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and to prevent the defendant from disputing his title. It is contrary to the practice of this Court to remand a case in order to give a plaintiff a second opportunity of proving his case, except for special reasons, and I see no reason why such a course should be adopted in this case. This is not a case in which the Court can see that the plaintiff is entitled to the relief which he claims on a ground other than that stated in his plaint. Nor is it a case in which any evidence tendered by the plaintiff has been wrongly excluded. There is no ground whatever for the admission of fresh evidence. On the evidence now on record the plaintiff's case fails, and should have been dismissed. I therefore concur in the order proposed by my learned colleague, namely, that this appeal should be accepted and the suit dismissed with costs.

BY THE COURT.—The appeal is allowed, and the decrees of the Lower Courts are set aside with costs.

Appeal decreed.

PRIVY COUNCIL.

P. C.
1901
June 21.
November 8 *and* 30.

BAHADUR SINGH AND OTHERS (PLAINTIFFS) *v.* MOHAR SINGH AND OTHERS (DEFENDANTS).

[Appeal from the High Court, North-Western Provinces, Allahabad.]

Title—Evidence and proof of Title—Effect of arrangement made by Settlement Officer between the widow in possession and the ancestors of the plaintiff—Recognition of relationship and heirship—Act No. I of 1872 *(Indian Evidence Act), section* 32, *clauses* (5) *and* (6)—*Evidence of pedigree—Statements* post litem—*Estoppel.*

The plaintiffs claimed certain lands on the death in 1892 of the widow of the last male owner as his collateral heirs. The last owner was, they alleged, descended in the same degree from a common ancestor as the persons of whom the plaintiffs were themselves descendants in the direct line. These persons had made a similar claim through the common ancestor in 1847, when the settlement of the estate with the widow was being made, alleging themselves to be her husband's reversionary heirs (the widow being then in possession of the lands in dispute). On that occasion (it being uncertain whether she had an absolute or only a life estate in the property, though she claimed to be the absolute owner) she was asked by the Settlement Officer who would be her heirs on her death. Her reply was:—"If the claimants undertake to pay the

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON AND LORD LINDLEY.

debt which is due by me on account of revenue, or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death; but so long as I am alive I have every sort of power in respect of my estate"; and the estate was settled with her, the claimants accepting her conditions. In the record-of-rights showing the shares in the estate as prepared under Regulation IX of 1833 at the time of settlement the widow stated:—"As to the appointment of lambardar the claimants who are own brothers will become the owners of this estate in equal shares, provided they pay the present and future debts and remain obedient to me, and one of them whom the Collector will think fit will be appointed lambardar." At a further settlement made in 1866 the widow stated:—"I have no heir to succeed me after my death, therefore I cannot propose anything in regard to the office of lambardar."

Held by the Judicial Committee that the statements made in 1847 amounted to an admission by the widow of relationship and recognition of the plaintiffs' ancestors as her successors, a recognition on her part both that her husband's heirs were entitled to succeed her, and also that she was not prepared to contest their claim to be such heirs. The statements were unintelligible on any other footing, and unless the claimants were the heirs they had no interest in the proceedings. Neither their acceptance of her conditions, nor her subsequent statement that she had no heirs, detracted from this effect of the proceedings of 1847; the latter statement was strictly accurate if (as their Lordships found was the fact) she had only a Hindu widow's estate in the property.

The principal oral evidence consisted of statements made by the plaintiffs as to their descent, the information as to which they had received from their ancestors. Objection was taken that such of these statements as were made since 1847 were inadmissible in evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872) as being *post litem*. The Judicial Committee held that they were admissible, the heirship of the then claimants not being really in dispute at that time.

The widow had in 1862 made an alienation of the property to the defendants and it was objected to the plaintiffs' claim that they were estopped by what took place in 1847 from disputing her power of alienation as absolute owner of the property.

Held by the Judicial Committee that there was no evidence of any representation on which to found an estoppel; and even assuming that the arrangement made by the Settlement Officer amounted to a contract between the then claimants and the widow, such contract was not binding on the plaintiffs. The then claimants were only expectant heirs with a *spes successionis*. The plaintiffs claimed in their own right as heirs of the last male owner when the succession opened, and it could not be held that a person so claiming was bound by a contract made by every person through whom he traced his descent.

On the whole case the Judicial Committee held (reversing the decision of the High Court) that the plaintiffs had made out the title they set up.

APPEAL from a decree (23rd December 1898) of the High Court at Allahabad, reversing a decree (31st January, 1896) of

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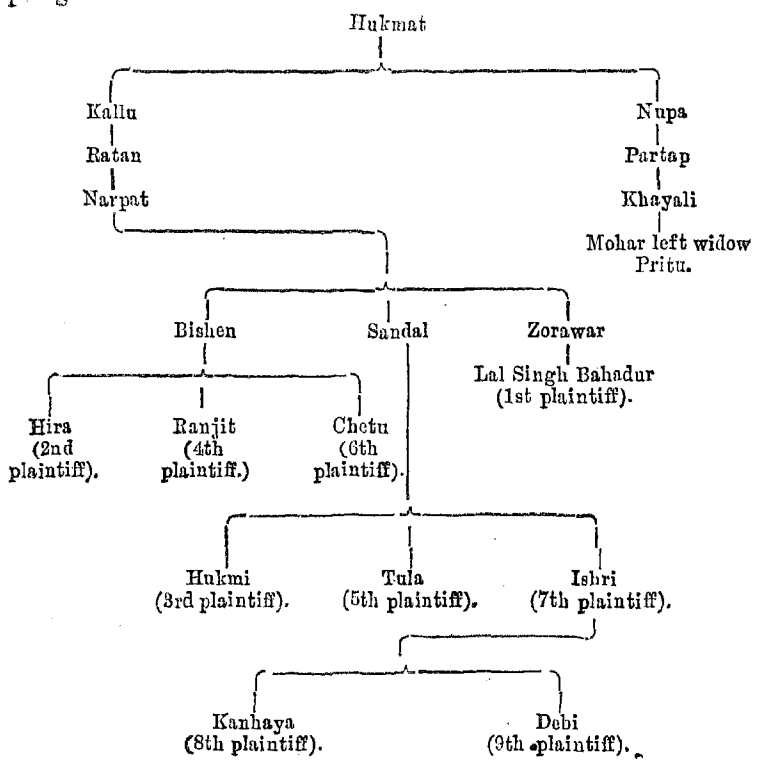
the Subordinate Judge of Dehra Dun and dismissing the appellants' suit with costs.

In their suit, the appellants, claiming as heirs in the male line of one Mohar Singh, sought to recover on the death of his widow, Pritu, certain jungle lands called mahal Guljawari, which were in possession of the defendants under a grant from her.

Mohar Singh died at some date considerably before 1847. He left a widow, Pritu, but no issue. The plaintiffs claimed to be the collateral heirs of Mohar Singh, as shown in the following pedigree:—



The plaintiffs alleged that on the death of Mohar Pritu acquired the rights of a Hindu widow in his estate, and that Guljawari then passed to her with his other property. On the 29th of November 1862 Pritu granted to the predecessors of the defendants for Rs. 1,000 a lease of three jungles, of which Guljawari was one with the right of cutting wood. On the 15th of February 1867 she sold the same jungles to one Major Delane, subject to the rights

of the lessees. He obtained mutation of names with the same reservation. Litigation ensued between Major Delane and the lessees, which was terminated by the sale by Delane of his rights to the lessees on the 23rd of May 1868. The defendants remained in possession until after the death of Pritu, which took place on the 3rd of March 1892.

The plaintiffs alleged that the defendants' lease expired on the 29th of November 1892; that they then stopped the defendants from cutting wood, on which, in proceedings under the Specific Relief Act, the defendants obtained an order for possession under section 9 of that Act, and possession was given to them.

The defendants in their written statement denied the plaintiffs' right to sue. They alleged that Pritu had been turned out for misconduct, and had lost her right to inherit; that on the death of Mohar his aunt Nando took possession of the property; that on her death Pritu took forcible possession and became full owner by settlement proceedings in 1848. The transactions of the adverse claimants at the time of those proceedings were pleaded as constituting an estoppel to the present plaintiffs.

The defendants further asserted that the lease was valid by custom in Dehra Dun, and as a matter of necessity within the legal powers of Pritu if she had only a widow's estate; that they were now holding either under a valid sale from Major Delane, or had obtained a good title by limitation; and they pleaded that they were purchasers for value in good faith, and if turned out were entitled to compensation.

These settlement proceedings which formed the documentary evidence in the case took place in 1847-48 and in 1866. The first zamindari settlement in Dehra Dun was made in 1847, and of the property now in dispute amongst other estates. On the 16th of February, 1847, Zorawar presented a petition to the Settlement Officer, Mr. Ross, in which he claimed that the settlement ought not to be made with Pritu, on the ground that Narpat, his father, and Khayali, the father of Mohar, were own brothers. A petition to the same effect was put in by Bishan on the 14th of May, 1848, in which he represented that Pritu had been turned out of her home for misconduct. In the same year depositions were given by

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Bishan and Zorawar in which they alleged that the zamindari of Dain Adhoiwala (which included the village of Guljawari now sued for) had been purchased jointly by their grandfather Ratan, and Mohar's grandfather who appears to have been known by the name of Chaini. A genealogical table showing the descent of both parties from a common ancestor was filed by Bishan. On the other hand Pritu's mukhtar gave a deposition in which he alleged that the property was purchased by Chaini alone, and that Mohar and Zorawar were only related as members of the same brotherhood. The result of the inquiry then made is shown in the following record of the proceedings of the Settlement Officer of the 9th of October 1848:—

"To-day, at the time of the settlement of Dain in dispute, this case was brought forward along with the office report and that of the Tahsildar of Mahal in the presence of the parties. After perusing the papers on the record and hearing the statement of the parties it appears that both the parties, *i.e.*, the (husband of the) person now in possession and the claimants are the descendants of a common ancestor, and the person now in possession is a widow having no heir or child. Although the claimants are the descendants of a common ancestor, yet they were never in possession of the share in dispute, a fact admitted by the claimants themselves. Having regard to the fact that the claimants have been out of possession from of old, their claim for possession and right to settlement was disallowed and the person now in possession, who was present with Natthu, her general-attorney, was asked to state who would be the owner of her estate after her death. She replied:—"If Zorawar, Bishan and Sandal, the claimants, who are own brothers, undertake to pay the debt which is due by me on account of the revenue of this Dain or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be the owners of my estate after my death. But so long as I am alive, I have every sort of power in respect of my estate." As the statement of the person now in possession seemed just and proper, the claimants were directed that if they had a claim to the estate, they should act according to the conditions now stated by the person now in possession before the Court, and that thus they could be the owners of her estate after her death; that during her lifetime she was to remain the owner of her estate in every respect and that they could not in any way interfere with her estate without her consent. Accordingly, the claimants agreed to act according to the conditions alleged by the person now in possession, and requested that their names might be entered in the settlement wajib-ul-arz (village administration paper) so that no dispute should arise in future. It is therefore

ORDERED:

"That for the reasons given above the claimants' claim to have the settlement made with them as zamindars during the lifetime of the person now in possession be considered disallowed, and according to the statement of the

person now in possession a mention of the fact that after her death, the claimants, with Sandal their third brother, would, if they fulfilled all the conditions alleged by her, be entitled to her estate be made in the wajib-ul-arz (village administration paper)."

The administration paper was as follows:—

"RECORD-OF-RIGHTS showing the shares in Dain Adhoiwala, pargana Sanaur, district Dehra Dun, as prepared under Regulation IX of 1833, at the time of settlement in 1848."

"As to the appointment of a lambardar. After my death, Zorawaf, Sandal and Bishan, who are own brothers, will become the owners of this estate in equal shares, provided that they pay the present and future debts and remain obedient to me, and one (of them) whom the Collector will think fit for lambardarship will be appointed lambardar."

At the settlement proceedings in 1866, the settlement of the zamindari with Pritu was confirmed. On that occasion she stated:—

"I have no heir to succeed me after my death: therefore I cannot propose anything in regard to the office of lambardar."

The oral evidence so far as it is material is sufficiently stated in their lordship's judgment. The principal witnesses Hira and Bahadur stated that they are in possession of the rest of the property held by Pritu.

The issues settled were (1), are the plaintiffs entitled to sue? (2) what was the position of Pritu with respect to the property in dispute, *i.e.* had she possession with the interest of a Hindu widow merely or was she in possession as absolute owner? (3) Did Pritu convey the property to Major Delane? (4) If so, and her position be found to be that of a Hindu widow, was the transfer justified on the ground of necessity, and is it binding on the plaintiffs?

On the 31st of January, 1896, the Subordinate Judge gave a decree in favour of the plaintiffs. On the first issue he found that they had made out their title satisfactorily, relying chiefly for this finding on the transaction of 1848, which was proved by documents filed by the defendants. On the second issue, after rejecting the suggestion of Pritu's misconduct and expulsion, of which there was no evidence, he said:—"It appears to me indisputable that Pritu got possession of Mohar Singh's property as his widow. Nando appears to have looked after the estate, Pritu being then very young. On the death of Nando, Pritu assumed the

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management herself." Further, he held that the plaintiffs were not estopped by anything done by their ancestors in 1848 from denying that she was then an absolute owner, and that Government in settling with her as zamindar was not granting new rights, but was merely restoring certain rights which had been for some time in abeyance. On the third issue he found that Pritu had sold the jungles in dispute to Major Delane who had conveyed them to the defendants; but on the fourth issue he held that her alienation was not justified by any proved custom, nor under the pressure of any such necessity as to constitute a valid alienation by a Hindu widow.

From this decision the defendants appealed to the High Court at Allahabad, a Division Court of which (KNOX and BANERJI, JJ.) on the 23rd of December, 1898, reversed the decree of the Subordinate Judge on the ground that the plaintiffs had not made out their title, which they were bound to do. The oral evidence they treated as quite insufficient. As to the documentary evidence they said:—

"As regards the documentary evidence, we may observe that it is not consistent with the genealogy now set up by the plaintiffs. It appears that in 1847 and 1848, upon the death of Musammat Nando, the paternal aunt of Mohar Singh, Bishan, Zorawar and Sandal, the ancestors of the present plaintiffs, claimed the estate in the court of the Settlement Officer. Zorawar stated in his petition, dated 16th February, 1847, that his father Narpat and Khayali, the father of Mohar, were own brothers. In his deposition he said that his grandfather Ratan and Chaini, the grandfather of Mohar Singh, were cousins. Bishan stated in his deposition, dated 14th August, 1848, that Chaini, the ancestor of Mohar, and Ratan were 'own brothers'. There is no mention of Chaini in the pedigree now set up, and no pedigree appears to have been produced in the proceedings in which the above statements were made. The relationship then claimed was repudiated on behalf of Musammat Pritu, who said that Zorawar and Mohar were only members of the same brotherhood. The Settlement Officer was no doubt of opinion that Pritu's husband and the claimants were descended from the same common ancestor, but he did not decide what the relationship was. It appears that Pritu stated that Zorawar, Bishan and Sandal would be the owners of her estate after her death, provided they paid her debts, present and future, and gave her satisfaction. This statement is regarded by the Court below as an admission of relationship and recognition by Pritu of the plaintiffs' ancestors as her heirs and successors. We are unable to take the same view of the statement of Pritu as the learned Subordinate Judge. It seems to us that in order to avoid further disputes, Pritu consented to those persons taking her estate after her on the condition

that they should pay her debts and remain obedient to her. If they were her heirs and were recognised by her as such, she was not competent to impose any such condition and those persons would not have submitted to it. It appears that this condition was not complied with, for we find that in the record-of-rights and village administration paper of 1866 Pritu distinctly stated that she had no heir to succeed to her after her death. In the face of this statement we cannot hold that she admitted the plaintiffs to be her heirs.

"Upon a careful consideration of the evidence, oral and documentary, we are of opinion that it is not sufficient to prove the relationship claimed by the plaintiffs. It may be that plaintiffs are distantly related to Mohar Singh; but unless they can establish that they are his next reversioners, they cannot succeed in the suit, and this they have, in our judgment, failed to do. The defendants, it is true, do not point to any particular person as the heir to Mohar Singh; but that circumstance cannot help the plaintiffs. As the plaintiffs have come into court and their title is denied by the defendants, they were bound to prove their title by clear and satisfactory evidence, and in our opinion they have not been able to do so. It is urged that they are in possession of the remainder of the estate left by Pritu; but the evidence proves the contrary. As the plaintiffs have not established the title upon which they came into court, their suit should have been dismissed. We allow the appeal and setting aside the decree of the Court below dismiss the suit with costs."

From this decision the plaintiffs appealed to His Majesty in Council.

The appeal came on for hearing on June 21st, and was heard *ex parte*, the respondents not appearing. Previously to judgment being delivered, however, their Lordships granted an application by the respondents to be allowed to appear and be heard. The case was re-heard on the 8th of November.

Mr. *Mayne* for the appellants contended that on the evidence the plaintiffs had proved their title. They had proved that they were collateral heirs of Mohar Singh, and that they were descendants of the claimants, Bishan and his brothers, whose descent from a common ancestor with Mohar Singh was admitted in 1848 and made the basis of the arrangement between them and Pritu recorded in the proceedings of that year; and the plaintiff's claim is founded upon the relationship then set up and admitted.

There was no evidence, no suggestion even, that there were any other collaterals of Mohar Singh in existence, and the evidence given by the plaintiffs was sufficient to throw on the defendants, who had no title, the burden of proving that there

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were any heirs nearer than the plaintiffs. The supposed inconsistency referred to by the High Court between the statements of Bishan and Zorawar that Narpat and Khayali and Chaini and Ratan were "own brothers," is only apparently so, for the expression so translated, is one loosely applied to cousins. And the fact that the grandfather of Mohar was in 1848 called Chaini and is now called Partab is not material, the same man being obviously referred to under each name. It is submitted that the judgment of the High Court is against the weight of evidence, and should be set aside. As to the admissibility in evidence of the proceedings of 1847-48 and of the pedigree sections 13 and 32, clauses 5 and 6 of the Evidence Act (I of 1872) were referred to.

Mr. *Cowell*, for the respondents, contended that the High Court had rightly decided that the plaintiffs had failed to establish the title they set up. There is nothing in the proceedings of 1847-48 which evidenced or raised any presumption, as against the respondents, that the appellants were the collateral relations of Mohar Singh or entitled to inherit his estate. The High Court find that the relationship then claimed was repudiated on behalf of Pritu. She, however, then consented to the claimants' taking her estate after her death on certain conditions which appear to have been not complied with; for in 1866 Pritu stated that she "had no heirs to succeed her after her death." The plaintiffs, it is submitted, do not prove descent from a common ancestor with Mohar Singh: they do not produce the only genealogical table said to have existed in the family. All that they do produce to show their descent is a table of descent said to have been copied from some other document. The oral evidence as to their relationship is vague and unreliable. The statements made by Hira and Bahadur are inadmissible in evidence under section 32 of the Evidence Act, clauses 5 and 6; as they say they heard what they state from others since 1847, they are statements made, therefore, after the question in dispute was raised. The respondents hold under an alienation of the property made by Pritu, which, it is submitted, is valid by the usage then prevailing in Dehra Dun, and, having been made by her under justifiable legal necessity is binding on the plaintiffs.

Hunter's Gazetteer, p. 410, and the case of *Nobokishore Sarma* v. *Hari Nath Sarma* (1) were referred to. The plaintiffs are estopped by the transaction which took place in 1847-48 from disputing the respondents' right under the alienation by Pritu.

Mr. *Mayne* was not called upon to reply, and the appeal was allowed, their Lordships stating that they would give their reasons for their report on a subsequent day.

On the 30th of November 1901, the reasons for their lordships' report on the appeal were delivered by LORD DAVEY:—

The suit out of which this appeal has arisen was one for recovery of some jungle land called Guljawari. This land was formerly the property of one Mohar Singh, who died before the year 1847 and probably as early as 1835. The plaintiffs and present appellants claim to be the next-of-kin *ex parte paternâ* and heirs of Mohar Singh. The defendants and respondents claim under a title derived from his widow Pritu, who had been recognised as proprietor of the land at the settlement of 1847. Pritu died in 1892, and thereupon the appellants claimed to succeed on the footing of her having had only a Hindu widow's estate, and they allege that the alienation made by Pritu under which the respondents claim is invalid.

Issues were stated by the Subordinate Judge for the purposes of deciding the various questions which arise on the pleadings, the first issue being:—"Are the plaintiffs entitled to bring this suit?"

All the issues were decided by the Subordinate Judge of Dehra Dun in favour of the plaintiffs, and by his decree dated the 31st January, 1896, he ordered that the plaintiffs' claim be decreed with costs. The decree was reversed in the High Court of the North-Western Provinces. The learned Judges of that Court held that the plaintiffs had failed to make out their title as heirs of Mohar Singh, and therefore allowed the appeal and dismissed the suit without considering the other issues in the case. The first question, therefore, is whether the plaintiffs have proved their title.

The appellants have adduced both documentary and oral evidence in support of their title. But before considering the

(1) (1884) I. L. R., 10 Calc., 1108.

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evidence it will be convenient to state the outlines of the pedigree put forward by the appellants. They are the sons and grandsons of three brothers named Bishan, Sandal, and Zorawar. These three brothers were the sons of one Narpat, who was a direct descendant in the fourth degree of Hukmat, the alleged common ancestor. Mohar (it is said) was also descended in the fourth degree from Hukmat. His grandfather was called Chaini in the proceedings of 1847, but is referred to as Partab in the pedigree now put forward.

The documentary evidence consists of the Settlement Proceedings in 1847 and 1866. It is a little difficult to follow the proceedings before the Settlement Officer in 1847. Zorawar and Bishan both filed petitions claiming possession of the zamindari of Dain Adhoiwala, which includes the lands in suit. The story told by the claimants was that the property had been jointly purchased by Chaini, the grandfather of Mohar and Ratan, the grandfather of the claimants, and that on a division Chaini acquired Adhoiwala. Bishan said that Chaini and Ratan were own brothers; Zorawar described them as cousins. It is, however, apparent throughout these proceedings that the term "brothers" is used in a loose sense. What is meant by both deponents is that they were members of one family. Zorawar in his deposition says "now my right is this that Mohar Singh died leaving only his wife"; and the ground on which they sought immediate possession was that Pritu had forfeited her estate by misconduct. There is not a trace on these documents of the effective assertion of any title by Pritu otherwise than as widow of Mohar, and indeed the deposition of her mukhtar Sahib Singh shows what her title was. Their Lordships think it plain that the three brothers were then claiming as the heirs of Mohar and in no other character.

Mr. Ross, Superintendent of the Settlement Department, in his record of the proceeding before him, stated that after perusing the papers and hearing the statement of the parties it appeared that both the parties, *i.e.* the husband of the person now in possession (Pritu) and the claimants were the descendants of a common ancestor, and that Pritu was a widow having no heir or child. He further stated that Pritu being asked to state

who would be the owner of her estate after her death replied :— "If Zorawar, Bishan and Sandal, the claimants, undertake to pay the debt which is due by me on account of the revenue of this Dain or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death, but so long as I am alive I have every sort of power in respect of my estate." Mr. Ross seems to have advised or put pressure on the claimants to act according to the conditions alleged by Pritu and made an order accordingly.

The record-of-rights showing the shares in Dain Adhoiwala as prepared under Regulation IX of 1833 at the time of settlement in 1848 is as follows :—"As to the appointment of lambardar—after my death Zorawar, Sandal and Bishan who are own brothers will become the owners of this estate in equal shares, provided they pay the present and future debts and remain obedient to me, and one of them whom the Collector will think fit for lambardarship will be appointed lambardar."

These proceedings at least show that the claim of kinship now put forward is not a recent invention, but was made nearly fifty years before the commencement of the present suit, and was not then seriously controverted, if it was not in terms admitted. The learned Judges in the High Court decline to regard the statement of Pritu as an admission of relationship or recognition of the appellant's ancestors as her successors. The whole proceeding, however, is unintelligible on any other footing. Pritu could not designate her successors or bind the reversion after her death. On the other hand unless the brothers were assumed to be the then heirs of Mohar they had no interest in the matter. Whatever was said or done is not of course conclusive upon the respondents or perhaps standing alone very strong evidence in favour of the appellants; but their Lordships think it was a recognition on her part both that her husband's heirs (which is the character in which the three brothers claimed) were entitled to succeed her and also that she at any rate was not prepared to contest their claim to be such heirs. The rather unintelligible conditions which the three brothers were induced by Mr. Ross to acquiesce in as the price

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of a recognition of their title to succeed Pritu do not seriously detract from the general effect of the proceedings in 1847-48.

The learned Judges seem to find some contradiction to the entry made at the settlement of 1847-48 in the statement made by Pritu in the record-of-rights and village administration paper of 1867-67—"I have no heir to succeed me after my death. Therefore I cannot propose anything in regard to the office of lambardar."

This of course is strictly accurate if Pritu had only a widow's estate. Bishan, Sandal and Zorawar had claimed and the appellants now claim as heirs of Mohar and not as heirs of Pritu. This can hardly have been overlooked by the learned Judges.

The only oral evidence which need be noticed is that of two of the plaintiffs and appellants, Hira and Bahadur. Hira is a son of Bishan and he states the descent of his father and mother from the common ancestor in the same way as was stated in 1847 except that he calls Mohar's grandfather Partab instead of Chaini. He says he learnt the particulars of his family from his elders. He also says that he found an old genealogical tree in the house, but for some reason it was not produced, and the respondents do not appear to have pressed for its production. If it had been produced it would of course have been treated with suspicion. The learned Judges comment on his evidence because he does not know whether the father of Mohar Singh had any other son (it is not suggested that he had) or what was the name of the husband of Nando, the paternal aunt of Mohar, which seems a little hypercritical and also on the non-production of his genealogical tree.

Bahadur is the grandson of Zorawar, from whom he says he obtained information about his family pedigree. He also speaks of the names of ancestors being called out on the occasion of marriages and says that in performing the ceremonies of *sradh* and *tarpan* the names of the father, grandfather, and of all the ancestors he can remember are repeated. He adds a detail in the descent of Mohar from Hakumat Singh, *viz.* that Nupa who was Mohar's great-grandfather had three sons Chaini, Partab, and Chaila. This may account for the differences in the name of Mohar's grandfather in the pedigree of 1847 and that in the

present suit. One brother may have been mistaken for the other. The variation is not a mark of untrustworthiness, but rather points to a more careful investigation.

There is also evidence that Pritu in her life-time was on good terms with the appellant's family, and that Hira performed her funeral rights.

Both Hira and Bahadur were cross-examined at great length; but there is no suggestion throughout the cross-examination of any other person as a possible heir, nor is there any attempt to attack any particular link in the chain.

It is of course for the plaintiffs to make out their title and they can only succeed on the strength of their own title. But their Lordships think that the appellants have given admissible evidence which in the absence of any counter-evidence and in the circumstances, sufficiently supports their title.

Mr. *Cowell* suggested that all statements made to the witnesses Hira and Bahadur since the year 1847 were inadmissible under section 32(5) of the Indian Evidence Act as being made *post litem*. It does not, however, appear that the heirship of the then claimant was really in dispute at that time. Such a construction of the Act would practically exclude any attainable evidence in the present case.

This appeal was originally heard *ex parte*, and the only question on which their Lordships were called upon to pronounce an opinion was whether the appellants had sufficiently proved their kinship. Subsequently the respondent obtained leave to appear and put in a case and their Lordships having heard the respondent are now in a position to dispose of the whole case.

The only additional point argued by Mr. *Cowell* on the respondent's behalf was that the appellants are estopped by what took place in 1847-48 from disputing Pritu's right to alienate the property This argument fails both in fact and in law. There is no evidence of any representation on which to found an estoppel; and even assuming that the arrangement made by Mr. Ross amounted to a contract between the then claimants and Pritu, such a contract is not binding on the appellants. According to Indian law the claimants of 1847 were but expectant heirs with a *spes successionis*. The appellants claim in their own right as heirs of

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Mohar when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent.

Their Lordships have already intimated that they will humbly advise His Majesty that the order appealed from be reversed and that the decree of the Subordinate Judge should be restored.

The respondents will pay the costs of this appeal including those of the first hearing.

Appeal allowed.

Solicitors for the appellants—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitors for the respondent—Messrs. *Ranken, Ford, Ford* and *Chester.*

J. V. W.

APPELLATE CIVIL.

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August 2.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

MAKKA (JUDGMENT-DEBTOR) *v.* SRI RAM AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Joint decree—Sale in execution—Purchase by decree-holders—Receipt for part of decretal money given by one decree-holder on behalf of both—Sale set aside—Appeal—Civil Procedure Code, sections 244, 294, 311.

Two persons holding a joint decree caused certain immovable property of their judgment-debtor to be sold, and having obtained permission to bid, themselves became the purchasers. The property was knocked down to the two decree-holders jointly. An application was then made to the officer conducting the sale by one of the decree-holders auction purchasers, but purporting to act in the name of, and on behalf of the other auction purchaser as well, asking that the purchase money should be set off against the amount due under the decree, and that to that extent satisfaction of the decree should be entered up; he at the same time paid the auction fees. This application was made under the second clause of section 294 of the Code of Civil Procedure. A receipt for the amount of the purchase money was given to the officer conducting the sale, and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held. The judgment-debtor subsequently made an application under section 311 to the Subordinate Judge, asking to have the sale set aside. That application was rejected; but the Subordinate

* Second Appeal No. 575 of 1900 from a decree of F. E. Taylor, Esq., District Judge of Shahjahanpur, dated the 7th March 1900, reversing an order of Babu Nihala Chandra, Subordinate Judge of Shahjahanpur, dated the 18th November 1899.