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the higher prevailing rate which is due from natural causes. We are supported in the view we take of this point by the case of *Luhhun Magilla* v. *Sreeram Chatterjee* (1).

The decision of the lower Appellate Court must, therefore, be set aside; but we cannot restore the decree of the first Court, because this is not a case in which the plaintiff is entitled to a decree for damages and ejectment. There should be a decree in favor of the plaintiff for the principal amount of rent and road-cess claimed, with interest at the rate of 12 per cent. from the beginning of 1285 F. S. to this date, and the aggregate amount thus decreed is to bear interest at 6 per cent. per annum from the date of the decree to the date of payment. The defendant must pay the costs of this suit throughout in all the Courts.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

ELLOKASSEE DOSSEE *v.* DURPONARAIN BYSACK.

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March 17 & 25.

Will—Period of Distribution—Contingency—Survivorship.

A, a Hindu, made the following provisions by his will:—"I have two sons living, *B* and *C*; they, and an infant son of my eldest son, the late *D*, and my wife *E* (four persons), shall succeed to the whole of my estate: these four persons will receive equal shares. If any of these four persons happen to die, which God avert, the survivor of them will receive this estate in equal shares; but if there be a son or a grandson surviving as the heir and representative of the party dying, such survivor shall succeed to his share: if there be a daughter or granddaughter in the female line surviving, such survivor shall receive a share of the property; the expense of the marriage of such female child only shall be defrayed out of the estate:" and also provided that "so long as my infant grandson shall not have attained his majority, the whole of my estate shall remain undivided."

All the persons named survived the testator.

Held, that they took absolute interests in the shares named; and that the estate became divisible on the infant son of *D* attaining majority.

Soorjeemoney Dossee v. *Denobundhoo Mullick* (2) discussed.

(1) 2 Hay, 427. (2) 9 Moo. I. A., 123.

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THIS was a suit for the construction of the will of one Ramchunder Bysack. The will contained the following provisions:—"I have two sons living, the abovenamed Durponarain Bysack and Sree Ramjoy Bysack; they, and an infant son of my eldest son, *the late Moheschunder Bysack, and my wife* Sreemutty Doorgamoney Dossee (four persons), shall succeed to the whole of my estate: these four persons will receive equal shares. If any of these four persons happen to die, which God avert, the survivor of them will receive this estate in equal shares; but if there be a son or a grandson surviving as the heir and representative of the party dying, such survivor shall succeed to his share: if there be a daughter or granddaughter in the female line surviving, such survivor shall receive a share of the property; the expense of the marriage of such female child only shall be defrayed out of the estate;" and after certain specific bequests, the testator continued:—"So long as my aforesaid infant grandson shall not have attained his majority, the whole of my estate shall remain undivided."

Ramchunder Bysack died on the 3rd day of April 1850, leaving him surviving his widow Doorgamoney Dossee, his two sons Durponarain Bysack and Ramjoy Bysack, and his grandson Juggutdullub Bysack, the son of Moheshchunder Bysack mentioned in the will. On the death of the testator, *Doorgamoney Dossee and Durponarain Bysack took possession of his* property and obtained probate of his will. Doorgamoney Dossee died in the year 1873 intestate, and Juggutdullub Bysack in the year 1875, leaving the plaintiff his sole widow and heiress him surviving. The present suit was brought against the testator's two sons Durponarain Bysack and Ramjoy Bysack; the plaintiff asking to have it declared that she, as the widow and heiress of Juggutdullub Bysack, was entitled to a four-anna share of the property of Ramchunder Bysack and to a five-anna and four-pie share of the property of Doorgamoney Dossee. Ramjoy Bysack died after the institution of the suit, and his widow Kheroda Dossee was made a party.

Mr. *Evans* and Mr. *Bonnerjee* for the plaintiff.

Mr. *J. D. Bell* and Mr. *Jackson* for Durponarain Bysack.

Mr. *Trevelyan* and Mr. *J. G. Apcar* for Kheroda Dossee.

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PONTIFEX, J.—A question of construction arises on the testator's will in this case. He left two sons, and a grandson by a deceased son. The plaintiff is the widow of the grandson who died after having attained his majority. The clause on the will, upon which I have to put a construction, is as follows (His Lordship read the clause set out above, and continued):—The plaintiff claims that the date of the testator's death is the period of survivorship intended by the will, and consequently that, as her husband survived the testator, he became absolutely entitled to one-fourth of the testator's estate, and that she, as his widow, is now entitled to a widow's interest therein. She is supported in this contention by the widow of one of the testator's sons, who died without male issue after the institution of the suit. The surviving son of the testator, on the other hand, claims that the period of survivorship intended is the date of the death of each of the legatees, and that as the deceased son and grandson died without leaving male issue, he, as the ultimate survivor, is entitled to the entire estate. If the clause of definition in the will had stopped at the words "will receive this estate in equal shares," preceding the gift over to male issue, there could have been little doubt of the testator's meaning. For, according to well known principles of construction, where the event of death, which of all events is the most certain and inevitable, is treated as a contingency, something else must be intended than merely to provide for the legatee dying at any time. And accordingly the words,—"If any of these four persons happen to die, which God avert, the survivors of them will receive this estate in equal shares,"—must necessarily have been read as referring to survivorship at the period of the testator's decease. For otherwise it would not be a contingency for which the testator was providing, but a certainty.

It has, however, been urged on behalf of the surviving son, that the subsequent words must also be taken into consideration, namely,—"But if there be a son or a grandson surviving as the heir and representative of the party dying, such survivor (son

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or grandson) shall succeed to his share;" and it is argued that the whole clause should be read as follows:—"If any of the four persons happen to die without leaving a son or grandson, the survivors of them will receive this estate." In which case the event named would in fact be a contingent, and not a certain event; and the words importing contingency would be satisfied by the words being taken literally as referring to the death of the legatee at any time under the prescribed circumstances.

To transpose the words of the will, and read the clause in this way, would to my mind be arranging and moulding the testator's language for the purpose of supporting the gift over, while we are only authorised to construe the words he has really used so as to arrive at his actual intention. It has been further urged, that the language used by the testator in this case is scarcely distinguishable from the language of the will in the case of *Soorjeemoney Dossee* v. *Denobundhoo Mullick* (1). In that case the language used was as follows:—"The *Issore* avert, but should peradventure any among my said five sons die, not leaving a son or son's son, such of my sons and my son's son as shall then be alive, they will receive that wealth according to their respective shares." In which case the event of survivorship was referred by the Privy Council to the period of the son's death, and not to the period of the testator's death. But as I have said, in order to make the words of the will in the present case uniform to the language of the will before the Privy Council, it would be necessary to remould the language of the testator which I have no authority to do.

Moreover, looking at the entire will, which I am bound to do, I come to the conclusion that it was not the testator's intention to postpone the absolute enjoyment and keep in suspense the nature of the interest bestowed, until the death of each legatee, or to confine the interest of any legatee to a life-estate, which would in effect be the result, if the period of survivorship was the death of the legatee; for in that case if the legatee died without male issue, his estate would cease, and if he left male issue, and the testator's assumed intention could be

(1) 9 Moo. I. A., 123.

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carried into effect, then his share would be given to such issue on his death, his own estate would equally be no more than a life-estate.

I arrive at this conclusion, partly from the subsequent clause in the will which directs:—"So long as my infant grandson shall not have attained his majority, the whole of my estate shall remain undivided;" from which words it is plain that the testator contemplated a division at least before the death of his grandson, which division would be repugnant to the idea of a subsequent survivorship, and also from the succeeding clause in the will, which gives an authority to advance capital to the testator's widow (one of the four legatees) for the performance of religious acts, such advances to be placed to her debit, which also points to an intention to give an absolute interest.

And there is besides a further very substantial reason for holding that the period of survivorship does not refer to the death of the legatee, namely, that if the will were so construed a partial intestacy might occur: and the strong bearing of the Court must always be against a construction involving such a consequence. For male issue might have been born to the sons or grandson after the testator's decease, and according to the decisions of this Court, such issue could not have been proper objects of the testator's bounty, and the gift over to such issue would be too remote, and the result would be an intestacy.

Interpreting this will as a whole, and adopting the ordinary principles of construction, which are equally applicable to a Hindu will as to an English will, I am of opinion that the two sons, the grandson and the widow, having all survived the testator, took absolute interests in these shares, and that the estate became divisible on the grandson attaining majority.

If it was necessary to cite any authority, and if an English case is an authority for the construction of a Hindu will, I might refer to the case of *In re Hills' Trusts* (1), where the words are almost identical with the words used in this will; and where it was held that the legatees took absolute interests before the period of their own deaths, though in that case, as there was a

(1) L. R., 12 Eq., 302.

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prior tenancy for life, the period of survivorship was deferred to the death of the tenant for life.

Attorney for the plaintiff: Mr. *Fink.*

Attorney for the defendant Durponarain Bysack: Baboo *P. C. Mookerjee.*

Attorneys for the defendant Kheroda Dossee: Messrs. *Swinhoe, Law, & Co.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

1879 *March* 31.

NEHORA ROY AND OTHERS (PLAINTIFFS) *v.* RADHA PERSHAD SINGH (DEFENDANT).*

Practice—Amendment of Issues—Act VIII of 1859, *s.* 141—*Act X of* 1877, *s.* 149.

A Judge is not bound to make any amendment in the issues of a case, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy as disclosed by the pleadings on either side.

Bizjie Bebee v. *Monohur Doss* (1), *Wilkin* v. *Reed* (2), *Lucas* v. *Tarleton* (3) followed.

Where no injustice would be done to either party, the Courts, in the exercise of their discretion, under special circumstances, may allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings. The power to allow such amendments is given by the first part of s. 149 of Act X of 1877 corresponding with the first part of s. 141 of Act VIII of 1859.

THIS was a suit to recover possession of certain lands, of which the plaintiffs alleged they had been dispossessed by one Radha Pershad Singh (who had taken the lands in execution under a decree obtained by him in 1866 against the predecessors in title

* Appeal from Original Decree, No. 1 of 1878, against the decree of Moulvi Mahomed Nurul Hosain, Subordinate Judge of Shahabad, dated the 20th September 1877.

(1) 2 Ind. Jur., N. S., 118. (2) 15 C. B., 192. (3) 3 H. & N., 116.