Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Nidhoomoni Debya v. *Saroda Persad Mookerjee, and others, from the High Court of Judicature at Fort William, in Bengal; delivered 29th June* 1876.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS appeal arises under these circumstances:—

One Doorga Pershad Mookerjee, a member of a Brahminical family, had three sons, Baman Dass, Gouri Pershad, and Amoda Pershad. Gouri had also three sons, Saroda, Grijanund, and Nilruttun. Grijanund died at the age of 21, leaving two widows, and one of those widows, Midhoomoni Debya, brings this suit as heir of her husband, for the purpose of recovering a half of his property. She also seeks to set aside a will of her husband and a will of her husband's father. The will of her husband which she seeks to set aside was dated on the 21st January 1865, a day, or a short time, before his death. The effect of it is to declare that he had adopted a son of his elder brother Saroda, and to devise and bequeath all his real and personal property to that adopted son, with the exception of a provision for the widows. The will of Gouri Pershad was to the effect, that his three sons should take his property as joint tenants, and that upon one of them dying the residue should go to the survivors. In the event of the will of Grijanund being set aside, the Defendants might possibly have availed

themselves of the will of Gouri his father for the purpose of showing that the widow could not recover in right of her husband, but if the will of Grijanund is affirmed no question as to the will of Gouri arises.

The subordinate Judge found against both the wills. That decision was reversed on appeal to the High Court, consisting of the Chief Justice and two puisne Judges. The High Court affirmed the will of Grijanund, and they rightly stated that that will being affirmed, no question arises with respect to the will of Gouri.

Their Lordships do not think it necessary to go into a lengthened examination of the evidence for and against this will. They think it enough to say that they concur with the opinion of the High Court that the will is sufficiently proved. It is, as the High Court observe, a will which it is highly probable that a man under the circumstances of Grijanund would make. There is a great body of evidence in support of it which appears to their Lordships to preponderate over the evidence against it; among the evidence in support of it is that, among others, of the family medical man, and of a relation who appeared to have the confidence of both the factions into which the family appears unfortunately to have been divided, and to have been required to arbitrate between them. The will was published and made known almost immediately after the death of the testator; and the adoption of the child which he declares in the will he has made was also made public and insisted upon. It is also to be observed that other members of the family, even those who now oppose the will, recognised the adopted child Koibullo in various judicial proceedings. They brought actions in which they associated his name with theirs, and one of them, Amada, who now opposes the will, endeavoured

to defeat an action on the ground that this very Koibullo ought, as the adopted son of Grijanund, to have been joined with him as a Defendant.

What has been said would have been sufficient to dispose of the case but for a contention which has been set up here, apparently for the first time, there being no trace of it in the proceedings below. The passages of the will on which it is based are in these terms: "And as I am "desirous of adopting a son, I declare that I "have adopted Koibullo Persad, third son of my "eldest brother Sarodo Persad. My wives shall "perform the ceremonies according to the Shas-"tras, and bring him up, and until that adopted "son comes of age, those executors shall look after "and superintend all the property movable and "immovable in my own name or benami, left "by me, also that adopted son. When he "comes to maturity the executors shall make "over everything to him to his satisfaction. The "executors are empowered to perform the daily "and occasional family ceremonies and pay the "expenses of suits, &c., after due consideration. "The minor, when he attains maturity, shall "be incompetent to object to anything done by "them in this respect. God forbid, but should "this adopted son die, and my younger brother "Nilruttun have more than one son, then my "wives shall adopt a son of his. If at that "time, Nilruttun has not a son eligible to "adoption, they shall adopt another son of "Saroda, and the wives and executors shall "perform all the afore-mentioned acts." It has been argued that inasmuch as the testator directed that his wives should perform certain ceremonies according to the Shastras, which ceremonies (though the nature of them has been by no means defined) were necessary to the completion of the adoption, and inasmuch as these ceremonies were performed by one wife

only, the adoption was not complete, and Koibullo never in any sense became the son of Grijanund.

This argument raised two questions. First, whether or not these ceremonies (whatever they may have been) were necessary for the completion of the adoption, or whether all that was necessary to it had been done by the testator, who in his lifetime received the child, the child having been given by his natural father. Secondly, whether, supposing these ceremonies to be necessary, and a power to have been given to two widows to perform them, one widow only could perform them effectually. But it appears to their Lordships that neither of these questions arises in the case, and probably it is because they did not arise that they were not discussed. The effect of the will according to their view is this: "I declare that "I give my property to Koibullo whom I have "adopted." There is a gift of his property by the testator to a designated person. This direction follows, "my wives shall perform "the ceremonies according to the Shastras, "and bring him up." Undoubtedly the testator desired and expected that the wives should perform certain ceremonies. He requested them to do so. But it appears to their Lordships that it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by Koibullo to be entirely dependent on whether the wives chose or did not choose to perform the ceremonies. If they did not, it may be that the adoption is not in all respects complete, although their Lordships by no means decide this or give any opinion on the subject. Be that as it may, the gift of the property nevertheless takes effect. The provision "God forbid, but should this adopted

" son die, and my younger brother Nilruttun " have more than one son, then my wives shall " adopt a son of his," further indicates that the testator did not contemplate his widows having the power of cancelling the adoption of Koibullo, and ousting him from the benefit he was to take under the will, by declining to perform the ceremonies. Whether they performed the ceremonies or not, it is certain that as long as Koibullo lived no other adoption could take place.

For these reasons it appears to their Lordships that the judgment of the High Court is right; that the widow has no claim under this will except to whatever is given to her for her maintenance; and they will humbly advise Her Majesty that the decree of the High Court should be affirmed, and this appeal dismissed with costs.