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respective plaintiffs, and from their testimony it is quite clear that they could not speak with any degree of precision as to the ages of the plaintiffs. It is a matter of some surprise to find the Subordinate Judge saying that, because Munni Bohu is the mother of the plaintiffs, her testimony is not to be relied upon. A mother's evidence would be the best evidence upon the question of the age of her sons, especially when that testimony is supported by the evidence of a horoscope which has been produced and proved by a competent witness. The Subordinate Judge should have accepted that evidence as fully trustworthy.

Upon these grounds we think that the decision of the lower Court is erroneous. We set it aside, and as the defendants' evidence has not been taken, the case will be remanded to the lower Court.

Costs will abide the result.

K. M. C. *Case remanded.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

1886
February 27.

J. N. MALCHUS (PLAINTIFF) *v.* BROUGHTON AND ANOTHER (DEFENDANTS).*

Will, Construction of—Charitable gift—Cy près, Doctrine of—Lapse of Legacy—Costs.

Under the will of *A*, who appointed the Administrator-General of Bengal his executor, *B* had a life interest in the residue of the testator's estate. *B*, brought a suit against the Administrator-General to have it declared that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between *B* and the Administrator-General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed on appeal.

On the question of costs, *held* that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit.

APPEAL from the decree of Pigot, J., dated the 8th June 1885.

The suit was one brought by the plaintiff, who had a life interest in the residue of the testator's estate, against the Administrator-

* Appeal No. 26 of 1885, against the decree of Mr. Justice Pigot, dated the 8th of June 1885.

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General of Bengal, for the construction of the will of one Nicholas Isaac Malchus, so far as it related to the 5th paragraph of the said will, and for a declaration that a pecuniary legacy given thereunder had lapsed and fallen into the residue.

Prior to the hearing of this suit on the petition of the plaintiff and with the consent of the Administrator-General, the plaint was amended by adding the Venerable Archdeacon Atlay as a party defendant. Embodied in the consent order granting this application was the following: "And it is further ordered that the defendant, the Administrator-General of Bengal, do in any event, out of the estate of the said Nicholas Isaac Malchus, deceased, retain his own costs of and incidental to this suit, to be taxed by the taxing officer of this Court, and pay the costs of all the other parties of and incidental to this suit, to be taxed by the taxing officer of this Court to their respective attorneys."

The facts of the case will be found fully set out in I. L. R., 11 Calc., 591.

The learned Judge in the Court below, after argument, held that the gift in question did not lapse, being a charitable bequest, and that under the circumstances of the case the gift should be construed *cy près*. As regards the question of costs, the learned Judge decided as follows: "The consent order is a binding order, and I cannot modify it. It appears that the plaintiff *ex abundantissimâ cautelâ* has provided that in any case he shall pay the costs of all parties; I observe that the plaintiff asks strangely enough for payment of the costs out of the residuary estate. That does not assist me in construing the order; all I can do is to construe the order strictly, but one thing I do hold, and that is, that it cannot operate upon the charity fund, and that, so far as I can judge, the only portion of the estate of Nicholas Isaac Malchus which was before the Court when that order was made, was that portion of the estate in which the plaintiff was interested. The order is one on the Administrator-General; he must construe it, but it appears to me that I must not, in dealing with the case, abstain from expressing this opinion, and if that construction be correct, the effect is that all the costs due up to decree will be paid by the plaintiff, otherwise I should of course have allowed the Administrator-General his costs out of the accumulations of

the charity fund. I am at liberty to add, though I cannot modify the order, so far as the Administrator-General's costs are concerned, if he be unable to obtain his costs out of that part of the estate which is affected by the order, he be at liberty to apply, that is to say, that the Court may have its hands free to allow his costs out of the charity fund."

The plaintiff appealed on amongst others the following grounds:

(1). "That the St. Paul's School, Calcutta, had ceased to exist at the death of the testator, and that the legacy had therefore lapsed, and had fallen into the residue.

(2). That the bequest was not a general charitable bequest; and that the *cy près* doctrine was inapplicable thereto.

(3). That under the consent order it should have been held that the said bequest of Rs. 7,000 was part of "the estate of the said Nicholas Isaac Malchus, deceased," out of which the costs of all parties in the suit had been agreed to be paid.

Mr. *Kennedy* and Mr. *O'Kinealy* for the appellant.

Mr. *Allen* for the Administrator-General.

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

WILSON, J.—This appeal raises a question as to the construction of the will of one Nicholas Isaac Malchus. The 5th clause of that will says:—

"I direct my executor to invest the sum of Company's Rupees seven thousand in the purchase of Company's Papers and to stand possessed thereof in trust by means of the income of the sum to provide a fund for or towards the education of two or more boys at Saint Paul's School, Calcutta, to be from time to time nominated for that purpose by the trustee for the time being of this my will, such boys to be natives of Calcutta, of poor and indigent parents or fatherless children of Armenian or other Christian religion, and such income to be paid to the Governors, Trustees or Managers of the school for the time being for the purpose of such education, and I direct that no boy shall be eligible for admission to the benefit of this provision at an earlier age than seven or at a later age than twelve, nor shall he continue the enjoyment thereof after

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he shall have attained the age of seventeen, though entitled to its benefit up to then, and whenever a vacancy shall occur either by the removal of any such boy at the age aforesaid, his earlier death or from any other cause, the trustee for the time being of this my will shall fill up the vacancy by appointing some other boy of the character and qualification hereinbefore in that behalf stated, and each boy admitted to the school shall be subject to the government and discipline thereof."

It appears that during the life of the testator St. Paul's School, Calcutta (which was a day school) was closed, and St. Paul's School, Darjeeling, opened in its stead, under the same management and with the aid of the same funds as the older school. The Darjeeling school is a boarding school, and therefore the cost of each pupil is much higher than that of the day scholars in Calcutta.

The plaintiff alleges that by reason of the closing of St. Paul's School, Calcutta, the trust in para. 5th of the will has wholly failed, and that the fund has become part of the residuary estate of the testator. The plaintiff having a life interest in that residuary estate claims the fund accordingly.

We agree with the learned Judge who heard the case that the plaintiff's contention is quite groundless. The trust was not one for St. Paul's School, Calcutta. Had it been so, the question, whether the present school is sufficiently a continuation of the old to receive the gift might have been material. But the trust is for the education of boys to be chosen and sent to the school. If therefore the school has ceased to exist, another mode must be found of giving effect to the governing intention of the testator. If the old Saint Paul's School can be said still to exist it has at any rate so far changed its character, that it would be difficult, if not impossible, to employ the trust funds in sending boys to it, as contemplated by the testator. The inquiry ordered is therefore necessary, and the decree made must stand.

The only other question is as to costs. Under ordinary circumstances the suit would simply have to be dismissed with costs. But there is an agreement embodied in a consent order to which effect must, if possible, be given. It was to the effect that the Administrator-General should retain his own costs, and

pay the costs of all other parties out of the estate of Nicholas Isaac Malchus.

The residuary estate of Nicholas Isaac Malchus is not before the Court, and the order cannot be construed as one dealing with that estate generally. If it were, effect could not be given to it.

We think on the whole the order should be construed as the learned Judge construed it, as an agreement between parties with reference to the residue, so far as they could properly dispose of it by agreement, that is to say, the plaintiff's interest in the residue.

We dismiss the appeal with costs; the costs to be charged as those in the first Court have been.

Appeal dismissed.

Attorney for appellant: Mr. *H. H. Remfry.*

Attorneys for respondent: Baboo *O. C. Gangooly* and Mr. *Carruthers.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ASHANULLAH KHAN BAHADUR (PLAINTIFF) *v.* TRILOCHAN BAGCHI AND ANOTHER (DEFENDANTS).*

1886 *April* 20.

Road Cess Act (Beng. Act IX of 1880), *ss.* 52, 53—*Evidence Act, s.* 114—*Presumption.*

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done.

Held, that the notice provided by s. 52 of the Road Cess Act did not come within the presumption of s. 114, cl. (*e*) of the Evidence Act, and must be proved.

THIS was a suit for the recovery of cesses against four defendants in respect of a lakheraj tenure.

* Appeal from Appellate Decree No. 979 of 1885, against the decree of Baboo Rajendra Coomar Bose, Subordinate Judge of Mymensingh, dated the 16th of February 1885, modifying the decree of Baboo Khettra Prosad Mukherji, Munsiff of Atiah, dated the 26th of June 1884.