Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Krishna Kishori Chowdhrani and another v. *Kishori Lal Roy, from the High Court of Judicature at Fort William, in Bengal; delivered February 16th*, 1887.

Present:

LORD WATSON.
LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THE question upon which this case must be determined is whether there was proof of the document alleged to have been executed by Goluck Nath Roy in the year 1840.

The Plaintiff claims to be entitled to half the estate which belonged to Goluck Nath. Goluck Nath died leaving only a widow and two daughters. The Plaintiff is the only son of one of those daughters, and would be, if there were no will disentitling him to the property, entitled to the half share which he seeks to recover in the action. But the Defendant in the action sets up that in a power to adopt which Goluck Nath executed in the year 1840 he devised, in the event of no adoption being made, the half share, which would otherwise go to the Plaintiff, to the other daughter and her son. The words relied on are at page 182 of the Record. After giving his widow power to adopt, he says:—"God forbid if, without any son "being begotten of my loins, I should die, and "you also should suddenly die without having "made"—the literal translation is "having delayed to make"—"an adoption, then my

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" younger daughter Roopmunjari, and her son, " that is my grandson by my daughter's side, " shall become entitled to, and shall exclusively " possess, all my above-mentioned zemindaris," &c. The question is, has it been proved that those words are contained in a document executed by Goluck Nath.

It is said that the original document was filed in the Collector's office when the widow, after the death of Goluck Nath, applied for mutation of names. It was unnecessary for the Collector, in deciding whether the name was to be changed from that of the deceased husband to that of the widow, to inquire into any subject except whether the widow was entitled to have her name substituted for that of her deceased husband. It was no part of his duty to inquire who, on the death of the widow, would be the reversionary heirs; and it is to be remarked that when she put in her petition to the Collector for the mutation of names, although she said that her husband had given her power to adopt, she did not go on to say that in that document he had devised over the estate to the second daughter and her son in the event of her not adopting. The Collector, also, in adjudicating that the widow's name was to be substituted for that of her husband, does not allude to that portion of the document. He merely declared that it has been shown to him; that the widow represents her husband; and that her name should be entered in the collectorate in place of that of her husband.

It is stated that Goluck Nath, after he had executed the document, notified to the Judge that he had given his widow power to adopt. Those proceedings are before the Court: but there is nothing in them to show that when he spoke of having given his widow power to adopt, he ever mentioned the fact of his having

devised over the estate to his second daughter and her son in the event of the widow's not adopting.

The original document is not produced, but the parties have endeavoured to give secondary evidence of it, and in order to let in secondary evidence they endeavoured to show that the document was burnt in a fire. The learned Judge of the first Court, at page 439, in dealing with this subject, does not go so minutely into the question as the High Court have done. He says:—"The anumati-patra will relied upon "by the Defendants is dated" so and so, "but "the original deed was burnt up by setting "fire in the Cutcha Cutchery bungalow of the "deceased Chundermoni, and its loss was satis- "factorily accounted for by the depositions of "the Defendant's witnesses." That is all he says upon the subject. The High Court in dealing with that question go more minutely into it. At page 457 they say :—"We have considered the "evidence as to the loss of this document, and "it by no means satisfies us. When the copy "was filed in 1868 this account was not given "of the loss of the original, and we think that "if this were a true account, the fact of the "loss by burning would have been stated at that "time. At page 15 of the Paper Book, in "Appeal No. 260, there is a judgement in a "suit, No. 31 of 1870, which contains a state- "ment as to the loss of the document, and "this was relied upon to show that a different "account was given on this occasion. We think "we cannot accept the recital of facts in the "judgement as evidence of a different account "having been given on a previous occasion. But "we are of opinion that we may properly make "the observation that the account of the loss by "burning, now given, was not given in 1860." But further there is a very important remark

which may be made in addition to that of the High Court. In the record to which they refer, and which will be found at page 159 of this record, it is said :—" The Plaintiff has failed to produce " the original will or anumati-patra : he has " only produced a copy of an anumati-patra of " 17th Magh 1246 as executed by Goluck Nath " Roy, in favour of Chundermoni, and the " Plaintiff's witnesses Nos. 2 and 3 have stated " that the Plaintiff searched for, but could not " find the original anumati-patra." Now if he knew that it was burnt, how could he produce witnesses to say that he had searched for it ? He not only does not give the same account, but he gives an entirely different account. He says now that it was burnt. He said in a proceeding subsequent to the alleged date of the burning, that he searched for the document but he has not been able to find it.

The High Court then go on :—" Upon the " evidence we think that the account now given " is not entitled to credit, and we feel bound to " say that the Defendant has not proved the loss " of the original so as to entitle him to give " secondary evidence of its contents."

Their Lordships are of opinion that the High Court came to a correct conclusion upon that point, and that being so, the loss or destruction of the document not having been proved, secondary evidence was not admissible under clause C., section 65, of the Indian Evidence Act. There are however cases under that Act, in which secondary evidence is admissible even though the original is in existence. One of the cases is under section 65, letter *e*. " When the original is " a public document within the meaning of " section 74 ;" and another under letter *f*, " When " the original is a document of which a certified " copy is permitted by this Act, or by any other " law in force in British India, to be given in

" evidence." But in either of those cases "a " certified copy of the document, but no other " kind of secondary evidence, is admissible." If then the anumatri-patra was a public document within the meaning of section 74 of the Act, which in their Lordships' opinion it was not, no secondary evidence would have been admissible except a certified copy. Where is the certified copy? The document which is set out at page 118 of the Record is not a certified copy. There is no certificate of any public officer that it is a true copy of a document contained in the office, *see* section 76.

Then again it is said that the Judge, on the trial, sent for the proceedings before the Collector's Court, and that they were sent up to him; and at page 218 of his Record we find that there is what is said to be an authenticated copy of the document in the proceedings. But that document was not a certified copy, and there is no evidence whatever to show that it had ever been examined by any witness with the original document, which was said to have been at one time in the Collector's office.

Their Lordships therefore are of opinion that there was no sufficient evidence of the loss or destruction of the original, and no sufficient secondary evidence, within the meaning of the Evidence Act.

Even if parol evidence were admissible as secondary evidence their Lordships cannot rely upon such evidence as was given in 1881 with reference to the contents of a document which had been executed forty years previously. The only witness who was an attesting witness says that he recollects a document being executed, but he cannot say whether it contained the words which amount to a devise over to the daughter and her son. There is no evidence on the part of the attesting witness that the document did

contain a devise, and there is only the evidence of witnesses who can hardly be supposed to have known at the time, or even if they did know at the time, to have recollected the contents of a document by which it is contended that the estate of this gentleman was alienated from him by the will of his grandfather.

Then again it was stated that at the time of the making of the will, the second daughter's son was born, and that the child was in the lap of the mother when her father gave the power to his widow to adopt, and also devised his estate to the daughter and her son in case the widow should not adopt. From the contents of the document it appears that the testator was not speaking of a son to be born, but of a son who was then actually in existence. From the evidence which was given it appears to be clear that at the time Goluck Nath executed this document, giving his widow power to adopt the child, Anund Soonder, was not in existence. The High Court have very carefully gone into the evidence upon that subject, and they have shown conclusively that the child was not in existence at the time when the document is alleged to have been executed.

Looking, then, to all the evidence in the case, their Lordships are of opinion that the High Court, who gave a very carefully considered judgement, and weighed the evidence with great care, came to a right conclusion upon the evidence, that the will was not executed by Goluck Nath, and consequently that the Plaintiff is entitled to recover his half share, and that the judgement of the High Court ought to be affirmed.

Their Lordships will therefore humbly recommend Her Majesty to affirm the judgement of the High Court, and the Appellant must pay the costs of the appeal.