PRIVY COUNCIL.

P. C.* 1881 *Feby.* 9 & 10, *March* 1.

RAMLAL MOOKERJEE (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Construction of Will—Use of words "putra poutradi krame"—Condition subsequent.

In a will, the words "*putra poutradi krame*," recognized as apt for conveying an estate of inheritance, do not limit the succession to male descendants, and will include female heirs of a female, where by law the estate would descend to such heirs.

The will of a Hindu, who died, leaving only a widow, a daughter's daughter, and a brother, directed as follows:—

"7. If no daughter or daughter's *son of mine* should be living at the time of the death of my wife, then my grand-daughter (daughter's daughter) shall become the proprietress of my property, and shall remain in undisputed possession thereof '*putra poutradi krame.*'

"8. If the death of my wife should take place before my daughter's daughter arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards, until she arrives at majority and bears a son.

"9. If my daughter's daughter should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for her life.

"20. If no son or daughter should be born to me, and if my daughter's daughter should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

The will further directed the use of the money by the Government in that event, for certain charitable purposes.

In an administration suit brought by the Secretary of State in Council against the testator's brother, wife, and grand-daughter, for the carrying out of the trusts of the will,—

Held, that clause 7, if it stood alone, would confer an absolute estate on the daughter's daughter on the death of the widow;

That the disqualifications in clause 9 must come into operation, if at all, at or before the death of the widow; and that it was unnecessary to decide

* *Present:*—SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR R. COUCH.

whether, if they had been conditions subsequent, they would or would not have been in violation of Hindu law;

That clause 20 was supplementary to clause 9, and that by it, the gift over to the Government was to take effect, if at all, immediately upon the widow's death, in the event of the grand-daughter dying before her without having borne a son, or in the event of the grand-daughter being disqualified at the date of such death.

One possible event not having been provided for by the will, *viz.*, that of the grand-daughter predeceasing the widow, having borne a son, their Lordships did not decide what would happen on the occurrence of that event. The rights of a son yet unborn would not, in the case supposed, be affected by any judgment in these proceedings.

Lady Langdale v. *Briggs* (1), as explained in the *Tagore case* (2), approved.

APPEAL from a decree of the High Court of Bengal (3rd March 1879), reversing a decree of the District Judge of Hughli (29th March 1877) (3).

The decree of the High Court, of 3rd March 1879, against which this appeal was preferred, was made in an administration suit brought by the Secretary of State for India in Council, against the present appellant and two of the respondents, for the purpose of obtaining a declaration of the true construction of the will of one Beharilal Mookerjee, who died in 1874 at Boinchi, in the Hughli district, possessed of considerable estates.

The clauses of the will, giving rise to questions on which the Courts in India differed, are set forth in their Lordships' judgment. The District Judge of Hughli decided that the will, in so far as it went beyond the gift of a life-interest to the testator's grand-daughter, was invalid; and that the gift over to the Government was, therefore, ineffectual. He held that, "in the event of failure of any male heir to whom Hori Dasi is to transmit the estate at her death, the Government is to become 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 the grand-daughter, is bad, this further provision is also null and void." Against this decision all the parties to the suit severally appealed.

(1) 8 DeG. M. & G., 391. (2) 9 B. L. R., 377.

(3) Reported in I. L. R., 5 Calc., 228, *nom.*, *Hori Dasi Dabi* v. *The Secretary of State for India.*

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The High Court reversed this decision and made the following decree:—"That the decree of the lower Court be set aside, and in lieu thereof it is hereby declared, that the will executed by Beharilal Mookerjee, and bearing date the 9th of August 1870, is a genuine and valid instrument. And it is further declared, that, under the said will, Srimoti Komoleh Kamini Debi, widow of the said Beharilal Mookerjee, deceased, is entitled, as a Hindu widow, to enjoy the profits of the estate left by the said Beharilal, subject to the payment of rupees one hundred (Rs. 100) per mensem to Srimoti Hori Dasi Debi for life, as in the said will mentioned; and that, on her death, the said Srimoti Hori Dasi Debi, grand-daughter (daughter's daughter) of the said Beharilal Mookerjee, if she be living at the time, and is not barren or without a living son, or otherwise disqualified, will be entitled to succeed to the estate left by the said Beharilal Mookerjee, deceased, absolutely. And further, that the gift over to the Government for purposes mentioned in the said will, in case of the said Hori Dasi not surviving, or being otherwise disqualified, as in the said will described and mentioned, is good and valid. And it is further declared, that, in the event of the said Hori Dasi being disqualified as aforesaid to succeed to the said estate, she shall be entitled to a monthly allowance of rupees three hundred (Rs. 300) only out of the proceeds of the said estate. And it is hereby further ordered, that the lower Court do frame a proper scheme for the due administration of the trust-fund for charitable purposes and the like, created by the said will of the deceased Beharilal Mookerjee, and that the administration of the said trust-fund be entrusted to the said widow, who shall be assisted in the said administration by Rakhal Das Chowdhri and Sitanath Banerjee, as provided in the will aforesaid, subject, as therein provided, to supervision by the Collector of Hughli, and also to removal in case of misconduct or negligence. And it is further ordered and decreed, that the defendant, Ramlal Mookerjee, do pay to the Secretary of State and Komoleh Kamini Debi and Hori Dasi Debi the sum of rupees four thousand two hundred and seventy-two (Rs. 4,272) to be apportioned between them, being part of the costs incurred by them in this Court; and do further pay to the

Secretary of State the sum of rupees one thousand (Rs. 1,000) only as costs for counsel's fees in the Court below; and further do bear his own costs of this Court and of the Court below. And it is further ordered and decreed, that the remaining costs incurred by the Secretary of State, Komoleh Kamini Debi, and Hori Dasi Debi, in this Court, which are hereby assessed at rupees two thousand seven hundred and fifty-five (Rs. 2,755), as also the costs incurred by them in the Court below, be paid out of the estate left by the deceased Beharilal Mookerjee aforesaid. And it is further ordered and decreed, that the costs incurred by the defendants Rakhal Das Chowdhri and Sitanath Banerjee, severally, in the Court below, be likewise paid out of the said estate of Beharilal Mookerjee deceased."

Mr. *Montague Cookson*, Q. C., and Mr. *Macrae* for the appellant.

Mr. *Cowie*, Q. C., and Mr. *Woodroffe* for the Secretary of State for India in Council.

Mr. *Graham*, Q. C., and Mr. *Cowell* for Komoleh Kamini Debi and Hori Dasi Debi.

Mr. *Montague Cookson*, Q. C., for the appellants.—The disposition attempted in this will goes beyond the limit permitted by the Hindu law. An ulterior estate may be created to take effect on the termination of a life-estate in favour of a person, either in fact or in contemplation of law, in existence at the death of the testator—*Soorjeemoney Dossee* v. *Denobundoo Mullick* (1) and *Jatindramohan Tagore* v. *Ganendramohan Tagore* (2); Mayne's Hindu Law and Usage, para. 350. But in this case there is an ineffectual attempt to create a future interest in favour of a granddaughter's sons when born. The words "*putra poutradi krame*" must have been used in clause 8 to indicate descent to male descendants only. The proper construction of clause 20 supports this view of the testator's intention. Clauses 1 to 6, relating to interests anterior to the gift in question, are not,

(1) 6 Moore's I. A., 526. (2) 9 B. L. R., 377.

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under the same rule of construction, precisely as clauses 7, 8, 9, and 20. The former merely follow the law of succession *ab intestato*, and any *lacunae* can be filled up by it. But as to the latter the bequest can only be brought within the law by straining the construction—a course not permitted—*Mainwaring* v. *Beevor* (1) and *Leahe* v. *Robinson* (2). The testator's intention must be taken as expressed by the words used, by which alone the validity of the bequest must be tested: for words cannot be supplemented or altered, even if intestacy should result from refraining from so dealing with a defective disposition—*Chapman* v. *Brown* (3) and *Driver* v. *Frank* (4). A similar case of gift to a class of sons occurred in *Bernal* v. *Bernal* (5). Again, at any period of her life, the grand-daughter might come under the disqualifications referred to in clause 20. Thus the will is uncertain as to the point of time fixed for the fulfilment of the conditions under which the estate to the grand-daughter and her sons is to take effect. But by Hindu law the object of a gift must be certain and known—*Jatindramohan Tagore* v. *Ganendramohan Tagore* (6); Vayavastha Darpana, 606. Again, by Hindu law, the property of a female (*stridhan*) is at her absolute disposal; so that the Hindu law is contravened by the limitation in favor of male descendants. If the gift can be taken to be absolute, it then will fall under the rule that an absolute gift cannot be divested by a direction which is only to take effect contingently upon an uncertain future event. The result is, that the gift is one which the Hindu law cannot recognize. He also referred to *Amirtolal Bose* v. *Rajoneekant Mitter* (7); Mayne's Hindu Law and Usage, 2nd edition, chap. xi; Macnaghten's Hindu Law, Vol. ii, case 15, pp. 221, 222; Vayavastha Darpana, 606; and *Soudaminey Dossee* v. *Jogeshchunder Dutt* (8).

Mr. *Woodroffe* (with whom was Mr. *Cowie*, Q. C.) for the Secretary of State in Council, respondents.—If the 7th clause

(1) 8 Hare, 49.
(2) 2 Mer., 363.
(2) 3 Burr., 1626.
(4) 3 M. & S., 25.
(5) 3 M. & C., 559.
(6) 9 B. L. R., 377.
(7) L. R., 2 Ind. App., 113; S. C. 15 B. L. R., 10.
(8) I. L. R., 2 Calc., 272.

had stood alone, Hori Dasi, the daughter's daughter, would have taken an absolute estate of inheritance on the death of the widow. The words "*putra poutradi krame*" do not indicate any intention to exclude females from the succession, but are apt and sufficient to create a general estate of inheritance—*Jatindramohan Tagore* v. *Ganendramohan Tagore* (1), *Kisto Kishore Bhattacharjea* v. *Seetamonee Bhattacharjee* (2), and *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (3). The argument for the appellant rests on a construction of those words, which they will not bear. There is no rule of Hindu law preventing the creation of an absolute estate in remainder upon a condition. In this case the estate was created conditional upon the grand-daughters not being disqualified, either in the manner pointed out by the will, or otherwise before the death of the widow. The widow's death was the *punctum temporis*. He referred to *Soorjeemoney Dossee* v. *Denobundhu Mullick* (4).

Mr. *Graham*, Q. C., and Mr. *Cowell* for the other respondents.—The estate given to the graud-daughter was a general estate of inheritance not limited to her male descendants—*Raja Nursing Debi* v. *Roy Koylasnath* (5). The will did not contemplate the divesting of the estate when once it had vested, which it would do on the death of the widow, provided that the grand-daughter had not then become disqualified. Such a limitation of future rights, defeasible only upon a contingency which might never arise, is good by Hindu law. The decree does not properly express the conditions, agreeing in that respect, neither with the will, nor with judgment.

Mr. *Montague Cookson*, Q. C., in reply, referred to *Hampton* v. *Holman* (6).

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—This was an administration suit for the purpose of carrying into effect the trusts of the will

(1) 9 B. L. R., 377.
(2) 7 W. R., 320.
(3) L. R., 5 Ind. App., 188; S. C., I. L. R., 4 Calc., 23.
(4) 6 Moore's I. A., 526.
(5) 9 Moore's I. A., 55.
(6) L. R., 5 Ch. Div., 183.

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of one Beharilal Mookerjee, instituted by the Secretary of State for India, in which Komoleh Kamini Debi, widow of the testator, Mani Lal Bundopadhya, father and guardian of a minor, Hori Dasi Debi, daughter's daughter of the testator, and Ramlal Mookerjee, a brother of the testator, were made defendants. Two other defendants were afterwards added, described in the will as advisers of the widow. The plaint concludes in these terms:—

"But as the defendant No. 3, Ramlal Mookerjee, has impeached the will as a forgery, and as defendant No. 1, the widow, who has the management of, and is in the enjoyment of the profits of, the estate under the provisions of the aforesaid will, has omitted to take any action to have the validity of the will determined, or to carry out the charitable bequests therein contained, though the period for carrying out such bequests has expired, and as the rights and interest of this plaintiff, as well as of other persons interested in the above will, are thereby seriously endangered, it is therefore prayed, that the authenticity and validity of the said will may be declared, and that the said Komoleh Kamini Debi, defendant No. 1, be directed and enjoined to make over to the Collector, or such other trustee or trustees as the Court may appoint, the sum of one lac and fifty thousand (Rs. 1,50,000), in Government securities, for the establishment of the aforesaid school and hospital, and a further sum of rupees one thousand (Rs. 1,000) (*sic*) for the furnishing of the said school and dispensary; and further, that the rights of the several parties under the will may be ascertained and determined, and that a scheme for the due administration of the trust under the will may be propounded, with such other relief as the Court may think fit to grant."

Beharilal Mookerjee, a wealthy Hindu, made the will in question on the 9th of August 1870. He had then a wife living. He had never had a son, but had had a daughter, who had died, leaving an infant daughter, Hori Dasi Debi. As he was then not passed middle age, he may have reasonably contemplated having further issue. He died on the 12th of August 1874, without sons or daughters, leaving his wife and granddaughter him surviving, and a brother, Ramlal Mookerjee, the

defendant, with whom he had not been on good terms. The material parts of the will for the purposes of the present appeal are as follows :—

"2. I have no son at present. If one or more sons should be born to me hereafter, and should have arrived at majority at the time of my death, then he or they shall be entitled to my properties according to the shastras.

"3. If my son or sons, or any son (of mine), should be a minor at the time of my death, then the whole of my properties shall remain under the Court of Wards until my son, or, in the case of my having more sons than one, until the youngest son, has attained majority.

"4. If grandsons or great grandsons of mine should be living at the time of my death, they shall be the owners of my property according to the shastras.

"5. If no sons, grandsons, or great grandsons of mine should be living at the time of my death, then my wife, Srimoti Komoleh Kamini Debi, shall be proprietress of the whole of my properties, according to the shastras, and shall enjoy the profits thereof during her lifetime.

"6. If one or more daughters should be born to me, then, on the death of my wife, she or they, and, on the death of her or of them, my grandsons (daughter's sons), shall be the owners of my property according to the shastras.

"7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my grand-daughter (daughter's daughter), Srimoti Hori Dasi Debi, shall become the proprietress of my property, and shall remain in undisputed possession thereof from generation to generation.

"8. If the death of my wife should take place before my grand-daughter (daughter's daughter) arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards, until she arrives at majority and bears a son.

"9. If my grand-daughter (daughter's daughter) should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for life."

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Here follow bequests for the purposes of establishing a school and dispensary, with respect to which no question now arises. Clause 20 is in these terms :—

"If no son or daughter should be born to me, or if my granddaughter (daughter's daughter) should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government. The whole of the profits of my estate, which shall remain as surplus after the expenses connected with the various matters specified above have been defrayed, shall be employed by the Government, as it thinks proper, in the improvement of the school and dispensary, and in alleviating the sufferings of the blind, the lame, the poor, and the helpless of my native village, and of the neighbouring villages."

After some previous proceedings, which it is not now necessary to refer to, the present suit was instituted on the 19th May 1876. All the defendants, except Ramlal, supported the will, and the widow submitted that she had carried out its directions to the best of her ability.

Ramlal disputed the factum of the will. He also maintained that no part of it was effectual except that which gave the estate to the widow for life.

On the cause coming on for hearing before Mr. Prinsep, the Judge of Hughli, he was of opinion that the making of the will was fully proved; that, under its provisions, and subject to the payment of an immediate legacy of Rs. 1,50,000 for charitable purposes, the widow took a life-interest in the estate; that, on her death, Hori Dasi, if not disqualified, would succeed and take a life-interest; but that, after the death of both ladies, or on the death of the widow, if Hori Dasi should be then disqualified, the estate would pass to the next legal heir of Beharilal Mookerjee, a supposed devise to the male descendants of Hori Dasi being, in the Judge's view, opposed to the rule laid down in the *Tagore case* (1), and ineffectual, and the devise to Government coming after it being thus defeated. He also directed, that the fund created by the legacy should be vested

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

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in the Collector as trustee, but declined to propound any scheme for the management, and he ordered that the costs of all the parties should come out of the estate.

Against this decision Hori Dasi appealed, on the ground that her interest had been unduly curtailed.

Ramlal, on the ground that Hori Dasi took nothing under the will; he no longer disputed its factum.

The Secretary of State, on the ground that the gift over to the Government, in certain events, ought to have been held good.

The High Court held, that Beharilal's intention was to confer on Hori Dasi, if she survived, and was, on the widow's death, not disqualified, an absolute estate, and that his intention was effectuated; also that the gift over to the Government, which they interpreted as taking effect in the event of Hori Dasi not surviving the widow, or being disqualified at the time of the widow's death, but not in the event of her becoming subsequently disqualified, was good.

The High Court, indeed, observed:—

"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 the 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."

A decree was drawn up, which, in some points which will be subsequently referred to, is not in conformity with the judgment.

No argument has been addressed to their Lordships founded on the first six clauses of the will, which are no more than bequests in accordance with what the testator conceived to be the rules of the ordinary Hindu law of succession. All of these, except the 5th, refer to possible events which did not happen.

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The 5th describes an ordinary Hindu widow's estate, which would take effect on the death of the testator by operation of law. The argument in favour of the appellant has been founded on the 7th, 8th, 9th, and 20th clauses.

It was not, and could not be, disputed, that, since the case of *Soorjeemoney Dossey* v. *Denobundoo Mullick* (1), recognized and confirmed as that case has been in the case commonly called the Tagore case—*Jatindramohan Tagore* v. *Ganendramohan Tagore* (2), and in *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (3), a gift by will upon an event which is to happen, if at all, immediately on the close of a life in being, to a person in existence, and capable of taking under the will at the testator's death, was good and valid under Hindu law; and consequently that it was competent to the testator, by the use of apt words, to confer an absolute estate on Hori Dasi on the death of his widow. But it was argued that the words "*putro poutradi krame*" (translated in the record "from generation to generation,") expressed in their etymological sense an intention on the part of the testator to limit the succession to the heirs male of Hori Dasi; that the gift, being "stridhan," would descend by law, in the first instance, to her unmarried daughters equally with her sons, and that in its further descent females would have peculiar rights; that, therefore, the testator had endeavoured to create an estate of inheritance in her inconsistent with the general law of inheritance, which endeavour, under the authority of the *Tagore case* (2), would render his gift to Hori Dasi void, or, at the least, would prevent its operating further than to give her an estate for life. This latter view was adoped by the Judge of first instance. Upon this question the High Court observe—

"We dissent entirely from the learned Judge, when he holds that the words '*putra 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* (4); the devise and bequest to her are con-

(1) 9 Moore's I. A., 123.

(2) 2 L. R., Ind. App., Sup. Vol., 47; S. C., 9 B. L. R., 377.

(3) L. R., 5 Ind. App., 188; S. C., I. L. R., 4 Calc., 23.

(4) 9 B. L. R., 377.

tained in the words '*adhikarini haibeh*,' 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."

The effect of these words is thus spoken of by Sir Barnes Peacock in delivering the judgment of the High Court in the Tagore case — *Jatindramohan Tagore* v. *Ganendramohan Tagore* (1):—

"A gift to a man and his sons and grandsons, or to a man and his sons' sons, would, in the absence of anything showing contrary intention, pass a general estate of inheritance according to Hindu law. I believe the words usually used in Bengal are '*putra poutradi krame*,' and in the Upper Province '*naslan baad naslan*,' the literal meaning of the former being to sons, grandsons, &c., in due succession, and of the latter in regular descent or succession."

The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the bar that these words, though undoubtedly importing the male sex in their primary signification, would, in the case of a gift to a male, be read as words of general inheritance, and would include female as well as male heirs, where, by the law, his estate would descend to females. Their Lordships feel no greater difficulty in applying them to the female heirs of a female, where, by law, the estate would descend to such heirs, and see no sufficient reason for narrowing the construction of words which have been often recognized in India and by this Board as apt for conferring an estate of inheritance. They are of opinion that clause 7, if it stood alone, would confer an absolute estate on Hori Dasi upon the death of the widow.

Clause 8 has been relied upon for enforcing the argument that the testator's object was to benefit the sons of his granddaughter, an object which their Lordships think he might reasonably suppose best effectuated by giving complete power

(1) 4 B. L. R., 182.

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over the estate to his grand-daughter. The provision for management by the Court of Wards obviously does not affect Hori Dasi's estate.

But it has been further contended that the conditions under which, by clause 9, Hori Dasi is to take, or, more properly speaking, under which she is not to take, are so uncertain as to render the gift to her void. It has been argued, that no time is fixed at which the disqualifications are to operate, that she may become a souless widow at any period of her life, and that, therefore, it must always remain uncertain whether or not she is capable of taking the gift. In their Lordships' opinion, all difficulty as to the question of time is got rid of, by reading the clause in conjunction with that which precedes it, and treating the death of the widow as the time when it is, if at all, to take effect. This natural interpretation of the clause gives effect to it, and their Lordships are by no means disposed to give it a forced construction which would defeat its operation. The death of the widow is, in their opinion, the point of time when it is to be ascertained once for all whether Hori Dasi takes, or is disqualified from taking.

More difficulty arises in the construction of clause 20.

It has been argued that the words "if my grand-daughter should die before she bears a son" are not limited to any point of time; that if this be so, the other disqualifications mentioned in that clause (which are repetitions of those in clause 9) are not limited either, and may take effect at any period of Hori Dasi's life; that they are in effect conditions subsequent, upon the happening of any of which, the estate, if it had ever vested in her, would be divested. It has been further argued, that the gift over of an estate on events which may happen, not upon the close of a life in being, but at some uncertain time during its continuance, is void, as contrary to Hindu law.

If, as the High Court have found, their Lordships think rightly, that one main object of the testator was to prevent his brother taking his property in any event, it is obvious that clause 9, creating the incapacity, under certain circumstances, of the grand-daughter to take upon the widow's death, required to be supplemented by another directing on whom the estate, if

such incapacity happened, should devolve. This is the purpose of clause 20, which should be read as supplementary to clause 9, and as if it had immediately followed it. This purpose points to the construction that the gift over was to take effect, if at all, at the widow's death. When providing for the devolution of the estate on Hori Dasi's being disqualified to take it, it was natural that the testator should also provide (which he had not done before) for its devolution in the event of her dying before her grandmother. This provision is, by implication, contained in clause 20, and full effect may be given to every part of the clause, without supposing (what their Lordships agree with the High Court is somewhat improbable) that the testator intended the estate, if once vested in his grand-daughter, should be liable to be afterwards divested.

Viewed in this light, the section would read,—

"If no son or daughter be born to me, or if, on my widow's death, my grand-daughter should have died before bearing a son, or should be barren, or become a sonless widow, or otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

This construction, which their Lordships adopt, makes it unnecessary to discuss whether the disqualifications, if they had been conditions subsequent, would or would not be in violation of Hindu law. It has not been disputed that, if they are to be ascertained on the widow's death, the gift over to the Government is good.

One possible event, undoubtedly, is unprovided for, *viz.*, the grand-daughter predeceasing the widow, having borne a son.

Their Lordships do not deem it necessary to decide what would happen on the occurrence of this event. Indeed, no judgment which they could give would affect the rights, if he should have any, of a son yet unborn, in the case supposed. In declining to declare the rights of the parties in this contingent event, they are acting in conformity with the rule laid down in the case of *Lady Langdale* v. *Briggs* (1) explained as it was in the *Tagore case* (2).

(1) 8 DeG. M. & G., 391. (2) 9 B. L. R., 377.

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It follows that the decree of the High Court must be amended by substituting, for the words "not surviving," "having died during the lifetime of such widow without bearing a son." It is further necessary that, for the words "or without a living son," there should be substituted the words "or a soulless widow." The decree as it stands is neither in accordance with the will nor the judgment.

Subject to these variations, their Lordships will humbly advise Her Majesty that the decree be affirmed. The costs of all the parties to the appeal should be paid out of the testator's estate.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers*.

Solicitors for the respondent, the Secretary of State for India in Council: Mr. *H. Treasure*.

Solicitors for the other respondents: Messrs. *Watkins* and *Lattey*.

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice Field.

1881
April 7.

GYAN CHUNDER SEN AND ANOTHER (PLAINTIFF) *v.* DURGA CHURN SEN (DEFENDANT).*

Partition—Appointment of Commissioner—Civil Procedure Code (Act X of 1877), s. 396 - General Clauses Act (I of 1868).

In a suit for partition, the Subordinate Judge appointed an Amin under s. 396 of the Civil Procedure Code to effect a partition. The Amin made his report, which was objected to on the merits by the defendant, but ultimately the report was confirmed, the defendant having acquiesced in the proceedings. On appeal to the District Judge, the defendant took an objection, that the appointment of the Amin was irregular.

Appeal from Appellate Order, No. 302 of 1880, against the order of J. F. Browne, Esq., Officiating Judge of the 24-Pergunnas, dated the 23rd September 1880, reversing the order of Baboo Kristo Mohun Mookerjee, Second Subordinate Judge of that district, dated the 5th April 1880.