Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sreemutty Sokheemonee Dossee and others v. *Mohendronath Dutt and others from Bengal, delivered 18th December*, 1869.

Present:—

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

Sir Lawrence Peel.

THIS Appeal is brought to reverse a decision of the High Court at Calcutta, which reversed a decree of the Judge of Beerbhoom in favour of the Plaintiffs the Appellants.

The suit was instituted by the Plaintiffs, who are the heirs and representatives of four out of five brothers, who formed at one time a Hindu family joint in food, worship, and estate. The Defendant Hurreenauth was the son and heir of the remaining brother. Hurreenauth during the progress of this litigation died, and is represented by his eldest son, the first-named Respondent, and his younger brothers, who appear by their guardian.

The object of the suit is to establish a trust, of a religious nature, against the several Respondents, as affecting the lands in their several occupations. The suit originally included two claims which could not properly be joined, viz. a claim in the character of Sebaits to establish the religious trust, and one founded on the ordinary right of coheirs in ordinary joint property.

On the objection of misjoinder being raised by the answers of the Defendants, the Plaintiffs yielded to it, and their plaint has in that respect been reformed, so that the suit must now be regarded as confined to one in the character of Sebaits, to establish their claim to lands alleged to be dewuttur.

A further objection was advanced by the answers,

that the Plaintiffs attributed a partible character to an indivisible property, by suing for four-fifths only. The Judge of Beerbhoom, admitting the correctness of this view of the nature of such property on which the objection was grounded, appears to have considered the plaint as one that might be supported by attributing to the Plaintiffs the character of managers. Whether this view of the subject removed the objection may well be doubted, since such a manager has no partible, and indeed no estate in the lands; and a trust of this character should follow the general rule, and be asserted and established by a suit so framed as to decide finally and entirely the matter of the claim. Their Lordships, however, regarding the point as one which does not affect the merits of the suit, will proceed to the consideration of the case on the merits.

The Plaintiffs state their case thus: By a deed of partition executed by the then members of the family in the year 1245 of the Bengal era, answering to the Christian year 1838, the trust was established: the family was then a continuing joint family, and, as such, they dedicated a portion of their joint property to the service of their gods, at Brindobun, and their family mansion respectively. The alleged foundation, therefore, of the trust was the common consent so to appropriate their common property; and if this foundation failed, the trust would necessarily fall with it.

The Plaintiffs state in their plaint that at an earlier period, viz. the Bengal year 1229, answering to our Christian year 1822, a deed of partition had been executed by the five brothers, who were then all living; but they sought to remove this impediment, and *primâ facie* bar to their subsequent endowment by alleging that the Partition was not acted on, nor designed to be so, being, in truth, a mere device of the family to protect its property from the creditors of one of its members, Gopeenauth, who had become insolvent.

The answers of the Defendants Hurrinauth and those claiming under his title, viz. Isserchunder, the Defendant Bose, and the Coal Company, on the contrary, assert (amongst other matters) the validity of this prior deed, that it was acted upon, that it was repeatedly established by decrees of several

courts of justice, that property has been distributed and titles derived and enjoyed under it. And they add that it was publicly registered.

Against the deed of 1838 they allege that it was not registered; that it was not stamped; that it had no original character of publicity; that Gopeenauth, an insolvent, is treated under it as equally entitled with the other sharers; that it makes no allusion to the previous deed; that it secularizes some property already devoted to the gods, and incapable of such change or transfer; that, without any assigned reason it constitutes the insolvent the sebait, and sets up a divided and separate administration of trust for one common object; and for these and some other grounds, they declare this latter deed to be false and fabricated.

The contest, in the opinion of their Lordships, may be decided by declaring to which of these deeds effect should be given, for clearly they cannot both stand together.

The objections raised by the several answers to the case made by the Plaintiffs, are compendiously and correctly stated at pp. 53 and 55 of the record, in the form of a statement of issues. The first, third, and fourth are those on which their Lordships will proceed to declare their opinion. A decision on these will render it unnecessary to consider the other issues.

The first, second, and third issues are, Whether the case is affected by the Law of Limitation?

Whether the partition took effect in 1229 or 1245?

Whether the disputed villages were given in debutter or not?

The first issue was found by the Beerbhoom Court in favour of the Plaintiffs, and by the High Court in favour of the Respondents the Defendants.

As the plaint was originally framed, this issue was correctly introduced. When the plaint was reformed and limited to a suit in the character of sebaits against trustees, limitation of time afforded no bar; the decisions, therefore, of both Courts on this issue are formally defective; but, as in both Courts its decision involved one on the validity of the trust itself, the substantial question was, in truth, considered and decided on the merits.

The third issue involves the second, not neces-

sarily, indeed, but as the facts are pleaded and presented in this case.

The Plaintiffs do not say that a partition once took place, but that the family reunited, and then made a fresh and operative partition of its then joint property, and dedicated a portion of that joint property by common consent to the service of the gods, constituting the land dewuttur.

The case of reunion and subsequent partition is not made by the pleadings, and is unsupported by the evidence.

The Plaintiffs' case assumes, and assumes rightly, that a valid partition acted on, would render the second deed inoperative. A Hindu family, consisting of persons in this near connection, may reunite; part also may reunite; and such reunited members may impress on their united property by common family consent such trusts as their law will support; but neither of these cases is that before their Lordships.

The burden of proof is on the Plaintiffs. The deed of 1229 has the ordinary legal presumption in its favour that it is honest, and is, what it purports to be, a deed of partition. It is also prior in time. It is *primâ facie* a good and operative deed. It cannot be got rid of, except by the establishment of a case by the Plaintiffs, as part of their proof, which involves all the family at that time, including those under whom they derive title, in the perpetration of a gross fraud. The deed of partition is declared by their pleading to have been designed for the express purpose and object of defeating creditors. It is, however, said in the pleadings not to have been acted on. It is not clear in what sense this phrase is used, unless it be that all outward acts of the family in acting upon it, disguised an inward design at variance with that which their actions declared. There is the most abundant, and indeed uncontradicted proof, that this deed was by Hurreenauth and his vendees produced, established, and made the subject of various decrees. It is unnecessary to state the instances of this, which were brought to the notice of their Lordships by Sir Roundell Palmer in his exhaustive argument. Mr. Field, in reply, did not deny that such was the case in numerous instances, but he answered, that these acts were all the natural and

premeditated results of the original device; that as it was a deed to defraud creditors, it would, of course, be used as such, and that such proof did not exclude the supposition that it might be considered *inter se* by the members of the family, as a mere writing, working no change of property amongst them. Without expressing any opinion upon the question, whether a Plaintiff supporting his case against those in possession whom he seeks to evict can be admitted to allege the inoperative character of an instrument by which his recovery would otherwise be barred, on the ground of a fraud in its concoction, to which all from whom he derives title are parties,—their Lordships, treating the question as one unaffected by such estoppel, and one simply of evidence arising on the facts, have to observe, that as all these public acts would equally attend the enforcement of an honest and valid deed of partition, when the estates derived under it are assailed, or rights derived under it have to be enforced, they furnish of themselves no evidence of *mala fides*, and should be rather ascribed to the character given to the deed by the Defendants, than to that imputed to it by the Plaintiffs.

Their Lordships, therefore, are of opinion, that the issue whether the partition took place under the deed of 1229 or that of 1245, should have been found in favour of the Respondents, which finding should, in their Lordships' opinion, have been followed by a corresponding finding on the third, whether the villages were given in debuttur, or, that they were not so given.

Their Lordships desire to add, that their conclusion, on the effect of the whole evidence as to the subsequent deed, does not materially differ from that of the judges of the High Court, so far as that Court regarded it as insufficient to establish a trust of this character. The altered state of the family property, their increasing expenses and diminishing means, render it improbable that the family really deliberately resolved and effected that resolution to place out of their control, by a legal dedication, so large a proportion of their remaining property. When it is considered that in this case, the Plaintiffs have advanced, as a part of their case, that a solemn deed, registered and purporting to effect a valid

partition of their property, was designed to have no such effect, but was merely a blind for a covert purpose, their Lordships must ask, what confidence can a Court of Justice repose in their statement, that one less solemn and public, and accompanied by many most suspicious circumstances, was designed to be a real and effective instrument of endowment, assented to by the whole family? Whatever may have been the real intention of some of the members of the family amongst themselves, a fact almost impossible to discover amongst the windings of guile and fraud, purchasers, at least, have an undoubted right to bind them, by these their public acts, to the fulfilment of those obligations which such public acts cast upon them. Courts ought not to credit readily assertions of hidden and fraudulent intentions, which, made to-day for one purpose, may be abandoned or denied to-morrow for the assertion of another and inconsistent one.

Their Lordships do not mean to apply the above observations to any mere benamee transaction, or in any way to shake the authority of the numerous decisions which have established, between the apparent and the real, though concealed title, that a benamee transaction, devoid of fraudulent design, may be made the foundation of a decree in a Court of Justice.

Their Lordships will humbly advise Her Majesty that this Appeal be dismissed with costs.