
(1869) 05 CAL CK 0005

Calcutta High Court

Case No: None

Ganendra Mohan
Tagore

APPELLANT

Vs

Upendra Mohan Tagore
and Others

RESPONDENT

Date of Decision: May 26, 1869

Judgement

Sir Barnes Peacock Kt., C.J.

This is a suit brought by Ganendra Mohan Tagore, the only son of the late Prasanna Kumar Tagore, a Hindu, against Upendra Mohan Tagore, Jatindra Mohan Tagore, and Durga Prasad Mookerjee, who were appointed executors and trustees under the will of the said Prasanna Kumar Tagore, dated the 10th day of October 1862, and also against Surendra Mohan Tagore and others, who were devisees under the said will. The suit is brought to obtain certain declarations of right and relief to which I shall have to advert more particularly. The above-named Jatindra Mohan Tagore was also a devisee under the said will, and it was objected that he ought to have been sued in his character of devisee as well as in his character of one of the executors and trustees. I am of opinion, however, that there is nothing in that objection, for he is a party to the suit, and as such can defend his rights as devisee as well as those in his character of executor and trustee. It should be remarked that the first three defendants were not sued as executors and trustees, and that the words executors and trustees were used merely by way of description. Furthermore, in paragraph 7 of the written statement of Jatindra Mohan Tagore, he, in his character of devisee, particularly submits his rights and interests under the will to the judgment of the Court. The will commences as follows:--(Here Peacock, C.J., read the material paragraphs of the will, and gave the effect of the remainder of the will and of the codicils, and the substance of the plaint, and recited the issues.)

2. It is not contended, nor could it be contended with any hope of success, that a Hindu, according to the Bengal school, is incapable of making a will. It was attempted to be shown that the will was void as to ancestral estate, and that the plaintiff is at any rate entitled to maintenance; but those points are, in my opinion, wholly untenable. The

Bengal school makes no distinction as to the right of alienation by sale, gift, will, or otherwise between ancestral and self-acquired property.

3. In 6 M.I.A. 309 (Privy Council) , it was said by Lord Kingsdown,--"Throughout Bengal, a man who is the absolute owner of the property may now dispose of it by will as he pleases, whether it be ancestral or not." So in Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee 12 M.I.A. 1 (37), decided by the Privy Council, on 4th March 1868, it was said,--"It is too late to contend that because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, "and may be exercised it least within the limits which the law prescribes "for alienation by gift inter vivos." See also the case of Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick .

4. I am of opinion that the plaintiff is not entitled to maintenance. Even if he would have been entitled to it, if wholly unprovided for (which I think he would not have been), he cannot have a right to maintenance after the receipt from his father as a nuptial gift of an estate yielding an annual income of Rs. 7,000 a year, as to which see the 9th and 10th paragraphs of the plaint Ante 4 B.L.R. O.C.J. p. 128.

5. It is contended, on the part of the plaintiff, that the devise to Jatindra Mohan and all the subsequent devises are void, and the fourth issue raises the question whether any, and which, of the gifts and limitations in the will and codicils are void in law. It will be more convenient to try the fourth issue before the first and second. As to the third, it is clear that part of the testator"s property was ancestral.

6. The first estate, both in the real and personal property, is created by the devise to the trustees, by which the whole of the testator"s property, both real and personal, of what nature and kind soever," was devised and bequeathed to them, their heirs, executors, administrators, representatives, and assigns, according to the nature and tenure of the said property," to have and to hold the same, upon the trust declared in the will. It is unnecessary to enter into the consideration whether the trusts, so far as they relate to the payment of debts, legacies and annuities, are valid or not. Their validity to that extent is admitted. I will, therefore, proceed to examine the case so far as it relates to the first life-estate in the real and immovable property, viz., that devised to Jatindra Mohan.

7. It has been contended that the devise to Jatindra Mohan is void : first, because a Hindu has no power to devise an estate to trustees for the use of another person; secondly, because a Hindu cannot by will create a qualified or particular estate, but must, if he devise at all, devise-- to use an expression of one of the learned counsel for the appellant--his whole bundle of rights; thirdly, because the devise infringes the rule of law against perpetuities. Similar objections have been made with reference to other devises. The consideration of them, so far as they relate to the devise to Jatindra Mohan, will suffice for the whole.

8. With reference to the first objection,--viz., as to the power of a Hindu to devise upon trust,--I concur in the conclusion arrived at by the learned Judge who decided the case, and who has pointed out that the contention is curiously inconsistent with the plaint, which submits that the trusts and limitations of the will are void, except so far as the same are for the payment of debts, legacies, and annuities.

9. The case of [Kumara Asima Krishna Deb Vs. Kumara Kumara Krishna Deb](#) , was cited in support of the position that a Hindu could not devise trustees. In that case I said,--"I am not aware of any rule of the Hindu law by which grants inter vivos, or gifts by will, in perpetuity, are expressly prohibited; but it appears to me that they are quite contrary to the whole scope and intention of the Hindu law, and that there are up means according to that law by which such gifts or grants can be effected. The Hindu law, so far as I am acquainted with it, makes no provision for trusts." In a subsequent part of the same case, I said-- It appears to me that, putting out of the question the case of religious "endowments, the consideration of which is wholly unnecessary in the present case, a devise by a Hindu upon trusts, which would be void as a condition, is void in the shape of a trust." But although the Hindu law contains no express provision upon the subject of uses or trusts, I see nothing contrary to the spirit and principles of the Hindu law in a devise to trustees, giving a beneficial interest to a person to whom it might have been given by a simple device without the intervention of trustees. It may be said of trusts, as it has been said of wills in the case of Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee 12 M.I.A. 1 (37), to which I have referred, that it is too late to contend that all gift or alienations upon trust are void, because the ancient Hindu law makes no express mention of them. All that I laid down in the case of [Kumara Asima Krishna Deb Vs. Kumara Kumara Krishna Deb](#) was, that a devise for a purpose which would be void as a condition, would be void in the shape of a trust; and I now add that, in my opinion, a Hindu cannot, by the intervention of trustees, create any beneficial interest which he could not create in substance without the intervention of trustees. I will take, for instance, the present case. The legacies and annuities were all bequeathed to persons in existence at the time of the testator's death. They have not been objected to by the heir-at-law, and may be assumed to be valid charges upon the estate according to the Hindu law. They might have been directly charged upon the rents of the estate without the intervention of the trustees at all. The balance of the net annual income of the immovable estate, after paying the necessary costs of management and the sum of 2,500 rupees a month to the person entitled to the beneficial enjoyment of the property, was intended to be applied in aid of the annual income derived from the moveable estate, if that income should be insufficient for the payment of such annuities and legacies as were by the will directed to be paid gradually. The intention of the testator in that respect might have been carried out without the appointment of trustees, and there is nothing contrary to the spirit or policy of the Hindu law in directing that intention to be carried into effect by means of a trust. It was probably considered by the testator that it would be much more convenient that the management of the estate, the collection of the rents, and payment of the Government revenue, &c., should be left to trustees, than that each legatee and annuitant should have

a separate charge upon the estate for his annuity or legacy, to be recovered against the devisees for life or in tail, who might be minors when the estates should vest in possession. Indeed, by the very act of charging an estate with the payment of a legacy or annuity, the devisee of the estate, subject to the charge, would be a trustee for the payment of it. There is no magic in the word trustee." It does not necessarily imply that the person called trustee holds the legal estate in the beneficial interest devised to the cestui que trust, and that the latter has the equitable estate only in such beneficial interest. Under a system of jurisprudence in which complete rights are administered, and full justice done by a single Court, instead of by two different Courts,--one administering what is called law, while the other administers what is called equity, each being as much a part of the law of the land as the other,--there is no distinction between legal and equitable rights, or legal and equitable estates. The person who has a certain beneficial interest to be derived out of an estate, may not have a right to the property out of which that interest issues. One man may have a right to manage an estate, to collect the rents and profits, and, after payment of the expenses of management, to divide the net proceeds amongst others, or to retain a share of them himself; others may have a right as legatees or annuitants merely to participate in the net proceeds, without having the right to manage the estate or to collect the rents, or a right to take and appropriate to themselves exclusively any portion of the whole mass of property, whether in money or in kind collected as rent. The holder of the estate is entrusted with it under the confidence that he will perform his duty, and an obligation is imposed upon him by his accepting the estate devised to him, subject to the trust or confidence reposed in him. It appears to me that it makes no difference in reality whether an estate is devised to a person upon trust out of the net rents to pay legacies or annuities, and to retain the surplus for his own use, or is devised to that person charged with or subject to the payment of such legacies or annuities. I see no reason why a Hindu should not devise an estate subject to a charge for maintenance, or subject to the payments of annuities or legacies to certain persons, whether he is bound to provide maintenance for them or not. If he can so charge the estate, there is no reason why he should not be allowed to devise it to trustees, upon trust to pay such maintenance, or such annuities or legacies out of the rents and profits. In the latter case, there is an express trust; in the former there is an implied one. If maintenance is charged upon an estate in a case governed by the Hindu law, an English Court of Justice would enforce the charge by treating it as a lien on the estate, and a lien creates a trust. See Story's Equity Jurisprudence, paragraphs 1217 and 1244.

10. The High Court, in the exercise of original jurisdiction, has not ceased to be a Court of Equity. It administers the same substantive law and the same substantive equity as the late Supreme Court would have administered, though it determines all the rights of the parties, whether legal or equitable, in one suit, and this whether the determination is based on the law of England, or on the equity of England, or on the Hindu or Mahomedan law. (See clause 18 of the Letters Patent of the 14th of May 1862, and clause 19 of the Letters Patent of the 28th December 1865). If a Hindu in Bengal were to devise an estate to his sons, charged with the payment of specific monthly sums for his widows, or

daughters, or daughters" sons, a Court of Justice could not hold that the estate or any part of it passed to the widow, or daughters, or daughters" sons; they would merely hold that the estate was vested in the sons subject to the charges for maintenance. A Court such as the late Supreme Court, which was a Court of Common Law and a Court of Equity, could not give the widows and daughters possession of any part of the estate, but would enforce the lien, and treat the devisees as trustees, and they would do the same thing if an estate were devised to trustees in trust for his minor sons, with charges for maintenance for widows and daughters, &c. The late Supreme Court might possibly have held that the suit, even though depending upon Hindu law, which made no distinction between law and equity, must be brought within its equity jurisdiction, because the estate was given to one person and the beneficial interests to others. The High Court, in the exercise of original jurisdiction, would enforce the charges in the same manner, without considering whether the suit to enforce them were within its common law or equity jurisdiction, for that distinction has been abolished. A Court in the mofussil is not a Court of Equity distinct from a Court of Law. It is governed by the general rules of equity, justice, and good conscience, which is the law in cases to which no other substantive or express law applies. Equity is as much the law of the land as any other law, and Courts of Justice are maintained by the State to administer that portion of the law which consists of equity as well as any other portion of the law. Such a Court would enforce payment of the maintenance, holding that the claimant is entitled to it by that law which the Court has to administer, and the High Court would do the same on appeal from a Mofussil Court. (See Letters Patent, 1865, clause 21.) Whether you call the holders of the estate trustees, or by any other name, or the charge a lien, or by any other name, the charge would be enforced by compelling those to whom the estate passed, subject to the charge, to pay the amounts charged upon it, and by the making the estate liable in cases in which equity and justice might require it.

11. It is clear that, under the Hindu law, a man to whom an estate is conveyed may not have the beneficial interest in the estate. See the case of 6 M.I.A. 53 (Privy Council) . In that case it was held that where a purchase of real estate is made by a Hindu in the name of one of his sons, the presumption of the Hindu law is in favor of its being a benami purchase; and although in the particular case the conveyance was in the English form of lease and release, the son in whose name it was purchased was declared to be a trustee for the father. So in *Doorga Persad Roy Chowdry vs. Tarra Persad Roy Chowdry* , the Privy Council, on appeal from the Sudder Court, which was not a Court of Law distinct from a Court of Equity, held one man to be a trustee for another, though both were Hindus. See also *Rajah Nursing Deb vs. Roy Koylas Nath and Others* , and the case of *Hurry Doss Bonerjee v. Hogg* 1 Ind. Jur. O.S. 86, cited by Mr. Justice Phear. Numerous other cases to the same effect might be referred to if necessary.

12. By the Roman law, every one who had a right to make a will might thereby create a fideicommissum Digest, 30-12.

13. I am of opinion that the devises are not void, merely upon the ground that the estates are devised upon trust, and that the testator had power to create by means of a devise to trustees such estates and beneficial interests as he could have created without the intervention of trustees.

14. As to the second objection, there appears to me no doubt that the devise to Jatindra Mohan was valid, though it created only a life-estate. A question was raised in the case of *Mussumat Bhoobun Moyee Debia*, whether a testator could, by will, restrict the interest of his son to a life-estate, or could limit the estate over, in the event of his son's leaving no issue male, or of the failure of such issue male, to a son of the testator to be adopted by his widow. But the point was not decided. I am not sure whether the doubt raised had reference to the general right of a testator to create by will limited interests of particular estates, or whether it extended only to the case then before the Privy Council of a gift over to an adopted son in case of failure of issue male of a natural-born son who survived his father. I see no reason, having regard to the spirit and principle of the Hindu law, to think that particular estates cannot be created. If a testator can disinherit his son by devising the whole of his estate to a stranger, there seems to be no reason why he should not be able to divide his estate by giving particular and limited interests in the whole of the property to different persons in existence, or who may come into existence during his life-time, to be taken in succession, as well as by giving his whole interest or bundle of rights in particular portions of lands included in his estate to different persons. But we need not speculate upon this subject. In *Rewun Persad vs. Mussumat Radha Beeby*, by an instrument in the nature of a testamentary disposition made by a Hindu domiciled in the North-West Provinces of Bengal, the testator gave his widow a life-estate in all his property; and he directed that, after the decease of his widow, his brother, and after the death of his brother, his brother's sons, should take one-half. B, the brother, died in the life-time of the testator's widow, leaving C, and D, him surviving. C, afterwards died in the life-time of the testator's widow. C, and D, were divided brothers. Upon the death of the testator's widow, the widow of C, one of the sons of the brother, claimed to be entitled to the share devised to her husband,--viz., one-half of the moiety. It was held by the Privy Council that C, and D, the sons of the brother, each took a vested interest in one moiety, of the half, the actual enjoyment of the expectant interest being postponed till the termination of the life-estate; and that it was not necessary that C's share should be reduced into possession during his life-time to enable his widow to succeed to it. It was further held that even if C, and D, took a joint interest in the moiety, there had been a complete division and separation between C, and D, and that consequently C's widow was entitled, under the Mitakshara law, to succeed to the share which vested in her husband during the life of the (testator's widow. Here, then, there was an estate for life in the widow of the testator, and vested estates in the two sons of the brother, expectant upon the termination of the widow's life-estate. In that case, however, all the devisees were in existence at the time of the testator's death.

15. As to the third objection, that the devise to Jatindra Mohan was void on the ground of perpetuity, and as to similar objections which have been raised with reference to some of the subsequent limitations, we have had very learned and elaborate arguments addressed to us. The case has been argued at considerable length, and with great ability, by the learned counsel engaged for the several parties in the suit; but it appears to me that many of the doctrines of the English law, including the rule against perpetuity, have no bearing upon the will now before us; and that we cannot, in a case in which the right of inheritance of a Hindu is concerned, reason by analogy from those doctrines. For instance, the question has been discussed whether some of the devises are executory devises or contingent remainders, as though the law of contingent remainders could be applicable to the estate of a Hindu, when a contingent remainder must be supported by a freehold estate, and the Hindu law knows of no distinction between freehold estates and estates less than free-hold. I am at a loss also to understand how the law of executory devises of springing or shifting uses, or such modifications of the law of immovable property as sprang up after the Statute of Uses, and were dependent on it, can be applicable to cases governed by the Hindu law. It was stated by Mr. Hargrave in his second argument in the *Telluson* causes *Fearne's Contingent Remainders*, 428 note, that executory devise was not regularly admitted in England earlier than two centuries ago. The rule of perpetuity for circumscribing it is, therefore, not of earlier date, and there are not any Statutes for that purpose. It is impossible, therefore," he said, that the rule against perpetuity should have been derived from any other source than the discretion of the Judges. For general use and public convenience, they admitted executory devise; but it was seen that if executory devise, or use, or trust of a similar nature was permitted without any restrictions, great "abuses might be generated, for it was settled by the Courts of Law that an executory devise could not be barred by common recovery." The rule laid down by the Judges to prevent perpetuities,--namely, that an estate cannot be tied up for a longer period than a life in being, and twenty-one years afterwards,--originated in the exercise of discretion, and it was evidently an arbitrary one. If it had been adopted with reference to the Hindu law, the twenty one years would probably have been sixteen, the period at which, in the case of Hindus, minority ceases. The time fixed by the Indian Succession Act is, as regards devises, a life in being, and eighteen years. (See section 101 and Interpretation Clause, Title "Minority.") It is manifest that the rules against perpetuity as well as the law regarding executory devises were no part of the original Hindu law, and I cannot see by what means they have become during the last two centuries. It is unnecessary to go further into this matter. The point appears to have been very clearly settled by the Privy Council in the case of *Mussumat Bhoobun Moyee Debia*. In pronouncing judgment in that case, Lord Kingsdown said,--"It seems "to have been considered by the two Judges of the Sudder Court, "who decided in favor of the respondent (certainly by one of them), that the document was to be regarded as a will and as containing a limitation, on failure of male issue of the testator in the life-time of Chundrabullee "Debia, of the estate of the testator to a sou to be adopted by Chundrabullee Debia as a persona designate; and one of the Judges in a very elaborate argument refers to Mr. Fearne's celebrated Treatise on Contingent Remainders, in order

to show that such a devise by the English law would be valid. There is no doubt that, by the decisions of Courts "of Justice, the testamentary power of disposition by Hindus has been "established within the Presidency of Bengal; but it would be to apply "it to a very false and mischievous principle, if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of a state of society differing, as far as possible, from that which prevails amongst Hindus in India." In *Sonatun Bysack vs. Sreemutty Juggutsoondree Dossee*, the Lord Justice Turner, in delivering the opinion of the Privy Council, said, "It may not be improper to observe that, with reference to the testamentary power of disposition by Hindus, the extent must be regulated by Hindu law."

16. The Hindu law of inheritance is based upon the Hindu religion, and we must be cautious that, in administering Hindu law, we do not, by acting upon our notions derived from English law, inadvertently wound or offend the religious feelings of those who may be affected by our decisions, or lay down principles at variance with the religion of those whose law we are administering. (See the remarks of Lord Wynford in *Mullick v. Mullick* 1 Knapp's P. C. Cases, 247, in which I entirely concur). To introduce our artificial system, and engraft it upon the Hindu law for Hindus (even if we were permitted to do so), would create the greatest injustice and the greatest inconvenience. We should introduce a system wholly unknown to the Hindus, and to the greater part of our Judges in the mofussil who have to administer the Hindu law, and we should cause such uncertainty that no man would know what his rights are, and no lawyer could safely advise him upon the subject. Lord Bacon, speaking of the Statute of Uses, called it a law whereupon the inheritances of this realm are tossed at this day like a ship upon the sea, in such sort that it is hard to say which barque will sink, and which will get to the haven,--that is to say, what assurances will stand good and what will not."--Tracts, 299.

17. If the Hindu law as to gifts by will is more strict and limited than the English law of devises, the restriction tends to the benefit of heirs-at-law, who take jointly, and of those members of Hindu families for whom, in the absence of a will, provision for maintenance is made. The Hindu law of inheritance and maintenance is more consistent with the Hindu religion than any rules which could be adopted by analogy to the English law of primogeniture, of entails, of executory devise, or of contingent remainders.

18. The devise to Jatindra Mohan is not, in my opinion, at variance with any principle of Hindu law. Even according to English law, it would give him a vested interest for life, subject to the trusts for the payment of debts, legacies, and annuities, and would not be void upon the ground of uncertainty or of its infringing the rule against perpetuity. The right to receive the 2,500 rupees a month out of the rents vested in him immediately on the testator's death. I am of opinion that, notwithstanding the devise to the trustees was to them and their heirs, the intention of the testator was that Jatindra Mohan should take an immediate vested beneficial interest in the real estate, subject to the charges for

payment of legacies, annuities, Ac; and in the 2,500 rupees a month which was to be paid to him as a first charge upon the estate. It is to be remarked that the sum of 2,500 rupees a month was directed to be paid to Jatindra Mohan, and that he was to receive the same--to use the language of the will--"as the person entitled under the limitations to the beneficial enjoyment of the said real property or of the income or surplus income thereof; and that the devise to him, including the devise of the 2,500 rupees a month, was not dependent upon the contingency whether he should or should not be living when the legacies and annuities should be completely discharged. In this view of the case, the devise to Jatindra Mohan was not bad for uncertainty.

19. The next question relates to the devises to the sons of Jatindra Mohan to be born and adopted after the death of the testator. With reference to them, I am of opinion that the testator had no power to create estates-tail, and certainly not estates-tail descendible, as he intended, to heirs male of the body according to the rule of primogeniture. The right of inheritance, according to Hindu law, is regulated with reference to the spiritual benefits to be conferred on the deceased proprietors. No such estate as an estate-in-tail is known to that law. The statute de donis was probably never heard of by a Hindu. And I see no more reason for contending that an estate in tail male can be created according to Hindu law, than there is for a similar contention in respect of an estate in tail female. The creation of an estate-tail by will might deprive the deceased owner of many spiritual benefits which could be conferred by others than issue male of the body in the fifth degree of descent, and amongst such nearer heirs there are females and heirs claiming through females. Yet no Hindu would. I think, say that a devise to a man and the heirs female of his body, or to heirs claiming through females, to the exclusion of his sons, grandsons and great grandsons, would not violate the first principles of the Hindu Law of Inheritance. (See the Dayabhaga, various sections of Chapter 11.) It is laid down in section 6, paragraph 29 of that chapter, that inheritance is in right of benefits conferred, and that the order of succession is regulated by the degree of benefit. In paragraph 17, referring to the text of Menu, in which it is declared that to three must libations of water be made, to three must oblations of food be given, the fourth in descent is the giver of those offerings, but the fifth has no concern with them : to the nearest kinsman, the inheritance next belongs," the author of the Dayabhaga points out that the fifth in descent, not being connected by a single oblation, is not the heir, so long as a person connected by a single oblation, whether sprung from the father's or the mother's family, exists. In paragraph 18 the author shows that the words to the nearest sapinda, &c." are not intended to indicate nearness of kin according to birth, but nearness according to the presentation of offerings. In default of a son, son's son, and son's grandson in the male line, therefore, the widow, and not the son of a great grandson in the direct male line, succeeds; in default of a widow, qualified daughters succeed. In default of qualified daughters, daughters' sons; in default of daughters' sons, the father; in default of the father, the mother; after the mother, the order of succession is such according to the Bengal school that there are about forty-three classes, reckoning from the deceased, including persons claiming through females, who are entitled to succeed (in consequence of the greater

spiritual benefits which they can confer upon the deceased) in preference to a son of a great-grandson in the direct male line. How, then, can it be supposed that the Hindu law made any provision for creating estates in tail male either by gift, grant, or will? Such estates appear to me to be wholly opposed to the general principles of the Hindu law; they would deprive the deceased proprietor of benefits to be conferred by females and persons claiming through females, as much as estates in tail female would deprive him of the benefits to be derived through males. If estates-in tail male can be created, there are no means by which the entails can be barred; and thus perpetuities might be created, and the free sale and disposition of property prevented, unless the Legislature should interfere to remedy so great a political evil. Fines and recoveries, as well as the fictions upon which they depended, are unknown to the Hindu law. Real actions are not, and never were, part of the system of procedure in the mofussil, and section 18 of Act XXXI of 1854, by which fines and recoveries were abolished, expressly declared that the Act should not extend to any case to which the English law was not applicable. Indeed, this appears to have been foreseen by the testator; for he declared that the entails were not to be subject to any law or custom of England whereby an entail may be barred, affected, or destroyed. Primogeniture, as a rule of inheritance, is unknown to the Hindu law, and its introduction would be entirely opposed to the principle by which equality among the heirs is the spirit. As to this, see the judgment of the Privy Council in the case of 6 M.I.A. 526 (Privy Council) and Dayabhaga, Chapter III, section 2, verses 24, 25, 26, 27. "Equality among the heirs (said Lord Justice Turner in the case last cited) is, as we understand, the spirit of that law." Primogeniture and singleness of heirship would also destroy partition of estates which is favoured by the Hindu law as spiritual benefits are multiplied by partition. A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy. See Scholastica's case Plowden, 403, cited by Mr. Justice Norman in [Kumara Asima Krishna Deb Vs. Kumara Kumara Krishna Deb](#); Coke upon Littleton, 25 a and 25 b; and Sonatun Bysack vs. Sreemutty Juggutsoondree Dossee . In Preston on Estates, page 416, it is said: "It is not in the power of any person by his own act to entitle another to take as his heir by descent, unless the law has imposed that character on him." At page 448, speaking of gavel kind, borough-English, and customary lands, the learned author says,--"As to property of this kind, it would be as fruitless in any owner to attempt to reduce the succession to the standard of the general rules of the common law, as it is to attempt to vary the order of succession to property not exempt from these rules. Nor can the order of succession be varied by means of trusts." In the same book, at page 448, the author proceeds;--"In respect of customary lands, attempts have been made to vary the order of succession by means of trusts. No doubt the common law heir may, by a trust, as he might by a legal limitation properly framed, be substituted for the customary heir, by making the common-law heir a purchaser. This can only be in the gift, and to the extent within which, by the rule against perpetuities, the designation of a purchaser would be effectual. Let a descent C attach, and the customary heir must be preferred. The order of descent cannot be changed in reference to the trust any more than it can be in reference to the legal estate.--Pullen v. Lord Middleton 9 Mod. R. 483. The "like observation is applicable to

attempts to entail the trust of copyhold "or customary lauds, when the legal estate cannot be entailed."--Ib., 449. In that case Lord Hardwicke said : The trust estate of a copyhold can, in no case, be capable of an entail where the legal estate is not, it being necessary that there should be the same rule concerning "property in law and equity." To use technical language, the words "heirs male of their bodies issuing" in the will under consideration were used not as words of purchase, but clearly as words of limitation. They were intended to regulate the mode of descent, and to substitute the eldest son for the sons jointly, and to give eldest sons a preference over younger sons in all cases of succession by descent under the entail, and thus to alter the Hindu law of succession, and to constitute persons heirs male of the body under the entail who were not heirs male of the body under the Hindu law.

20. Similar arguments apply to the devises to the sons of Surendra Mohan to be born or adopted after the death of the testator and the heirs male of their bodies, as well as to the devises to the sons of the subsequent tenants for life to be born after the death of the testators and the heirs male of their bodies. According to this view of the case, all the entails intended to be created by the will are void.

21. But it is not because the Court cannot legally give effect to the real and actual intentions of the testator that they would be justified in so construing the will as to declare that the testator intended to create estates which it is clear he never intended to create. If the devises which he did intend are contrary to law, and such as he had no legal power to make, they ought to be rejected as void, and not be converted by the Court into devises creating larger estates than the testator intended. The learned Judge, in the judgment which is now before this Court on appeal, held that the devises to the use of the devisees and the heirs male of bodies issuing were devises of the entire estate of inheritance.

22. The first devise of this nature which occurs in the will is the devise to the use of the first and other sons successively of the eldest son of Jatindra Mohan Tagore, who should "be born during the life of the testator, according to their respective seniorities, and the heirs male of their "respective bodies issuing successively." There was a similar devise to the use of the first and other sons successively of the second and other sons successively of the said Jatindra Mohan Tagore, who should be born during the life of the testator and the heirs male of their respective "bodies issuing successively." But as Jatindra Mohan had no son born in the lifetime of the testator, those devises lapsed.

23. It was contended, in the course of the argument, that the will of the testator took effect from the time of its execution, and not from the time of the testator's death. But this is immaterial, though in my opinion there is no foundation for such a contention.

24. The next devise to a person and the heirs male of his body was the devise to the use of each of the sons of the said Jatindra Mohan Tagore, who should be born after the death of the testator successively, according to their respective seniorities, and heirs male of their respective bodies issuing," &c. The devise, although contingent, is one in

which it is possible that a person may come into existence who will answer the description of the devisee. I shall, therefore, consider, with reference to that class of devises, whether it is sufficient to pass the general and absolute estate of inheritance.

25. The learned Judge, in support of his view that the words heirs male of the body were sufficient to pass the whole estate of inheritance, considered that a devise to a person and the heirs male of his body issuing is equivalent to a devise to a person, his sons, and his sons "sons;" and that these last words are sufficient, according to Hindu law, to convey a complete right of inheritance. He says (reads portion of judgment of Phear, J.,) Ante 4 B.L.R. O.C. 140, 141. (It is manifest that the testator--but the devise of the inheritance contingent). Notwithstanding the great respect which I entertain for the opinion of the learned Judge, I cannot concur in this view of the case. I quite agree that the Court ought to gather the intention of the testator from that which the will expressly or by implication declares. The rule is just as applicable to the wills of Hindus as to those of persons of other religions. This case depends upon the will of a Hindu, and affects the right of inheritance to the estate of a Hindu. It must, therefore, be determined according to Hindu law, 21 Geo. 3, c. 70, s. 17. The fact of the plaintiffs having renounced his religion does not in any way impair or affect his right of inheritance (Act XXI of 1850). It is hardly necessary to cite texts to prove that, according to the Hindu law, the will of the donor is the cause of property. But if authorities were wanting, they may be found in the Dayabhaga, Chapter 4, section 1, verses 16 and 17; see also Vyavastha Darpana, pages 606, 794. In the case of Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick, Lord Justice Turner, speaking of the construction of the will of a Hindu, says: 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 material 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, these 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." See also Mussumat Bhoobun Moyee Debia. In that case it is said,--"Effect ought to have been given to Gaur Kishore's intention, which could be gathered only from the legal and intrinsic signification of the words used by him."

26. I quite agree with the learned Judge that the testator did of design use English legal phraseology, and I am quite willing to assume, although it is not necessary for my argument, that he fully understood its technical force. It shows that the testator intended

to create estates-tail, and not that he intended to pass a general estate of inheritance in those cases in which the devise was to a person and heirs male of his body. He not only used language which, according to English legal phraseology, would describe an estate-tail, but he actually used the very word entail." His intention appears to have been to create estates-tail according to English law, descendible to heirs male of the body, according to the rule of primogeniture, but not to heirs male of the body according to the Hindu law, under which all the sons and the sons of deceased sons take jointly. Moreover, it was clearly the intention of the testator that the heirs-in-tail should not be capable of barring the entail. He says:--"I declare my will and intention to be to settle and dispose of my estate in manner aforesaid, as fully and completely as a Hindu born and resident in Bengal may give "or control the inheritance of his estate, or a Hindu purchaser may "regulate the conveyance or descent of property purchased or acquired "by him, and not subject to any law or custom of England whereby an entail may be barred, affected, or destroyed." And further he declared, that if any devise or tenant for life, or in tail, or otherwise, should suffer or permit the property devised to be sold for arrears of Government revenue, or should fail to perform certain other conditions, the devise should wholly cease as to him, and that the person next in succession, under the limitation aforesaid, should at once succeed, as if the person permitting the property to be sold had then died. Power was also given to the person for the time being in possession, after the estate should cease to be vested in the trustees, to grant leases for twenty years upon certain conditions Ante 1 B.L.R. O.C. 121, 122. Looking at the whole of the expressions of the will, I am clearly of opinion that it was not the intention of the testator that any son of Jatindra Mohan, born after the testator's death, should take a general and absolute estate of inheritance, which, in default of male issue, would descend to his heirs general according to Hindu law, in derogation of the rights of the persons to whom the estate was subsequently limited. He clearly did not intend that such a son of Jatindra Mohan should take even what, under English law, would be called "a conditional fee simple," or should be capable of alienating the estate under any circumstances. It seems to be beyond all doubt that the testator did not really and actually intend that, in the event of any such sons not alienating, and of his dying without leaving heirs male of his body, the estate should descend to his general heirs, whether females or males, according to the Hindu law of inheritance, without reference to primogeniture, If it should be held to have been the testator's intention that a son of Jatindra Mohan, born after the death of the testator, should take a general and absolute estate of inheritance according to the Hindu law, such a son, say, might alienate the estate by will or otherwise; and in the absence of such alienation, the estate, upon the very first descent after the death of such son, without issue male, might pass to numerous collateral heirs as coparceners, according to the Hindu law of inheritance, whether males or females, any one of whom would be entitled to claim partition; and if a male, to sell his own interest, which, if not alienated, would again pass by inheritance to his own heirs according to Hindu law, female or male, as the case might be, however numerous. Thus one of the declared objects of the testator to prevent the frequent division and sub-division of his estate which he considered injurious alike to the families of zemindars and to the ryots, might be frustrated upon the very first

descent of his estate. I have no doubt that it was in the contemplation of the testator that the limitations to Jatindra Mohan's sons, whether natural born or adopted, and the heirs male of their bodies, might fail; and that it was his intention that on such failure, the estate should go over to Surendra Mohan, if he should survive, or pass under the ulterior limitations according to the directions in the will. If the words pass a general and absolute estate, an adopted son might succeed to the estate, and upon his death, without issue, the estate might descend to his widows, though they might be minors; or an adopted son succeeding to the estate might alienate it, or even devise it to his own natural father, or the members of his natural family, and thus pass it away altogether from the family of the testator to a family of different name and lineage.

27. The testator intended to create qualified estates of inheritance descendible according to the rule of primogeniture, which, according to Hindu law, he could not create. The Court cannot properly say that he intended to create general and absolute estates. To do so would be to hold that the testator intended that which he did not intend, and that which was clearly contrary to his intentions, instead of holding that he intended to do that which the Hindu law would not permit him to do, and consequently that his intentions could not have effect given to them. It is clear that a conditional fee, and especially a conditional fee descendible according to the rule of primogeniture, is unknown to the Hindu law, and is as contrary to the rules and principles of Hindu law as an estate-tail. Even if it could be held that, under the Hindu law, an estate of inheritance, conditional upon the birth after the death of the testator of a particular class of heirs, could be created by will (which, in my opinion, it could not), it would be quite contrary to Hindu law to hold that a conditional fee, descendible to heirs male of the body, according to the rule of primogeniture, could be created; and it would be quite as contrary to the intention of the testator to hold that he intended to pass a conditional fee descendible to the heirs male of the body generally according to Hindu law, as to hold that he intended to pass general and absolute estates of inheritance. It is clear that he intended that the sons of Jatindra Mohan should not, under any circumstances, be capable of selling or alienating the estates by devise or otherwise. The learned Judge, after, stating that it appeared to him that the devises in the will intended to create successive life-interests, each commencing on the termination or failure of the preceding, the whole completed by the gift of inheritance to take effect on the expiration of the last life interest, proceeded to say--"I do not know whether this "state of things still obtains, or whether, since the testator's death, any "persons designated by the will as ultimate takers of the inheritance "have been born; if they have not, the plaintiff as heir-at-law has for the time the immediate expectation of succeeding to the inheritance on the termination of a life in being; and for that reason has a "sufficiently substantial present interest to entitle him to ask that the property be protected against waste." I do not thoroughly understand the meaning of the learned Judge in this part of his judgment. The plaint states that Lalit Mohan Tagore, named in the will, died in the life-time of the testator, leaving Jaduki Nandan Tagore, his eldest son, who also pre-deceased the testator, leaving the defendant Sarat Chandra, his son, a minor of the age of four years or thereabouts, at the time of the death of the testator. The defendant Sarat Chandra,

therefore, is the son of a son of Lalit Mohan, born in the life-time of the testator; and he was, therefore, at the time when the suit was commenced, one of the persons to whom an estate tail was intended to be given. If the construction of the learned Judge is correct, that the words of entail pass a general estate of inheritance, I do not clearly see how the plaintiff, as the heir of the testator, is entitled during the life of the defendant Sarat Chandra to the immediate expectation of succeeding to the inheritance on the termination of a life in being, unless the learned Judge intended to hold that all the estates subsequent to the estates given to Jatindra Mohan's sons born after the death of the testator, are void. Though I do not agree with the learned Judge in his reasons, I have arrived at the same conclusion, that subject to the trusts for payment of the funeral and testamentary expenses, and of the debts, legacies, and annuities, the plaintiff, as the heir-at-law of the testator, is entitled (not under the will, but notwithstanding the will) to a general estate of inheritance in reversion in the immovable property of the testator, and that by the terms of the will no estate larger than an estate for life has been validly created, and that there is a resulting trust in the plaintiff's favor.

28. I have gone into these questions, not for the purpose of making a declaratory decree as to the rights of the several devisees under the limitations subsequent to the life-estate given to Jatindra Mohan, for according to the case of *Lady Langdale v. Briggs* 8 De Gex. M. & G. 391, the plaintiff is not, I think, at present entitled to a declaratory decree against the unborn sons of Jatindra Mohan, or the subsequent unborn devisees. I have expressed my opinion upon these matters with reference to the issues laid down, for the purpose of considering whether the plaintiff is entitled to prevent waste, and in order that I may not be understood as concurring in the view taken by the learned Judge that the words "heirs male of their bodies lawfully issuing as used in the will, are words of limitation sufficient to create general estates of inheritance descendible according to Hindu law, and to pass the whole interest in the property. The cy pres doctrine has been referred to in argument. But even admitting that the cy pres doctrine can be properly applied in construing the will of a Hindu (though according to the principle laid down by the Privy Council for the construction of Hindu wills, I think it cannot be so applied), it is clear that the doctrine does not warrant the construction put upon the will by the Court below. To apply that doctrine, so as to construe words of entail as intending to create general and absolute estates of inheritance, would be to carry the doctrine of cy pres in the construction of a Hindu will to an extent to which it has never as yet been carried in the construction of a will in England. In *Money Penny v. Bering* 2 De. Gex M. & G. 172, the Lord Chancellor (Lord St. Leonards), speaking of the doctrine of cy pres, remarked that the doctrine is nothing more than that which prevails in other cases of giving effect to the general intent, but with this difference, that it is not as in them carried into effect at the expense of the particular intent. In the common case there is a valid particular intent, and there is a valid general intent, and the particular intent not in the view of the Court effectuating all the intentions which they presume the testator to have had, they look to his general intent, and they effect his general intent at the expense of his particular intent. In applying, however, the doctrine of cy pres, nothing is sacrificed." But, if the doctrine be

extended to the present case, and it be held that because the qualified estates of inheritance, viz., the intended estates-tail male, cannot, according to Hindu law, be created, the testator intended to create general and absolute estates of inheritance in the devisees to whom estates-in-tail male were given, the testator's general intent and all the ulterior limitations must be sacrificed. It might, with equal reason, be held that, because a devise of lands in England to A, for life, with remainder to such of his children as shall attain the age of twenty-seven is not allowed by the law against perpetuities, the Court would, under the doctrine of cy pres, hold that the testator intended to create a remainder in the children who should attain twenty-one, in order that the devise might not fail. This would, in effect, be making a new will for the testator, instead of giving effect to his declared intentions. Such a devise to children, and the limitations over were consequently held absolutely void in the case of *Cambridge v. Rous* 8 Ves. 12; *Jarman on Wills*. 1st Ed., 214, and no effect was given to it. In *Lord Danganon v. Smith* 12 Cl. & F. 625, the Lord Chancellor, Lord Lyndhurst, said: "I never can lend myself to the process of altering a will for the purpose of framing, as it were, a new will, in order to put a construction upon it to obviate difficulties arising out of the law against perpetuities." It is certainly true, as stated by the learned Judge, that a gift to a man and his sons and grandsons, or to a man and his sons and sons' sons, would, in the absence of anything showing a contrary intention, pass a general estate of inheritance according to Hindu law. I believe the words usually used in Bengal are *putra pautradi krama* and in the Upper Provinces *naslan baad naslan*, the literal meaning of the former being to sons, grandsons, &c., in due succession, and of the latter in regular descent or succession.

29. A gift by will of an estate to a man under the Hindu law, even without any words of limitation, would convey a general estate of inheritance, in the absence of words showing a contrary intention. But if a gift should be made by will or conveyance to a man or to a man and his sons and sons' sons, and words should be added that the elder line should always be preferred to the younger; and that every elder son of each heir in succession by descent, and his issue or heirs male by descent, should be preferred to every younger son or his issue or heirs male by descent, to the exclusion of females and their descendants; and that in default of sons or sons' sons, the estate should go over to a third person and his heirs, such a gift could not, without doing violence to language, be construed as expressing an intention to vest in the donee a general and absolute estate of inheritance, alienable at pleasure, and descendible to all heirs according to Hindu law, lineal or collateral, male or female, as the case might be. Speaking of the cy pres doctrine in the case of *Money Penny v. Dering* 2 De. Gex. M. & G. 172, just referred to, the Lord Chancellor, Lord St. Leonards, said,--"I apprehend the rule is this, that neither by implication, nor by the doctrine of cy pres, can an estate be carried to a class or a portion of a class for whom the testator never intended to provide." Still less can it be carried to a class or to classes which the testator expressly intended to exclude. "Nothing," as remarked by the Lord Chancellor in *Money Penny v. Dering* 2 De Gex. M. & G. 172, "is so dangerous with regard to a man's will as to strike out words which admit of a reasonable interpretation." Yet how can the entire estate of inheritance pass without striking out; and

giving no effect to the words excluding females, and directing that in the constructions of his will every elder son of each heir in succession by descent and his issue or heirs male by descent shall be preferred to every younger son and his issue or heirs male by descent, and without also striking out all the limitations intended to take effect on failure or determination of the first intended estate-tail? In the case of *Wright v. Pearson* 1 Eden's Chancery Cases, 119, a testator devised to trustees and their heirs, upon trust, for the use of the testator's nephew, Thomas Rayney, for life, with remainder to trustees and their heirs, to preserve contingent remainders, with remainder to the use of the heirs male of the body of the said Thomas Rayney and their heirs, and in the default of issue male of the said Thomas Rayney, then to the use of the testator's five grandchildren, or such of them as should be living at the time of the failure of the issue male of the said Thomas Rayney, as tenants-in-common, and to their respective heirs and assigns. A question was raised whether the words with "remainder to the use of the heirs male of the body of the said Thomas Rayney and their heirs," following the devise to trustees to preserve contingent remainders, were intended as words of purchase or words of limitation; and consequently whether the said Thomas Rayney took an estate for life or an estate-tail. The Lord Keeper said the contention introduced the question whether the heir male of the said Thomas Rayney was intended to take an estate in fee by purchase, or an estate-in-tail by limitation from his father, and with reference to that question he said: The testator is here disinheriting his heir for the sake of preserving his name, and yet it is supposed that after the limitation to Thomas Rayney for life, he has given it to the first son of Thomas Rayney in fee, without any regard to the succession of the estate or the preservation of the name; but what is more contradictory to the testator's intending to give a fee to the heirs of the body of Thomas Rayney, and shows that the testator intended manifestly only a particular estate, is, that he has "limited a remainder on it, for on a general failure of issue male of "Thomas Rayney, he has limited the remainder in fee to his five grandchildren. This is *cardo cause*" In a subsequent part of his "judgment he said : I think Thomas Rayney (the father) took an estate-tail from the intent of the testator, who plainly intended that his heirs male should not take an estate-in-fee, which they must do if they take as purchasers. It is true that the words "their heirs or assigns" will, "on this construction, in a great measure, be rendered ineffectual; and though it is a rule never to reject words in a will if they can stand, yet I "must do it in this case to support the testator's intent, because, if I give "them their full effect, I destroy the substantial provisions in the will, of which the testator had a thorough understanding. The ground of my determination is the manifest intent of the testator; and, therefore, on the whole, I am of opinion that Thomas Rayney took an estate-tail, and not an estate for life only under this will." Mr. Fearne has entered into an elaborate discussion in respect of this case, but his remarks do not detract from the weight of it as an authority so far as it bears upon the present case. I use it merely to show the length to which the Lord Keeper went, in order to avoid holding that a general estate-in-fee was intended to be devised to the heirs male of the body of the said Thomas Rayney.

30. In that case the words heirs of the body were held to create an estate-tail in Thomas Rayney, the father, notwithstanding words of limitation were added to the words the heirs male of the body," and notwithstanding the devise to Thomas Rayney. the father, was expressly for life, and that there was a limitation over to the trustees to preserve contingent remainders after the life-estate given to the said Thomas Rayney. In that case the words of limitation added to the devise to the heirs male of the body, the words for life added to the devise to the father, and the limitation to trustees to preserve contingent remainders, were all rejected, rather than allow the supposed intention of the testator to be defeated by giving the heirs of the body a general and absolute estate-in-fee.

31. In the present case the words heirs male of the body" were clearly used as words of limitation, and clearly intended to create an estate-tail. No words of limitation were added to them; and as in the case of Wright v. Pearson 1 Eden's Chancery Cases, 119 there are also limitations over to Surendra Mohan, &c., which will be defeated if the words are held to pass a general estate of inheritance. So that whereas, in the case above cited, words were rejected to avoid holding that a general estate of inheritance was created, in this case the words of limitation over the words introducing primogeniture and excluding females must be rejected, in order to give an absolute estate of inheritance. This would be quite contrary to the clear intention of the testator, who did not intend to create general estates of inheritance that might be sold or alienated at pleasure, and which, if not alienated, would descend to the general heirs according to the Hindu law.

32. If I am right in thinking that the testator intended that his estates were not to be sold or alienated by Jatindra Mohan's sons (natural or adopted), or to descend to their general heirs, lineal or collateral, male or female, according to Hindu law, I should not be justified in putting such a construction on the will as would allow any of Jatindra Mohan's sons, born or adopted after the testator's death, to sell or alienate all his estates, and would render the estates, if not so alienated, descendible to all the heirs of such sons, who in their turn might sell, divide, or alienate or transmit the estates to their general heirs according to the Hindu law of inheritance, whether such heirs might be male or female. I cannot make a new will for the testator because he made one which the Hindu law would not allow to be carried into effect. If he has not devised his estate in the manner which the law allows, his heir is entitled where the devises fail. I cannot make new devises in place of those which are void; all that I can do is to carry the intentions of the testator into effect according to my understanding of them, and so far as the law will allow. I cannot hold that he intend to create estates which, from the words used, I am sure he never intended to create, and thereby put such a construction upon his will as would, in my opinion, entirely frustrate all his expressed intentions.

33. Is it possible for this Court or for any one to say that if the testator had known that he could not by law create estates-tail descendible according to the course of primogeniture, he would have preferred that a son of Jatindra Mohan, born after the testator's death, or a son who might be adopted by Jatindra Mohan in his life-time, or one who might have been adopted by any of Jatindra Mohan's widows after his death, should take an absolute and

entire estate of inheritance which he might alienate at pleasure, which would descend to his collateral heirs, however numerous, and which might include widows, or other females, or the issue of females who would probably not bear the testator's name, in preference to allowing his estates to descend to his own son and heir-at-law? Whatever conjectures the Court may entertain upon that subject, they have no means of forming any certain or definite opinion upon it. A Court of Law must construe a man's will, not upon mere speculative doubts, but according to just reasoning. See 6 M.I.A. 526 (Privy Council) . Even if the testator had expressed ill-feeling towards his son, such a construction as that put upon the will would not, in my opinion, be warranted.

34. An heir-at-law ought not to be disinherited without an express devise over or necessary implication: mere negative words are not sufficient to exclude him without an actual gift to some other definite object; and if that actual gift is one which the law does not allow, it ought not to be interpreted to mean something which the testator never intended, so as to disinherit the heir and to deprive him of his just rights. A mere expression in a will that the heir-at-law shall not take any part of the testator's estates is not sufficient to disinherit him, without a valid gift of the estates to some one else. Still less can an heir-at-law be disinherited by words expressing that he is not to take any benefit under the will. He will take by descent and by his right of inheritance whatever is not validly disposed of by the will, and given to some other person.

35. It was contended by Mr. Paul that the testator's intention was not so much to benefit the devisees as to disinherit his own son, and to tie up the property in such a manner as to perpetuate his own name; and he alluded to the large legacies, to the servants as tending to show that the testator's main object was to disinherit his son. I see nothing unreasonable in the legacies to the servants, nor anything beyond what a gentleman of large property might, in a liberal and generous spirit, bestow upon those who had served him faithfully. Besides, there was no necessity to give large legacies to the servants in order to disinherit the heir. There is nothing to show that the testator intended to disinherit his son under all circumstances. The will contains no devise of the ultimate reversion after the determination of the estates which were intended to be created. This may have been because the testator supposed that the devisees would tie up the estate for ever. But if they did not do so, the heir-at-law is not the less entitled to succeed.

36. The rules of construction cannot be strained to bring a devise within the rules of law.-- *Leake v. Robinson* 2 Merivale's Rep. 390; *Griffiths v. Grieve* 1 Jacob & Walker 33. In the latter case, the Master of the Rolls said : We must adhere to the words of the testator, unless we are warranted by the context in putting a different meaning upon them."

37. But even if an estate-tail descendible according to the rules of primogeniture could, according to Hindu law, be created, I am of opinion that the devisees to the sons of Jatindra Mohan Tagore, to be born or adopted after the death of the testator, were not valid according to Hindu law. According to that law, a donee must be capable of accepting the gift. He must, like an heir-at-law, be a sentient being. I apprehend that,

according to the general principles of Hindu law, a gift inter vivos, or by will, cannot be made to "a person not in existence at the time of the gift; or in the case of a will at the time of the death of the testator; and that it cannot be made in such a manner as that the donee cannot be ascertained at the time at which the property, by virtue of the gift or devise, ceases to be that of the donor or testator.

38. The Hindu law knows nothing of an estate in nubibus or of a scintilla juris, and, with the exception of the case of *Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick*, I know of no authority which shows that, under the Hindu law, executory bequests have been sanctioned as part of the system of Hindu law. The principle of that law seems to require that property which passes out of one man must immediately vest in another, This point, as regards inheritance, was considered in the case of [Krishan Chandra Das Vs. Kalidas Das and Others](#), and there appears to be no distinction in principle between the creation of property by the annulment of previous right by death, and the creation of property by relinquishment of the right by gift. The first chapter of the Dayabhaga (see especially verses 4 and 5) shows that the term heritage (daya) by derivation, signifies "what is given." It points out that the use of the verb (to give) is secondary or metaphorical, since the same consequence is produced, viz., "that of constituting another's property after annulling the previous right "of a person who is dead, or gone into retirement, or the like" (see also the note to verses 4 and 5). In verse 5 it is said,-- "The word "heritage is used to signify wealth in which property dependent on relation to the former owner arises on the demise of that owner." Thus, it appears that property in the heir must arise immediately upon the death of the ancestor, in the same manner as the property of the donee arises immediately upon relinquishment by the donor. In a note to paragraphs 4 and 5, it is said, Heritage signifies what is given. Since the verb to give signifies the will "be this no longer mine," which has the effect of vesting property in another; and since that cannot exist in the proposed "case (meaning heritage), therefore it here merely signifies any act which has the effect of vesting property in another, such as the demise of the "former owner, his retirement, &c.--Achyuta. There is not, in this "instance (speaking of heritage), a relinquishment, on the part of the person deceased or retired, consisting in the will, be this no longer "mine, "and operating to annul the former property."--Raghoonundun Dyatatwa. Again, in a note to verse 5, the term heritage signifies by "acceptation property vested in a relative in respect of wealth, in right of "relation to its former owner (as son or otherwise) on the extinction of his property."--Rayhoonundun Dyatatwa.

39. There is nothing to show that, after property has ceased by virtue of a gift to be that of the donor, there can be any contingency or uncertainty as to the person in whom it is to vest, or that the property can be so given by will as to remain in abeyance or in nubibus until the donee comes into existence.

40. The object of the Hindu law is that the property of a deceased proprietor may be immediately made available for his spiritual benefit, and for that of his ancestors. There seems to be no more authority for holding that property can, according to Hindu law, be

given by will to a person not in existence, or to a person not ascertained at the time of the death of a Hindu testator, than there is for holding that a thing can be inherited by a person not in existence, or upon a contingency. Verse 21 of Chapter I of the Dayabhaga is very important. It says: "The right of "one may consistently arise from the act of another, for an express passage of law is authority for it; and that is actually seen in the world, since, in the case of donation, the donee"s right to the thing arises from the act of the giver, namely, from his relinquishment in favor of the donee who is a sentient person." In verse 22 it is said : Neither is property created by acceptance, since (if that were so) it would follow that the acceptor was the giver, for gift consists in the effect of raising another"s property; and that effect would here (that is to say if acceptance created property) depend on the donee." In verse 23 an objection is raised. It is said--"Is not receipt acceptance? for the affix in the word swicara implies a thing becoming what it before was not; and the act of making his own (swan curvan) what before was not his, constitutes appropriation or acceptance (swicara). How then can property be antecedent to that," Then in verse 24 the answer is, though property had already arisen, it is now by the act of the donee, subsequently recognising it for his own, rendered liable to disposal at pleasure; and such is the meaning of the term "acceptance" or "appropriation." Further learning upon the effect of gift and acceptance under the Hindu law, will be found in 2 Colebrooke"s Digest, 510--511.

41. The result appears to me to be that a gift cannot operate to pass property unless the donee is in existence, so that, as soon as the property is relinquished, and passes out of the donor, it may vest in the donee. That, in the case of a will, would be at the time of the death of the testator, from which moment the will operates as a relinquishment. The donee must at that time, according to my view of the law, be a sentient being. This is only in accordance with reason and common sense, especially where there is no express provision for trusts. I exclude from these remarks a posthumous child of the testator and a son adopted by a widow of the testator after the death of her husband. These cases depend upon particular law, and do not extend to posthumous sons of strangers, or sons of strangers adopted by their widows after their deaths. I do not, therefore, intend to exclude from the general remarks sons of Jatindra Mohan, &c., to be born or adopted after the death of the testator, whether adopted in Jatindra Mohan"s life-time or after his death.

42. According to the Roman law, every being capable of enjoying rights and fulfilling duties was called a persona : Justinian"s Institutes by Sandars, Introduction, 37; Id., 86; and by the same law a person could not devise to a posthumous stranger or to a person not in esse. In the strictness of the old civil law, a child born after the death of the testator was incapable of taking as his heir or as a legatee under a testament. He had not at the time of the testator"s death any certain existence, and the law said incerta persona hīc ½res institui non potest (Ulp. Reg. 224) Still the child, when born, might be suus haeres of the testator; and as his agnatio would be considered in law to date from the time of conception, and not from that of his birth, the testator would pass over one of his

sui heredes if be omitted o include him or exclude him in the will, although, if he had included him, the posthumous child could not have taken anything. In course of time the law permitted the posthumous child, if a suus haeres to become an heir, but the civil law never permitted the posthumous child of a stranger born after the testator's death, to be an heir or a legatee.-- Idem, Book II, Title XIII, page 265. In like manner, according to the common law of England, a grant could not be made to a person not in case at the time of the grant.--Comyn's Digest, Title Grant. B. 1. It is there said, "Every person in case at the time may take by grant. But a person not in case at the time of the grant cannot be a grantee, as if a grant be "to the right heirs of B., who is then alive." See also 1 Sanders on Uses, 128; 2 Blackstones Commentaries, 168 to 169; Fearne on Contingent Remainders, 354-362; Williams on Real Property, 242 to 247. I do not cite these cases for the purpose of showing what the Hindu law is upon the subject of grants to uncertain persons or to persons not in existence; but merely for the purpose of showing that there is nothing contrary to reason or common sense in the Hindu law as I read it. I apprehend that, according to that law, the donee must be a person in existence, in whom the property may vest immediately it ceases by virtue of the gift to be that of the donor; and further, the designation of the donee must be so certain that the latter may be capable of accepting the gift, and that it may be ascertained, immediately the property ceases to be that of the donor, who is the person intended to be benefited, and in whom the property given has vested.

43. We are not to declare what the law ought to be, or how it can be improved, but what the law is. We are judges, and not legislators.

44. The learned Judge who decided this case, on considering whether a gift of the inheritance to a person who was not in existence at the time of the testator's death, is bad upon public grounds, said--"I think the "answer is given with singular completeness by the words of the Privy Council in Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick : We are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles "of Hindu law, in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the "law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." In that case there was an absolute gift of one-fifth of the testator's property to each of his five sons, with a gift over in the event of any of the five sons dying without a son or a son's son, the testator declaring that in such an event neither the widow nor the daughter's son should take any part of his share. It was held that there was a good executory devise (or conditional limitation), and that upon the death of one of the sons, without leaving a son or a son's son, the estate went over and did not pass to his widow as his heiress-at-law. In that case no question was raised or decided as to whether an estate could pass by Hindu law, by way of executory devise, to a person not in case at the time of the decease

of the testator. There is no doubt that a gift by the Hindu law may be made upon condition.-- Shama Churn's Vayavastha Darpana, octavo edition, pages 601 and 620; Macnaghten's Hindu Law, Volume II, Chapter 8, case 21, pages 230--231. It seems also that a grant may be made upon condition, and that it may cease upon breach of the condition. If the subject pay not revenue, the grant being conditional is annulled by the breach of the condition.--Vyvada Bhangar Nava and other authorities; Vayavastha Darpana, page 606; Macnaghten's Hindu Law, Volume II, Chapter 8, case 15, pages 221 to 223. It also seems that a gift in remainder upon condition is good--see Vyavastha Darpana, page 607; Macnaghten's Hindu Law, Volume II, Chapter 8, case 1, pages 207 and 208; but these cases do not show that there can be a gift in remainder, or upon condition to a person not in existence. In the case of Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick above cited, the Privy Council held that the conditional limitation, which, by borrowing terms from English law, was called an executory bequest, was valid according to Hindu law. They considered that there was nothing against public convenience, or against the principles of Hindu law, in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England), upon an event which was to happen, if at all, "immediately upon the close of a life in being," I do not understand Lord Justice Knight Bruce, by the use of the words immediately on the "close of a life in being," to have intended to lay down that the rules of English law against perpetuities were part of the Hindu law, otherwise he would probably have added or within twenty-one years afterwards." His remarks were made with reference to the facts of the case which was then under consideration. In that case, Soroop Chunder Mullick, the son who died without leaving male issue living at the time of his death, so long as he lived had an absolute estate vested in him by the will, though it was subject to the conditional limitation over. He was in case at the time of the testator's death. He was capable of accepting the bequest, and there was no portion of his fifth share of the estate which was not vested in him, or which could have been given to his brothers by his father in his life-time. His brothers also were in existence at the time of the testator's death. The question to be determined was whether the devise ever was good, not what persons took under that devise. It was sufficient to hold that the widow of the deceased brother, who was the plaintiff in the suit, was not entitled to take her husband's share by descent. It was not necessary to decide whether the sons of a deceased brother not in case at the time of the testator's death took jointly with the surviving brothers, in the present case the gift to Jatindra Mohan Tagore was only for life; the remainder was given over to his first and other sons, to be born after the death of the testator. The Hindu law knows nothing of freehold estates, and consequently it knows nothing of contingent remainders supported by freehold estates. It knows nothing of the Statute of Uses; it knows nothing, therefore, of springing or shifting uses, or of executory devises. There were no means provided by the Hindu law for creating a perpetuity; it was, therefore, unnecessary for it to provide against perpetuities. If the devise over to the unborn sons of Jatindra Mohan was valid, there was no person in existence independently of the trustees in whom that portion of the estate which was given to the unborn sons could vest by virtue of the gift, or who was capable of accepting any estate created by executory devise

or conditional limitation. The case of *Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick* is binding upon this Court as to all cases in which the facts are similar, but I do not consider that it was intended to lay down, as a general rule, that the law of England, as regards either executory devises or perpetuities, has been so far recognised in practice as to have become part of the Hindu law current in Bengal, and part of the law according to which the rights of inheritance of Hindus are to be determined, or by which heirs may be disinherited. If such was the intention, it appears to be at variance with the later decision in *Mussumat Bhoobun Moyee Debia* to which I have already referred. The estate which the survivors of the joint family, according to the decision of the Privy Council in *Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick* took under the will, was similar to the estate which survivors of a joint family in ancestral property take under the law of inheritance as laid down in the *Mitakshara*. See the *Katama Natchiar vs. Srimut Rajah Moottoo Vijaya* .

45. If, however, the Privy Council intended to lay down that the English law of executory devises has become part of the Hindu law, there seems to be nothing to prevent the creation of perpetuities, unless the English law against perpetuities has also become part of the Hindu law. If I am correct in holding that there is no rule of Hindu law expressly providing against perpetuities, and that the English law has not been engrafted upon the Hindu law, very serious and inconvenient consequences may be the result of holding that the English law of executory devises is to be administered as part of the Hindu law, and that devises can be made in trust for persons not in existence, whether in possession or in remainder. We must take care not to introduce our English notions into oases governed by Hindu law, and not to give effect to rules by which perpetuities may be created, unless we are at the same time prepared to hold that the law against perpetuities is part of the Hindu law.

46. It was contended that the estate having been given to the trustees and their heirs, the rule of Hindu law requiring the devisee to be in case at the time of the testator's death would not apply, as the trustees were in esse, and capable of accepting. But the law will not permit that to be done indirectly which cannot be lawfully done directly. In 1 *Jarman on Wills*, page 247, it is said : As the law does not permit to be done indirectly "what cannot be effected in a direct manner, the rule which forbids the "giving of an estate to the issue of an unborn person, equally invalidates "a clause in a settlement or will containing limitations to existing persons for life, with remainder to their issue-in-tail, empowering trustees, on "the birth of each tenant in-tail, to revoke the uses, and limit an estate "for life to such infant with remainder to his issue." *Duke of Marlborough v. Lord Godolphin* 1 *Eden's Chancery Canes*, 401; see also *Preston on Estates*, 448; *Pullen v. Lord Middleton* 9 *Mod. Rep.* 483.

47. If the intervention of trustees will enable a testator to create estates which he could not otherwise create, and to devise to a person unborn or not ascertained at the time of the testator's death, there is nothing to prevent a testator, under the Hindu law, from devising to the unborn son of A. for life, remainder to the unborn sons of such son in

succession for life, according to seniority; remainder in like manner to the unborn grandsons of such son for life, and so on; nor is there anything to prevent a devise to trustees in trust to keep up a perpetual succession of trustees to accumulate the rents, and to hand them over to an unborn person, who, at the end of 100 years after the testator's death, shall be his nearest male heir, or shall be the owner of a particular zamindari. The devise in the last case, though unborn and unascertained at the time of the testator's death, is capable of being ascertainable at the time at which the beneficial interest is to commence. If an estate cannot be given directly to an unborn person or to the heirs in succession of an unborn person for life, such estate cannot be given indirectly by means of the intervention of trustees or otherwise.

48. If it be held that particular estates, such as estates for life, can be created by Hindu law, and that remainders dependent on life-estates can be devised to unborn persons for life with remainder over to other unborn persons for life, we should in effect allow Hindu testators to do by will that which the Indian Succession Act does not allow other testators to do. (See Act X of 1865, section 100). This, though no reason for holding that such a devise cannot be made according to Hindu law, if the right be clear, is a good ground to induce us to be cautious before we hold that such a right exists by Hindu law.

49. For the above reasons, in addition to those already given in considering whether the intended estates-tail were valid, I am of opinion that the sons of Jatindra Mohan, to be born or adopted after the death of the testator, do not take general estates of inheritance as held by the Court below, or any other valid estate.

50. The clause which directs the trustees to convey the real estate, so far as the limitations and conditions can be introduced without infringing any law against perpetuities, does not render the devises to the unborn sons of Jatindra Mohan valid, or vest in the trustees the power of creating by conveyance valid estates in such sons for life or otherwise. The clause does not authorise a conveyance omitting the directions or provisions in respect of primogeniture, or the clause excluding females, nor does it authorise the creation of estates for life or general estates of inheritance instead of qualified estates. Farther, the estates are not to be conveyed until after the legacies and annuities shall have fallen in and been fully satisfied. The estates intended to be given are not merely executory. It was clearly intended that the payment of Rs. 2,500 a month to the persons mentioned in the devise should commence immediately after the death of the testator, and before the legacies and annuities should be satisfied. If the devisees-in-tail could not take the rupees 2,500 a month, and the surplus interest and dividends, &c., before the legacies and annuities are satisfied and fall in, they cannot take the estates by means of a conveyance to be executed after the legacies and annuities have fallen in. Further, the authority to convey so far only as the limitations can be introduced into a deed without infringing the law "against perpetuities (if any such there be)" cannot authorise the trustees to substitute new limitations or estates valid under the Hindu law for limitations or estates which the testator intended to create, but which could not be created and held under that law; nor can it render valid, either before or after the

legacies and annuities are paid, those devises which are void so long as the annuities and legacies are unpaid. The Court cannot alter the limitations in a will by directing a conveyance which will not carry out the intentions of the testator, because those intentions are contrary to law. The only alteration which the testator intended was such as might be necessary to prevent an infringement of the law against perpetuities in conveying the estates which he intended to create. See as to this point--*Bagshaw v. Spencer Fearn*e's Contingent Remainders, 9th ed. page 120; *id.*, 183-185, *Garth v. Baldwin* 3 Ves. Sen. 655, and *Mr. Fearn*e's Consideration of the Cases, in which the Court of Chancery in decreeing the execution of trusts has departed from the legal operation of the words by which the trusts were limited.

51. A further question arises, whether the life estates to Surendra Mohan, Upendra Mohan, and the other devisees for life are void or valid, or are accelerated by the invalidity of the devises in tail male to the unborn sons of Jatindra Mohan. It is not necessary for the purposes of the present suit to decide that question; and as, according to *Lady Langdale v. Briggs* 8 De Gex. M. & G. 391 above cited, we ought not to make any decree declaratory of the right of the parties subsequently to the life-estates given to Jatindra Mohan, we abstain from expressing an opinion upon that point which is not necessary at present. I have expressed my opinion as to the limitations to the heirs male of the body in the devises to the unborn sons of Jatindra Mohan, in order that I may not be supposed to acquiesce in the doctrine of the lower Court that those words pass general or absolute estates of inheritance.

52. We come now to the personality, and here I may observe that there is an important distinction between the real estates and the personality. With regard to the latter, there was no gift of the corpus except in the direction as to the trust upon which the same was to be held by the trustees as soon as all the annuities and legacies should have fallen in and been fully satisfied. It was declared that as soon as that event should take place, the trustees were to stand possessed of and interested in the corpus, in trust absolutely for the person or persons entitled under the limitations in the will to the beneficial or absolute enjoyment" of the said real property.

53. The words or persons" are not very intelligible, as the real estates were not intended to be taken jointly by several heirs, but by one person only, viz., by the heir male of the body in the elder line. It appears to me that the words or persons must be rejected, and that it was the intention of the testator that when the annuities and legacies should have been fully satisfied, the corpus of the moveable estate was to be held absolutely for the person who might then be entitled to the beneficial or absolute enjoyment of the immovable estate. There was to be no life-interest in the corpus of the personality, and no particular or qualified estate in such corpus. If the legacies and annuities should be fully satisfied in the lifetime of Jatindra Mohan, he was to be entitled to an absolute interest in it. He was to be entitled to alienate it, or in the event of his not doing so, it would pass upon his death to his representatives. It was not given to the person in whom the first beneficial interest for life in the real estate should vest under the will. It was to remain a

matter of doubt and uncertainty, until the legacies and annuities should be fully satisfied, who was to be entitled to it. It was to be held in trust for the person or persons who, at the moment when the legacies and annuities should have been fully satisfied or fallen in, might happen to be the person entitled to the beneficial or absolute enjoyment of the real property. It was a mere possibility which depended upon the contingency whether Jatindra Mohan or any other of the devisees might ever become entitled to it. If the devisees named in the will should all die without issue male of their bodies, either adopted or otherwise, before the legacies and annuities should be fully paid, the corpus would revert to the testator's heir as undisposed of, and there would be a resulting trust in his favor, The person who was to succeed to the corpus might be Jatindra Mohan, or he might be a son of Jatindra Mohan born after the death of the testator; he might be a son or other heir male of the body of such son, or he might be a son adopted by Jatindra Mohan in his life-time, or a son who might be adopted after the death of Jatindra Mohan by his widow, or he might be a son or heir male of the body of either of such sons. Surendra Mohan, or any of the persons named or designated under any of the subsequent limitations, might be the person who, under the contingency, might become entitled to it. There was no intention to give it to any particular or ascertained person of the whole of those who, under the limitations in the will, might, according to the intentions of the testator, become entitled to the absolute and beneficial enjoyment of the real estate upon the happening of the contingency. Many of them were not in existence, and as to some of them, such as sons of the several tenants for life, or in tail, to be born or adopted after the testator's death, it was not even certain that they ever would come into existence, nor was it certain that the event upon which the property was to vest would happen within the period of a life in being or twenty-one years afterwards.

54. In *Bagskaw v. Spencer Fearn*'s Contingent Remainders 121, 122, Lord Hardwicke, speaking of a devise, said--"As to its being considered an executory devise, it was too remote to be good in that view, being after all debts indefinitely should be paid, which in point of time might exceed a life or lives in being or any other time allowed by law." See also *Jones v. Morgan Brown*'s Chancery Cases, 206; *Fearn*'s Contingent Remainders, 134. In that case, the testator devised certain real estates to trustees to raise money in aid of his personality, for payment of debts, and after payment of his debts the estate was limited over. Lord Chancellor Thurlow said--"The first use for the payment of debts might absorb the whole estate." See also *Lord Dungannon v. Smith* 12 Cl. & Fin. 646 and *Boughton v. Boughton* 1 H.L.C. 406. In cases of this nature, possible, and not actual, events must be looked to. The same rule of construction must be applied to this case as ought to be applied if the legacies amounted to a crore of rupees, and the income of the real and personal estate together were rupees 500 a year. No one can say how long it will be before the corpus of the personal estate is to vest, or who will be the person then entitled to it. It seems clear that if this case had to be decided according to English law, the bequest would be bad for remoteness according to the decisions above cited.

55. In *Lord Dungannon v. Smith* 12 Cl. & Fin. 646, the ground on which the gift failed was the want of certainty that the bequest would take effect within the prescribed period. In the present case, it appears to me that the ground on which the gift fails under Hindu law, is the want of certainty at the time of the death of the testator who would be the donee, and whether the donee was a person in existence or not. No one, until the whole of the legacies and annuities are satisfied, could accept the gift or sell or dispose of the corpus subject to the charges. If such a bequest as the present is good, and no rule against perpetuities exists under the Hindu law, there is no reason why a Hindu may not give and devise his moveable and immovable property to such person as. at the expiration of 200 years, shall be the beneficial owner of a particular zamindari, and either dispose of the rents and profits in the meantime, or leave them to accumulate. The remarks made by Mr. Baron Rolfe, in delivering his opinion in *Lord Dungannon v. Smith* 12 Cl. & Fin. 573, are very applicable to this case. He said: The testator has in effect directed his trustees to retain the corpus in their own hands until some person answering the description of heir male of the body of B. shall attain his age of 21, and then, but not till then, to assign the corpus to such person. In this case the trustees are to retain the corpus of the moveable property in their own hands until some one of the persons to whom the real estate is limited shall, after the payment of the legacies and annuities, answer the description of the person entitled to the beneficial or absolute enjoyment of his real property, and then, and not till then, to bold it for the absolute use of such person. If the rents of the real estate had not been charged, in aid of the personality, with the payment of the legacies and annuities, the happening of the event upon which the corpus of the personality would be liable to be so disposed of, would probably be very far distant. I say probably, because we know nothing beyond the recital in the will as to what is the amount of the income of the personality, and of the surplus which may be available to satisfy the legacies and annuities.

56. The learned Judge appears to have considered that the annuities and legacies must all be satisfied during lives in being, but that is not so; if the assets should not be sufficient to pay all the legacies in the life-time of the legatees, the legacies will have to be paid gradually, as directed by the will, to their personal representatives after their deaths. See clause 11 of the will 4 B.L.R. O.C.J. 115. There is no power to sell any portion of the real or of the personal estate, after it has been invested, to pay the legacies. The learned Judge says: "The plaintiff's counsel maintain that under the "operation of this clause (meaning the clause for payment) the functions "of the trustees might remain in full force for a period much beyond any "life in being. On the whole, though with some doubt, I think "this view is not correct. It seems to me better to conclude that the ""testator merely meant to free the trustees from the obligation of paying such legacies and annuities in cash immediately on their becoming due, if they could not be paid in full out of the income at that time. With "a view to preserving the corpus intact, he gave them the power of "adjusting the payments to the income. But I do not think he intended "the duties of the trustees to continue beyond the life of the last annuitant, and in this way to give them the opportunity of changing the legacies and annuities into rent charges of uncertain

duration." The learned Judge, however, does not appear to have adverted sufficiently to the 11th clause of the will, in which the testator directed that each of the legacies and bequests or shares shall be deemed and taken to have vested in the several legatees to whom they are bequeathed immediately upon his death, and that in case of any of the said legatees dying after his death, but before attaining the age at which payment was to be made to them under the provisions contained in the will, his, her, and "their legacy or share shall be payable as he, she, or they shall respectively "will, or direct, or in case of intestacy, to the personal representatives of such legatees or legatee as conveniently may be after his or her death." There is also a provision in the will that interest at the rate of 5 per cent. shall be paid, provided always, the will says, that interest at the "rate of 5 percent. per annum shall be paid to every legatee or annuitant whose legacy or annuity, or a portion of whose legacy or annuity, shall be "postponed under the provisions and directions immediately hereinbefore "contained, until the same shall have been fully paid and satisfied" Paragraph 3, 4 B.L.R. O.C.J., 111. It is manifest from the clauses just quoted that the duties of the trustees were to continue until the whole of the legacies should be paid either to the legatees or their devisees or to their personal representatives, which (as the legacies were to be paid gradually out of the income of the testator's real and personal estate) might embrace a period long after the death of the legatees, and after the death of the survivor of the annuitants.

57. Further, the corpus of the " personality is so bequeathed, that the person in whom it was intended to vest as the beneficial owner of the real estate, might be one of the persons intended by the testator to take the real estate under the devises which have been held void. For the above reasons I am of opinion that the gift over of the corpus of the personality after the payment of the legacies and annuities was bad, and consequently that the property in it is vested in the son and heir of the testator subject to the trusts for the payment of debts, legacies, annuities, &c. There is a distinction between the corpus of the personality and the surplus interest and dividends thereof. The latter is to be paid to the person beneficially entitled to the beneficial enjoyment of his real property, or of the rents and profits or surplus rents and profits thereof. Jatindra Mohan is that person. When the legacies shall have been fully paid, and only one annuitant is living, there probably will be a surplus annual income both of the real and personal estate. That is to be paid at once, before the arrival of the time when, on the death of the last annuitant, and when all the legacies shall have been paid, the real estates are to be conveyed, and the corpus of the personality is to vest. The right to receive the surplus rents and profits of the real estate and of the interest and dividends of the personality, if there be any, is vested in Jatindra for life, or until the time arrives for the conveying of the real estates, and the vesting of the corpus of the personality.

58. I now proceed to determine the first issue, and for that purpose to consider whether, according to the facts stated in the plaint, if true, the plaintiff has any cause of action. The plaint alleges in paragraph 19 "that the plaintiff has been informed and believes" (and the facts are more within the knowledge of the defendants than that of the plaintiffs) that the

defendants, the executors of the said Prasanna Kumar Tagore, "or some or one of them, have, against the directions contained in the said will, sold or otherwise disposed of a large amount of Government securities out of the corpus of the estate of the said testator, and have improperly applied the proceeds thereof, and that he apprehends that "unless the defendants be restrained by injunction, there is danger of the estates being wasted, or otherwise dealt with contrary to the direction of the said testator." The defendants Upendra Mohan Tagore, Jatindra Mohan Tagore, and Durga Prasad Mookerjee, in the 6th paragraph of their written statement, say they have not, nor has any of them, sold or disposed of any Government securities contrary to the directions of the will, or in any way improperly disposed of any proceeds of any Government securities. They have sold a portion of the Government securities, and have applied the proceeds in the payment of the debts of "the testator." But they do not in the last paragraph say that they have not sold any other portion of the Government securities, or applied the proceeds otherwise than in the payment of debts. Their defence rests upon the denial contained in the first portion of the paragraph, which asserts that they have not sold any Government securities contrary to the directions of the will, nor in any way improperly disposed of any proceeds of any Government securities. That denial involves a mixed question of law and fact. Upon that the sixth issue settled for trial raised the question whether the executors have misappropriated any and what portions of the testator's estate. It therefore becomes necessary to consider whether, assuming that the executors and trustees have misappropriated any part of the testator's estate, the plaintiff has any cause of action.

59. The learned Judge, with reference to this portion of the case, says: "I am in a position to say that the allegation of waste made by the plaintiff falls to the ground. The trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personality, and the selling of the Government papers, of which the plaintiff complains, may, as far as anything goes, which is stated by plaintiff, have" "been effected for that purpose," I cannot concur in this view of the case, for if the sale of the Government papers, of which the plaintiff complains, was effected under the powers of the will, merely for the purpose of paying such of the debts and legacies as the defendants were authorised to pay out of the personality, it is clear that the plaintiff's allegation that the executors have sold and disposed of a large amount of Government papers against the directions of the will, and have improperly applied the proceeds thereof, is not true. That allegation, however, has been made, and has been denied, and an issue has been expressly and directly raised upon it. If the plaintiff has a right to complain of waste, the sixth issue ought to be tried and determined. The learned Judge, as I have already shown, has held that if no person designated by the will as ultimate taker of the inheritance, has been born, the plaintiff as heir-at-law has for the time the immediate expectation of succeeding to the inheritance on the termination of a life in being, and for that reason has a sufficiently substantial present interest to entitle him to ask that the property be protected against waste." The plaintiff has, in my opinion, a right to have the sixth issue tried, for I do not concur with the learned Judge that the allegation of waste made by the plaintiff falls to the ground. Independently of that finding that the allegation of

waste falls to the ground, the plaintiff, even according to the opinion of the learned Judge upon the other part of the case, has a right to have the sixth issue tried. I find upon the first issue that the plaint does disclose a cause of action; secondly, that the testator did die intestate as to some portions of his property, that is to say, without any valid devise or bequest thereof; thirdly, that part of the immovable property of the testator was ancestral estate, and that he had a right to dispose of it by will, and that it is therefore unnecessary to determine what particular portion of such property was ancestral.

60. As to the fourth issue, it must be declared that the devises and gifts to Jatindra Mohan for life are valid, so far as they relate to the real property, and that he is entitled during his life and so long as he shall be entitled to the beneficial enjoyment of the said real property, or to the rents or surplus rents thereof, and until the legacies and annuities in the will mentioned shall have fallen in and been fully satisfied, to receive the monthly sum of rupees 2,500 out of the net rents and profits of the real estate, and the unexpended surplus of such rents and profits, after payment of the charges thereon, and also to the surplus of the interest, dividends, and annual proceeds of the moveable estate which shall, from time to time, remain unexpended after making the payments directed by the said will to be made out of the same; and it must be declared that it is not necessary to come to any other finding upon the fourth issue, or to make any other declaration of right as to the real property, save that above mentioned, and that the gift of the corpus of the personality is void, and that the beneficial interest in the same is vested in the plaintiff, subject to the charges thereon created by the will. Fifthly, that the plaintiff is not entitled to maintenance.

61. The case must be sent back to the lower Court, with a request that that Court will try the sixth issue, and return its finding thereon, together with the evidence, to this Court.

62. It appears to me that the trustees, defendants, are bound to render an account of the rents and profits of the immovable estate, and also an account of the moveable estate, and of the interest, dividends, and profits "of such moveable estate, and of the mode in which they have applied the same. The testator by his will directed that, "out of the net annual income of the said real property, the person or persons for the time being entitled under the limitations and provisions thereafter contained to the beneficial enjoyment of the said real property, or of the income or surplus income thereof, should receive for his own use every year rupees 2,500 a month; and that the various legacies and annuities given by the said will should only be paid gradually, and as might be found possible by his said trustees or trustee, out of the balance, that, after such last mentioned payment, should remain of the said annual income of the said real property 4. B. L.R. O. C.J. Paragraph 3, p. 111.

63. As I understand that portion of the will, the surplus rents of the real property, after paying the rupees 2,500 a month, are to be applied to the payment of the legacies and annuities given by the will.

64. The testator also desired the trustees, after making certain payments, to bold the personality upon trust to sell and convert into money such portion thereof as shall remain unexpended, and as shall not consist "of money or securities for money, in trust to invest the same, or to permit the same to remain invested; and out of the interest and dividends and annual proceeds thereof, in trust to pay the said annuities, and any of the said legacies which shall become payable after the trust moneys shall have been invested, so far as the said interest, &c., shall suffice for those "purposes; and after payment of such annuities and legacies, to pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who, for the time being, shall, under the limitations and directions thereafter contained and expressed, be entitled to the beneficial enjoyment of the real property or of the rents and profits or surplus rents and profits thereof" 4 B. L.R. O. C.J. Paragraph 3, p. 109.

65. The plaintiff, being entitled to the corpus of the personal estate as soon as the legacies and annuities shall have been paid off, is interested in seeing that the funds which by the will were made applicable for the payment of such legacies and annuities are duly and properly applied; and in order to ascertain whether they are so applied or not, he is entitled to have an account of the moneys and securities which have come into the hands of the trustees, and to see how they have been applied. I find it laid down in Lewin on Trusts, page 329, that trustees for the sale and payment of debts" (and I apprehend that the same rule applies to trustees for the payment of legacies and annuities) "are of course bound at any time to answer enquiries by the author of the trust, or the persons "claiming under him, as to what estates have been sold, and what debts have been paid." The plaintiff claims under the authority of the trust, Ha claims by inheritance the corpus of the estate which has not been legally bequeathed by the will of the testator. At page 491 of the same volume, it is stated that "as an incident to the beneficial enjoyment by the cestui qui trust of his interest, he has a right to call upon the trustee for accurate information as to the state of the trust. Thus in a trust for sale and payment of debts, the party entitled subject to the trust may say to the trustee--What estates have you sold? What is the amount of the moneys raised? What debts have been paid? It is, therefore, the bounden duty of the trustee to keep clear and distinct accounts of the property he administers, and he exposes himself to great risks by the omission. It is the "first duty," observed Sir T. Plumer, "of "an accounting party, whether an agent, a trustee, a receiver, or an "executor (for in this respect they all stand in the same situation) to be "constantly ready with his accounts." In Williams on Executors, page 1852, it is said that a Court of Equity will compel an executor or administrator in the same manner as it does an express trustee to discover and set forth an account of the assets and of his application of them." It seems clear, then, that a trustee is an accounting party, and bound to render accounts. In Brooks v. Oliver Amb. Rep. 406, "the plaintiff being entitled to a large real estate in Antigua, and to a personal estate there and in "England, under the will of Jonas Longford, brought his bill against the defendant Oliver and others for an account; and it was prayed that Oliver, who was the only acting executor and trustee in England, and to whom the produce of the estate in Antigua was remitted, by the directions of the

testator, might account annually by affidavit, instead of the usual way, which it was said would be a great saving to the infant's estate, and a precedent for such a decree was produced in the case of Blair v. Drake, 11th February 1755. where Lord Hardwicke directed that the defendants Drake and Long should account for the estate and effects of "" the plaintiff Blair, an infant; and as often as any sum or sums belonging to the plaintiff, the infant, should come to their hands, by consignment of "effects or remittance of money, it was farther ordered that the same be ascertained by the affidavit of the said defendants, and that after all "just allowances deducted thereout, the defendants pay the clear surplus of what shall so come to their hands, by consignment or remittance, into "the Bank, with the privity of the Accountant-General, &c." In that case the order was made for the defendant to account annually by affidavit to the infant. It appears to me, therefore, that the plaintiff in this case is entitled to an account from the defendants of the whole of the funds which are applicable to the discharge of the legacies and annuities, and also to know from them how they have applied those funds. Suppose, in this case, that the annuities and legacies were vary small, and that the rents of the real estate and the interest of the personal estate were much more than sufficient by the present time to have paid off the whole of the annuities and legacies,--surely the plaintiff, who is entitled to have the corpus of the personal property made over to him for his absolute use as soon as the legacies and annuities are fully discharged, is entitled to have the trust moneys properly applied to the discharge of the legacies and annuities, and to have an account of what has been received, and how the same has been applied. There must, therefore, be a decree for an account. The costs in the lower Court are to be paid out of the surplus rents and profits of the immovable estate after payment of the monthly sum of Rs. 2,500.

66. The legatees and annuitants are not parties to this suit, and consequently the costs ought not to come out of the interest of the moveable estate or of the dividends and interest thereof, which form the first fund applicable to the payment of the debts, legacies, and annuities; and further, the principal contention in this case has been with reference to the immovable estates. The plaintiff's costs of this appeal will also be paid out of the said surplus rents and profits of the immovable estate. The costs of the defendants of this appeal are reserved until after determination of the sixth issue.

Norman, J.

67. This is an appeal from a decision of Mr. Justice Phear dismissing the plaintiff's suit.

68. The plaintiff is the heir, according to Hindu law, of his father, the late Prasanna Kumar Tagore, Rai Bahadur, formerly a member of the Legislative Council of the Governor-General of India. It was admitted before us that Prasanna Kumar Tagore was a Hindu of Bengal, and that the case must be governed by the Hindu law as current in Bengal.

69. The defendants are the executors under the will of Prasanna Kumar Tagore, and certain devisees under the will.

70. The plaintiff asks, amongst other things, for an injunction, and for other relief, on the ground that the executors are committing waste by selling Government paper contrary to the directions of the will. The Court laid down an issue whether the executors have misappropriated any, and what, part of the testator's estate. The learned Judge says: I am in a position to say that the allegation of waste made by the plaintiff falls to the ground. The trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personality, and the "selling of Government papers, of which the plaintiff complains, may, as far as- anything goes which has been stated by the plaintiff, have been effected for that purpose." In that observation I cannot concur. No doubt, the statement that the executors are committing waste by selling Government paper contrary to the directions of the will, is very loose. Possibly, the defendants might have objected to answer, on the ground that the allegation was too vague. But it must be remembered that a plaintiff, who under Act VIII of 1859 is obliged to verify his plaint, is in a very different position from that of a party filing a bill on the equity side of the late Supreme Court in charging waste or other wrongs done or supposed to be done by trustees or other persons of whose transactions he has no means of obtaining exact information. The defendants have not only answered the charge made against them, but accepted an issue raised upon the question, whether they have misappropriated any part of the testator's estate. It seems to me too late after that to say that the issue cannot or shall not be tried.

71. The next question is whether the plaintiff has such an interest in the property dealt with by the will as to give him any right to raise that question. According to the practice of Courts of Equity, if there be any person who, under the will, takes a vested estate of inheritance interposed between that of the executors and such ultimate reversionary or expectant interest as may remain in the plaintiff as heir according to the Hindu law, the plaintiff would be considered as having no such present interest as would entitle him to ask the aid of the Court to call on the executors to account, and we should only have to pronounce that the plaintiff is not entitled to obtain immediate relief of any kind from this Court; and, therefore, the suit ought to be dismissed.

72. The surplus income of the moneys and securities for money forming part of the testator's estate, after payment of annuities and legacies, is given by the will to the person or persons for the time being, under the limitations of the will, entitled to the beneficial enjoyment of the real property or the rents thereof; and as soon as the annuities and legacies are paid, the trustees are to stand possessed of the said trust moneys in trust absolutely for the person or persons entitled, under the limitations and directions in the will expressed, to the beneficial and absolute enjoyment of the real property. I proceed to examine the limitations of the real property contained in this will.

73. The testator states that the frequent division and sub-division of estates in Bengal is injurious alike to the families of zemindars and to the ryots, who are oppressed by numerous and needy landlords having conflicting interests; that he has bestowed much time on the improvement of his estate and the condition of the ryots and tenants thereof; and that he is desirous that such improvement should go on, and should not be interrupted by any division of the said estate, or disputes concerning the same; and then proceeds, after first giving the landed property to Jatindra Mohan Tagore for his life (in the events that have happened), to limit his estates to the sons successively of Jatindra Mohan Tagore, born after the testator's death, and what he calls their heirs--not their heirs according to Hindu law, or any other known law of inheritance, but according to a system of primogeniture devised by the testator excluding females, on which he has attempted to engraft the Hindu law of adoption. He says: (reads paragraph 13) 4 B.L.R. O.C.J. 191. (I declare in the construction of this my will--here made by descent or adoption).

74. He then provides for the exclusion of females and their descendants, and for the exclusion of all right or claims to provision or maintenance of any person, male or female, out of the estate.

75. He provides that (reads paragraph 13) 4 B.L.R. O.C.J. 120. (Any and every son adopted according to Hindu law--as if he had been adopted by such husbands in his life-time).

76. Now, if this provision giving estates to sons to be adopted by widows could have any effect, as the widow is to be excluded from inheritance, the consequence would be that, on the death of any person, who might become entitled under the limitations in the will, dying, leaving a widow with power to adopt, the estate must remain in abeyance for an indefinite time, without an owner, until the widow should either adopt or die without adoption. After the failure or determination of the limitations to the sons of Jatindra Mohan and their descendants, the testator proceeds to limit over the estate to Surendra Mohan Tagore and his descendants successively; Lalit Mohan Tagore and his descendants; Upendra Mohan Tagore and his descendants; and Brijendra Mohan Tagore and his descendants, in each case, subject to the provisions declared respecting the sons of Jatindra Mohan and the heirs male of their bodies, as if the same had been repeated in each case." Then he declares his will and intention to be to settle and dispose of his estate in manner aforesaid as fully and completely of a Hindu resident in Bengal may give or control the inheritance of his estate, or as a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of England by which entails may be barred, affected, or destroyed.

77. He adds-- (reads paragraph 13) 4 B.L.R. O.C.J. 121. (I hereby declare that if any devisee or tenant--breach of any of the covenants or terms to be contained in such lease or patta).

78. When the scheme of the will now before us is carefully considered, it becomes at once apparent that it is utterly repugnant to Hindu law. It is an attempt to exempt the testator's family and property from the operation of that law, and subject that family and that property to special laws and rules of inheritance for a time which is absolutely indefinite, and which, looking at the powers of adoption, may be conceived as capable of lasting as long as the Hindu law itself. If the limitations beyond the gift of life-interests to persons living at the death of the testator, or possibly a life-interest to the first son of Jatindra Mohan born of his loins, or adopted in his life-time (the question as to which first life-interest stands, as we shall see, on a footing somewhat different from the rest), are good for anything at all, they are apparently good for that.

79. Before discussing in detail the provisions of the will, it seems convenient to consider the nature and extent of testamentary disposition as it must exist in communities when such power has not been extended by legislative enactments. In all civilized communities we find laws of inheritance regulating the transmission of property by descent or inheritance. If those laws are to be altered, if the rules of succession and course of descent as affecting any particular lands or any other property is to be permanently changed, it must be by the act or with the sanction of the Legislature, the supreme and sovereign authority in the State. It is evident that no citizen of the State can, by any act of his own, withdraw any portion of his property from the operation of the laws of the State. And it is equally clear that no such person can either, by gift or will, subject his property to special rules of descent, conditions, or other incidents unknown to, or which are at variance with, those laws. It seems needless to cite authorities to support so clear a proposition. But if authority is needed, I may mention that in *Prince's case* 3 Coke's Rep. 14, it was determined that a course of inheritance against the rule of the common law of England could not be created except by Act of Parliament. So a condition, attempted to be engrafted upon an estate-in-fee, that daughters shall not inherit, has been held void, because it is repugnant to the estate, and an attempt to establish a different kind of inheritance from that which is allowed by law. I will add an illustration from the case of an estate-tail. In *Sir Anthony Mildmay's case* 6 Coke's Rep. 40, it was determined that there are several incidents to an estate-tail. "First that the tenant-in-tail shall be punishable for waste. Second, that his wife shall be endowed. Third, that the husband of a woman tenant-in-tail after issue shall be tenant by the courtesy. Fourth, that tenant-in tail may suffer a common recovery, and thereby bar the estate-tail, and the reversion or remainder also. And these inseparable incidents which the law annexes to an estate-tail cannot be prohibited by condition. And, therefore, if a man makes a gift in tail, on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant-in-tail after issue shall not be tenant by the courtesy, or that tenant-in-tail shall not suffer a common recovery, these conditions are repugnant to and against law."

80. Now, if a Hindu can, by deed or will, create an estate-tail, he can subject his estate to a rule of inheritance unknown to the Hindu law. The testator apparently imagined that he

could create an estate-tail. He expresses a desire to do so; he calls the estate an entail, and has employed technical language which at first sight may appear to be appropriate for that purpose. For instance, he gives, to the use of each of the sons of the said Jatindra Mohan Tagore, who shall be born after my death successively according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and taken before the younger of such sons and the heirs male of their and his respective bodies issuing." These words would be appropriate to the creation of an estate-tail if a Hindu could create such an estate. I propose then to see what an English estate-tail really is in order to determine the question whether such an estate can be created by a Hindu either by deed or will.

81. The English common law originally recognized three species of estates,--estates-in-fee, estates for life, and estates for years. Estates in fee might be either absolute, or conditional or qualified. Prior to the passing of the Statute of Westminster Second, in the thirteenth year of the reign of King Edward I., if lands had been given to a man and the heirs of his body issuing, the donee took a fee-simple conditional. If, before the birth of issue, he sold or made what was called a feoffment-in-fee, the donor could not have entered for the forfeiture, and the sale or feoffment barred the issue of the donee born afterwards. After issue born the donee might have alienated in fee, and thereby have barred the donor and his heirs from all possibility of reverter. The Statute in question made new provisions concerning lands given upon condition. It declares that "where one gives his land to a man and his wife, and to the heirs begotten "of their bodies, with a condition expressed that if the man and his wife die without heirs of their bodies begotten, the land so given shall revert to "the giver or his heir, and where one gives land to another and the heirs of his body issuing, it seems very hard to the giver and his heirs that his will being expressed in the gift should not be observed;" it recites that in such cases donees have power to alienate the land so given and to disinherit their issue of the land contrary to the minds of the givers, and "contrary to the form expressed in the gift." And that when the issue of such donees fail, the land ought to return to the giver or his heir by the form of the gift; yet by the deed and feoffment of them (to whom land was so given upon condition) their reversion was directly repugnant to the form of the gift; therefore to provide a remedy in such classes, it was ordained "that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed; so "that they to whom the land shall be given under such condition shall have no power to alienate the land so given, but that it shall remain to the issue of them to whom it was given after their death or shall revert "unto the giver, or his heirs, if issue fail." The English estate tail was created by this enactment, which is commonly called the Statute de donis. The enactment, just and reasonable as it may appear at first sight, was productive of anything but unmixed good. In Sir Anthony Mildmay's case 3 Coke's Rep. 14 already cited, it was said--"At common law all inheritances were "in fee-simple, and the reason thereof was that neither Lords should be "defeated of their escheats, nor farmers or purchasers lose their estates "or

leases, or be evicted by the heirs of the grantors or lessors: nor such infinite occasion of troubles, contentions, and suits arise. But the true policy and rule of the common law on this point was in effect overthrown by the Statute de donis, which established a general perpetuity by Act of Parliament for all who had, or would make it, by force whereof all the possessions of England in effect were entailed accordingly, which was the cause of great mischief." And it was attempted to remedy the same in different Parliaments. And various bills were exhibited, but they were always on one pretence or other rejected. The truth was that the Lords and Commons knowing that those estates were not to be forfeited "for felony or treason, as their estates were before the said Act (and chiefly in the time of Henry the Third in the Barons War), and finding "that they were not answerable for the debts or encumbrances of their ancestors, nor did the sales, alienations, or leases of their ancestors bind them for the lands which were entailed to the successors, always rejected such Bills. And the same continued till about the twelfth year of the "reign of King Edward the Fourth, when the Judges, in consultation amongst themselves, resolved that an estate-tail might be docked and barred by a common recovery."

82. It is needless to state that the Statute de donis does not apply to the wills of Hindus. And Hindus have never been empowered by any legislative enactment to transmit their estates to their descendants fettered with conditions unknown to Hindu law. The conclusion which I draw is that a Hindu has not the power to create an estate-tail. I think it plain that Courts of Justice in this country would not be warranted on any supposed principles of natural justice, public expediency, or convenience, in giving effect to a disposition by which a Hindu should attempt to create such an estate.

83. No man can by will create a new rule of inheritance to regulate the descent of his property. But wherever during life an owner of property can dispose of it at his own free will and pleasure, it would seem true on principle, and I believe that, notwithstanding a great deal that has been said to the contrary, it is generally true in fact, that in communities where the power of disposition has not been restricted by positive law or artificial rules, each owner can make a gift of the same to take effect on his death. In considering the extent to which a person may bind his property by will or gift, it must be remembered that from the instant of death all further dominion on the part of the former owner ceases to exist. The property at once passes into new hands. The new owner may be the heir to whom the succession falls, or the legatees, or if part is given by will the legatees may take such part, but in such case the residue must descend to the heirs of the former owner. The whole inheritance must at once vest in some person either absolutely, or where the law allows of such a limitation, as a trustee, such as a trustee to preserve contingent remainders or the like. No part can remain in abeyance or without an owner till the happening of a future event. We have, therefore, to consider what is a Hindu will. To the extent of such gift as a Hindu can make by will and no further, he can interfere with the course of descent. The question as to the power of a Hindu to dispose of property by will, and the extent to which by such will he can disinherit his heirs, are distinct, and must be considered separately. Hindu law contains no separate head on the

subject of wills or testaments. But I will endeavour to show that the power of making gifts to take effect on the death of the donor, in other words, gifts by will, is not of modern introduction or foreign origin, but is distinctly recognized by Hindu law. From the time of the establishment of the Mayor's Courts in Calcutta and Madras, probates of wills of Hindus were granted by those Courts. To this I may add, on the authority of a statement of the Procureur General, cited in an essay by Mr. Montriou on the Hindu will, that at Pondicherry the wills of Hindus were recognized in the French settlements from the commencement of the French Rule. Between 1789 and 1792, the Pundits of Calcutta, Nuddea, Benares, Gya, Dinajpore, Moorshedabad, and Dacca were consulted as to the effect of the will of the Nuddea Raja. Amongst these was Jagannatha Tarkapanchanana, the author of the Digest. The Pandits differed as to the effect of the will, but it does not seem that one of them doubted the right of a man under Hindu law to dispose of property by will. See Montriou's cases on Hindu Law, Appendix, note XVI. In 2 Strange's Hindu Law, pages 417 to 427, the opinions of the Pundits of Bellary, Madras, Mussulipatam, Chittoam, Chingleput, and Vizagapatam are given, each upon a different case. In every one of these opinions the power of a Hindu to make a will is either asserted or assumed. Wills are also found in the records of the Zilla Courts at Bombay, as appears from numerous cases in Borradaile's Reports. Of the wills litigated in the late Supreme Court, the earliest in point of date is that of Amichand, a Sikh. Then comes that of Ganga Bissen Khettre, apparently a native of a province in which the rule of the Mitakshara prevails. Sir William Jones is said by Sir Thomas Strange to have observed that the "Hindu law knows no such instrument as a will" Strange's H. L. 254, I do not know to what passage in Sir William Jones's works the author refers; but we find that learned oriental scholar and eminent lawyer in the case of Munnoolall Baboo v. Gopee Dutt Montriou's H. L. Cases, 295, upholding a particular will as valid according to what seemed to be the opinion of the Pundits, citing Sanskrit Books, and particularly a passage from one of the Hindu writers according to Mr. Justice Hyde, whom the Pundits acknowledged to be the highest authority." Mr. Henry Colebrooke, in a note to the Digest, had said that Hindu law knows no such instrument as a will." We shall see that he recanted that opinion at a later period. It seems plain that at least the Hindu will was not of local origin, but that wills were known to and in use amongst Hindus not in the presidency towns only, but from one end of the Peninsula to the other. I think it is a just inference that the right to make a will does not arise from any mere modern practice or approved usage, but springs from a source to which all Hindus have access; in short, that it is a part of the Hindu law itself.

84. The whole scheme of inheritance as found in Hindu law depends on, and has reference not to any notion of a right existing in the persons designated as heirs arising from nearness of kin, the claims of natural affection, or any theory of representation, but almost solely on the spiritual benefits to be conferred on the ancestor by the person on whom the property is to devolve. The notion of gift implied in the term for heritage, Dayabhaga or Dayabibhaga, is a favourite theme for the speculations of commentators on Hindu law. It seems to show that the title of the Hindu heir is not treated as one arising out of any inherent right in persons standing in a particular relation to the deceased to

take as the next or natural occupant of property abandoned at his decease, but from some original theory of a gift, relinquishment, or surrender by the dead man to the heir. When such is the case, the transition seems quite easy to the idea expressed at page 9, Vol. III, of Colebrooke's translation of the Digest, that no right is vested in the son if it is resisted by the father's declared will,--"This shall belong to the priest." I ought to add that the passage I refer to relates to a gift completed by delivery during life, but it seems equally applicable whether delivery took place in life or not.

85. There are several passages in the older writers which lead to the inference that gift by will is included when they are speaking of gifts in general terms, and of what can, and what cannot be given. In the Sonrite Sara, it is said the gift of a man's whole estate is valid, for it is made by the owner, but the donor commits a moral offence because he observes not the prohibition. Now such a gift would hardly be made otherwise than to take effect on the death of the donor, or in contemplation of his becoming an anchorite. Vrihaspati and Menu say in general terms,--"At his pleasure a man may give what he has himself acquired." Narada says,--"The father "advanced in years may himself divide the estate among his sons, giving to the first-born the best portion, or in any mode which he shall choose." In Colebrooke's Digest, Book V, Chapter 4, Section 1, Sloke 3, is a passage from Katyayana as follows:

What a man has promised in health or in sickness for a religious "purpose must be given, and if he die without giving it, his son shall, doubtless, be compelled to deliver it. Jimuta Vahana, in the Dayabhaga, points out that gift is the cause of ownership. It would follow that, in his opinion, a gift by will, though the donee did not accept in the life-time of the donor, would vest property in the thing given in the donee, so as to entitle him to accept and appropriate it at his pleasure after the death of the donee without needing the assent of the heirs. There is a plain allusion to a will in the Digest of Jagannatha Tarkapanchanana, Book V, Chapter 1, Section 1, Article 1, Sloke 2, note. It is said to be in accordance with the opinion of Vachaspati Bhattacharjee (author of the Dewaitahirnaya). If a father at the point of death, or becoming an anchorite, declares : So much wealth is left by me, "let it belong to my "sons," it may, in that case, be said he died or became an anchorite after giving or bequeathing all his property to his sons." In the 2nd volume of the Digest, page 284, it is said : In the case of a gift in this or other form, "this field belonging to me shall be thine after my death," the act of volition which constitutes gift is passed at that very time. The property of the giver is not divested, nor is it vested in the donee until after the giver's demise." It is added: "Authors admit the gift of a future thing.

86. Now if I am right in thinking that a law of wills is part of the Hindu law, and not a mere usage which has grown up of modern times, borrowed from Western civilization, the extent and nature of the disposition which a Hindu testator is capable of making is not a question to be determined upon any notion of public expediency, as supposed by Mr. Justice Phear, or of custom or usage as suggested by Mr. Justice Markby in a late case, but depends on the nature of the power which the testator is exercising, and must be

regulated by rules to be found in, or directly deduced from, Hindu law. Mr. Justice Phear says, A will has been well termed a testamentary trust." I do not know to what he refers, or whether the expression has ever been applied to a Hindu will. An English will has been said to operate as a declaration of uses, but I think, that that expression would be wholly inapplicable to a Hindu will.

87. The truth is that the Roman testament, by which the hereditas, the entire political and social rights of the testator, were transferred to the person appointed to be heir, with a testament or writing containing directions to the heir or the familiae emptor, as to how the property should be disposed of after the death of the testator, the English will of personality appointing an executor, and containing the testator's will as to what he would have done with the property after his death, under which a legatee does not take his legacy without the assent of the executors; the English devise of land, which is considered not in the nature of a testament, but as a conveyance by way of appointment to a particular devisee, and the Hindu will, though all passing under the common name of will, were, in their origin, and are in their nature, distinct things. I think that there is no ground whatever for saying that a Hindu will can operate as a declaration of uses.

88. In May 1812, Mr. Henry Colebrooke, then a Judge of the late Sudder Court, in answer to a question by Sir Thomas Strange, whether a Hindu can dispose of his property by will, writes as follows:--"After much consideration of the question when agitated here some years ago, it was settled that a will must be held valid in the case of a Hindu, being in fact a gift made in contemplation of death, which the Hindu law, if it does not directly sanction, contains at least nothing to prohibit. Considering it then as a gift to take effect at a future time determinable by a certain event--the decease of the giver--I apprehend it must be governed and controlled by the general rules regarding gifts." See 2 Strange's Hindu Law, page 431. Again, in a further letter at page 435, he says:--"A man cannot confer on a stranger or his own heir, by will, what he could not bestow by deed of gift." Now, in order to make a gift valid in Hindu Law, it would appear that there must be a person capable of accepting the donation. In the Dayabhaga, Chapter 1, Section 21, it is said,--"In case of donation, the donee's right to the thing arises from the act of the giver, namely, from his relinquishment in favor of the donee, who is a sentient person."--See also Shamachurn's Vayavastha Darpana, page 600. In a passage there cited from Srikrishna's Commentary upon the Dayabhaga, it is said,--When a donor makes a gift to an absent person with an assurance that the donation will be accepted by him,--the donee's right accrues; but if it be known that the gift would not be accepted by the donee, the donor's right is not extinguished." In such case the gift is said to be void. As the ownership of the donor has expired by his death, the thing which has been given by such void gift becomes at once part of the heritage of the deceased, and partible amongst his heirs. To use the words of the Commentator Jagannatha Tarkapanchanana, Colebrooke's Digest, Book V, Chapter I, Section 1, Sloke 11, note, the vesting of the right in the sons is no longer resisted by the father's declared will. The property in that which is not given vests at once in the heir of the testator. On that principle, according to Hindu

law, a gift to a person not in existence at the time of gift, would fail. If such is the rule of Hindu law, it is not one which is exceptional or anomalous. It would be in fact strictly analogous to the ancient rule of Roman law before the introduction of fidei commissa, and that of English law before the introduction of trusts. By the ancient Roman law, a child born after the death of the testator was incapable of taking as heir or legatee under a testament. He had not at the time of the testator's gift any certain existence, and the law said *incerta persona hirc 1/2 res institui non potest*. In course of time the law permitted the posthumous child, if a child of the testator or of his descendants in the male line, to become an heir, but the civil law never permitted the child of a stranger born after the testator's death to be a legatee. It is a rule in English law that a devise ought to be good and take effect at the time of the death of the devisor; and, therefore, it was ruled that if a man seized of land devised the same to the priests of a College or Chantry, and there was not any such College or Chantry at the time of the death of the devisor, and afterwards such a College or Chantry was made, the devise was void. The reason is stated as follows : the devisees are purchasers, and when a man takes lands or tenements by purchase he ought to be of ability to take the same when it falls to him by the purchase, or otherwise he shall not have the same. So a devise in remainder to a corporation where there was none such, has been held void, though the corporation was created before the remainder fell. It was early recognized as a principle of English law that a devise may be made to all such persons to whom a grant may be made. By the conjoint operation of the Statute of Westminster, and by the introduction of the system of trusts by which the beneficial interest was dealt with as a thing distinct from the legal estate, the power of an English testator to limit estates in futuro was greatly increased. In *Scattergood v. Edge* 12 Mod. Rep. 286, in the eleventh year of the reign of King William the Third, we find Treby, Chief Justice, saying, "Ancient books generally ran, "A devise to a son in the womb of his mother, is void." But I think we must allow such a devise to be good now, for otherwise many wills would be destroyed, which would be inconvenient; and surely there is no difference between saying "I give my land to the child my wife goes with," and "to the child my wife shall have." He adds, executory devises are utterly unknown to the common law, Mr. Justice Phear treats the question whether an unborn person can take under the will of a Hindu as disposed of by the judgment of the Privy Council in the case of *Sreemutty Soorjeemoney Dossee vs. Denobundoo Mullick* . The question there was not as to the effect of gift to a person not in existence. The testator had devised his estate to his sons with a proviso, which was construed to mean that if either of such sons died without leaving a son or son's son living at his death, neither his widow nor daughter should get his share, but the same should go over to the other sons. This was exactly what would have happened if the family had been a joint Hindu family governed by the Mitakshara. Their Lordships held the gift over to be valid. They treat the question as being whether there is anything against public convenience, anything generally mischievous, or "anything against the general principle of Hindu law, in allowing a testator to give property, whether by way of remainder or executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being." Their Lordships thought there was not, and that there

would be a great general inconvenience and public mischief in denying such a power, and that it was their duty to advise her Majesty that such power does exist, Now, so far as regards limitations to persons in existence at the date from which the will speaks, and so capable of taking a vested interest to take effect in possession on the happening of some future event, that is no doubt true. But whether a Hindu could by will make a devise of his property to an unborn person, was not the question before their Lordships, and for myself I cannot assume that they meant to decide it. We have not been referred to a single case in which a devise by a Hindu to an unborn person has been held good. I am disposed to think that there is not much reason why Courts of Justice should endeavour by construction to extend the power of disinheritance by will already possessed by Hindus in Bengal. In England the law of primogeniture exists. The testamentary powers are of the greatest importance to enable a father to make proper provision for his younger children. Amongst Hindus, the sons inherit equally, and wives and daughters have a right of maintenance out of the estate of a deceased man. As Mr. Ingram very fairly said, The rule amongst Hindus is not testacy but intestacy." The will of a father disinheriting his children is looked upon as a sin, though operative on the principle of *factum valet*,

89. Now, if in order to constitute a valid gift by will, according to Hindu law, there must be a person in existence capable of accepting at the time from which the will speaks; it will follow that no gift to an unborn person can take effect.

90. But suppose a trustee is interposed, and the gift is to a trustee who would be a person capable of accepting in trust for a person to be born within a life in being. Suppose, for instance, a man having a son blind, insane, of weak intellect, or hopelessly extravagant in his habits, were to give his property to a trustee, upon trust to provide for the maintenance of his son and his family during the life of that son, and after the decease of that son in trust for the child or children of such son : suppose the son at the date of the will had no children, would the limitations in favour of the children to be afterwards born be valid according to Hindu law? I am not at present prepared to say that it would not. It is not necessary to decide that question, for it does not arise in the present case. If we were now to decide that a Hindu can make a gift by will to an unborn person, we should, undoubtedly, be extending the testamentary power of Hindus by judicial construction. It would be inconvenient to do this to the extent of allowing Hindus a power of disposition by will, and a right of restricting the enjoyment of those to whom they may bequeath their estates, which is not permitted to any persons to whomsoever the Indian Succession Act would apply. In the present case, the limitations to unborn children purport to confer on them no more than life-interests. By the 100th section of the Indian Succession Act, it is enacted that where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the latter bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed." It seems to me that the enactment proceeds on sound and intelligible principles. It is not necessary that we should determine that the gifts to the unborn children are wholly valid, because, as I shall presently show, the gifts are at most gifts of

life-interests, and therefore even if unborn sons can take at all, it will not affect the plaintiff's right to maintain this suit. Mr. Justice Phear says that a devise of property to the use of a person, and the heirs male of his body issuing," appears to him to be fairly and reasonably interchangeable with, and equivalent to, a gift to "a person, his sons, and his sons" sons; but it seems plain that, in the present case, there is no devise to any person and the heirs of his body. The clause immediately following the words referred to by Mr. Justice Phear, and the interpretation clause, read together, show that the gift is not to the sons of Jatindra Mohan and the heirs of their bodies, which words would mean in their natural sense their sons taking as heirs according to Hindu law. The words "heirs male of his body" are used in an artificial sense, for the purpose of indicating persons who are not the heirs, but persons selected by the testator from among the heirs, who are to take in succession by special limitation or special substitution, or if any one prefers that term, each in his turn as a purchaser. Persons taking under such special substitution, do not take estates of inheritance. The intention is plainly to give to each in succession no more than an estate for his own life; they have no power of disposition. If the testator has given a succession of estates for life, we cannot construe the gift as a gift of the inheritance, because it cannot take effect as the testator intended. We certainly should not be carrying out the intention of the testator, as expressed in his will, if we treated the first unborn son of Jatindra Mohan who should come into existence as intended by the testator to take an estate of inheritance. We should be treating every subsequent limitation as having been intended by the testator to be merely nugatory, or at least as entirely subordinate to the object of giving the property to the first son of Jatindra Mohan Tagore, on conditions which would enable him at once to defeat the whole of the objects which the testator declared that he had in view in limiting the estate as he has done. In a somewhat similar case, *Seaward v. Willock* 5 East, 198, Lord Ellenborough "said, The meaning of the testator clearly was to "give estates for life only to his grandsons, and after them to his sons, and after them to their sons down to the tenth generation. But this he could not do by law, inasmuch as the law will not allow a succession of limitations for life to persons unborn." Can we then make another will for the testator giving the devisees different estates from those, he meant to give to them, because the estates he intended cannot, by the rule of law, take effect? This I conceive would be assuming a power which does not belong to us."

91. I do not propose to consider the position of Surendra Mohan Tagore, his sons, Promoth Kumar Tagore and Sarat Chandra Tagore, and the sons of Jadu Nandan, the son of Lallit Mohan Tagore. These persons were all in existence at the time of death of testator; it is sufficient to say that the utmost to which in any event any one of them can be entitled is a life-interest to the property. It may be that the devises to these persons will fail, as being given to them in succession after limitations to persons who, by no possibility, could take under the gifts to them, first, because we cannot assume that the testator would have given anything to the subsequent devisees if he had known that this prior gift could not take effect; and, secondly, because if gifts over in such cases were held to be valid, it might, in many instances, wholly defeat the testator's intention.

92. But the case of *Evers v. Challis* 7 H. L. C. 531 creates a doubt in my mind whether the prior limitation may not be treated as divisible. Whether if Jatindra Mohan died without ever having had any children, and without leaving a widow with power to adopt, Surendra Mohan might not, as suggested by Mr. Phillips, take an estate for life by way of remainder on the happening of those events, according to the case of *Lady Langdale v. Briggs* 6 De Gex. M. & G. 391, we cannot, under the 15th section of Act VIII, now make a binding declaration as to what may be the right of Surendra and the others, in events which have not happened; and therefore I abstain from pronouncing a decided opinion on the subject.

93. As soon as the legacies and annuities are satisfied, there is a trust to convey the real estate to and unto the use of the person who shall under "the limitations and directions herein contained, be entitled to the beneficial interest therein, with, under, and subject to such and the like "limitations, provisions, and directions, as are hereinafter contained and expressed of and concerning the said real estate as far as the then conditions and circumstances will permit, and so far, but so far only, as such limitations or directions can be introduced into any deeds of conveyance or settlement, without infringing upon or violating any law "against perpetuities which may then be in force, and apply to the said real estate, and the conveyance or settlement of it as last aforesaid, if any such law there shall be," It appears to me that this clause cannot, in any way, improve the position of the devisees under this will. In the first place, a testator cannot, by directing trustees to execute a conveyance at a future time, extend his own testamentary powers, or enable himself, through the intervention of such trustees, to make dispositions, which he could not have made himself at the date of his will. See the *Duke of Marlborough v. Lord Godolphin* 1 Eden's Chancery Cases, 404. Secondly, when the power given by the will, with reference to this object, is carefully considered, it does not appear to authorize the revocation of, or in fact any interference with, the existing limitations in the will, further than as they may be affected by any future law against perpetuities not in force at the date of the will. The testator evidently considers that he had provided for all existing difficulties of that kind.

94. I now come to the clause relating to the personal estate which the plaintiff alleges the executors to have misapplied; the material parts of it are as follows : (reads paragraph 3) 4 B.L.R. O.C.J. 106, 110 and 111. (I give, devise, and bequeath all my property, both real and personal, of what nature or kind soever--shall be the person entitled to the rents of the real estate).

95. The gifts would have been probably void for uncertainty, not only because there is no one who can answer the description, and can accept the gift, but because it cannot be ascertained who will be the person entitled to take under the gift until what must apparently be a remote and uncertain period, which may possibly extend far beyond the limits of the lives of persons now in existence. Even if this gift be treated as coming by way of proviso on the gift of the income of the same fund, there is a further element of uncertainty. What is the meaning of the words person or persons?" The word "or "used in its proper and ordinary sense is a disjunctive participle. If that is the true construction, the

case would resemble that of *Loundes v. Stone* 4 Ves. 649. I do not think that, as a matter of fact, the insertion of the words "or persons" is a mere accident or a mistake of that sort. On the contrary, I believe that it is probable that the testator had a meaning in writing these words. The use of this expression, which I think cannot be rejected, seems to me inconsistent with the notion that any single person was intended to take and be at liberty to use and expend the corpus of the fund absolutely for his own purposes, though the events should happen on which it is to go to him. My impression is, that if the true construction is that the gift is an absolute gift of the whole fund to the person who may be entitled to the rents of the estate at the time when all the legacies and annuities shall have been paid off, the gift is bad for uncertainty. But, if the true construction is that the person then in possession and his successors should take the entire income and profits of the fund without deduction, then it would stand on the same footing as the gift of the surplus income. But there is the third alternative, that it is wholly uncertain what was the testator's meaning, whether he meant the person entitled to the rents at the time when the legacies and annuities shall have all been paid, to take absolutely or not. For myself, I incline to that view. I think it not necessary to decide, and indeed we have no power to make any binding decision at the present time, as to the surplus income of the personality; but I concur with the Chief Justice in thinking that the gift of the corpus is void; and, therefore, that, subject to the trusts affecting the income, it belongs to the plaintiff as heir of the testator. It is plain that if, instead of paying the legacies out of the income, as directed by the will, the trustees sell Government paper for that purpose, the interest of the plaintiff may be most seriously affected. The result is that I agree with the Chief Justice in his findings on all the issues. The decree of the appellate Court was as follows:

It is ordered and decreed, that the decree of the lower Court, in its Ordinary Original Civil Jurisdiction, dated the first day of April last, be and the same is hereby reversed; and it is declared that the plaint in this suit does disclose a cause of action; and it is further declared that Prasanna Kumar Tagore, the testator, in the pleadings named, did die intestate as to certain portions of his property; and it is further declared that part of immovable property of the said testator was ancestral estate, and that he had a right to dispose thereof by will; and it is further declared, that the plaintiff is not entitled to any maintenance from the estate of the said testator; and it is further declared that the devises and gifts by the will of the said testator to Jatindra Mohan Tagore for life are valid, and that, subject to the trusts and provisions in the said will contained for the payment of the debts of the testator, and the legacies and annuities bequeathed by his will out of the rents and profits of his real property, he is entitled during his life to the beneficial enjoyment of the real property so devised to him, and of the rents or surplus rents thereof; and that under the trusts of the will he is entitled, until the legacies and annuities in the said will mentioned shall fall in and be fully satisfied, to receive the sum of rupees two thousand and five hundred a month, out of the net rents of the immovable property, and also the surplus rents of the said immovable property, and the unexpended surplus of the interest, dividends, and annual proceeds of the moveable property, which shall, from time

to time, remain unexpended after making the payments directed by the will to be made out of the said rents, interest, and dividends; and it is further declared that the said Jatindra Mohan Tagore is entitled for life to use and enjoy the library, carriages, horses, farm-yard, furniture, jewels, gold, and silver plates, and other articles belonging to the said testator, except the jewels, household furniture, and other articles which, at the time of the death of the said testator, was or were in the personal use of any member or members of the said testator's family which, by the will of the said testator, were not, and are not to be, collected, got in, or sold by the said trustees and executors; and it is further declared that it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immovable property or to any portion of the rents thereof, or as to the surplus income of the personality, so long as the debts, legacies, and annuities are unsatisfied; and it is further declared that the trust as to the personal estate by the said will directed to be invested, or continued in investment, by the said trustees, so far as such trust relates to the said personal estate after the annuities and legacies given by the will shall have fallen in, and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the plaintiff, as the heir and the representative of the said testator; and it is further declared that the first three defendants, executors and trustees, are bound to render to the plaintiff an account of the debts due from the testator, at the time of his death, and of the rents and profits of the immovable property of the said testator, and also an account of his moveable property, and of the interest and dividends of such moveable property, and of the mode in which they have applied the said rents, profits, moveable property, interest, and dividends; and it is further ordered and decreed that the costs of the parties in the lower Court (as between attorney and client on Scale 2) be paid out of the surplus rents and profits of the real property of the said testator, and that if such costs have been paid out of the personal estate, the amount thereof be made good to the personal estate, out of the said surplus rents and profits of the real estate; and it is further ordered and decreed that the plaintiff's (appellant's) costs occasioned by the appeal be taxed as between attorney and client on Scale 2, and paid out of the said surplus rents and profits of the real property, and the consideration of the question of the defendant's costs occasioned by the appeal is reserved until the accounts to be rendered by them have been delivered in; and it is further ordered and decreed that this case be remanded to the lower Court, with a request that it will try the 6th issue and return its finding thereon with the evidence to the appellate Court.