are wrongfully seized, there is no discretion vested in the Court as to whether it will entertain a suit for their release or not. The plaintiff is entitled to have them released. It would be an error to call a suit intended to have such a result a suit for declaration.

As to the third question, we think the plaintiff was entitled to abandon part of his claim so as to bring the case within the limits of the Small Cause Court jurisdiction.

The fourth question must also be answered, we think, in the affirmative. The right to relief against all the attaching creditors is in respect of the same matter, and so the suit fulfills the requirements of section 28 of the Civil Procedure Code. Mr. Vicaji contends that as some of the claimants have attached the property as that of Runchordas Goculdas, while others have attached it as the property of Lakshmishankar Pranshankar, the provisions of section 28 do not cover the case, but that does not appear to us to vary the plaintiff's right of suit. Both sets of creditors have attached goods which the plaintiff claims as his. The plaintiff must establish his ownership as against both. The law does not compel him to establish it as against each attaching creditor, or against each set of attaching creditors. It would be very unfortunate, we think, if it did, though it might be an advantage to the legal profession.

The costs of the reference will be costs in the case.

Attorneys for plaintiff:—Messrs. *Nanu and Hormusji.*

PRIVY COUNCIL.

P. C.*
1898.
June 28, July 12.

KARAMSI MADHOWJI (DEFENDANT), APPELLANT, *v.* KARSANDAS NATHA AND OTHERS (PLAINTIFFS), APPELLANTS.

On appeal from the High Court at Bombay.

Hindu law—Will—Construction—Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son, not carried out—Bequest of residuary property—Condition precedent not fulfilled

The will of a childless testator directed that the widow of his deceased son should adopt a boy, then aged nine years, who was the son of the testator's nephew. To this boy the testator bequeathed his residuary estate to be made

* Present: LORDS WATSON, HOBHOUSE, and DAVEY, and SIR R. COUCH.

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over to him at the age of twenty-one years. The widow, having refused to adopt him, died while he was still a minor, without having done so.

During her life the question arose whether this bequest was to take effect only upon the condition that the adoption should have taken place, or was a legacy validly made in his favour, as a person designated, without the adoption having been carried out.

In 1887, before the death of the widow, a suit for the construction of the will was decided to the effect that the adoption was a condition precedent to the minor's taking the legacy. A review of that judgment was refused when, after coming of age in 1894, he applied for it. His application to be allowed to appeal from that judgment was, however, granted, the circumstances being deemed by the appellate Court to be sufficient cause for the delay, within section 5 of the Limitation Act (XV of 1877).

The appellate Court subsequently heard the appeal and affirmed the decision of the Division Court. On appeal to the Privy Council,

Held, affirming the decree of the High Court, that the adoption was a condition precedent and that the boy not having been adopted could not take under the will.

APPEAL from a decree (21st February, 1896) of the appellate High Court[1], affirming a decree (1st October, 1887) of the High Court in the original jurisdiction.

With the object of obtaining the true construction of certain of the provisions of the will of Kessowji Jadhowji, a Hindu resident in Bombay, who died on the 9th February, 1886, this suit was brought in 1887 by Karsandas Natha and others, executors. The testator's only son Liladhar had died before his father, leaving a widow Ladkavahu and an only child Kesserbai. The plaintiff Karsandas Natha, now first respondent, was nephew of the testator. The widow Ladkavahu was the first defendant, and with her was joined Karamsi Madhowji, then an infant, as co-defendant, through his father Madhowji Katchra, who was another nephew of the testator.

By the will, in the Gujaráti language, Ladkavahu was directed to adopt Karamsi, then nine years old. She, however, refused to adopt him, and she died in 1890 without having done so. The will also used words to the effect that so much of the estate as might remain, after all the things directed in the will had been done, should go to Karamsi as his inheritance.

(1) (1896) 20 Bom., 718.

Difference of opinion having arisen as to whether or not the adoption was a condition precedent to Karamsi's becoming entitled to the residuary estate, this suit was instituted in 1887 for the construction of the will.

On this appeal the question was, mainly, as to the true construction of the words used by the testator in reference to the residue,—whether the words referred to what it would consist of, or, having a wider effect, meant that the adoption must precede Karamsi's getting the residue.

The clauses in the will affecting this question appear in their Lordships' judgment.

The suit, *Karsandas Natha and others* v. *Ladkavahu and another*[1], was decided on the 1st October, 1887, in the original jurisdiction by Farran, J. The Court was of opinion that the testator's direction to his daughter-in-law to adopt was to adopt a son to her deceased husband and herself, that being the only lawful adoption to which she was competent; and that Karamsi, unless and until he should have been adopted, was not entitled under the will to the testator's property, his adoption being a condition precedent to the taking under the will, as the Court construed it. *Shamavahoo* v. *Dwarkadas Vasanji*[2] was cited. Karamsi, having come of age in 1894, filed a petition for review, stating that he had been a minor in 1887, and that the decree had not given him an opportunity to show cause against it, with reference to its effect upon his interests on his attaining full age. The judgment on that petition, dated 4th March, 1895, and rejecting it, is reported in *Cursandas Natha* v. *Ladkavahu*[3].

On the 8th March, 1895, Karamsi petitioned for an order calling on the plaintiffs to show cause why, as he had been a minor when the case had been decided by the original Court, and as circumstances had been such as to impede an appeal being preferred on his behalf, he should not be allowed to appeal after all. The High Court were of opinion that cause should be shown; and after hearing the plaintiffs, granted leave to appeal. Their judgment (Sir C. Sargent, C. J., and Bayley, J.) stated the

(1) (1887) 12 Bom., 185. (2) (1878) 12 Bom., 202.
(3) (1895) 19 Bom., 571.

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grounds on which the special circumstances were considered by them to be sufficient excuse for the lapse of time that had taken place, within section 5 of the Limitation Act XV of 1877, regard being had to the fact that the interest of the minor to obtain reversal of the original decree had not been identical with those of his guardian—*Cursandas* v. *Ladkavahoo*(1).

The appeal having been heard, the High Court (Parsons and Strachey, JJ.) on the 21st February, 1896, confirmed the decree made by Farran, J., in the original Court on the 1st October, 1887. They said (2) that they agreed with the learned Judge that Karamsi, as he had not been adopted, was not entitled to the residue of the testator's property.

They quoted clause 28 of the will, and added :—

" That clearly means that he is first to be adopted,—adoption being one of the things mentioned in the will. The words 'as his inheritance' show that the residue is left to him because he is an heir. Clause 46 provides for the case of his dying after adoption. Nothing being left to him if not adopted, this was the only contingency to be provided for.

" The case of *Bireswar* v. *Ardha Chunder*(3) is quite different. There was clear indication there of the testator's intention before making an adoption, to give the property to the boy. Here there was no such intention. On the contrary it was clear that the intention was only to give it after the adoption had taken place. It was to the adopted boy, and not to the *persona designata*, Karamsi, that the bequest was made ;—compare clause 46 of the present will with clause 11 of the will in that case, and the distinction pointed out by their Lordships of the Privy Council at p. 107 will at once appear. This case is on all fours with *Shamavahoo* v. *Dwarkadas Vasanji*(4), and the decision of the Judge following that case is correct. We, therefore, confirm the decree with costs."

On this appeal—

Cozens-Hardy, Q. C., and *Branson*, for the appellant, argued that the High Court were in error in holding that the appellant, in order to become entitled to the property bequeathed by the will, must have been adopted. The right construction was that he was entitled to the residue bequeathed to him independently of the adoption. The fact that there was no gift over, in the case of the appellant not being adopted, went far to show that the bequest to him was absolute, and not conditional upon his adoption by

(1) (1895) 20 Bom., 104.
(2) (1896) 20 Bom., at pp. 719-720.
(3) (1892) 19 Ind. Ap., 101.
(4) (1878) 12 Bom., 202.

Ladkavahu. They referred to *Bireswar Mukerji* v. *Ardha Chander Roy*[1], where the bequest was by name to a boy whom the testator indicated as one whom he was about to adopt, but who was not adopted. As in that case, the appellant was not selected as being the adopted son, but for reasons independent of adoption;—and, as in that case, the bequest was held good, so here Karamsi should be held entitled. In clause 28 of the will there was an absolute gift to him. He was a designated person, and it was not of the essence of the gift that he should have been adopted before it could take effect. The words of the will, throughout, were consistent with his taking the bequest; and, on the other hand, if he did not obtain it, there would be an intestacy as to part, a state of things contrary to the testator's intentions. And such a construction would be contrary to the presumption applicable to a will. Reference was made to section 71 of the Indian Succession Act, 1865, as to the construction of a sentence in a will susceptible of two meanings. That which would give effect was to be preferred to that which would not.

Haldane, Q. C., and *J. D. Mayne*, for the respondents:—The will taken as a whole made it clear that the capacity to take the residue depended on the legatee having the qualification of being the adopted son. Clause 29 made it appear that his adoption was a condition without which the bequest was not to operate. The will, in short, was that there should be an adopted son who should take the testator's property. There was a continuous series of provisions showing that only as adopted son was this legatee in the testator's mind.

Cozens-Hardy, Q.C., replied, adverting to the provision that, in a certain event which had not occurred, the executors were to choose who should be adopted; and arguing that there was no sign, on the part of the testator, that he was actuated by the desire which ordinarily operated in bringing about an adoption, by, or for a Hindu who had no son.

Afterwards, on the 12th July, their Lordships' judgment was delivered by

(1) (1892) 19 Calc., 452; L. R., 19 I. A., 101.

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LORD HOBHOUSE:—The suit in which this appeal is presented was instituted in the year 1887 on the original side of the High Court of Bombay to procure an authoritative construction of the will of Kessowji Jadhowji. He was a wealthy Hindu, who made his will on the 8th February, 1886, and died the next day. The appellant claims to be entitled to his residuary estate.

The testator was the son of Jadu Asar, who had other children. The testator had one child, a son named Liladhar, who married Ladkavahu, and in his turn had one child, a daughter named Kesserbai. Liladhar predeceased the testator. Ladkavahu has died, but Kesserbai is still living. The testator had two nephews: one named Karsandas, who is one of his executors, and is stated to be his nearest reversionary heir, and another whose son is the appellant Karamsi.

The will is written in Gujaráti. The version used in this suit is by the translator of the High Court. In the first 27 clauses the testator gives a great number of legacies and directions about his property. The 28th clause is as follows:—

"28. There is my nephew Madhowji Katchra's son Karamsi Madhowji now (living). He is about nine years of age. It is my wish to adopt him as my son. If I should not be able to do so in my life time, then my son Liladhar's widow is to take the said Karamsi in adoption. His adoption ceremony (*dattvidhan*) is to be performed. My property which may remain as a residue after all the things mentioned in my will have been done I give to this lad as (his) inheritance. And (I) appoint (him) as my heir. Choru Liladhar's widow Ladkavahu is to get him betrothed (the outlays being made) out of my property. For the same about Rs. 5,000 are to be spent."

By the 29th and 30th clauses he directs that after Karamsi is adopted he shall take the name of Kessowji; and provides for the costs of his marriage and for his residence, which till he is 18 is to be with Ladkavahu. By the 31st clause he directs his executors to make over the property to Karamsi on his attaining 21, if his conduct is good, with alternative provisions if his conduct is bad, in favour of a well-behaved son. The 46th clause is as follows:—

"46. In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith after the said Karamsi shall have been adopted should he die without (leaving) any descendants then Choru

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Ladkavahu is duly to adopt out of my father Jadu Asar's descendants any lad who may be found fit. And if the said Ladkavahu should not be living at that time then (any) lad (begotten) of the loins of my father Jadu Asar who may appear to my executors to be fit, is duly to be appointed my heir. And to him my property as mentioned above is duly to be given in inheritance. And his adoption ceremony is to be performed and the outlays on the occasion of his marriage also are duly to be made as written above."

The difficulty has arisen from the circumstance that Ladkavahu refused to adopt Karamsi. The cause was heard in October, 1887, when Ladkavahu was living, before Mr. Justice Farran, now Chief Justice of Bombay, who decided that until adoption Karamsi was not entitled to the residue After Karamsi attained majority he obtained leave to appeal; and in February, 1896, the Court of Appeal affirmed the decree below. The present appeal is from that Court. The respondents are the executors, one of whom has an interest to support the existing decree.

The controversy turns on the construction to be given to the sentence "My property which may remain as a residue after all the things mentioned in my will have been done I give to this lad as his inheritance." That sentence admits of being read in two different ways with equal facility. The words "after all things mentioned in my will have been done" may be attached to the preceding word "residue"; or making a pause at "residue," the same words may be thrown forward and attached to "I give". On the former reading the disputed words merely show what is meant by "residue"; on the latter they import a condition precedent to the gift.

Mr. Justice Farran arrived at his conclusion without leaving on record any verbal criticism. The learned Judges of the Court of Appeal express themselves thus: —

"Clause 28 of the will is as follows:—'To this boy all the things (*kam*, literally business, work, things to be done) mentioned in my will having been done, I give the residue of my estate as his inheritance and I appoint him my heir.' That clearly means that he is first to be adopted, adoption being one of the things mentioned in the will."

It is not clear whether they mean to say that the words between commas are a clearer translation than the official one, or only to put their own construction on the words as they stand in the official translation. On the expressions used by the

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learned Judges no question can be raised. But their Lordships not being able to read the original for themselves, must abide by the official translation.

Of course the controversy takes the form of subjecting the will to a minute analysis in order to extract inferences in favour of or adverse to each of the two possible constructions; and that has been done very thoroughly at the Bar. On the appellant's side it is forcibly argued that the construction adverse to him leads to an intestacy, which it must be presumed that one who is making his will does not intend. It is also urged that, if the testator had attached primary importance to adoption, he would have taken care to place his meaning beyond doubt; that if it were so essential, it was an adoption not to himself but to his dead son, which he might have secured before his own death; that he must have known that after his death Ladkavahu would be a free agent, and might disregard his wishes; and that the words "inheritance" and "heir" are just as compatible with the idea of taking directly by devise as with that of taking in the character of grandson and heir through adoption. On the other hand, it is insisted that the wish for an adopted son is placed first in order; that it is an express condition precedent to the assumption of the testator's name; that it is necessarily implied in the direction that the boy shall reside with Ladkavahu; that the gifts over on failure of Karamsi's issue are only to take place after his adoption, and that there is no gift over unless he is adopted; in short, that the testator assumed as a basis of his dispositions that there would be an adoption, and that the alternative did not occur to him. Thus, it is urged, with the failure of adoption the whole structure of the will fails; and there ensues an intestacy, not as desired or contemplated by the testator, but because he took for granted the existence of a condition which has not come to pass.

On such a peculiar will it is hardly a profitable task to weigh each verbal criticism in very nice scales, the more particularly as several of the expressions relied on are double-edged and may be used one way or the other with nearly equal force. Their Lordships confine themselves to saying that the meaning of the

testator is very obscure, but that the arguments adduced to support the decree are such that they are not justified in disturbing it. They will humbly advise Her Majesty to dismiss the appeal. The costs must follow the result, and the appellant must pay them.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Brown, Ringrose, and Lightbody.*

Solicitors for the respondent:—Messrs. *Nicholl, Manisty, and Co.*

PARSI CHIEF MATRIMONIAL COURT.

Before Mr. Justice Fulton.

KAWASJI EDALJI BISNI, PLAINTIFF, *v.* SIRINBAI, DEFENDANT.*

1898. *September* 9.

Pársis—Marriage—Husband and wife—Suit by husband for restitution of conjugal rights—Defence to such suit—Agreement for separation a good defence—Parsi Marriage and Divorce Act (XV of 1865), *Sec.* 36.

Under section 36 of the Parsi Marriage and Divorce Act (XV of 1865) a contract by which a husband has agreed to allow his wife to live separate is a good defence to a subsequent suit by him for restitution of conjugal rights.

SUIT by plaintiff (husband) for restitution of conjugal rights.

The suit was filed in July, 1898. The plaint stated that the parties had been married in January, 1875; that in September, 1893, the defendant had left the plaintiff's house and had since lived separately.

The defendant pleaded (*inter alia*) that in January, 1896, the plaintiff had filed a previous suit against her for restitution of conjugal rights to which she had pleaded his cruelty, and she on her part had about the same time filed a suit against him for judicial separation; that both suits were fixed to come on for hearing on 10th July, 1896, but that on the 9th July the parties had come to an agreement, in consequence of which both suits were dismissed.

By this agreement the plaintiff (*inter alia*) agreed to allow the defendant to live separate from him and to make her a monthly

* Suit No. 4 of 1898.