and not provided for in the will.

But we need not occupy ourselves with a case not before us.

We have stated our impression as to what Behari Lall intended, and we proceed to consider whether effect can be given to his intentions, and whether the Court below has decided correctly.

We dissent entirely from the learned Judge when he holds that the words *puttro poutradi krame* denote an attempt to limit the succession to Hori Dasi's male descendants in any manner opposed to the decision in the Tagore Will case [*Tagore* v. *Tagore* (1)]; the devise and bequest to her are contained in the words *adhikarini hoibek*, and the words added are merely usual words implying an absolute and heritable estate. If these words are to be interpreted in the sense applied to them by the Judge, very few grants in the Bengali language could stand, because the formula is one constantly used to show that the estate is to go beyond the life, and in this particular case, the significance of it appears on comparison between the devise to Hori Dasi with that to the wife. Of the latter it is said: She shall become owner according to the *shastras*, and shall enjoy the profits for her life. Of Hori Dasi, it is said she shall become the owner and shall enjoy it to her latest posterity, *i. e.*, for ever.

Puttro and *poutro*, no doubt, mean son and son's son, but these two persons are always the first in the category of heirs, and, therefore, *puttro poutradi* may well be taken to mean heirs generally. Indeed the Judge's construction was not supported in this Court by Mr. Montriou.

(1) 9 B. L. R., 377.

The facts of the *Tagore case*, well summarized by Mr. Mayne in his exceedingly valuable work—"Hindu Law and Usage"—were as different from those of the present case as it is possible to conceive. In that case the testator contemplated not merely the disinheriting of his son, but the creation of a highly complex and artificial system of succession, embracing a number of persons not in being and who very probably might never exist. In fact, he sought to create a "kind of estate-tail" wholly unknown and repugnant to Hindu law.

In the case before us, the testator after giving the widow's (or life) estate to his wife, gave the reversion to another person then in being, though not in the line of succession. Thus far it is clear he could go. The Judicial Committee in *Sreemutty Soorjeemonee Dossee* v. *Denobundoo Mullick* (1), say, "whatever may have formerly been considered the state of that law as to the testamentary power of Hindus over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of 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, 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." Mr. Montriou, however, contends that this bequest is bad, not by reason of the alleged limitation to male heirs, but because it is imperfect and invalid as a gift, and is not in truth a gift at all, but an ineffectual attempt to alter the rule of succession and convert a stranger into an heir.

There was some discussion at the bar as to whether this was a gift subject to be divested or a gift burthened with conditions. We have already intimated our opinion that it was not Behari Lall's intention that the estate once vesting should after-

(1) 9 Moo. I. A., 135.

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wards be divested. Is the gift then subject to conditions, or in other words, subject to the donee having fulfilled, or being in a condition to fulfil, certain qualifications repugnant to Hindu law? We think not.

Mr. Montriou with the assent of opposing counsel put in, as part of his argument, a printed paper said to be the composition of a native gentleman learned in the *shastras*.

I confess that it seems to me to be among the advantages for which the people of this country have in these days to be thankful, that their legal controversies, the determination of their rights, and their status have passed into the domain of lawyers, instead of pundits and casuists, and in my opinion the case before us may very well be decided on the authority of cases, without following Sreenath, Achyutanund, and others through the mazes of their speculations on the origin and theory of gift.

But viewed merely as a case of gift interpreted by such light as those commentators afford, it seems to me that Hori Dasi's position may be perfectly well supported.

The owner Behari Lall having to dispose of the ownership of this property for all time, bestowed it in two parts—on his widow for her own life and on Hori Dasi thereafter, provided that she answered certain stipulations, and if not, on the Government. Now, it might be uncertain, during the continuance of the widow's life-estate, whether Hori Dasi would answer the conditions or not, but the uncertainty would be unimportant, because the ownership would be for the time in the widow. At her death, the ownership would have to vest in some one, but at that moment there need be no uncertainty whether Hori Dasi was within the prescribed conditions; if she was, she would take; if not, then the other person indicated, namely, the Government of whom there is never a failure, would take. But, moreover, the conditions themselves, far from being repugnant to Hindu law, are in entire accord with it, being in fact those which that law itself expressly imposes on a daughter, and which are not laid down as to the daughter's daughter only because the law does not make her an heir. But now that the power of disposing of property by will, founded on established custom,

recognized first by judicial authority and since by legislation, enables a Hindu to bequeath his property to a person whom the *shastras* would not have made his heir, surely the bequest cannot be the worse because the testator in elevating the taker to the position which her mother would have occupied, if she had lived, imposes the same qualifications as the *shastras* would have imposed on the mother.

This view of the matter coincides with the rule as laid down in Mr. Mayne's work already referred to (page 340, s. 350), and seems to us reasonable and right. The conditions imposed are neither in violation of the fundamental principles of the Hindu law, nor inconsistent with the nature of the estate given.

We see no indication of a desire to introduce a new principle or rule of succession, but on the contrary, the testator's desire being to benefit a particular person, depriving another, he sought to assimilate the position of the person preferred as closely as possible to that of the person through whom, if she had survived, the desired object would have been effected.

We think, therefore, that Behari Lall's intention was to confer on Hori Dasi, if she lived and was qualified, an absolute estate, and that this object has been effectuated; and we also think that the gift over to the Government in case of Hori Dasi not surviving or being disqualified, is perfectly good and valid.

We have next to consider the Judge's order touching the trust fund, and we find that the District Judge, without assigning any reason for it, has directed the Collector to be trustee for the carrying out of the charitable purposes specified in the 13th and following clauses of the will. On the other hand, he has refused to frame any scheme for the administration of the trust. This is simply to deprive the persons who may be supposed to have a personal interest in carrying out the wishes of the testator, without any misconduct imputed to them, and to place the trust in the hands of a public servant who can have little leisure to attend to it without the protection of any rules framed for his guidance. We can see nothing in the conduct of the widow which proves her to be undeserving of confidence, and with reference to any supposed general want of capacity for such business on the part of females, we observe that provision has

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been made by the husband, who has associated with her two persons whom he considered capable.

We think this part of the Judge's order should be set aside, that a scheme should be framed for the administration of the trust, that the management should be entrusted to the widow assisted by the persons named and with a power of inspection reserved to the Collector.

It was contended by Mr. Montriou, that making a declaration as to the rights of parties in such a case as the present was in the discretion of the Court, and that we should not make such declaration where the obvious intention of the testator was to defeat the rules of succession. We see, however, nothing in the will beyond a simple and valid exercise of testamentary power, and we think the case a proper one for a declaratory decree.

Finally as to costs, one or two questions have arisen, first as to the costs of Roop Lall, which, together with all the other costs, the Court below has ordered to be paid out of the estate.

The attitude of Roop Lall has been hostile throughout. He has not merely impugned the validity, but even affirmed the spuriousness of the will, and this on two distinct occasions, in the Court below.

It is said on his behalf that he was entitled to have the will which disinherited him proved "in solemn form," and that it was right his costs should come out of the estate.

Now, although the objector could not in any view of the case have been entitled to inherit immediately, although the widow's life was probably at least as good as his, and he might, therefore, have never been entitled at all, yet as he and his brother were not on good terms, and he might have no knowledge of the facts, he would be quite justified in having evidence gone into as to the factum of the will. But this was actually done in the certificate proceedings. The will was keenly contested there, and the Judge decided in favor of its authenticity. The evidence showed the will to have been deposited in the Burdwan Registry office by Behari Lall in person. It is impossible to believe that after this Roop Lall can have doubted in good faith whether the will was his brother's. Assuming then that he

knew it was really his brother's will, he chose to come into Court and attempted to upset the will on the ground of its being inofficious and contrary to Hindu law. In doing this, he took his chance like any ordinary litigant, and we cannot see that he can expect any other fortune.

Oddly enough in the certificate case the petitioner (widow) recovered costs from him, the pleader's fee being fixed at Rs. 80. In these proceedings, where so far as these two properties are concerned, precisely the same question is raised, and his position very little improved, he is allowed his costs including a vakil's fee of Rs. 2,800.

We think that he should be left to pay his own costs of opposition. But that the costs of other parties should, as ordered by the Court below, come out of the estate.

The Advocate-General has applied for the costs of employing counsel (Mr. Ingram) to watch the case in the Hooghly Court on the ground, as we understand, that Roop Lall having insisted that the Advocate-General should be a party, as the Attorney-General would be in England, it was necessary to employ some person who could argue that part of the case. We think there is some force in this. The contention on the part of Roop Lall seems to us to have been an extraordinary one, for we may confidently say that the appearance of the Advocate-General as a party has been unknown in the mofussil Courts. The application was one with which a mofussil pleader could hardly have been qualified to deal, and we think that a fee not exceeding Rs. 1,000 might have been allowed for instructing and retaining Mr. Ingram.

We shall, therefore, vary the decree of the Court below by making a declaration as to the rights of parties in conformity with what has been said. We shall set aside the appointment of the Collector as trustee, and we shall refer it to the District Court to frame a proper scheme for the administration of the trusts by the widow for her life, subject of course to removal in case of misconduct or negligence, and subject to inspection by the Collector. We shall also reverse so much of the decree as enables Roop Lall to recover his costs out of the estate.

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We are unable to understand why precisely equal costs are allowed to the widow and Moni Lall (guardian of the minor), on whom the brunt of the suit fell, and to Rakhal Dass and Seetanath, who were added as parties, but had no interest in the matter, and who took care to tell the Court so. But there is no appeal before us on this point.

Decree varied.

Before Mr. Justice Jackson and Mr. Justice McDonell.

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May 16.

BRINDABUN CHUNDER SIRKAR (DEFENDANT) *v.* DHUNUNJOY NUSHKUR (PLAINTIFF).*

Limitation—Right of Occupancy—Res Judicata—Ejectment—Beng. Act VIII of 1869, *s.* 27—*Act VIII of* 1859, *s.* 2—*Act X of* 1877, *s.* 13—*Possessory Suit.*

The plaintiff sued for a declaration of *mourasi mokurari* rights to certain land and for mesne profits, alleging that he had been wrongfully ejected by the predecessors in title of the defendants. A previous suit on the same cause of action was heard and dismissed on the ground of limitation.

Held, that the present suit was not barred (as *res judicata*) under s. 2 of Act VIII of 1859 (corresponding with Act X of 1877, s. 13), inasmuch as the first suit having been brought after the period allowed by law, the Court in which it was instituted was not competent to hear and determine it.

Held also, that the lower Courts were wrong in giving the plaintiff a decree for possession on the ground of occupancy right, he not having claimed such relief in his plaint.

Bijoya Debia v. *Bydonath Deb* (1) followed.

Where a ryot, having a mere right of occupancy in certain land, has been wrongfully dispossessed by the zemindar, his suit to recover possession must be brought under s. 27 of Beng. Act VIII of 1869, within one year from the date of dispossession.

IN this suit the plaintiff claimed to recover possession of four holdings, with mesne profits. He based his title on pottas which he alleged had been granted to him in 1262 (1855) by the naib of the then proprietors of the zemindari, Srish Chunder Sircar and

* Appeal from Appellate Decree, No. 1977 of 1878, against the decree of H. Beverley, Esq., Additional Judge of Zilla 24-Parganas, dated the 7th of August 1878, affirming the decree of Baboo Brojendro Coomar Seal, Subordinate Judge of that District, dated the 11th of December 1877.

(1) 24 W. R., 444.