Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rai Bishen Chand v. *Mussumat Asmaida Koer, from the High Court of Judicature for the North-Western Province of Bengal, delivered* 1*st March* 1884.

Present :

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

In this case the suit was brought by the Appellant against the Respondent and her husband Udey Narain, for the purpose of avoiding a deed of gift made in favour of the children of Udey Narain, and of making land comprised in that deed available to answer debts of Udey Narain.

Udey Narain belonged to a joint family living in the Benares district, and governed by the Mitakshara law. At the date of the transaction complained of Mata Dyal was the head of the family. Udey Narain was his only son, and he had by his wife Asmaida one son, named Satrujit, who was then between two and three years old. That appears to have been the whole of the family.

Udey Narain was then, and had for some time been, living a profligate life. He had left his wife and the family house, and was living with a prostitute in the city of Benares. He is stated to have been an extravagant man, running into

debt, and wasting the family property in the pursuit of pleasure.

It was under these circumstances that the deed in question was executed. It bears date the 12th January 1875, and is in the form of a declaration by Mata Dyal. He recites that he is too old and infirm to attend to the management of the ancestral villages and the family, that Satrujit is an infant, that Udey Narain pays no attention to the family affairs, that he is frivolous, extravagant, and not likely to support his wife and children, and is placing the family reputation and property in jeopardy. The deed then proceeds as follows :—

"Therefore I have executed this deed of gift of my own accord and free will, and with the consent of Babu Udey Narain Singh, and I am getting the signature of the said Babu affixed to the margin of this document, so that he (Babu Udey Narain Singh) and his heirs may abide by the terms of this document. That Babu Satrujit Narain Singh minor himself and his own brothers who may be born hereafter, are and will be the permanent and rightful owners and claimants of all the ancestral properties, moveable and immoveable, my own property ; that so long as the said donee does not attain the age of majority, Musammat Asmaida Kuar, the mother of the minors, should duly look after the support, education, and bringing up of the minor and manage the estate and the family affairs as a guardian of the said minor. That with a view to the completion of this document, I the executant will by filing applications in every department having jurisdiction in this matter get my name expunged, and will get the name of the minor under the guardianship of his mother entered in respect of all villages and land or portions of land and houses, &c. ; that the said guardian will in every way be competent to collect rents from the ilaka (estates), realize the outstanding debts, carry on banking transactions, manage all moveable and immoveable properties, and dismiss or employ servants, managers for collections, and Court mukhtars, just as she will think proper ; that out of the profits which will accrue, after the payment of the Government revenue and defrayal of other necessary expenses, she will with all possible caution support, educate, and celebrate the marriage of the minor son and of other sons who may be born in future, and of the daughter, and keep the expenses on a moderate scale, and take every care, so that the ancestral property may not be mismanaged or charged with debt ; that Babu Udey Narain Singh should defray his expenses from the profits arising from the lease of Tikari estate acquired by him,

and he will have no connection with the ancestral property (and) my own property; that similarly the donee minor and his guardian will not have generally any right to demand the profits and products of the said ilakas under lease from Babu Udey Narain Singh, except whatever he (Babu Udey Narain Singh) may give of his owu accord from the profits of the said ilaka under lease; that if, after the expiry of the term of the lease, a new lease be not granted to Babu Udey Narain Singh from the Tikari estate, the donee and the guardian should look after the support of Babu Udey Narain Singh; that besides this, Babu Udey Narain Singh will have no more right or title left to my ancestral property, because all his rights, present and future, to my inheritance have been sufficiently compensated by payment of his heavy debts, defrayal of his extravagant expenses on frequent occasions, and recent payment of Rs. 5,000 on account of debt which he now states to be due by him, which I have been compelled to pay to release the property from every liability, and besides all this, by fixing an allowance for his personal expenses for present and future."

Udey Narain acknowledged the deed under the head of "witnesses," but adding the words "with my own consent." He was therefore a party to his father's gift.

The deed was registered soon afterwards in the registry office of Benares, the Sub-Registrar recording that Mata Dyal, who was personally known to him, admitted its execution.

In the month of March 1875 orders were made for the removal of the several mauzas comprised in the deed from the name of Mata Dyal into that of Satrujit minor under the guardianship of Asmaida. These orders were made on the reports of Tahsildars that Satrujit by his guardian was in possession.

On the 28th of August 1875 Satrujit died. Asmaida then claimed as his heir to have the estates transferred into her own name, and as after notices issued no one objected, orders were made to that effect. She also procured a certificate entitling her as representative of Satrujit to realize about Rs. 544 outstanding debt due to him, and certain promissory notes and bank shares which were his property. It does not appear that these properties were ancestral, but

it is not suggested that the infant had any other property.

On the 21st April 1878 Mata Dyal died. The Plaintiff was a creditor of Udey Narain by virtue of two bonds given in February and March 1874 for an aggregate sum of Rs. 3,000. He had obtained a decree on these bonds against Udey Narain on the 26th April 1877 for the sum of Rs. 5,111. On the death of Mata Dyal the Plaintiff took steps to enforce his decree against the family property, and on the 26th July 1878 he attached it, with other property, and advertised it for sale as the property of Udey Narain.

Asmaida then intervened as an objector to the sale, and on the 4th of November 1878 the Subordinate Judge of Benares allowed her objection, and directed that the family property should be released from attachment. In his judgement he states that Asmaida has, as guardian to Satrujit and in her own right, been in possession, and that "her possession up to this day is proved "from papers that are extant."

The creditor thereupon brought the present suit, alleging that the deed of January 1875 was executed merely to defeat the right of the creditors, and was only a paper and fraudulent proceeding; and further that it was illegal as being a gift to unborn persons.

The Defendant Asmaida put in a written statement, which was verified by Bindu Lal her agent. In it she alleged the profligacy and extravagance of Udey Narain; that he had on several occasions incurred illegal debts, which Mata Dyal was compelled to pay in order to maintain his reputation; and that he had consented to the deed of gift after receiving Rs. 5,000, which was considered to be the value of his proper share in the property according to his future title.

The Subordinate Judge decided in favour of the Plaintiff. He took the view that Udey

Narain's consent, without which Mata Dyal could not alienate the ancestral property, was a fraud on Udey Narain's creditors, and that the deed of gift was wholly void.

Asmaida appealed to the High Court, who reversed the decree and dismissed the suit. That Court considered that the deed was made on good consideration, in good faith, and with a proper provision, not shown to be insufficient, for Udey Narain's creditors. They further thought that the transaction might in some sense be considered as a partition, meaning apparently that Udey Narain had received the value of his share, and had in effect been bought out of the ancestral property.

The transaction has been attacked at the bar on several grounds.

First, it is said that the evidence of change of possession after the execution of the deed is insufficient to show that the parties considered the ownership to be changed. But there are two answers to this argument. In the first place it proves too much. If it is worth anything, it proves that the deed was a pure benami transaction, which their Lordships consider to be an inadmissible conclusion. They think it impossible to say that, as between Udey Narain or Mata Dyal and the others, it was intended to have no effect. The second answer is, that, though the evidence of ostensible change of possession seems meagre, there is some, which the Courts below have thought sufficient to prove the fact, though the Subordinate Judge thinks that it is of no validity because tainted by fraud. The Subordinate Judge says :—

" There are papers produced in this case to show that, subsequently to the gift, affairs connected with the estate were carried on in the name of Musammat Asmaida Kuar, as guardian of the minor donee [Satrujit Narain Singh, and after the death of the latter in her name, as being the proprietor of the estate by right of inheritance to her minor son deceased,

and that she has all along been in possession of the estate. But this use of the lady Defendant's name in the affairs, while Mata Dyal Singh and Udai Narain Singh wished it, and all of them formed the members of a joint family, cannot but be considered to be nominal, and has not the effect of removing the taint of fraud from the gift."

And the High Court says :—

"We see no reason to doubt that the gift was intended to take effect, and that it did as a matter of fact take effect. The proper and necessary mutation of names in the revenue registers was at once effected, and in the name of Satrujit Narain Singh; and Musammat Asmaida asserted her position as guardian and manager for the minor Satrujit Narain Singh, obtaining a certificate under Act XXVII. of 1860, and she dealt with the estate in his name, and at his death she succeeded him as heir, and had mutation of names made in her favour, and dealt with the property in her own right."

It may be added that in the execution proceeding, where the question was who actually had possession, the then Subordinate Judge decided in favour of Asmaida.

The second point made at the bar was that which forms the main discussion below, viz., that the transaction was a fraud upon creditors. On this point their Lordships concur with the High Court. That it was intended to save the ancestral property from being wasted by the vices and extravagance of Udey Narain is openly avowed on the face of the deed. But such an intention is not fraudulent. It may be carried into effect by honest means. And people who mean to effect such a design by fraud are not likely to put it in the forefront of an instrument which must be registered, which may easily be discovered by persons interested to inquire about the property, and to which attention is likely to be drawn by the consequent mutation of names after public notice and a change of management.

If the statements in the deed are true, it clear that Udey Narain received a substantial consideration for his consent, not only because the ancestral estate was secured for his son, but

because his debts had been paid by Mata Dyal in the past, and were now being provided for to the extent of R. 5,000. It is urged that there is no evidence of the payment of this R. 5,000, and it is true that Asmaida was not called as a witness, that Bindu Lal her agent who verified her statement was not called, and that the witnesses who speak to the payment speak without much particularity, and do not distinguish between the amount, if any, paid to Udey Narain himself and the amount paid directly to his creditors. But it is difficult to suppose that there was any dispute on the point in the Courts below. No special allegation is made about it in the plaint, though the Plaintiff then knew the precise contents of the deed. No separate issue is framed upon it. Besides the written statement, three witnesses speak of Udey Narain "taking" Rs. 5,000. Two of them had attested the deed; and two of them had been employed in carrying portions of the Rs. 5,000, Rs. 900 in all, to the Plaintiff himself. All three are cross-examined, but their statements as to the payment are not challenged or tested in any way. The Subordinate Judge treats the payment as one of the facts in the case, though he holds that it cannot save the gifts from the taint of fraud. The High Court treat it as one of the facts in the case, and to a great extent found their judgement upon it. Neither Court discusses the proof of it, or intimates that there was any dispute or doubt raised upon it. It would be a dangerous thing for this Board to allow a conclusion so formed to be brought into doubt, merely because the evidence of it in the Record may not be so good as would be required if the matter had been directly disputed.

It is suggested that the Rs. 5,000 came from the joint chest; that it was an inadequate consideration for the interest which Udey Narain

was giving up; and that he was left insolvent. But the Plaintiff, who now wishes us to draw these conclusions, has laid no adequate ground for them in his allegations or in his evidence. Such as the evidence is, it seems probable that the Rs. 5,000 (to say nothing of prior payments on Udey Narain's account) was very nearly, if not quite, the value of his share, which on a partition would have been one fourth of the estate. According to the Plaintiff's own valuation of the estate, Rs. 5,000 exceeded the value of that fourth. Even if it came from the joint chest, it is an application by the head and manager of the family of a large share of the family property to the separate purpose of one member, who was indulging his inclinations apart from the family. That is a substantial consideration. There is no proof that Udey Narain was left insolvent, nor any reason to think that he was. It does not clearly appear that he owed anything except to the Plaintiff, whose debt at the date of the transaction was reduced to about Rs. 2,400. And it does clearly appear that Udey Narain had other property. He had the Tikari lease, mentioned in the deed of January 1875. And he had a property called Mouza Sarai Nandan, which has been taken by the Plaintiff in execution. It may indeed be that he had only one immoveable property, called by two names; but if such things are left in doubt, it is the Plaintiff's fault for not raising issues upon them.

Indeed the Plaintiff's case has been framed and argued as though the creditors had got some charge on Udey Narain's share in the family property, and as if it were for the Defendant to show purchase for value without notice, in order to retain that property. But all the Defendant has to show is that the transfer was made in good faith and for good consideration. The document in fact

shows valuable consideration approaching, if not equalling, the whole value of Udey Narain's then share. And, though Mata Dyal seems to have taken the precaution to see that portions of the Rs. 5,000 actually reached the hands of Udey Narain's creditors, he was not bound to do that, because they were general creditors and had no lien upon the property. It would place these joint families in a very unfortunate predicament if they could never buy out a vicious member who threatens their ruin, so long as any one of his creditors remains unpaid.

There remains a question of some difficulty whether the deed, which contemplates benefits to after-born sons of Udey Narain as well as to Satrujit, can have any operation in his favour. This question, though raised in the plaint, is not dealt with by either of the Lower Courts. It depends entirely on the view which may be taken of the meaning of the parties to the transaction, for the rule of law on which the Plaintiff relies, viz., that gifts cannot be made to persons unborn at the time, is well settled.

It is said then that the gift is made to a class, and that, inasmuch as some of the class are unable to take, none can take, and certain sections of the Indian Succession Act of 1875 are invoked to give weight to this contention, the Legislature having thought fit to apply those sections to Hindoo wills.

Independently however of the distinction which may be taken between wills the operation of which is suspended during the testator's life, and deeds which operate immediately, especially such deeds as confer a present interest upon a present person, the sections cited have no bearing on such a gift as that under consideration. Sect. CII. lays down the rule that a bequest inoperative as to some of a class shall be wholly void, not in all cases, but only when the bequest

offends against the rules contained in Sects. C. and CI. And the gift under consideration does not fall within either of these two sections. It may be that Illustration (*b*) to Sect. CII. imports into India an English rule of construction which usually defeats the intention of the testator. But whatever force the illustration may have (and it seems out of place as attached to a section intended, not to define the word "class," but only to establish a special incident of gifts to classes), it is not made applicable beyond the two cases contemplated by Sects. C. and CI.

Assuming that the deed is intended to express a gift to the brothers of Satrujit which cannot take effect as such, what is the whole scheme of the parties? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them except a complete partition, is a transfer by the Head of the family, with the consent of his son, to the lower generation. The only member of that generation was the grandson Satrujit. He therefore is made to take by name and immediately, and the possession and ownership are transferred to him. Is then the gift indisputably designed for him wholly to fail because the parties supposed that they could join with him possible after-born sons, who, if any had happened to be born, could not legally claim under a gift? Is Udey Narain, whose interests were bought out for valuable consideration, to re-enter upon his son, in whose favour they were bought out? No doubt that, on the present assumption, some portion of the intention must fail, but that is no reason why the whole should fail. The paramount intention was to get rid of Udey Narain by passing the property to his sons. That intention is much more readily effectuated by giving the property

to Satrujit the only then son of Udey Narain, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of Asmaida, did not operate any change at all.

Cases are not rare in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. In the present case, there is every reason for holding that, if Satrujit's possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there present, and able to receive the gift. He is an individual designated in the deed. If the deed stood alone, it is a question in each case whether a designated person who is coupled with a class described in general terms is merged into that class or not. But the deed does not stand alone. It is followed by actions of a kind which, even without a deed, may work a transfer of property in India. Satrujit is entered in the Collector's books as the sole possessor of the property, and his guardian takes possession, first in his name, and afterwards as his successor. Their Lordships hold that the circumstance that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed, and is clearly proved from the transfer of the property in fact.

But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gift. The High Court viewed it in the light of a partition. It cannot be strictly

a partition, for, according to the Mitakshara (Cap. I., Sec. V., verse 3), there can be no partition directly between grandfather and grandson while the father is alive. But it is a family arrangement, partaking so far of the nature of a partition that Udey Narain receives a portion and is thenceforth totally excluded, and *quoad ultra* Mata Dyal surrenders his interest to his grandson, who on a complete partition among the whole family would be entitled to one fourth.

Now in such an arrangement it would be quite consistent with Hindoo ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed in the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate does not out of the residue of his father's estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga, Cap. VII., Secs. 10, 11, and 12, which is a Bengal authority, but it refers to Vishnu and Yajnyavalkya authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely, but more closely, insisted on by the Benares school than by the Bengal school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between Satrujit's heirs on the one hand, and his brothers, if any should be born, on the other. They are only showing that the notions present to the mind of the Head of a joint Hindoo family who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class.

It is curious that in the appeal which was argued immediately before this (Hurdey Narain *v.* Rooder Perkash), there was a similar gift made from a similar motive. Shib Perkash and his infant son Rooder constituted the whole of a joint family living under the Mitakshara law. Shib was extravagant and embarrassed, and to save the ancestral estate he executed a deed of gift to Rooder, coupled with a declaration that, if other sons should be born to him, they should from the date of their birth acquire equal right in the property. It did not occur to anybody to contend that the deed was void, except as a fraud upon creditors. The High Court, consisting of J. J. Mitter and Tottenham, say :—

"But conceding that the gift is void against the father's creditors, it is binding and operative as between the parties to the instrument. Therefore from the moment of its execution Shib Perkash ceased to have any joint interest in the family estate."

The appeal turned on other questions, and their Lordships only refer to the case as illustrating the notions present to the minds of Hindoos when making arrangements of ancestral property.

The result is that, in whatever light the transaction may be viewed, and whatever questions may arise between those who claim under it, the property effectually passed away from Mata Dyal and from Udey Narain. The Appellant's claim fails; his appeal must be dismissed, and their Lordships will humbly so advise Her Majesty.