Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Soorendronauth Roy v. *Mussumat Heeromonee Burmonee and others, from the High Court of Judicature at Calcutta; delivered 2nd July,* 1868.

Present:

Sir James W. Colvile.
Lord Justice Wood.
Lord Justice Selwyn.

Sir Lawrence Peel.

THIS is an Appeal from a decision of the High Court at Calcutta which reversed the Decree of the Judge of the Zillah Court of Nuddea, dismissing the Plaintiffs' (the Respondents') suit with costs.

The suit which is to determine the right of succession between the representatives of each of two joint owners, Paresnauth and Batooknauth, Hindus, to the succession of one of them, Batooknauth, was brought to recover a moiety of a family estate consisting of landed and of moveable property which had belonged to one Khoderam Roy, the grandfather of both Paresnauth and Batooknauth. The property of Khoderam descended from him, by inheritance, to his two surviving grandsons Paresnauth and Batooknauth, the sons respectively of his two sons Jai Singh Roy and Prag Singh Roy, who had predeceased their father. These grandsons, who were first cousins, formed a joint undivided Hindu family, joint in food, worship, and estate. During their joint lives they resided continually together.

Paresnauth was the manager. He survived Batooknauth about two and a-half years. Batooknauth left

no children. The Plaintiff was his childless widow. She was very young at the time of her husband's death; certainly under fourteen years of age, and perhaps younger. She had, however, near relations, members of her own family, competent to the protection of her rights, her father and two other persons: and the sister of Batooknauth had a son, a minor, in the line of succession to his deceased uncle under the Law of Bengal, and whose father was competent to the protection of his rights also. The widow, if entitled, might have been placed under the protection of the Court of Wards in the case of any probable invasion of her rights.

Paresnauth, on the 18th Bysach, 1260, that is, thirteen days after the death of Batooknauth, which took place on the 5th Bysach, 1260, corresponding to the 16th April, 1853, propounded and proved before the Civil Court of Nuddea, under Act 20 of 1841, an alleged will of Batooknauth, the cancellation of which Instrument is also sought by the Plaintiffs' suit. By this will, which bore date the 2nd Bysach, 1260, three days before his death, the whole of Batooknauth's property was given to Paresnauth. It contained a provision for maintenance of the widow; but in case of her quitting the family 25 rupees per month only were to be allowed her for her maintenance. The usual notifications were issued by the Court; no person appeared to oppose, witnesses were examined, the will was proved, and the ordinary certificate obtained, and under that title Paresnauth enjoyed the property unopposed and undisturbed during the remainder of his life, a period of about two and a-half years. The will was not registered, but two days only elapsed between the date of it and the death.

Paresnauth left a will, or testamentary trust deed by which he appointed his mother and wife guardians of his infant son. It contained a provision for adoption by his widow in case the infant died, and some directions as to religious rites and usages.

Shortly after Paresnauth's death, the widow of Batooknauth asserted her title to a moiety of the property jointly owned and enjoyed by her husband and Paresnauth. Upon her application to the proper authorities to be admitted to her share, she was,

in consequence of the certificate before mentioned having been obtained and being in force, directed or advised to proceed by regular suit, and she instituted the suit accordingly out of which this Appeal arises. She was the sole Plaintiff, and the Defendants were the mother and widow of Paresnauth, as trustees and guardians of the infant son of Paresnauth, who was also named a party. The suit proceeded in that form until the son attained majority, when he applied for leave and was permitted to defend in his own person without guardians. He is the Appellant in this Appeal. The property being situate wholly in Bengal, and the family having been long resident there, the Plaintiff was certainly entitled to rely on her *primâ facie* title, as heiress under the General Hindu Law as administered in that part of India.

It was incumbent on the Defendants to allege and prove a title displacing this *primâ facie* title. They accordingly pleaded their title, which embraced two separate answers of the Plaintiff's title. They alleged that the title to the property was, by reason of the retention by their family of its ancient law, that of the Milacshara, to be governed by that authority, under which Paresnauth, and not the widow, was heir to Batooknauth; and besides this, they alleged that Batooknauth had bequeathed his whole property to Paresnauth. If this last title prevail, it displaces equally a descent *ab intestato*, under either system of law, viz., that of the Mitacshara, or that of the Dayabhaya.

Some doubt was raised by Mr. Cave, in his argument of this case, as to the original acquisition of this property, whether the whole was acquired by Khoderam, as a large part certainly was, or whether a part was not ancestral property which had descended to him. It is not necessary to inquire into this subject, because the prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family. It must have had a legal origin, and have continuance (see Abraham *v.* Abraham, 9 Moore's Privy Council Cases, Indian, pp. 242 and 243); and whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally

as to both. A legal foundation for this family usage was laid sufficiently by the evidence. The family came into Bengal from a distant part of India where the Mitacshara prevails. The High Court did not decide more on this issue than that the family had adopted the law of Bengal for some generations: that is consistent with a discontinuance of a former usage. It appears further from the evidence of the Purohit that his was an hereditary office, as it very frequently is, and that his ancestors, officers of the priesthood, and of the family, had followed the Mitacshara constantly.

On the evidence, it seems clear that the family came attended by priests of their own persuasion; and since Orientals are commonly tenacious of their usages and customs, and more especially of their family and religious observances, therefore, on the ordinary principles of viewing evidence, a continuance of this state of things is presumable, and the onus would then lie on the party alleging an interruption or cessation of it to prove such allegation. In this case, therefore, the onus of proving such a cessation seems to have been properly declared by the High Court as incumbent on the Plaintiff, in consequence of the admissions in the pleadings.

The Plaintiff originally advanced a title which she did not maintain throughout her suit. She alleged originally that her husband had given her authority to adopt a son, and had constituted her heiress, *ad interim*, by a written instrument, of which she alleged the spoliation and destruction by Paresnauth. Such an authority is one not unlikely to be conferred. The will of Paresnauth himself evidences the strong desire of a Hindu to be succeeded by a son. Why the allegation, if untrue, was made, or why, if true, it was abandoned, it is difficult to say. It is the great misfortune of Hindu litigants that their cases often fall, in the earlier stages of litigation, into the hands of incompetent advisers, who, by the mixture of falsehood with truth, or by the suppression or abandonment of part of a true case, from some mistaken views of policy, or difficulty, create often impediments to its success from which the true story, if revealed, would have been free. If, for instance, it should seem expedient to exaggerate the illness, weakness, or incapacity of an alleged testator, and to tutor witnesses to such proof, it may

be thought politic to drop that part of a case, which necessarily supposes during the same interval a disposing capacity in the testator; and in Indian cases it is scarcely safe or just to make against the suitor himself the ordinary presumptions from the conduct of a suit which would be made in our own Courts under the like circumstances.

It has, therefore, been very properly urged in the able arguments on behalf of the Plaintiff, that her youth, ignorance, sex, and dependent state must all be weighed and have due importance given to them when her supposed acquiescence in the title of Paresnauth is urged against her. As respects herself, personally, the force of these arguments may be admitted so far as they regard acquiescence alone; but her ignorance of Paresnauth's proceedings and claim to the whole succession which she alleges, cannot so readily be conceded, and the weight of presumptive proof arising from the conduct both of herself and of other persons competent to the protection of her interests, cannot be excluded from the consideration of their Lordships when deciding whether such ignorance is established in any of them.

The Plaintiff denied in her replication each title pleaded by the Defendants. The will she alleged to be a forgery, and insisted that the Dayabhaga was the authority to be applied to the question of her title to the succession.

The issues of fact, which are stated in page 12 of the Appellant's case, comprise these two points, the only ones before their Lordships on Appeal:—

1st. Whether Batooknauth executed a will dated 2 Bysach, 1260, in favour of Paresnauth, or not.

2ndly. Whether the question of inheritance in this suit is determinable by the Shastres of Bengal, or of the Western Provinces.

The Judge of the Court at Nuddea found the first issue, that on the will, in favour of the Defendants. He expressed no opinion on the second, which, in consequence of his finding on the first, he judged to be then an immaterial issue. On Appeal to the High Court, that Court consisting of three Judges, Mr. Trevor, Mr. Seton Karr, and Mr. Jackson, found unanimously the issues in favour of the Plaintiff, the now Respondent, and reversed the Decree of the Civil Court.

In the view which that Court of Appeal took, it was necessary to decide both issues, for a decision on the will alone, unless it had established the will, would not have decided the case. In the view taken of the will, in the Civil Court of Nuddea, the contention as to which law whether the Mitacshara or the Dayabhaga should prevail was a needless one, except as it tended to disprove the will by showing it to be an inofficious disposition.

If, however, the evidence afford ground enough for believing that the ancient family usage, whether legally obsolete or not, might yet be operative enough in the mind of a male member of his family to lead him to prefer the sole ownership of a male, his conjoint owner and coheir, with whom he had been associated in the enjoyment, and with whom the entire management had been, to what he might consider the risk of female ownership, then no sound argument derived from the mere presumed inofficiousness of the disposition *according* to the general law could be used to weaken adequate evidence as to the factum of the will. In the opinion of their Lordships it would be a rash conclusion on the state of the evidence in this cause to suppose that a preference of the law of Bengal was likely to be operative in the mind of the testator, and without a belief in the probable existence of such a preference, where is the foundation for treating the will as inofficious?

It is not necessary for their Lordships to decide the second issue in the view which they take of this case, which is substantially the same as that taken by the Civil Court of Nuddea. It is, however, necessary for them to review the evidence on this issue, to some extent, in order to support the opinion already expressed by their Lordships as to the probability of a continuing attachment by the testator Batooknauth to his original family usages.

From the admissions in the pleading referred to by the High Court in their Judgment, and from the evidence, it may be safely concluded that this family came from a part of India where the Mitacshara was and is the prevailing authority; that it came not unattended by ministers of religion, and that it originally continued in Bengal its ancient law. As at the time of that migration, the Mahometan was the governing power, and as the

Hindus were rather connived at than sanctioned by the governing power in the exercise of their religion, their law was in the nature of a personal usage or custom, and it is probable that migratory families or tribes amongst Hindus would retain their own usages.

There seems to be no reasonable ground for doubting that the office of priest was hereditary, and derived to the existing family priest by successors in the mode stated by the Purohit, whose evidence was rather laid aside by the High Court, on the ground that he might be swayed by interest, than rejected by it as untrustworthy. An adherence to family usages is a strong Oriental habit; it is in most places not a weak one, and since, generally, the love of them increases with their long prevalence, it requires no effort to believe that the retention of religious usages and customs spoken to by the Defendant's witnesses did prevail in that particular branch of the family, to which point indeed, the Purohit's evidence in a most important particular, that of the performance of the Shrand of Batooknauth, is clear and direct, and on that point not contradicted by proof, for though the Plaintiff alleges, she does not prove that she performed her husband's Shraud.

This, indeed, is not decisive of the question as to the devolution of property in the family by right of succession, since a family might retain its religious rites, and yet acquiesce in a devolution of property in the common course of descent of property in that district, amongst persons of the same race. But still there is in the Hindu law so close a connection between their religion and their succession to property, that the preferable right to perform the Shraud is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union. Now, it is proved by the Purohit, the proper witness to be adduced for the purpose, that Paresnauth performed the Shraud of Batooknauth, and that proof is not opposed by counter proof.

It is a fact, which unexplained, bears strongly on the question of the right to the succession being under the Mitacshara. The High Court considered the evidence to be nearly balanced, so far as the evidence, exclusive of the judicial proceedings

hereafter to be referred to, went; but it is to be observed, that the High Court, without any sufficient reason assigned, set aside the evidence of the Purohit, which, if it be regarded as the uncontradicted evidence of the appropriate and ordinarily adequate witness to the performance of a Shrand, by establishing the performance of the ceremony by Paresnauth, should have inclined the scale in favour of that side, especially when it is remembered that a presumption existed in favour of the continuance of the ancient family custom.

Their Lordships are relieved from the necessity of considering whether the High Court did, or did not, attach undue weight to the proofs on which they mainly rested their judgment on this point; since the question now to be considered by their Lordships is only, whether the will was inofficious. The High Court proceeded on the ground that the judicial proceedings which they rely on, and state in their judgment, and which are set forth in the Respondent's case, show that the family had for some generations recognized the law prevalent in Bengal as that of their succession. The High Court had no explanation given to it of these proceedings. It certainly lay on the Defendants to give that explanation. Possibly Paresnauth might have been able to show that no actual enjoyment according to such title by record had ever obtained in his branch of his family; and might have shown that he, as a party to the suit, had not advised or suggested that form of procedure and joinder of parties, and was not conscious of the effect of it, as evidence to rebut the continuance of a family custom; but whatever weight may attach to such suggestions when made and established by proofs, it is not the duty of a Court to suppose them. It suffices to say, that the decision on this issue of the High Court, on the evidence in the cause, may be correct; yet, their Lordships cannot derive from such evidence, viewed in connection with the other evidence in the cause, that belief which would justify them in treating the will as *primâ facie* improbable, because inofficious, and inofficious because regardless of the ordinary preferences of Hindus of the Bengal Schools.

Their Lordships proceed now to the consideration of the evidence as to the factum of the will itself. It must be remembered that Paresnauth is dead, and

that imputations are cast on him after his death, which he might have been able, and which his representatives in this suit may be unable, to reject, at least with equal success. Therefore a Court of Justice should be careful to see that no inference be raised against the title which he asserted, and proved, and under which he obtained and retained possession during his life unopposed, unless it be such as the evidence in the cause clearly warrants. The evidence as to the factum itself in the judgment of both Courts appeared satisfactory. It is declared by the High Court to have been "precise enough on the main points of execution and signature, and to exhibit no signal discrepancies." In an ordinary case, even on proof of an Hindu will, such evidence would be deemed adequate; and it must be remembered that this will was very soon after its execution publicly exhibited in Court, and submitted to some investigation and proof, and was proved; and that, though proved *exparte*, yet such proof followed on the ordinary notifications which ordinarily must be taken to give due notice of a claim under a will.

If, then, no discrepancy of any material character be found between the proof which was given on the application for a certificate in 1853, and that given on the trial of the cause in 1859, the witnesses being native witnesses, and speaking again to the same facts after so long an interval, the absence of such discrepancy, and the precision of the statements as to the execution and signature are some arguments in themselves in support of the truth of that to which those of the witnesses who were examined on both trials depose. One discrepancy, however, is noticed in the Respondent's case at page 3, line 33, on which much stress was laid by Mr. Cave in his able argument for the Respondent.

The witnesses at the earlier judicial investigation described the will as having been immediately dictated by the testator to Denonauth, the writer; whereas at the trial of this cause, they depose that Tanuckanauth made the draft from the dictation of the testator, and that Denonauth made a fair copy from it. This discrepancy certainly exists, but it is one which might be found in many a case free from suspicion. It may have proceeded from mere inaccuracy of recollection; and sometimes in native statements an intermediate agency is passed

over, and an action ascribed to an immediate source, which in truth proceeded from a derivative one. The reason assigned by the Respondent's Counsel for this variation of story is little probable. Had the witnesses for the will recollected the evidence which they gave on the first trial, they, if false witnesses, would have adhered to it. They are not likely on the trial to have made intentionally their evidence conformable to that of the Respondent's witnesses who were examined before them, for no draft was produced at all; nothing was shown to which they were likely to desire to make their account conformable. The transaction to which they deposed, and that to which the Plaintiff's witnesses were deposing, were utterly irreconcilable, and no motive could have existed for injuring their own story by taking up a part of that of the rival witnesses. Their Lordships, therefore, concur in the view taken of the evidence as to the factum of the will by both Courts, that it was in itself adequate to the proof of an ordinary will. Was the internal evidence against it, and was the internal improbability of the will sufficient to discredit it?

No inherent improbability can be stated as to this will or its provisions, unless by assuming either that the law of the Mitacshara was known to the testator to be clearly applicable, or that a preference in the female line of descent was likely to be influential in his name. Their Lordships, therefore, put aside these speculations and apply themselves to the consideration of the evidence in the cause. The grounds upon which the judgment of the High Court proceeds as to the will are that the witnesses to it are not such as they would have expected to find attesting his will; that the handwriting of the testator seems too firm for one suffering from such a sickness; that if the Mitacshara prevailed, the will would be needless; that 25 rupees per month was an absurdly small allowance for the widow; that there was no hint of any disagreement between him and his wife; and they conclude by observations derived from these matters as to the improbability of the case. But to these reasons it may answered, that the 25 rupees which are given only in case of the widow leaving the family house, may not have been meant to measure her maintenance whilst

resident; that it may have been designed *in pœnam* to enforce residence in the family house; that there was much conflict of evidence, and may have been room to doubt whether the Mitacshara did or did not prevail in the family as the authoritative exposition of their law; that there had been that compliance with the rules of procedure in the Courts of the district, and such apparent admissions on record, inconsistent with the prevalence of the Mitacshara as an authority, which might, unless explained, altogether destroy a custom by breaking in upon its continuance; and that these things might suggest to his own mind, or the minds of those about the testator, the wisdom of not relying on the usage alone; that the testator's imputed neglect of the pecuniary interests of his widow, is no greater than that which belongs to any follower of the Mitacshara school, who, having the power to separate from an united family and so to qualify his widow as an heiress, prefers to let the law of his class take its course. And as to the strength of the signature: that two days and part of a third intervened between the execution of the will, and the death; that though weakened by illness, the testator may have rallied his strength to the performance of that short act of signature. As to the character of the witnesses: that the family priest was an attesting witness to the will, and that such an attesting witness might well be supposed, by those at least who placed confidence in him, to be sufficient to save the will from the objection of being attested only by persons unconnected with the family, or too low to give support to such an instrument, whilst the known aversion of persons of respectable position to be connected with cases likely to be the subject of litigation may be one reason why attesting witnesses to Hindu wills are seldom found to be of a class from which it would be most desirable to select them.

The case of the Defendants certainly derives some support from the failure of the case made as to the forgery of the will.

Though the youth and dependent state of the Plaintiff herself may be admitted to afford very cogent reasons for not pressing against her those presumptions of acquiescence which similar conduct on a competent adult would give rise to, yet pre-

sumptions from the conduct of others cannot, as it has been said, be excluded from the consideration of this case, when the probabilities on either side are weighed.

During the whole of Paresnauth's life no attempt was made by any one to question the validity of this will. Is this consistent with a belief in the family that the widow was the heiress of her husband? It is not alleged that he shared the proceeds with the widow. Could it have been unknown generally to the family and inmates of the house, and those most conversant with the family business, that he was dealing with the property as sole beneficial owner. According to the case of the widow, she immediately on her husband's death became entitled to the usufruct for her life of a considerable estate. Could that be a matter of slight moment to her immediate family? Would there not have been a considerable difference in the estimation of her by others as an heiress, instead of being one entitled merely to a moderate maintenance out of the wealth of another? Yet, according to the statement of herself, two and a-half years of silence and uncomplaining, non-participation in profits, ensue, not only on her own part, but also on the part of her father and others, who, knowing her youth and incompetence to the management of business, would be naturally expected to be on the alert to watch over her interests, and to share, in some degree, it may be, in the fruits of her succession. The will was proved in the ordinary mode; there is no proof of any alteration in the ordinary mode of notification which must be viewed as ordinarily adequate to give knowledge where knowledge is proper to be given. The notification is said to have been on the house and on the property, yet the whole of the Plaintiff's own family is connected with herself in ignorance until after the lapse of two and a-half years from the date of an ordinarily sufficing notification.

Is it reasonable to suppose that Paresnauth could stifle all inquiry, and keep secret from the family, that he had proved a will publicly, inofficious as it is alleged, and disinheriting a wife, an expectant heiress, between whom and her husband the ordinary friendly relations existed. Such an entire

state of ignorance, so improbable, and of such long duration, it is most difficult to suppose possible. We find it asserted strongly for the Plaintiff, but unfortunately her case is not free from statements some of which, as to the violence designed against her, seem to be most improbable, one of which, the Instrument with the power of adoption, has been abandoned, and another, viz., the proof of the forgery, discredited. She herself, young and inexperienced, is probably not in any way answerable for the management of her own case: but the case, as pleaded, relative to the forgery of the will, is discredited by both Courts, and contains such improbable statements as fully to justify their rejection of it. Again the statement of the Plaintiff as to the instrument which accompanied the permission to adopt a son, which she alleges that she received, though not improbable in itself, bears still the semblance of an invented story. Her conduct in this matter is not in the least degree consistent with probability nor with duty. If that instrument was prepared, why was it suffered to remain unacted on? If destroyed, as she alleges, by Paresnauth, why should that destruction have prevented proofs of its existence and of the spoliation? Was it not her duty to make the adoption, according to her so urgently recommended, that the permission provided for five acts of adoption in succession on failure of each preceding one? If then the Court finds itself compelled to discredit these allegations, what rational ground has it for reposing confidence even on the story of her own continued ignorance, during the lifetime of Paresnauth, of any title adverse to her own? In a suit not instituted by Paresnauth, but which was instituted hostilely to him, to set aside a certain putnee tenure, which suit affords not the slightest ground for a supposition that there was any collusion with him in it, he is found pleading the will, and she repeating that title and praying, therefore, to be dismissed from that suit. *Primâ facie*, at least, credit must be given to that pleading, that it proceeds from one who was qualified to represent her. Is the contrary proved? Is any one called to show how that answer came to be filed? Paresnauth is dead; and, after his death, is it to be presumed that he put her

answer, without her authority, on record, that is, that he committed a fraud on the Court, and continued a fraud on her? A Court should not impute fraud; and after the death of Paresnauth nothing should be supposed to his prejudice for which there is not a legal foundation.

Their Lordships therefore, on a review of the grounds on which the High Court has held this will not proved, are compelled to say that they think that Court laid no foundation for treating the will as inofficious in itself, for disregarding the evidence of the Purohit, or for ascribing the answer of the widow to the deceased Paresnauth. The will had been proved, though *ex parte*; it had been acted on very recently after the testator's death, and possession held for a considerable time under it. There appears to have been no desire on the part of Paresnauth to escape from the publicity and responsibility attending the proof of such a document. In fact, it was not drawn into question so long as Paresnauth himself lived. That apparent acquiescence is attempted to be ascribed to a general and enduring ignorance, which is in itself eminently improbable. The will is met by distinct allegations of fraud and forgery, the witnesses to which are discredited by both Courts. Besides this, the case of the Plaintiff does, in the several parts of it before commented on, bear the appearance not simply of exaggeration, but of conscious untruth. Whatever might have been the result of this case, had these presumptions in support of the case for the will been wanting, the ordinary support which the failure of an opposing case lends to the case which it impeaches, with the presumptions arising against the opposing case from the introduction into it of matters too grossly improbable for belief, and not the subject of innocent mistake, must be applied, on a review of the whole evidence in the cause, to support the factum of this will. Their Lordships think, therefore, that the decision of the High Court must be reversed with costs, and that the decision of the Civil Court of Nuddea should be restored and affirmed, and that the Appellants should have the costs of this Appeal; and they will humbly certify their opinion to Her Majesty to the above effect.