Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Puthia Kovilakath Krishnan Rajah Avergal v. *Puthia Kovilakath Sreedevi and others from the High Court of Judicature at Madras; delivered July 17th*, 1889.

Present:

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

[*Delivered by Lord Hobhouse.*]

THEIR Lordships consider that this case is concluded by the findings of the courts in India. So far as regards the merits of the case two questions are raised: first, whether there was an agreement between the parties interested in the fund which is the matter in dispute, that it should be divided into equal fourth parts among the four branches of the family; and, secondly, whether the unequal division which actually took place and which was affirmed by the decree of the Court, was due to underhand or foul play. On the first point the Subordinate Judge finds that there was an agreement for equal division, and he finds that on the ground of oral evidence which he believed. It is quite true that in assigning reasons for preferring that evidence to evidence given the contrary way, he relies upon some documents which are contemporary, or nearly contemporary, with the transaction, showing that letters were written or instructions given by other branches of the family in terms which point to the division of the property in equal fourths, and one of which refers to similar

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documents written on behalf of all the branches of the family. Then it is stated by the Defendant that there were letters and papers containing instructions which warranted the actual transaction that was carried out, and the actual division of the money, but none of those letters or papers are forthcoming, and the mention of them and their disappearance does not benefit the case of the Defendant. Those are the reasons assigned by the Subordinate Judge for preferring the evidence which affirms an agreement for equal division into fourths. Whatever his reasons are, the question remains one of pure fact. The two courts have found the same way on that question of fact. Nothing is stated to make their Lordships conclude that if they went through the whole of the evidence, and differed from the courts below, they would differ from them on anything but questions of pure fact. Therefore the case clearly falls within that wholesome rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the courts below. Their Lordships think they would be making a departure from that principle if they were to allow this evidence to be canvassed for the purpose of reversing the decision.

The same thing may be said with respect to the second question of dishonesty or foul play. It all resolves itself into a question of credit due to the witnesses, and their Lordships have the same reluctance to interfere with the findings of the Court on that question. So far as to the merits of the case.

Then a defence is raised on the ground of bar by lapse of time; and it is said that the case falls within Article 95 of Act XV. of 1877. That Article provides that a suit to set aside

a decree obtained by fraud, or for other relief on the ground of fraud, must be brought within three years from the time when the fraud becomes known to the party wronged. Whether the case does fall within that Article or not is a question in controversy, but their Lordships will treat it for the sake of this judgment as falling within that Article, that being the ground which is most favourable to the Appellant's case. Then the question arises when did the fraud become known to the Plaintiffs in this suit? That again is a question of pure fact. Both courts have found that there is no evidence that the fraud became known before the month of December 1880. It is doubtful whether it became known so early, but that is sufficient. The Plaintiffs swear, and are believed when they swear, that they did not know of the fraud within the statutory time; and as they have given as much evidence of a negative as people can be expected to give, it was for the Defendant to come forward and show something which might carry the knowledge home to them. He has not done it. That issue is found against him, and upon those findings their Lordships think that the Court was right in holding that, even if the case falls within Article 95, the plea of limitation is not proved.

The result is that the appeal fails, and should be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.