Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Shunmugaroya Mudaliar v. *Manikka Mudaliar, from the High Court of Judicature at Madras; delivered the 20th July,* 1909.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
SIR ANDREW SCOBLE.

[*Delivered by Lord Collins.*]

This is an Appeal from an Appellate Decree of the High Court of Madras reversing a Decree of Boddam, J., sitting on the Original Side of the High Court, who dismissed an application by the Plaintiff (the present Respondent) for probate of a will purporting to have been executed by one Thiruvengada Mudaliar on the 11th October, 1903, and a codicil thereto of the 18th October, 1903.

The only issues were:—

1. Was the testator, when he executed the will of the 11th October, 1903, of sound disposing mind?

2. Was the testator, when he executed the codicil of the 18th October, 1903, of sound disposing mind?

The onus was admittedly on the Plaintiff, who propounded the will and codicil, to make good the affirmative in each case.

[31] P.C.J. 99.—L. & M.—125—5 7/09. Wt. 98.

The learned Judge, who heard and saw the witnesses, held that he had entirely failed to do so.

The Court of Appeal, who suffered under the disadvantage of neither seeing nor hearing the witnesses, nevertheless held that the onus on the Plaintiff had been discharged, and admitted the will and codicil to probate.

It is not disputed that the learned Judge correctly laid down for his own guidance the essentials of "a sound and disposing mind." For reasons which he gives, he was unable to place any reliance on the persons called who were present on the 11th October at the signing of the will, except the native doctor, who was one of the attesting witnesses. This gentleman's evidence, a great part of which is set out in the judgment, entirely justifies, in their Lordships' opinion, the view taken by the learned Judge, that it left the onus on the Plaintiff quite undischarged, with the necessary consequence that, in the absence of other reliable evidence, the learned Judge had no alternative but to dismiss the application. Certainly no other medical evidence was forthcoming sufficient to turn the scale. Dr. Browning, the only other medical witness, had declined to see the testator with a view to witnessing his will, and says in evidence :—

> If what they say is true, that he had an attack of apoplexy on the 3rd, I should think it doubtful if he could have dictated a will like that [*i.e.* of the 11th October]. I am not prepared to say he could.

As to the attack of apoplexy, there can be no possible doubt, for it was not disputed at the trial. As the result, therefore, of the medical evidence the onus is very far from shifted. The chief point made by the Court of Appeal against the decision of the Trial Judge is that he

confounded physical with mental incapacity. But, in their Lordships' opinion, there is no sufficient foundation for this imputation. It really arises from the fact that the learned Judge dwelt upon the proved physical infirmities of the testator in limb and speech as entirely discrediting the account given by the Plaintiff and the witness Strinivasa Chariar of what took place on the 11th and 18th October, a conclusion which, in their Lordships' opinion, was entirely just. No doubt it is always difficult for judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have (see the observations of Lindley, M. R., in *Coghlan* v. *Cumberland*, 1898, 1 Ch. 705) ; but that difficulty is greatly aggravated where the judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of truth, and that was the inference which Boddam, J., drew with regard to some of the material witnesses for the Plaintiff in this case.

The Court of Appeal seem to have attached some weight to a suggestion that the testator was on bad terms with his brother, his nearest male relative and heir. But this suggestion is displaced by the letters which were produced, showing the affectionate terms on which they corresponded.

The Court of Appeal also seem to attach too much weight to the fact that the Defendant's Vakil advised that formal notice should be sent to the testator shortly before his death, demanding a disclaimer of interest in certain arrears of rent in respect of property which had fallen to the Defendant's share on a family division. Even if the Defendant appreciated its significance, it was

no more than an attempt under the advice of his lawyer to cure a technical blot as a measure of precaution in a legal process.

Their Lordships are of opinion that Boddam, J., was right in holding that the Plaintiff had failed to discharge the burden of proof.

They will therefore humbly advise His Majesty that the Appeal should be allowed, the Appellate Decree of the High Court set aside with costs, and the Decree of Boddam, J., restored.

The Respondent will pay the costs of the Appeal.

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