1878

SECRETARY OF STATE v. POHAN SINGH.

admits many duties of which the lower Court has taken upon itself to relieve him for the future; and it seems reasonable that duties of a kindred nature to those which are now obsolete should be performed in lieu of them, since the ghatwals still enjoy their old advantages of land tenures, which have become much more valuable than they were when first fixed.

On the whole we entertain no doubt that the plaintiff has no right to be reinstated in the ghatwali land unless the executive authorities will condone his conduct and restore him to his situation. We think that, under all the circumstances, looking to the long continuance of the ghatwalship in the plaintiff's family, to the increase of duty, and the more disagreeable nature of that duty lately required of the ghatwals, and to the punishment the plaintiff has undergone, it would be consistent with the dignity and character of the Government to reinstate him on the occurrence of an opportunity or to allow some member of his family to be appointed in his place. But this is wholly a matter for the consideration of Government. We must set aside the judgment and decree of the District Judge, and order the suit to be dismissed with costs of both Courts.

Appeal allowed.

PRIVY COUNCIL.

P. C.* 1879 *Nov.* 21, 22, 26.

LEKRAJ KUAR (DEFENDANT) *v.* MAIPAL SINGH (PLAINTIFF)

AND

RAGHUBANS KUAR (DEFENDANT) *v.* MAIPAL SINGH (PLAINTIFF).

[On appeal from the Court of the Commissioner of Lucknow and the Court of the Judicial Commissioner of Oudh.]

Proof of Custom—Indian Evidence Act (I of 1872), ss. 35 and 48—Reg. VII of 1822—Admissibility of village Wajib-ul-arz.

Held, on the question whether there did or did not exist a custom in the Bahrulia clan in Oudh excluding daughters from inheriting, that the *wajib-ul-arz* of a mouza in the taluqa, stating the custom of the Bahrulia clan as to inheritance, had been properly received in evidence under s. 35 of the Indian

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

1879

LEKRAJ KUAR v. MAHPAL SINGH

RAGHUBANS KUAR v. MAHPAL SINGH.

Evidence Act, 1872. Further, that this custom was a usage of the kind which Reg. VII of 1822 required officers to ascertain and record: and that it was no valid objection that this *wajib-ul-arz* had been prepared and attested by officers subordinate to the Settlement Officer.

Semble.—That had it been the case that these papers were not to be treated as records describing a custom, but as recording only the opinions of those likely to know it, the 48th section of the Act would have made them admissible.

APPEALS from a decree of the Officiating Commissioner of the Lucknow Division (28th August 1876), and from a decree of the Judicial Commissioner of Oudh, affirming the judgments of the Deputy Commissioner of Bara Banki (22nd October 1875 and 8th July 1876).

In 1873, the respondent, Mahpal Singh, sued the appellant, Rani Lekraj Kuar, claiming the proprietary right in the Taluqas Shiurajpur and Rawat Sarai, on the ground that he was entitled to them as the nearest male collateral relation of the last taluqdar, Udit Partab Singh, who died in 1872 sonless, but leaving a daughter Raghubans Kuar. The plaintiff alleged that a custom of the Bahrulia clan (Bais Rajputs), to which the family belonged, excluded the daughter of Udit Partab Singh, and that Lekraj Kuar, who was then in possession, had no right to succeed to the estate by Hindu law, she being only a childless stepmother of the deceased taluqdar. Mahpal Singh alleged title, under the custom, as the eldest living son of Fateh Singh, grandfather of Udit Partab Singh, and formerly taluqdar.

The Deputy Commissioner decreed the claim, with the reservation that Lekraj Kuar, who had been for some time in possession of the taluqa in virtue of a compromise of certain disputes between her and the late taluqdar's widow, Subhraj Kuar (the latter having been alive when proceedings commenced, but having since died), should be left in possession during her lifetime for her support and for that of Raghubans Kuar.

On appeal to the Commissioner of the Lucknow Division, the suit was remanded, under s. 354 of the Code of Civil Procedure (1859), for the trial of the additional issue—"Has Raghubans Kuar a better claim to the estate than the plaintiff Mahpal Singh." Thereupon Raghubans Kuar was made a party to the

1879

LEKRAJ KUAR v. MAHPAL SINGH

RAGHUBANS KUAR v. MAHPAL SINGH.

suit, and the Deputy Commissioner, finding in the negative upon this issue, made his return to the Commissioner, who confirmed his judgment to the effect that the alleged custom excluding daughters was proved. Against this decision Lekraj Kuar preferred the present appeal, but the suit as against Raghubans Kuar, who also appealed to Her Majesty, was carried a step further in the Indian Courts, an application being made in her behalf to the Judicial Commissioner of Oudh under Act XVIII of 1876, s. 28. The Judicial Commissioner, calling for the suit under that section, on the question of the admissibility of the evidence, gave judgment as follows on the 8th July 1876:—

"The principal evidence in support of the custom consists of the *wajib-ul-araiz* of several properties owned by members of the Bahrulia clan of Rajputs — the clan to which the parties belong. Exception was taken to these documents on the part of the daughter, on the ground that they were not prepared or attested by the Settlement Officer in person, as required by Reg. VII of 1822, and that they relate to matters which the Settlement Officer had no jurisdiction to include in them. It must be borne in mind that Reg. VII of 1822 has never been in force in this province in such a manner as to render the revenue or judicial officers bound by the letter of the Regulation. Officers in administering the province were directed to be guided by the spirit of this amongst other Regulations, but they were not tied down to its exact text. Besides this, Reg. IX of 1833 was as much in force as Reg. VII of 1822, and the former provides for the appointment of subordinate officers empowered to perform under the supervision of the Collector all or any of the duties imposed on Collectors by the latter.

"The mere fact then that the settlement-records of this province were prepared and attested by officers subordinate to the Settlement Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves.

"As to the objection that the *wajib-ul-araiz*, especially that of Shiurajpur, contain matters which the officers by whom they were prepared were not authorized to insert, and that as regards Shiurajpur a rule of succession is prescribed which is opposed

to Act I of 1869, it is sufficient to note that these documents are not put forward as evidence of a contract by which the parties are bound, but simply as evidence of the existence of a special family custom, not in the Shiurajpur Taluqa only, but generally throughout the Bahrulia clan.

"As remarked by the North-Western Provinces High Court in the case of *Dabi Dat* v. *Inayat Ali* (1), a *wajib-ul-arz* is not a mere contract, it is a record of rights made by a public servant; and consequently without attestation or execution by the proprietors of the mouza it is entitled to weight as evidence of village custom. I would further note, that it has been ruled by this Court that entries made in settlement-records duly prepared and attested must be presumed to be correct records of facts until the contrary be proved. Legislative sanction has been accorded to this ruling by s. 17, Act XVII of 1876.

"Seeing, then, that the *wajib-ul-araiz* of eight or more separate properties, owned by Bahrulia Rajputs, contain a clause declaratory of the existence of a custom, within the clan, whereby daughters are excluded from succession to real property, I must hold that the plaintiff adduced sufficient evidence in support of the existence of the custom he has set up, to shift the onus of rebutting the presumption raised by this evidence on to the opposite party, *i. e.*, the daughter; and as the daughter has failed to adduce any evidence to rebut this presumption, I must hold that the lower Courts were justified in finding that such a custom did exist, and that under this custom the daughter, Raghubans Kuar, was excluded from the succession to her deceased father, Udit Partab Singh, and that the Shiurajpur Taluqa must pass to the plaintiff as the nearest male collateral."

The fourth paragraph of the *wajib-ul-arz* relating to Shiurajpur was as follows:—

"4. Of transfer of landed property and succession. The taluqdar has the power of alienating property by gift, sale or mortgage. The custom regarding inheritance is, that the eldest son of the taluqdar succeeds on the latter's demise, and becomes absolute master of the entire inheritance. If there be more than one wife, the eldest male member of the family by all the ranis

(1) 2 N. W. P. Rep., 395.

1879

LEKHRAJ KUAR v. MAHPAL SINGH.

RAGHUBANS KUAR v. MAHPAL SINGH.

(wives) inherit, and the son of the eldest rani (wife), as such, has no preferential right. Other sons are entitled to maintenance, provided they be obedient to the member who succeeds. Other brothers have no right to claim 'sir' (1) or to be disobedient to him that succeeds to the taluqa; they must depend for their maintenance on his choice. No one, in case of a misunderstanding, has a right to claim a partition or separation contrary to the wishes of the taluqdar. If the taluqdar happen to have no offspring, the nearest relation succeeds him. The taluqdar has power to adopt during his lifetime the nearest relation from among the sons in the family. After the death of the taluqdar, the eldest rani (wife) can succeed and have the same authority as her husband possessed. After the demise of the eldest rani, if she have not adopted any body during her lifetime, the younger rani succeeds to the estate and has the powers indicated above. If the eldest rani be in possession of the taluqa, and there be more than one younger rani, the latter are entitled to maintenance. The concubines and their issues have no right to share whatever,—they get food and raiment from the person getting the inheritance in case of their being submissive to him, and their seclusion in the 'pardah.' If during his lifetime the taluqdar has granted a village, sír, or grove, to a concubine or her issue, they cannot retain possession after the taluqdar's demise, contrary to the wishes of the person to whom the taluqa descends in succession. The daughters, whether the offspring of lawfully married wife or of a concubine, have no right or share; they are maintained until their marriage."

Mr. *Leith*, Q. C., and Mr. *Doyne* for the appellant Lekhraj Kuar.

Mr. *Cowie*, Q. C., for the appellant Raghubans Kuar.

Mr. *J. Graham* and Mr. *J. D. Mayne* for the respondent.

For the appellants it was contended that the *wajib-ul-arz* of Shiurajpur, and the other administration-papers of villages, admitted in evidence in this suit, had not been prepared and attested in the manner directed and required by Reg. VII

(1) Name applied to lands in a village, which are cultivated by the hereditary proprietors or village zemindars themselves.—*Wilson's Glossary of Indian Terms*, p. 485.

of 1822, having been prepared and attested by subordinate officers of the revenue settlement department, not intended by the Regulation to be entrusted with these powers. It was argued that these papers were not, therefore, admissible under s. 35 of the Indian Evidence Act, 1872, and that, if not shown to come within the latter Act, they were inadmissible. Nor was the custom in question such a usage as the Regulation contemplated. It was not connected with matters bearing on the revenue administration, those being the usage to which the Regulation referred.

The counsel for the respondent were not called upon.

Their Lordships' judgment was delivered by

SIR M. E. SMITH.—The question in this appeal is, whether the plaintiff, Babu Mahpal Singh, or one of the defendants, Rani Raghubans Kuar, is entitled, as the next heir to Udit Partab Singh, one of the taluqdars of Oudh, to the Taluq of Shiurajpur, and another taluq, of which Udit Partab Singh died possessed. Udit died without male issue, leaving a widow, since deceased, and an only daughter, the defendant Raghubans. The plaintiff is the nearest male relation of the deceased taluqdar, standing in the position of first cousin once removed. On the death of Udit Partab Singh, his widow Subhraj was put into possession of the taluqs in dispute; but under a compromise with Rani Lekraj Kuar, the stepmother of the deceased taluqdar, the possession was given up to Rani Lekraj. That was the state of things when the present plaint was brought, and Rani Lekraj Kuar was alone made the defendant. The first judgment in the case was given by the Deputy Commissioner, when the record was in this state. On an appeal from his judgment, the Commissioner directed that the daughter, Rani Raghubans Kuar, should be joined as a defendant, and remanded the case to the Deputy Commissioner, directing a new issue, which was necessary in consequence of her being brought into the suit. That issue in substance was, whether the plaintiff or the daughter was the next heir to Udit Partab Singh, and entitled to succeed to his estate. There can be no doubt that, by the general Hindu

1879

LEKHRAJ KUAR v. MAHPAL SINGH.

RAGHUBANS KUAR v. MAHPAL SINGH.

law, which would prevail in the absence of any special custom, the daughter would have been entitled to the inheritance of her sonless father. The question which is raised in the case, and by the issue which was joined after Raghubans had become a defendant on the record, is, whether, in the Bahrulia clan, to which this family belongs, a custom exists to exclude daughters from succeeding to the inheritance of their fathers' estate.

Other questions were raised in the suit, but the only question which remains to be determined is, whether the evidence which was given by the plaintiff to support that custom was properly admissible? This evidence consists of a number of *wajib-ul-araiz*, or village administration-papers, which state, in a manner which will be hereafter adverted to, a custom to the effect that daughters are excluded from inheritance in the Bahrulia clan. There is no doubt that, if those papers are properly admissible in evidence as proof of the custom, Raghubans, the daughter, would be excluded by the custom stated in them. These *wajib-ul-araiz*, or village-papers, are regarded as of great importance by the Government. They were directed to be made by Reg. VII of 1822, and it may be as well to read the language of it before adverting to the objections which have been taken to the reception of the papers in the present suit. The 9th section is: "It shall be the duty of Collectors, and other officers exercising the powers of Collectors, on the occasion of making or revising settlements of the land-revenue, to unite, with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable, a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land;" and other purposes are referred to in this section. Then in the latter part of it there occurs this passage: "The information collected on the above points shall be so arranged and recorded as to admit of imme-

diate reference hereafter by the Courts of Judicature." It is stated by the Judicial Commissioner that officers in administering the Provinces of Oudh were directed to be guided by the spirit of this, amongst other Regulations.

The papers which are objected to were offered in evidence and received by the Courts under the 35th section of the Indian Evidence Act, 1872. The section is this: "An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

The manner in which these village-papers were made up with respect to the custom, appears to be, that the officer recorded the statements of persons who were connected with the villages in the pargana in which this taluq is situate. Some of the persons whose statements were taken were the proprietors of villages in the taluq; others appear to be the proprietors of villages not in the taluq, but in the pargana. The record contains translations of the *wajib-ul-arz*, but not of the whole contents of the papers. Extracts from them only are printed, and these extracts show that the persons giving the information, made statements, which are contained in paragraph 4, declaring the existence of the custom in question. These documents are entered of record in the office, and they must be taken upon the evidence to have been regularly entered and kept there as authentic *wajib-ul-arz* papers. The objections which were taken to their reception are stated in the judgment of the Judicial Commissioner, and are these: "Exception was taken to these documents on the part of the daughter on the ground that they were not prepared or attested by the Settlement Officer in person as required by Reg. VII of 1822, and that they relate to matters which the Settlement Officer had no jurisdiction to include in them." Those are the only objections which are stated by the Judicial Commissioner to have been made. A further objection which was relied on by Mr. Cowie appears also to have been taken by the daughter

1879

LEKRAJ KUAR v. MAHPAL SINGH.

RAGHUBANS KUAR v. MAHPAL SINGH.

in the course of the proceedings, *viz.*, that she was not bound by the statements in question, inasmuch as she was no party to the making up of the *wajib-ul-arz*. Before dealing with these objections, it will be convenient to refer to what the Commissioner says of the documents. He says: "These are official records of admitted customs all properly attested." It must therefore be taken that they are official records kept in the archives of the office, and that they are authenticated by the signatures of the officers who made them, that being what their Lordships understand from the statement of the Commissioner, that they are all properly attested.

The first objection, and the one most relied upon, is, that these papers were not prepared or attested by the Settlement Officer in person. We have no precise information of the manner in which the Regulations were directed to be of force in Oudh, but the Judicial Commissioner, as already mentioned, says: "Officers in administering the Province were directed to be guided by the spirit of this amongst other Regulations, but they were not tied down to its exact text." It is plain that they could not be so tied down, because the Regulation in question refers to Collectors, and there are no Collectors in the Province of Oudh. Therefore, in applying this Regulation in its spirit, we must substitute for Collectors and their subordinates the persons who were performing the duties which would have fallen upon Collectors in the parts of India to which the Regulation originally applied. These would be the Settlement Officers, or those subordinate to the Settlement Officers, who were employed in making or revising the settlements. The words of the Regulation are:—"It shall be the duty of Collectors and other officers exercising the powers of Collectors, on the occasion of making or revising settlements of the land-revenue," to make up the papers. When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation, unless the contrary appears. Upon this objection the Judicial Commissioner makes the following observation: "The mere fact then that the settlement-records of this Province were prepared and attested by officers subordinate to the Settle-

ment Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves." He was of opinion that the officers who obtained this information, and who attested the record of what they had obtained, were officers subordinate to the Settlement Officer, and this being so, their Lordships think that the Judicial Commissioner was right in holding that the *wajib-ul-araiz* were prepared by the proper officers, and that this first objection ought not to prevail.

If then these documents were made by proper officers, is there any valid objection to receiving in evidence the information which they record? The objection taken and referred to by the Judicial Commissioner does not very precisely hit the point which has been argued at the bar. He says: "The objection was that they"—that is, the administration-papers—"relate to matters which the Settlement Officer had no jurisdiction to include in them." That objection seems to their Lordships to be unfounded. The officers who were to make the inquiries were directed to ascertain and record "the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible, of all local usages connected with landed tenures." This custom of the Bahrulia clan relating to the mode of inheritance in the clan seems clearly to be a usage of the kind which the Regulation requires the officer to ascertain and record.

The objection which has been argued is, that the papers, upon the face of them, do not show that the officers had passed any judgment upon the information they received, and contain no record of their opinions and findings upon them. It is true that no express statement of the opinion or finding of the officers appears upon the papers, but their Lordships think that the fact that the officers recorded these statements, and attested them by their signature, amounts to an acknowledgment by them that the information they contained was worthy of credit, and gave a true description of the custom. Suppose the papers had had a heading such as the following: "The usages of the Bahrulia clan appear in the information recorded below." This would undoubtedly be an expression by the officer of his opinion that

1879

LEKRAJ KUAR v. MAHPAL SINGH.

RAGHUBANS KUAR v. MAHPAL SINGH.

the statements contained a correct description of the custom. Then, when we find that the statements are recorded and authenticated in the manner that has been mentioned, and placed in the Government records, ought it not to be implied that the officer has in effect affirmed that the information embodied in the recorded statements was true, and described an existing custom? Their Lordships think that such an implication may in this case be properly made.

The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulations, and the plaintiff must therefore show that these papers are admissible under some provision of the Indian Evidence Act. That relied on is the 35th section, which has been already read. It is necessary to look at the precise terms of this section; and for the present purpose it may be read: "An entry in any official record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duties is itself a relevant fact." There can be no doubt that the entries in question, supposing them to bear the construction already given to them, state a relevant fact, if not the very fact, in issue, *viz.*, the usage of the Bahrulia clan. If so, then, the entry having stated that relevant fact, the entry itself becomes by force of the section a relevant fact; that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant.

There is another ground upon which it is said that these entries would be admissible. Supposing that these papers were not to be treated as records themselves describing the custom, but as recording only the opinions of persons likely to know it, the 48th section would appear in that view of the entries to make them admissible. The 48th section is,—"When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence, if it existed, are relevant." Then, if opinions of this nature were relevant, the entry of such opinions in an official record is itself a relevant fact, which makes the entry admissible. There may be doubt whether, what for the present purpose are assumed to

be opinions, would fall under the 48th clause, or the 49th, which is as follows, and refers to family usages: "When the Court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons having special means of knowledge therein are relevant facts." It is enough for their Lordships, without giving an opinion on this last ground, to rest their decision as to the admissibility of the entries on the first ground. Placing the admissibility of the papers on this ground, the Evidence Act does not appear to have altered the law with regard to papers of this description, for it had been decided by the High Court of North-Western Provinces that *wajib-ul-araiz* papers, being a record of rights made by a public servant, were admissible in evidence and entitled to weight in proof of village-customs. That case is found in the second Volume of the N. W. P. High Court Reports, p. 395.

On the part of the daughter it was objected that, being no party to the making up of the papers, she was not bound by the statements in them. She is, no doubt, not bound in the sense of being concluded by them. They do not in any way estop her from asserting her right or disputing the custom which is stated in them. They are only received as evidence, and are open to be answered, and the statements in them may be rebutted. No evidence however was given on the part of either of these defendants to show that the custom did not exist, and their Lordships cannot but observe that, if the custom did not exist, nothing could have been easier than to obtain proof of descents and succession to property which would negative it. It appears that there are numerous villages in this taluq, and more in the pargana; the Bahrulia clan is a large one, and, if the custom did not exist, the defendants must have had means, to be obtained without difficulty, of disproving it.

Their Lordships, therefore, think that these administration-papers were properly admitted in evidence; that the objections made to their reception have failed; and that being so, it is not disputed that they contain full proof of this custom.

Their Lordships are of opinion that the judgments of the

1879

LEKRAJ KUAR v. MAHPAL SINGH.

RAGHUBANS KUAR v. MAHPAL SINGH.

Court below are right, and they will humbly advise Her Majesty to affirm them, and to dismiss the appeal with costs.

Appeal dismissed.

Agent for the Appellants: Mr. *T. L. Wilson.*

Agents for the Respondents: Messrs. *Watkins* and *Lattey.*

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

1880
May 7.

IN THE MATTER OF MONOHUR MOOKERJEE (PETITIONER).*

Executor by Implication—Probate—Reference—High Court a Court of Concurrent Jurisdiction—Indian Succession Act (X of 1865), ss. 182, 264—Code of Civil Procedure (Act X of 1877), s. 617.

Where *A*, under the terms of a will, although not expressly appointed an executor, was directed to receive and pay the testator's debts, and to get in and distribute his personal estate,—

Held, that *A* must be taken to have been appointed under the will an executor by implication.

In the goods of Baylis (1) followed.

The order made by a District Judge on an application for probate not being a final order, cannot be referred for the opinion of the High Court under s. 617 of the Code of Civil Procedure. But the Court will, under certain circumstances, entertain such an application, as a Court of concurrent jurisdiction, under s. 264 of the Indian Succession Act.

AN application was made in this case by one Monohur Mookerjee for probate of the will of his father Rajkissen Mookerjee, deceased. The petitioner contended he was entitled to such probate under the terms of the will, which appointed him an executor by implication under s. 182 of the Indian Succession Act. The 4th, 5th, and 8th paragraphs of the will were as follows:—

"That whatever amount shall remain due to me under the terms of the deed of gift from my eldest discarded son Hurry Hari Mookerjee, on account of family expenses, religious expenses, and building expenses, or whatever amount that shall

* Reference No. 8 of 1880 by J. P. Grant, Esq., the District Judge of Hooghly, under s. 617 of the Civil Procedure Code; referred on the 16th April 1880.

Note.—The Sections quoted from the Indian Succession Act will be found in the Hindu Wills Act (XXI of 1870), ss. 182, 264.

(1) L. R., 1 P. & M., 21.