Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Mussoorie Bank, Limited, v. *Raynor, from the High Court of Judicature for the North-Western Provinces, at Allahabad; delivered* 21*st March,* 1882.

Present:

SIR BARNES PEACOCK.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

IN this case their Lordships have felt almost more difficulty in deciding whether or not to hear the Appeal than they have in disposing of it when heard, and in order to show the nature of that difficulty it is necessary to state the precise course which this litigation has taken.

In the month of December 1839 Captain William Raynor died, having left a will which he expressed in the following terms:—"I give to "my dearly beloved wife, Mary Anne Raynor, "the whole of my property, both real and per- "sonal, including my Government promissory "notes, Delhi Bank shares, my house at Feroze- "pore, No. 50, together with all my plate and "plated ware, and whatever money, furniture, "carriages, horses, &c. may be in my possession "at the time of my decease, together with all "moneys due or which may afterwards become "due, feeling confident that she will act justly "to our children in dividing the same when no "longer required by her." And he appointed his son William Joseph Raynor, and his wife Mary Anne Raynor, to be his executors. Mrs. Raynor alone proved the will.

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During her lifetime no question arose as to the true nature of Captain Raynor's will. It appears that she possessed herself of his property, and she assumed to deal with it as though it were her own. On the 5th September 1868 Mrs. Raynor made her will by which she gave to her son, Albert Charles Raynor, who is the Respondent in this Appeal, "24 of my shares in the Delhi and London Bank," and she also gave him a house and some land. Other property, consisting mainly of houses and land and of Government rupee paper, she gave partly to her daughter Adelaide Louisa Swetenham, partly to her son William Joseph Raynor, and partly to her step-daughter Elizabeth Goolding. To the latter was given the house No. 50 at Ferozepore, which the testatrix describes as "my house and estate." Mrs. Raynor died some time in 1875, and her will was proved, it does not appear by whom.

In the year 1876 the Mussoorie Bank, who are the Appellants, instituted two suits against Mrs. Raynor's executors for the purpose of recovering the sum of Rs. 25,000 advanced by the Bank to Mrs. Raynor upon the security of 30 Delhi Bank shares and of certain houses. One of these suits, No. 41 of 1876, was instituted in the Small Cause Court at Dehra Doon, and on the 5th December 1876 the Bank obtained a decree under which the 30 shares were attached. The other suit, number 115 of 1876, instituted before the Subordinate Judge of Dehra Doon, was to enforce the Bank's mortgage upon the houses. On the 12th December 1876 the Bank obtained a money decree for the sum of Rs. 32,121 2a. 4p., but the Subordinate Judge refused to give them any specific relief on the basis of the mortgage. His principal reason appears to have been that the nature and extent of Mrs. Raynor's interest in the mortgaged properties was uncertain.

Against this decision the Bank appealed to

the High Court, who gave judgment on the 2nd of January 1878. They held that Mrs. Raynor certainly had some interest in the properties she mortgaged to the Bank; that she might have had an absolute interest in them, especially as she had acquired them after Captain Raynor's death; and that the Bank was entitled to enforce its security against whatever interests might ultimately prove to be hers. They varied the decree accordingly. As regards the interest which Mrs. Raynor had in the properties the High Court pronounced no opinion, holding, quite rightly as their Lordships think, that the question did not arise in a suit in which Captain Raynor's estate was not properly represented.

While the appeal in the mortgage suit was pending, Albert Raynor brought the present suit for the purpose of setting aside the order of the 5th of December 1876 so far as regards the 24 bank shares bequeathed to him by his mother, and of obtaining possession of those shares. The identity of the shares with the shares bequeathed by Captain Raynor may be assumed for the present purpose; and the case made by the Respondent is that Mrs. Raynor took only a life-interest in her husband's property. On the 10th of May 1878 the Subordinate Judge dismissed the suit, holding that Mrs. Raynor took an absolute interest under her husband's will. Albert Raynor appealed, and on the 22nd of August 1878 the High Court gave him a decree on the ground that Mrs. Raynor held her husband's estate, not absolutely in her own right, but as trustee for their children, with a power of appointment among them.

The Bank then applied to the High Court for leave to appeal against this decree. On the 13th of January 1878 the High Court refused leave on the ground that the property at stake in this suit was valued at no more than Rs. 6,000, and

that the question of law was so clear that an appeal could only result in the affirmance of the judgment.

The Bank then presented a petition to Her Majesty in Council for leave to appeal, on which leave was granted by an Order in Council dated the 14th August 1879. And it is the frame of that petition that gives rise to the preliminary question now raised. Waiving all questions as to the honesty of the Petitioners, the Respondent's counsel insists that in fact their petition is so framed as to mislead this Board, and to bring it to a favourable decision on false grounds.

The petition states the Petitioners' mortgage suit, number 115 of 1876, and it states the effect of the decree of the High Court therein; but it does not give the date of that decree. Then it goes on to state that under that decree the bank shares were attached; that Albert Raynor objected; that his objection was overruled; and that thereupon he brought the present suit. The proceedings in the present suit are correctly stated; but it is not true that the bank shares were attached under the decree in the mortgage suit, or that Albert Raynor's objection and suit directly struck at any portion of the decree in the mortgage suit. The shares were attached in the suit relating to them alone, which was valued at Rs. 6,000 only; whereas the mortgage suit was of greater value.

The first question is, whether the preliminary objection is taken too late. The Order was made more than two years ago, and the Respondents were fully aware of it; yet no objection was made until all the costs of the Appeal had been incurred. As a general rule, the proper course, in a case like the present, is for the Respondent to move as early as possible to rescind the Order in Council; and their Lordships think it right to call attention to the opinion expressed in the second volume of the

Law Reports, Indian Appeals, page 82. It is there said, "In their Lordships' opinion an ob-"jection of this kind ought to be taken by "the Respondents as early as the matter is "brought to their notice, for the plain reason, "that if the leave to appeal is on that ground "rescinded, no further costs are incurred: and "it is wrong to leave the objection until the "hearing of the Appeal, when the record has "been sent from India, and when all the costs "attending the hearing have been incurred." At the same time their Lordships desire it to be distinctly understood that an Order in Council granting leave to appeal is liable at any time to be rescinded with costs, if it appear that the petition upon which the Order was granted contains any mis-statement, or any concealment of facts which ought to be disclosed.

In this case, if their Lordships had any reason to think that there were intentional mis-statements in the petition, they would at once rescind the order and dismiss the Appeal. But they do not think there was any intention to mislead. The Appellant's solicitor has filed an affidavit showing how he confused the decree of the 12th of December made in the mortgage suit, with the decree of the 5th of December under which the shares were attached; and it appears that he did not leave the judgment of the 12th of December to be explained solely by the petition, because a copy of it was among the papers put in with the petition. Still if there has been a material mis-statement, it is not sufficient to clear the case of bad faith. To use the words of Lord Kingsdown,* "Where "there is an omission of any material facts, "whether it arises from improper intention on "the part of the petitioner, or whether it arises

* *Mohun Lal Sookul* v. *Beebee Doss and others*, 8 Moore, Indian Appeals, 195.

" from accident or negligence, still the effect is " just the same if this Court has been induced " to make an Order which, if the facts were fully " before it, it would not, or might not, have been " induced to make." Their Lordships therefore proceed to ask whether the Order in question was one which they might not have been induced to make if the facts had been fully and truly stated.

The grounds which the Petitioner relies on as reasons why an appeal shall be allowed, notwithstanding the value of the suit is only Rs. 6,000, are three in number: first, that the decision virtually affects the right of the Bank to have a mortgage security for the whole sum of Rs. 32,000 odd; secondly, that the point of law decided by the High Court will cover other claims arising in reference to the estate of Mrs. Raynor; and thirdly, that the decision on appeal in this suit will probably prevent any appeal against the decree in the mortgage suit, or against the proceedings in execution thereof. Their Lordships consider that the first two grounds are solid grounds for granting the leave asked; and they are not at all affected by the error in the petition. It is clear that if Mrs. Raynor took only a life-interest in her husband's property, the Bank cannot enforce their decree against any portion of the property enjoyed by her in her lifetime, whether comprised in the mortgage or not, unless they successfully contest against the Raynor family, as to each such portion, the question whether or no it belonged to Captain Raynor or was purchased with his assets. The third ground is affected by the mis-statements in the petition; first, because the date of the decree in the mortgage suit is not given, and therefore it does not appear on the face of the petition that the time for appealing had, as in fact it had, then expired; secondly, because the decree obtained

by Albert Raynor appears to be more directly mixed up with the mortgage suit, when it is stated that the shares were attached under that very decree, than when they are shown to be attached under a decree in a different suit. Still there is a sense in which the third ground may be explained. It is impossible to suppose that, after the decision of the High Court in this suit, any effectual proceeding could be taken by way of simple execution of the decree in the mortgage suit, for all purchasers would be deterred by the knowledge that they were buying a formidable litigation. It certainly would be necessary for the Bank to frame a new suit, properly constituted for the purpose of contesting all questions with the Raynor family and seeking execution of their decree against them. In such a suit as that, the construction of the will might, and probably would, be brought by appeal before this Board. And it might possibly, though probably it would not, be found necessary for properly working an appeal in a subsidiary suit of that kind to obtain leave to appeal from the original decree the execution of which was being prosecuted.

Their Lordships are of opinion that the petition is very faulty, and that due care was not shown in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed. Their Lordships also were, when hearing the preliminary objection, strongly impressed with the circumstance that there was *primâ facie* strong ground for an appeal upon the merits. For these reasons they have thought it right to hear the Appeal.

Passing to the merits of the case, their Lordships are of opinion that the current of decisions now prevalent for many years in the

Court of Chancery shows that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice James in the case of *Lambe* v. *Eames*, and by Sir George Jessel in the case of *Re Hutchinson and Tenant*. They are further of opinion, that if the doctrine of precatory trusts were applied to the present case, it would be extended far beyond the limits to which any previous case has gone. No case has been cited, and probably no case could be cited, in which the doctrine of precatory trusts has been held to prevail when the property said to be given over is only given when no longer required by the first taker.

Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be,—his appeal to the conscience of the first taker,—to be imperative words.

In this case nothing is given over to the children of the testator except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by

his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of gift over were precatory only, but it would have been void notwithstanding that the most direct and precise words of gift over might be used. Their Lordships think that substantially the words "when no longer required by her" must in this will be taken to have the same meaning as if he had said, "I give to my children so much as is not required by her." Considering the nature of the property, which includes a number of articles as to some of which the use is equivalent to the consumption; to the nature of the first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of the wife, their Lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. That is equivalent to an absolute gift to the wife.

They do not think it necessary therefore to enter into a consideration of the various authorities which have been cited as to the application of the doctrine of precatory trusts, or nicely to weigh one authority against another. They consider it sufficient to say that upon this will the wife took an absolute interest, and that to apply the doctrine of precatory trusts to it would be a very large extension of that doctrine.

The result is, that their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to substitute for it a decree dismissing the Appeal to the High Court with

costs; but with respect to the costs of the present Appeal they think it right to follow the case, from which a citation has already been made, in the second volume of the Law Reports, Indian Appeals, of *Ram Subuk Bose* v. *Monomohini Dossee*; and having regard to the nature of the petition presented for leave to appeal, and the course pursued by the Appellants, they will give no costs of the Appeal. The money which has been deposited will be returned to the Appellants.