Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tayammaul v. *Sashachalla Naiker, from Madras; delivered 22nd December*, 1865.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THIS is an Appeal from a Decree of the Sudder Adawlut of Madras, affirming a Decree of the Civil Court of Cuddalore, in a suit instituted by the Respondent as guardian of Virasami Naiker, an infant, against the Appellant (the widow of Balakristnama Naiker) and others, to recover the property of the late husband of the Appellant in the possession of herself and the other Defendants.

The claim to the property is founded on an alleged adoption of the infant Virisami Naiker by Balakristnama Naiker on the day of his death, on which day it is alleged that he also executed a will by which he appointed the Respondent Sashachalla Naiker, the uncle of the infant, and Devanayaga Naiker, the father of his wife (the Appellant), the guardians of his adopted son, and "to manage all the affairs," till his adopted son came of age.

The alleged adoption took place at 7 o'clock, and the will was made about 9 o'clock in the evening of the 30th July, 1849. Although there is no necessary connection between these two acts, as the adoption might be good and the will invalid, yet it is difficult to separate the different transactions of the day from each other, or to view them in any

other light than as different parts of one arrangement.

On the part of the Appellant both the adoption and the will are disputed, the first by denying that it ever took place, and both upon the ground that Balakristnama Naiker was on the day in question utterly incompetent to perform either of the acts imputed to him.

The acts which are said to have constituted the adoption are described by all the witnesses in almost the same words (no unusual circumstance with Indian witnesses), but there is no reason to suspect that these acts were not performed; and the mere factum of the will appears to be sufficiently established by the evidence.

There was no proof that application had been previously made to the natural parents of Virasami to give their child in adoption, nor was it shown that Balakristnama Naiker had ever contemplated the adoption of this boy before the day in question.

The acts were performed without much preparation and without many of the customary ceremonies, but it was admitted in argument that they were not essential, and that enough was done (if there were no other objection but the absence of these ceremonies) to constitute a legal adoption.

The case was heard *ex parte* before their Lordships, but in the Civil Court in India it was strongly pressed against the Appellant in support of the validity of the adoption, that she was a consenting party to it, performing her part in the ceremony, and afterwards showing by unequivocal acts her entire acquiescence in what had been done. These acts were—allowing the boy to perform the funeral rites as an adopted son, and the day after the adoption putting her mark to an arzee addressed to the Collector of Southern Arcot, stating the adoption and the performance of the funeral rites by the adopted son, and praying for the transfer into his name of her late husband's property.

With respect to the arzee, the Appellant, who was examined as a witness in the suit, positively denied that she ever put her mark to it, and asserted that it was a fraudulent imposition upon her; and as to the performance of the funeral rites, it was alleged on her behalf that they were not performed by Virasami as an adopted son, but as her agent, she

being unable by the custom of her caste to go out and perform them herself.

The evidence in support of the arzee is not of the most satisfactory description. Devanayaga, the Appellant's father, by whom it is said to have been prepared, and who wrote her name before she put her mark to it, was not produced, although he was in the list of witnesses delivered in by the Plaintiff. The reason for not examining him is stated in a memorandum presented to the Court by the Plaintiff, "that he suspected Devanayaga Ayangar was associating with the adverse parties."

With respect to the performance of the funeral rites considerable doubt (at least) arises upon the testimony of the Purohit or Family Priest, whether they were really performed by the boy as an adopted son.

But assuming both these acts to be satisfactorily established, and also the participation of the Appellant in the proceedings of the 30th July, 1849, all this will not sustain the validity of the adoption unless it clearly appears that the act itself was performed under such circumstances as would render it perfectly legal.

The concurrence of the widow, and the various acts of acquiescence attributed to her, would be important if they were brought to bear upon a question which depended upon the preponderance of evidence; but if the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove. The Appellant is a Hindu female. So long as she is acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or will ought not to prejudice her. In such a case as the present it was hardly to be expected that she would be capable of distinguishing between an adoption in fact and a legal adoption, or between a will in fact and a valid will. The acts attributed to her are really no confirmation of the Respondent's case, as every one of them upon which reliance is placed might equally have been done with respect to a legal or an avoidable adoption.

The question therefore will be, not whether certain acts were done which if unobjectionable in other respects would have constituted adoption, but whether the alleged adopting father was of sufficient

capacity at the time to understand the nature and object of those acts, and voluntarily gave an intelligent consent to their performance.

On this question, upon which the validity of the adoption and of the will depends, many witnesses were called on both sides. It is unnecessary to examine the evidence or to weigh one set of witnesses against the other, because the Judge who tried the cause in the Court below declined to decide the case upon their conflicting testimony, but himself directed an additional witness to be examined, and taking the facts deposed to by him as to the bodily and mental state of Balakristnama Naiker at the time of performing the acts in question, made them the foundation of his judgment. Can it be said that he rightly exercised his judicial function in the appreciation of those facts, and in the correct application of the law to them? What is the description given by Kandoji Rao, the Court witness (as he is called), of the state of Balakristnama Naiker on the day in question? That of a dying man, almost continually insensible, though occasionally roused to consciousness by loud tones, or by pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility, and when momentarily conscious, with his mind quite inert and instantly fatigued upon the slightest exertion.

How is it possible that a person in such a condition could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared. In such a state as that described, even if the mind were passively awake to the suggestions made to it, it would naturally cling to repose, and yield, for the sake of it, to any external suggestion. Viewing the adoption and the will together, they present every appearance of a concerted family arrangement. As an adopted child passes into a new family, his natural relations become, as it were, strangers, and the association of the boy's natural uncle with the father of the adopting mother for which the will provides, must be regarded as a contemporaneous and concurrent act with the adoption. If the law were to countenance acts of this description, performed at such a time and under

such circumstances, without the clearest and most cogent evidence to establish their validity, relations and managers would be encouraged to advance their own private notions of what might be advisable to be done for the good of the family, and to ascribe acts to a dying man in which he would have been the merely passive instrument to prolong their own gain and authority.

If this question had come originally before their Lordships, and not by way of appeal, they would have had no difficulty in deciding that Balakristnama Naiker was on the day in question quite incompetent to perform the adoption, or any other act requiring the exercise of the powers of judgment and reflection.

They have, however, to deal with the case under the influence of two previous decisions at variance with their own views. But the concurrence of opinion of two Courts in India, even upon a mere question of fact, has not upon previous occasions prevented their Lordships acting upon their own independent judgment. In the case of Rungama *v.* Atchama (4 Moo. I. A., p. 1), upon a disputed question of adoption, the Provincial Court and the Sudder Court on Appeal held that the evidence was not sufficient to establish the fact of adoption: but their decision was reversed by this Committee. Precisely the same state of things occurred in Huradhun Mookurjia *v.* Muthoranath Mookurjia (4 Moo. I. A., 414), and with the same result. And in Mudhoo Soodun Sundial *v.* Suroop Chunder Serkar Chowdry (4 Moo. I. A., 431), Dr. Lushington in delivering the Judgment of their Lordships, says in p. 433, "Both the Courts below have decided against the validity of the instrument, a fact which, considering the advantages the Judges in India generally possess of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions, but does not and ought not to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case."

This case is something different from a mere question of fact. The matters questioned, an adoption

and a will, involve both the factum of each and the capacity of the alleged adopting father and testator. Each of these acts interferes with and displaces previously existing rights inchoate or presumptive. A Judge who decides in favour of a disputed adoption or will in a case of questioned capacity of a dying man, must apply his mind not simply to the act of adoption in fact, or to the execution in fact of a will, but he must be careful to see that the jealous requisitions of the law as to the proof of acts of persons done *in extremis* are fully complied with. Now in this case the Judge, not satisfied with the evidence brought before him, selected a witness to assist him with his judgment. There was no careful weighing of the evidence on both sides, but his decision was founded upon the single testimony of this witness. The Sudder Court say, "Little need be added to the arguments on which the Civil Judge has founded his decision," and they add nothing. They therefore adopt the conclusions at which the Civil Judge arrived, based not upon a review of the whole of the evidence, but upon a witness chosen by himself, whose testimony in the opinion of their Lordships does not warrant the Judgment which he has pronounced. They will, therefore, recommend to Her Majesty that the Decrees appealed from be reversed, with costs.