Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Sri Virada Pratapa v. Sri Brozo Kishoro Patta Deo, from the High Court of Judicature at Madras: delivered 24th March, 1876.

Present :

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.

RAJAH ADIKONDA DEO, the then holder of an impartible zemindary in the district of Ganjam, which in these proceedings is called sometimes Chinnakimidy, and sometimes Pratapagheri, died on the 23rd of November, 1868. He left no legitimate male issue, but a widow, then *enceinte*, whom it will be convenient to designate by her title of Mahadevi. He had, however, several natural sons, one of whom, Ramakrishna Deo, contrived, on the death of his father, to be invested by some of the retainers with the "Sadhi," and asserted a claim to the zemindary on the ground that he was in fact legitimate, and had been designated by Adikonda as his successor in an urzi signed by him on the 19th of November, and forwarded to the collector. This claim has since been found to be groundless, and may be treated as no longer existent.

The Appellant Raghunadha, who was a half-brother of the deceased zemindar, must now be taken to have been an undivided brother, and the person who, according to the ordinary law of succession, was entitled to the zemindary on the death of Adikonda without a legitimate son, either procreated or adopted.

It is necessary, in order to explain some parts of

the subsequent history of the case, to observe that the question of succession, when it first arose, was further complicated by the fact that the zemindary, though permanently settled, was one of those as to which it was then conceived that, owing to the omission to issue a permanent Sunnad, the Government of Fort St. George had retained the right of nominating on the death of each successive holder his successor. The confirmation by this Board of the decision of the High Court of Madras in the Marangapury case (see Law Reports, 1, Indian Appeals, p. 282) has since established that there was no legal foundation for this pretention on the part of Government; and it must now be taken to be settled law that the title to the zemindary is to be determined by the ordinary law of succession in like cases.

On the day after that of the death of Adikonda, *i.e.*, on the 24th of November, 1868, the Mahadevi addressed an urzi to the collector (p. 143), in which she stated the death of her husband; that the family was composed of women and children; that she had then none legally entitled to the taluq, but was three months gone with child; and prayed to be intrusted with the care of this taluq. In this document she made no mention of an authority to adopt.

It is shown, however, beyond all question, by the Collector's letter of the 2nd December, 1868, which is recited in the proceedings of the Board of Revenue at p. 105 of the record, that before that date he had received a second urzi or letter from the Mahadevi, in which she had alleged that it was her husband's express wish that, in the event of her having not a son, but a daughter, she should adopt a son. And if the exhibit R. at p. 64 of the record be that second urzi, or a true copy of it, there can be no doubt that as early as the 26th of November, 1868, the Mahadevi had asserted publicly that her husband had, on the 20th of that month, executed in her favour a written authority to adopt a son in the event which afterwards happened. The confusion which seems to have taken place in the Civil Court, with respect to the proof of exhibit R., has given rise to a controversy on its authenticity which will be afterwards considered. But whatever may have been the precise contents of the second urzi, it is unquestionable that as early

as the 11th of December, the Mahadevi presented a formal petition to the Government of Fort St. George, in which she stated that Adikonda before his death executed and gave to her a putrica or will containing words to this effect, "You have now conceived; if you bring forth a male child, he will be a Rajah to the taluq; in case of a female child, you are authorized to select a good child for the seat;" and that in several subsequent petitions and applications she persistently put forward and relied upon a written authority to adopt executed by her husband. One of these, bearing date the 18th of March, 1869, stated the date of the instrument to be the 20th of November, 1868; and in most of them she claimed to be heiress to the zemindary in default of a legitimate son, natural or adopted, of her husband. Raghunadha seems on his side to have been also asserting his claim before the Government and the Revenue authorities.

The action taken by the Government of Fort St. George was as follows:—

The Board of Revenue, on the report of the Collector, had, on the 7th of January, 1869, expressed its opinion that Raghunadha had the best claim to the zemindary, provided the Mahadevi did not give birth to a son; but that if she should have a son that son ought to succeed. Thereupon Government, on the 1st of March, ruled that a posthumous son would be entitled to the inheritance, and directed the Collector to take such measures as he might think fit to ascertain whether the widow was really pregnant, and to verify the sex of the child when born. To the widow's repeated applications it made answer that the claim to the zemindary was under consideration. On the 11th of July, 1869, the Mahadevi was delivered of a daughter, and on the 17th of September in that year Government, in the exercise of its supposed power, and on the recommendation of the Collector, supported by the Board of Revenue, resolved (p. 143) to recognize Raghunadha, who had been reported by the Collector to be the undivided brother of the deceased zemindar, as the successor to the Chinnakimidy estate; thereby overruling the Mahadevi's claim to be heiress to her husband; and ignoring her asserted right of adoption.

Pending these proceedings there had been litigation between the Mahadevi and Raghunadha touching the right to a certificate, under Act XXVII of 1860, for the collection of the debts due to the deceased zemindar. This was determined in favour of the Mahadevi by the Civil Judge on the 31st of March, 1869. But on the 11th of February, 1870, his decision was reversed by the High Court, and the certificate granted to Raghunadha, apparently on the general ground that the claim of an undivided brother was preferable to that of a widow, and that there was no satisfactory proof of division.

For some short time after the determination of the Government in his favour, Raghunadha and the widow seem to have lived together in amity. She retained, apparently with his consent, the custody of the keys of the goutaghoros, or treasuries, in which the jewels, cash and other valuables that had been left by the late zemindar were kept; but allowed Raghunadha to receive thereout both jewels and cash for the purposes of his installation, which took place on the 1st of February, 1870. He again was in correspondence with the Collector in November touching the villages to be assigned to her for her maintenance (pp. 115 and 116); and speaks of their friendly relations, although in one of his letters he complains that Haribondha Surmanto and two or three more wicked persons were "making intrigues and giving evil advice." But this state of amity, if it ever sincerely existed, was of brief duration. In the course of 1870 the parties again plunged into active litigation. In his suit numbered 9 of that year, Raghunadha sought to recover from the Mahadevi the jewels and cash in the goutaghoros, greatly exaggerating their amount and value, as property to which he was entitled as zemindar. In her suit, No. 12 of 1870, she sought to recover from him the particular jewels and cash which had passed from her to him on the occasion of his installation, alleging that he had received them by way of loan on a promise to restore the former, and repay the latter. Her suit was ultimately dismissed on the ground that she had failed to establish any such contract. In the other suit the material issues were whether Radhunadha was the undivided brother of Adikonda, or separate in estate from him; whether the Mahadevi, as widow of Adikonda, was entitled

by right of succession, to the money and jewels left by him; and if not, whether Adikonda had made to her at the time of his death a gift of them that was valid against Raghunadha.

In this suit, the Civil Judge found that Raghunadha, the Plaintiff, was the undivided brother of Adikonda, and that Adikonda, at the time of his death, did not make a gift to his wife of any part of the property then in dispute. He found, however, in the first instance, upon the second issue, that the Mahadevi, as widow of Adikonda, was entitled to all the money and jewels left by him; proceeding, apparently, on the ground that, inasmuch as each succeeding zemindar must be taken to have held the estate by virtue of a new grant from Government, he held it as self-acquired property; and consequently, that, on his death, his personal assets would pass to his widow, to the exclusion of his brother. Before, however, a final Decree had been drawn up in this suit, the Marungapury case was decided by the High Court of Madras; and the Judge thereupon granted a review of his decision. On that review, he found that the Mahadevi, as widow of the late zemindar, was not entitled to the money or jewels left by him; and, finally, made a Decree in favour of Raghunadha, but for an amount much less than that claimed by him. There was no Appeal against the Decrees in these suits. They decided as between the Mahadevi and Raghunadha that the status of the family was that of indivision; and that Raghunadha, being in default of male issue of Adikonda entitled to the estate, was entitled to the jewels and cash as appurtenant thereto. They have, however, little bearing on the questions now to be determined; although some of the depositions taken in them have been relied upon as affecting the credibility of the testimony given by the same witnesses in the present suit.

Pending these two suits of 1870, and on the 20th of November in that year, the Mahadevi adopted the present Respondent. He was the son of the zemindar of Piddakimidy, who is admitted to be a sapinda of Adikonda Deo, though separate in estate from him; both families being, as shown by the pedigree at p. 19, derived from a common ancestor, Purushottama Deo. Nor is the validity of the

adoption impeached, except on the ground that the Mahadevi had not sufficient authority to make it.

On the 15th of December, 1870, the Respondent, by his adoptive mother and guardian, the Mahadevi, commenced his suit for the recovery from Raghunadha, of the zemindary and of all the property appurtenant thereto, with mesne profits. The Defendant, Raghunadha, originally set up, by way of defence, that his title as zemindar appointed by Government could not be questioned. But it is now admitted that, since the decision of the Marangapury case, this defence cannot prevail; and that the only questions to be decided are, whether the exhibit Q., which is propounded as the written authority to adopt, of the 20th of November, 1868, was, in fact, executed by Adikonda Deo, and, if not, whether the adoption is not, nevertheless, valid according to the law that prevails in the Presidency of Madras, as one made by a widow, without express authority from her husband, but with sufficient sanction and consent on the part of her husband's relatives.

The Civil Judge decided both these questions against the Respondent. He came to the conclusion, both from external and internal evidence, that the document was a forgery; he was also of opinion that the requisite assent to an adoption, in the absence of an authority from the husband, was not given, and consequently that the adoption was not valid as against the Defendant. The High Court inclined to the opinion that Q was, in fact, executed by Adikonda, but did not go very much into the evidence for or against the document; being of opinion that, even if no express authority was given by Adikonda, the adoption by the widow, being made with the consent of one of his sapindas (the father of the child adopted), was valid by the law of Madras.

Their Lordships propose to consider, first, whether Q was, in fact, executed by Adikonda.

It has been strongly urged upon them that the Judgments of the two Indian Courts upon this question, though not concurrent, are not directly conflicting, the High Court having omitted to find that the document is genuine, or fully to consider the evidence concerning it; that, in this state of things, their Lordships cannot safely over-rule the

decision, upon a question depending mainly on the credibility of conflicting witnesses, of a Judge of great local experience, who saw and examined those witnesses, and has expressed his conclusion in a Judgment that demonstrates with what remarkable care and industry he tried the cause.

Their Lordships are by no means insensible to the force of the general proposition involved in this argument. That force, however, seems to them to be somewhat diminished by particular circumstances in this case. They consider that the voluminous Judgment of the Civil Judge deserves the credit due to a most painstaking endeavour to arrive at the truth in a difficult case. But its excessive elaboration tends to impair its value by defeating the proper object of a Judgment, which is to support, by the most cogent reasons that suggest themselves, the final conclusions at which the Judge has conscientiously arrived. This document records the fluctuations of the Judge's mind from day to day in the course of an exceptionally long trial; the effect, often temporary, upon him of a particular piece of evidence or argument of counsel; it subjects every witness to criticism more or less unfavourable; and from this mass of often conflicting statements, it is not easy for a Court of Appeal to extract the precise grounds on which the final conclusion rests.

Again, the Counsel for the Respondent have strongly insisted on the objection to the authority of this Judgment, which they founded upon the observations of the learned Judge in paragraph 62, &c. (p. 376). It must be admitted that the passage is ambiguous. If it means only that where a case has been manifestly proved to be false (as, *e.g.*, if Q had been shown to be written on a stamp paper purchased after Adikonda's death), it is unnecessary to weigh general probabilities, the observation is a mere truism; since it is obviously idle to inquire whether it was likely a man should do that which it has been demonstrated he never did. On the other hand, if it imports that the Judge refused to weigh the probabilities of the case, because he believed one set of witnesses rather than the other, it would support the objection taken, viz., that in forming his belief he had excluded from his consideration that which ought to have entered into it. Their

Lordships, however, upon a review of the whole Judgment, are of opinion that, in whatever sense the learned Judge made the observation in question he did not, in fact, fail to consider the probabilities of the case. Whether he gave due weight to them will be afterwards considered.

A more substantial objection to the Judgment is that it does not dispose of the question as it was presented by the parties. The learned Judge was not content to find that Q was a forgery. By a careful examination and comparison of it with admitted signatures of Adikonda, he satisfied himself that the signature purporting to be that of Adikonda was itself forged. Yet the Appellant (p. 255) had admitted that that signature, and the sankhu and chakran (the emblems on it) were of his brother's handwriting; and the case made by him and his witnesses was that the forgery was effected by filling up, after Adikonda's death, a blank paper, which had these genuine marks and signature upon it. Their Lordships agree with the Judges of the High Court in thinking that little weight ought to be given to a comparison of Oorya handwriting by an European Judge, however skilled and experienced, when opposed to the admissions of those who dispute the document. They feel bound, therefore, to assume, and that has been almost admitted in the argument addressed to them on the part of the Appellant, that the signature of Adikonda upon Q is of his handwriting. It is obvious, however, that the erroneous conviction of the Civil Judge to the contrary may greatly have biassed his estimate of the credibility of the Plaintiff's story, and may have prevented him from duly weighing the improbabilities of that told by the Defendant, which he did not adopt. The genuineness, therefore, of the signature of Adikonda is a circumstance which materially detracts from the general value and authority of the Judgment of the Civil Judge; and their Lordships cannot but feel that they have to determine the question before them upon the evidence taken in the cause, without the assistance which they generally find in similar cases in the Judgment of one or the other of the Indian Courts.

That there is in this case a strong antecedent probability that Adikonda did authorize an adoption is

incontestable. It does not rest upon the mere presumption that on his death-bed he would desire to perform that general duty of imperfect obligation which prompts a childless Hindoo to supply the want of natural male issue by adoption. It is shown that the brothers, though legally undivided, were long on bad terms with each other. The strife began, as appears by the Collector's letter at page 106, on the death of their father in 1835, when there was a dispute as to their succession to the zemindary, Raghunadha claiming it as the eldest son of the then Mahadevi, though younger in years than Adikonda, who was born of a wife of inferior rank. This controversy was determined by the then Government, in the exercise of its assumed power, in favour of Adikonda. The strife, however, was embittered by subsequent quarrels between the brothers, and by the desperate attempt of Raghunadha as late as 1852 to oust his brother by proving him to be illegitimate. In these circumstances, whatever may have been the precise relation of the brothers during the later years of their joint lives, there is a high degree of probability that Adikonda would desire to retain, by all means in his power, the zemindary in his own line; and would be unwilling to expose the wife, to whom he was attached, to the chance of falling from the rank which even as adoptive mother of a reigning Rajah she would possess, to that of a widow entitled only to be maintained, however honourably, by her brother-in-law.

There being then this antecedent probability that he would execute some such document as that which bears his admitted signature, what is the direct evidence to show that he really did or did not execute it. The witnesses, whose names are upon it, are Sumanto the Treasurer, Siva Purohit, now the Dewan of Raghunadha, but formerly the servant in the like capacity, first of Adikonda, and afterwards of the Mahadevi, Balaji, the scribe, and Damapattojosi the Purohit. Of these the two former are the only subscribing witnesses in the strict sense of the term; Balaji signing only as the writer of the instrument; and Damapattojosi, though named as a witness, not having signed at all. Again, the only one of the four who deposes to the execution of the instrument is Sumanto. His story (page 215) is

that on the 20th of November (*i.e.* on a day between which and the day of the Rajah's death two clear days intervened), at about 3 prohoros of the day (*i.e.*, about 3 P.M.), the Rajah sent the Peon Narayani to call in any respectable people (Bollolokho) that might be in the outer hall (Sodoro); that the Peon returned with Siva Purohit, Damapattojosi, Bodhrosanto, Bhagirathipani and Balaji; two other persons, viz., Boyiduorahu and Gouro Bondhari being already in the room when the order was given; that Balaji was then sent out to bring paper, pen and ink; that on his return he wrote the authority to adopt under the Rajah's dictation, making first a draft and afterwards a fair copy; that the list of witnesses which appear in Balaji's handwriting on it was also written at the Rajah's dictation, first in the draft and then in the fair copy; that the subscribing witnesses Siva Purohit and the witness himself then signed, Damapattojosi excusing himself, with the Rajah's consent, from signing on the ground that he was an old man, and could not see; that Balaji also wrote his name as the writer of the document; that the Rajah himself traced the sankhu and chakrun at the top and wrote his own signature at the bottom of the document; that they all wrote with the same pen dipped in the same ink-bottle; that it took about 2 ghadyahs (1½ hour) to complete the transaction; and that afterwards and when about the same space of the day remained, the witness, by order of the Rajah, took the document to the Mahadevi, who, while it was being prepared, was in "the chapel," being a room near that of the Rajah, and put it on the threshold, the door being ajar. The witness also states that nearly two ghadyahs before this, and previously to the preparation of the document, he had taken to the Mahadevi, by order of the Rajah, the keys of the Treasury House, and had said to her "The keys of the other Treasury House were given you, now keep the keys of this Treasury and all the property therein."

This witness is directly contradicted by the three other persons, whose names are upon Q, Siva Purohit, Balaji, and Damapattojosi. Their testimony in this suit is to be found at pages 189, 269, and 267 of the Record. The account which they give of the fabrication of Q is the following: About ten, or at most twelve, days after the death of

Adikonda, Sumanto brought to Balaji a paper, having upon it Adikonda's signature, and the sankhu and chakram, but otherwise blank, together with a draft, and told him to fair-copy the draft upon the blank paper. Balaji, according to his own account at first refusd, but afterwards obeyed. The result was Q, as it now stands, with the exception of the signatures of the subscribing witnesses. The paper in that state was given by Balaji to Sumanto, who took it to Siva Purohit for his signature. He swears that he refused to sign it, and denies that the signature upon it which purports to be his is of his handwriting. The value of that denial will be presently considered. The paper was subsequently (*i.e.*, about fourteen days after Adikonda's death) taken by Sumanto to Damapattojosi, who also swears he refused to sign it as witness.

The question is which of these two stories is to be believed. The last their Lordships think must be taken with the qualification that, notwithstanding the denial of Siva Purohit, the disputed signature is of his handwriting. That it is so was found by the Civil Judge, and his finding does not depend on mere comparison of handwriting. Its correctness seems to their Lordships to be placed beyond doubt by the exhibit L. L. page 3, in which, writing to Iswara Puttro as late as the 10th of July, 1869, he speaks of the document executed by the late Rajah to the Mahadevi, and urges his correspondent to use his best endeavours to get from Government a recognition of it. It is clear, therefore, that, if Q be a forgery, Siva Purohit was at one time a consenting party to that forgery. The Civil Judge has undoubtedly recorded a most unfavourable opinion of Sumanto. He says of him: "H. S. lied and prevaricated grievously. I could not believe anything one bit the more readily from the fact that he asserted it" (Judgment, paragraph 54, page 320). Yet the credibility of this witness, however small, is nevertheless superior to that of Siva Purohit and Balaji. Notwithstanding his demeanour he may have told what is substantially a true story; whereas the others must either have been guilty of perjury in this suit, or have been conscious actors in an antecedent forgery. Damapattojosi is not open to this imputation, and is apparently a more respectable witness. All that the Judge says against him is,

that "he protested too much." But there is a high degree of improbability in his story.

The *primâ facie* improbability that there should exist any blank paper with the genuine signature of the deceased Rajah upon it is no doubt removed by the evidence of Binayaka (p. 263), and the production of the four blank papers similarly signed, which that witness swears he discovered eighteen months before he gave his deposition (*i.e.*, early in 1870) in the late Rajah's record box. There is, however, no proof that at the time when Q is said to have been forged any such papers had been found; and the subsequent discovery of them may have suggested the present answer to the Plaintiff's case. If, however, it be assumed that the supposed forgers had but one such paper in their hands ten days after the late Rajah's death, it is obvious that such a paper was very precious; and it is inconceivable that they would have inserted Damapattojosi's name in the list of witnesses until they were assured of his willingness to sign. If, again, they had then in their hands more than one such paper, they would naturally, on Damapattojosi's refusal to join in the conspiracy, have destroyed it, and fabricated a similar instrument on which his name should not appear. The story then told by him is less probable than that told by the Plaintiff's witnesses in order to account for the non-signature of it by him; for he is shown to be a person of weak sight, and not to have been in the habit of writing with a pen. All these three witnesses against the document are shown to be now more or less dependent upon the Defendant; and there is little, if any, other affirmative evidence in support of the Defendant's case.

On the side of the Plaintiff, however, there is a considerable amount of direct testimony in confirmaon of that of Sumanto.

Of the witnesses in this category, who are vouched by Sumanto as present when it was prepared and executed, are Boyiduorahu, the native doctor; and Gouro Bhondhari, the barber; who are said to have been with the Rajah when he sent the Peon to call in the respectable people; Narayana Bisoyi the Peon sent; and Bordhono Santo, and Bhaghirathipani, who were brought in with Siva Purohit, Damapattajosi and Balaji. They generally confirm Sumanto's account of the trans-

action. It is true that all are more or less discredited by the Civil Judge; that the barber is not relied upon even by the Respondent as worthy of credit; and that the evidence of the Peon, who says he was not continuously in the room, is of little value. But the others, particularly Bordono Santo, who was related by marriage to Adikonda, seem to be of respectable position, are persons who were not unlikely to be present; and their statements, notwithstanding some slight discrepancies, in the main confirm Sumanto's account of the transaction. In further corroboration of the Plaintiff's case his Counsel rely on the evidence of the Mahadevi and of Iswara-Puttro.

The latter is the Vakeel, who, in 1868 and 1869, prosecuted the Mahadevi's claim before the Government at Madras. He seems to have been employed as a Vakeel by Adikonda in his lifetime; and there is nothing to impeach his general respectability. His testimony is to the effect that having been sent for by the Rajah, on account of some pending suit, he was at the house after the execution of Q; and that on the next day, that is, on the 21st of November, the Rajah being then in full possession of his faculties, told him that he had the day before executed in the Mahadevi's favour a written authority to adopt. This evidence does not justify the observation of the Civil Judge that "it amounts to nothing," since, if believed, it would establish a clear admission by the Rajah of his antecedent act. It is, however, open to the exception taken by Mr. Norton, viz., that it is but evidence of an oral admission, said to have been made by a deceased person, and, as such, incapable of contradiction, and open to suspicion. His presence, moreover, at the place at the time in question is not sworn to by any other witness, and is not very satisfactorily accounted for.

The evidence of the Mahadevi (p. 205) is to the effect that on the morning of the 20th of November she was weeping over the Rajah, who was very ill; that he told her in the event of her not having a male child to adopt one, and promised to give a written authority for the purpose; that in the evening of that day, whilst she was sitting within her room with the door a little ajar Sumanto brought a paper and left it on the threshold, saying it was

the authority to adopt; that afterwards, and when the lamp was lighted, *i.e.*, after sunset, she took the paper to the Rajah, nobody else being in the room; that he took it from her and said, "I have given you written authority—you are pregnant. You will bring forth a male child, if not you will adopt," and then returned it to her, and that she afterwards kept it in her box. She identified Q as that paper. She further deposed that the key of the Goutaghoro was brought to her by Sumanto before he brought the document; and afterwards, in answer to a question not given in the record, said, "The keys and this written authority were given to me in the evening when there were two ghadies to sunset."

Of this witness the Civil Judge (p. 320) has recorded the following opinion:—"On the face of her deposition, I see no reason to think her untruthful, but rather the contrary; and yet in O.S. No. 9 of 1870 she put forward, and supported with much evidence, three assertions on important facts which have been declared false, or have been disbelieved, viz. (1st) division between Adikonda and the Defendant, it being admitted by her in this suit that they were undivided; (2nd) an examination of the treasuries showing that they contained but a small sum, with a view to reduce the amount recoverable by the Plaintiff against her, if he should be successful in that suit; (3rd) the gift of the jewels and cash by Adikonda to her. And now she has put forward Q, which is certainly a forgery; she has supported it with much evidence; she has sworn that Adikonda himself, in speaking to her, acknowledged it as his; and she has contradicted the story told by all her witnesses."

Of the objection to the Mahadevi's credit, which the learned Judge founds upon Q, and the evidence given by her in support of its execution, it is enough to observe that he thereby begs the question which he had to try, viz., whether it was a forgery or a genuine instrument. He would hardly have done this if he had not previously, and by comparison of handwriting, satisfied himself that the signature of Adikonda was itself forged. That this foregone conclusion, which must now be taken to be erroneous, must materially have affected his general estimate of the credibility of the Plaintiff's witnesses is therefore

shown by the passage just cited from his Judgment. Nor do their Lordships attach much more weight to his other objections to this lady's credit. They do not find any material contradiction between her statement in this suit and those of the other witnesses. There is undoubtedly a discrepancy as to the time when the key was delivered (as to which only Sumanto and the native doctor speak). But that the Mahadevi, a native woman examined from behind the Purdah, should have made some confusion as to the time that elapsed between the two acts of delivery does not, in their Lordships' view, materially affect her credit. Again, her contention in the former suit that her husband and the Defendant were undivided brothers, may, under the circumstances, have been raised *bonâ fide*. The fact which was found against her cannot have been in her own personal knowledge, and it was one which before that Decree was not perfectly clear. That she should have undervalued (if she did undervalue) the amount of property in the Gontaghoros will surprise nobody conversant with native suits in India. On his side, Raghunadha grossly exaggerated the amount and value of that property. Again, the alleged gift of the jewels and cash to her was no doubt found by the same learned Judge against her. There may have been no appeal against his decision (the adoption having then taken place), but it is obvious that the fact of that gift is again in issue in this suit, and that it was more or less determined in the other upon the view which this same Civil Judge then formed of the credibility of the Plaintiff's witnesses in this suit. There is, however, one circumstance connected with that suit of 1870 which affects the credibility, not only of the Mahadevi, but of other witnesses for the Plaintiff, and ought here to be considered. That circumstance is the date on which the gift was said to have taken place. The Mahadevi, in that as in the present suit, deposed that she received the key and the written authority to adopt on the same day. And this is the story now told by those of the witnesses who in their depositions in the former suit were silent on the authority to adopt. But the date assigned to the gift of the jewels throughout the suit of 1870 was "two days" before the Rajah's death, which, in common parlance, would import, and seems to have been so understood, the 21st of November.

The date assigned to the transaction in this suit is a date between which and that of the Rajah's death two clear days intervened, *i.e.*, the 20th of November.

This circumstance would be almost fatal to the Plaintiff's case as to Q if it were possible to suppose that that case had been got up after the evidence in the jewel suit was given. But the depositions in that suit were taken in December 1870; and when it is shown beyond all doubt that the Mahadevi had at least as early as the 18th of March 1869 (in her petition at page 70), stated the date of the alleged authority to be the 20th of November; that the witnesses who impeach Q which bears that date, admit it to have been in existence ten days after the Rajah's death, and say that Sumanto was the concoctor of the fraud; it is impossible to suppose that Sumanto would ever have treated the authority to adopt as executed only on the 21st. Nor, indeed, is it easy to see why the gift of the jewels should have been represented to have taken place on that day. One of the issues contested in the cause was whether Adikonda was of sufficient mental capacity to make the gift; and the nearer to the time of his death the date of the gift was laid, the greater the difficulty of showing his capacity of making it. There may have been some strange confusion in the jewel suit as to the effect of the term "two days before his death," and misapprehension as to the date to which the witnesses then meant to depose. Their Lordships are unable further to explain this discrepancy; but for the reasons above given they do not think that it seriously affects the question now under consideration.

Their Lordships desire next to say a few words about two documents of which much has been said in the argument before them.

The first is E.E, at page 89 of the Record. Their Lordships are not inclined to adopt the statement of the Defendant, that he signed this security bond without a knowledge of its contents. They do not, however, attach much weight to the words, "as soon as I, or my son, from my giving him in adoption, get possession of our zemindary," as evidence in favour of the genuineness of Q; for the utmost that any inference to be fairly drawn therefrom would establish is, that in January, 1869, the Defendant knew that the Mahadevi had asserted an authority to adopt (a

circumstance which is otherwise probable); contemplated the possibility of the power being established and his son adopted under it; and was persuaded by his creditor to provide against such a contingency. Siva Purohit was at that time acting for the Mahadevi; and if Q. were forged, the defendant would not then have had the knowledge which he says he subsequently acquired of the fabrication of the document. The most, then, that can be said of E.E. is that it contradicts his statement, that he knew nothing of an alleged authority to adopt until a later period.

The other document is R. It is dated the 26th of November, and contains a distinct statement by the Mahadevi that her husband, on the 20th of November, executed in her favour a written authority to adopt, to the effect of Q. It bears upon it the words (by whom written is not known), "Received 1st December evening, by hand, foul copy." The contention on the part of the Defendant is that this document affords no legal proof of the contents of the second urzi, stated in the Collector's letter of the 2nd of December to have been received by him from the Mahadevi; and that the terms in which he refers to that urzi are consistent with the supposition that the Mahadevi then put forward only an oral authority to adopt—Q. not having then been fabricated. What the Collector says on this point is:—"In her second (letter) she adds that it was her husband's express wish that, if she brings forth a son, such son should succeed; if a daughter, that she (the widow) should then adopt a son." These terms are not necessarily inconsistent with those of R. All that can be said of them is that they do not state affirmatively that she alleged her husband's wish to have been expressed in writing, or on a particular day.

It is now admitted on both sides that R is not the original urzi; that it is not an official copy of it, which, as such, would be receivable as evidence; and that if grounds had been laid for proving the contents of the missing urzi by secondary evidence, R has not been shown to be a true copy of it. Each side has imputed to the other foul play in respect of this document, but neither hypothesis is supported by proof or probable in itself. The proceedings afford some grounds for thinking that

the original urzi, as well as R., was produced from the Collectorate, but it seems that, owing to a blunder or, as suggested, a fraud on the part of a Vakeel, R. was shown to the witnesses who were at first examined upon it as if it were the original, and that the original, if ever before the Court, has slipped out of the record.

It is to be regretted that when the mistake was discovered, and the contest about this document arose, the Civil Judge did not further investigate, by inquiry at the Collectorate or otherwise, the history of R. and ascertain what had become of the original urzi. Either party might have called on the Judge to do this, but neither did so. It was suggested by Mr. Norton in his reply, that their Lordships might now see fit to direct such an inquiry. They do not, however, think that they would be justified in thus prolonging this litigation, inasmuch as they do not consider that a knowledge of the precise terms of the second urzi is essential to the determination of the issue before them. It is no doubt true that if the second urzi were in the terms of R., the Mahadevi must have asserted the existence of a written authority to adopt bearing the same date and to the same effect as Q., before the date at which Q. is said by the Defendant's witnesses to have been fabricated. But this circumstance, though it would throw considerable discredit on the Defendant's case, would not conclusively disprove it; because it is possible that the document so said to exist, might not have then actually come into existence. Again, if the second urzi were only in the terms of the collector's letter, it would not, as has before been observed, be inconsistent with the existence of a written authority to adopt. Their Lordships will, therefore, deal with the questions before them on the assumption that the precise terms of the second urzi have not been proved, and leave the Plaintiff to bear the burthen of having failed to establish that, before the 2nd of December, the Mahadevi asserted that she had a written authority of a particular date; and the Defendant to bear that of having failed to show affirmatively that she then asserted only a parol authority. They now proceed to consider the grave objections to the genuineness

of Q., which the learned Counsel for the Defendant have founded on the form and appearance of the document.

Their Lordships have the original before them, and so far as they can judge some of these objections are, to say the least, plausible. The list of witnesses in the handwriting of the writer of the instrument is unusual. It is also unusual for the witnesses to sign before the executing party, and to write their signatures immediately above his. The form of the instrument might naturally be expected to be that of exhibit X. d. (p. 77) the translation submitted to Government by the Mahadevi's vakeel with her petition of the 26th of July, 1869; and it has been contended on the part of the Appellant that that exhibit was purposely so modified in order to avoid the suspicions which a more literal translation of Q would have engendered. Lastly, it was contended that the appearance of the document is inconsistent with the evidence which represents that all the signatures were written at the same time, and with the same pen, and the same ink; the fine signature of Balaji being written after those of the subscribing witnesses. Their Lordships were certainly at first much impressed by the last objection. It is, however, to be observed that after insisting on the impossibility of all the signatures being written with the same pen, the Zillah Judge, on the 26th of November, 1871 (p. 311), saw fit to record that, having just had to look again at Q, he thought it quite possible, though not very likely, that with the pen that made the last "ro" of Sumanto's signature Adikonda might write as well as his signature is written; and a good writer like Balaji might write as finely as his signature is written. Very different appearances may certainly be produced by the same pen and ink when used by different hands; and this is more likely to happen with the coarse ink that is used by the natives of India.

Again, as regards the objection founded on X. d., it is to be observed that it seems to be satisfactorily answered by the Judge himself at p. 318, who finds that X. d. is, in fact, the translation of a Telegu version of Q., taken down probably by a Telegu man from the mouth of Iswara Puttro, there probably

being few persons at Madras who could read or translate an Oorya document like Q.

Of the list of witnesses, it is sufficient to say that it is difficult to see why it should have been inserted in Q., if it were not done by the order of the Rajah. The suggestion on the other side is that it was inserted in order to fill up the space above the Rajah's signature on the blank paper. But surely a forger would have had no difficulty in expanding the document so as to fill up the vacant space. Nor, as their Lordships have already remarked, is it likely that a forger would have inserted the name of Damapattojosi in that list until he had ascertained whether that person was willing to sign.

Upon the whole, then, their Lordships dealing with this document as one which bears the genuine signature of Adikonda; and as containing a disposition which he was likely to make; and weighing the evidence and the probabilities in favour of the Plaintiff's case, against the evidence and the probabilities in favour of the Defendant's case, have, not without doubt or difficulty, come to the conclusion that the former so preponderates over the latter that they ought to pronounce in favour of Q. as a valid written authority to adopt executed by Adikonda on the 20th of November, 1868.

This finding is, of course, sufficient to dispose of the present Appeal; and renders it unnecessary for their Lordships to consider whether, if it had been the other way, they could have affirmed the Decree of the High Court upon the grounds stated in the judgment of Mr. Justice Holloway. The great importance, however, of the subject induces them to make some observations upon it.

That, according to the law prevalent in the Dravada country, which includes the district in which the Chinnakimidy Zemindary is situate, a Hindoo widow, not having her husband's express permission, may, *if duly authorized by his kindred*, adopt a son to him, is a proposition which cannot now be controverted. The law has been so settled by the decision of this Committee in the Ramnad case; and the principles and authorities upon which it rests are elaborately considered and reviewed, both in the Judgment of the Committee, "12 Moore, Indian Appeals, p. 269," and in the Judgment of Mr. Justice

Holloway in the same case, "2 Madras, H. C. R., p. 206."

The two Judgments, however, though agreeing in this general conclusion, which was all that was necessary for the determination of the cause, were by no means *ad idem* on several points, and notably on the nature of the authority required.

Mr. Justice Holloway intimated an opinion that, if the requirement of consent is more than a moral precept, the assent of any one of the husband's sapindas would suffice. This Committee was far from adopting that broad proposition. It pointed out that on the question, who are the kinsmen whose assent will supply the want of a positive permission from the husband, the authorities are extremely vague; that there exists a broad distinction between cases in which the deceased husband was a member of a joint and undivided Hindoo family; and those in which, he being separated, the widow has taken his estate by right of inheritance; but that, even in the latter case, the assent of some person who stands to her in the relation of protector may be requisite. It is unnecessary to repeat at large this portion of their Lordships' Judgment on that occasion, which is to be found at pp. 441 to 443 of Mr. Moore's Report.

The question has since come before the "Sudr Court of Travancore" in the case reported in the "Madras Jurist," of February, 1873; and before the High Court of Madras in the present case. In the Travancore case the Court, though a foreign Court not bound by the decisions of this Tribunal, in a Judgment of remarkable ability and research, adopted the principles suggested by this Committee as those which should govern the determination of the question in the case of an undivided family, and ruled that the assent of certain separate dayadies of the deceased husband was not sufficient to validate an adoption by a widow, to which the husband's undivided brother and the head of the undivided family had not assented. In the present case Mr. Justice Holloway, adverting to what was said by this Committee in the Ramnad case, concerning an undivided family, observed, "whether this be so or not, it has no application to the present case, in which the property is to be held in severalty, and not in

coparcenary." And he finally formularised the following propositions :—

1. The adoption by the widow, with the assent of a sapinda is a substitute for the actual begetting by a sapinda.

2. That the argument from analogy is in favour of the assent of one sapinda rather than more.

3. That his assent is not to supply a capacity for rights, but a capacity for action.

4. That proximity to the deceased with respect to rights of property is wholly beside the question, and if this were not so, the rule would be entirely defeated.

5. That in the present case that capacity has been sufficiently supplied, as in the law which this assent of sapindas has superseded, a child begotten by this assenting sapinda would have been undoubtedly legitimate.

Their Lordships cannot adopt these propositions as a correct exposition of the law.

They observe in the first place that they are all more or less founded on the assumption that the law of adoption now prevalent in Madras, is a substitute for the old and obsolete practice of raising up seed to a deceased husband by actual procreation; and that the limitations, if any, upon the power to adopt are to be traced by analogy from that practice. In the Ramnad case (12 Moore, I. A., p. 441) their Lordships, after stating their general conclusion, added the following observations :—"They think that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindoo law, or upon analogies, real or supposed, between adoptions according to the Dattaca form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular by the Dattaca Mimansa of Vidya Narainsamy, the author of the Madhavyam; but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention."

To these remarks of their predecessors their Lordships adhere. They desire further to observe that it is to their minds extremely doubtful whether the supposed analogy is sufficient to support Mr. Justice Holloway's propositions in their integrity. The myth of Satyavaty referred to by Narainsamy, and most of the texts relating to the obsolete practice which are to be found collected in Colebrooke's Digest and elsewhere, all imply an authority external to the widow as the justification of her act, an act repugnant to the general rule of asceticism and celibacy imposed upon Hindoo widows. Most of the texts speak expressly of "the appointed" kinsman. By whom appointed? If we are to travel back beyond the Kali age, and speculate upon what then took place, we have no reasonable grounds for supposing that a Hindoo widow, desirous of raising up seed to her deceased husband, was ever at liberty to invite to her bed any sapinda, however remote, at her own discretion; and that his consent, of itself, constituted a sufficient authorization of his act.

Positive authority, then, does not do more than establish that, according to the law of Madras, which in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay, a widow, not having her husband's permission, may adopt a son to him, if duly authorized by his kindred. If it were necessary, which in this case it is not, to decide the point, their Lordships would be unwilling to dissent from the principle recognized by the Travancore case, viz., that the requisite authority is, in the case of an undivided family, to be sought within that family. The joint and undivided family is the normal condition of Hindoo society. An undivided Hindoo family is ordinarily joint not only in estate, but in food and worship; therefore not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation. The Hindoo wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that in the strict contemplation of law she

ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her. There seem to be strong reasons against the conclusion that for such a purpose as that now under consideration she can at her will travel out of that undivided family, and obtain the authorization required from a separated and remote kinsman of her husband.

Mr. Justice Holloway, however, not directly determining anything adversely to the principle affirmed in the Travancore case, distinguishes the present on the ground that, although the family must be taken to be undivided, the particular property is to be held in severalty and not in coparcenary. It is not necessary for the determination of this Appeal that their Lordships should decide whether this distinction can be supported, and they abstain from doing so. They may, however, observe that a distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Mr. Justice Holloway has himself strenuously insisted upon elsewhere (2 Madras, H. C. R., p. 229), viz., that the validity of an adoption is to be determined by spiritual rather than temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it.

Their Lordships desire further to observe, that even if the distinction suggested were adopted it would be necessary, in order to maintain the present adoption as one duly made without the permission of the husband, to go the full length of ruling that the assent of one separated and distant sapinda (and that the natural father of the child taken in adoption) is an authority sufficient to validate the act.

Mr. Justice Holloway, indeed, in one place treats Raghunadha as an assenting party to the exercise of the power to adopt, though not to the particular adoption.

Their Lordships, however, are of opinion that even this general assent is not established by E. E., or by the other evidence in the cause. The parol testimony on this point is untrustworthy; and E. E., taking it at its highest, is consistent with the

supposition that Raghunadha then intended only to provide for the contingency of the Mahadevi's establishing the authority to adopt, which she said she had derived from her husband, and exercising it in favour of his son. It must, therefore, be taken that the only sapinda of Adikonda, who is shown to have assented to this adoption, is the Rajah o Piddakimidy, the father of the adopted child; and their Lordships have already intimated their grave doubts whether such assent would in any case have constituted a sufficient authority.

In the present case there is an additional reason against the sufficiency of such an assent. It is admitted on all hands that an authorisation by some kinsman of the husband is required. To authorise an act implies the exercise of some discretion whether the act ought or ought not to be done. In the present case there is no trace of such an exercise of discretion. All we know is that the Mahadevi, representing herself as having the written permission of her husband to adopt, asked the Rajah of Piddakimidy to give her a son in adoption, and succeeded in getting one. There is nothing to show that the Rajah ever supposed that he was giving the authority to adopt, which a widow, not having her husband's permission, would require.

Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present Appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which, before the decisions in the Rammad case had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras. It may be the duty of a Court of Justice administering the Hindoo law to consider the religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of,

or capable of exercising dominion over, property. It seems therefore to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it; and the propositions of Mr. Justice Holloway appear to their Lordships calculated unduly to enlarge those limits.

Their Lordships have further to observe that the Decree, as it stands, makes the Defendant accountable for mesne profits from the time when he was placed in possession by the order of Government. That was about September, 1869. At that time Raghunadha was, in default of a son of Adikonda, natural or adopted, unquestionably entitled to the Zemindary. The adoption took place on the 20th November, 1870, and the Plaint states that the cause of action then accrued to the Plaintiff. The Plaint itself was filed on the 15th of December, 1870, and there is no proof of a previous demand of possession. Their Lordships are of opinion that the account of mesne profits should run only from the commencement of the suit. They think that the Decree, with that modification, ought to be affirmed, and they will humbly advise Her Majesty accordingly. But their Judgment must be understood to proceed on the establishment of Q as a genuine permission to adopt; and not upon the ground upon which the High Court principally relied. The costs of the Appeal must follow the result.

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