IN EQUITY

SREE MOTEE NABOODOORGA DABEE *v.* CONNYLOLL TAGORE, AND OTHER EXECUTORS, &C. (1847. *March* 31. *Wednesday.*)

Hindoo will—Construction—Legacy—Period of vesting interest when chargeable.

Testator by his will, after giving the interest of Rs. 50,000 to his wife for life, bequeathed as follows. "At her death my two daughters shall receive the amount in equal shares. If they bear children they are to receive the same as their children become of age; and if they do not bear children they are not to receive the same, and Connyloll and Gopaloll are to receive this amount. 2nd *Item* my daughter Naboo Doorga shall receive Rs. 25,000 and Sridoorga Rs. 25,000 in the whole 50,000—they are not to receive these sums now, but on sons having been born of them, they are to receive these sums; and they are not to receive the interest also now." Naboodoorga bore children, and her eldest son had attained majority; Sridoorga died childless—*Held* that there was no evidence of intention by Testator to confer a benefit of survivorship; nor any ground for implying cross remainders; that the gifts of Rs. 50,000 in both clauses were distributable; and on fulfillment by one daughter of the condition attached, viz. production of a son, and his subsequently attaining majority, the daughter so producing was entitled to her own share, although the other daughter might not have also fulfilled the condition. As Naboodoorga, therefore, had given birth to a son, who has attained majority, she was entitled to her moiety of each bequest: but as Sridoorga had died childless, the gift to her had lapsed, and fell into the residue—

Held also—that the mother's right became vested on her eldest son attaining majority: and that interest became payable upon the legacies from the period of their so vesting.

MOHONEYMOHUN Tagore, by the first and second clauses of his will, dated 25th day of November, 1819, bequeathed as follows:

1st Item. My wife the mother of Srijut Connyloll Baboo is to receive Rs. 50,000, with the interest of which she will perform pious acts, This amount is to be placed to her credit in the account of Srijut Connyloll Baboo and Srijut Gopaloll Baboo and she will receive interest thereon yearly at the rate Company's Paper bears. On her death my two daughters Sreemotee Naboodoorga and Sreemotee Sridoorga are to receive the amount in equal shares. If they bear children they are to receive the same as their children become of age and if they do not bear children they are not to receive the same and Srijut Connyloll Baboo and Srijut Gopaloll Baboo are to receive this amount. Thus———"

[62] "2nd Item. My eldest daughter Sreemotee Naboodoorga shall receive 25,000 Rs. and Sreemotee Sridoorga 25.000 Rs.; in the whole, 50,000 Rs. are to be placed to their credit in the account of Srijut Connyloll Baboo and Srijut Gopaloll Baboo they are not to receive these sums now but on sons having been born of them and becoming of age they are to receive these sums and they are not to receive the interest also now the Baboojees will give them food and clothes."

"The 3rd Item (amongst other things) directed that as long as Connyloll and Gopaloll (sons of the Testator) remained minors, their mother, Juggodissoree Dabee, should continue mistress of his property on their part, and that the

Testator's eldest brother, Ladleymohun Baboo, should remain in the meantime manager on behalf of Juggodissoree." It is unnecessary to notice the remaining clauses of the will, as nothing turned upon them. In April, 1820, Mohoneymohun Tagore died, leaving him surviving all the parties above named, viz. his widow Juggodissoree; his two sons Connyloll and Gopaloll, two daughters, whereof the complainant was the eldest, and Sridoorga the youngest; and also his brother, Ladleymohun Tagore. The two sons of the testator, Connyloll and Gopaloll, being infants at the time of their father's death, Ladleymohun, in pursuance of the direction contained therein, obtained probate of the will, and, as executor or manager thereunder, took possession of the real and personal estate and property of Mohoneymohun, and continued to hold and manage the same, until Connyloll attained the age of 18 years, (which happened in the year 1829,). Connyloll then entered into possession and continued to manage the property, in substitution of Ladleymohun, until his younger brother Gopaloll attained his full age, in the year 1833; when the two entered into joint possession and joint administration of the estate, Ladleymohun having first fully accounted to them for such estate of the Testator as had come to his hands, and **[63]** Connyloll and Gopaloll having executed a release to him in respect thereof.

Shortly afterwards Ladleymohun died. Some time previous in the year 1823, Sridoorga had departed this life, intestate and unmarried, leaving her surviving her mother, the defendant Juggodissore Dabee, her sole heiress and representative, according to the Hindoo law. In 1824 the complainant intermarried with one Pertaubnarain Mookerjee, by whom she had a son, born about four years afterwards, named Mohindromohun Mookerjee, who attained his majority, according to the Hindoo law, in July 1844.

The bill prayed (among other things) that it might be declared that the rights of the complainant under the 1st and 2nd clauses of the will became absolutely vested, on her son Mohindromohun attaining his full age, and that she was entitled to receive, and be paid forthwith, the sum of 25,000 Sa. Rs. with interest from such time, and at such rate as the Court should think fit. And also for a declaration that the complainant was entitled as to one moiety in her own right, and as to the other moiety by survivorship, to the whole of the other legacy of Sa. Rs. 50,000, subject only to the life interest therein, of the defendant Juggodissoree, the same to be payable at the death of the latter; and for an account.

The case now came on upon evidence against the defendants Connyloll and Gopaloll, and upon bail and answer against Juggodissoree. None of the facts of the case were disputed. The defendants admitted assets: and the only questions raised were those upon the construction of the two first items of Mohoneymohun's will.

Mr. *Colvile, A. G.*, Mr. *Morton* and Mr. *Taylor* for the complainant contended—*Firstly*, in consequence of her sister Sridoorga having died unmarried and childless, the complainant is entitled, on the death of Juggodissoree, **[64]** (the widow), to receive the whole of the bequest of Rs. 50,000 mentioned in

the 1st clause, one moiety in her own right, and the other by survivorship, at her sister's decease, the words "*in equal shares*," creating a joint tenancy between them, with benefit of survivorship. For the same reasons the complainant is also entitled by survivorship, to the sum of Rs. 25,000 mentioned in the 2nd clause. *Skey* v. *Barnes* (a), *Currie* v. *Goold* (b), and *Scott* v. *Bargeman* (c).

2*ndly*,—The legacies vested on the birth of a son by either daughter, and on that son's attaining majority.

3*rdly*,—Interest became payable on the legacies from the period of their so vesting.

Mr. *Dickens* and Mr. *Ritchie* for the Executors. 1st, Each daughter is entitled to her own share, on her fulfilling the condition attached to the bequest to *her*, irrespectively of the share or moiety to the other. On failure by both or either of the daughters, the whole or a moiety of the bequest goes to the Executors. Cross remainders cannot be implied unless the whole fund becomes payable at once. Here the conditions may be fulfilled at different periods, *Turner* v. *Frederic* (d), *Taniere* v. *Peakes* (e), *Jones* v. *Randall* (f).

2nd. The question, as to when the legacies vested, we leave in the discretion of the Court.

3rd As to interest. That is chargeable not from the period the legacies may have vested, but from the time they became due and payable.

Mr. *Clarke* appeared for Juggodissoree (the widow).

Cur. ad. vult.

[65] SIR L. PEEL, C. J. I shall state the reasons which influence my own judgment separately, for although my colleagues agree with me in the result of the decision, yet there is some slight difference in our reasons for the conclusion we have come to. My opinion is founded on the circumstance that the will under discussion is that of a Hindoo. The question whether survivorship is implied or not is one which depends on the evidence of intention on the face of the will. Cases on the construction of English wills, afford little light as to the mode of collecting the intention of a Hindoo Testator, if regard be had to the different view in which Hindoos look upon their male and female progeny and other circumstances peculiar to that race. In cases where cross-remainders have been implied in the English law, the question has always been decided by evidence of intention arising on the face of the will whether the limitations have been of estates tail or of other estates. The evidence of intention may vary according to the nature of the estates limited, but alike in all will it be found, that the decisions have turned on the fact of the will indicating, that the ultimate gift shall not take effect, piecemeal, therefore, not until the exhaustion of estates not given in terms, and consequently only imperfectly given. But though the intention be, that the gift over should not take effect

[64] (a) 3 Mer. 345. (b) 4 Beav. 117. (c) 2 P. Wms. 69.
(d) 5 Sim. 466. (e) 2 Sim. & St. 383. (f) 1 Jac. & W. 100.

piecemeal, that is not decisive of the question whether cross limitations should be implied. The reason given in the text of Mr. Jarman's work on Devises, for implying them in estates tail, to avoid chasms in the estates, (which, however, a descent would prevent,) is no other than that the law leans against a partial intestacy. But the reason seems to be that unless cross-remainders were implied, the ultimate limitation could not take effect as a *remainder* of the whole, and would be void as an executory devise for remoteness, a reason indeed which is given in the notes to the same work. In the cases of **[66]** gifts of personalty, or of estates in fee, given over on contingencies not too remote, the same reason for implying cross-remainders does not exist, and in cases of contingent estates or interests, no good reason (apart from that of intention) appears to exist for implying them. If it be a vested legacy, the representative of the legatee is entitled till the happening of the contingency: if it be a contingent legacy, why is not the representative of the Testator entitled till the happening of the same contingency?

Upon the best consideration I have been able to give to the case, it seems to me, that the evidence of intention is very defective. There is nothing to show that the Testator meant, upon failure of the condition by one daughter, and the fulfilment or completion of it by the other, that the moiety of the former shall go to the latter. The legatees over are the sons, who are also the general legatees, and the persons who by Hindoo law, would be the general heirs in case of intestacy. The case in 3rd Merivale, is not applicable to one like the present, where the legatees over, the general legatees, and the parties entitled in the event of intestacy, are identical. I do not construe the bequest over to the Executors as a devisable bequest, but as a bequest of the whole fund, and as taking effect only in failure of issue to both daughters; yet, nevertheless I think there is no implication thence, of an intention on the part of the Testator, in the event of one share failing to vest, to give it to the other daughter. It is an event overlooked on the part of the Testator. The share to that daughter becomes, on that unlooked for event, undisposed of, and falls into the residue: the complainant is therefore entitled only to the bequest of Rs. 25,000, and also to Rs. 25,000 on the death of her mother. The interest is to be allowed, only from the time the money vested, viz. when the eldest son attained majority. The costs will come out of the estate, for the will is ambiguously worded.

[67] *Mr. Justice Grant.* I concur in what has fallen from the learned Chief Justice, but I put my judgment upon the construction of the will merely. The clear intention of the Testator was to give these legacies to his daughters, if they had children, in order that the latter might be provided for. I consider that the word "they" is to be taken distributively. The meaning, therefore, is, that in the event of either daughter dying without male issue, her share should go over to the Executors. The bequests are contingent, and Sridoorga's never became vested at all, and goes to the residuary legatees. This is consistent with the case cited of *Turner* v. *Frederick*.

The same construction is applicable to the bequests in the second clause of

the will, Rs. 25,000 is given to each daughter, the whole to be placed in the hands of the Executors to their credit, with a condition attached, which each daughter must fulfil for herself—and Sridoorga never having, during her life-time, fulfilled the condition, her share never became vested. As to the interest, I also think, that is payable from the time the legacy vested.

Mr. *Justice Seton* concurred.

PLEA SIDE.

NUSSEERWONJEE RUTTONJEE *v.* TARRONJEE RUTTONJEE.

(1847. *April* 5. *Monday.*)

Capias ad resp. Arrest Bail rules 3 and 6 Sheriff's duty.

A writ of *cap. ad resp.* requiring a Defendant to put in special Bail within eight days, must be executed within Calcutta or 10 miles thereof.

If a Defendant at the time of issuing the writ be within those limits, and subsequently depart thereout, so that he cannot be arrested, the Sheriff must apply for further instructions.

A RULE had been obtained, calling upon the Plaintiff to show cause, why the writ of *capias ad respondendum* **[68]** issued in the cause, should not be set aside; or why the Defendant should not be discharged from the custody of the Sheriff, upon filing common bail.

Mr. *Dickens* showed cause. The writ in question was regularly obtained upon the usual affidavit, and the arrest under it was perfectly regular. The only ground advanced for the purpose of setting it aside, is that of the Defendant having been arrested at *Moulmein*, and brought thence to Calcutta. It is immaterial to consider where the Defendant might have been at the time of the arrest; the real question is, where was he at the time of plaint filed and writ issued. He was then in Calcutta, but having, immediately afterwards embarked and sailed to Moulmein, the Sheriff followed, and, as was his duty, arrested him there.

Mr. *Morton* in support of the rule. The motion is in the alternative, either to set aside the writ, or to discharge the Defendant upon filing common bail. Although the writ itself may have been perfectly regular, yet it is manifest, that the arrest under it, was an abuse of the process of the Court. The form of the writ itself shows, that the Judge who issued it, intended that it should be executed in Calcutta, or within a certain distance of that place. The Sheriff is required to take the Defendant, if he should be found in the provinces, districts, or countries of Bengal, Behar, or Orissa, or in any of the Factories, districts, or places annexed to the Presidency of Fort William, and to keep him safely until he should have put in bail, or made deposit according to law; at the same time the Defendant is required to take notice that within eight days after execution, he is to cause special bail to be put in for him to the action. From the tenor of this notice it is clear, that the writ was to have been executed in Calcutta or its neighbourhood; for by the 3rd and 6th **[69]** Bail rules—only eight days are allowed for perfecting special bail, where