Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Anundmoyee Chowdhoorayan v. *Sheeb Chunder Ray* (*ex parte*), *from the Sudder Dewany Adawlut, Bengal; delivered* 19*th July,* 1862.

Present:

LORD KINGSDOWN.
JUDGE OF THE ADMIRALTY COURT.
SIR EDWARD RYAN.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THE Appellant is the widow of one Kirtee Chundro Chowdhooree, who died in 1828, leaving two sons. The elder, Juggut Chundro, died a few months after his father, unmarried and intestate. The younger, Bhoobun Chundro, died in December 1844 a minor, and childless, but leaving a widow, Huromonee. Shortly after his death Huromonee, under an Unoomotee Puttur, or authority to adopt, which she alleged her husband had executed in her favour, on the night of his death, adopted one Gerish Chundro as the son and representative of Bhoobun Chundro. And in 1847 the Appellant, who disputed Huromonee's right to adopt, set up an Unoomotee Puttur, which she alleged had been executed in her favour by Kirtee Chundro Chowdhooree on the 20th of May, 1828, and under that instrument adopted the son of one Neelkunth Gooptoo as the son and representative of her husband Kirtee Chundro, and gave him the name of Bhairub Chundro Chowdhooree.

These rival adoptions gave rise to two suits, which it will be convenient to distinguish by the numbers 316 and 317, by which they were known in the Sudder Dewany Adawlut.

 [1862] UKPC 24

No. 316, in which the present Appeal is presented, was instituted in 1849 on behalf of Bhairub Chundro Chowdhooree, a minor, by his natural father Neelkunth Gooptoo, as his well-wisher or next friend, against the present Appellant, Huromonee, and several other persons as Defendants. The Plaint stated the execution of the Unoomotee Puttur by Kirtee Chundro; the adoption of the infant Plaintiff under it; his title, by virtue of that adoption, to one-third of the estate of Kirtee Chundro in immediate possession, and to the other two-thirds, subject, as to one of them, to the interest of the present Appellant as heiress at law of her eldest son; and subject, as to the other, to the life interest of Huromonee as heiress of her husband. And it claimed the possession of one-third of the zemindary, and some personal property as against the two female Defendants with Wassilât; and as against Huromonee, the cancelment of the adoption made by her as illegal. The other Defendants had no interest in the property, and seem to have been made Defendants only because they had taken part in the adoption by Huromonee. To this suit, therefore, the Appellant, though no doubt a friendly, was a substantial, Defendant.

Shortly before the institution of No. 316, Huromonee had commenced the suit No. 317. The only Defendants to this were the Appellant and another woman. It set up the adoption made by Huromonee, and claimed by virtue of that, and other acts of the Appellant, the whole of the property as against her, disputing the adoption made by her. In this suit the Appellant pleaded the Unoomotee Puttur alleged to have been executed by her husband, and insisted on the validity of the adoption made by her under it.

Huromonee died before either suit came to a hearing, and certain proceedings were had by which Gerish Chundro Chowdhooree, the infant adopted by her, became, through his well-wisher or next friend, a Defendant in No. 316, and the Plaintiff in No. 317.

The two suits were heard together by the Principal Sudder Ameen, in whose Court they were pending. In No. 317 he decided in favour of the Plaintiff, Gerish Chundro, affirming the validity of his adoption by Huromonee; treating the Unoomotee Puttur set

up by the Appellant as not established by proof, and the adoption thereunder as invalid. Upon the same grounds he decided against the title of Bhairub Chundro in No. 316, and dismissed that suit with costs.

Appeals were preferred to the Sudder Dewany Adawlut against both decisions. That in No. 316 was, in the first instance, an Appeal on behalf of the infant Plaintiff Bhairub Chundro by his father and well-wisher. The Appeal in No. 317 was that of the present Appellant.

Before the Appeals were heard, Bhairub Chundro died; and the present Appellant (being, on the assumption of his adoption being valid, his heiress-at-law) seems, on her own application, to have been substituted for him as Appellant in No. 316, notwithstanding her character as Defendant in that suit. She thus became, regularly or irregularly, *domina litis* in both Appeals.

These Appeals were heard by the Sudder Dewany Adawlut in 1855. In No. 317 the Court reversed the decision of the Principal Sudder Ameen, mainly on the ground that Bhobun being an infant at the time of his death, had no power to make the instrument under which Huromonee claimed the right to adopt, without the consent of the Court of Wards; and therefore that the adoption of Huromonee under it was wholly void. Against that decision there has been no Appeal.

In No. 316 the Court dismissed the Appeal, and confirmed the decision of the Zillah Court, holding that the Unoomotee Puttur under which the Appellant adopted Bhairub Chundro had not been proved, and was wholly unworthy of credit. Against this decision, and that of the Court below, the present Appeal is proposed.

The decision in No. 317 has determined the interest of the party claiming under the adoption by Huromonee; and the various deaths that have occurred have vested the whole interest in the estate, at least during her life, in the Appellant. It is not therefore surprising that the present Appeal has come on *ex parte*. Their Lordships, however, do not the less feel the difficulty in which every *ex parte* Appeal places them, of having to decide the questions raised after hearing one side only.

The first and most important question is, whether

the decision of the Principal Sudder Ameen was, when pronounced, a correct decision of the issues then pending before him between the then parties to the suit. No subsequent event, or devolution of interest, can affect this question; because to give effect to these, should justice require it, would be the office not of an appeal, but of some supplemental proceeding.

The question in the suit was the title of Bhairub Chundro, as the adopted son of Kirtee Chundro, to recover certain property, and to have another adoption cancelled. The foundation of this title was the Unoomotee Puttur under which he was adopted. If the proof of that failed, he had no title, and his suit was properly dismissed.

It is not now contended that there is before their Lordships, or was before the Principal Sudder Ameen, testimony strong enongh to establish the validity of the instrument, if impugned. But it is argued that the evidence which the Principal Sudder Ameen treated as too weak for that purpose was irregularly taken, because it was taken in No. 317, to which Bhairub Chundro was not a party. It is further argued that proof of the instrument by witnesses was unnecessary, because the answer of Huromonee did not impeach, and must therefore be taken to have admitted, its validity. These two objections shall be considered separately.

Their Lordships are not satisfied that the depositions of the witnesses examined in support of the Unoomotee Puttur (which are not before them) were not substantially taken in both the suits, which were clearly tried together. At page 73, line 33, of the Appendix the father and next friend of Bhairub Chundro, in his reasons of appeal, comments on this evidence; and at the hearing in the Sudder Dewany Adawlut the Appellant's Counsel argued upon it. But suppose it to be out of the case, what is the result? Why, that the Plaintiff has given no evidence whatever in support of an averment material to his title. The only question that can remain is, whether there has been an admission of that averment sufficient to relieve him from the necessity of giving any such evidence.

Their Lordships cannot answer this question in the affirmative. The answer of Huromonee denies generally the truth of the Plaintiff's case. If it

does not directly impugn the instrument, it does not in terms admit it. The defence is no doubt mainly directed to the avoidance of the adoption by the Appellant by setting up the adoption made by the Defendant Huromonee ; but it does not admit that if the latter adoption fails, the other is necessarily valid.

Their Lordships cannot apply to the pleadings in these Courts the strict rule that averments not traversed must be taken to be admitted ; and they are not prepared to say that the answer contains an admission which, even as between the Plaintiff and Huromonee, would have dispensed with the necessity of proving the instrument. But when the case was heard the issue was no longer one between the Plaintiff and Huromonee. She was dead, and Gerish Chundro had been admitted as a Defendant on the record. He did not come in as the heir of Huromonee, for, if he were duly adopted, his title was paramount to hers. He would not then have been bound by her admissions of an instrument (even had they been more unequivocal than they are), the execution of which had been formally made one of the issues in the suit. Their Lordships, therefore, can see no ground for disturbing the Decree of the Principal Sudder Ameen.

The next question is, whether any case has been made for reversing or varying the Decree of the Sudder Dewany Adawlut. It has been argued that the substitution of the Appellant for Bhairub Chundro, which made her both Plaintiff and Defendant in the suit, was grossly irregular. It may have been so ; but it was an irregularity of her own seeking. If she had not taken up the Appeal, it must either have been prosecuted by the well-wisher and next friend of the deceased infant (if the forms of the Court permitted this), or abandoned by him. Their Lordships must assume that the Decree of the Zillah Court, which they think to be correct, would in either case have stood. The Appellant on her own application has been allowed, perhaps irregularly, to contest the correctness of that Decree. She has done so unsuccessfully, and it is but fair that she should be left to pay the costs of the proceedings.

The Appellant is now entitled, as a Hindoo female

heiress, to the whole estate; if she makes any further adoption, the validity of that adoption will be probably tried between the party adopted and those who will be the heirs of her husband on her death. In any such suit it is difficult to see how these Decrees can be admitted as evidence for the purpose of showing the invalidity of the instrument of adoption.

At any rate their Lordships think it would be objectionable to disturb or vary Decrees properly made by the Zillah and Sudder Courts in this suit, for the mere purpose of guarding against the possible error of some other Tribunal in some future suit, and the only order which they can recommend Her Majesty to make on this Appeal is, that it be dismissed.