Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussawat Basmati Kowari v. *Baboo Kirut Narain Singh, from the High Court of Judicature at Fort William, in Bengal; delivered February 27th,* 1880.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

IN this case the sole question was, whether or not an adoption in the kritima form had been proved. Ram Persad Narain had one whole brother and two half-brothers. He died on the 1st March 1872, leaving two widows, one of whom had a daughter about five or six years of age. The other widow had had sons, but they had died in infancy. It may not be altogether immaterial to observe, with regard to the probabilities of the case, that if the daughter of the deceased should have a son, that son would be able, though perhaps not quite as efficaciously as an adopted son, to perform the ceremonies which are supposed to be of benefit to his soul.

The Plaintiff in this case is Sri Narain Singh, the son of Kirut Narain Singh, the whole brother of Ram Persad; and he seeks to obtain possession of the property of Ram Persad, as against the widow, on the ground that he, being of the age of 14, was adopted by Ram Persad two days before Ram Persad's death. The widow denies the adoption. The question is one entirely of fact. The case was heard before the Sub-

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ordinate Judge, who is himself a Hindoo, and who appears from his judgment to have given a very intelligent attention to the evidence. The effect of his judgment is, that he does not believe the Plaintiff's case. It does not, indeed, appear that he gives very much more credence, if any, to the witnesses for the Defendant, but he rightly observes that the onus of proof is thrown on the Plaintiff, who alleges the adoption; and says that, in his opinion, the Plaintiff has not made out his case. The Subordinate Judge comments upon both descriptions of evidence,—the documentary and the oral. The documentary evidence for the Plaintiff consisted chiefly of two sets of papers or accounts, one called the Hustabood papers, the other the Jummabundi papers. The learned Judge, being probably more conversant with these papers than a European, comes to the conclusion that neither set of papers are trustworthy; and their Lordships do not find that the High Court differ from him on this subject—at all events, they do not state that they differ from him. The learned Judge of the first instance also intimates a general disbelief of the witnesses of the Plaintiff. He gives one or two further reasons for his judgment, consisting of certain probabilities of the case, that on which he dwells most being this: That, according to the evidence of the Plaintiff, the adoption was made by Ram Persad two days before his death, and one day before a certain impurity which he was under in consequence of the death of a relative had expired; that it would have been more consistent with Hindoo usage if he had waited till the next day (and he was well enough to do so with safety), when this impurity would have passed away; but the learned Judge does not intimate that the adoption was necessarily invalid in point of law because performed during the time when Ram

Persad was in a state of impurity. Their Lordships cannot help observing that the High Court do not seem altogether to have understood the view of the Subordinate Judge on this point: for they discuss the question whether the adoption was invalid in consequence of its having been made when Ram Persad was in this state of impurity, a proposition which was not affirmed by the learned Judge below.

The question being one of the credibility of witnesses, their Lordships think that a good deal of weight ought to be attached to the consideration that the Subordinate Judge had the opportunity of seeing and hearing these witnesses. Their Lordships have now to consider what judgment the High Court ought to have pronounced, and they have come to the conclusion that the High Court have not given sufficient reasons for reversing the judgment of the Court below. The main reasons are stated in this paragraph, wherein the Acting Chief Justice observes, "Looking at the whole of the "case, I think that the evidence given on "behalf of the Plaintiff is more distinct and "more reliable in its general character than "that given on behalf of the Defence. I think "that the story told is *primâ facie* a natural "and a probable one; and it is to be recol-"lected that the Defendant herself, on her cross-"examination (although she denied his having "ever expressly stated that he intended to "adopt), admits that her husband used to ex-"press regret at the death of his children, "and at his not having a son to leave behind "him." Their Lordships, on referring to the evidence, do not find that the lady used precisely these words, but said no more than that her husband and herself had been grieved when their children had died; and their Lordships cannot think that the slightest importance in

this case is to be attached to such a statement. With regard to the observation of the High Court as to the general character of the evidence being more reliable, they observe that it is difficult to come to a satisfactory conclusion on the general trustworthiness of written evidence against the opinion of a Court which has heard and seen the witnesses; but, further, if their Lordships were called upon to express an opinion as to the trustworthiness of the evidence, they would, on the whole, be disposed to pronounce the evidence against the adoption somewhat more credible than that in its favour. One circumstance in the case appears to them to incline the preponderance, if the scales were at all evenly balanced, in favour of the Defendant; viz., that the widows appear to have remained in possession of the estate after the death of Ram Persad. There is a document certainly unimpeached in the cause, a receipt for income tax dated on the 2nd of July 1872, whereby it appears that the two widows paid a sum of 104 Rs. in respect of income tax on this property. It appears to their Lordships that this payment of income tax on their part is inconsistent with the case of the Plaintiff, who alleges that he had been adopted, and that they, consequently, had merely a title to maintenance; and that, if his case were true, he, and not they, would have been entitled to the possession of the estate, and liable to the payment, amongst other things, of this tax.

Further, it appears that after the death of the junior widow, which took place in September, the widow who is now the Defendant applied for a mutation of names; that upon that occasion the officer of the collectorate was satisfied that she was in possession, and his decision, which was appealed against to the commissioner, was affirmed by the commis-

sioner upon the ground that she was actually in possession, the commissioner attaching a good deal of importance to this document which has been before referred to. It is stated on behalf of the Plaintiff, that he was actually placed on the guddi on the 25th of July 1872, when he was recognised by both the widows, and his case appears to be that, if the widows had possession up to that time, he then obtained possession, and the widows subsequently dispossessed him; but of that there is no evidence whatever, and their Lordships cannot help thinking, on the whole of the case, that the widows have all along been in possession. On the whole, they have come to the conclusion that the High Court was wrong in reversing the judgment of the Court below.

Under these circumstances, their Lordships will humbly advise Her Majesty that the judgment of the High Court be reversed, and the judgment of the Subordinate Judge be affirmed, with the usual order as to costs.