1887
FEB. 26.

ORIGINAL CIVIL.

12 B. 202.

12 B. 202.

ORIGINAL CIVIL.

Before Sir C. Sargent, Justice.

SHAMAVAHOO (*Plaintiff*) *v.* DWARKADAS VASANJI AND OTHERS (*Defendants*).* [26th February, 1887.]

Hindu law—Adoption—Adoption directed by will—Bequest of property by will to the boy named for adoption by testator—Adoption a condition precedent to such boy taking under the will—Conditional gift on adoption—Conditions proposed by natural father before consenting to give his son in adoption—Adopting widow not obliged to consent to such conditions.

G. T., a Hindu of the Bhatia caste, died on the 6th September 1867, having by his will, dated the same day, directed that, in case no son was born to him, his widow S. (the plaintiff), should adopt the son of his nephew, who was to be "made his adopted son." The following was the material part of the will:—

"15. During my lifetime, or subsequently to my decease, should a child (begotten) by me not be born of the womb of my wife Shamavahoo, then I direct and order and appoint as follows:—There is my nephew Bhai Dwarkadas Vasanji. He has now one son to whom he has not as yet given a name. My wife Shamavahoo is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in (this) my testamentary writing has been done accordingly, I give (him), as an inheritance, all the residue of my property left at the time, and I appoint him as my heir. This lad is to perpetuate (my) own name as (if he were) the son of my loins, and (he) is to pay as much respect to my wife Shamavahoo as (if she were) his own mother; and agreeably to her directions he is to act righteously. And my wife is to have this lad married, as (though he were her) own son, and upon his marriage, Rs. 20,000 are to be expended out of my property. And during the lifetime of my wife, should this lad die without coming of age, then my wife is duly to take in adoption such other (or second) son of Bhai Dwarkadas as may be (living) at the time, and he is duly to be treated as my son. (All) are duly to act towards him in all respects agreeably to what is written above, and he is to obey my wife Shamavahoo. If, by the will of Providence it should so happen that there may be no other son of Bhai Dwarkadas then I appoint my nephew Dwarkadas Vasanji as the heir, of my property. **[203]** And to him I give as an inheritance all the residue of my property left at the time. (It is given) in the following manner."

In 1870 this suit was filed by the plaintiff, (the widow and executrix of testator), for the purpose of having the will construed. The plaintiff (*inter alia*) complained that the defendant Dwarkadas Vasanji had refused to give his infant son in adopting to the plaintiff, and had named him Sundardas Dwarkadas, and had no other son. In his written statement, filed in 1871, the defendant Dwarkadas Vasanji denied that he had refused to give his said son in adoption. In a subsequent written statement filed on the 4th March, 1872, he informed the Court that a second son (Narronji) had since been born to him, and he submitted to the Court what were the rights and interests of such sons under the will. A decree was made in the suit in March, 1872. In January, 1878, the plaintiff presented a petition to the Court, stating that Sundardas having been born on the 29th April, 1867, was of the age of ten years and nine months; that, according to the custom of the testator's caste, the period during which he could be adopted would terminate on his attaining the age of eleven years, *viz.*, in April 1878; that she was ready and willing to adopt him, and had offered to do so, but that his father (the first defendant), had refused to give him in adoption. She prayed (*inter alia*) that it might be declared that, in the event of the first defendant failing to give the said Sundardas in adoption, the first defendant and his two sons took no benefit under the said will.

The first defendant filed a counter petition in which he stated that he was always willing to give his son Sundardas to be adopted by the plaintiff on certain conditions, but that she had refused to consent to them, or to anything which would in the least interfere with her authority as a mother over the boy when

* Suit 601 of 1870.

1887
FEB. 26.
ORIGINAL
CIVIL.
12 B. 202.

adopted. He stated that the plaintiff was an adherent of a sect which held certain pernicious and immoral doctrines, to which he was much opposed, and which had been abhorred by the testator; and that, unless certain conditions, which he suggested, were imposed upon the plaintiff, the moral character of his son, if adopted, would be in danger of fatal injury.

Held that the infant sons of the first defendant took nothing under the will, unless adopted.

Held, also, that the plaintiff was under no obligation to take the infant Sundardas in adoption on the conditions proposed by the first defendant, his natural father.

[F., 12 B. 185 ; 20 B. 718.]

Further Directions :—The plaintiff was the widow and executrix of one Gokuldas Tejpal, a Hindu inhabitant of Bombay, who died on the 6th September, 1867, leaving much moveable and immoveable property. Probate of his will, which was dated the 6th September, 1867, was granted on the 6th July, 1868, to the plaintiff and the first two defendants, *viz.*, Dwarkadas Vasanji and Lakhmidas Khimji.

The present suit was instituted on the 24th August, 1870. The plaint prayed (*inter alia*) that it might be declared what were the rights of all persons interested under the said will or otherwise in respect of the estate of the said testator, and that the true construction of the will might be determined, and also that, if necessary, the estate of the testator might be administered by the Court, &c., &c.

The fifteenth clause of the will was as follows :—

"15. During my lifetime, or subsequently to my decease, should a child (begotten) by me not be born of the womb of my wife Shamavahoo, then I direct and order and appoint as follows :—There is my nephew Bhai Dwarkadas Vasanji. He has now one son, to whom he has not as yet given a name. My wife Shamavahoo is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in (this) my testamentary writing has been done accordingly I give (him), as an inheritance, all the residue of my property left at the time, and I appoint him as my heir. This lad is to perpetuate (my) own [204] name, as (if he were) the son of my loins,and (he) is to pay as much respect to my wife Shamavahoo as (if she were) his own mother; and agreeably to her directions he is to act righteously, and my wife is to have this lad married as (though he were her) own son, and upon his marriage Rs. 20,000 are to be expended out of my property. And during the lifetime of my wife should this lad die without coming of age, then my wife is duly to take in adoption such other (or second) son of Bhai Dwarkadas as may be (living) at the time, and he is duly to be treated as my son. (All) are duly to act towards him in all respects agreeably to what is written above, and he is to obey my wife Shamavahoo. If by the will of Providence it should so happen that there may be no other son of Bhai Dwarkadas, then I appoint my nephew Dwarkadas Vasanji as the heir of my property ; and to him I give as an inheritance all the residue of my property left at the time. (It is given) in the following manner :—As long as my wife Shamavahoo may live, and my respected mother may live, Bhai Dwarkadas shall take care of my property, but he is not to take or withdraw anything therefrom, and appropriate it to his own use, and he is to keep up the respect and possession of my wife as if she were his own mother ; and after the deaths of my wife Shamavahoo and of my respected mother Gangabai, the owner of all my property is to be Bhai Dwarkadas Vasanji. I give him all my property as an inheritance. Therefore my name is always to be perpetuated by Bhai Dwarkadas Vasanji and his heirs and representatives. And he or they are to render assistance to my religious and charitable works. In respect thereof they are not to be in fault in any way."

As to this clause the plaintiff in her plaint stated as follows :—

"23. In the fifteenth clause of the said will the said Gokuldas Tejpal directed that if a child begotten by him should not be born of the womb of the plaintiff, she should, after his decease, adopt the infant son (then unnamed) of the defendant Dwarkadas Vasanji, and that if during the lifetime of the plaintiff the said son of the defendant Dwarkadas Vasanji should die without coming of age, then that the plaintiff should adopt such other son of defendant Dwarkadas Vasanji as might be living at the time; and if it should so happen that there should be no other son of the defendant Dwarkadas Vasanji, then the said Gokuldas Tejpal appointed the defendant Dwarkadas Vasanji heir to his property (meaning his residuary estate), provided that, as long as the plaintiff and the defendant Gangabai should live, the defendant Dwarkadas Vasanji should not withdraw or appropriate to his own use any of the property of the said Gokuldas Tejpal.

1887
FEB. 26.

ORIGINAL CIVIL.

12 B. 202.

"24. The defendant Dwarkadas Vasanji has refused to give his said unnamed infant son in adoption to the plaintiff, and has named him Sundardas Dwarkadas, and has no other son, and claims to be residuary legatee under the said will.

"25. The plaintiff submits that, having regard to the provisions of the said will in that behalf, the defendant Dwarkadas Vasanji, (if entitled at all), is not entitled until after the death of the plaintiff and the defendant Gungabai to any beneficial interest in the residuary estate of the said Gokuldas Tejpal."

"27. The plaintiff submits that she is entitled during her life to the income of the said residue."

[205] The first defendant Dwarkadas Vasanji filed a written statement in 1871, in which he impugned the plaintiff's construction of cl. 15 of the will, and submit ted that immediately on the testator's death the whole property mentioned in the fifteenth clause of the will vested in him as devisee and legatee in perpetuity, subject only to the limitations and directions in the will, and (amongst others) to the direction given concerning the executory limitation in trust in favour of his only son Sundardas Dwarkadas and his (the first defendant's) future male children as yet unborn.

He further denied that he had refused to give his said infant son in adoption to the testator. On the contrary he alleged that five or six days before the date of the will he had performed with the testator the preliminary ceremony in adoption, called "*wacha dataka*," by which the child had been formerly asked and promised, and that it was in consequence of this ceremony having been performed that the child was mentioned in the testator's will.

The first defendant also alleged that the plaintiff since the testator's death had shown herself hostile to the performance of the directions contained in will as to the adoption, being influenced by the opinions of the sect of Wallabhacharya, which she zealously held, but to which opinions he (the first defendant) and his co-executor Lakhmidas Khimji, the second defendant, (and her deceased husband, the testator, in his lifetime), were notoriously opposed; and he submitted whether under the circumstances the plaintiff was a fit person to have custody of the said infant child when finally adopted. He stated that his infant son Sundardas was then (1871) between three and four years of age, and that by the custom of the Bhatia caste, to which the parties belonged, adoption might take place up to eleven years of age; and that the plaintiff being, under the will, empowered to adopt at any time during her own life was not anxious to complete the incipient adoption of the child; that she refused to take the child in adoption; and that he was apprehensive for the safety of the child after adoption, unless protected by the Court.

On the 4th March, 1872, the first defendant filed a further written statement in which he informed the Court that subsequently to the filing of his first written statement, a second son (Narronji) had been born to him, and he submitted to the Court what were the rights and interests of such son under the testator's will. He further submitted whether, in the event of the plaintiff's declining or becoming from any cause whatever unable to comply with the directions in the fifteenth clause of the will and to take Sundardas in adoption, she ought or ought not to be decreed to take in adoption the said new born son Narronji, or any other lawful son (if any) hereafter born to the first defendant.

The case came on for hearing in March, 1872.

The decree (*inter alia*) contained a declaration that there had been no valid adoption of the said Sundardas as son of the testator Gokuldas Tejpal: "and this Court doth further declare that the mesne profits of the residuary estate since the death of the said testator will belong to the said Sundardas or other son of the defendant Dwarkadas Vasanji (as the case may be) on his becoming the adopted son of the testator according to the provisions in the fifteenth paragraph of the will contained."

[206] On the 24th January, 1878, the plaintiff Shamavahoo presented a petition to the Court stating that Sundardas having been born on the 29th April, 1867, was of the age of ten years and nine months; that, according to the custom of the Bhatia caste, the period during which he could be adopted would terminate on his attaining the age of eleven years, *viz.*, in April, 1878; that she was ready and willing to adopt him within the said period, that she had repeatedly offered to take him in adoption, but that his father, the first defendant Dwarkadas Vasanji, had always refused and still refused to give him in adoption. She prayed (1) that it might be declared that the first defendant had declined and failed to give his son in adoption according to cl. 15 of the will; (2) that a reasonable time might be fixed within which the said first defendant should be directed to give the said child in adoption; (3) that it might be declared that, in the event of the first defendant Dwarkadas failing to give the said Sundardas in adoption, the said Dwarkadas and his sons Sundardas and Narronji took no benefit under the said will; and that he, (the plaintiff), was entitled to the residuary estate of the testator.

1887
FEB. 26.
ORIGINAL
CIVIL.
12 B. 202.

On the 24th February, 1878, the defendant Dwarkadas filed a petition in which he stated that he was always and was still willing to give his son Sundardas to be adopted by the plaintiff upon certain conditions; that these conditions had been proposed to the plaintiff, but that she had refused to consent to them, or to anything which would in the least interfere with her rights and authority as a mother over the boy when adopted. The following are the concluding clauses and prayer of his petition:—

"3. Your petitioner submits that it is competent for this Honourable Court to order in this suit that the plaintiff shall perform the ceremonies of adoption contemplated by the said testator, or such part thereof as remain incomplete, upon such terms as this Honourable Court may judge necessary to be imposed in the interests of the said Sundardas, and in furtherance of the expressed or well-known feelings and opinion of the said testator, and your petitioner also submits that it is proper and desirable in the interest of the said Sundardas that this Honourable Court should otherwise determine whether any and what terms shall be so imposed upon the plaintiff, and order the plaintiff to perform the ceremonies of adoption upon such terms (if any) as it shall have so determined to impose.

"10. Your petitioner believes and submits to this Honourable Court that it is absolutely necessary that the plaintiff should not have such right and authority over the said infant after his adoption as she demands, and that such order ought to be made as shall provide that the plaintiff shall have no control or authority whatever over or in respect of the religious and moral education or training of the said infant.

"11. The plaintiff is a devoted adherent of the sect of Vallabhacharya, and your petitioner believes that if the plaintiff should possess and exercise such control and authority as aforesaid over the education and training of the said infant, it will be wholly impossible to guard against the mind of the said infant being influenced by the doctrines, and his character affected by the practices of the said sect.

[207] "12. Your petitioner says that the doctrines of the said sect, which are openly and habitually taught to, and followed by, the members thereof, are in the highest degree pernicious and abominable; that the practices usual in the said sect, which are founded on the said doctrines and are sanctioned by the teaching of the sect, are in the highest degree immoral: and that the said infant could not be exposed to the influence of the doctrines and practices of the sect without danger of fatal injury to his moral character.

"13. Your petitioner further says that the said testator held in great abhorrence the doctrines and practices generally prevailing in the said sect. Your petitioner believes that to expose his adopted son to the influence of the said doctrines and practices would be wholly at variance with the wishes of the said testator, and in disregard of his expressed and well-known feelings and opinions respecting the said sect.

"14. That your petitioner craves leave to refer to the pleadings and other records in this suit, and particularly to the two separate written statements of your petitioner with regard to the circumstances and expressed opinions of the testator, and the circumstances under which the said will was prepared and was assented to, and made and published by him.

"Your petitioner prays:—

"(1) That upon this suit being set down for further directions this Honourable Court may determine the following issues:—

"(*a*) The twenty-ninth issue raised in the suit as aforesaid.

"(*b*) Whether the terms and conditions set forth in the seventh paragraph of this petition are such as ought to be imposed upon the plaintiff with reference to the said adoption.

"(*c*) Whether this Honourable Court will not make such order as may be requisite for the due and proper observance of the said terms and conditions (if any) as it shall determine ought to be imposed.

"That in determining the said issues this Honourable Court will, if necessary, have regard to the circumstances and expressed opinions of the said testator and the circumstances under which the said will was prepared and was assented to, and made and published by him.

"That, if necessary, this petition may be read as a written statement in this suit."

The two infant sons of the first defendant, *viz.*, Sundardas and Narronji, had been made defendants in the suit. Their guardian *ad litem*, Mathuradas Lowji, also presented a petition to the Court, dated 23rd February, 1878, in which he submitted that certain terms and conditions should be imposed on the plaintiff in adopting Sundardas. These conditions were substantially those which had been proposed by Dwarkadas Vasanji to the plaintiff, and had been rejected by her. They were as follows:—

"i. The moral and religious education of Sundardas shall consist of instructions according to the morality and religious principles contained in the Vedas, [208] being the original religion of the Hindus, and according to no others; and he

1887
FEB. 26.
ORIGINAL CIVIL.
12 B. 202.

shall be carefully excluded from the Vallabhacharya sect, and from all knowledge of their doctrines.

"ii. The secular education of Sundardas shall consist of the best English education until he shall have taken the highest degree in the University of Bombay.

"iii. What is commonly known in high schools as the second language should be the Sanskrit language, and should be taught to Sundardas, in order to enable him, to understand the pure and original Hindu religion which is taught in the writings of that language.

"iv. The education of Sundardas should be entrusted to a teacher, being a Gujarati Hindu thoroughly qualified in English and Sanskrit, and, if possible, one who shall have taken a degree in the University of Bombay; and Sundardas shall at all times be under the guidance of such teacher, and the teacher shall be constantly with him.

"v. Sundardas is to marry a woman of his own choice after having attained the age of eighteen years,

"vi. Sundardas is to be permitted to live with the plaintiff and his natural father from time to time according to his wishes.

"vii. A fit and proper guardian should be appointed, who should be a Hindu gentleman."

The case now came before the Court for further directions. After some discussion the Court raised the following issues:—

33. Whether the infants Sundardas and Narronji, or either of them, take any and what interest in the residuary estate in the event of their not being adopted?

34. Whether Shamavahoo is bound to accept the infant Sundardas in adoption upon the conditions mentioned in the petition of Mathuradas Lowji?

35. Whether, in the event of her refusing to adopt upon such conditions this Court can and will execute the trust (if any) reposed in Shamavahoo?

Lang and *Telang*, for the plaintiff.

Marriott (Advocate General), and *Pigot* for Dwarkadas Vasanji.

Taylor and *Wagle*, for the executors.

Latham and *Inverarity*, for Mathuradas Lowji, the guardian of the infant Sundardas.

On behalf of the infant the following authorities were cited.—Lewin on Trusts, (5th ed.), p. 593; *Brown* v. *Higgs* (1); *Burrough* v. *Phitcox* (2); Specific Relief Act I of 1877, s. 30; *Prasannamavgi* v. *Kadambini* (3); *Bayabai* v. *Bala Venkatesh Ramakant* (4); *Rupchand Hindumal* v. *Rakhmabai* (5); *Bhagvandas Tejmal* v. *Rajmal* (6); *Gower* v. *Mainwaring* (7); *Chitko* v. *Janki* (8); Manu, ch. 5, secs. **[209]** 147, 148; *Morral* v. *Sutton* (9); *In re Blake's Trust* (10); *Humphreys* v. *Humphreys* (11); *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (12); *Abhai Charan Ghose* v. *S. M. Dasmani Dasi* (13); *Warren* v. *Rudall* (14); *Child* v. *Elsworth* (15); *Walker* v. *Tipping* (16); *Compton* v. *Bloxham* (17); *Gauntlett* v. *Carter* (18).

On behalf of Dwarkadas Vasanji the following authorities were cited:—*Skimmer* v. *Orr* (19); *Bhau Nanaji* v. *Sundarabai* (20).

On behalf of the plaintiff the following authorities were cited:—Norton's Leading Cases, Vol. I, p. 58; *Rungama* v. *Alchama* (21).

SARGENT, J.—This suit came before the Court for further directions on the 26th February last, in order that a finding might be recorded on certain questions arising out of the will of the late Gokuldas Tejpal, and which have since been raised in the following issues numbered 33, 34, 35 in this suit:—

33. Whether the infants Sundardas and Narrondas, sons of Dwarkadas Vasanji, or either of them, take any and what interest in the residuary estate of the late Gokuldas Tejpal in the event of their not being adopted?

34. Whether Shamavahoo is bound to accept the infant Sundardas in adoption upon the conditions mentioned in the petition of Mathuradas Lowji?

35. Whether, in the event of her refusing to adopt upon such conditions, the Court can and (if so) will execute the trust (if any) reposed in Shamavahoo?

The question raised by the first of these issues turns upon the construction to be put upon the fifteenth clause of the will, which is in the following words:—

"During my lifetime, or subsequently to my decease, should a child begotten by me not be born of the womb of may wife Shamavahoo, then I direct and order and

(1) 4 Ves. 708, 5 Ves. 495, and 8 Ves. 561.
(2) 5 M. & Cr. 92.
(3) 3 B. L. R. O. J. 85.
(4) 7 B. H. C. R. App. 1 (10-21).
(5) 8 B. H. C. R. A. C. J. 114 (118).
(6) 10 B.H. C.R. 241.
(7) 2 Ves. 87.
(8) 11 B. H. C. R. 199.
(9) 1 Ph. 533.
(10) L.R. 3 Eq. 799.
(11) L.R. 4 Eq. 475.
(12) 3 I.A. 253.
(13) 6 B.L.R. 623.
(14) 4 K. & J. 603.
(15) 1 DeG. M. & G. 679.
(16) 9 Hare, 800.
(17) 2 Coll., 201 (203).
(18) 27 Bea. 586.
(19) 14 M.I.A. 309.
(20) 11 B.H.C.R. 257-8.
(21) 4 M.I.A. 159.

1887
FEB. 26.
ORIGINAL CIVIL.
12 B. 202.

appoint as follows:—There is my nephew Bhai Dwarkadas Vasanji. He has now one son, to whom he has not as yet given a name. My wife Shamavahoo is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in this my testamentary writing has been done accordingly, I give him, as inheritance, all the residue of my property left at the time, and I appoint him as my heir. The lad is to perpetuate my own name as if he were the son of may loins, and he is to pay as much respect to my wife Shamavahoo as if she were his own mother; and agreeably to her directions he is to act righteously, and my wife is to have the lad married as though he were her own son, and upon his marriage Rs. 20,000 are to be expended out of my property. And if during the lifetime of my wife should this lad die without coming of age, then my wife is duly to take in adoption such other or second son of Bhai Dwarkadas as may be living at the time, and he is duly to be treated as my son. All are duly to act towards him in all respects, agreeably to what is written above, and he is to obey my wife Shamavahoo. If by the will of [210] Providence it should so happen that there may be no other son of Bhai Dwarkadas, then I appoint my nephew Dwarkadas Vasanji as the heir to my property; and to him I give as an inheritance all the residue of my property left at the time, in the following manner &c., &c."

But before proceeding to discuss the language of that clause, it will be convenient to consider the decisions cited at the Bar which have been already arrived at on testamentary previsions of a similar natur .

In the case of *Doss Money Dossee* v. *Prosonomoye Dossee* (1) the testator directed his wife (in a certain event which the Court considered had arisen), to adopt the two sons of his two uterine sisters, in doing which there should be no deviation, and he further directed that if his wife should not adopt the children after his decea ised, then his executors should, according to his will and in pursuance of the permission given by him, cause the said two children to be adopted. The widow made no adoption after her husband's death, and ultimately claimed the property of her husband, on the ground that he had died intestate, except as to any property he had specifically buqueathed, and filed a suit against the executor for an account. Mr. Justice Phear, doubting whether the event had occurred on which power was given to the widow to adopt, held that a in any case there was no intention to make the sons of the two sisters devisees, and that not having been adopted, they took nothing. On appeal, however, before Sir Barnes Peacock, C.J. and Norman, J., it was held that the event had occurred on which the widow was to adopt; that the power might be exercised any time during her life; and that whether or no the adoption of two sons would be a legal adoption, the sons when adopted were intended to take, or as it was there was an implied gift to them.

The same will was considered by Phear. J., in *Abhai Charan Ghose* v. *Dasmani Dosi* (2), on which occasion the learned Judge, not considering himself bound by the decision of the Court of Appeal in the former case, expressed his dissent from the conclusion arrived at by that Court as to there being a devise by implication to the sons of the sisters, and adhered to his former decision. The language of the Court of Appeal is scarcely as clear as might be wished; but I gather that the point on which the two Courts differed was whether there was a gift to the sons if adopted by the widow; whether or no such adoption was a legal one; and that the Court of Appeal held there was.

In the case of *Siddessoary Dossee* v. *Doorga Churn Sett* (3) the will recited, erroneously as it turned out, that the testator and his wife had adopted two boys, Hem Chunder and Moti Lal Bysack, and then peoceeded to say: "According to our *Shastra* the said two adopted sons will perform our obsequies and shall become 'hists' successors to our property;" and Phear, J., held that, assuming the words to amount to a substantive gift, still the gift was conditional on the boys being adopted;—the character of adopted son and the capacity to perform the obsequies being, as the learned Judge considered, the moving consideration for the gift.

[211] In *Monemothon nuth Dey* v. *Onontnauth Dey* (4) the testator began his will by stating that he had adopted two sons—the elder to his elder wife to bring up, and the younger to his younger wife to bring up,—both of them to be nurtured as sons born of their own womb. That he provided that if either of his two sons should die without issue, the wife whose foster-son should have died should take another son in adoption, and he gave his property in equal shares, subject to certain legacies. to his two adopted sons. The plaintiff is the elder of the sons. The younger one died an infant without issue, upon which his mother in adoption in exercise of the power reserved to her by the will adopted the defendant in place of her deceased adopted son.

---

(1) 2 Ind. Jur. 18.
(2) 6 B.L.R. 623.
(3) 2 Ind Jur. 32 = Bourke 360.
(4) 2 Ind. Jur. 24.

1887
FEB. 26.
ORIGINAL
CIVIL.
12 B. 202.

The Court (Trever, J., *dissentiente*) consisting of Sir B. Peacock, C. J., and Shrinitronauth Pandit, J., held that whether the adoption by the widow was valid or not, still that it was the intention of the testator that she should adopt, and that the defendant fulfilled the terms of the will, and was entitled to half the property. This decision appears to be in accordance with that arrived at in the first-mentioned case.

Lastly, in the case of *Nidhoomoni Debya* v. *Saroda Pershad Mookerji* (1) the words of the will were: "As I am desirous of adopting a son, I declare that I have adopted K., third son of my eldest brother. My wives shall perform the ceremonies according to the *Shastras*, and bring him up; and until the adopted son comes of age, those executors shall look after and superintend all the property, also that adopted son. When he comes to maturity the executors shall make over everything to him. Should this adopted son die, and my younger brother Nilruthan have more than one son, then my wives shall adopt a son of his. If at that time Nilruthan has not a son eligible to adoption, they shall adopt another son of Sawda, and the wives and executors shall perform all the above-mentioned acts."

The Court in its judgment says: "The argument raised by two questions (1) whether the ceremonies were necessary for the completion, 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; (2) supposing these ceremonies to be necessary, whether power having been given to the two widows, the ceremonies could be validly performed by one. But it appears to their Lordships that neither of these questions arises in this case.

"The effect of the will, according to their view, is this: 'I declare that I give my property to Koibutto, whom I have adopted.' There is a gift of his property 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 Koibutto to be entirely dependent on whether the wives choose or did not choose to perform the ceremonies."

[212] Here the circumstance that the testator had so far adopted Koibutto as to receive him in adoption, (a fact which, I gather from the judgment, was not in dispute) was a strong reason for concluding that it could not have been his intention to make the mere performance of the religious ceremonies by his wives (whether necessary or not to constitute a legal adoption) a condition precedent of the devise taking effect.

No special rule of construction is, I think, to be gathered from these decisions. They all deal with the question as one of intention, to be gathered from the language of the particular will.

Now it scarcely admits of a doubt that if the words "and after what is mentioned in my testamentary writing has been done accordingly" apply, as was contended for the widow, to the adoption of the boy, as directed by the testator in the sentence immediately preceding, the object of the gift of this inheritance can only be the boy when so adopted. In other words, the *persona designata* is not the son of Dwarkadas Vasanji, but such son when adopted. That would be the plain and obvious meaning of the testator's language.

It was contended, however, for the infant Sundardas that those words do not refer to the act or ceremony of adoption, but to the payment and setting apart of the various legacies and charitable bequests as directed by his will, and that they are to be read in connection with the word "residue", so that the sentence would run thus:—"I give him as an inheritance the residue of my property after what is mentioned in my will has been done."

Mr. Flynn was examined as to the correct translation as to this passage. His evidence was to the effect that the vernacular word "*teni*," with which it commences, and which may be translated "him" or "to him," is at an unusual distance from the verb "I give," if intended to be its object. On the other hand, he says that it would not be idiomatic, although grammatical, to use "*teni*" without some such word as "*babat*" (meaning, literally, "in regard" or "respect to") if it were intended to be the object of the verb translated "done" or "doing," and he inclines to the opinion that it is governed by the verb "give." As to the rest of the clause, he says it may be literally translated—"According in my will written having been done (or doing) at that time, the remainder of my whole property I in heritance give." The words "at that time" must refer to the epoch ascertained by the preceding words "according in my will having been done or doing." Asto which Mr. Flynn admits that,

(1) 3 I. A. 253 (255).

grammatically they may refer either to the adoption of the boy, or to the providing forth as directed by the will.

Now it is to be remarked that in two other passages in the will where the testator is appointing an heir in certain events, as at the close of cl. 14 and later on in cl. 15 when he is appointing Dwarkadas his heir, he uses the same expression, "my property left at the time," in which cases there can be no doubt that the time referred to is the time at which the gift takes effect. Again, if those words are introduced only to amplify the term "residue" (which must be the case if the devise to Sundardas took effect at once on the death of the testator) as being what remained after the several bequests and legacies have [213] been satisfied, the testator might have been expected to use the same detailed form of expression on the occasion when speaking of the "residue" of his property, or at least in the earlier passage in the will when that term is used, as in cl. 14, where he is appointing his natural son as heir, or disposing of the residue in the events mentioned at the conclusion of that clause. Further, the introduction of these words, in the sense contended for on behalf of the infant, between the verb and its object, it is plain from Mr. Flynn's evidence, is awkward and unusual; whilst, on the other hand, if interpreted as referring to the adoption immediately before directed to be carried into effect, their introduction in their actual place is easy and natural, and accounts for the word "*teni*" being removed so far from the verb which, as Mr. Flynn thinks, governs it.

These considerations appear to me to point to the conclusion that, whether the word "*teni*" is to be taken in connection with the words following or as the object of the verb give, the words under discussion refer to the carrying out the adoption, and not the providing for the legacies and charitable bequests mentioned in the will.

Lastly, an examination of the original shows there is no stop of any kind in cl. 15 until after the words "he is to be made my adopted son." There is then a full stop, which I am told by the interpreter has come into use for the purpose of showing that the sentence is concluded.

In construing English wills it has not been the practice to pay regard to the punctuation or paranthesis, because, as said in *Sandford* v. *Raikes* (1), it would make the construction depend on the grammatical skill of the writer. However in *Compton* v. *Bloxam* (2) Vice-Chancellor Knight Bruce looked at the original, and relied on the circumstance that the words "my monies" began an entirely new sentence. The circumstance that there is no such thing as punctuation, properly so called, in native writings, but merely a practice—by no means general—which has grown up of making a dot to denote the end of a sentence, gives the existence of a dot a special importance, which the Court may, I think, take note of without any such risk as was contemplated by Sir W. Grant in *Sanford* v. *Raikes*.

The circumstance that the words "him according to my will having been done" come immediately after the sentence thus concluded, points strongly to the conclusion that by "him" at any rate was intended the boy who answered to the complete description of being the natural son of Dwarkadas and also the adopted son of the testator.

Leaving the passage which has been hitherto under consideration we find the following words:—"This lad is to perpetuate my name as if he were the son of my loins." Next, in the event of the lad dying before coming of age, he directs that such other son of Dwarkadas as may be living be adopted without employing any words of gift, and it is only in case there be no other son that he appoints Dwarkadas, who would otherwise have been his heir, at least on the death of his wife, to be his heir, thus showing that the permanent motive in the testator's mind was the perpetuation of his name and family by the Hindu ceremony of adoption.

[214] It was said, indeed, that there was a gift by implication to the other sons of Dwarkadas, whether adopted or not, by force of the words "if by the will of Providence it should happen that there be no other son of Dwarkadas, then I appoint my nephew Dwarkadas Vasanji as the heir to my property." But the testator is here only providing for an event which would render his previous direction ineffectual for want of an object, and his words cannot be reasonably read as implying that such other son should take independently of adoption. This would be to impute entirely inconsistent intentions to the testator at one and the same time.

Lastly, the directions in cl. 23 as to the "power" to be obtained from the Court show that the natural status of the sons were, in the testator's mind, entirely merged in the new *status* by adoption, as directed in his will, and that he did not contemplate them as taking this property in any other character.

It was said, however, that the will shows an anxious desire, on the part of the testator, to appoint an heir in every event that was likely to occur, and which, it was urged, renders it improbable that he should have intended adoption to be a condition of

(1) 1 Mer. 651. (2) 2 Coll. 201.

1887
FEB. 26.
ORIGINAL CIVIL.
12 B. 202.

heirship. It is doubtless true that the will provides for nearly every possible event, but the nature of those provisions leaves no doubt, that the paramount object he had in view was that he might always be in the favourable position of one having a son to perpetutate his name. After providing for the event of his having a son by his wife before he died, he contemplates the event of that son dying in infancy, and there being a daughter by his wife who may have married and have a son. As that son would, by the Mitakshara (see West and Bühler on Inheritance, p. 115, and the cases cited), be, in respect of obsequies, regarded as a son's son, and capable of conferring equal benefits, he gives his property to his daughter, who would in that event be his next heir (supposing his wife excluded). At the same time he provides that, if she should die before her son arrives at sixteen, that the son should be adopted into his own family, and thus continue his name. Lastly, he provides for his having no offspring by his wife, in which case the persons whom he selects would not, unless adopted, be capable of conferring on him the benefits of a son, or perpetuating his name, and he consequently directs them to be adopted.

The whole scope of the will, in my opinion, indicates that the object the testator had in view was to ensure to himself all the benefits which a son (in the largest sense in which that term is employed by Hindu writers) is supposed to confer on his father.

And, moreover, this view of the testator's intention derives corroboration from the circumstances under which the will was made. The will apparently assumes that Dwarkadas is ready to give his son in adoption; and it appears, from the evidence of Mathuradas Lowji, that the testator had been in communication with Dwarkadas with the view to his giving his son in adoption, and that the latter had ultimately agreed to do so.

Upon the whole of the will I must decide that the infant sons of Dwarkadas Vasanji take nothing under the will, unless adopted.

[215] As to the 34th issue, I expressed an opinion at the hearing, which I have since seen no reason to change, *viz.*, that Shamavahoo is under no obligation to take the infant Sundardas in adoption on the conditions upon which Dwarkadas is alone ready to give him in adoption.

Assuming that the direction by the testator to his wife to adopt Sundardas makes her a trustee for the exercise of the power to adopt, and that the case falls within the principle laid down by Lord Eldon in *Brown* v. *Higgs* (1), namely, that the Court will not allow the interest of those, for whose benefit she is called upon to execute the power, to suffer by the negligence or conduct of the donee of the power, I am unable to find anything in the circumstances of this case which would justify the interference of the Court, assuming that it has the power to do so. It is admitted that the father of the child is unwilling to give him in adoption, except upon conditions of a most stringent character, which would virtually deprive Shamavahoo of all control over the bringing up and education of the child. The conditions are set out in the petition of Mathuradas Lowji, the next friend of the infant, and are to the following effect:—

"i. The moral and religious education of Sundardas shall consist of instructions according to the morality and religious principles contained in the Vedas, being the original religion of the Hindus, and according to no others; and he shall be carefully excluded from the Vallabhacharya sect, and from all knowledge of their doctrines.

"ii. The secular education of Sundardas shall consist of the best English education, until he shall have taken the highest degree in the University of Bombay.

"iii. What is commonly known in high schools as the second language should be the Sanskrit language, and should be taught to Sundardas, in order to enable him to understand the pure and original Hindu religion which is taught in the writings of that language.

"iv. The education of Sundardas should be entrusted to a teacher, being a Gujarati Hindu thoroughly qualified in English and Sanskrit, and, if possible, one who shall have taken a degree in the University of Bombay; and Sundardas shall at all times be under the guidance of such teacher, and the teacher shall be constantly with him.

"v. Sundardas is to marry a woman of his own choice after having attained the age of eighteen years.

"vi. Sundardas is to be permitted to live with the plaintiff and his natural father from time to time according to his wishes.

"vii. A fit and proper guardian should be appointed, who should be a Hindu gentleman."

The first four of these conditions lay down a scheme of education. The fifth condition regulates the choice of his wife, and in a manner which implies that Shamavahoo is to have no voice in it; it further fixes the age at which he is to marry far beyond the usual custom of Hindus. The sixth condition leaves it virtually to the boy to decide with whom he will live; and it would be affectation **[216]** to shut one's eyes to the

(1) 4 Ves. 708=5 Ves. 495=8 Ves. 561.

1887
FEB. 26.

ORIGINAL CIVIL.

12 B. 202.

almost inevitable result of such a condition, *viz.*, that the child (especially in view of the angry relations subsisting between the father of the child and the widow), would elect to live with his natural parents. Lastly, the seventh condition provides that a guardian be appointed to the child.

These conditions, excellent as they may be abstractedly speaking, leave no doubt that the object of the father is, practically, if not in terms, to deprive Shamavahoo of the rights which as the mother of the adopted child she would, by Hindu law, be otherwise entitled to.

The Hindu law books abound in texts to show that by adoption the child is transferred from the family of his natural parents into that of the adopting parents, and that the relation of mother and son is established between the adopting mother and the adopted son. If that be so, how can it be said that Shamavahoo is violating the trust reposed in her when she refuses to accept Sundardas upon such conditions as would curtail and injuriously affect her rights as his adopting mother?

The will imposes no such conditions on her, but contemplates adoption in its simple and ordinary form. "My wife is to take that son in adoption"—to which are added expressions showing his complete confidence in Shamavahoo. He says, speaking of the boy, he is to pay as much respect to his wife Shamavahoo as if she were his own mother, and agreeably to her directions he is to act righteously, and she is to have the lad married as if he were her own son. Again, when speaking of the adoption of the other son of Dwarkadas, he says: "he is to obey my wife Shamavahoo."

If Dwarkadas has not the same confidence in Shamavahoo that her husband appears to have had, or if her conduct since her husband's death as an alleged devotee of the Maharajas be not such as to meet with his approval, he may perhaps be morally justified in not fulfilling his promise to the testator to give his son in adoption; but as long as she is willing to act according to her husband's directions, what ground is there for this Court (assuming that it had such a power), to interfere?

It is said in Dwarkadas' petition and correspondence, annexed, that Shamavahoo is a worshipper of the Maharajas; and that, if the testator were now alive, he would himself wish that the child should be adopted subject to the above conditions; and that this Court ought, therefore, to compel Shamavahoo to adopt on such terms. It would, however, lead to most inconvenient consequences if this Court were to allow itself to be drawn into questions of religious difference between the various Hindu sects, except where it was absolutely necessary for the determination of legal rights. In the present case the testator has not only reposed complete confidence in his wife, but has recognised the worship of Maharajas, as at least not reprehensible, by making a bequest in support of such worship. The petition contains no specific charges of improper conduct on the part of the widow, but is confined to general imputations on the sect. If it be true, as Dwarkadas and Mathuradas Lowji suggest, that the conduct of the worshippers of the Maharajas is such as to make a woman an improper guardian of youth, it will be time to consider that when Shamavahoo fills the character of mother to the [217] adopted Sundardas. If at that time the conduct of Shamavahoo should be such as to render her an improper person to have the charge of bringing up of the child, I apprehend the Court would act upon the general principles by which it is guided in removing children from the control of their natural parents.

I find issues 33 and 34 in the negative, and record none on the 35th.

Costs of hearing on further directions of all parties to come out of the estate, to be taxed between attorney and client.

Costs of, and incidental to, the two petitions to be borne by the petitioners themselves.

Attorneys for plaintiff:—Messrs. *Hearn, Cleveland and Peile.*

Attorneys for the defendants: Messrs. *Craigie, Lynch and Owen* and Messrs. *Jefferson and Payne.*