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Before Mr. Justice Farran.

JAVERBAI (*Plaintiff*) *v.* KABLIBAI (*Defendant*).*
[29th and 30th August, 1890.]

Will—Construction—Succession Act X of 1865, *ss.* 98, 100, 102—*Gift to a class some of whom not in existence—Rule in Tagore Case—Valid gift—Subsequent gift valid although prior gift void—Contingent gift—Succession Act X of* 1865, *s.* 103—*Power of appointment given by will, Effect of—General power of appointment.*

Mancharam Pitambardas by his will dated 14th April 1873, after appointing his brother Jamnadas to be his executor and directing the payment of legacies, bequeathed all his estate, moveable and immoveable, not otherwise disposed of, to Jamnadas, his executors, administrators and assigns, upon trust to collect outstandings and to pay debts and legacies and to stand possessed of the residue in trust (1) for his (the testator's) wife Javerbai and Ambavahu, the wife of his brother Jamnadas during the life of both, or the survivor of them, for their or her sole use; (2) and from and after decease of the survivor of them in trust for the male issue of Jamnadas, if any there be; (3) and, in default of such male issue, in trust for any person or persons, in any shares or share, and in such manner as his brother Jamnadas should by any deed or deeds or writing or writings appoint with or without power of revocation or new appointment.

Jamnadas proved the will, and as executor managed the estate until his death on the 17th October, 1888. He had no male issue, but he had two daughters, who were the defendants in his suit. Shortly before his death, *viz.*, on the 7th October, 1888, he made a will (as stated therein) in accordance with the authority given to him by the last clause of the will of Mancharam. He directed that twelve months after the death of Javerbai (Mancharam's widow) the estate should be divided equally between his two daughters, Kabli and Moti.

[327] *Held*, that the trust in Mancharam's will in favour of the male issue of Jamnadas, was void under the rule laid down in the *Tagore Case* (1). The testator plainly meant that the male issue of Jamnadas living at the death of the survivor of the tenants for life should take the estate according to the rules of Hindu law, without distinguishing between those born in the life-time of the testator and those born prior to that event, but subsequently to his death. At the death of the testator, Jamnadas had no male issue, and the bequest was, therefore, a bequest to a person or persons not in being, and void.

Held, also, regarding the subsequent creation of the power in favour of Jamnadas as equivalent to a gift of the estate to him, that such gift was valid, although the prior gift was void. It was a gift to him if he should have no male issue; a gift which, as he was alive at the death of the testator, was good under Hindu law. It was not a gift over to him on an indefinite failure of his male issue. It came into force immediately on the death of the surviving tenant for life if at that time he should have had no male issue alive between the death of the testator and the latter event. If a son had been born to him after the testator's death, the gift to him could not have come into operation. It was only in the event of no son being born to him that he could take. It could not, therefore, make any difference that the testator made an ineffectual and inoperative disposition in favour of such son if born. The rule of the *Tagore Case* (1), that the gift of an estate to take effect after the failure of previously created invalid estates is void, did not apply.

Held, further, that the power of appointment given by Mancharam's will operated to confer ownership upon Jammadas after the death of Javervahu upon his executing his will, and that the bequests given by his will to his daughters, the defendants, were valid bequests.

SUIT for the construction of a will.

Mancharam Pitambardas, the husband of the plaintiff, died on the 14th April, 1873, having made his last will, dated 7th July, 1869, whereby

* Suit No. 235 of 1890.

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he appointed his brother, Jamnadas Pitambardas, his executor. Jamnadas proved the will, and as executor managed the estate of the deceased until his death on the 17th October, 1888.

The plaint stated that Jamnadas had no property of his own, but on the 7th October, 1888, a few days before his death he "made a will with the object (as expressed therein) of making a will in accordance with the authority given him by the last clause of the will of the said Mancharam Pitambardas. The said will acknowledged all the property to be that of the estate of Mancharam Pitambardas."

[328] Shortly after the death of Jamnadas, *viz.*, on the 27th January 1890, letters of administration, with the will annexed *de bonis non*, to the estate of Mancharam were granted to plaintiff, Javerbai, and letters of administration to the estate of Jamnadas were granted to his daughter Kablibai, (defendant No. 1).

By his will Mancharam, after appointing Jamnadas his executor and directing the payment of certain legacies, provided as follows :—

Clause 4. "I hereby demise and bequeath all my immoveable and moveable estate and effects not hereinbefore otherwise disposed of (except estate vested in me as a trustee or mortgagee) unto my brother the said Jamnadas Pitambardas, his executors, administrators and assigns' upon trust that her the said Jamnadas Pitambardas, his heirs, executors, administrators and assigns shall call in and collect all my outstandings and pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my last will as aforesaid, and shall stand possessed of the said residuary trust monies and all my immoveable and other moveable property in trust for my wife Javervahoo and for Ambavahoo, wife of my said brother Jamnadas Pitambardas, during the life of both or the survivor of them for their or her sole use, benefit, advantage and comfort, and from and after the decease of the survivor of them in trust for the male issue of my said brother Jamnadas if any there be, and, in default of such male issue as aforesaid, in trust for any person or persons, in any shares or share, and in such manner as my said brother Jamnadas shall by or any deed or deeds, or writing or writings, appoint, withor without power of revocation and new appointment."

With reference to the above clause the plaint stated as follows :—

"7. The plaintiff is advised that under the will of Mancharam Pitambardas there is no doubt that she is now entitled to life-interest in the whole of the property and estate of Mancharam Pitambardas, and she is also advised that it is doubtful whether or not she is not entitled to the whole of the moveables absolutely and to a widow's estate in the immoveables."

"9. The principal questions which arise on the said will are, the plaintiff is advised, as follows :—

"(*a*) Whether the trusts created by the said clause (4) subsequent to the trust for the life of the plaintiff are not wholly void ?

"(*b*) Whether the power given by the said clause, if a valid power, authorizes an appointment by a will ?

"(*c*) Whether the said Mancharam Pitambardas has not died intestate (in the events that have happened) with regard to the whole residue of his estate, moveable and immoveable, save so far as a life-interest in the property has been created in favour of the plaintiff ?"

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[329] The material parts of the will of Jamnadas Pitambardas, dated the 7th October, 1888, were as follows:—

"Now my health being bad I make this my last will or testament in accordance with the authority given to me in the last clause of the will of my deceased brother Mancharam Pitambardas, dated 7th July, 1869, (and this) *nemnuk patra* or deed of appointment and (this) arrangement for the maintenance of the family."

Then after directing certain outlays it concluded as follows:—

"After making all the above-named outlays as to whatever immoveable and moveable property and ornaments and jewels and clothes and apparel and furniture, all the household goods and things that there may be, the owners and heirs to the same are my daughters Ben Kabli and Ben Moti. They after the expiration of twelve months after my brother's widow Bai Javer's death shall truly divide and take the same in equal shares. According to these particulars as written above this my last will—that is, testament—is made. The same shall be accepted and agreed to by my heirs and representatives. In the *Samvat* year 1944; also *Sud*, 2nd Sunday; date 7th October 1888."

The two defendants, Kabli and Motibai, were the daughters of Jamnadas Pitambardas. Motibai was born in 1876 long after the death of Mancharam. Jamnadas had no male issue.

The following paragraphs of the plaint set forth the plaintiff's case:—

"11. The plaintiff is advised that it is doubtful whether the said will (*i.e.*, of Jamnadas) is operative in any way so as to affect the estate of Mancharam Pitambardas. The plaintiff is also advised that, assuming the power given by the will of the said Mancharam Pitambardas to the said Jamnadas Pitambardas was a valid power, that it is doubtful whether the exercise of such power by the said Jamnadas Pitambardas is legal, and she submits that the will of the said Jamnadas Pitambardas does not affect in any way the estate of the said Mancharam Pitambardas."

"13. The plaintiff says that the will of the said Mancharam Pitambardas should be construed by this Honourable Court, and the validity or invalidity of the trusts thereby created declared, and that it should be declared that the will of the said Jamnadas Pitambardas did not affect in any way the estate of the said Mancharam Pitambardas.

"14. The plaintiff is advised that, as widow of the said Mancharam Pitambardas, she is in all probability, in the events that have happened, entitled absolutely to the whole of his moveable and to a widow's estate in his immoveable property."

The plaintiff prayed—

"(*a*) That the will of the said Mancharam Pitambardas may be construed by this Honourable Court, and the validity or invalidity of the trusts thereby created declared.

[330] "(*b*) That it may be declared that the said will of Jamnadas Pitambardas was not a valid exercise of the power of appointment in pursuance of which it purported to have been made.

"(*c*) That the will of the said Jamnadas Pitambardas may be declared to be of no effect in disposing of or dealing with the estate of the said Mancharam Pitambardas.

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"(*d*) That the rights of the plaintiff and defendants (if any) in the estate of the said Mancharam Pitambardas may be ascertained and declared."

The following issues were raised at the hearing:—

(I) Whether the trusts created by the fourth clause of the will of Mancharam, or any and which of them, are void?

(II) Whether the power of appointment given by the said clause is a good and valid power?

(III) Whether such power, if good and valid, has been validly exercised?

(IV) Whether, upon the findings on the above issues and in the events which have happened, the said Mancharam died intestate, save in so far as a life-interest in the property left by him was created in favour of the plaintiff?

Inverarity and *Anderson*, for the plaintiff referred to *Srimati Bramamayi Dasi* v. *Jages Chandra Dutt* (1); *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (2); Succession Act X of 1865, s. 103; *Ramguttee Acharjee* v. *Kristo Soonduree Debia* (3); West and Bühler, pp. 171—178, 179, 217 (3rd ed.); Mayne's Hindu Law (4th ed.), pl. 354.

Lang (with Advocate-General), for defendant No. 1 (Kablibai) referred to *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (4); Sugden on Powers, p. 394 (8th ed.).

Tyabji and *Russell*, for defendant No. 2 (Motibai) cited Mayne's Hindu Law, pls. 381, 382, 384 (4th ed.); Theobold on Wills (3rd ed.), p. 352: *Hales* v. *Margerum* (5); *Langham* v. *Nenny* (6).

JUDGMENT.

FARRAN, J.—The first four issues in this case raise questions as to the validity of the devise of the residue of the estate of one Mancharam Pitambar. By the fourth clause of his will, [331] the testator devised and bequeathed the residue of his estate to his executor, his brother Jamnadas, his executors, administrators and assigns, upon trust to collect and get in his outstandings, and after payment of funeral and testamentary expenses, debts and legacies to stand possessed of the residuary trust monies and all his immoveable and other moveable property in trust for his wife Javervahoo, and for Ambavahoo, wife of his brother Jamnadas Pitambardas, during the life of both or the survivor of them, for their or her sole use, benefit, advantage and comfort; and after the decease of the survivor of them in trust for the male issue, if any there be, of his said brother Jamnadas; and, in default of such male issue as aforesaid, in trust for any person or persons, in any share or shares, and in such manner as his said brother Jamnadas should, by any deed or deeds, writing or writings, appoint with or without power of revocation and new appointment.

The above will was dated the 7th July, 1869. The testator died childless on the 14th April, 1873, leaving him surviving his widow Javervahoo, the plaintiff in this suit, and his brother Jamnadas, and Ambavahoo, the wife of the latter. At the date of the will, Jamnadas had no son or male issue, nor was a son afterwards born to him; but he had a daughter, the defendant Kabli, who was born in the life-time of the

(1) 8 B.L.R. 400. (2) 2 C. 262. (3) 20 W.R. C.R. 472.
(4) 11 I.A. 164. (5) 3 Ves. Jun. 299. (6) 3 Ves. Jun. 467.

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testator, and another daughter, the defendant Moti, was born to him after the testator's death. Ambavahoo died before Jamnadas. Jamnadas died on the 17th October, 1888. By his will dated 7th October, 1888, subject to the plaintiff Javervahoo's life-interest therein, and subject to certain specific bequests and directions, he directed his daughters Kabli and Moti to divide the residuary estate of Mancharam between them.

The whole scheme of the will of Mancharam, the dispositions of which accord with Hindu ideas, is one which the Court would willingly support, if, having regard to Hindu law as expounded by the latest authorities binding upon the Court, it can properly do so. The first point for consideration is one purely of construction. Is the bequest "to the male issue of Jamnadas, if any there be," to be construed as a bequest to such male issue, if any there **[332]** be at the death of the testator, or if any there be at the death of the survivor of the tenants for life, or if any there be at any time? To decide this we may refer to s. 98 of the Succession Act, X of 1865, which is embodied in the Hindu Wills Act XXI of 1870, s. 2. This section (98) enacts that "where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death. *Exception.*—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator." Read in the light of that section, the bequest under consideration means a bequest to the male issue of Jamnadas born in the life-time of the testator or at any time previous to the death of the survivor of the life-tenants Javervahoo and Ambavahoo. The will in question was made previous to the Hindu Wills Act XXI of 1870 coming into operation, and that Act does not directly apply to any will made by a Hindu before the 1st of September, 1870; but the rules laid down in the Succession Act X of 1865 are, for the most part, old standing rules of construction, which I think ought to guide the Court in ascertaining the meaning of the testator. Independently, however, of such rules, I think that I ought to arrive at the same conclusion. Reading the whole clause, the testator plainly meant that the male issue of Jamnadas, living at the time of the death of the survivor of the tenants for life, should take the estate according to the rules of Hindu law, without distinguishing between those born in the life-time of the testator and those born prior to that event, but subsequent to his death. At the death of the testator, Jamnadas had no male issue, and the bequest was, therefore, a bequest to a person or persons not in being, and void under the rules laid down in the *Tagore Case* (1).

In considering the next question which arises, I shall treat for the moment the creation of the power in favour of Jamnadas as a **[333]** gift of the residuary estate to him. The will in that view gives the residuary estate to the male issue of Jamnadas born before the death of the surviving tenant for life, and, in default of such male issue, to Jamnadas. It is, in other words, a gift to Jamnadas if he shall have no male issue. As Jamnadas was alive at the death of the testator, this gift to him is

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perfectly good under Hindu law—*Sreemutty Soorjeemoney Dossee* v. *Dinokand Mullick* (1); *Kumar Tarkeswar Roy* v. *Kumar Shoshi Shikhareswar* (2), unless the intermediate gift to the male issue of Jamnadas, in default of which the gift to Jamnadas comes into play, invalidates it. I cannot help thinking that the decision in the last quoted case is an authority for saying that it does not. There the gift was to each of the nephews of the testator and their sons and grandsons and other descendants in the male line, and there was a gift over of the share of each nephew to the surviving nephew or nephews in the event of any of them dying without leaving a male child. Their Lordships of the Privy Council held that the gift to the sons and grandsons, &c., was void, and that, therefore, each nephew only took an estate for life; but they also held that the gift over, in the event of a son dying without leaving a male child, was good.

It is to be observed that the gift over to Jamnadas is not on an indefinite failure of his male issue, but comes into force immediately on the death of the surviving tenant for life, if at that time he (Jamnadas) shall have had no male issue alive between the death of the testator and the latter event. It is not a limitation ulterior to or expectant on a devise invalid for remoteness. It is also to be observed that ss. 100—102 of the Succession Act X of 1865 and ss. 13—16 of the Transfer of Property Act IV of 1882, even if applicable to this particular will, which they are not, do not affect the case. "In the first place, these Acts do not affect any rule of Hindu law, and, secondly, the sections quoted only cause the interest created for the benefit of a class to fail entirely when such interest fails by reason of any of the rules contained in the two preceding sections (which are **[334]** identical in the two Acts)"—*Manjamma* v. *Padmanabhayya* (3). The simple question is whether there is anything in Hindu law which makes such a gift inoperative. None of the cases cited before me show that there is. In *Srimati Bramamayi Dasi* v. *Jages Chundra Dutt* (4), the gift over was obviously bad for remoteness. The same remark applies to *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (5). These, too, were strictly cases of limitations over after failure of the previous estates, which, as I have shown, this is not. The reasoning, moreover, of the Judges in these cases, based upon the English law and the rules of the Indian Succession Act, has met with disapproval in subsequent cases, and cannot be relied on: see *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (6); *Ram Lal Sett* v. *Kanai Lal Sett* (7); *Manjamma* v. *Padmanabhayya* (3). The *Tagore Case* (8) itself shows that the gift of an estate to take effect after the failure or determination of previously created invalid estates is in itself void. Does this case fall under that rule? I think that it does not. If a son was born to Jamnadas after the death of the testator, the gift to Jamnadas could not have come into operation. It is only in the event of no son being born to him that Jamnadas takes. Can it make any difference that the testator made an ineffectual and inoperative disposition in favour of such son if born? I think not. The event upon which the testator expressed his will that Jamnadas should take his estate has happened. Why, then, should he not take it? He was capable of taking the gift which the testator in a certain contingency willed that he should take.

(1) 9 M.I.A. 123.
(2) 10 I.A. 51 (57).
(3) 12 M. 393 (399).
(4) 8 B.L.R. 400.
(5) 2 C. 262.
(6) 11 I.A. 164.
(7) 12 C. 663.
(8) I.A. Sup. Vol. 47.

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It is objected that it could not be known at the death of the testator who would take the estate at the death of the surviving tenant for life, and that this uncertainty is repugnant to Hindu law. That is not so. It is sufficient if it can be known with certainty when the estate falls in at the death of the first owner. *Bhoobun Mohini Deby* v. *Hurrish Chunder* (1), *Manjamma* v. *Padmanabhayya* (2), *Kumar Tarakeswarv. Kumar Shoshi* (3), [335] all show that this is so. It appears to me, therefore, that there is no rule of Hindu law which would prevent Jamnadas from taking the estate in this case. He can only take it if the previous estate, whether lawful or otherwise, does not come into existence, and he must take, if he take at all, immediately on the death of the surviving life-tenant.

The trust declared upon the death of the surviving tenant for life does not, however, take the form of a direct trust in favour of Jamnadas, but confers upon him a general power of appointment in respect of the residue, which power he has purported to exercise. The property intended to be dealt with by the will is mixed, consisting partly of what in English law would be called realty and partly of what would be called personalty. Where the rules of English law are applied by way of analogy to Hindus, those relating to personalty as being less technical are more frequently resorted than those relating to realty. The English law as to powers, even when applied to personalty is technical. The appointor under a general power of appointment is a person who, having no estate or property in the subject-matter of the power, has the right to confer an estate or property in it upon himself or any one else when he pleases. In theory there is a wide difference between the holder of such a power and the owner of property. In practice there is but little. The property over which a man has the power of appointment passes under a general devise in his will. It is, when appointed by will, no matter in whose favour, assets for the payment of his debts—*Fleming* v. *Buchanan* (4). It passes to his creditors in bankruptcy. The distinction between a power over property and the ownership of it is frequently unknown to those to whom the power belongs: Williams' Real Property, p. 303. The chief, if not the only, distinction in practice is that, if the power is not exercised by the holder of it, the person to take in default of appointment becomes the absolute owner of the property: Williams on Personal Property, p. 319.

I have not considered carefully what the Anglo-Indian law upon this subject is, or how far, under that law, creditors can [336] avail themselves of a general power of appointment vested in their debtor. It is probably much the same as the English law. I think, however, that if the testator had asked the draftsman what would be the effect of the general power of appointment in his will, assuming it to be construed according to English law, he would have been given the above description of its scope and effect.

Powers of appointment, whether general or special, are, however, quite unknown to the Hindu law; and I have not been referred to nor have I found any case in which their adaptability to that system has been ever discussed. The technical idea upon which their introduction into English law is founded, is opposed to Hindu notions of the law of gift: West and Bühler's Hindu Law, p. 190 (3rd ed.). I think it would be difficult to find a place for powers in their system of law. The aggregate of practical rights which the possession of a general power

(1) 5 I.A. 138.
(2) 12 M. 393 (396).
(3) 10 I.A. 51 (57).
(4) 3 DeG. M. & G. 976.

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confers upon the individual possessed of them, is, however, an aggregate of rights which can be conferred, I think, according to Hindu law.

There is nothing in that law, I think, which prevents a testator bestowing a legacy upon another, subject to the condition that the legatee expresses in writing his willingness to receive it. It is only requiring that the volition of the donee necessary to complete the transaction, and which in the case of gift by will cannot concur at the same moment with the will of the donee, must be expressed in a particular manner. It is not, indeed, clear that a gift or bequest, subject to a condition precedent, is held void by Hindu lawyers. As pointed out by West and Bühler, p. 190 (3rd ed.), Nilkanth does not place a conditional gift amongst those which are essentially void: Vyavahara Mayukha, chap. IX, pl. 6; and in the works of other Hindu writers the word *upadhi* usually implies fraud and not merely condition: Dig. Bk. II, chap. IV, s. 54. The judgment in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo* (1) favours the argument that a testator might make a gift on such a condition: see also, as to conditional gifts, *N. Visalatchmi Ammal* v. *N. Subbu* [337] *Pillai* (2). If that be so, a bequest by the testator expressed thus would have been valid. "Jamnadas is to exercise full power over the residue if when the estate falls in he has expressed in writing his intention to accept it." In this city, Hindus frequently give property by will by declaring that the legatee shall have "power" or "power and authority" or "full power and authority" over it. I have met many such wills in the course of my practice.

Must, then, the intention of the testator be defeated, because, instead of using ordinary language, he or his advisers have employed a technical English phrase, the effect of which in practice is the same as such ordinary language would have produced, though according to the theory of the English law it is produced in another way and in one unknown to Hindu law? I think not. Jamnadas, as is seen by the tenor of his will, treats himself as the owner of the property upon the death of Javervahoo. The plaintiff herself attested the will after reading it, and must have entertained the same view. Any Hindu other than a Hindu lawyer would probably have done the same, especially as there is no gift over in default of appointment. In this case I think that I also ought to construe the will according to Hindu ideas, *ut res valeat*, rather than according to English principles, *ut res pereat*. On some such principle the Court must have acted in *Hales* v. *Margerum* (3): see *Langham* v. *Nenny* (4). On these cases it might be argued that even under English law the devise in question would give an absolute estate, as no previous limited estate is given to Jamnadas. I therefore construe the clause in question as conferring upon Jamnadas, upon his declaring his option in writing, "power" over the estate, in the Hindu sense, to do what he pleased with it, and to confer it upon whom he wished. He gave it after the death of Javervahoo, subject to certain charges, to the defendants Kabli and Moti; and I must hold that they took such bequests from him, and not from the original estate, and that they were, therefore, valid bequests. This view (if not dissented from by the Court of Appeal), puts an end to litigation between the parties. The opposite view opens a vista of further [338] litigation, in the course of which the whole estate would probably be wasted.

(1) 9 M.I.A. 123.
(2) 6 M.H.C.R. 270.
(3) 3 Ves. Jun. 299.
(4) 3 Ves. Jun. 467 (470).

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I find on the issues—1, that the trust created by the fourth clause of the will of Mancharam in favour of the male issue of Jamnadas is void, but that the other trusts thereby declared were not void; 2, that the power of appointment given by the clause operated to confer ownership in the residue upon Jamnadas after the death of Javervahoo upon his executing his will; 3, that the provisions contained in the will of Jamnadas are valid, and effectually dispose of the residue of the property left by Mancharam, subject to the life-interest of the plaintiff therein; 4, that Mancharam did not die intestate in respect of any of his property.

No finding on the other issues. Decree for the plaintiff, declaring that she is entitled to a life-interest in the property left by Mancharam Pitambar, and that, subject to such life-interest, the said property after her death has been validly disposed of by the will of Jamnadas Pitambar. Parties to bear their own costs.

Attorneys for the plaintiff:—Messrs. *Chitnis, Motilal and Malvi.*

Attorneys for the defendant:—Messrs. *Jefferson, Bhaishankar, Dinsha and Kanga.*

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Before Mr. Justice Farran.

LALCHAND BALKISSAN (*Plaintiff*) *v.* JOHN L. KERSTEN (*Defendant*).* [8th September, 1890.]

Contract of sale—Delivery—Contract time for delivery—Delivery on Sunday—Custom as to delivery.

Where the defendant, a European, was sued for damages for non-delivery of goods, and contended that he was not bound to deliver on Sunday.

Held, that delivery on Sunday was not unlawful, and that, in the absence of custom to the contrary, the defendant was bound to deliver the goods on that day if they had not already been delivered.

[Disappr., 24 Ind. Cas. 883=7 S.L.R. 141.**]**

SUIT for Rs. 2,500 damages for non-delivery of goods.

[339] The plaintiff sued as the assignee of a contract made by the defendant with Messrs. Hursamal Madhaoram on the 6th April, 1889. By this contract the defendant agreed to sell to Messrs. Hursamal Madhaoram one hundred tons rape-seed at Rs. 6-1 per cwt. "Delivery May June, 1889."

The plaintiff alleged that Messrs. Hursamal Madhaoram demanded delivery on the 29th June, 1889, but the defendant failed to deliver. Messrs. Hursamal Madhaoram accordingly by their attorneys' letter of the 4th July, 1889, demanded payment of Rs. 2,500 as damages, "being the difference between the contract price on the 30th June, 1889, but the defendant by his letter of the 5th July, 1889, repudiated his liability, on the ground that the said Hursamal Madhaoram failed to comply with the terms of the contract."

On the 11th October, 1889, the said Messrs. Hursamal Madhaoram assigned the said contract to the plaintiff.

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* Suit No. 229 of 1890.