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and without which he would have had no right of appeal, have entirely failed, and their Lordships therefore think that the appellant ought to pay the costs of the appeal.

Decree modified.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitor for the respondent: Mr. *Horace Earle.*

TAROKESSUR ROY (PLAINTIFF) *v.* SOSHI SHIKHURESSUR ROY (DEFENDANT).

SOSHI SHIKHURESSUR ROY (DEFENDANT) *v.* TAROKESSUR ROY (PLAINTIFF).

P. C.* 1883 *February* 28, *March* 2 *and* 17.

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

Hindu law—Will, Construction of—Gift ineffectual so far as it departs from the law of inheritance—Gift over of accrued share.

A gift by will, attempting to exclude the legal course of inheritance, is only effectual, in favor of such person as can take, to the extent to which the will is consistent with the Hindu law. And it is a distinct departure from that law to restrict the order of succession to males excluding females.

A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts." He also directed as follows: "The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any die without leaving a male child, which God forbid, then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs."

In a suit between the survivor of the three nephews and the testator's heir, *held*, that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life.

The gift over of a life estate was competent; it being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive.

On the death of one brother his share went to the two other brothers, and on the death of one of the latter his augmented share, made up of his original and accrued share, went to the survivor.

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, and SIR A. HOBHOUSE.

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APPEAL and cross appeal from a decree of the High Court, (9th September 1880) (1) modifying a decree of the first Subordinate Judge of the Rajshahye district (2nd May 1878.)

Chandra Shikhuressur Roy and Moheswar Roy were brothers, of whom the former dying in 1865 left a son, Kumar Shikhuressur Roy, the respondent and cross appellant. He had made a will containing a bequest in favor of Moheswar's three sons, of whom the survivor, Tarokessur Roy, was the appellant and cross respondent.

The material clause of the will, and the facts relevant to this report, appear on their Lordships' judgment.

In the Original and Appellate Courts it was found that the will was genuine, and the only question now raised was as to its legal effect. The Subordinate Judge of the Rajshahye district held that the appellant, Tarokessur Roy, was entitled to an absolute interest in the estates given by the will; but the High Court, (GARTH, C.J., and MITTER, J.,) held that the gift, in so far as it restricted the inheritance to male descendants, was inoperative; that on the authority of the *Tagore* case (2) the three brothers were entitled to the estate in equal shares for their respective lives; and that the particular estate of inheritance which the testator had attempted to create was void. But that the gift over to the surviving brothers was valid according to the Hindu law, as declared in the above cited case, and also in *Soorjeemoney Dossee* v. *Denobundho Mullick* (3). On the remaining question, whether the share of the brother who died first went over, with the share of him who died next, to the surviving brother, they held that it was the intention of the testator that the whole share, original and accrued, should pass. The judgment is reported in I. L. R., 6 Calc., 424.

Against this decision Tarokessur appealed on the ground that he was entitled to the absolute interest. The respondent, Shikhuressur Roy, contesting his right to more than a life estate, filed a cross appeal to the effect that the will, properly construed,

(1) See *Shoshi Shikhuressur Roy* v. *Tarokessur Roy*, I. L. R., 6 Calc., 421.

(2) *Jotendromohun Tagore* v. *Ganendromohun Tagore*, 4 B. L. R., O. C., 103, 9 B. L. R., 377; S. C. L. R., Sup. Vol., 47.

(3) 9 Moore's I. A., 123.

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gave no more than a life estate on the one-third share as it originally stood, without the accrued shares.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for Tarokessur Roy.

Mr. *J. D. Mayne* and Mr. *J. T. Woodroffe* for Soshi Shikhuressur Roy.

For the appellant it was argued that the clause in the will now in question gave, when only due effect was given to the ineffectual attempt to restrict the right to inherit to males, an absolute interest, as well in the survivor's own third part as in the accrued shares to which he had succeeded, under the gift over, on the deaths of his brothers, respectively.

The testator having attempted to effect what was contrary to the Hindu law, his will was to that extent inoperative. But it did not follow that he was intestate as to the estate of inheritance, of which he had attempted the disposal. For the latter proposition the *Tagore* case (1), in which, in the most express terms, the estate given to the first taker was a life estate only, was hardly to be considered an authority.

That case did not precisely apply to what had arisen here, the testator in this instance having attempted to create an estate of inheritance in the first taker. The conditions which he had attempted to impose could not indeed be held valid; but the intention of the testator, to the extent to which it was consistent with the Hindu law, should receive effect. This it would hardly receive if the absolute interest were cut down to a life estate. It would be sufficient to strike out the words of the will attempting to control the course of descent; and the gift of the absolute interest could be maintained on the principles indicated in *Soorjeemoney Dossee* v. *Denobundho Mullick* (2). In connection with this argument reference was made to *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (3); *Ramlal Mookerjee* v. *The Secretary of State for India* (4); *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (5);

(1) 9 B. L. R., 377.
(2) 9 Moore's I. A., 123.
(3) L. R. 5 I. A., 138; S. C. I. L. R., 4 Calc., 23.
(4) I. L. R., 7 Calc., 304.
(5) I. L. R., 2 Calc., 262.

Srimati Bramamayi Dossee v. *Jagesohandra Dutt* (1); *Kherodemoney Dossee* v. *Doorgamoney Dossee* (2); the Hindu Wills' Act, (XXI of 1870); and the Indian Succession Act, 1865.

For the respondent and cross appellant, it was submitted that the surviving nephew was entitled only to a life estate, and that he took his one-third without the addition of the shares of his deceased brothers. The will was valid only to the extent of giving a life estate to the three nephews—a proposition clearly resting on the principle of the *Tagore* case, which was applicable here. The testator had attempted to make the property descend in three lines, restricted in a manner not permitted by Hindu law. That being the state of things, to give an absolute estate to the first taker, striking out the restriction as to the mode of descent, and to let the gift operate as a gift of the inheritance, would be to make another, and a distinct line, which (however well it might accord with law), would not accord with the testator's intention. The creation of a life estate in such a case as the present agrees with what the testator certainly, at least, intended; but the creation of an unrestricted estate of inheritance would not. Again, as a gift of the inheritance, the disposition would form a gift to a class some of whom were not in existence at the death of the testator; and it was, as regards the inheritance, affected by the invalid restriction. That the gift over was valid would appear doubtful if the case were put (which might have arisen) of two of the nephews surviving the third, and then one of the survivors dying, leaving sons who would stand in his place. Forming a class, and entitled to take as a class if at all, they could not all take, so much of the gift as related to the sons being invalid; and it being the rule that, in gifts to a class, there could not be a choice between two objects thereof, so as to give effect to one part, and not to another—*Leake* v. *Robinson* (3); *Pearks* v. *Moseley* (4). This doctrine has been recognized in India—see *Callynauth Naugh Chowdhry* v. *Chundernath Naugh Chowdhry* (5); and *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (6).

(1) 8 B. L. R., 400.
(2) I. L. R., 4 Calc., 455.
(3) 2 Mer., 363.
(4) L. R., 5 App. Cas., 714.
(5) I. L. R., 8 Calc., 378.
(6) I. L. R., 2 Calc., 262.

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Reference was also made to the *Tagore* case (1), and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (2). Tried by this test the gift over was of questionable validity.

Mr. *Doyne* replied.

On a subsequent day (March 17th) their Lordships' judgment was delivered by

SIR R. P. COLLIER.—The question in these appeals arises upon the construction of a clause in a Hindu will, which is in these terms :—

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

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

(1) 4 B. L. R., 103 at p. 179. (2) I. L. R., 4 Calc., 455.

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

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

The Court of first instance gave the plaintiff a decree for his whole claim.

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

From the judgment of the High Court there are cross appeals. The first by the plaintiff, on the ground that he was entitled to an absolute estate in the whole. The second by the defendant, on the ground that the plaintiff was entitled to a life estate in one-third only. It will be convenient to deal firstly with the first appeal.

The grounds of the judgment of the High Court that the plaintiff was entitled to a life estate only may be thus shortly stated.

They held, on the authority of *Jottendromohun Tagore* v. *Ganendromohan Tagore* (1) commonly called "the *Tagore* case," that the testator, having attempted to create an estate of inheritance unknown to and opposed to Hindu law, that estate of inheritance was void, and that the will operated only to confer on the plaintiff an estate for life.

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

"If the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal

(1) L. R. Sup. Vol. Ind. Ap., 47.

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course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

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

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

Their Lordships are unable to accede to this view.

Considering that the gift to the nephews is expressed as to be received for the defrayment of their pious acts, and that alienation is forbidden, they do not construe the gift, independently of the words prescribing the course of succession, as conferring an absolute estate. They are further of opinion that to alter the

words prescribing the course of succession, so as to admit females, would be in effect to make a new will for the testator, and one which, so far from carrying his intentions into effect, would be in direct opposition to his intention, and indeed to his main object, expressed in other parts of his will, as well as in this clause, *viz.*, to exclude females.

The case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (1) has been cited on behalf of the appellant, in which the following words of a grant,—"You are my sister; I accordingly grant you a taluk for your support, . . . being in possession of the lands, and paying rent, &c., to the tahut jamma, do you and the generations born of your womb successively (Santán sreni kramé) enjoy the same, no other heir of yours shall have right or interest,"—were construed as conferring an absolute estate, defeasible on the failure of issue living at the death of the donee. In that case the words of gift (of which the original in the native language are given) were held to have no technical meaning, signifying much the same as "children and grandchildren," and indicating an estate of inheritance, while the only words which created a difficulty, "no other heir of yours shall have right or interest" were held to be satisfied, by giving them the effect of making the absolute estate defeasible in the event of the failure of issue living at the time of the death of the donee, in which event the estate was to revert to the donor and his heirs. This case has no bearing on the present.

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

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

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

Their Lordships construe this clause thus, in accordance with the construction put upon it by both the Indian Courts: "Any of them" means any of the three nephews, not any of their descendants; on the death of any of three nephews his share shall

(1) L R. 5 I. A., 138; I. L. R., 4 Calc., 23.

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go to the surviving nephews or nephew, not to the descendants of a dead nephew; but on the estate getting into the hands of the surviving nephew or nephews, it is to descend, as had been before provided, to males only. This construction disposes of an ingenious argument of Mr. Mayne—based on the hypothesis that upon the death of the second nephew his share would go to his surviving brother, and to the "male descendants" of his dead brother—that this would be a gift to a class, some of whom, *i.e.*, the male descendants, could not take, and would, therefore, by a well known rule of law, be altogether invalid.

According to the construction which their Lordships adopt, the gift over was to persons alive, and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent, according to the authority of *Sreemutty Soorjeemonee Dossee* v. *Denobundhoo Mullick* (1), as explained in the *Tagore* case. For the reasons above given it could only confer an estate for life.

One point only remains to be considered, which was indeed not argued before their Lordships, but is suggested in the judgment of the High Court, *viz.*, whether upon the death of the brother dying secondly, his original share only, or the share also of his deceased brother which had accrued to him, went over to the surviving brother. It is undoubtedly a rule of English law that, when a fund is given to a class of persons with a direction that, on the death of any of them, their shares are to go over, the original shares only and not the accruing shares, will go over. This rule was stated by Lord Hardwick in *Pain* v. *Benson* (2) and has been followed, not always without expressions of reluctance, by a long series of decisions.

But an intention that the accruing shall go over with the original shares has been inferred where there is what has been called "an aggregate fund" which the testator desires to keep unsevered (when the gift has been to several with benefit of survivorship), (3) when, in addition to the word "share," the word "interest"

(1) 9 Moore's I. A., 135.

(2) 3 Atk., 80.

(3) *Worlidge* v. *Churchill*, 3 Brown's Ch. Rep., 465. *In re Crawhall's Trust*, 8 De. G., M. & G., 480.

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is used, (1) or where the words are his "or her share or *shares*" (2), so that the application of the doctrine to English wills has sometimes given rise to questions of some nicety. What might have been the effect of the words in question had they been found in an English will, their Lordships think it unnecessary to decide, as they are of opinion that the rule, founded in a great measure on our peculiar doctrine, that the heir-at-law is not to be disinherited but by express words or necessary implication, has no application to the wills of Hindus. It may be observed that such a course of devolution is the ordinary course for Hindu property as between brothers inheriting from brothers, and would present itself most readily to the mind of a Hindu testator; so that, even if the English rule should be applied anywhere beyond the domain of English law, it could hardly be applied to Hindu wills without defeating the intention. Their Lordships feel constrained by no rule of law to read the words in any other than their natural sense, *viz.*, that, on the death of the first brother, his share goes to his two brothers, and that, on the death of one of these, the share which he had at his death, made up of his original and his accrued share, goes to the surviving brother.

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

Appeals dismissed.

Solicitor for the appellant in the appeal and respondent in the cross appeal: Mr. *T. L. Wilson.*

Solicitor for the respondent in the appeal and appellant in the cross appeal: Mr. *H. Treasure.*

P. C.*
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February 15, 16, 17.
March 15.

MOHESH LAL (PLAINTIFF) AND MOHANT BAWAN DAS (DEFENDANT.)

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

Mortgage, Payment of—Extinction of charge—Intention of Parties—Presumption.

Whether a mortgage, paid off, has been kept alive or extinguished depends upon the intention of the parties; the mere fact that it has been paid off

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) *Douglas* v. *Andrews*, 14 Beavan, 347.

(2) *Wilmot* v. *Flewitt*, 11 Jur., N. S., 820.