Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sreemuthoo Raghoonadha Perya Oodya Taver v. Kattama Nauchear, from the High Court of Judicature of Madras; delivered the 7th November, 1866.

Present:

LORD WESTBURY.
SIR JAMES COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THE facts of this case have been lucidly presented to us, and the case has been argued very ably by the learned Counsel for the Appellant; but their Lordships feel no difficulty upon the point. All that has been urged is involved in and decided by the Judgment of the Privy Council in the year 1863, and what passed before this tribunal on that occasion.

To render our decision intelligible, it is necessary to make a short recapitulation of the leading facts of the case.

On the death of the Zemindar, the original proprietor, questions arose whether he was undivided in estate with his brother, and whether this property was to pass as undivided or divided estate. A document was produced in which the Zemindar made a testamentary gift of the estate to the Appellant's father in the event of the child of one of his widows, who was *enceinte*, not proving to be a son. A great deal of litigation ensued; but in the suits that were brought before the Privy Council in 1844, the exact issue whether the family was undivided or divided had not been so raised as to become necessarily the subject of judicial determination. The issue, however, of the validity of the alleged testamentary paper had been raised, and the decision of the Sudder Court was against it.

When the case came before the Privy Council in 1844, having regard to the law touching undivided property, their Lordships were of opinion that there must be a judicial determination upon the point whether the family was divided or undivided before the question of the validity of any devise could arise. No opinion therefore was expressed upon the issue raised as to the validity of the testamentary paper, which remained until it had been ascertained that the property in question was capable of being devised. The Privy Council accordingly remitted the case, pointing the parties' attention to the necessity of having it determined whether there was division or no division. It is plain that when the issue was raised whether there was division or no division, the importance of determining whether the paper in question was a valid testamentary gift or not would immediately be felt; because, if it should turn out that it was a divided property, then the party in possession, claiming by virtue of his being a nephew of the deceased proprietor, would immediately have been enabled to set up the Will as constituting his title. But it has been contended before us to-day that what was said by the Privy Council must be considered as amounting to a positive direction that there should not, in the subsequent litigation contemplated, be any question whatever raised except the question of division or no division. It is plain to us that the language used by the Privy Council on that occasion does not admit of any such construction. The same point was raised and insisted upon before the Judicial Committee in 1863; for it was then contended, on behalf of the present Appellant, or those who preceded him in title, that the suits which had been instituted and were brought by way of appeal were suits that transgressed the limits imposed by the Order of the Privy Council in 1844 (being, in effect, the same argument that we have heard to-day); but that contention was overruled, and it was held that the Order of the Privy Council in 1844 did not at all interfere with or preclude the parties from bringing forward the claim, and instituting the suits which they had instituted subsequently to 1844, the Decrees in which were the subject of the Appeal to the Privy Council in 1863.

We take as an example of these suits the form of the suit Number 10 of 1856. One of the present Respondents filed her Plaint in that suit for the recovery of the Zemindary, and the question of the forgery or genuineness of this alleged testamentary paper was distinctly raised in that Plaint. By the answer to it, the present Appellant, answering by his guardian, did not set up the alleged testamentary paper, but he rested his defence on the ground that as to this property the brothers were undivided. Ultimately all the suits came before the Judicial Committee of the Privy Council in 1863; and the Judicial Committee were of opinion that the question of division or no division was, after all, immaterial, because they found it clear that the Zemindary in question was self-acquired property; that is, that the deceased proprietor had been the first purchaser of it; and they accordingly held, that even if the brothers were undivided, yet that the estate being self-acquired was not governed by the law applicable to undivided property, but descended to the heirs general, and was capable therefore of being devised. Immediately it became most material in the mind of the Judicial Committee of 1863, to determine the question with regard to the testamentary paper; but they were wholly relieved from the necessity of doing so, because the present Appellant then appearing by most able Counsel, as Respondent at the Bar, deliberately told their Lordships, that although the paper in question had been familiarly called a Will, the name had been introduced only as a short denomination of the instrument, which in reality was not testamentary, and neither had, nor was ever intended to have, the effect of devising the property; and that the Respondent did not claim any title under it as a testamentary devise; but used it only as conclusive evidence of what the opinion of the last proprietor was, viz. that this Zemindary was in reality undivided property. It is quite plain why the learned Counsel for the then Respondent adopted that course. In their minds it was thought safest to rest their case upon the question of division or non-division. They appear to have reasoned thus:—"If we set up this as a Will, then it is a conclusive declaration by the alleged testator that the property was devisable; and if

devisable, that it was not undivided. We will therefore abstain from treating that instrument as an instrument of title. We will abstain from insisting upon it as a devise, and we deliberately tell the Judicial Committee, that it is not to be regarded as being in any sense testamentary." The result, therefore, was that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of preventing further litigation, recorded in its Judgment the fact that the Respondents' Counsel, the present Appellants' Counsel, had deliberately elected to disclaim any title under that instrument as a Will, and that therefore its validity or invalidity became no longer material for decision.

That being the state of the case, we are now called upon to approve of a suit, subsequently instituted by the very person who had deliberately given this character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the Appellant had then the power of relying upon that document as being a valid Will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might, first, have insisted that it was an undivided property, and that therefore the Plaintiff in those suits had no interest therein; and, secondly, he might have pleaded, "But if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour." When a Plaintiff claims an estate, and the Defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present Appellant might have insisted on the validity of the alleged Will; but instead of doing so when his suit came on to be heard, and decided in the Court of Final Appeal, he in effect disclaimed all title under the instrument as a Will, and insisted that it must be regarded by the Court as not being testamentary. There would be an

end to all security in the administration of justice if the course now taken by the Appellant, of setting up the Will, were allowed.

On every ground, therefore,—first, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment; secondly, upon the personal ground that the Appellant, having used this document and abandoned all right to it as a will, cannot now use it for a different purpose; we are of opinion that there is no doubt as to the correctness of the determination of the Court below. We regard this suit, in which the present Appeal is brought, as a suit instituted without *bona fides*, and directly contrary to what the Appellant must be considered to be bound by; and we have no hesitation, therefore, in advising Her Majesty to affirm the decree, and to direct that this Appeal be dismissed with costs.

Sir Roundell Palmer. If it would not be taking too great a liberty, it may be a satisfaction to your Lordships to know that what Sir Hugh Cairns did at the Bar was a mere repetition of what had been done in the printed answer to the Appeal by the Respondent in India, and your Lordships will find it at page 218, paragraph 39 of the Record of 1863. If I may be permitted to read it, it runs thus:—"In opposition to paragraph 64 of Appeal Petition, Respondent submits that the correspondence which passed at the time shows that the Government authorities did acknowledge the *primâ facie* right of the Respondent's grandfather, and that the Civil Court was correct in terming the Will a mere declaration of right. It is only necessary to refer to Regulation V. of 1829 to perceive that it could not possibly be more, and that in quoting it the Government officers could only have viewed it in that light, and not as a bequest."

Lord Westbury. I am very glad that you have stated that, because it removes from the case any possibility of its being supposed that Sir Hugh Cairns either mistook or exceeded his instructions.

Sir Roundell Palmer. That was my motive for presuming to mention it.