Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Hurrish Chunder Chowdry v. *Srimati Kali Sundari Debi, from the High Court of Judicature, at Fort William, in Bengal; delivered November 16th*, 1882.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

IN order to make the subject of this Appeal intelligible a short statement is necessary. In the year 1819 Sumbhoo Chunder, by a sunnud, conveyed to his sister Kassiswari a certain talook. Upon the construction of this sunnud various questions have since arisen. Kassiswari, treating the sunnud as having conveyed to her an absolute estate, disposed of it by her will, the material part of which is this:—
" Of the whole of the rest of the rent-paying
" and rent-free immovable properties in benami
" and in my own name, in my possession and
" not in my possession, in which I have a right
" and interest, a moiety shall after my death
" be received by my daughter Chundermoni,
" and if she adopt a son by that adopted son,
" otherwise by her daughters, *i.e.*, by my grand-
" daughters,"—naming them—" in equal shares:
" and the children born of their wombs, or
" adopted by them, shall from generation to
" generation get their (the grand-daughters')
" respective shares in the order of succession,
" and the other moiety shall be received by

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" my daughter-in-law, Srimutti Kali Soondari " Debia, and if she adopt a son by that adopted " son, and by his children from generation to " generation in the order of succession. But " the same shall remain in the possession of my " daughter-in-law, Kali Soondari Debia, till the " said adopted son shall have attained his " majority; and in case there shall be a mis- " understanding between him and my daughter- " in-law after he shall have attained his majority, " the said adopted son and my daughter-in-law, " Srimutti Kali Soondari Debia, shall receive " equal shares" (of the property). "But, after " the death of Kali Soondari Debia, her adopted " son, or any surviving lineal heir of her " adopted son, shall obtain the same" (her share of the property).

Upon the death of Kassiswari, the now Appellant, Hurrish Chunder, who was the son of Sumbhoo Chunder, took possession of this property; whereupon an action was brought to obtain possession of it by Chundermoni and by Kali Soondari, who were then widows, Kali Soondari having adopted a son, Chundermoni not having made an adoption. The plaint in that action claims possession. It recites the sunnud from Sumbhoo Chunder; the will and the death of the testatrix; and proceeds:—"In virtue of " this will, I, Plaintiff No. 1,"—*i.e.* Chundermoni, —"and I, Plaintiff No. 2," — Soondari — "on " behalf of the minor, have, since her death, " become entitled to hold and enjoy all the " aforesaid movable and immovable properties." The plaint goes on to state that the Defendant had unjustly intruded himself into this land. The Defendant denied most of the allegations in the plaint, among them the adoption of a son by Kali Soondari.

The Plaintiffs obtained a judgment and a decree from the Court of First Instance; and

it is necessary now to determine, as far as possible, what was the precise effect of that judgment. The issues raised were, "1st, Can "Kali Soondari prefer this suit jointly with "Chundermoni? 2nd, Had Kassiswari Debia au- "thority to make a will, and did she make one? "3rd, If so, is the will valid, and can the Plain- "tiffs, jointly or individually, prefer the present "action for the recovery of the talook with "wasilat? 4th, Is it necessary to consider the "question of adoption of a son or otherwise in "the present action?"

The judge, after disposing of the first two issues in favour of the Plaintiffs, proceeds thus: —"Touching the third issue, it is true the "original will is not forthcoming, but an "attested copy has been filed. I would accept "the copy as evidence, as it was attested by the "registration authorities, who have the original "in their safe custody. The opposite party, I "may remark, does not distinctly and empha- "tically deny the existence of the original will, "the execution of which has been substantiated "by witnesses." He finds in favour of the will. He proceeds:—"But even supposing there was "no will executed, yet Chundermoni Debia, as "the successor and child of Kassiswari Debia, "can sue for the entire talook; and she herself "has no objection to have Kali Soondari as a "co-plaintiff; therefore, the Plaintiffs can sue in "the manner they have." It may be observed that there is no allegation of or issue upon Chundermoni's heirship to Kassiswari, and the learned judge's dictum on the subject is merely obiter. "For the aforesaid reasons it is not "necessary to consider the question of adoption "of Shurut Chunder Lahiri, the minor. To my "mind the Plaintiffs can sue upon the will of "Kassiswari, the existence and genuineness of "which I do not doubt." Their Lordships

regard this as, in effect, a suit for the purpose of establishing the will; and the only question to which the issues relate, and which really seems to have been tried, was whether it was valid, comprising the questions whether it was executed and whether the testatrix had the right to make it. The decree is in pursuance of this judgment, and goes on to affirm, "The Plaintiffs institute "this suit against the Defendant, on the basis "of the said will, for the recovery of posses- "sion after establishment of their shikmi right," and so on. And it concludes :—"That this case "be decreed with costs in favour of the Plaintiffs, "and that the Plaintiffs do recover from the "Defendants possession of the disputed mouzahs "and the costs of Court and wasilat from this "day until realisation, with interest at the rate "of 6 per cent. per annum." It is true that, if the plaint be read with technical strictness, the second Plaintiff sues only in right of her adopted son; but it does not seem to have been so understood by the judge, who meant to give each of the ladies possession of half the property, and declined to try the question of adoption, because, whether the adoption were proved or disproved, Kali Soondari's right to immediate possession remained. Their Lordships are not prepared to say that the judge was wrong in taking this broader view of the question before him.

An appeal was preferred to the High Court against this judgment, and it was reversed by the High Court on the ground that the testatrix only took an estate for life, and therefore was incompetent to dispose of the property by will; but the High Court also treat the action as one brought for the purpose of establishing the validity of the will. The daughters of Chundermoni (she having died before the last-mentioned judgment) appealed to the Queen in Council, and by Order in Council the judgment of the

High Court was reversed, and the judgment of the Subordinate Court was affirmed. With respect to the judgment of the subordinate judge, their Lordships observe:—"No dispute "was raised as to the genuineness of the "will of Kassiswari or its validity to pass "whatever interest she was capable of devising. "The subordinate judge gave judgment in "favour of the Plaintiffs. The grounds of his "judgment, which are not very clearly stated, "would appear to be, that, in his opinion, "Chundermoni took an absolute estate under "the sunnud on the death of her mother; but "that, having elected to take under her mother's "will and to admit the co-Plaintiff to a half "share of the estate, both the Plaintiffs were "entitled to maintain the action against the "Defendant." Their Lordships also observe that their decision was not intended to conclude any question between the co-Plaintiffs.

The judgment of the Queen in Council was sent to India to be executed, but in the meantime the Defendant had acquired the interest of the Plaintiffs in Chundermoni's moiety, whereupon an application was made to Mr. Justice Pontifex, on behalf of Kali Soondari, who claimed the other moiety, for an execution of the judgment of the Court of First Instance as for as that moiety was concerned.

Mr. Justice Pontifex was the judge appointed under the power, which had been previously conferred by statute upon the High Court, to execute a portion of their jurisdiction, viz., that which related to enforcing the orders of the Privy Council and other questions having to do with the relations of the Privy Council to the Courts in India. That learned Judge refused to direct execution under section 610 of Act 10 of 1877, which regulates the procedure for enforcing the execution of any order of Her Majesty in Council.

That section is to this effect: "Whoever desires to "enforce or to obtain execution of any order of "Her Majesty in Council shall apply by petition, "accompanied by a certified copy of the decree "or order made in appeal, and sought to be "enforced or executed, to the Court from which "the appeal to Her Majesty was preferred. "Such Court shall transmit the order of Her "Majesty to the Court which made the first "decree appealed from, or to such other Court "as Her Majesty, by her said order, may direct, "and shall (upon the application of either party) "give such directions as may be required for the "enforcement or execution of the same; and the "Court to which the said order is so transmitted "shall enforce or execute it accordingly in the "manner and according to the rules applicable "to the execution of its original decrees." Mr. Justice Pontifex in a short judgment observes, "This is an application for the execution of a "Privy Council decree, in part, by one of two "Plaintiffs. The original Court passed a decree "in favour of both the Plaintiffs. On appeal to "this Court that decree was overruled. One of "the Plaintiffs only appealed to the Privy "Council, and on appeal to the Privy Council "the decree of the original Court was restored "and that of this Court reversed. The Privy "Council, in their judgment, expressly said they "would not decide the rights of the Plaintiffs "*inter se*. Subsequently the Defendant, who is "in possession of the property, bought the "interest of the appealing Plaintiff. The party "who did not appeal, having applied to execute "decree, has been met with two objections, "the first under section 610 of Act 10 of 1877, "that that application could not be granted "because it was not accompanied by a certified "copy of the decree of Her Majesty in Council. "But the Defendant himself has got that certified

" copy, and therefore I think the objection under " section 610 cannot be sustained."

Their Lordships think it well, before proceeding further, to say that they entirely agree with the learned judge in this view, which was adopted by the Appellate Court. The practice with respect to the decrees of Her Majesty in Council seems to be this:—The original decree is given to the successful party, or to one of the successful parties, to the Appeal. That is taken to India, and it is the duty of the person to whom it is given, as he is informed by a written circular, a copy of which has been read, to file that original decree in the High Court of Calcutta. That being done, the proper officer of the Court in Calcutta would be able to give a certified copy, or indeed the registrar of this Board would be able to do the same. It seems that in this case the Defendant got, through Chundermoni, whose interest, as before stated, he had taken, the original order. He neglected to file it, as he ought to have done, in the Court, and it was under those circumstances that Mr. Justice Pontifex held that a copy of that order, though perhaps not a certified copy, might be properly admitted; and their Lordships think he was right. The provisions of section 610 cannot be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any Order in Council should be supplied to the Courts in India. Mr. Justice Pontifex proceeds—" The other objection to the " execution of the decree of the Privy Council " was that the decree of the original Court, " upheld by the Privy Council, could only be " executed as a whole, and not partly by one of " the two Plaintiffs. Mr. Phillips relies on " section 231 of Act 10 of 1877. Now the two " Plaintiffs claim under a will which is not free

" from difficulty. The Privy Council declined to " construe the will as between the two Plaintiffs " claiming under it. I think, therefore, I must " refuse this application for execution, and the " applicant must be left to a regular suit to " enforce her claim to any share of the property."

From this order or judgment of Mr. Justice Pontifex an appeal was preferred to the High Court. All three of the learned judges of the High Court, the Chief Justice and the two puisne judges, were of opinion that Mr. Justice Pontifex had exercised a wrong discretion, and that he ought to have sent the case for execution; but the Chief Justice was of opinion that no appeal would lie from the proceeding before him, and that his error could not be set right. The two puisne judges were of opinion that an appeal would lie under section 15 of the Royal Charter of 1865, which is in these terms:—" We further " ordain that an appeal shall lie to the said " High Court of Judicature, at Fort William " in Bengal, from the judgment (not being a " sentence or order passed or made in any " criminal trial) of one judge of the said High " Court, or of one judge of any Division Court, " pursuant to section 13 of the said recited Act " —the said recited Act, with regard to this matter, having enabled the Court to confer upon a judge, or a division of the Court, the power of the Court itself. These learned judges held (and their Lordships think rightly) that whether the transmission of an order under section 610 would or would not be a merely ministerial proceeding, Mr. Justice Pontifex had in fact exercised a judicial discretion and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kali Soondari to an execution in this suit. They held, therefore, that it was a judgment within the meaning of section 15.

The Chief Justice was of opinion that it was not a judgment: and he seems to have based his opinion in a great measure upon the ground that, in his view, Mr. Justice Pontifex had no jurisdiction to inquire at all whether or not Kali Soonduri had a right to execution; that his function was merely ministerial; that all he could do, or ought to have done, was to transmit the decree of Her Majesty in Council to the Lower Court for execution; that he usurped a jurisdiction which did not belong to him; and that under those circumstances no appeal would lie. Their Lordships do not think that Mr. Justice Pontifex can be properly treated as having usurped jurisdiction; but, if he had, this would have been a valid ground of appeal, and they are unable to agree with the Chief Justice, that if a judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice.

It only remains to observe that their Lordships do not think that section 588 of Act 10 of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the Appeal is from one of the Judges of the Court to the full Court.

The remaining question is whether Mr. Justice Pontifex was right in refusing to make the order in question; and their Lordships are of opinion that the learned Judge was wrong. They are unable to subscribe to the doctrine that a decree can only be executed as a whole and not partly by one of the Plaintiffs,—a doctrine, which, as pointed out by the High Court, would lead to the consequence that a Defendant could prevent the execution of a decree by buying the interest of one of the Plaintiffs. The effect of the judgment which

had to be enforced was, in their Lordships' view, as has been already expressed, that the second Plaintiff, Kali Soondari, was entitled to possession of half of the estate in question. The Defendant had obtained the share of Chundermoni's representatives. As far, therefore, as that share was concerned, he was in no better position to dispute any right the Plaintiff might have to execution than Chundermoni herself would have had; and it appears to their Lordships that Chundermoni would have had no right in this suit to dispute the title of the Plaintiff to present possession of a moiety of the land. As a Defendant he had no better rights. As against the Plaintiff he was a wrongdoer; and as against him she had an immediate right to possession. But it has been asserted that he had a right to have the question of the adoption by Kali Soonduri determined, and that this question could not be determined in an execution proceeding, to which latter proposition their Lordships assent. But if the adoption were set aside, still Kali Soondari would have a life interest in the property, and could maintain the action in respect of that interest. With this view, as already pointed out, the Judge of First Instance found in her favour, declining to try the question of adoption, and it is his judgment which has now to be executed. Any possible hardship which the Defendant might complain of in the present judgment operating as an estoppel against him, or otherwise unfavourably to his trial of this question, should it ever arise, will be obviated by a declaration that the decree is to be executed in respect only of the share to the possession of which Kali Soondari is entitled under and by virtue of the will, and that nothing in this judgment shall affect any right which the Defendant may at any time have to question the validity of the adoption.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, coupled with this declaration, and to dismiss this Appeal with costs.