ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

F. YORKE SMITH AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* TRIBHOVANDÁS MANGALDA'S (ORIGINAL DEFENDANT), RESPONDENT.* 1894. *October* 12.

Will—Construction—Bequest to executors and trustees in trust for son of testator and his widow—Life interest—Estate in fee—Control and management of executors and trustees.

Sir Mangaldás Nathubhoy, a Hindu, by his will bequeathed certain property to his executors and trustees "upon trust for my son Tribhovandás and his heirs from the time of my death to allow him to occupy and use the same, and to enjoy the income thereof and after the death of my son Tribhovandás, in trust to allow his widow to occupy and use the same and enjoy the income during her life; but if the said Tribhovandás Mangaldás shall die without leaving male issue him surviving, then in trust after the death of the survivor of them without leaving such male issue to my son Purshotamdás and his heirs according to the rules of Hindu law." The sons Tribhovandás and Parshotamdás both survived the testator, and Tribhovandás (the defendant) had a wife and three sons living at the date of suit. The defendant contended that under the above clause he was absolutely entitled to the property subject to the interest of his widow for her life. The plaintiffs, (the executors and trustees), contended that the defendant had only a life interest in the property.

Held, that the defendant Tribhovandás took only an interest for life in the property. The words "in trust for Tribhovan and his heirs," which, standing alone, would give the property in fee, were to be read with the words immediately following, which showed a clear intention that Tribhovan should only take a life interest to be followed by the same interest in his widow, after whom the heirs of Tribhovan would take as purchasers.

Held, also, that the trustees were intended to take the legal estate and to have the control of the property, allowing Tribhovan to enjoy the income of it.

SUIT for the construction of a will.

The plaintiffs were the executors and trustees of the testator Sir Mangaldás Nathubhoy, who died leaving two sons, *viz.*, Tribhovandás, (the defendant), and Parshotamdás. The testator's will was dated the 27th January, 1888, and was duly proved by the executors on the 8th May, 1890.

The will contained the following clause:—

"I devise and bequeath all my property at Girgaum Back Road and Khetvádi Road, as well as the furniture, pictures, glass and crockery ware and cooking utensils, that it may contain at the time of my death, to my said executors and trustees, upon trust for my son Tribhovandás and his heirs from the time of my death to allow him to occupy and use the same, and to enjoy the income thereof, and after the death of my

* Suit No. 670 of 1892. Appeal No. 805.

1894.

F. YORKE SMITH v. TRIBHOVANDA'S MANGALDA'S.

son Tribhovandás, in trust to allow his widow to occupy and use the same and enjoy the income during her life; but if the said Tribhovandás Mangaldás shall die without leaving male issue him surviving, then in trust after the death of the survivor of them without leaving such male issue to my son Purshotamdás and his heirs according to the rules of Hindu law."

The defendant at the date of the suit had a wife living and three sons living. Under the above clause he claimed to be absolutely entitled to the property mentioned therein, subject to the interest of his widow for her life. He accordingly contended that he had a right to manage and deal with the said property, and had erected a building on it to be used as a club without consulting the plaintiffs.

The plaintiffs, on the other hand, contended that as trustees the legal estate of the property was vested in them; that the only right of the defendant was to occupy it and enjoy the income during his life; and that all expenses of repair, &c., ought to be provided out of the income of the said property and not out of the general estate of the testator.

The last three clauses of the plaint were as follows :—

"9. The defendant recently on the 7th day of October, 1892, without communication with the plaintiffs, got a vernacular agreement prepared purporting to be between the plaintiffs and Dáda Fatubhái Patan and Bái Rái by which the plaintiffs purport to agree to let a portion of the said premises at Girgaum to Dáda Fatubhái and Bái Rái for cultivation purposes. The said lessees have executed the said agreement.

"10. The plaintiffs object to the defendant using their names as aforesaid, and submit that the defendant ought to be restrained by injunction from using the names of the plaintiffs in any agreement with reference to the said premises.

"11. The plaintiffs although they have not consented to the conversion of a portion of the said premises into a residential club are unwilling, if they are not bound by their duties as trustees aforesaid to do so, to compel the defendant to restore the said premises to their original condition; but, if this Honourable Court should be of opinion that they are bound to do so, they will, in addition to the relief hereafter specially prayed for, seek to have the said premises restored by the defendant to the condition they were in prior to the said acts of the defendant."

The following were the prayers of the plaint :—

"1. That the respective rights and duties of the plaintiffs and defendant with reference to the said premises may be ascertained and declared by this Honourable Court, and that all consequential directions and relief that arise on such declaration may be granted.

"2. That the defendant may be restrained by the injunction of this Court from using plaintiffs' names in any agreement with reference to the said premises and from entering into any agreement in the plaintiffs' names without their authority.

"3. That the said passage in the will of Sir Mangaldás Nathubhoy quoted in paragraph 2 of this plaint may be construed by this Honourable Court and the trusts created by the same may be ascertained and declared, and in particular what trust arises on the death of the survivor of the defendant and his wife in the event of the defendant leaving male issue him surviving."

At the hearing before Parsons, J., the following issues were raised :—

(1) Whether the defendant does not under the will take an absolute interest in the property, subject to the life interest of his widow, if any ?

(2) Whether in any event the defendant is not entitled to use the said property during his life-time as he pleases, and to alter existing buildings and erect new buildings on vacant portions so long as he does not thereby injure the reversion ?

(3) Whether the club in the plaint mentioned was built without the consent of the plaintiffs ?

(4) Whether the defendant has used the names of the plaintiffs as alleged in paragraph 9 of plaint ?

(5) Whether the plaintiffs are entitled to an injunction.

Macpherson and *Inverarity* for plaintiffs :—We say the defendant is equitable tenant for life of the property. He can occupy it, but cannot alter it. If he leaves no issue, the property will go to Purshotamdás ; but if he leaves issue, there will be an intestacy, as the will does not say who, in that case, is to take the property on the death of the defendant and his wife.

Lang (Advocate General) and *Scott* for the defendant :—The defendant is absolutely entitled. There is a gift to him and his heirs. The gift of the income carries the *corpus*—Succession Act (X of 1865), section 159 ; Mayne's Hindu Law (5th Ed.), para. 388 ; *Bhoobun* v. *Hurrish Chunder*[1] ; *Baker* v. *Sebright*[2] ; *Jones* v. *Chappell*[3] ; *Doherty* v. *Allman*[4].

PARSONS, J. :—I find on the first issue in the affirmative. It seems to me that the will while keeping the legal estate with the executors gives defendant an absolute interest in the property. It leaves it to him and his heirs. In the event, however, of his widow surviving him, it gives the widow a life interest. There is no question in this suit as to the legality of the bequest of that life interest or of the bequest to Purshotam after the death of the survivor without male issue. I think the latter gift cannot

(1) L. R., 5 Ind. Ap., 138.
(2) 13 Ch. D., 179, at p. 185.
(3) L. R., 20 Eq., 539.
(4) 3 Ap. Ca., 709.

1894.

F. YORKE SMITH v. TRIBHOVANDA'S MANGALDÁS.

take effect under section 111 of Act X of 1865, but both of them relate to points which have not been raised, and which cannot be decided in the absence of the persons interested.

I find the second issue in the affirmative. There is no dispute about it.

I find the third issue in the affirmative. No consent is shown. I also find, at the request of the parties, the additional point that the building of the club is not an injury to the reversion.

4. I give credence to defendant that the agreement (Exhibit E) was not prepared with his knowledge or consent, or sent by him to the executors. He knew of the draft only, and, therefore,

5. I do not grant an injunction, but only make a declaration.

6. The repairs must be done and paid for by the defendant out of the income of the property or his own money. They are not payable out of the general estate.

There will, therefore, be a decree declaring that the defendant under the will takes an absolute interest in the property, subject to the life interest of the widow if she survives him, with the following directions:—

(1) The trustees are to keep the legal estate to preserve it for the contingent interest of the defendant's widow.

(2) The trustees are not to interfere with the defendant's management so long as he does not injure the reversion.

(3) The repairs are to be provided and paid for by the defendant.

(4) The defendant is not entitled to use the plaintiffs' names as parties to any document without their consent previously obtained.

The costs of this suit are to come out of the general estate of the testator; those of plaintiffs being taxed as between attorney and client.

The plaintiffs appealed.

Macpherson, Inverarity and *Macleod* for appellants (plaintiffs):—We say that on the death of Tribhovandás and of his wife, if Tribhovandás leaves no male issue, Purshotam takes

absolutely. Section 111 of the Succession Act (X of 1865) does not apply. If it does, the period of distribution is the date of the death of Tribhovandás or his wife, whichever of them survives the other.

[BAYLEY, J., referred to *Rám Lál* v. *Secretary of State for India*[1] ; *Sreemutty Kristoromoney* v. *Mahárájah Norendro Krishna*[2].]

Lang (Advocate General) and *Scott* for respondent (defendant):—We contend there is an absolute devise to us subject to the life interest of the widow—*Bhoobun Mohini* v. *Hurrish Chunder*[3]. The gift to Purshotam must refer to the date of the testator's death—Section 111 of the Succession Act (X of 1865). They also cited *Jones* v. *Chappell*[4]; *Doherty* v. *Allman* [5]; *Doe Dem Grub* v. *The Earl of Burlington* [6]; White and Tudor's Leading Cases, Vol. I., p. 851.

SARGENT, C.J.:—The question in this case, which turns upon the relative legal position of the parties, depends upon the proper construction of the following clause in the will of the late Sir Mangaldás Nathubhoy (His Lordship then read the clause and continued:—)

The Division Court held that Tribhovandás took an estate in fee subject to the life estate of his widow. The words, however, "in trust for Tribhovan and his heirs" which standing alone would create a fee in Tribhovan, must, we think, be read with the words immediately following "to allow him to occupy and use the same and enjoy the income thereof and after his death to allow his widow to enjoy the income during her life," which words, in our opinion, show a clear intention that Tribhovan should only take a life interest to be followed by the same interest in his widow, after whom the heirs of Tribhovan would take as purchasers.

It is necessary, however, to consider another question in order to determine the rights of the parties which are in dispute, *viz.* whether Tribhovan or the executors take the legal estate. As to this it is to be remarked that the English authorities, for which we may refer to Jarman on Wills, Vol. II, Ch. 34, p. 293, show that

(1) L. R., 8 Ind. Ap., 46, at p. 61.
(2) L. R., 16 Ind. Ap., 29.
(3) L. R., 5 Ind. Ap., 138.
(4) L. R., 20 Eq., 539.
(5) 3 Ap. Ca., 709.
(6) 5 B. and A., 507, 517.

1894.

F. YORKE SMITH v. TRIBHOVANDÁS MANGALDA'S.

a distinction has been drawn between the words "on trust to pay the rents to a person" and a direction "to permit him to receive them," a distinction which, however, did not meet with Lord Mansfield's approval, who held that in each case it should be equally a trust, and that the estate should vest in the trustees. However, here it must, we think, in any view of the above distinction, be inferred that the trustees were intended to take the legal estate throughout, as the same words are used when speaking of the widow's interest, with respect to which it can scarcely be doubted that a Hindu testator would intend that the trustees should have the control over the estate both for her protection and that of the reversioner. This is held to be so by the English authorities in the somewhat analogous case of a wife, who is to take the income for her separate use; see *Doe d. Stephens* v. *Scott* (1).

In this view of the relative position of the parties, it follows that Tribhovan was not justified in his resistance to the plaintiffs' contention that "the control of property was with them, and that it was their duty to manage it, allowing you to enjoy the income" as stated in their letter of 15th July, 1891. The first two issues must, therefore, be answered in the negative. And the decree varied by declaring that Tribhovan takes a beneficial interest for life under the will in the property in question.

Passing to the other questions, which were alluded to in argument, *viz.* as to who would be the heirs to succeed on the death of the survivor of Tribhovan and his wife, and what was the proper construction of the devise over, their determination, as the Divisional Court pointed out, is not necessary for the cardinal purpose for which the suit was instituted. Moreover, they could not be determined in the absence of the parties interested in them so as to bind them, and it is not the practice of the Court, as pointed out by the Privy Council in *Kathama Natchariar* v. *Dorasinga* (2), to determine questions of title as to future interests. We may here remark that section 43 of the Specific Relief Act (I of 1877) relied on by the Advocate General only applies to a case under section 42; and no such case has arisen except between the plaintiffs and Tribhovan.

(1) 4 Bingh., 505. (2) 2 Ind. Ap. 169, at p. 190.

1894.

F. YORKE SMITH v. TRIBHOVANDA'S MANGALDA'S.

The Division Court has, at the request of the parties, expressed an opinion as to whether the building the club is not an injury to the reversion. No objection has been taken to this declaration, and we see no reason to differ from it, but it is to be remarked that it will not bind the reversioners, who have not been made parties to the suit.

As to costs, we think that as the suit has been rendered necessary by the wording of the will, the costs were properly thrown on the general estate. Costs of this appeal to come out of the same funds.

Attorneys for appellants:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for defendant:—Messrs. *Nanu and Hormasji.*

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

MA'NEKLA'L MOTILA'L AND ANOTHER (PLAINTIFFS) *v.* THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY (DEFENDANT).*

1895. *January* 25.

Municipality—City of Bombay Municipal Act (Bombay Act III of 1888), *Secs.* 298, 299, 301, 504, 527—*Land taken by the Municipality for street improvement—Compensation—Dispute as to amount of compensation—Limitation.*

In 1891 the Municipal authorities of Bombay gave notice to the plaintiffs under section 299 of Bombay Act III of 1888 that they required 23·30 square yards of the plaintiffs' land for street improvement. On the 14th December, 1891, the plaintiffs gave possession of the land to the Municipality, and on 27th January, 1892, claimed Rs. 60 per square yard as compensation. By letter dated 23rd February, 1892, the Municipal Commissioner (without prejudice) offered Rs. 50 per square yard as compensation and stated that on the plaintiffs producing the title-deeds and papers to establish their title the necessary documents in connection with the payment would be prepared. Nothing further took place in the matter until the 14th February, 1894, on which date the plaintiff wrote a letter to the Municipal Commissioner in which, without mentioning any sum, he requested the payment of the amount which might be due to him as compensation for his land taken by the Municipality. The Commissioner refused to pay the compensation, contending that the plaintiffs' claim was time-barred. The plaintiffs thereupon brought this suit claiming Rs. 1,165 (being at the rate of Rs. 50 per square yard) as compensation for the land taken up by the defendant or in the alternative for that sum as damages for the breach of contract to

* Small Cause Court Suit No. $\frac{256}{18761}$ of 1894.