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that the plaintiff's right had been admitted at the date of that agreement. Upon all these grounds his conclusion was one which he was entitled to form and is not, in my opinion, one which should be disturbed in second appeal. I, therefore, agree with the order proposed by my learned brother.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

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October 15.

BAI DHANLAXMI, DAUGHTER OF MANILAL UTTAMRAM (ORIGINAL DEFENDANT NO. 2), APPELLANT *v.* HARIPRASAD UTTAMRAM DESAI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 1), RESPONDENT*.

Will—Hindu testator—Creation of estates unknown to Hindu law—Invalidity of bequests—Indian Succession Act (X of 1865), section 118.

A Hindu made his will whereby he bequeathed his property successively to the three sons of his sister in the following manner. In the first place, it was to go to one of the sons absolutely, subject to the condition that, if he died without male issue surviving, it was to go to the second. The latter was also given an absolute estate, similarly liable, however, to be defeated if he in his turn died without leaving male issue, in which event the property was to go to the third son subject to a similar condition. Ultimately the property was devised in favour of charity. The first two sons having died without male issue surviving, the third son sued for construction of the will and for a declaration of his right to the property in the events that had happened :—

Held, that although the testator might have defeated the absolute estate which he gave to the first son by a gift over to the second son in accordance with the provisions of section 118 of the Indian Succession Act, he could not attach a condition to the gift over, and thus further restrict the devolution of the estate in a manner unknown to Hindu law by directing that the second son was not to take an absolute estate, but what would be, in the language of the English law of real property, "an estate in tail male."

Held, further, that the estates which were intended to be created by the testator being thus in fact a succession of estates in tail male, the original gift over was bad in its creation and failed absolutely, and the first son took an absolute estate, which on his death would go to his daughter as his heiress.

* First Appeal No. 29 of 1919.

A Hindu may create a life-estate or successive life-estates. But a series of absolute estates defeasible in succession on the happening of an uncertain event cannot be considered as a succession of life-estates. It can only be considered as an attempt to create a state of inheritance which is not recognised by Hindu law.

FIRST appeal from the decision of Karsandas J. Desai, First Class Subordinate Judge at Ahmedabad.

Suit for construction of a will.

One Lallubhai Kasandas made a will on the 9th April 1898, whereby he bequeathed his property successively to the three sons of his sister—viz., Manilal, Kalyanrai and Hariprasad. The terms and conditions on which the bequests were made appear sufficiently set out in the judgment.

On Lallubhai's death, Manilal succeeded to his property. He enjoyed it till his death which took place in 1907. He left him surviving a daughter Dhanlaxmi (defendant No. 2). The second son Kalyanrai too died in 1914, leaving behind him his widow Muli (defendant No. 1).

The third son Hariprasad filed the present suit in 1916 for a construction of the will, alleging that in the events that had happened he had become entitled to Lallubhai's property.

The trial Court held that the plaintiff was entitled to the property.

Bai Dhanlaxmi appealed to the High Court.

G. S. Rao, for the appellant.

Jayakar, with *G. N. Thakor*, for respondent No. 1.

MACLEOD, C. J. :—The plaintiff brought this suit (*a*) to have the will of one Lallubhai Kasandas, dated the 9th of April 1898, construed, and to have his rights in the properties A to R and other properties determined and declared; (*b*) to have an account from defendants Nos. 1 and 2 and proper administration of the properties by the Court; (*c*) to have it declared that he was entitled to the properties specified in para. 11 of the

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plaint, and to obtain an injunction restraining the defendants from interfering with his realizing the rent of the properties from the tenants in possession thereof, and also with his dealing with these properties as owner; and for further and other reliefs which it is not necessary to mention in detail.

The testator died in 1898 leaving him surviving a sister Tara, three sons of that sister, Manilal, Kalyanrai and Hariprasad, and his own daughter Prankore. Manilal died in 1907 leaving a widow Hariganga who died in 1908, and his daughter Dhanlaxmi, who is the second defendant. Kalyanrai died in 1914 leaving a widow Muli who is defendant No. 1. The plaintiff is the third son of the testator's sister Tara.

The question which has been argued before us in this appeal is what is the construction to be placed on clauses 12 and 13 of the will. Clause 12 is in effect a bequest of specific properties mentioned in clause 1 of the will and also the residue to the testator's nephew Manilal. I read from the translation at page 27 :—

"I appoint after my death the Chiranjiv (i.e., long-lived) Manilal the middle son of my sister Tara,...the owner and heir in the name of Manilal Lallubhai of the properties of all sorts mentioned ... and of any property or outstanding over and above the same and which may have been left out to be mentioned in the above list and of all my such properties as I may not have disposed of by this will or hereafter. He should therefore after my death take possession of all my estate in accordance with the provisions of this will and should after me spend for the expenses of my obsequial ceremonies for 12 months at least up to Rs. 2,000....That should be paid accordingly by the Chiranjiv, i.e., (long-lived) Manilal or by any one who may be then in his place enjoying as owner (thereof) the properties mentioned in this clause and as regards the rest he and his male issue after him or daughter's son or the person whom Manilal may have appointed should carry on the Vahiwat (i.e., management) and put into effect according to the provisions of this will and Manilal or his children or his heirs have got no right to do away with my immoveable properties given to Manilal as mentioned above by sale or by jeopardising or giving them away in any other way."

If that clause stood by itself, I should say that that should be construed as giving Manilal an absolute

estate in the properties mentioned specifically in that clause and in the residue, and that the restriction on alienation would be void. However, it is not necessary to decide that until we construe clause 13 which runs :—

" I direct that my immoveable properties and cash vatans which I have directed the Chiranjiv (i.e., long-lived) Manilal to take and enjoy as owner after my death as provided in clause 12 mentioned above of this will, should not go by inheritance or in any other way in the family of the daughter or daughter's daughter of the Chiranjiv Manilal or to the husband of a daughter or to the relations of the husband, in the event of there being no male issue or daughter's issue of Manilal, after the death of the Chiranjiv Manilal and his wife, and I direct that in that event my other Bhanej (i.e., nephew, i.e., sister's son) Kalyanrai Uttamram or his male issue should in accordance with the provisions relating to the said properties take them into their possession and enjoy them and should perform the work of the management and the duties which are required to be performed by this will and I direct that in the absence of the said Kalyanrai or his male issue, after the death of Kalyanrai my third Bhanej Hariprasad Uttamram and his male issue pursuant to the provisions mentioned above should take them into their possession and enjoy them and should perform the work of management and the duties which are required to be performed by this will. But in the absence of Hariprasad or his male issue, the said property shall not on any occasion contrary to the provisions mentioned above go in the family of my sister or that of my sister's daughter or that of the daughters of her sons or the husband of any one of them or that of the relations of their fathers-in-law but should go for the use of the 'Dharmada Khata' (i.e., charity) mentioned in clause 9 of this will...."

This case cannot be dealt with under the Hindu Wills Act. As laid down by their Lordships of the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1] : " In determining that construction, what we must look to, is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition ; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are

[1] (1857) 6 Moo. I. A. 526 at p. 550.

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to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

It appears to me that the intention of the testator appears very clearly on the face of the will itself. There is no necessity whatever in this case to consider the surrounding circumstances. The intention was that the properties mentioned in clause 12 and the residue were to go to Manilal, and to his male issue or his daughter's sons. Then if Manilal died leaving his widow and no sons or daughter's sons, it may be said that the testator intended that Manilal's widow should take the estate, although there is no direct gift to Manilal's widow. But after her death the estate was to go to Kalyanrai or his male issue, and it was on the failure of Kalyanrai and his male issue, that the estate was to go to Hariprasad and his male issue. No doubt the wording of clause 13 is defective because the testator directs that in the absence of Kalyanrai or his male issue, after the death of Kalyanrai, the estate should go to Hariprasad and his male issue. That as it stands is unintelligible. We can only presume from the later words that the testator intended that Hariprasad should only take on the failure of Kalyanrai and his male issue, because from the words at the end it clearly appears

that the testator intended that the property should devolve on Kalyanrai and Hariprasad and their male issue in accordance with the provisions mentioned.

Now it cannot be disputed that a gift to A, and if he should die without leaving male issue, then over, is a good gift : see *Chunilal Parvatishankar* v. *Bai Samrath*[1]. There it was assumed that the gift over was good on the death of one of the sons of the testator dying without having had male issue. The only question which was argued there was what was the period to which the gift over referred. We may take it, therefore, that an absolute gift to Manilal with a provision that if he should die without male issue the estate should go over, would have been good. That is in accordance with the provisions of section 118 of the Indian Succession Act, and there is no reason to think that such a provision would be contrary to the provisions of Hindu law. What that section provides is that a bequest may be made to any person with the condition superadded that in case a specified uncertain event happened the thing bequeathed shall go to another person, or that in case a specified uncertain event did not happen the thing bequeathed shall go over to another person. Ordinarily speaking once a gift has been made to a particular person it cannot be taken away. But for the provision of section 118 of the Indian Succession Act such a gift, absolute on the face of it, but defeasible on the happening of an uncertain event, would have been construed as an absolute gift, and the condition that it could be defeated would have been considered as void. But it is impossible to carry the exception which is allowed by section 118 any further than the section provides for, and a condition cannot be attached to the gift over. Here the testator intended that the gift or bequest to

[1] (1914) 38 Bom. 399.

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Manilal should be defeasible. If he died without male issue or daughter's sons, then there should be a gift over. But he attached a conditon to that gift over, and he attempted to restrict the inheritance of his estate in a manner contrary to the principles of Hindu law. He intended that the estate should go to Kalyanrai and his male heirs, and on the extinction of Kalyanrai's line in the male line of descent, then again it was to go over to Hariprasad and his male issue, and on the extinction of that line then it was to go to charity.

It can be admitted that a Hindu may create a life-estate or successive life-estates. But a series of absolute estates defeasible in succession on the happening of an uncertain event cannot be considered as a succession of life-estates. It can only be considered as an attempt to create an estate of inheritance which is not recognised by Hindu law. The appellant has relied on the case I have referred to, viz., *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1]. But the only point in that case which was argued before the Privy Council was whether the accumulations of the income on the share of a son who died without issue should go with the corpus to the surviving brothers, or whether it should go to the heirs of the deceased son.

In these cases which relate to the construction of a will, the only assistance the Court can derive from decided cases is the ascertainment of the principles which have been laid down in those cases, since with regard to the construction of a particular document before the Court, it must almost inevitably be the case that the respective documents construed in those cases were of a different character to the one presently in dispute. But considerable assistance can be derived from the decision of the Privy Council in *Purna Shashi Bhattacharji* v. *Kalidhan Rai Chowdhuri*[2].

(1) (1857) 6 M. I A. 526. (2) (1911) 38 Cal. 603.

In that case two brothers subject to the Dayabhaga School of Hindu law executed a document whereby they purported to provide for the permanent devolution of their respective properties in the direct male line, including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule, and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs and their descendants. One of the brothers died leaving a son who died thereafter without leaving any issue. The plaintiffs in the suit claimed as next reversioners to that son. The question before the Court was held to be a question whether the gift over was good in its creation and not whether it was good in the event which happened. Their Lordships say at p. 619 :— "Throughout the instrument there is no indication of an intention to make a gift to any person; whilst paragraph 4 clearly shows that the 'sons and grandsons' who took the properties left by the executants acquired them as 'full owners'. There was no restriction on their powers to deal with such properties 'in any way they wished.' But, although they acquired the estate as absolute owners, it was not to descend in the legal channel according to the prescriptions of the Hindu law, but in accordance with the rules framed by the executants with the avowed object stated in the preamble. It was only on the indefinite failure of male issue in both branches that the female heirs or their descendants were to receive the shares prescribed for them in the *Shastras*. This is the general policy of the instrument. It was clearly intended to vary the rule of Hindu law, and to control the devolution of the properties until the indefinite failure at some remote period of the male line of both brothers. That

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such an attempt to alter the mode of succession prescribed by law is illegal is enunciated in the clearest terms in the judgment of this board in the *Tagore case*[1]." Stopping there, it seems to be very clear from the terms of the document that we have to construe, that the testator intended to control the devolution of the property until the indefinite failure at some remote period of the male lines of Kalyanrai and Hariprasad. Their Lordships continue: "The learned Judges of the High Court had present in their minds the difficulty of reconciling the acquisition by each individual male descendant of full rights of ownership in the property that descended to him with the restraint imposed on its devolution. And, therefore, to give effect so far as possible to the intention of the executants they considered that the absolute estate Ananda acquired 'was defeasible in the event of his death without male issue'. If the attempt to interfere with the course of descent according to law is to be regarded as a condition of defeasance, it was applicable not merely to the case of Ananda, but to the case of every male descendant who happened to leave no male issue; and its application might have been postponed for an indefinite period. Their Lordships are not aware of any authority to warrant such a provision. Nor is there any for the contention that under the instrument in question there was a devise in favour of Ananda with a gift over to Naba Kishore, the uncle. As the Subordinate Judge very properly observes in his judgment, 'the question is not whether the gift over was good in the event which happened afterwards but whether it was good in its creation'. It is clear from the document that if there was any idea at all in the mind of Krishna Kishore of a gift over in favour of Naba or his male descendants, it was dependent on the contingency of the

[1] (1872) L. R. I. A. Sup. Vol. 47 at pp. 61, 65.

indefinite failure of male issue in his own line. At the time the document was executed there is no reason to suppose that he contemplated that his sons would die without issue, or that Naba would survive him. And therefore if it were assumed that a gift over was intended, it would be wholly invalid in view of the clear rule of law laid down in the *Tagore case*[1]. Their Lordships, however, have no doubt that the sole intention of the executants in this document, as they expressly avowed in the preamble, was to alter the rule of succession in their family which they had no power to do". The result was that the plaintiffs as the next reversioners of Ananda were held entitled to succeed to the property which devolved upon him from his father Krishna Kishore.

It seems to me, therefore, that although the testator might have defeated the absolute estate which he gave to Manilal by a gift over to Kalyanrai, he could not endeavour to restrict the devolution of the estate in a manner unknown to Hindu law by directing that Kalyanrai was not to take an absolute estate, but what would be, in the language of the English law of real property, " an estate in tail male." The estates which were intended to be created by the testator in this case by his will were a succession of estates in tail male. The result must be that the gift over fails absolutely, and it cannot be considered that that portion of it which is bad can be removed so as to make it an absolute gift to Kalyanrai. The question is whether the gift in its creation is good or bad. There can be no doubt in my opinion that it is bad. Then the result must be that the original bequest to Manilal is not affected by it. So that he took an absolute estate, and on his death it would go to the second defendant as his heiress. We think, therefore, that the appeal must be

(1) (1872) L. R. A. Sup. Vol. 47.

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allowed and the plaintiff's suit dismissed, as the second defendant is entitled to the property bequeathed to her father Manilal by clauses 12 and 13 of the will. The cross-objections which do not arise are dismissed. The Receiver should hand over the property to defendant No. 2 after passing his accounts. As the difficulties requiring a decision by the Court arose from the act of the testator the ordinary rule as to costs prevails. Costs of the suit throughout, including the costs of the cross-objections, to be paid out of the residue.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1920.

October 18.

JAMSHEDJI HORMASJI (ORIGINAL PLAINTIFF), APPLICANT *v.* GORDHANDAS GOKULDAS (ORIGINAL DEFENDANT), OPPONENT*.

Rent (War Restrictions) Act (Bom. Act II of 1918), section 9†—Order for possession—Small Cause Court has no power to alter the order—Presidency

* Civil Application No. 237 of 1920 under Extraordinary Jurisdiction.

† The section runs as follows :—

9 (1) No order for the recovery of possession of any premises shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this act and performs the conditions of the tenancy.

(2) Provided that nothing in this section shall apply where the tenant has committed any act contrary to the provisions of clause (*a*) or clause (*p*) of section 108 of the Transfer of Property Act, 1882, or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighbouring occupiers, or where the premises are reasonably and *bona fide* required by the landlord either for the erection of buildings or for his own occupation or for the occupation of any person for whose benefit the premises are held, or where the landlord can show any cause which may be deemed satisfactory by the Court.

(3) The fact that the period of the lease has expired, or that the interest of the landlord in the premises has terminated, shall not of itself be deemed to be a satisfactory cause within the meaning of sub-section (2).