Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sreemutty Nittokissoree Dossee v. *Jogendro Nauth Mullick, from the High Court of Judicature at Fort William in Bengal, delivered 5th February* 1878.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THIS is an appeal from a judgment of the High Court of Bengal sitting in its ordinary original jurisdiction. The action is brought by Jogendro Nauth Mullick, claiming to be the adopted son of Choytun Churn Mullick; and the Defendant in the suit (the Appellant) is Nittokissoree Dossee, the widow of Choytun Churn, and his heir in default of his leaving a natural or adopted son. The principal question in the suit was whether the Plaintiff had been adopted by Choytun Churn or not. A great deal of evidence was gone into upon both sides upon the issue so raised. It is unnecessary for their Lordships to advert to that evidence, inasmuch as the learned counsel for the Appellant, upon his opening at their Lordships' bar, expressed his inability to overturn the judgment on that issue by any argument that he could raise before us upon the evidence. Their Lordships think that in taking that course he exercised a wise discretion, and in no way injured the interests of his client. They have read the judgment of the High Court, and it appears to them that the case was very carefully

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tried. The judgment contains a lucid and elaborate analysis of the evidence, and assuming that analysis to be accurate their Lordships can have no doubt that the Court arrived at a sound conclusion in declaring that the adoption had taken place.

Another question arises, however, in the suit, namely, the maintenance to which the Defendant is entitled as a widow, upon the assumption that the Plaintiff was the adopted son of her husband. Their Lordships would be extremely reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at. It appears to have been the usual course, when there was a master attached to the Court, for the Court to refer to the master the question of maintenance, and to consider the proper amount upon hearing the report. In this case the Court did not apparently make any separate inquiry with regard to the maintenance, but acted upon the facts as they appeared in evidence before them, upon the general case. An ordinary form of reference appears to have been this: "Refer it to the Master to settle the amount, "regard being had to the value of the estate." Their Lordships think that another element to be considered is the position and status of the deceased husband and of the widow. The main subject of inquiry would be the value of the estate; and the question for the Master and ultimately for the Court to consider would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, but that which she might reasonably

expend for religious and other duties incident to the station in life which she might occupy.

In this case, independently of the value of the property which has been disputed at their Lordships' bar, there were circumstances which the Court took into consideration, and which their Lordships think may properly be taken into consideration, not as conclusive upon the amount which ought to be awarded, but as affording some guide to the proper amount, if not a measure of it. It seems that the husband, Choytun Churn, about two years before his death, had given instructions for his will. That will was never executed, but the papers connected with it were given in evidence by the Plaintiff, and were relied upon as affording strong corroboration of his adoption. Choytun Churn himself gave instructions for his will to a solicitor of the name of Sreenauth Chunder, who happened to be the brother of Jogendro, the Plaintiff, and who was a partner in the firm of Swinhoe, Law, and Company. It seems that the testator in his first instructions desired that the interest of a lakh of rupees, in Government paper, should be given to his widow, and, in addition thereto, that she should live in the family house, and be maintained out of his general estate, as she had been in his lifetime. It seems that a draft was made in conformity with these instructions, which was copied; and after receiving the copy Choytun Churn had another interview with Sreenauth, and in that interview he altered the instructions which he had previously given, and instead of bequeathing the interest of one lakh of rupees to his widow for life, he desired that the lakh should be given to her absolutely. An engrossment was made of the will containing that bequest. Upon this question of maintenance the Court say,

at the end of their judgment, after they had disposed of the principal issue that arose upon the adoption, "Under these circum-" stances, if it had been left to the Court to " determine the sum which should be awarded " to the Defendant in the future for her " maintenance we should only have given her " the most moderate provision which, having " regard to her husband's property and position, " the law would allow." The circumstances to which the learned Judges allude are those contained in their summary of the case which appears in the previous paragraph of their judgment, and there, after stating the main positions which they find in favour of the Plaintiff and of the adoption, they add, " That the fact of the Plaintiff being Choy-" tun Churn's adopted son was perfectly well " known to the Defendant and to all the " members of the family." The Court therefore seem to have thought that she was not justified in defending the claim of the Plaintiff as she had done, and that opinion does appear to have influenced their judgment in awarding the maintenance which they thought sufficient to be allowed to her. They say, "We should only have given her " the most moderate provision under those " circumstances." One cannot read that passage without perceiving that the Court reduced as low as they could, upon the principle upon which they proceeded, the maintenance which they allowed, as a kind of punishment to her for having defended a suit which they thought she must have known was properly brought against her. That the Court, being under this influence, should have allowed its judgment to be affected by it, their Lordships think was a departure from the strict principles which ought alone to have guided it. That influence operating on

the minds of the Judges, they proceed to consider what they would allow; and in coming to that conclusion they bear in mind the bequest of the lac of rupees intended to be made to her absolutely, and they refer to an offer which had been made by the Plaintiff. This is what they say :—" But the Plaintiff himself has relieved us " of what might otherwise have been an un- " pleasant duty. He has intimated to us through " his counsel that he desires the Defendant to " have the same provision as she would have had " if her husband's will had been duly executed." This they state to have been the desire of the Plaintiff. " And although, having regard to " the Plaintiff being an infant, we do not consider " it right to hand over to the Defendant abso- " lutely a lakh of rupees out of the Plaintiff's " property, we think we may without impro- " priety award her as maintenance the annual " sum of Rs. 4,000 payable monthly." If the objection was to handing over the corpus of a lakh of rupees, that might have been obviated by turning the value of the lakh of rupees into an annuity for the life of the widow, which would have produced a much larger sum than the interest merely at 4 per cent. upon the capital. Their Lordships do not say that the Judges were bound to do this; but on the principle on which they would apparently have acted but for the influence on their minds arising from the conduct of the Defendant in the suit, it seems not improbable that that is a conclusion at which they might have arrived. However, what they did was to award a sum of Rs. 4,000. Their Lordships wish to guard themselves against its being supposed that they consider the Plaintiff bound by his offer, or that the widow is entitled to the lakh of rupees because it was intended to be given to her by the will. They think both those circumstances

can be regarded only as elements which may properly be considered in determining a suitable amount of maintenance; and inasmuch as the Plaintiff at one time, through his guardian as it must have been, was willing to settle the matter amicably and to give the widow, and—as the Judges expressed it—desired that she should have the lakh of rupees, their Lordships entertain hope that when the matter is brought before him,—if it should be brought before him in India,—now he is of full age, he may be disposed to renew that offer, and if not to give the corpus of the lakh of rupees, to give an annuity which such a sum would produce. Their Lordships feel that they can do no more than send the case back with that intimation of their hope, and with this further intimation to the counsel here that, judging, as they do, from what they have seen in the Record and what they have heard from the learned counsel, they think that it would not be unfair to either of the parties if they could agree upon raising this sum of Rs. 4,000 a year to Rs. 6,000. Their Lordships feel that they cannot impose this arrangement upon the parties, but they throw it out as well worthy of their consideration to prevent any further litigation. If that sum is agreed to, then their Lordships would amend the decree here, by consent, by increasing the sum to Rs. 6,000. If that is not assented to, their Lordships will have no other course but humbly to advise Her Majesty to remit the suit to the High Court of Bengal to determine, with reference to the considerations that they have thrown out, the proper amount of maintenance to be allowed to the widow.

On the 12th February it was intimated to their Lordships by counsel on both sides that the parties in India adopted the suggestion

made by their Lordships in the foregoing judgment, and their Lordships therefore agreed humbly to report to Her Majesty that, the parties having consented thereto, the decree of the High Court of Judicature ought to be varied by raising the allowance to the widow for maintenance from Rs. 4,000 to Rs. 6,000 a year, and further that in other respects the decree ought to be affirmed, each party paying their own costs of this appeal.