PRIVY COUNCIL.

DAMODARDAS TAPIDAS, APPELLANT, AND DAYABHAI TAPIDAS AND ANOTHER, RESPONDENTS.

On appeal from the High Court at Bombay.

P. C.*
1898.
February 10 and 11; April 1.

Hindu will—Construction of bequest—Indian Succession Act (X of 1865), Secs. 82 and 111—Absolute estate given.

This appeal related to three clauses in the will of a Hindu, who bequeathed his property to his two sons, one of whom had a son. The other son was childless, his only issue having died before the will was made. There were gifts over on the death of either son.

The Courts below, construing the first of the three clauses, decided that each of the two sons took a life-interest in the property comprised in that clause, as tenants in-common; and that the ulterior interest, not having been validly disposed of, fell into the residuary estate.

On this appeal, with reference to section 82 of "the Indian Succession Act, 1865," made to apply to wills made by any Hindu in the town of Bombay, by section 2 of the Hindu Wills Act, 1870, some doubt was expressed by the Judicial Committee whether in that clause it sufficiently appeared that the estates given to the sons were only estates for life. It was, however, in the view taken of the other clause of which the construction was in dispute, unnecessary to determine that point.

In the next clause to be construed there were words which had been held by the appellate High Court to give to each of the two sons of the testator only a life-estate in a half share of the residuary estate. Whether those words, which followed a gift to the testator's two sons of the whole residue in equal shares, were so clear that only this restricted interest was intended to be given to them, was considered in like manner to be open to doubt in regard to the rule of construction imposed by section 82. But this was also not required to be determined, as this clause, the 13th in the will, was not applicable under the circumstances.

It was now determined that the third and last of the disputed clauses, No. 18 in the will, clearly gave the residuary estate to the testator's two sons, in equal shares, each an absolute estate, except in the case of the subsequent birth of a son or daughter. The two clauses, 13 and 18, were not, in the Committee's opinion, intended to be read together and reconciled, nor were they mutually explanatory. They were each intended to provide for different circumstances.

Held, that the two sons of the testator must be declared to have each taken an absolute interest in the half share of the residuary estate.

* Present:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

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APPEAL from a decree (7th April, 1896,) of the appellate High Court, varying a decree (28th March, 1895,) of the High Court in its original jurisdiction.

The suit was brought on the 6th November, 1894, by the respondent Dayabhai Tapidas for the construction of a will in the Gujaráti language dated the 26th May, 1885, made by his father Tapidas Varajdas, a Hindu of Bombay, who died on the 31st March, 1886, leaving houses and other property in Bombay acquired by himself. The testator left a widow, who died on the 12th August, 1887, two daughters, and two sons, Dayabhai and Damodardas. The first of these sons, the plaintiff, had a son Karsandas, whom he now sued as co-defendant with Damodardas. The only issue of the latter had died in infancy before the date of the will.

The clauses, the subject of contention, the 8th, 13th and 18th in the will, are set forth in the report of the appeal in the High Court [1], where the judgments of the Courts, original and appellate, are given at length.

The plaintiff, and his son, the second defendant, claimed that, on the true construction of the clauses, the plaintiff and the first defendant were each entitled to a life-interest only in the houses comprised in clause 8, and in the residuary estate referred to in clauses 13 and 18; and that after the death of the plaintiff and of the first defendant, then the second defendant would be absolutely entitled to all.

In answer to this the first defendant, Damodardas, contended for the construction that he and his brother, the plaintiff, each took an absolute estate as tenants-in-common in all the property comprised in all the three clauses.

On this appeal the principal question was resolved into whether the interest taken by the two brothers in the residuary estate was absolute or only for their lives.

The issues fixed in the Court of first instance appear in the report of the appeal in the High Court (I. L. R., 21 Bom., at p. 5) already referred to.

(1) (1895) I. L. R., 21 Bom., 1.

Upon the first and second of these issues the first Court (Candy, J.) decided that, under the 8th clause of the will, Damodardas and Dayabhai took, on the death of the widow, a life-interest only in the property mentioned in the clause, and the rest of the estate and interest in the same was undisposed of and fell into the residue of the estate. Upon the third and fourth issues he held that the two sons of the testator took an absolute estate as tenants-in-common in the residue, under the provisions of clauses 13 and 18 of the will, subject to the interest of Damodardas being defeasible if he should die without having a son born to him in the life-time of his brother. Upon the fifth and sixth the first Court could not say what the interest of Karsandas would be in the property, while the two sons of the testator were both alive; but that the two sons had power to alienate beyond their lives, subject to the proviso that the interest of Damodardas was defeasible in the case of his dying without having had a son born to him in the life-time of his brother.

An appeal having been heard by a Divisional Bench of the appellate High Court (Farran, C. J., and Strachey, J.), the Judges concurred in the decision of the first Court on the first issue, holding that the testator, when he gave the income of the houses in clause 8 to his sons equally, did not intend more than that their possession should extend to their lives respectively.

As to the gift of the residue under clauses 13 and 18, they held (p. 17) that the proper construction of clause 13 was that "on the death of one brother before the other, without having had issue sons, or without leaving issue sons, whichever might be the correct interpretation of the words, the gift over to the surviving brother would take effect, although both brothers survived the testator."

They held, in effect, that the estates of the two sons in the residue were life-estates. As to the gift over, they held (p. 20) that the most natural meaning to attach to this was that "on one brother dying, not having male issue, the estate of that brother, subject to the provision for his daughter and widow, passed to the surviving brother."

On the whole case the appellate High Court were of opinion that to hold that the testator's sons took only life-estates in the

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property which they were to divide and take under clause 13, also given to them by clause 18, gave better and more complete effect to the declared intention of the testator than to hold (by rejecting the direction in favour of the sons' sons as ineffectual and void) that the two sons of the testator took absolute estates.

The result of the judgment of the High Court was that the construction put upon the clauses was the following:—Dayabhai and Damodardas each took a life-estate in a moiety of the houses bequeathed in clause 8, and in a moiety of the residuary estate under clauses 13 and 18. The reversion of Dayabhai's share was now vested in his son Karsandas.

If Damodar should die without leaving a son, his moiety would devolve upon his brother Dayabhai, or, if the latter should be dead, upon his son Karsandas. The Court considered it premature to decide what would be the result if Damodar should have a son, or to decide as to the rights of other sons of Dayabhai, should he have any.

Before the decree was settled, it having been made known that Damodardas had had two children, who had died in infancy before the date of the will, and, by consent, argument having been heard thereupon, there was the following alteration. The judgment concluded thus (p. 22): "Reading then the expression 'have issue' in the sense of 'leave issue,' the sense which we have indicated, the result as to the reversion of Dayabhai's share being now vested in his son Karsandas must be struck out."

On this appeal by Damodardas

Cohen, Q. C., and *Mayne*, for the appellant, argued that the High Court had wrongly construed the clauses of the will. The decision should have been that the two sons of the testator each took an absolute interest on the death of the widow, in both the property bequeathed in clause 8 and in the residuary estate bequeathed in clauses 13 and 18. The Court of construction should have declared the gift, as made to the testator's sons, to have been an absolute gift to each of an equal share. The limitations over, which were to take effect contingently on the happening of a specified uncertain event, were not to take effect before the period when the property would have been dis-

tributed to the sons. They were, therefore, void, not being in accordance with section 111 of the Indian Succession Act, 1865. Gifts to persons not existing when the gifts should take effect, would not operate. Part XIII of the above Act was referred to, and also *Alangamonjori Dabee* v. *Sonamoni Dabee*[1]; *Norendra Nath Sircar* v. *Kamalbasini Das*[2]; and the *Tagore* case[3]. The period of distribution in this case was not at the death of the testator, but at the death of the son who first should die. The attempted disposition was that the surviving son should succeed to a deceased son's share; but, if the latter left issue, the surviving brother should not exclude the issue of the deceased brother. The only construction, legally permissible, was that the two sons each took absolute estates, which either originally were, or might have become, indefeasible. The words "have issue sons" meant "have" or "have had issue sons," and there was no sufficient reason derivable from the will for taking the words to mean "leave issue sons." If the absolute estate, which, it was contended, was given by section 13, were defeasible on the death of either son leaving issue, then an adopted as well as a natural-born son would count as an heir. Again, if it was right to conclude, as the High Court had concluded, that the words in clause 13 "in the event of their" (meaning my sons') "decease, they" (meaning my sons' sons) "are their heirs," were to be taken as words of gift to sons' sons, that gift would be void, because it would be a gift to persons not necessarily in being at the period of distribution. If, on the other hand, those words were to be taken as meaning that sons, and sons only, should inherit, such a declaration would be void as opposed to the principal rules of inheritance of the Hindu law. If the High Court were right in their decision, that the interests given to the testator's sons by clauses 13 and 18 were only life-estates, then it followed that the residue had not been disposed of according to law. The consequence would be that this residue would pass at once to the testator's sons as intestate inheritance. Thus in any view they obtained absolute estates.

(1) (1882) I. L. R., 8 Cal., 637.
(2) (1896) L. R., 23 Ind. Ap., 18; I. L. R., 23 Cal., 563.
(3) (1872) L. R. Ind. Ap., Sup, Vol. I, 47.

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entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him. This section is by section 2 of "The Hindu Wills Act, 1870" made to apply to wills made by any Hindu in the town of Bombay, and their Lordships have some doubt whether in the 8th clause it sufficiently appears that the sons were to take only an estate for life. It is, however, in the view which their Lordships take of clauses 13 and 18, unnecessary to determine it.

In the 13th clause the testator after referring to the business carried on in the name of Shah Tapidas Varajdas and Company, in which he had two shares and Damodardas one share, and his intention to make Dayabhai a partner, says that in the event of his decease the sons remaining joint shall carry on the business, their shares being half and half, and the commission is to be received by them in equal shares. "But if my son Bhai Damodardas should not make Dayabhai a partner in accordance with what is written above, and should not annually give him an equal moiety out of the commission money of the Alliance Cotton Manufacturing Company, Limited, that may be received annually, then out of my property of all descriptions and moneys he shall first give Bhai Dayabhai Rs. 2,00,001, namely, two lákhs and one." Then he says: "Afterwards on what is mentioned in this will being given to all, as to the whole of the property which may remain over, my sons may divide and take the whole," and then follow the words which have been held by the High Court to give to the sons only a life-estate in a half share of the residue. It appears to their Lordships that the latter part of the clause beginning "afterwards" is intended to apply to the case of Dayabhai not becoming a partner in the business and receiving from Damodardas the Rs. 2,00,001. According to the plaint and the admissions in the written statements, the whole of the residue of the estate, except the house and land at Surat, has been divided between the sons and is now enjoyed in severalty by them. There is no statement or any ground in the plaint or written statements for supposing that Dayabhai has received the two lákhs and one rupee. Clause 13, therefore, does not appear to their Lordships to be applicable in the circumstances which have arisen, and it may also be observed that what has been said about section 82

of the Succession Act with reference to the 8th clause is applicable to clause 13. It may be doubted whether the words which follow the direction, that the sons may divide and take the whole of the residue in equal shares, are so clear as to show that only a restricted interest was intended to be given to them. In their Lordships' opinion, clause 18 is that which is now applicable to the residue, and there is no difficulty in its construction. It gives the residue to the sons in equal shares absolutely, except in the case of the subsequent birth of a son or a daughter. Their Lordships cannot agree with the appellate Court in thinking that the two clauses must be read together and reconciled and must be treated, not as antagonistic, but as mutually explanatory of each other. They are intended to provide for different circumstances. They will humbly advise Her Majesty to reverse the decree of the High Court, except the order therein as to the costs of the suit, and to declare that Damodardas and Dayabhai each took an absolute interest in a half share of the residuary estate of the testator. The costs of this appeal of both parties, to be taxed as between solicitor and client, will be paid out of the property of the testator.

Appeal allowed.

Solicitors for the appellant:—Messrs. *Payne and Lattey*.

Solicitors for the respondent, Dayabhai Tapidas:—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent, Karsandas Dayabhai:—Messrs. *T. L. Wilson & Co.*

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* WILLIAM PLUMNER.*

1897.
February 4.

Criminal procedure—Continuing offence—Cantonments Act (XIII of 1889), Sec. 26—Rule 2 of the Rules made under Section 26—Additional fine for continuing offence.

The additional fine referred to in Rule 2 of the Rules framed under section 26 of the Cantonments Act, XIII of 1889, is not only to be imposed *after* the first

* Criminal Reference, No. 137 of 1896.