not be pleaded as *res judicata* in a subsequent suit, unless the Judge, by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised. In this respect the enactment goes beyond s. 13 of the previous Act X of 1877, and also, as appears to their Lordships, beyond the law laid down by the Judges in the *Duchess of Kingston's* case (1). They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.

They will therefore humbly advise His Majesty that the appeal be dismissed, and the appellants will pay the costs of the respondents, who have appeared.

Appeal dismissed.

Solicitors for the appellants: *Watkins and Lempriere.*
Solicitors for the respondents: *T. L. Wilson & Co.*

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[716] PRESENT:

Lords Macnaghten and Lindley, Sir Ford North, Sir Andrew Scoble and Sir Arthur Wilson.

GOPAL CHUNDER BOSE *v.* KARTICK CHUNDER DEY. [2nd May, 1902].

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

Hindu Law—Will—Construction of Will—Direction as to management of endowment by testator's daughter and her husband and their male children successively—Estate created by such direction.

A Hindu testator, after by his will creating an endowment for "religious worship in a pagoda," directed that the sebaitship should be held by his wife, and after his death by his son, and after his death "by my daughter and her husband Nundo Doolal Bose and their male children successively."

***Held*, affirming the decision of the High Court, that the word "successively" controlled the whole gift to the daughter, her husband, and the male children and that the intention of the testator was to give life estates in the sebaitship to the sons of his daughter in succession.**

On the death of the last surviving son of his daughter, the succession of sebaits failed, and the sebaitship reverted to the heirs of the testator.

APPEAL from a judgment and decree (9th March 1900) of the High Court at Calcutta in its appellate jurisdiction substantially affirming a decree (25th May 1899) of the same Court in its Original Civil Jurisdiction, which granted the relief sought in the suit.

The defendant appealed to His Majesty in Council.

The suit was brought on 2nd January 1896 for the construction of the will of one Nilmoney Dey, a Hindu inhabitant of Bengal, governed by the Dayabhaga School of Hindu Law. The will was made in English, and was dated 15th March 1838. By it the testator made various gifts to the members of his family, expressing as to his wife that his money gift made to her beneficially was to be for life only. He dealt with the property in suit in the following words:—

"I give and bequeath Company's Rs. 20,000 for the religious worship at my house, a lower-roomed house in which the pagoda is established, and another house

(1) (1776) 2 Smith's L. C. 10th Ed. 713.

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situated to the north of the pagoda consisting of about five cottahs of ground two upper rooms and two lower rooms, and also a flower garden situated to the east of the pagoda containing more or less five cottahs of ground and two lower brick-built sheds."

[717] And then later on in the will the testator directed as follows :—

"The superintendence of the pagoda I entrust to my wife, and after her death to hold it by my son Gour Mohun Dey, after his death by my daughter and her husband Nundo Doolal Bose, and their male children successively."

On his death, which took place on 1st January 1839, Nilmoney Dey left (1) Doorgamoni Dasi, his widow, (2) Gour Mohun Dey, his son, (3) Kishori Dasi, his daughter, married to Nundo Doolal Bose, (4) Sham Chand Bose, Ram Chand Bose, and Prem Chand Bose, grandsons, sons of Kishori Dasi, (5) Peary Mohun Dey, grandson, son of Kristo Mohun Dey, who predeceased his father, Nilmoney Dey, and (6) Gobind Mohun Dey, grandson, adopted son of Gour Mohun Dey. The sebaitship or superintendence was assumed in turn by (1) Doorgamoni Dasi, (2) Gour Mohun Dey, and (3) Sham Chand Bose, whose father Nundo Doolal Bose and his mother Kishori Dasi died before Gour Mohun Dey. Sham Chand Bose survived his two brothers and died in 1884; and on his death his son Gopal Chunder Bose and his nephew Bolye Chand Bose took possession of the trust estate, and were in possession when the suit, out of which the present appeal arose, was brought. The plaintiff was Kartick Chunder Dey, a great-grandson and the eldest heir in the male line of Nilmoney Dey, and the defendants were Gopal Chander Bose, Bolye Chund Bose, Purna Shashi Dey, a younger brother of the plaintiff, Sasilla Dasi, the widow of an elder brother of the plaintiff, and Nagendra Nath Dey, son of Gobind Mohun Dey. The plaintiff claimed that the Deys were entitled as heirs of Nilmoney Dey, the founder of the endowment, on the failure of the line of sebaits appointed by the testator, to be sebaits of the endowment. Such failure the plaintiff contended took place on the death of Sham Chand Bose, and he asked for a declaration that the Deys were entitled in succession to the sebaitship of endowment.

The Bose defendants, amongst other defences, submitted that they and not the Deys were entitled to the sebaitship on the true construction of the will.

The case was heard in the first instance by

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STANLEY, J. This action is brought by Kartick Chunder Dey against Gopal Chunder Bose and others to have a declaration that the plaintiff and certain of the defendants are entitled as representatives of the late Nilmoney Dey to be sebaits or superintendents of a pagoda, which was endowed by [718] Nilmoney Dey to carry out the religious trusts created by his will and for the usual accounts and declarations. The plaintiff also applied that possession of the trust estate should be delivered over to the representatives of Nilmoney Dey, and, if necessary, that a scheme should be framed for carrying out the trusts.

Nilmoney Dey died on the 1st January 1839, having made a will dated the 15th March 1838, whereby, amongst other things, he made the following bequest :—"I give and bequeath Company's Rs. 20,000 for the religious worship at my house, a lower-roomed house in which the pagoda is established, and another house situated to the north of the pagoda, consisting of about five cottahs of ground, two upper rooms and two lower rooms, and also a flower garden situated to the east of the pagoda, containing more or less five cottahs of ground and two lower brick-built sheds," and then later on in the will the testator directed as follows :—"The superintendence of the pagoda I entrust to my wife, and after her death to hold it by my son, Gour Mohun Dey, after his death by my daughter and her husband, Nundo Doolal Bose, and their male children successively."

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Probate of the will was granted on the 16th February 1889 to William Oxborough and Gour Mohun Dey. William Oxborough did not act in the trusts, and left this country many years ago.

"The persons purporting to act under the will as sebaits were first Doorga Money Dassee, then Gour Mohun Dey, upon whose death Sham Chand Bose became the sebait, his father Nundo Doolall Bose having died before Gour Mohun Dey. Sham Chand Bose was the eldest son of Nundo Doolall Bose. Sham Chand Bose died in 1884, and thereupon his son, Gopal Chandra Bose, and Bolie Chand Bose, who was the son of Gopal's brother, Ram Chand, took over the management and superintendence of the pagodas. The plaintiff, who is the heir of Nilmoney Dey, now contends that, upon the true construction of the will, the succession to the office of sebait has wholly failed, and that the right to the management of the pagoda reverted to the heirs of the founder, Nilmoney Dey; that the will only provided superintendents, of the pagoda during the life of the testator's wife and the lives of his son and daughter and her husband and their male children, and that the last survivor of such male children having died, the succession of sebaits provided by the will determined. It is necessary to scrutinize carefully the words used by the testator in this short paragraph of his will.

For the plaintiffs it has been contended that the word "children" used in that paragraph must be read in their ordinary singnification, that is, as denoting the immediate offspring. On the other hand, Mr. O'Kinealy on behalf of the defendants, has forcibly argued that the language of the will manifests an intention on the part of the testator to confer upon his daughter's family the perpetual sebaitship of the pagoda, and he contends that the words giving the sebaitship to the testator's daughter and her husband and their male children successively are equivalent to an absolute gift to them of the sebaitship; that these words are equivalent to the expression *putra pautradi krame*, i.e., son and son's son successively commonly found in a Hindu will, and which are regarded as apt words to pass an estate of inheritance.

In construing a will words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected and that other sense can be ascertained.

[719] There is a class of cases which supports Mr. O'Kinealy's argument, namely, cases in which an estate is devised to a person and his children in succession where the Court, in order to effectuate the general intent, will construe the gift as of successive estates in tail. The case of *Lord Tyrone* v. *Marquis of Waterford*, 1 D. F. and J. P. 613, is an illustration of this class of cases. There the Marquis of Waterford devised estates, to Lord John Beresford and to his children in succession, and it was held that the intention of the testator was to give a succession of fee simple estates, but inasmuch as it would be contrary to law to limit a fee upon a fee, the Court must adopt the Cypres doctrine and interpret the will so that it may be as nearly in accordance with the intention of the testator as the law will permit. Accordingly the Full Court of Appeal decided that Lord John Beresford took under the will an estate in tail.

This question was discussed in the case of *Studdert* v. *Von Steiglitz*, 23 L. R. Ir. 581, in which I was one of the Counsel.

In that case the gift of an estate was to the sons in succession of the testator's eldest sister. The learned Vice-Chancellor of Ireland reviewed all the cases, and following the decision in *Lord Tyrone* v. *The Marquis of Waterford* held that the sons took successive estates in tail. He stated the principle thus: "When there is a devise to several in succession in words sufficient to pass the fee or the whole interest of the testator in freehold, the Court will, in order to give effect to the general intent, construe the gift as of successive estates in tail." The general intent must be ascertained from the whole will.

Reading the words of the gift in the present will, is it possible to say that the testator intended to give the sebaitship absolutely to his daughter or to his daughter and her husband? I think not.

The word "successively" appears to me to apply as well to the gift to the testator's daughter and her husband as to their male children; that is, the testator intended that as the sebaitship first went to his wife for her life, and after her death to her son for his life, so after the death of her son he intended that it should go to his daughter for her life only and then to the daughter's husband for his life, and afterwards to their male children in succession.

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If it had been the intention of the testator to vest the sebaitship absolutely in his daughter and her husband and their male children in succession, it may be that the principle laid down in the cases to which I have referred would have applied, and the contention of Mr. O'Kinealy would have been well founded. But it appears to me that the language of the will precludes me from adopting this construction. The testator manifestly did not intend that his daughter should take an absolute interest because after her death the sebaitship was to pass to her husband, and then to their male childern successively. I am unable therefore to adopt the argument of the defendant's Counsel. In my opinion the words "male childern" must be construed as male offspring, and such male, offspring were intended to enjoy the sebaitship in succession for life only in the same way as their parents were intended to hold it. Consequently on the death of the last surviving son of the testator's daughter, the succession of sebaits failed.

It has been admitted that if this be so, the appointment of sebaits reverts to the heirs of the founder of the trust.

[720] The plaintiff and the defendants in the same interest with him are such heirs, and in may opinion are entitled to have the superintendence of the pagoda and worship of the temple.

Another contention has, however, been raised by the defendants. They say a suit was instituted for the administration of this estate on the 30th January 1850, in which Nundo Doolall Bose, Kissory Money Dassee, and their children were plaintiffs and Gour Mohun Dey and Doorga Dassee were defendants.

That suit was instituted for the enforcement of the payment of legacies given by the will of Nilmoney Dey and for the administration of his estate. On the 15th August 1851 a primary decree was pronounced. That was an ordinary primary decree not determining rights, but directed accounts and enquiries.

Gour Mohun died and the suit was revived by his son Gobindo. Shortly after this, the suit was compromised and a deed was on the 24th June 1858 executed, whereby Gobindo assigned his interest in the trust properties to the Boses to hold upon the trusts declared by the will. It is contended by the defendant that the present plaintiffs are estopped by this deed from raising the present contention. The plaintiffs were not represented in that suit at all. It is a deed between the immediate parties to that suit for the purpose of carrying out the terms of the compromise. Neither the plaintiffs nor those through whom they claim were parties to the suit or to the deed. Moreover, according to the recital in the deed, Nundo Lall Bose was then entitled to the superintendence of the pagoda, and it was to him as temporary superintendent the conveyance of the property was made. In the operative part of the deed the property is conveyed to him to the uses and subject to the limitations contained in the will. I fail to see therefore how the rights of the plaintiffs in respect of the plaintiffs in respect of the sebaitship are prejudiced by this deed. On the contrary, the deed appears to me expressly to preserve the rights of all parties in respect of the pagoda according as some are to be gathered from the language of the will.

Consequently, I am of opinion that this deed does not operate as an estoppel, and that the defence wholly fails, and accordingly I must make a decree and declare that the defendants, the Deys, are, as the present representatives of the testator, entitled, in the events which have happened, to be the sebaits and superintendents of the pagoda and to carry out the religious trusts in the will mentioned.

Futher, the plaintiff and the defendants, the Deys, are as such representatives entitled to possession of the trust estate with accumulations. I direct an account of what the trust estate consisted and of what it now consists with accumulations, and an account of the dealings of the defendants with the estate and of the accumulations thereof from the 29th November 1884, the date of the death of Sham Chand, to the present time. I do not think it necessary at present to frame a scheme.

The defendants Gopal Chunder Bose and Bolye Chand Bose appealed from his decision to the Appellate Bench, MACLEAN C.J. [721] MACPHERSON and HILL JJ., who delivered the following judgment, dismissing the appeal :—

"For the appellant it was contended by the Advocate General that one of three contentions must prevail : (1) that the sebaitship was conferred upon the testator's daughter Kishori absolutely, or (2) that she, her husband and children took as joint tenants absolutely, or (3) that the sebaitship was given to Kishori for life, then to

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her husband for life, and then to their children absolutely. This, in effect, means that we are to read the words 'and their male children successively' as equivalent to a well-recognized Hindu expression '*putra pautradi krame*—' words regarded as sufficient to pass an estate of inheritance; or, to put it in another way, that we must read the words used as words of limitation and not as words of purchase.

"As regards the suggested construction pointing to the creation of a joint tenancy, I may at once point out that the principle of joint tenancy as known to the English Law is one unknown to Hindu Law, except in the case of co-parcenary between the members of an undivided family. (See *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1).) On the other hand, the plaintiff contends that the sebaitship was given to Kishori and her husband successively for life, then to their male children successively for life, and that, upon the death of the survivor of such children, the management reverted to the heirs of the testator Nilmoney Dey.

"It was contended before us for the respondent that we are not dealing with an actual bequest or gift of immovable property, but only with the appointment of persons to superintend and manage the pagoda. It would appear, however, from the observations of their Lordships of the Judicial Committee of the Privy Council in the recent, and, as yet, unreported case of *Gnanasambanda Pandara Sanadhi* v. *Velu Pandaram* (2), delivered on the 19th December 1899, that the ruling in the *Tagore case* (3) is applicable to a hereditary office and endowment as well as to other immovable property.

"For the appellant it is urged that, looking to the general scope of the will, the testator intended to exclude from the sebaitship the adopted son of his son Gour Mohun Dey, and also the heirs of his eldest son Kristo Mohun Dey, who predeceased his father; and that, in this view, he intended to confer upon his daughter's family the perpetual sebaitship of the pagoda. To which it is answered that one must gather the testator's intention from the language he has used, and that it may very well be that he was satisfied to leave the management of the pagoda in the hands of his daughter and her husband and their male children, all of whom were living at the date of his will and death; and that, after their deaths, he was equally willing that the management should revert to his heirs.

"In construing the will, I ought to mention that the case is not touched by the Indian Succession Act. We are guided by the principles [722] laid down by their Lordships of the Judicial Committee of the Privy Council in the case of *Soorjeemoney Dassee* v. *Denobundoo Mullick* (4), where their Lordships say at page 550 of the report—

"In determining that construction, what we must look to is the intention of the testator. The Hindu Law, no less than the English Law, point 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 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 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.

"The case is not free from difficulty; but upon the best consideration I can give to the language used, I do not think the testator intended to confer a perpetual sebaitship upon the daughter or her husband, or their male children. I do not see what reasonable effect we can give to the word 'successive' if we adopt such a construction.

"It is true, no doubt, that in another part of his will he has, when he intended a gift to his wife to be only for life, used the expression 'for life,' and from this we are invited to infer that, inasmuch as in the matter of the sebaitship he has not used the expression 'for life,' he must have intended to create a perpetual sebaitship. This reasoning seems to me rather fallacious, for we are at once led to inquire

(1) (1896) I. L. R. 23 Cal. 670, 679; L. R. 23 I. A. 37, 44.

(2) (1899) L. R. 27 I. A. 69; I. L. R. 23 Mad. 271.

(3) (1872) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377.

(4) (1857) 6 Moore's I. A. 526, 550.

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what meaning in this view we can fairly attribute to the word 'successively,' and which are the words which create the perpetual sebaitship. The scheme of the clause appears to be based on life sebaitships. The wife was to have it for life, Gour Mohun Dey was to have it for life, and the daughter, her husband and their male children were to have it 'successively.' The latter expression, which to my mind controls the whole gift to the daughter, her husband and male children must mean, I think, that the daughter, her husband and their male children were to take it one after another for their respective lives, and in that sense 'successively;' and that the word 'male children' must be read as words of purchase and not as words of limitation. I do not think we can reasonably read, as the appellants invite us to do, the word 'successively' as meaning 'sons and sons' sons in succession.' I see nothing in the will which would justify us in reading the expression 'male children,' save in its ordinary acceptation.

"In my opinion the view taken by the Court below is right; and, in this view, it is not disputed that the sebaitship would revert to the heirs of the testator."

[723] *Mayne* and *G. Branson* for the appellants contended that the intention of the testator was that the superintendence of the endowment should be held by his daughter, her husband, and their descendants in regular succession, and this intention was sufficiently evidenced by the language he used. *Tagore* v. *Tagore* (1) and *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (2) were cited to show that such an interpretation was borne out by decisions of the Judicial Committee. In cases of religious trusts the fact that a perpetuity is created does not make the trust invalid by the Hindu Law. *Greedharee Doss* v. *Nund Kishore Dutt* (3), *Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (4) and *Janoki Debi* v. *Gopal Acharjia* (5), *Gnanasambanda Pandara Sanadhi* v. *Velu Pandaram* (6) were referred to.

Cohen, K. C. and *A. Phillips* for the respondents were not called upon.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships think the High Court has given a perfectly correct interpretation of the will, which is the subject-matter of this appeal, and that no other interpretation is possible.

Their Lordships will therefore humbly recommend His Majesty to dismiss this appeal, and the appellant must pay the costs of the first respondent, who alone appeared therein.

Appeal dismissed.

Solicitors for the appellant: *Watkins* and *Lempriere.*

Solicitors for the respondent: *Kartick Chunder Dey* and *W. W. Box.*

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29 C. 724.

[724] CRIMINAL REVISION.

Before Mr. Justice Stevens and Mr. Justice Harington.

GOURHARI GOPE *v.* ALAY GOPINI.* [12th March, 1902.]

Immoveable property—Possession—Order by Subordinate Magistrate restoring—Appeal—Jurisdiction—Magistrate of first class specially empowered to hear

* Criminal Motion No. 1117 of 1901, made against the order passed by Akhoy Kumar Sen, Deputy Magistrate of Dacca, dated the 3rd of September 1901.

(1) (1872) L. R. I. A. Sup. Vol. 47, 65; 9 B. L. R. 377, 395.
(2) (1878) L. R. 5 I. A. 138, 147; I. L. R. 4 Cal. 23, 28.
(3) (1863) Marshall 573, 581; (1867) 11 Moore's I. A. 405, 428.
(4) (1874) L. R. 1 I. A. 209, 228.
(5) (1882) L. R. 10 I. A. 32; I. L. R. 9 Cal. 766.
(6) (1899) L. R. 27 I. A. 69, 77; I. L. R. 23 Mad. 271, 280, 281.