Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Amrito Lal Dutt v. *Surnomoye Dasi and Others, from the High Court of Judicature at Fort William in Bengal ; delivered 2nd May* 1900.

Present at the Hearing :

LORD HOBHOUSE.
LORD MORRIS.
LORD DAVEY.
LORD ROBERTSON.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

This is a suit instituted before the High Court of Judicature in Calcutta in its original jurisdiction for administration of the estate of Hurridas Dutt, who died on the 30th October 1875, having executed a will on the same day. He had no son, but left a widow Surnomoye Dasi and two daughters who were all Defendants below and now are Respondents. The Plaintiff in the suit, now Appellant, claims to be the son of the testator adopted by virtue of a power contained in his will ; and the cardinal question in the suit is whether or no he bears that character.

The material passages in the will which was written in English are as follows :—

"I appoint my wife Srimutty Surnomoye Dasi the "executrix, and my father Babu Modhusudan Dutt of "Mullick's Street aforesaid, and my uncle Babu Dwarka "Nath Dutt of Thuntoneah in Calcutta aforesaid, the "executors and trustees of this my will.

Para. 8. "Whereas having no son born to me of my body I "am desirous of adopting one in my lifetime, but in case I depart

" this life before carrying such my desire into effect, I hereby " authorise and empower my wife and executrix Srimutty " Surnomoye Dasi, and my executors and trustees, to whom I " give full permission and liberty, to adopt after my decease a " son, and in case of his death during his minority or on " attaining his full age and without leaving male issue, to " adopt a second son, and in case of his death during minority " or on attaining such age and without leaving male issue, to " adopt a third son, and no more. In any of the above cases " of adoption, should the adopted son die leaving a son or " sons, the power of adoption shall cease or remain in abeyance " during the life or livestime of such son or sons of such " adopted son, but shall revive on the death of such son or " sons during minority.

Para. 13. " I authorise and empower my said executrix and " executors and trustees and the survivor of them and the " trustee for the time being of this my will, to appoint any " other person or persons to succeed them or him in the execu- " tion of the trusts of this my will.

Para. 15. " In case of any accident arising to cause my wife " to depart her natural life before adoption of a male child my " surviving executors are empowered to act with my full " consent and direction to adopt a male issue. Dated this 30th " October 1875."

By the ninth clause the testator provided an income for his wife and adopted son during the life of his wife and directed accumulation of the surplus income. The adopted son is to take the property if he survives the widow and attains the age of 18, otherwise it is given over to the daughters.

The will was proved by the testator's widow and his uncle Dwarkanath Dutt. The testator's father Modhusudan Dutt did not renounce probate, but he never took any part in the administration of the estate.

On the 9th August 1876 a deed was executed by which the widow purported with the consent of Dwarkanath Dutt as executor to accept Joti Pershad Mullick a boy five years old as the adopted son of the testator. In the year 1877 Modhusudan Dutt died, and in January 1881 Joti died, being then ten years old. On the 9th February 1881 a deed was executed by which the widow purported, by virtue of the

authority given to her by the will, and with the consent of Dwarkanath Dutt as executor, to accept the Plaintiff then a boy of eight years old as the adopted son of the testator. After attaining his majority the Plaintiff instituted this suit in the year 1894.

The cause was heard in the first instance before Mr. Justice Jenkins who held that the Plaintiff was rightly adopted and proceeded to determine the other questions arising under the will. He held 1st, that the testator had given the power of adoption to his widow subject only to the assent of the other executors. 2ndly, that the death of Modhusudan did not destroy the power, and 3rdly that the terms of the adoption deed were in sufficient conformity with those of the will. Both parties appealed from his decision.

The Court of Appeal consisting of Chief Justice Maclean and Justices Macpherson and Trevelyan were unanimous in holding that there was no adoption of the Plaintiff. Their main ground was that the power of adoption which the testator purported to give was one which the law does not allow. They further intimated an opinion that even if the power could be held valid by virtue of the construction adopted by Jenkins J. it could not be exercised after the death of Modhusudan. They therefore dismissed the suit.

Their Lordships felt no doubt during the argument that the testator could not confer any such power as he desired. That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu law, and one so constantly occurring in ordinary life, that it is difficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in various ways, and among them by requiring the consent of persons

named by the husband, is also familiar law. If it turns out that such consent cannot be procured she has no authority to adopt, and that is the question which has been raised in this case with reference to the death of Modhusudan. But the fundamental objection arises not on the events that have happened but on the provisions of the will as it stood at the testator's death. It never gave any authority at all to the widow. In terms, the literal construction of which admits of no doubt, he authorised an appointment not by his wife, but by her and the two others whom he had appointed executors and trustees. Whether he intended the authority to be attached to the office can make no difference; or if it did make any it would not be favourable to the Plaintiff. It was given not to a single person but to several. Not only so, but the testator went on to authorise his surviving executors to adopt a boy after his wife's death; while rather significantly he did not authorise her to adopt after their death; and yet she was more likely to be the survivor than the members of the elder generation.

The suggestion that the testator really meant to give authority to the widow restricted by the consent of the others cannot be accepted as a legitimate construction of his will. It is a mere speculation, and we may speculate in other directions. When using the term adoption the testator may have been thinking merely of the choice of a male successor in the property; seeing that he does not leave the adoption to carry with it the ordinary right of succession, but subjects the inheritance to rather capricious conditions; postponing enjoyment during the widow's life, and making the boy's interest in the corpus contingent on his surviving the wife, and attaining 18. Such speculations however are, in a case in which the language conferring

the authority is clear, and there is nothing in other parts of the will inconsistent with it, quite beyond the legitimate range of judicial interpretation.

The joint power conferred on the three executors being invalid, the Plaintiff has no status in the family and his suit was rightly dismissed. Their Lordships will humbly advise Her Majesty to dismiss this Appeal and the Appellant must pay the costs.