the difficulties have plainly arisen in consequence of the defendants not having appeared at the hearing of the case in September, 1878, we think they ought to pay the costs of this motion.

Attorney for the plaintiffs:—Mr. *Khanderav Moroji.*

Attorneys for the defendants:—Messrs. *Crawford and Buckland.*

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Before Mr. Justice Farran.

KARSANDAS NATHA AND OTHERS (*Plaintiffs*) *v.* LADKAVAHU, KARAMSI MADHOWJI (A MINOR), AND KESSARBAI (*Defendants*).*

[29th September and 1st October, 1887.]

Hindu law—Will—Adoption—Adoption directed to be made, not by testator's widow, but by the widow of his deceased son—Such adoption is an adoption, not to testator himself, but to his deceased son—Adoption of testator's nephew directed by will—Bequest of property to such nephew—Adoption a condition precedent to his taking the property under the will— Persona designata*—Bequest of property to an unmarried grand-daughter of testator, and after her death to her children, if any, is a gift of life interest in such property.*

K., a Hindu, by his will dated the day before his death, declared that it was his wish to adopt his nephew Karamsi as his son, but that, if he should be unable to do so in his lifetime, his daughter-in-law Ladkavahu, (the widow of his deceased son Liladhar), was "to take the said Karamsi in adoption." This will then continued: "His adoption ceremony 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." A subsequent clause of the will directed 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* 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 [186] (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."

Held, that the direction by the testator to his daughter-in-law to adopt a son was a direction to her to adopt a son to herself and her deceased husband Liladhar, and not to adopt a son to the testator; the former being the only adoption which she was by Hindu law competent to perform.

Held, also, that, unless Karamsi was adopted as directed by the will, he was not entitled to the testator's property. His adoption was a condition precedent to his inheritance.

The will also contained the following devise in favour of the testator's grand-daughter Kessarbai, who was unmarried at the date of K.'s death:—

27. "When Kessarbai may marry, there is to be given to her out of my immoveable property one house which has been purchased from Shah Virji Narsi's widow Lilabai. * * * That (house, is to be given to *Choru* Kessarbai as *kanyadan*. The rent which it may yield, Kessarbai may enjoy after (she) my grand-daughter shall have married. And after Kessarbai's decease (she ownership of) the said house shall duly be enjoyed by Kessarbai's children. If by the will of God Kessarbai should die without (leaving) descendants, then my 'Trustees' are duly to take back the said house into their possession."

Held, that, under the above clause, Kessarbai was entitled only to a life estate in the house.

[Appr., 9 C.W.N. 309.]

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THIS suit was brought by the plaintiffs, as executors of the will of Kessowji Jadowji, for the purpose of having the will of their testator construed.

Kessowji Jadowji, a Hindu inhabitant of Bombay, died on the 9th February, 1886, leaving a will, dated the 8th February, 1886, of which he appointed the plaintiffs to be the executors. Probate of the will was obtained on the 7th March, 1886. The testator left him surviving (1) his daughter-in-law, the first defendant Ladkavahu, who was the widow of his deceased son Liladhar Kessowji; (2) a grand-daughter Kessarbai, the only child of Ladkavahu; and (3) Karsandas Natha, the first plaintiff, who was the son of a separated brother of the testator.

The testator left a very large amount of property, both moveable and immoveable. By his will he bequeathed many legacies and a large sum in charity. He also provided for his daughter-in-law, the first defendant Ladkavahu, and his grand-daughter [187] Kessarbai. He then directed (cl. 28) that his daughter-in-law should adopt one Karamsi Madhowji, the son of his nephew Madhowji Kachra; and the residue of his property, "after all the things mentioned in his will had been done," he gave "to this lad as his inheritance."

The following are the clauses of the will which are material to this report:—

10. "In our caste at Abdasha a distribution (*lani*) of small silver goblets is to be made. To each house (family) one small goblet (weighing) about eleven *tolas* is to be given."

20. "As to whatever ornaments (or jewellery) and silver and copper (and) brass vessels (and vessels) of other metals which there are in my house, and as to the household furniture of any sort whatever that exists, all those (I) give to my son Liladhar's widow Ladkavahu. She may use the same according as she may please."

21. "In Mody Bazar there is my house (known as) that of Shah Lalji Punsi. It has now fallen down. That house is to be (re) built and completed with three upper storeys, (outlays being made) out of my property. The said Ladkavahu is to reside therein. And my (deity) *Thakorji* shall gloriously abide in the said house. A *bhot* (arrangement, &c.) is to be made in respect of the temple thereof. And my executors are to purchase out of my property and give to Ladkavahu household furniture for the said house (worth) Rs. 2,500. My place of business (*pedi*) is to be established in the hall on the first storey of the said house. And the remaining portion of the house the said Ladkavahu may duly use as she may think (proper)."

24. "*Choru* (1) Liladhar's daughter Bai Kessarbai is now (living). When Ladkavahu shall get her betrothed, in accordance with the advice of *Choru* Karsandas, an executor of my (will), my trustees are to pay to her out of the undermentioned 'trust fund' Rs. 1,000 for the expenses of her betrothal."

25. "When my grand-daughter Kessarbai may marry, on the occasion of her marriage for (the purpose of defraying) the [188] expenses of inviting and feasting the caste and the expenses of feasting the *jan* (2) (brought) by the *vevai* (3) and the expenses of (giving) *peheramni* (presents)

(1) *Choru*, which is equivalent to child, is a term applied to the junior members of a family by the seniors.

(2) *Jan* means party of relations, &c., which accompanies the bridegroom when he goes to his father-in-law's house to be married there.

(3) *Vevai* is the father-in-law of one's son or daughter.

the said Ladkavahu shall duly spend, in accordance with the advice of my executors from Rs. 8,000 to Rs. 11,000 out of my property. Those rupees are to be paid out of the income of the 'trust fund'."

26. "When Kessarbai may marry, gold, silver and jewelled ornaments and wearing apparel worth from Rs. 14,000 to Rs. 15,000 are duly to be given to Kessarbai out of my property at the time of the '*kanyadan*' (ceremony). The amounts mentioned in the foregoing twenty-fifth and twenty-sixth clauses (directed to be paid) for the marriage, my 'trustees' are duly to pay out of the undermentioned 'trust fund'."

27. "When Kessarbai may marry, there is to be given to her, out of my immoveable property, one house which has been purchased from Shah Virji Narsi's widow Lilabai. The said house bears 'Ward No.' 1451 and 'Street Nos.' 225 and 231 in the municipal bill, and (it) is (situated) in Kazi Sai (D) Street. That (house) is to be given to *Choru* Kessarbai as *kanyadan*. The rent which it may yield, Kessarbai may enjoy after (she) my grand-daughter shall have married. And after Kessarbai's decease (the ownership of) the said house shall duly be enjoyed by Kessarbai's children. If, by the will of God, Kessarbai should die without (leaving) descendants, then my 'trustees' are duly to take back the said house into their possession."

28. "There is my nephew Madhowji Kachra'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 lifetime, then my son Liladhar's widow is to take the said Karamsi in adoption. His adoption ceremony (*dattavidhan*) 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 [189] (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."

29. "After Bhai Karamsi Madhowji shall have been taken in adoption, Karamsi is to use (as his) name (the name) Karamsi Kessowji. And when Karamsi may marry, an outlay of Rs. 6,000 for (giving) feasts, &c., at his marriage is to be made out of my property. And for Karamsi's wife, ornaments (or jewellery) to the amount of Rs. 7,500 are to be made out of my property. The expenses referred to in the twenty-eighth and twenty-ninth clauses my 'trustees' are to pay out of the income of the undermentioned 'trust fund'."

30. "*Choru* Karamsi Madhowji is to reside with Ladkavahu. After (he) shall have attained the age of eighteen years if (he) cannot agree with Ladkavahu, then Karamsi is to reside on the first storey of the house (known as) that of Shah Lalji Punsi; and on the second and third storeys (thereof) Ladkavahu is to reside. And when Karamsi shall (go to) live apart, my executors are to fix and give him a (certain) sum every month for his expenses as to them may appear proper and just. The same is to be paid out of the income of the undermentioned 'trust fund'."

31. "On *Choru* Karamsi attaining the age of twenty-one years, if his conduct should be good, my executors are duly to make over to him my property. And if Karamsi's conduct after he has come of age should not be good—that is to say, if he should turn out to be a drunkard or a profligate (person)—then my property is not to be made over to him at that time. When (in case) his son born (to him) shall be (should be a person) of good behaviour, the same is to be made over to him. But if

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Karamsi should be (a person) of good behaviour, then my executors are not in any way to obstruct him."

35. "After the said Kessarbai's marriage when her *agarni* (1) (ceremony) may take place (the presents called) *mosalu* on account thereof will have to be made. For that purpose my 'trustees' [190] are duly to pay out of my property Rs. 2,000 out of the income of the undermentioned 'trust fund'."

40. "My immoveable property is here. It is my intention to make a 'trust' thereof. And, if I should not have made that 'trust' in my lifetime, the executors of my 'will' are to make a 'trust.' In that trust I give and settle to give my immoveable property mentioned below. The said properties are (situated) in different localities. The municipal authorities have fixed (the different) 'wards' to which they belong. The numbers thereof they have mentioned in their bills. The said numbers and the street numbers and the names of the streets as mentioned in the municipal bills, (I) state below (*i.e.*) those of each one property."

41. "When my own (grand-daughter) Kessarbai shall marry, Rs. 15,000 are to be paid to her as a 'legacy' out of my property. And for that (amount) 'Government promissory notes' are to be purchased and given; or (some) immoveable property is to be purchased and given. The income of the interest (and) rent thereof that shall be received is duly to be paid to Bai Kessar."

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* 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."

This suit was filed by the executors in April, 1887. The plaint stated as follows:—

"2. Various questions have arisen as to the validity of certain of the bequests contained in the said will and as to the true construction of some of the provisions of the said will, and the [191] plaintiffs have been advised that they ought to submit the said questions to the judgment and direction of this Honourable Court.

"3. The said questions may be shortly stated as follows:—

"(*a*) Whether any, and if so which, of the bequests and directions in the said will contained are invalid, and if so to what extent are the same invalid?

"(*b*) What are the rights and interest of the defendant Ladkavahu in the testator's estate under his said will?

"(*c*) What are the rights and interest of the defendant Karamsi Madhowji in the testator's estate under his said will?"

The prayer of the plaint was as follows:—

"(*a*) That it may be declared by this Honourable Court whether any, and if so which, of the bequests and direction contained in the said will are invalid, and if so, to what extent they are invalid?

(1) *Agarni* is the ceremony performed on the occasion of the first pregnancy of a Hindu wife.

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"(*b*) That the right and interest of the defendant Ladkavahu in the said testator's estate under his said will may be ascertained and declared by this Honourable Court.

"(*c*) That the right and interest of the defendant Karamsi Madhowji in the said testator's estate under his said will may be ascertained and declared by this Honourable Court.

"(*d*) That, if necessary, the said estate may be administered by, and under, this Honourable Court's direction."

The first defendant Ladkavahu filed a written statement in which she asked that the Court should direct the punctual payment to her of the various sums to which she was entitled under the testator's will. She also complained that the plaintiffs had not handed over to her the silver vessels and ornaments and furniture given to her, as directed by the 20th clause of the will; and that they had not carried out the directions of cl. 21. The concluding clauses of her written statement were as follows:—

"5. This defendant submits to the judgment of this Honourable Court the true construction of the cl. 28 of the said will, and how far the directions in the said clause and cl. 29 contained are valid, and how the same ought to be carried into effect. This [192] defendant says that the testator shortly before his death promised this defendant that she should receive a sum of rupees five lakhs out of his estate if she adopted Karamsi Madhowji; and this defendant submits that this sum should be ordered to be paid to her if the said adoption is performed. This defendant believes that Madhowji Kachra, the father of the said Karamsi Madhowji, is not willing to give his said son in adoption, unless he is paid a large sum of money out of the said estate, and this defendant submits to the judgment of this Honourable Court whether such sum should be paid to him.

"6. This defendant also submits that the various sums described by this will to be paid to, or for the benefit of, the said Kessarbai should be forthwith set aside.

"7. This defendant also submits that the religious charitable bequests in the said will contained should be forthwith carried into effect."

The second defendant, Karamsi Madhowji, in his written statement claimed to be absolutely entitled to the residuary estate of the testator under his will; and that an adequate sum should be set aside and applied for his maintenance and education.

The suit came on for hearing before Farran, J., on the 29th September, 1887, when the following issues were raised:—

1. Whether the Advocate-General is a necessary party to the suit?

2. Whether Kessarbai, the daughter of Ladkavahu, is a necessary party to the suit?

3. Whether the defendant Ladkavahu is absolutely entitled to the copper, brass, and other vessels and furniture left by the testator, and referred to in cl. 20 of the will?

4. Whether the house at Mody Bazar, mentioned in cl. 21 of the will when re-built and completed, is to be included in the trust provided by cl. 40 of the said will?

5. What is the true construction of cls. 28, 29, and 30 of the will?

[193] 6. Whether any of the sums directed to be paid to, or for the benefit of, Kessarbai should not be forthwith set aside for her benefit?

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7. What estate Kessarbai takes in the house given to her by cl. 27 of the will?

8. How far the religious and charitable bequests in the will should be carried into effect?

9. Whether the second defendant Karamsi Madhowji is absolutely entitled to the whole, or what part, of the residuary or other estate of the testator comprised in the said wills?

10. Whether the second defendant is entitled to any, and what, sum for his maintenance and education?

Counsel for the various parties having stated that it was not intended to challenge any of the charitable bequests in the will, the Court found, on the first issue, that the Advocate-General was not a necessary party to the suit. As to the second issue, the Court was of opinion that Kessarbai was entitled to appear, and directed that she should be added as a co-defendant, and the first defendant was appointed as her guardian *ad litem*.

Macpherson (Acting Advocate-General) and *Chitty*, for the plaintiffs.
Jardine and *Telang*, for the first defendant.
Lang and *Russell*, for the second defendant Karamsi.
Telang and *Carnac*, for the third defendant Kessarbai.

Macpherson, for the plaintiffs.—The first and eighth issues are immaterial, as none of the parties propose to contest the charitable bequests in the will. The second issue has been disposed of, as Kessarbai has been made a party to this suit. As to the third issue, I refer to cls. 10 and 20 of the will. We do not offer any evidence, and leave the construction of these clauses to the Court.

As to the fourth issue. This issue depends on the construction of cls. 21 and 40 of the will. We submit that Ladkavahu is only given the use of the house in question. Under the last paragraph of cl. 21 she would probably be entitled to let the house. Clause 30 also applies to this house.

[194] As to issue No. 5. With regard to cls. 28, 29 and 30 of the will, the executors submit whether the direction given to his daughter-in-law to adopt Karamsi is not wholly inoperative. We say Karamsi cannot now be adopted. A man cannot delegate the duty of adopting to any one but his widow—West and Bühler, p. 1072, p. 984; *Bhagvandas Tejmal* v. *Rajmal* (1). The testator clearly intended that his daughter-in-law should adopt to himself: see cl. 46. But it has never been decided that any one can thus act vicariously for a man, except his own widow.

Further, the executors submit that the gift of the residue to Karamsi is conditional on his being adopted. This question depends on the construction of the will. The cases on this point are only useful as illustrations. In *Nidhoomoni Debya* v. *Saroda Pershad* (2) the Privy Council held that where a gift was made to a person whose adoption was contemplated by the testator, such person took as a designated person, whether adopted or not. But see the decision of Sargent, J., in *Shamavahoo* v. *Dwarkadas Vasanji* (3); *Fanindra Deb Raikat* v. *Rajeswar Das* (4); *Doorga Sundari Dossee* v. *Surendra Keshav Rai* (5). The will in *Shamavahoo's Case* (3) was similar to this will, and the reasoning in the judgment applies here. We contend that the gift to Karamsi is contingent on his adoption.

(1) 10 B.H.C.R. 241 (257). (2) 3 I.A. 253. (3) 12 B. 202.
(4) 12 I.A. 72=11 C. 463. (5) 12 C. 686 (693).

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As to issues nine and ten. These issues naturally come next in order, for they depend on the decision of the fifth issue. If our contention be correct, *viz.*, that Karamsi cannot be adopted, then these issues are immaterial. But if we are wrong, and if Karamsi may be adopted by Ladkavahu, then it is necessary to decide these issues. The questions raised depend on cls. 30, 31, and 46 of the will. We contend that Karamsi, at most, takes a life estate under these clauses. Karamsi is now only nine years of age, and there is no provision for his maintenance until he is eighteen.

As to issue No. 6. This issue depends on cls. 24, 25, 26, 27, 35, and 41. We say the sums referred to in this issue ought not [195] to be set aside, as these clauses provide that the legacies are to be paid out of the trust fund.

As to issue No. 7. We say under cl. 27 Kessarbai takes a life estate. The gift to her children is void, as she has no children at present—*Tagore Case* (1).

Jardine, for the first defendant Ladkavahu.—Issue No. 3 is the first issue in which we are interested. As no evidence is offered by the other parties, it must be decided in our favour.

As to issue No. 4. We agree with the plaintiffs that the house referred to is comprised in the trust, but subject to the directions in cls. 21 and 30 of the will. We say Ladkavahu takes a life interest in the house, subject to the specific appropriation of it, either present or contingent, contained in cls. 21 and 30, and that she is entitled to such portion of it as is not appropriated.

As to issue No. 5. We contend that the clauses referred to in this issue contain a direction to Ladkavahu to adopt Karamsi as son to herself and her deceased husband, Liladhar, and that Karamsi's inheritance is conditional on such adoption: see cl. 28. The religious efficacy of a grandson is the same as that of a son.

The direction that Karamsi should take the name of Karamsi Kessowji would be mere surplusage if he were adopted to the testator. The Court should adopt a construction which would give effect to the intention of the testator. The words of the will in *Shamavahoo's Case* (2) were stronger than the words here: see cl. 15 of the will in that case.

We also contend that the gift to Karamsi is contingent on his adoption. *Shamavahoo's Case* (2) is directly in point. Clause 46 of the will is almost conclusive. The provision in this clause as to the possible adoption of some other person is nugatory, unless the gift under cl. 28 is conditional on adoption. The words in this latter clause giving Karamsi the residue follow the words directing his adoption. The will in *Shamavahoo's Case* (2) is different in this respect.

[196] *Telang*, for Kessarbai.—As to issue No. 7. Only for the latter part of cl. 27 Kessarbai would undoubtedly take an absolute interest. We ask the Court to construe the clause as a gift to Kessarbai and her children. It is a gift to her on her marriage, subject only to its being divested on her death without issue.

Lang, for the second defendant Karamsi Madhowji.—We submit that Karamsi is absolutely entitled under the will, although he has not been adopted and although he should never be adopted. Ladkavahu may refuse to adopt him, and she cannot be compelled to adopt. It is

(1) I.A. Sup. Vol. 47. (2) 12 B. 202.

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impossible that the testator can have intended the devolution of his property to depend entirely on the will of Ladkavahu. This must be the result if the Court holds adoption to be a condition precedent to Karamsi's taking the property. The Court, if possible, will hold this to be a condition subsequent, not a condition precedent—Theobald on Wills (3rd ed.), p. 373.

[FARRAN, J.—Has that principle ever been applied by the Privy Council to Hindu wills?]

I do not know of any case. It is only by holding that adoption is one of "the things mentioned to be done" in cl. 28 that it can be made a condition precedent. But it is clear that those words refer to the residue remaining after making the prescribed payments. If adoption be a condition precedent, the estate may be in suspense indefinitely, for Ladkavahu can adopt at any time till her death, and until then the estate will not vest—*Peyton* v. *Bury* (1). A condition precedent must be expressly stated, and cannot be implied. Here it is only implied. If the plaintiffs' contention be correct, the Court must imply an impossible condition precedent. If Ladkavahu's argument be correct, the estate is left at her mercy. Clause 31 shows that Karamsi is the *persona designata*, and not any adopted son. *Shamavahoo's Case* (2) is distinguishable in several points; but in any case that decision is not binding on this Court. The words of the will there were different. Clause 46 of this will shows that the testator selected Karamsi to be his heir, and expressed a desire that he [197] should be adopted. *Nidhomoni Debya* v. *Saroda Pershad* (3) is a very ambiguous case, and is in our favour.

If, however, the Court holds adoption to be a condition precedent, then we submit that the contention made on behalf of Ladkavahu is correct, and not that made on behalf of the plaintiffs. The Court will not hold that the contention is to do what by Hindu law cannot be done.

[FARRAN, J.—What do you say is to be the effect of cl. 27? You are interested if you take the residue.]

I say Kessarbai takes a life interest only.

Macpherson, in reply.—As to cl. 27, the contention that the words "and after Kessarbai's decease, &c.," are words of limitation cannot be supported. The fact that the gift to her children is void, does not give her a larger interest; therefore she takes only a life interest. As to cls. 28 and 29, it is clear that the testator's object was to perpetuate his name by having an heir, and the natural way of doing that was to have adopted a son to himself. That was clearly his intention in making his will. But it is contended that he must have known that by Hindu law an adoption to himself by his daughter-in-law was impossible. It is clear, however, that the testator did not know the law as to adoption. Clause 46 shows that he contemplated an adoption by his executors.

The English rules as to conditions precedent are not applicable here. It is a misnomer to call this a condition precedent. The question is, who is the devisee? Is the devisee the adopted son, or is it Karamsi whether adopted or not?

JUDGMENT.

FARRAN, J.—I do not think that any advantage would be gained by delaying my judgment in this case, and I will, therefore, give my decision at once. I will take the issues in their order.

(1) 2 P. Williams 625. (2) 12 B. 202. (3) 3 I.A. 253.

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The first I have already decided, and have held that the Advocate General is not a necessary party to this suit. The eighth issue may be taken in connection with the first. All parties are willing that the charities should be carried out; and as there is [198] nothing which is shown to be invalid in the charitable bequests in the will, I will find the eighth issue in the affirmative. The intention of the testator is clear, and as all parties are desirous that his intention should be effectuated, even though there may perhaps be some doubt as to its perfect legality, I will not endeavour to discover it.

The third issue also I decide in the affirmative, no evidence having been offered with regard to it.

Next comes the fourth issue. I decide this issue in accordance with the contention put forward on behalf of the plaintiffs and the first defendant; and I hold that the house in Mody Bazar is comprised in the trust created by cl. 40 of the will, and ought to be included in it, but subject to the provisions contained in cls. 21 and 30.

Passing over the fifth, I deal with the sixth issue. All these sums are plainly to be paid out of the income of the trust premises, and that income cannot be ascertained at present. This issue must, therefore, be decided in the negative.

As to the seventh issue, I confess I should wish to put a different construction on the will than that which I find myself compelled to adopt. (His Lordship read cl. 27 of the will.) It is true that a gift of the rents of a property is generally equivalent to a gift of the property itself; but it is clear that the testator does not mean or intend that Kessarbai shall take the property absolutely. He gives her the rent of the house, and after her death he gives "the ownership" to her children. Obviously, therefore, if she had children she was only to take a life estate. But at the testator's death Kessarbai had no children, and, therefore, on the authority of the *Tagore Case* (1), the gift to them is void. That circumstance, however, cannot be taken to enlarge the interest given to her by the will, and, therefore, I must find upon this issue that under cl. 27 she is entitled only to a life estate.

The remaining issues to be dealt with, *viz.*, the fifth, ninth, and tenth, all depend on the construction to be put on cls. 28, 29, 30, and 46 of the will. By cl. 28 the testator directs his [199] daughter-in-law, (the first defendant Ladkavahu) to adopt a son (His Lordship read cl. 28.). Now, the first question which arises is, whether that direction is a direction to her to adopt a son to himself (the testator), or a direction to her to adopt a son to herself and her deceased husband Liladhar, which was the only adoption which she was competent by Hindu law to perform. By that law any adoption made by a widow enures to herself and her husband. Why should I hold the testator to have directed Ladkavahu to do what she could not do? The fact that by cl. 29 the adopted son is directed to take the name of Karamsi Kessowji has been relied on as showing that the adoption was intended to be to the testator. I do not think, however, that any weight can be attached to that circumstance. That direction would have been unnecessary if the adoption was to the testator, but I do not think it in any way assists us in construing cl. 28. The provisions of cl. 46, however, tend to show that what Ladkavahu was directed to do was what could be legally done, *viz.*, to adopt a son

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to her husband and herself. It was argued that the testator did not know the law, and in his ignorance contemplated an adoption to himself. But the Privy Council has laid down that in construing a Hindu will we are to keep in mind what the Hindu law is, and what it permits, and I must, therefore, hold that the direction to Ladkavahu was a direction to do what by law she was alone competent to do, *viz.*, to adopt a son to her husband and herself; and I find nothing in the will to compel me to hold otherwise.

The next question to be considered is, whether Karamsi is under the will entitled to the property, although he has not been adopted. I am unable to distinguish this case from the case of *Shamavahoo* (1). I consider I should be bound by that authority even if I did not agree with it; and, if the decision be erroneous, I must leave the matter to the Appeal Court to be set right. But I do not disagree with that case; and I think, upon the facts, I should have come to the same conclusion.

In construing the will now before me I think cl. 46 strongly supports the contention that inheritance was to be contingent on [200] adoption. The intention of the testator was that the adopted son, and no other, was to succeed to his property. He could not have intended that a person not adopted should inherit all his wealth, and leave penniless the son to be adopted for the purpose of perpetuating his family and name. If the will admits of the construction which will carry out what was clearly the intention of the testator, that construction ought to be adopted. In the view of the testator, the direction as to adoption was the most important portion of his will, and I think that the adoption of a boy was one of "the things mentioned in my will" which by cl. 28 were to be done before ascertaining the residue which was then to be given "to this lad as his inheritance." The words of cl. 46 support that construction, for by this clause it is provided that the property is in certain events to go to a subsequently adopted son. But that would be impossible if Karamsi took the property independently of his adoption and the adopted heir would be left wholly unprovided for. To my mind, that is almost conclusive as to the meaning of cl. 28. In these clauses the testator, in effect, says, first "adopt a son", then "I give to the lad so adopted the residue of my property, and I appoint him my heir." By the word "heir" in this country is usually meant the person who can discharge the functions of an heir according to Hindu ideas. In the subsequent clauses of the will the boy so adopted is treated as the testator's heir.

My decision makes adoption a condition precedent to inheritance. The English decisions show, no doubt, that there is in England a strong desire to avoid, whenever it is possible to do so, any construction which would involve a condition precedent in such a case as the present. Here, however, we have to deal with Hindu law, and we must keep the provisions of that law in mind in endeavouring to carry out the intentions of a testator.

On the fifth issue, therefore, I find that Karamsi is entitled to the property on being adopted by Ladkavahu.

I admit that my decision on this point will leave the inheritance in suspense for a time, but that is always the case where a will directs an adoption to be made.

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[201] As to the question raised by the ninth issue, probably, if adopted, Karamsi would take an absolute estate, but that question had better be left open for the present.

My decision on the fifth issue renders it unnecessary to record any finding on the tenth.

The decree will be a declaratory decree setting out the issues and the findings thereon, and declaring accordingly.

All parties to have their costs out of the estate, as between solicitor and client.

The following were the findings on the issues :—

3. That the defendant Ladkavahu is absolutely entitled to the copper, brass, and other vessels and household furniture left by the testator, and referred to in cl. 20 of his will.

4. That the house at Mody Bazar, mentioned in cl. 21 of the said will, when rebuilt and completed as provided in the said clause, is to be included in the trust provided for in cl. 40 of the said will; and that Ladkavahu takes a life interest in the said house, but subject to the specific appropriation of it, present and contingent, contained in cls. 21 and 30; and that she is entitled to use such portions of it as are not so appropriated in such manner as she thinks fit.

5. That by cl. 28 as read with cls. 29, 30 and 46 of the said will, Ladkavahu is directed to adopt Karamsi Madhowji as her son, and that upon such adoption the said Karamsi will be entitled to the residue bequeathed to him by cl. 28 of the said will to be made over to him upon his attaining the age of twenty-one years, in pursuance of the directions contained in cl. 31 of the will. No finding as to the *quantum* of the estate taken by the said Karamsi in the said residue.

6. In the negative, and for the plaintiffs.

7. That Kessarbai takes an interest for life in the house given to her by cl. 27 of the said will.

8. That the religious and charitable bequests contained in the said will are valid, and should be carried into effect.

[202] 9. That until his adoption the defendant Karamsi Madhowji is not entitled to the whole or any part of the residue or estate of the testator comprised in the said will.

10. No finding, as the defendant Karamsi Madhowji has not yet been adopted.

11. Declaratory decree setting out the issues and the findings thereon, and declaring the rights of the parties in accordance with such findings.

All parties appearing to have their costs out of the estate taxed as between attorney and client. The infant's costs to be taxed separately from those of the defendant Ladkavahu in her personal capacity.

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