Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Bhoobun Moyee Debiah v. *Ram Kishore Acharj, from the late Sudder Dewanny Adawlut of Calcutta; delivered 26th May*, 1865.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THE Appeal in this case arises out of a suit brought by the Respondent Ram Kishore to recover certain estates in Bengal which were claimed by and were in the possession of the Appellant and of Rajendro Kishore, whom she alleged to be her adopted son.

The facts, so far as they are necessary to make our Judgment intelligible, are these:—

Gour Kishore Acharjee, being the owner of considerable estates in Bengal, died in the year 1821. He left surviving him a widow named Chundrabully and an only son named Bhowanny Kishore.

At the time of his father's death, Bhowanny, who succeeded as his heir, was about four years of age. He attained, however, his majority and married the Appellant, Bhoobun Debia. He died in the month of August 1840, being then about twenty-four years old. He left no issue, and Bhoobun Debia, his widow, became the heir of his property as well ancestral as of other estates which had been purchased with his own money during his life.

Immediately upon the death of Bhowanny an instrument was set up as being his Will by

Chundrabully, his mother, and Bhoobun Debia his widow. By this instrument power to adopt a son was given to Bhoobun Debia, and until such adoption was made the income of the estates was given to Chundrabully and Bhoobun Debia.

Under this alleged will these two ladies took possession of the estates of Bhowanny and remained in the enjoyment of them for nearly four years.

In December 1843 Bhoobun Debia professed to exercise the power alleged to have been given to her by the instrument already referred to, and adopted a boy called Rajendro Kishore.

Upon this a quarrel appears to have arisen between Chundrabully and Bhoobun, and Chundrabully alleged that the supposed Will of Bhowanny, under which she had so long been in the enjoyment of half his property, was a forgery, and had not been made till after his death, and that Bhoobun had no power of adoption. She further set up an instrument called an Oonamuttee Putter or deed of permission, by which she alleged that a power to adopt a son had been given to her by her husband Gour Kishore in his lifetime, and which power, in the events which had happened, she claimed a right to exercise.

She accordingly adopted, or professed to adopt, the Appellant Ram Kishore as the son of Gour her late husband.

Bhoobun Debia on behalf of Rajendro Kishore, her adopted son, having obtained possession of all the property of Bhowanny, the suit in which the present Appeal is brought was instituted in 1852 in the Zillah Court of Mymensing by a next friend of Ram Kishore, on his behalf, against Bhoobun Debia and Rajendro Kishore, and certain other persons, the Plaintiff claiming as the adopted son of Gour the whole property ancestral and acquired of Bhowanny. To this suit Chundrabully was made a Defendant instead of suing as a Plaintiff on behalf of her son; that course being adopted probably with a view to avoid any prejudice which might arise from the inconsistency of her previous conduct with the title now set up for her son.

When the case came before the Sudder Ameen he was of opinion that the Plaintiff must recover upon the strength of his own title, and that if such title failed it was unnecessary to decide upon the case of the Defendants.

He was of opinion that the Plaintiff had failed to prove his title, and he, therefore, dismissed the suit, expressing at the same time a strong opinion in favour of the Defendant's adoption.

He awarded the costs of the suit to the Defendants, with the exception of Chundrabully, whom he held to be really the promoter of the suit.

From this decision there was an Appeal to the Sudder Dewauny of Calcutta. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of Rajendro was invalid, and that the will of Bhowanny, purporting to create the power of adoption, was a forgery. They were equally unanimous in holding that the Oonamuttee Putter of Gour Kishore was a genuine and valid instrument, and that if the power to adopt continued at the time when Chundrabully professed to execute it, there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made therefore, in favour of the Plaintiff as to the ancestral property of Bhowanny, but not as to his self-acquired property; and the costs of the parties were ordered "to be borne by them in proportion to the amount of the property decreed or dismissed."

The case now comes before us on Appeal by Bhoobun Debia, as representing her own rights and the rights of a son, whom she had adopted in lieu of Rajendro, who is dead, and on a cross-Appeal by Ram Kishore complaining that the Decree in his favour ought to have included the self-acquired property as well as the ancestral property of Bhowanny.

On the hearing of these Appeals we expressed a clear opinion, without calling on the Respondent's Counsel, that the Court below was right in holding that the alleged will of Bhowanny was a forgery. The evidence is irresistible that it was contrived by the different members of his family after his death, in order to give effect to an arrangement which they considered would be for the common benefit. This being so, and no power of adoption having been proved or alleged to have been given by parol, the adoption of Rajendro and of the son now substituted for him must of course be held in this suit to be invalid.

The next question is as to the validity of the adoption of Ram Kishore. We see no reason to dissent from the opinion of the Court below upon the facts of the case, viz., that the Oonamuttee Putter of Gour is a genuine instrument, and that, supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that at the time when Chundrabully professed to exercise it the power was incapable of execution.

It will be necessary to go into this part of the case with some minuteness.

It appears that some years before the birth of Bhowanny, and in the year 1811 of our era, Gour Kishore being then childless, and anxious, as Hindus generally are, to provide a son by adoption if he should have no natural-born son, executed an Oonamuttee Putter on the 30th March, 1811, by which he gave power of adoption to Chundrabully, his wife.

In 1819, two years after the birth of Bhowanny, he executed the instrument on which the present question depends, which is found at page 51 of the Appendix, and is in these words :—

"Gour Kissore Surma,

"By the pen of Ram Nursing Surma.

"To the abode of all goodness, Chundrabullee Dabea.

"This is an *onoomuttee putter* (deed of permission) to the following purport :—Prior to the birth of a male child from your womb, I had executed in your favour an onoomuttee putter on the subject of your receiving (an) adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (*gotra*), or from a different race (*gotra*), for the purpose of performing mine and your *Sradh* and other rites, and for the *Sheba* (service) of the gods, and for the succession to the zemindary and other property; on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the *pinda* (funeral cake or offering); that dattaka (adopted) son shall be entitled to perform your and my *Sradh*, &c., and that of our ancestors, and also to succeed to the property. To this end I execute this onoomuttee putter. Dated 25th Kartic, 1226 B.E."

The first question which arises is as to the construction of the instrument. It seems to have been

considered by the two Judges of the Sudder Court, who decided in favour of the Respondent (certainly by one of them), that the document was to be regard d as a will, and as containing a limitation, on failure of male issue of the testator in the life-time of Chundrabully, of the estate of the testator, to a son to be adopted by Chundrabully, as a *persona designata*; and one of the Judges, in a very elaborate argument, refers to Mr. Fearne's celebrated treatise on Contingent Remainders, in order to show that such a devise by the English law would be valid. There is no doubt that by the decision of Courts of Justice the testamentary power of disposition by Hindoos has been established within the Presidency of Bengal; but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society differing as far as possible from that which prevails amongst Hindoos in India.

But their Lordships are quite satisfied that there is in this case no room for the application of any such doctrines. The instrument before us is merely what it purports to be, a deed of permission to adopt; it is not of a testamentary character, it was registered as a deed in the life-time of the maker; it contains no words of devise, nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—religious motives, the perpetuation of his family, and the succession to his property; but it was by the adoption and only by the adoption that those objects were to be secured, and only to the extent in which the adoption could secure them.

The main ground of the decision in the Court below appears, therefore, to fail, and this instrument must be construed and its effect must be determined in just the same way as if it had been made in one of the provinces of India in which the power of testamentary disposition is not recognized.

How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been that Bhowanny had left a son natural born or adopted, and that such son had died himself leaving a son, and that such son had attained his majority in the life-time of Chundrabully. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

But whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if Bhowanny had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chundrabully would have been at an end.

But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us.

In this case Bhowanny had lived to an age which enabled him to perform, and it is to be presumed that he had performed all the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir, he had full power of disposition over it, he might have alienated it, he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.

On the death of Bhowanny, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers if he had had any. She took a vested estate as his widow in

the whole of his property. It would be singular if a brother of Bhowanny, made such by adoption, could take from his widow the whole of his property when a natural born brother could have taken no part. If Ram Kishore is to take any of the ancestral property he must take all he takes by substitution for the natural born son, and not jointly with him.

Whether under his testamentary power of disposition Gour Kishore could have restricted the interest of Bhowanny in his estate to a life interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider; it is sufficient to say that he has neither done nor attempted to do this. The question is, whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken.

This seems contrary to all reason and to all the principles of Hindoo law, as far as we can collect them.

It must be recollected that the adopted son, as such, takes by inheritance and not by devise. Now, the rule of Hindoo law is, that in the case of inheritance the person to succeed must be the heir of the last full owner. In this case Bhowanny was the last full owner, and his wife succeeds as his heir to a widow's estate. On her death the person to succeed will again be the heir at that time of Bhowanny.

If Bhowanny had died unmarried, his mother Chundrabully would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption she would have devested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the text books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow the estate of the heir of a deceased son vested in possession can be defeated and devested.

The only case referred to in the argument before

us or in the Judgment below as tending in that direction is that of Luckee Narain Thakoor, reported by Sir F. McNaghten, page 168; but it is incontestable that in that case the disposition depended wholly on the testamentary power. The authority to adopt was only subsidiary to the disposition of the property. The will of Luckee Narain Thakoor is set forth in full in No. 5, page 9, of the Appendix to Sir F. McNaghten's Works. It is termed a will; it appoints an executor; it disposes of the whole estate; gives various legacies; gives the residue to the child of which his youngest wife was pregnant, whether a son or a daughter, in which latter case it would obviously break the legal order of succession; and directs that at that child's death the adoption of a son shall take place. We have already said that we express no opinion as to the power of Ghour Kishore to have made the disposition now insisted on by the Appellant by devise of his estates, but we find no such devise in the instrument which he has executed.

An additional difficulty in holding the estate of the widow of Bhowanny to be devested may, perhaps, be found in the doctrine of Hindoo Law, that the husband and wife are one, and that as long as the wife survives one-half of the husband survives; but it is not necessary to press this objection.

Upon the whole, we must humbly report to Her Majesty our opinion on the original Appeal, that the Plaintiff's suit ought to be dismissed; but, inasmuch as the main expense of it has been occasioned by the Appellant setting up a state of facts which has turned out to be untrue, and disputing the facts alleged by the Respondents, which have been established, we think that no costs should be awarded to either party of the suit or of the original Appeal. The cross Appeal is wholly groundless, and we must advise that it be dismissed with costs.

The several Orders and Decrees complained of, so far as they are inconsistent with the above recommendations, must be reversed.