Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Serumah Umah and another v. *Palathan Vitil Marya Coothy Umah and another, from the High Court of Judicature at Madras; delivered 3rd February,* 1871.

Present:—

SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.
LORD JUSTICE JAMES.

SIR LAWRENCE PEEL.

THE suit out of which this Appeal has arisen was instituted by two ladies, who were the daughters of one Patha Kutti. In the course of the litigation they died, and a daughter of each of them was substituted in the room of her mother as Plaintiff on the record. It may be assumed that the persons so substituted, the Appellants, were the representatives of the original Plaintiffs, and, in determining the Appeal, it will be more convenient to speak throughout of the original Plaintiffs as if they had carried on the litigation to the end.

The suit was brought against those who may be taken, for the purposes of the Appeal, to have been the representatives of one Moidin Kutti, the son of one of the Plaintiffs, and it was brought to recover property which by the admission of both parties was once the property of Patha Kutti. The history of that property it may be convenient shortly to mention. It was purchased from one Amaneth, by Kunju Hajji, who was one of the sons of Patha Kutti. He afterwards died. There appears to have been a partition of his estate among the persons entitled thereto, under, as their Lord-

ships collect from the proceedings, the general Mahommedan law, and this particular property was assigned to and became vested in Patha Kutti as one of his heirs. Patha Kutti died in 1842, and before her death, viz. some time in 1839, her grandson Moidin, in some character or another, unquestionably entered into possession of the property. He retained that possession up to the time of his own death in 1858 or 1859, a period of about twenty years. Upon his death his widow and other representatives entered into possession, claiming as his heirs or under a title derived from him. The Plaintiffs thereupon instituted this suit to recover possession of the property from them. The Defendants relied both upon the long possession of Moidin and upon a title founded upon a deed of purchase from Patha Kutti. In that state of things it was necessary that the Plaintiffs should recover by the strength of their own title; and they were met in the first instance by the plea of the Statute of Limitations founded upon the long possession of Moidin. The Zillah Judge, looking to the nature of the suit, has very properly overruled that plea as a bar to the trial of the suit; because the question whether the suit is barred by the Statute of Limitations or not, necessarily depends upon the determination of the principal issue raised in the suit, namely, whether the long possession of Moidin Kutti was adverse or fiduciary; whether he was in possession of his own right as proprietor of the estate, or whether he merely managed the estate as the agent first of his grandmother and afterwards of the Plaintiffs in the suit. It was therefore essential to the Plaintiffs' case to establish the latter proposition.

What is the case which they make? It is that Moidin was first appointed manager by the grandmother; and that he was afterwards appointed to or continued in such management by them. But if he continued in possession in the character of agent or manager, it lies upon them to show that they at the death of their mother, Patha Kutti, were entitled to assume the character of principals. And, as their Lordships understand the pleadings and the evidence, in order to do this they say, We do claim a right to inherit the property as the general heirs, under the Mahommedan law, of

Patha Kutti; but we contend that either by some act done by her in her lifetime or by some special custom of descent attaching to this property, we, and we alone, although she had other persons who would under the general law have been co-heirs with her,—became entitled to the whole of the property, either beneficially or with reference to some semi-religious trust; and therefore that Moidin Kutti, who continued in the possession of the estate as manager, was the agent of us and of us only; and that we only are entitled to recover the whole property. This, notwithstanding some confusion in the argument at the bar and a suggestion that the Plaintiffs might be suing as some of the heirs on behalf of all the heirs, appears to be really the effect of the title alleged and sought to be proved.

Then, upon what does the proof of this title rest? It appears to their Lordships, to rest solely upon the oral testimony of three witnesses, who are entitled, no doubt, to all the advantage derivable from the fact that the Judge who saw them, the Zillah Judge, has stated that their demeanour in the box impressed him favourably. But when examined that testimony appears to their Lordships to fall very far short of the evidence which is necessary to prove such a case as that which they were brought to support. They are none of them, it is to be observed, members of the family; almost all of them are described as Mopla merchants.

It is important to revert to the former history of the property. It is shown that it certainly passed to Patha Kutti under the general Mahommedan law. It cannot therefore be said that it is property of which the devolution is governed by any local law or custom. If it is contended that the succession to it is regulated by any special family custom, that custom ought to have been alleged and proved with a distinctness and certainty which are wholly wanting here. If the evidence of these witnesses is examined, it really is not clear upon what they rest the Plaintiffs' title. They seem to allege that some of the property of this Mopla family was governed by one law, and that other part of their property was governed by another law. It is admitted that this particular property

came into the family, came to Patha Kutti, under the general law; but then it is said that, by some act of hers done in her lifetime, she transferred it to what is called the tarwad, or family property, and made it subject to a different law of devolution, the nature of which is neither stated nor proved with that degree of certainty which is required to establish so special a case in any Court of Justice.

Therefore their Lordships, notwithstanding the favourable manner in which the Judge may have spoken of the demeanour of these witnesses, feel bound to concur with the High Court in refusing to believe the story to which they depose.

Two other witnesses were called to prove that Moidin accounted to his mother and his aunt for the proceeds of this property. They do not appear to be persons very likely to have been present at such a transaction. They attempted to prove that on one occasion, viz. in 1850 or 1851, he accounted for the whole of the period during which he had then been in possession, but they did not agree in the account which they give of what passed on that occasion. One of them stated that the accounts were delivered to the Plaintiffs, the other denied that any accounts were so delivered. This, therefore, seems to be evidence to which their Lordships cannot give any credit.

The Judge of First Instance seems to have proceeded more upon the supposed defects in the Defendants' proof of their title than upon the strength of the Plaintiffs' title, and he called in aid various documents which had been proved in the case and to which our attention has also been directed. But of those documents, the exhibits numbered from A to F, it is to be observed that, although they may here and there afford an inference which tends to throw suspicion upon the genuineness of the Defendants' deed, their general tendency is to contradict the case of the Plaintiffs and to support the case of the Defendants; because they show that during his twenty years' possession, Moidin was sometimes sued as the proprietor of the estate; and that as proprietor of the estate he petitioned the Collector for a remission of revenue. These proceedings took place publicly in the district; they can hardly have failed to come

to the knowledge of the Plaintiffs who, if their present case were true, would have called their manager to account for taking upon himself the character of absolute owner, when, in fact, he was a mere agent.

The Plaintiffs therefore seem, to their Lordships, to have failed to prove that which was the substance of their case, namely, that the possession of Moidin was a fiduciary and not an adverse possession; and if that be so, they were unquestionably out of time in bringing their suit, which ought to be dismissed on that ground. This being their view of the case, their Lordships do not think it necessary to express any strong opinion as to the genuineness of the Defendants' Deed. It is the less necessary to do so, since the Judgment of the High Court does not, as their Lordships understand it, positively affirm that the Deed was genuine. It assumes, no doubt, as their Lordships must assume, that in some way or another and by virtue of some act of his grandmother, Moidin came into possession of this property on his own account and for his own benefit. And their Lordships may observe that that view of the case is corroborated, not only by the acts which he did, but by the transfer to him, which is admitted, of the original Sunnud, and the deed of partition forming the title to the estate. Mr. Leith, indeed, has endeavoured to explain that possession by attributing it to his character as an agent. But, in their Lordships' opinion, it is far more reasonable to suppose that if the Plaintiffs had been the true proprietors of the estate, they would, in accordance with native habits, have kept their title deeds in the recesses of the zenana, and would not have entrusted them to a mere manager. And if this was likely to happen under ordinary circumstances, *à fortiori* it would have happened in a case in which, according to the evidence for the Plaintiffs, the management of this property was by family custom vested in the females of the family.

On the whole, then, it appears to their Lordships that the Judgment of the High Court was correct, and they must accordingly humbly advise Her Majesty to dismiss this Appeal, with costs.