Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ajoodhia Prosaud and Another, heirs of Baboo Bodhnarain Singh and others, v. Omrao Singh, from the High Court of Judicature, at Fort William, in Bengal, delivered 2nd December, 1870.

Present:—

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

In this case an action in the nature of an ejectment was brought by the Respondent, Omrao Singh, as the Committee, and in right of his wife (a lunatic), for the recovery of certain parcels of land which were admitted to be in the possession of the Appellants. The Plaint also asked that a certain Ikrarnamah should be set aside. Their Lordships may at once dispose of the latter question by saying that it appears to them, as it appeared to the High Court of Bengal, to be one which cannot be disposed of in this suit; that it is a question which can only be determined between the Appellants and the persons who are named as their co-Defendants on the Record. Their Lordships, therefore, will deal with the case, as being nothing but an action in the nature of an ejectment for the recovery of the lands in question from the Appellants.

The title upon which the Plaintiff sued, is based upon the fact that his wife, as the daughter of Indrabuttee, the last surviving widow of one Teijnarain, became on the death of her mother entitled to the property as the next heir of her father Teijnarain; and the principal issue raised in the

cause is, whether that lady had not lost her right to inherit, by reason of her lunacy. It seems to be admitted on both sides (the point has not been argued here, nor was it argued in the Court below) that by the Hindoo law, if she was, when the succession opened to her, that is to say, on the death of her mother, insane, she did lose her right, and that it passed to the three persons who are mentioned in the Record to be her sons.

The sole question, therefore, for their Lordships' determination, is a question of fact, whether the lady was or was not insane at the time of her mother's death, or whether, as alleged by the Plaintiff, she became insane within two months after that event. This issue of fact was found in favour of the Appellants by the Court of First Instance, the Principal Sudder Ameen. His Judgment was reversed by the High Court upon certain grounds, and it has been contended before their Lordships that those grounds are unsatisfactory, inasmuch as the Appellate Court has given undue weight to a certain document which had been admitted in evidence in the cause. Hence, there being two conflicting Judgments, and a grave question touching the weight which ought to be given to a particular document, it has fallen to their Lordships to deal with this case according to their own view of the evidence taken in the cause, and to form their own conclusions upon it.

It seems to their Lordships desirable in the first instance to consider whether, by reason of the undue weight which the High Court gave to the document in question, the value of its Judgment is destroyed. That document is the report of the Moonsif made upon the application for the appointment of the husband as Committee. It appears that within two months after the death of Indrabuttee, Omrao Singh applied to the Zillah Judge, under Act XXXV. of 1858 of the Indian Legislature, to be appointed Committee of his wife, alleging her lunacy. The Act directs that in case the party lives at a certain distance from the Sudder Station, the Judge shall delegate the inquiry to a local officer; who in this case was the Moonsif. The local officer has to report to the Judge, who passes the final Order in the case. The Act, however, contemplates only the question

of lunacy or sanity at the time of the inquiry; there is no provision in the Act that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind.

In these circumstances the Appellants, who had long been pressing their claims in respect of this property against the other branch of the family, thought it expedient to appear as objectors on this proceeding. It is not clear that the Judge passed any Order allowing them to go before the Moonsif, but in some way or other they appear to have been admitted before the Moonsif. They did not attend throughout the inquiry, and they failed to produce witnesses to prove that the lady had been a lunatic from the time at which they alleged she became so, or at any time before the death of Indrabuttee. The result, therefore, was, that they did not go into their case before the Moonsif. The Moonsif, on the other hand, took evidence on the part of the Respondent, who was seeking to be appointed Committee, and came to the conclusion that the lady was of unsound mind. His Report is at page 89 of the Record. It states what I have just said about his having taken the evidence, and then contains this passage;—"In this case both par-"ties acknowledge the lunacy of Mussumat Sree-"buttee; but the dispute between them is on this "subject. The Applicant writes that Mussummatt "Sreebuttee became insane in the month of "Maugh, 1267, Fuslee, subsequent to the death "of her mother, Mussummat Indrabuttee, and "the Interveners state contrary to this, that she "has been a lunatic for a very long time, that is "to say, from anterior to the death of Indrabuttee, "her mother. From the evidence of the witnesses "which have been produced on the part of Appli-"cant (from No. 1 to 29), it has become known "that Mussummat Sreebuttee, daughter of Mus-"summat Indrabuttee, deceased, after her death, "became insane, in the month of Maugh, 1267, "Fuslee, at Mouzah Dinnaree Pergunnah Kund-"hour, in the house of her husband, and that she "continues in the same state up to this time. "From the evidence as to the lunacy taken by "me before the Interveners, it has been ascertained "that the Mussummat aforesaid is quite insane.

"The Interveners have produced no proofs before "me from which it may be learnt that the Mus- "summat aforesaid has been insane for a greater "length of time." This Report having been made to the Judge, the Appellants again objected before the Judge, but the Judge very properly held that he had no jurisdiction to decide the question between the parties; that the simple issue was whether Indrabuttee was a person possessed of any property, and if so whether she was sane or insane, and required the protection of a Committee; and accordingly he appointed the husband Committee. The learned Judge who delivered the Judgment of the High Court seems to have thought that the evidence before him being conflicting, the scale was turned by the document to which I have just referred. He says, "The evidence ad- "duced by them (the Appellants) is not only very "far from satisfactory, but it is directly opposed to "the recorded opinion of the Moonsiff deputed by "the Zillah Judge, in 1860, to investigate the "matter of Sreebuttee's lunacy." It appears to their Lordships that if he meant to give to this finding, what we do not think he did mean to give, the effect of *res judicata* between the parties, he was clearly wrong. There was no adjudication by any competent Tribunal upon the point in issue in this suit. The Moonsiff had no jurisdiction to decide it; nor had the Appellants in strictness any *locus standi* before him. If, on the other hand, he meant to say that the conduct of the Appellants, as evidenced by that proceeding, had been such as to lead to an inference that the case they afterwards made was untrue, he seems also to their Lordships to have given an effect to their conduct which it does not fairly bear. All that appears is, that they went unnecessarily before a Tribunal which could not have decided the question between them and the opposite party, and that being there they failed to produce their evidence. Their Lordships are of opinion that it is neither a necessary nor a legitimate inference from that fact that the evidence which the Appellants have produced in this suit ought not to be believed. That being so, their Lordships think that the Judgment of the High Court, whether the Judges came to a right conclusion or to a wrong conclusion, has been put

upon grounds which do not justify that conclusion.

Their Lordships have then to consider the effect of the whole evidence. The issue is a remarkably simple one; it is whether this lady, admitted on both sides to be a lunatic, became a lunatic between the death of her mother and the period at which the husband applied to be appointed Committee—that is to say, two months afterwards,—or whether she had been a lunatic for some considerable period before the death of Indrabuttee. Now their Lordships will concede that the burden of proof may be on the side of the Appellants,—that it may be sufficient for the other party, in proving his title, to prove that this lady, now a lunatic, but who certainly had not always been a lunatic, was the nearest heiress to Teijnarain; but it is evidently a burden which becomes of a much lighter character when the lunacy is admitted to have supervened within two months of the critical time, the death of Indrabuttee.

Then again, the case of the Respondent is open to the observation which has been made at the Bar, that if it is true, far better evidence of it might have been produced than has been produced by the Respondent. For instance, if the woman became mad within two months of her mother's death, one would suppose that that madness must have been caused by some disorder which would require and receive medical treatment. We have, however, no medical evidence whatever. We have nothing to show, that, having been sane up to a certain period, she became suddenly ill. Again, we have none of the near relations of the family produced. The mere fact that the husband verifies in the ordinary way the truth of the allegation in the plaint, is no answer to the suggestion that, if he had a true case, he, the nearest relation of this party, might have come forward and shown how the madness came on and all the circumstances relating to it. He, again, has within his power all her family and female domestics; but there is not a single witness produced on that side, except the witnesses of the character so common in the Indian courts, viz. male menial servants, dependants, and ryots living in the neighbourhood, who are all obviously persons less likely to have the circum-

stances deposed to within their knowledge, and to be far less trustworthy than the members of the family who might have been produced. On the other hand, it is said that the evidence produced by the Appellants is of no better character. It does not seem to their Lordships that this observation is altogether just. There is certainly, at least, one person produced by the Appellants who does stand to the parties in near relationship. No doubt his testimony is open to the observation that though the uncle of the lunatic, he is also the father-in-law of one of the Appellants, but still he is a man of position; he is a man who from his relationship must have had the means of knowing what he deposes to, and he seems upon the whole to be the most trustworthy witness that has been produced to give direct evidence as to the date of the lunacy on either side. Again, there are the other witnesses mentioned by Sir Roundell Palmer, viz. the two servants, one of whom was employed to take care of her, and they seem to have had more peculiar means of knowledge than those possessed by most of the witnesses on the other side. Then a great deal has been said touching the evidence of the witness upon whom the Principal Sudder Ameen seems, from the expressions in his Judgment, to have placed the greatest reliance,—I mean the evidence of Mr. Duff. It has been argued that Mr. Duff's evidence, being mere hearsay, was not admissible at all. Their Lordships are not prepared to admit that this evidence is properly described as mere hearsay. The witness speaks of his own knowledge to the fact, that at a particular period the insanity of Mussumut Sreebuttee was rumoured and generally believed in the district with which he was conversant. Their Lordships do not feel it necessary to decide whether that testimony, if objected to, would have been receivable on the trial of such an issue as this in an English Court of Justice. It has been received in India; and their Lordships conceive that they ought to deal with it according to the principles enunciated by Dr. Lushington in the case mentioned in the course of the argument (see 7 Moore, I. A., 137) as those which govern this Board, viz. that when evidence of doubtful admissibility has, under the looser practice of the

Indian Courts, been received in a cause, their Lordships, sitting as an Appellate Court, will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail. In the present case their Lordships think that they ought not wholly to reject Mr. Duff's testimony. The next question is, what effect can legitimately be given to it. If we had to deal here with the broad question of sanity or insanity,—whether Mussumut Sreebuttee were now sane or insane,—Mr. Duff's evidence would be of little or no value. But when it is an admitted fact that the woman is insane, and the question is whether she first became so before or after the date of the death of Indrabuttee, the testimony of a trustworthy witness, that long before that period she was, to his knowledge, reputed insane, is an important corroboration of the direct testimony given in the cause to the fact of her insanity at that time.

Their Lordships, moreover, deem it right to observe that if Mr. Duff's deposition was struck out of the record they would, nevertheless, be of opinion that the preponderance of the evidence is in favour of the conclusion that the lady was insane at the time of Indrabuttee's death. And they are confirmed in that opinion when they come to consider the *res gestæ* of the case. This family was originally a joint family, and there was an attempt at a partition as early as 1802. From that time forth, however, the two branches of the family represented by the Appellants seem to have contended that the estates were to a certain extent joint, and that the descent of them was to be governed by the rules regulating the descent of joint property. Their Lordships do not say whether they were right or wrong. In the lifetime of the two widows there seems to have been an arrangement by which the widows were left in possession of the property, but it is said on some understanding that on their death it was to go as if it were joint estate to the male heirs. Whatever may be the merits of that contention, it seems to their Lordships impossible to resist the conclusion that the punchayat which is alleged to have been held was held. Possibly the circumstances which led to it may have been circumstances of violence

tending to a breach of the peace, but with that we have nothing to do. In point of fact their Lordships believe that the punchayat was held, that the Ikrarnamah was executed in pursuance of that punchayat, and that the possession of the lands, which is now admitted to be in the Appellants, followed upon the execution of that instrument. It is unnecessary to consider whether that document was obtained by duress or fraud, or anything of that kind, for that is a question which can only arise between the sons of this lady, who executed it, and the Appellants; but if the transactions above mentioned did take place then, then it follows that at that time, which was immediately after the death of Indrabuttee, the sons, and not the mother, were held out to be and were dealt with as the heirs. If the lady had not then been insane, it seems most improbable that some person would not have put forward her interest, or that the Appellants would have dealt with those as heirs, who really did not possess that character.

Therefore, weighing all the circumstances, their Lordships have come to the conclusion that the Principal Sudder Ameen was right in the view which he took of the evidence, that Mussumat Sreemutty was of unsound mind at the time of her mother Indrabuttee's death, and that consequently the Plaintiff in the action has failed to make out his title. Their Lordships must, therefore, recommend Her Majesty to reverse the decision of the High Court, and to order that in lieu thereof the Appeal to that Court against the decree of the Principal Sudder Ameen dismissing the Appellants' suit be dismissed with costs. The Appellants must also have their costs of this Appeal.