Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Myna Boyee and others v. *Oottoram and others, from the Sudder Dewanny Adawlut of Madras; delivered 2nd August,* 1861.

Present:

Lord Kingsdown.
Lord Justice Knight Bruce.
Sir Edward Ryan.
Lord Justice Turner.

Sir Lawrence Peel.

THE facts of this case, so far as they are material to the questions we have to consider, lie in a narrow compass. Mr. George Arthur Hughes, an Englishman, living in India had two illegitimate children, named Ramaprasad and Taukooram, by a native woman, a Hindoo, who appears to have been a married woman, to have deserted her husband, and to have lived in adultery with Mr. Hughes. This woman appears to have been originally of one of the privileged classes, and not of the Sudra class. Mr. Hughes had also three other illegitimate children, Myaram, Chundoolaul, and Oottoram, by another native woman. By his Will he devised the estate of Kadalkoody to his five illegitimate children in equal shares, to each a fifth share. The children appear to have been brought up as Hindoos and to have lived at first as an united family, but some time after Mr. Hughes's death Ramaprasad, the original Plaintiff in the suit from which this appeal arises, instituted a suit for partition and obtained a Decree accordingly. There was an appeal from this Decree and pending this appeal the parties compromised, and a razeenamah, or deed of compromise, was entered into between them. This deed, to which four of the children, one of whom, Chundoolaul,

had purchased the share of Oottoram, the fifth of the children, who had died, after reciting the Will of Mr. Hughes and the above-mentioned purchase proceeded as follows:

"Of the said Kadalkoody paliaput the share assigned to the third Appellant by Mr. Hughes' will is one-fifth, and this added to the one-fifth share purchased by him as stated above, makes his total share two-fifths of the whole estate. The share assigned to the second Appellant Myaram under the said will is one-fifth, and that left to the first Appellant Taukooram and the Respondent Ramaprasad by the said instrument is one-fifth each. Thus it having been settled that we four should enjoy the said zemindary in five shares, we have entered into the following agreement, viz.: That from Fusly 1254, the management of the entire zemindary shall, for life, be entrusted to one of us four, viz., Taukooram, the other three abiding by this arrangement. That the paishcush, amounting to rupees 4,469–8–0 per annum, shall be punctually paid by Taukooram from and out of the income of the paliaput for each Fusly, the irsal or remittance being made in the names of us all four. That all the repairs necessary to the paliaput shall be executed by him every year, at an annual outlay of 500 rupees, he taking care that the money is properly spent. That of the surplus left of each year's income, after defraying the paishcush, charges of repairs, and costs of establishment of that year, Taukooram shall pay to Myaram and Chundoolaul whatever may fall due to them for their said three shares as per accounts. That on account of the one-fifth share of Ramaprasad, Taukooram shall, for his life, pay into the treasury of the Court the fixed sum of 1,300 rupees a-year, a moiety thereof being payable on the 11th April, and the other moiety on the 11th July of each Fusly. That Ramaprasad, or the heirs appointed by him, shall receive the said sum from the Court. That should the income of Ramaprasad's said one-fifth share for any year exceed the fixed amount above referred to, such excess shall be appropriated by Taukooram. That should the income of the said share fall short in any year of the fixed sum above referred to, Taukooram himself shall make good such deficit. That Taukooram shall be entrusted with the title-deeds of the said paliaput, and any sharer shall be at liberty to refer to them whenever he wishes. That should the accounts furnished by the Ameen deputed to attach the paliaput exhibit any old balance outstanding for Fuslies 1251 to 1253, during which period the paliaput remained under attachment, Taukooram shall recover the same and pay to Ramaprasad his one-fifth share thereof, taking a receipt from him. That the other sharers also shall receive their shares of the said balance in the same manner. That after Taukooram's death Ramaprasad, or the heirs appointed by him, shall have the management only of his one-fifth share, subject to profits or loss. That the management of the other four shares shall be entrusted to Myaram or Chundoolaul, or their heirs or representatives appointed by them. That the ryots, kurnums, servants, &c., of the paliaput, shall pay to the other sharers when they go to visit the estate, the very same respect that they would show to Taukooram or persons entrusted

with the management after his lifetime. That the paliaput shall never be divided, but only the income thereof, of which each sharer shall receive and enjoy his share with reference to accounts of income and expenditure. That neither the sharers, nor their heirs or representatives appointed by them, shall alienate their respective shares by sale, mortgage, lease or security; all such transactions if effected being null and void."

In pursuance of the arrangement made by this deed Taukooram had the management of the estate during his life, and paid to Ramaprasad the annual sum stipulated for by the deed. On the 21st January, 1852, Taukooram died intestate and without having had issue, and on his death Chundoolaul took possession of all his real and personal estate, including his one-fifth part of the Kadalkoody estate. The plaint in the suit which has given rise to the appeal before us, was filed on the 18th of September, 1852, by Ramaprasad claiming as the heir of Taukooram against Chundoolaul for the recovery of the real and personal estate of Taukooram. The Defendant, Chundoolaul, by his answer in the suit amongst other grounds of defence which are not material to be mentioned, stated that in the partition suit the Plaintiff had declared that he was not related to Taukooram; that if they were co-parceners they were so through their father and not through their mother; and that the Hindoo law was not applicable to them. That each of them having received a certain amount of property under Mr. Hughes's Will, their interests were distinct, and one of them had nothing to do with another's portion; that that was the status in which Ramaprasad had, in the Partition suit, prayed the Court to place him; and that the Decree in that cause was that the parties were not amenable to the Hindoo law, and he insisted that in the teeth of these proceedings in the former suit it was not open to the Plaintiff to claim Taukooram's share of the estate of Ramaprasad; he relied also upon the razeenamah, insisting that Taukooram's intention that his share of the Kadalkoody estate should on his death pass to him, the Defendant, was evident from the fact of that instrument containing a detailed provision that Taukooram's share, and the management of the other four shares of the estate, should be held in succession by the Defendant and his heirs, or other persons appointed by him; he also set up a mooktearnamah

and a Will alleged to have been made by Taukooram in his favour.

The Plaintiff, by his replication, explained the allegations made by him in the Partition suit, and denied that they bore any such meaning as was imputed to them by the answer.

The rejoinder was a mere recapitulation of the answer; and the only material evidence in the cause was, on the part of the Plaintiff, the razeenamah, and on the part of the Defendant, the mooktearnamah, and the will, with the depositions of some witnesses in support of those instruments. There was no evidence as to the Plaintiff's title as heir; but upon this point the following question appears to have been submitted to the Pundit of the Court of Sudder Adawlut:—

"You are requested to state whether, upon the death of one of two illegitimate sons of a Hindoo woman, the estate of the deceased by law devolves upon the surviving brother?"

And to this question the following answer appears to have been returned:—

"If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon his surviving brother. If divided it would go to him only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother."

Upon the hearing of the cause in the Zillah Court, the Judge was of opinion that the mooktearnamah and the will were forgeries, and that the provisions of the razeenamah had reference to the management of the estate, and did not affect the right to it; and resting upon the opinion of the Law Officers, he treated the allegations in the Partition suit as irrelevant, and considered the Plaintiff's title as heir to be established. The Decree of the Zillah Court, therefore, was wholly in favour of the Plaintiff.

From this Decree the heirs of Chundoolaul, who had died in the meantime, appealed to the Court of Sudder Adawlut; but the Judges of that Court were also of opinion that the mooktearnamah and the will were not genuine documents; and as regards the right of the Plaintiff to inherit the property of his uterine brother Taukooram, they were of opinion that those persons must be looked upon as Hindoos,

and subject to Hindoo law; and the question as to the Hindoo law of the case having, as they thought, been fairly put to the Pundits of the Court, they considered that the Plaintiff had a right to inherit the property of Taukooram. They accordingly, by a Decree dated the 7th November, 1856, affirmed the Decree so far as respects the estate of Taukooram not included in the razeenamah; but as to the one-fifth part of the Kadalkoody estate, which was included in the razeenamah, they were of opinion that the intent of that instrument was, that the right of the Plaintiff should be confined to the enjoyment of his own one-fifth share, and the management thereof, and that the right and title to the management and enjoyment of the profits of the other four shares was vested in the other shareholders, and they accordingly held that the Plaintiff was not entitled to recover the one-fifth share of the Kadalkoody estate, which belonged to Taukooram, and reversed that part of the Decree which awarded that share to the Plaintiff.

The Plaintiff, however, afterwards obtained, as it would appear *ex parte*, an order for the case to be reheard, but he died soon after the making of this order, without having had issue.

By his will, which appears on these proceedings to have been disputed, he devised the Kadalkoody estate to the now Appellants, and appointed two of them to be his executors. They accordingly revived the suit, and the Sudder Court having subsequently, by an order dated the 12th November, 1857, discharged the order for re-hearing, upon the ground that the case was more proper to be the subject of appeal, they obtained leave to bring, and have accordingly brought this appeal, which is from so much of the Decree of the 7th November, 1856, as reversed the Decree of the lower Court so far as it awarded to the Plaintiff Taukooram's share of the Kadalkoody estate, and also against the order of the 12th November, 1857.

With respect to the objection raised by the answer that the Appellant was precluded by reason of the allegations made by him in the Partition suit, their Lordships are of opinion that no weight is due to that objection. The allegations referred to could, at the highest, operate only, under the circumstances of this case, as an admission against title, on a par-

ticular view of the legal status of the party, in point of law, which, if it were erroneous, ought not to have bound the party in another suit for a different object, the Court having before it all the facts relating to the true status.

The immediate question raised by this appeal, therefore is, whether the Sudder Court was right in the construction which it put upon the razeenamah. Their Lordships find themselves unable to agree with the Sudder Court upon the construction of this deed. The deed had its origin in the partition suit. The result of that suit and of the Decree which had been made in it, if carried out, would have been to sever, at all events, one-fifth of the estate, and to destroy, to that extent at least, not only all unity of interest but all power of joint management.

The deed appears to have been framed for the purpose of avoiding these results. It provides that there shall be no sale, mortgage, lease, or security of any separate share; that during the life of Taukooram he shall have the management of the whole estate, Ramaprasad receiving a fixed income; and that after his death, Ramaprasad shall have the management of his fifth, and the management of the other four-fifths shall be entrusted to Myaram or Chundoolaul; but these provisions point to management, and to management only. They affect the mode of enjoyment, not the right of property. That right does not appear to be affected by the deed otherwise than by the particular provisions against alienation—provisions which, it is to be observed, are carefully limited by the deed, and do not extend to prevent alienation by devise, for it is plain that the deed contemplates that each co-sharer might devise. It is scarcely possible to suppose that it could be intended that the right to devise should be preserved, but that the right of inheritance should be taken away. Failing this argument upon the construction of the razeenamah, the Respondents contended that the title of the Appellant was nevertheless defeated by that instrument. They argued that all the illegitimate sons were to be considered, as they were considered, and, as it appears to their Lordships, rightly considered, in the Courts in India, to be Hindoos; and that the sons, except Ramaprasad, having continued in common, Rama-

prasad could not, by the Hindoo law, be entitled to any portion of Taukooram's share.

This argument renders it necessary to consider what sort of a partnership was constituted by the actual agreed union of the other sons. They were not an united Hindoo family in the ordinary sense in which that term is used in the text-writers on the Hindoo law ; a family of which the father was, in his lifetime, the head, and the sons in a sense parceners in birth, by an inchoate though alterable title : but they were sons of a Christian father by different Hindoo mothers, constituting themselves parceners in the enjoyment of their property after the manner of a Hindoo joint family. On the death of each, his lineal heirs, representing their parent, would, by the effect of the agreement, enter into that partnership ; collaterals, however, could not so enter by succession, unless the Hindoo law gave, in the case under consideration, a right of inheritance also to collaterals. The parties could not by their agreement give new rights of succession to themselves or their heirs unknown to the law. The law of survivorship, which is the consequence of such a partnership amongst Hindoos, would come in only on failure of the heirs.

A further suggestion was made on this part of the case, that from the peculiar status of the parties it was to be presumed that the intention of the instrument was to bar the State by the arrangement between the parties, *inter se*, as to the enjoyment of the property, but no such intention is to be collected from the instrument, or is disclosed by the evidence ; and it may be added that the arrangement for the parties continuing in common would, as already observed, include survivorship, and that it could, therefore, only be on failure of heirs of the last survivor that the claim of the State could arise. The instrument too, in its dealings with the management, contemplates the existence of *hæredes facti*, and the parties, therefore, cannot but have been aware that they had in their power the means of protection against any claim of the State. So far, therefore, as the immediate question raised by this Appeal is concerned, their Lordships are of opinion that the Decree complained of cannot be maintained.

A further question was also raised on the part of

the Respondents, whether the appeal, although from part of the Decree only, did not open to them, the Respondents, the whole Decree. Their Lordships were of opinion that it did not, but they thought that under the circumstances of this case leave should be given to present a cross appeal, and the Appellants not having insisted that the mere form of presenting such an appeal should be gone through, it was agreed that the whole Decree should be considered as open.

The whole case as to the mooktarnamah and the will, and as to the Appellant's title as heir to Taukooram, was thus open to the Respondents. Nothing was said by them as to the mooktarnamah or the will, and it is unnecessary, therefore, to refer further to those documents, which no doubt were forged. The contention was as to Ramaprasad's title as heir. This title appears to have been affirmed by both the Courts in India upon the faith of the opinion given by the Law Officers. It does not appear to have been further investigated or inquired into.

The correctness of this opinion was questioned by the Respondents, who objected to the mode in which the question was submitted to them, but the Court declined to take another opinion, and adopted the opinion of these officers, apparently without noticing its inconsistency with the ordinary text expositions of the Hindoo law. The question submitted to the Law Officers does not include some important facts which existed in this case. Every such reference in a suit, where it may bind a right, should embrace all important facts proved or admitted in the cause, which may affect the conclusion; and it is the duty of the Court itself so to frame the questions that they may elicit an opinion upon the very facts on which the legal title depends. If the facts be not ascertained, but stated, and disputed, then the questions should embrace either view of the facts. When the opinion given is apparently irreconcileable with the opinions of approved text-writers, those who give the opinion should be asked further to explain that which appears, *primâ facie*, thus irreconcileable, so that they may show on what they ground an apparent exception from the general law, whether on general custom modifying texts, on local usage, family customs, or other exceptional matter.

In this case it was very important to point out to the notice of the Law Officers that the mother of the Plaintiff and of his uterine brother was a wife living in adultery—originally, as above mentioned, one of the privileged classes; that her sons were adulterous issue; that the property had never been the mother's, but had been bequeathed by the father, an Englishman, to his sons, as his sons, and was meant by him to be a parental provision for his children. It was not referred to the Law Officers to consider whether the inability of the sons to succeed to the father affected their heritable capacity as collaterals *inter se*.

On the terms of the answer, the Law Officers may have considered the case merely as one of succession amongst Sudras proper, and may have acted simply on a wider view of the law of succession amongst Sudras than the written text authorities afford. They may have viewed it as enlarged by some general custom there prevalent extending the law, according to the principles of the Hindoo law which would support such custom, if in fact such custom has obtained.

It is, however, impossible to treat these sons as the sons of a Sudra father; if the Appellant and Taukoram be viewed as the sons of a Sudra mother, still the property never was hers, and their heritable capacity even to property of hers has not been established. If any general usage in this part of India has ripened into a custom having the force of law, that the illegitimate children of a woman pursuing an unchaste course of life, whether married or unmarried, inherit her property, this custom is not in proof.

If amongst Sudras proper a course of decisions, or other evidence of the prevalency of a general custom, support a heritable capacity of illegitimate Hindoos beyond that which the writers' text-books establish, these decisions have not been made known, nor has that custom been established. But a title such as the present, so wholly irreconcileable with the expositions of any text-writer, and, unsupported by any authority, cannot be established upon the evidence which this case affords. To assume without evidence, on assertion simply, a capacity in the Appellant and his uterine brother to inherit to their mother, and assuming that capacity of lineal inhe-

ritance to their mother, thence to derive collateral heirship *inter se* to property which never was their mother's, would be at variance with legal principles.

Their Lordships have accordingly felt some difficulty in dealing with this part of the case. On the one hand, they are not prepared to act upon the opinion of the Law Officers given upon an imperfect statement of facts, unsupported by authority, and apparently not easily to be reconciled with the opinions of the text-writers on the Hindoo law. On the other hand, they do not feel satisfied that the opinion of the Law Officers may not be well founded, more especially with reference to some local custom or usage. They have come to the conclusion, therefore, that the only safe course which can be taken is to remit this question to India for further investigation and consideration.

In the course of the argument on the part of the Respondents, an objection was taken on their behalf to the title of the Appellants as the heirs of Ramaprasad, but this objection does not appear to have been entertained or considered by the Sudder Court, and their Lordships very much doubt whether it is competent to the Respondents to raise it upon this Appeal, having regard to what must have been done in the cause.

Their Lordships, therefore, taking the whole case into their consideration, delivered the foregoing Judgment at the close of the sittings after Trinity Term, but they ordered their Report to stand over until after the Long Vacation, in order that the Minutes might be fully considered by their Lordships and by Counsel; and the matter having been again brought before their Lordships on the 26th of November, 1861, the following Minute was finally settled by their Lordships, with the assent of Counsel on both sides, on the 30th of November, 1861 :—

"The Appellants, having by their Counsel consented that the rights of the parties should be considered and dealt with in the same manner as if the Respondents had presented a cross Appeal confined to the subject matter of this Appeal, viz., the share of Taukooram in the Kadalkoody estate, their Lordships humbly recommend to Her Majesty that the Decree of the Sudder Court

of the 27th of November, 1856, be reversed, in so far as the same is complained of by the Appeal, and that the Appeal be dismissed in so far as it complains of the Order of the 12th of November, 1857, and that it be declared that the razeenamah in the pleadings mentioned does not prejudice or affect the Appellants' claim to Taukooram's share of the Kadalkoody estate, and that the mooktearnamah and the will in the pleadings also mentioned were not genuine instruments; and that it be also declared that the aforesaid reversal of the said Decree of the Sudder Court shall not in any way prejudice or affect the right of the Respondents to contest the title of Ramaprasad as the heir of Taukooram to his (Taukooram's) share of the Kadalkoody estate upon any other grounds than those above mentioned, nor prejudice any objection which may be now open to the Respondents, and which they may be advised to take, to the title of the Appellants as the heirs of Ramaprasad to the said share of Taukooram in the said Kadalkoody estate, and to any application they may be advised to make to the Sudder Court respecting the same; and that it be ordered that the Sudder Court do make all such further inquiry as may be proper and necessary as to the title of Ramaprasad as the heir of Taukooram to his (Taukooram's) share of the Kadalkoody estate, and do proceed in the cause as respects that property according to the result of such inquiry; and that it be further ordered that, if it shall appear that Ramaprasad was entitled, as the heir of Taukooram, to the said share of the Kadalkoody estate, and that the Appellants are entitled thereto in right of Ramaprasad, the costs of this Appeal be paid by the Respondents, and the whole costs in the Sudder Court be also borne by them, except the costs of the application for review, as to which, in that event, there should be no costs; but that, if it shall appear that Ramaprasad was not entitled as the heir of Taukooram, or that the Appellants are not entitled, in right of Ramaprasad, to the said share of the Kadalkoody estate, the whole costs of the case in the Sudder Court be dealt with as the said Court may direct, and that in that event there be no costs of this Appeal."