for Rs. 2,781-12-2 with interest on Rs. 156-11-2 at nine *per cent. per annum* from the 10th March, 1885, till payment; costs and interest on judgment at six *per cent.*

Attorneys for the plaintiffs:—Messrs. *Tobin and Roughton.*

Attorneys for the second defendant:—Messrs. *Crawford and Buckland.*

ORIGINAL CIVIL.

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

HIRA'BÁI, (ORIGINAL DEFENDANT), APPELLANT, *v.* LAKSHMIBÁI, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *January* 8.

Will—Construction of Hindu wills—Joint tenancy—Tenancy-in-common—Appointment of persons "to be the heirs" of testator—Widow's estate in property devised to her by her husband's will.

B., a Hindu, died in 1876, leaving by his will all his property to his widow Hirábái and his adopted son Nathu "as his heirs," with a direction that they should maintain themselves out of the income, and pay one Dayábhái Rs. 1,000 a year for managing it. Nathu died intestate in 1880 in Hirábái's lifetime, and Hirábái then claimed the whole estate, contending that, under the will, she and Nathu had been joint tenants, and that, on his death, she took his share by survivorship. Nathu left a widow, the plaintiff Lakshmibái.

Held, that, under the will, Hirábái took only a widow's estate in half the property, and that (subject to her right, as a Hindu widow, to a widow's estate in a half share) the entire property vested absolutely in Nathu. On Nathu's death the property (subject as aforesaid) vested in the plaintiff Lakshmibái, as his widow and heir, for a widow's estate, and she became entitled to joint possession with the defendant Hirábái.

A widow taking under her husband's will takes only a widow's estate in the property bequeathed to her, unless the will contains express words giving her a larger estate.

APPEAL by the defendant from the decision of Scott, J.: (see the case of *Lakshmibái* v. *Hirábái* reported *ante*, page 69).

The appellant, (defendant), Hirábái was the widow of one Bhojráj Dessur. The respondent, (plaintiff), Lakshmibái was the daughter-in-law of Hirábái, being the widow of one Nathu Bhojráj who was the adopted son of Bhojráj Dessur.

Bhojráj Dessur died on the 27th September, 1876, leaving his widow, Hirábái, and his adopted son, Nathu Bhojráj, his only heirs and next of kin. The said Nathu Bhojráj died intestate

1887.

HIRÁBÁI v. LAKSHMIBÁI.

in 1880 without issue, leaving his widow, the plaintiff Lakshmibái, him surviving.

The plaintiff alleged that the defendant had taken possession of all the property of Bhojráj Dessur, setting up the authority of a will left by him, dated the 22nd September, 1876, which will, however, had never been proved.

The plaintiff, as widow of Nathu Bhojráj, (the adopted son of Bhojráj Dessur), claimed to be entitled to the whole of the property left by the said Bhojráj Dessur, or, in the event of the said will being proved, to the interest which the said Nathu Bhojráj took in the property of the said Bhojráj Dessur under the terms thereof.

The defendant denied that the plaintiff was entitled to anything more than maintenance out of the estate of Bhojráj Dessur, and contended that, under the terms of the will, the whole of the property of Bhojráj Dessur was left to the defendant, Hirábái, (his widow), and his adopted son, Nathu, *jointly*; and that upon Nathu's death, in 1880, it went to Hirábái by survivorship, so that Lakshmibái took nothing under the will, and had merely a right to maintenance out of the estate.

The following are the material portions of the will:—

"Clause first as follows:—*As my heirs to my property are my son Bhái Nathu Bhojráj and my wife* Bái Hirábái, making in all two persons. They are truly to take out power (probate) from the High Court at Bombay in respect of my properties (property): on (or to) the same no one (else) has any right (or) claim in any manner whatever." * * * * *

"Clause sixth:—"May God forbid it; and in case my decease (or) death should take place, then (funeral, &c.) outlays are truly to be made after me agreeably to the customs of our caste, and for pilgrimage here and at Bombay, *as my heirs two persons* and Bhái Dáyábhái Kalyánji may deem proper." * * * *

"According to what is written above, the above-mentioned sums are truly to be paid (set apart) on the *dharma* (religious and charitable) account; and they are truly to act according to the above-mentioned conditions; and *the (said) two persons have*

been appointed heirs to my property; and they are truly to obtain power (probate) in respect of my immoveable and moveable property and effects at Bombay. If any person whatever should oppose them, then the claim, &c., of such (person) shall not prevail in any way whatever; and the whole property shall truly reach *(go to) my (said) heirs two persons;* and out of the rent of my houses that may be received and (out of) the interest that may be received, my wife Bái Hirábái and my son Bhái Nathu Bhojráj together shall maintain themselves; and Bhái Dáyábhái Kalyánji is truly to take care and trouble of (and for) my estate (houses and lands) and my moneys. For *his trouble my heirs, two persons,* shall truly pay him Rs. 1,000 *per* year. Further, if at any time there should arise any disagreement between my wife, my son, *i. e.*, the mother and the son themselves, then Bhái Dáyábhái Kalyánjí is (to act) as *upri* (superior) over the said two persons. He is truly and properly to advise, persuade, and guide them. Further, there is a debt due to me by Bhái Dáyábhái Kalyánji. As to whatever debt there appears to be due (to me) from the account of Bhái Lakhamsi Bhojráj & Co., and of Bhái Dáyábhái Kalyánji & Co., and all that, I, as to whatever debt there appears to be due to me in (these) two accounts up to the 30th of *Asoo Vad* of *Samvat* 1932, (17th October, 1876), I make a gift of and forgive the same. The same are truly to be debited to my account; and thus (the said two) accounts of Bhái Dáyábhái Kalyánji are truly to be squared (and written off); and as to whatever moneys may hereafter become receivable from and payable to him, those are truly to be received (from) and paid (to him) in a proper manner. Further, *my heirs, two persons,* shall for (his) trade lend to Bhái Dáyábhái Kalyánji & Co. Rs. 25,000. If he at any time should require more, even then he may according to his credit truly borrow the same (from them). Further, if my son Bhái Nathu should wish to carry on trade, then he shall not trade separately (from Dáyábhái), but he may keep a small share in Dáyábhái Kalyánji & Co., and thus he may truly trade (with him). Further, in my books, moneys appear to be due to me from people. The same are to be demanded and recovered from them; and, further, there are my mother-in-law and my wife's brother's

1887.

HIRÁBÁI v. LAKSHMIBÁI.

wife (or widow), making in all two persons. My heirs shall truly maintain them as long as they may live; and above I have directed Rs. 1,000 *per annum* to be paid to Bhái Dáyábhái Kalyánji for (his) trouble, the same shall truly be paid (to him) always. Thus I, in my life-time, make (have made this) my will. This will I have made of my accord and pleasure and in sound mind and consciousness, and without having taken any intoxicating drug (as) drink, I have made (this) will. The same is truly agreed to and approved of by me and my heirs and representatives; and whatever business my heirs, two persons, may do, is truly to be done with the advice of Bhái Dáyábhái Kalyánji."

Telang (*Russell* with him) for the appellant:—The words of the will are words of gift to Lakshmibái and Nathu Bhojráj. *Primâ facie*, they create a joint tenancy, there being no words importing a division between the two donees—*Nánce Tárá Náikin* v. *Allárakhia Soomár*[1]. The other provisions of the will support that construction. The mother and adopted son were to live and maintain themselves together out of the rents (cl. 6 of the will.) There are some payments provided for, and loans to Dáyábhái Kalyánji. There also it is plain the testator contemplated a joint enjoyment by the two donees. The conclusion to be drawn, therefore, by the aid of the above rule of construction laid down by Couch, J., is supported, not negatived, by the other provisions in the will. It is also supported by the general leaning of the Hindu law, which is the law of the parties, in favour of a joint tenancy rather than a tenancy-in-common—*Lakshmibái* v. *Ganpat Moroba*[2]; *Jáiram Nárronji* v. *Kuverbái*[3]. The argument of Scott, J., in relation to the joint system is quite erroneous. The state of a joint family is not derogated from, but in harmony with, the construction which we suggest. We admit the principle laid down in the Privy Council cases cited in the Court below, but say those cases support our construction.

[SARGENT, C. J.:—The testator must surely have contemplated the probability of his son having sons. Did he intend that they

(1) I. L. R., 4 Bom., at p. 573, *note*.
(2) 4 Bom. H. C. Rep., O. C. J., 150, S. C.; 5 Bom. H. C. Rep., O.C.J., 128.
(3) I. L. R., 9 Bom., 491.

should be excluded, and that the widow, if she survived, should take the whole estate?]

The son's sons would take after the widow's death. The considerations relied upon by Scott, J., are speculations as to the testator's intentions, not a collecting of those intentions from the words of the will. The probability is that the only event the testator contemplated was the event of his adopted son surviving his widow—the former a much younger person than the latter. The idea of the widow surviving, was one probably not present to his mind; and no intention in relation to that event can properly be attributed to him.

The cases collected in Williams on Executors, Vol. II, p. 1468, show that the principle of construction, which we say has always been adopted in this Court, is also the principle laid down in England. *Cookson* v. *Bingham*[1] further illustrates the same view; the doctrine there laid down agrees with that laid down by Sir R. Collier in the case of *Moulvie Mahomed Shumsool Hooda* v. *Shewukrám*[2]; the Privy Council notice the point (see p. 15), but do not decide it. The opinion of the Calcutta Judges in that case is in our favour.

It is not necessary in this case to argue whether the defendant by survivorship took an absolute estate, or a widow's estate, or a life estate, in the residue of the testator's property. There is nothing necessarily against legal principles in two persons taking different estates under the same words of gift. Such difference may arise by reason of difference of *status* between the different donees. The authorities, however, show that even a gift by a husband to his wife of immoveable property may create an absolute estate. It is a question of construction—*Prosunno Coomar Ghose* v. *Tarrucknáth Sirkar*[3]; *Seth Mulchand* v. *Bái Manchá*[4].

Inverarity (with *Macpherson*, (Acting Advocate General), and *Lang*) for the respondent:—We contend that Hirábái, the widow of the testator, is really only entitled to maintenance out of her husband's estate; but, if this Court is against us on that contention, we support the judgment of the Court below, which holds that

(1) 17 Bea., 262.
(2) L. R., 2 Ind. App., 7.
(3) 10 Beng. L. R., 267.
(4) I. L. R., 7 Bom., 491.

1887.

HIRÁBÁI v. LAKSHMIBÁI.

wife (or widow), making in all two persons. My heirs shall truly maintain them as long as they may live; and above I have directed Rs. 1,000 *per annum* to be paid to Bhái Dáyábhái Kalyánji for (his) trouble, the same shall truly be paid (to him) always. Thus I, in my life-time, make (have made this) my will. This will I have made of my accord and pleasure and in sound mind and consciousness, and without having taken any intoxicating drug (as) drink, I have made (this) will. The same is truly agreed to and approved of by me and my heirs and representatives; and whatever business my heirs, two persons, may do, is truly to be done with the advice of Bhái Dáyábhái Kalyánji."

Telang (*Russell* with him) for the appellant:—The words of the will are words of gift to Lakshmibái and Nathu Bhojráj. *Primâ facie*, they create a joint tenancy, there being no words importing a division between the two donees—*Nánee Tárá Náikin* v. *Allárakhia Soomár*[1]. The other provisions of the will support that construction. The mother and adopted son were to live and maintain themselves together out of the rents (cl. 6 of the will.) There are some payments provided for, and loans to Dáyábhái Kalyánji. There also it is plain the testator contemplated a joint enjoyment by the two donees. The conclusion to be drawn, therefore, by the aid of the above rule of construction laid down by Couch, J., is supported, not negatived, by the other provisions in the will. It is also supported by the general leaning of the Hindu law, which is the law of the parties, in favour of a joint tenancy rather than a tenancy-in-common—*Lakshmibái* v. *Ganpat Moroba*[2]; *Jáiram Núrronji* v. *Kuverbái*[3]. The argument of Scott, J., in relation to the joint system is quite erroneous. The state of a joint family is not derogated from, but in harmony with, the construction which we suggest. We admit the principle laid down in the Privy Council cases cited in the Court below, but say those cases support our construction.

[SARGENT, C. J.:—The testator must surely have contemplated the probability of his son having sons. Did he intend that they

(1) I. L. R., 4 Bom., at p. 573, *note*.
(2) 4 Bom. H. C. Rep., O. C. J., 150, S. C.; 5 Bom. H. C. Rep., O.C.J., 128.
(3) I. L. R., 9 Bom., 491.

should be excluded, and that the widow, if she survived, should take the whole estate?]

The son's sons would take after the widow's death. The considerations relied upon by Scott, J., are speculations as to the testator's intentions, not a collecting of those intentions from the words of the will. The probability is that the only event the testator contemplated was the event of his adopted son surviving his widow—the former a much younger person than the latter. The idea of the widow surviving, was one probably not present to his mind; and no intention in relation to that event can properly be attributed to him.

The cases collected in Williams on Executors, Vol. II, p. 1468, show that the principle of construction, which we say has always been adopted in this Court, is also the principle laid down in England. *Cookson* v. *Bingham*[1] further illustrates the same view; the doctrine there laid down agrees with that laid down by Sir R. Collier in the case of *Moulvie Mahomed Shumsool Hooda* v. *Shewukrám*[2]; the Privy Council notice the point (see p. 15), but do not decide it. The opinion of the Calcutta Judges in that case is in our favour.

It is not necessary in this case to argue whether the defendant by survivorship took an absolute estate, or a widow's estate, or a life estate, in the residue of the testator's property. There is nothing necessarily against legal principles in two persons taking different estates under the same words of gift. Such difference may arise by reason of difference of *status* between the different donees. The authorities, however, show that even a gift by a husband to his wife of immoveable property may create an absolute estate. It is a question of construction—*Prosunno Coomar Ghose* v. *Tarrucknáth Sirkar*[3]; *Seth Mulchand* v. *Bái Manchá*[4].

Inverarity (with *Macpherson*, (Acting Advocate General), and *Lang*) for the respondent:—We contend that Hirábái, the widow of the testator, is really only entitled to maintenance out of her husband's estate; but, if this Court is against us on that contention, we support the judgment of the Court below, which holds that

(1) 17 Bea., 262.
(2) L. R., 2 Ind. App., 7.
(3) 10 Beng. L. R., 267.
(4) I. L. R., 7 Bom., 491.

1887.

HIRÁBÁI v. LAKSHMIBÁI.

Hirábái and the adopted son took under the will as tenants-in-common. We submit that, by the statement in the will that Hirábái and Nathu were the heirs, the testator merely indicated that, as they were the only surviving members of his family, the estate would devolve upon them. It is merely the statement of a fact, not a direction or an expression of a desire. He does not indicate what estate they are to take; he simply mentions that his estate will devolve upon them; and he leaves them to take such interests in the estate as the law will give them, just as English testators leave property to be taken by their relations according to the statute of distributions. By the Hindu law the widow will only take a right to maintenance out of the estate, and the son takes all.

It is impossible the testator can have intended to give a joint estate, so as, in the event of his son dying in the widow's life-time, to give the widow all, and to exclude his son's family.

SARGENT, C. J.:—We have to construe the will of a Hindu testator who died leaving an adopted son Nathu and a widow Hirábái. By his will he appoints them his heirs, for that, we think, after reference to the interpreter of the Court, is the effect of the two paragraphs in the will in which he refers to them as such. He directs them to take out probate, and that the whole of the property shall truly reach (go to) his said heirs; and that out of the rents of his house and the amount that may be received, his wife Hirábái and son Nathu together shall maintain themselves. He directs that his brother-in-law, Dáyábhái, should take care of the estate and moneys and be paid Rs. 1,000 annually by his said heirs; and that, if any disagreement should arise between his son and wife, then Dáyábhái should advise, persuade, and guide them. We agree with the Division Court that there is nothing in this will to lead to the conclusion that in appointing his wife to be one of his heirs he intended her to take more than a widow's estate. The rule must, we think, be taken as well established, that, in the absence of express words showing such an intention, a devise to a wife does not confer an estate of inheritance, but carries only a widow's estate as understood by Hindu law—*Koonjbehari Dhur* v. *Premchand*

Dutt[1]. In *Prosunno Coomár Ghose* v. *Tarrucknáth Sirkár*[2] the widow was held to take a heritable estate, the devise being to her, her heirs, and assignees for ever. In *Seth Mulchand* v. *Bái Manchá*[3] there was an express power of alienation given to the widow.

In the present will the only exceptional circumstance is that the wife is associated in the appointment of the testator's heirs with the adopted son, who by his appointment as heir must be presumed to have been intended to take an estate of inheritance. But we think that, having regard to "the ordinary notions and wishes of Hindus," which, as the Privy Council point out in *Moulvie Mahomed Shumsool Hooda* v. *Shewakrám*[4], may properly be taken into consideration in construing a Hindu will, the above circumstance is not sufficient to outweigh the extreme improbability that having adopted a son the testator should have intended to give more than a life estate, or, at the utmost, a widow's estate to his wife. The language, however, of the clause, which directs that his son and wife should pay Dayábhái Rs. 1,000 a year for managing the property, and maintain themselves out of the income, shows, we think, a clear intention that during their lives they were to be on the same footing and entitled to the income in equal shares; the object of the testator being that they should live together in harmony.

It has been contended for the defendant Hirábái that, under these provisions, Hirábái and Nathu took a joint estate for life, and that Nathu having died, she is entitled to the property for her life. But we agree with the Division Court, that, under the circumstances of this family, the presumption is that they were intended to take several interests, and that a construction, which would exclude the adopted son's family from all enjoyment in the estate, if the widow survived him, during her life, should not be adopted, as it would operate *pro tanto* to defeat the exigencies of the family, the preservation of which, as shown by the adoption and the appointment of his son as heir, must have been his paramount object.

(1) I. L. R., 5 Calc., 684.
(2) 10 Beng. L. R., 267.
(3) I. L. R., 7 Bom., 491.
(4) L. R., 2 Ind. App. 7, at p. 14.

1887.

HIRÁBÁI v. LAKSHMIBÁI.

Upon the whole we think that the widow Hirábái took a widow's estate in a moiety of the property, and that, subject to such estate, the entire property vested absolutely in Nathu. On the death, therefore, of Nathu the property (subject as aforesaid) vested in his widow as his heir for a widow's estate, and she became entitled to joint possession with the defendant Hirábái. We must, therefore, confirm the decree of the Court below with costs.

Decree confirmed.

Attorneys for the appellant:—Messrs. *Little, Smith, Frere, and Nicholson.*

Attorneys for the respondent:—Messrs. *Payne, Gilbert, and Sayáni.*

ORIGINAL CIVIL.

Before Mr. Justice Jardine; and, on Appeal, before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

1887. *May* 6.

WATSON, (ORIGINAL PLAINTIFF), APPELLANT, *v.* YATES, (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation—Limitation Act XV of 1877, *Sec.* 19—*Acknowledgment after period of limitation has expired—Promise to pay—Conditional promise to pay barred debt—Contract Act IX of* 1872, *Sec.* 25.

Where the defendant, after his debt had become barred by limitation, wrote as follows to his creditor in reply to a demand for payment:—"I bear the matter in mind, and will do my utmost to repay this money as soon as I possibly can,"

Held, that this promise by the defendant was only a conditional promise, *viz.*, to pay when he was able; and the plaintiff having failed to prove the defendant's ability to pay, the promise did not operate, and the plaintiff could not recover.

SUIT for Rs. 2,177-1-0. The plaint stated that at and subsequently to the 23rd January, 1879, the plaintiff lent money to the defendant in divers sums and at different times, amounting, with interest thereon, to the said sum of Rs. 2,177-1-0 on the 15th June, 1886; and that no payment had been made by the defendant, except a sum of Rs. 54 paid on the 17th June, 1879.

* Suit No. 489 of 1886.