Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajendro Nath Holdar v. *Jogendro Nath Banerjee, from the High Court of Judicature at Fort William in Bengal; delivered 8th February*, 1871.

Present:—

Sir James W. Colvile.
Sir Joseph Napier.
Lord Justice James.

Sir Lawrence Peel.

THIS case had been extremely well argued on both sides; but their Lordships having had time to examine the evidence, and having now weighed the arguments on both sides, have come to a clear conclusion that this Appeal ought to be allowed, and the grounds of that conclusion I am now instructed to state.

The question is one touching the right of succession to the estate of one Kali Prosad Holdar, a Brahmin, who seems to have been possessed of a considerable estate, including certain spiritual rights and privileges connected with the worship of the Goddess Kalee in the well-known temple in the vicinity of Calcutta. Kali Prosad died on the 16th Assin, 1244, a day which corresponds with some day in September, 1837. He left a widow, a mother, and four sisters. The mother pre-deceased the widow, and died in 1855; the widow died in July, 1864. Of the four sisters, two are dead; one of them without issue, the other leaving a daughter. And of the two surviving sisters, one is childless, and the fourth only has male issue, namely, the Respondent Jogendro Nath, and the infant Respondent Kameeka Nath Banerjee, and these two persons, if Kali Prosad died intestate, are the persons who, according to Hindoo law, would be

entitled to inherit the estate in succession to the widow.

Shortly after the widow's death, in 1844, the Respondent, Jogendro Nath, suing *in formâ pauperis*, commenced this suit, in which he claims to recover an eight annas share of the estate from the Appellant, who claims under an adoption by the widow, alleged to have been made by virtue of a testamentary disposition of her husband, and from the other persons claiming interests in the estate under that testamentary disposition. The infant brother is made a Defendant *pro formâ* on the Record, and is represented by his father and guardian Kasseeputtee Banerjee.

The Appeal, however, has been argued as if the litigation were confined to the adopted son of the widow, who is in possession, that is the Appellant, and the Respondent Jogendro Nath; and in that point of view it will be convenient to consider it.

The issues are stated at page 18: they are these,—"Whether or not the suit is barred by the "Statute of Limitation? Whether or not the Will, "the Dan Unnoomottee puttro, of the 6th Assin, "1244 B. S., alluded to in the written statement "filed by the Defendant Rajendro, was a genuine "document: if so, whether the Defendant had been, "according to the Shastras, adopted by Matunginee "Dabea, widow of Kalliprosad Holdar, deceased?" The next issue is, "Whether, in the event of the "aforesaid deed of gift being not proved, the "Plaintiff is entitled, under the Hindoo law, to "succeed to the estate or property included in the "suit? and if so, whether he is entitled to possess "the whole estate or not?"

Of these issues, the second alone, and perhaps only part of the second is material. The first issue, that upon the Statute of Limitations, was originally determined by the Principal Sudder Ameen, the Judge of First Instance, in favour of the Defendant. His decision was reversed on Appeal, and it has been candidly and fairly admitted at the bar by Mr. Bell that it is impossible to impeach that decision; that, according to the authorities in India, time would only begin to run against the Respondent from the date of the widow's death.

Again, the third issue, it may be assumed, would, if it were necessary to try it, be necessarily found

in favour of the Respondent, the Plaintiff in the suit, to the extent of the interest claimed by him in the estate, namely, a moiety, or eight annas.

With respect to the second issue, it has been suggested by Mr. Doyne that it may admit of the contention on his part, that the adoption of the Respondent was invalid, because it was not made with the consent of the mother, which the Will made a condition precedent to any adoption. But their Lordships, as they have already intimated, do not consider that that point is in terms open upon the issue, the latter part of the issue being "whether "the Defendant had been, according to the Shastras, "adopted by Matunginee Dabea, widow of Kali "Prosad Holdar, deceased." Those words really raise only the question whether all the ceremonies, and whatever other requisites the Hindoo law has made essential to an adoption, had been complied with. Their Lordships would not have held the parties strictly bound to the terms of the issue, if they had seen any trace that it had been understood in any other sense in the Court below. But they cannot find that that was the case, that it ever was raised below, that the mother had not given her consent to that adoption; and they are confirmed in this by looking at the grounds of Appeal which were filed by the Respondents in the High Court in which he takes these two points with reference to the adoption: "The Lower Court has failed to consider that Ma- "tunginee had no right to adopt under the exist- "ing Hindoo law of adoption. There is no proof "to show that the ceremonies and formalities pre- "scribed by the Hindoo law were legally per- "formed, and the Defendant's adoption ought to "have been cancelled on that score." There is not a word suggesting that the mother's consent had not been given. Under these circumstances, if the mother's consent were necessary under the Will, as to which their Lordships give no opinion, it must be presumed that that consent was given.

That part of the issue which relates to the validity of the adoption according to the Shastras was found by the Court of First Instance in favour of the Appellant. The High Court has intimated no opinion, as it was not necessary for them to decide that point whether the Judgment in that

respect was right or not; but their Lordships have heard no reason whatever, and no grounds have been shown before their Lordships at the bar, for impugning that part of the decision of the Principal Sudder Ameen.

The sole question, therefore, on which the determination of this Appeal depends, is the validity of that Dan Unnoomottee puttro, which it will be convenient, as it is in its nature testamentary, to call in the observations which I shall hereafter make, "the Will." This Will purports on the face of it to have been executed on the day of the testator's death. The effect of it, so far as it is necessary to read the passage, is correctly stated in the Judgment of the High Court. The Judges say, "This deed," as they call it, "it "will be observed, gives his wife Matunginee per- "mission, with the consent of his mother Jeo- "money, to adopt one son. It makes a present "division of his property into seven annas and "nine annas, but postpones the enjoyment of it by "the parties for whom the several shares are in- "tended, until the death of his mother, who, during "her lifetime, is to be the proprietor and manager "of the whole sixteen annas of his property, and to "pay his debts out of the nine annas share and "other expenses of maintenance, etc., out of the "sixteen annas. On the death of his mother his "four sisters are to take possession of their seven "annas share, and, in case of any one of them "dying childless, her share is to descend to the "children of the other sisters. The nine annas "share is to be the property, without power of "alienation, of Matunginee during her life, and "after her death it is to descend to her adopted "son." I stop there because I am not clear that the Judges have really given the true construction of the concluding clauses of the Will in what follows, and it is unnecessary to consider whether that construction is right or not.

The earliest production of the document was within ten months of the testator's death, in August, 1838. In that month Jeomoney, the mother of the deceased, came forward as executrix, as we should say, under this Will, claiming to be substituted as decree holder in a suit in which her son had recovered a decree in his life-

time. The widow appeared on that occasion by her mooktear to support her mother-in-law's application. The Judge seems to have required, or the parties to have tendered, proof of this instrument. The writer of the instrument was examined, and one, if not two, of the attesting witnesses were also examined. The evidence, such as it was, seems to have satisfied the Judge, at all events for the purposes of the application that the document was to be treated as a true document, and, accordingly, the mother was substituted as the decree holder.

So far, therefore, the widow, who was the heiress-at-law of the alleged testator, was supporting the alleged testacy. In 1844, however, there seems to have been some change in her disposition in that respect and some disagreement in the family, and she then made the application which is found at page 69 of the Record, to sue *in formâ pauperis*, in order to assert her rights as heiress-at-law. She appears from that document at that time to have left her husband's house and to be residing in her father's house, where, of course, she would be under the influence of parties who would urge her to assert her extreme rights, and if they considered it necessary for her rights to do so, to dispute the Will. Whatever she may have actually done after that in the suit, does not appear, but it is clear that in 1845 that litigation was compromised, and she reverted to her original position of a person supporting the Will and taking under it. The compromise is at page 75. The effect of it was that the Will was admitted as the foundation of the rights of the family, but the mother retired from that position in which the Will placed her of being mooktear of the whole estate,—the person managing the estate with whatever beneficial interest that management might give her, and supporting the whole family out of the proceeds of the whole estate; and that she thenceforward agreed to be entitled to receive maintenance only, and to put the widow in the possession of that which the Will gave to her and the sisters—in immediate possession of that which the Will gave to them. Now, that compromise has been very much relied upon by Mr. Doyne as affording an argument against the validity of the Will. Their Lordships are unable to accede to the argument which he has laid

before them. His contention is that it must be presumed that the mother would not have agreed to those terms unless she knew that the Will was a false document, and was afraid of its validity being contested in open Court. But, on the other hand, it may equally be said that the widow would not have agreed to relinquish her claim to the whole estate if she had known that the document could not be proved in open Court, and that she had every chance of gaining her suit. Without imputing such a motive to the mother, it seems not wholly unnatural to suppose that she might be guided in that by the advice of members of the family,—that they might have put before her that the estate would very likely be wasted in litigation,—that the proof of a Hindoo Will when a true document is always an uncertain thing, and that being advanced in years and having her daughters put in possession of seven annas of the property, her position would not be materially worse, and that she might fairly agree for the sake of peace to make the sacrifice which she did make. On the whole, their Lordships think that it is impossible to draw any conclusion from that compromise which militates strongly against the evidence in favour of the Will.

From that time forth, with perhaps one exception, the family appear to have acted consistently upon the Will. This compromise was filed in 1845. The adoption was, I think, in 1848; but, intermediately, there are several proceedings both before and after the adoption in which all the family put forward this Will, claiming under the Will; and, in fact, there is nothing except the document to which I am now about to refer which shows that the Will was questioned by any of the immediate family of Kali Prosad. That document is the one filed on the part of the Respondents, and is at page 33 of the Record. It is the Petition of the widow when a party, a relation of the family who had recovered a decree for costs against the mother, was seeking, after the mother's death, to get these costs from the widow; and she, after stating that she had no connection with the widow as heir, that the heirs of the mother were her daughters, no doubt does in the second paragraph of her petition speak of having been in-

duced to consent to a division of the whole sixteen annas by collusion. But this document is filed in the Court by her mooktear; it does not seem to have been signed by her, and their Lordships, considering that in this very document she describes herself as the mother and guardian of the son adopted under the Will, cannot ascribe any importance to it or suppose that this statement is anything but one of those statements which a native mooktear is so apt to put in without much regard to the truth of what is alleged in it, in order to gain some immediate object in the suit in which it is filed. The adoption took place with great publicity and formality, was known to all the members of the family, and must be presumed to have been made under the Will.

We therefore find that for a period of twenty-seven years this Will was, with the exceptions I have mentioned, acted upon and recognized by the whole of the family of Kali Prosad, and that the legal *status* of the Appellant was acquired under it with the knowledge of all the members of the family. If the document had been a fabrication, and if there were persons who might have intervened and have contested the Will, the presumptive heir, who was in existence before his title was defeated by the birth of the present Respondent, might have come forward in one way or another and contested the Will. Therefore there arises from all these circumstances a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favour of the Will. No doubt these circumstances, as the law stands, are not conclusive against the Respondent. He has the right to call upon the Appellant, the Defendant in the suit, to prove his title; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period by death or otherwise, every allowance which can account for any imperfection in the evidence, ought to be made; and on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the Will and to the acts done by them

under the Will. The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the Defendant, in order to defend his *status*, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindoo claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title.

With these observations, their Lordships proceed to consider the direct evidence as to the validity of this Will. They do not propose to go into it at any great detail. It was fully considered in the first instance by the Principal Sudder Ameen, himself a Brahmin, who has embodied his conclusions in a Judgment, the careful preparation and expression of which seem to their Lordships to be highly creditable to that native Judge. He came to a clear conclusion that the witnesses who were called by the Respondent to show that Kali Prosad was in such a state of body that it was impossible that he could have executed this Will, were persons of no credit and not to be believed. He, also weighing all the circumstances, giving weight to the probabilities of the case, and considering the positive testimony which had been adduced before him, came to a clear conclusion that the Will was genuine and ought to have been affirmed. Upon appeal to the High Court, the learned Judges of that Court, for reasons which they have not recorded, but which may easily be presumed to have been a desire to examine the subscribing witnesses for themselves, and also to examine the subscribing witness who had not been called in the Court below,

the father of the Respondent, re-examined the three witnesses who had been examined, and examined for the first time Kasseeputtee Banerjee. Of the evidence then taken, it may be said that the witnesses who were re-examined do not appear to have been in any degree shaken, and the cross-examination of one of them, Shiboram Chatterjee, elicited some fuller account of the preparation of the Will, which is not altogether immaterial, if true, to the Appellant's case. Of the evidence of Kasseeputtee Banerjee it is sufficient to say that it amounted only to this, that though his name did appear upon the document, it had been added some twenty days after the death of the testator at the instigation of the mother, who told him that the arrangement was for the benefit of his future son, and that her consent was necessary to any adoption. He does not venture to express a conviction one way or the other as to the truth or falsehood of the Will, and it is obvious that his statement, taking it in the most favourable sense, that he merely put his signature at that time to a document of which he had not witnessed the execution, on that persuasion, does not entitle him to very much credit. If, on the other hand, he did it believing the document to be a forgery, he would, of course, be entitled to much less credit, and therefore his evidence is not that upon which any reliance can be placed, and the Judges of the High Court do not appear to have grounded their Judgment upon it. All they say as to the evidence of Kasseeputtee Banerjee is, "We think it better to "form our opinion on the merits of this case irre-"spective of anything contained in it. Although, "notwithstanding the equivocal position in which "he stands on his own showing, we are inclined to "think that there is some truth in what is stated "as to the origin of the Deed now before the "Court." That, therefore, may be left out of consideration.

Now if the two judgments are looked at in opposition to each other, it would appear that the learned judges of the High Court have, in the first place, differed somewhat from the Principal Sudder Ameen in his appreciation of the probability that such a document as this should have been executed. They say,—"As the Principal Sudder Ameen has

"remarked, it is contended by the Plaintiff that "that Deed was a concoction of Kalliprosad's "mother, Jeomoney, who fabricated it to provide "for her daughters, for whom a Hindoo mother " has greater affection than for male children, and " that it was only to quiet the wife that nine annas " of the property was allotted to her: whereas by " the Defendant it is urged that Kalliprosad's four " sisters were, according to the custom of the " family, married to Koolin Brahmins, who never " take their wives to their home or otherwise main- " tain them; that, mindful of their helpless situa- " tion and of his own salvation, he made a provision " for the former at the same time that he provided " for the maintenance of the latter; and that as a " dutiful Hindoo son, he made the mother manager " and proprietor; that, moreover, Kalliprosad's " income was about rupees 800 a year, and that " one quarter of seven annas of that sum, viz. 85 " rupees per annum, was not an out-of-the-way sum " for each of his sisters. There is no doubt that this " deed is for the benefit of the sisters of Kallipro- " sad Holdar, and that it is only in case his adopted " son has issue that nine annas of the property can " remain away from the sisters or their heirs even- " tually. Without going so far as saying that " there is an antecedent improbability in this dis- " tribution of the testator's property, the Court has " no hesitation in saying that that distribution is " unusual. A permission is not given to the wife " to adopt more than one son, and the adopted " son's patrimony is cut down, and it does not " become vested in him until after his mother's " death, and if he dies issueless the property goes " to the testator's sisters and their heirs. As to " the necessity of Kalliprosad providing for his " sisters married to Koolins by a deed of that sort, " that is not so apparent; whilst they live in the " family house the obligation would remain on " Kalliprosad and his heirs to maintain them and " their children, but to divide his estate in this " way is to go beyond the obligation which the " Hindoo law imposed on Kalliprosad. Again, the " Court does not see the justice of considering the " adopted son of a stranger, and of contrasting him " in the position of a stranger with that of the tes- " tator's sisters. After the adoption, the adopted

" son is no longer a stranger; he is the person who " procures the salvation of his adopting father, and " therefore in the face of so great a benefit accruing " to the testator from the son adopted, any perma- " nent diminution of the property left to him, even " to the amount of four times 85, 340 rupees a " year, bears the semblance of injustice."

On this it is to be observed, that the principal point upon which they differ from the Sudder Ameen is the probability of the provision made for the sisters, by giving them specific shares in the property, instead of giving them mere allowance for maintenance; and it may be very true, as the learned Judges say, that these sisters being married to Koolin Brahmins, there would remain the obligation on Kalliprosad or his successors to maintain them. The whole question was, however, raised before the Principal Sudder Ameen, who, as a Brahmin, is at least as likely as the Judges of the High Court to know what a Brahmin would be likely to do in those circumstances, and he has expressed an opinion, that the provision was not an unnatural one for the testator to make in those circumstances. Again, it is no doubt true that greater power is given the mother than she would have naturally under the law, and that the interest of the adopted son is postponed, and that the disposition is altogether different from that which might have been made by a man who had in his mind the single object of leaving an adopted son.

It is possible, and it has occurred to their Lordships, considering that evidence which points to the provisions of the Will having been discussed a day or two before its actual execution, and to the relations subsisting between the members of this family, that there may have been something like a compromise in the testator's mind, namely, that there may have been some pressure upon him on the part of his mother to make a larger provision for his sisters: on the other hand, that he was anxious to carry out the principle, dear to every Hindoo, of having an adopted son, and that the actual disposition may have been the result of some such a compromise. But their Lordships have to observe that they are not dealing here with a question whether a disposition has been obtained by any undue influence or under any pressure of

that kind, but upon the issue whether this document is a forgery or is the Will of the testator.

Another point upon which the learned Judges of the Sudder have intimated some dissent from the Principal Sudder Ameen was the credit to be given to two of the witnesses examined, namely, the two young men, Denonath Holdar and Koylas Chunder Banerjee. They say of that, "We do not believe "the statement of Denonath Holdar and Koylas "Chunder Banerjee on this point. They were both "boys: no intelligible reason is given for their "being at Kalliprosad's at such a time, and the "evidence before us as to the duration of Kalli- "prosad's sickness, as to his state two days before "his death, and as to his state on the day of his "death, even if it be credited, does not admit of "our believing at the same time that he entered "into those explanatory conversations with the "witnesses, which in their depositions they detail." The observation that is founded upon the age of these two witnesses might have some force if this document were now produced for the first time and their names were found upon it as subscribing witnesses. But the argument is all the other way, when it is considered that the document was beyond all question produced in 1838; because it is in the highest degree improbable that if persons were concocting a forgery, they would call into their councils two boys sixteen or seventeen years old, who would be manifestly from their youth not likely persons to be entrusted with the secret. They have given an explanation which seemed plausible to the Principal Sudder Ameen, and seems plausible to their Lordships for their presence on that occasion. The explanation is, that a message came to the father of one of them to go to the house, that he was prevented by business from going to the house, and he said to the son, "Will you go?" The son met a companion, also apparently a relation of the family, and they went together. There may be some little exaggeration as to the amount of explanation given, but their Lordships see no reason, as the Principal Sudder Ameen saw no reason, why their statement, that the testator did actually acknowledge before them that the document was his Will, should be discredited.

Therefore, going through the whole of these two Judgments, it appears to their Lordships that really the *ratio decidendi*, or at least the turning-point in the minds of the learned Judges, was the impression which they derived from the inspection of the letter M. Now that point was not taken for the first time before the High Court. The suggestion seems also to have been made in the Court of the Principal Sudder Ameen, and he, as we understand his Judgment, thought that there was nothing in it. Now, with great respect for the knowledge which the two learned Judges of the High Court possessed, as their Lordships doubt not, of the Bengalee language, their Lordships cannot but think that upon such a point as that, the native Judge, examining a letter in his own alphabet, is more likely to be a competent Judge than the two European Judges. But independently of that, it appears to their Lordships to be a very unsafe ground of decision. The evidence as to the absolute prostration and insensibility of the testator at the time has been discredited. No doubt his own witnesses state that he put this letter, feeling too weak to write his name at full. But it is impossible from the mere inspection of the letter, as it appears to their Lordships, to be able to predicate with any degree of certainty or accuracy, that the man was too weak to make the impression with his pen which he is said to have made. It is impossible to say what momentary rally of strength might take place to do an act of such brevity as that; and, therefore, their Lordships are unable to give to that, which is after all merely the impression of these two Judges derived from actual inspection, the weight which has been given to it. They cannot think (considering that the evidence, supported as it is by the presumptions to which reference has been made), on the whole greatly preponderates in favour of the genuineness of this instrument; that the mere appearance to the eyes of those Judges of that letter is sufficient to outweigh it; and, therefore, their Lordships, however great their respect for the Judgment of the High Court, feel that it is their duty in the present case to advise Her Majesty to allow this appeal, to reverse the Judgment of the High Court, and to direct that in lieu thereof an order be made dismissing the appeal to the High Court. The party having sued *in*

formâ pauperis, their Lordships will further recommend that an order be made dismissing the Appeal to the High Court, with such costs, if any, as according to the practice of that Court are given to an Appellant suing *in formâ pauperis*, and the repayment of any costs that have been paid by the Appellant; and their Lordships, considering that they are dealing with an heir-at-law questioning this Will and supporting a Judgment which has really been in his favour setting aside the Will, are not disposed to make any order as to the costs of this Appeal.