

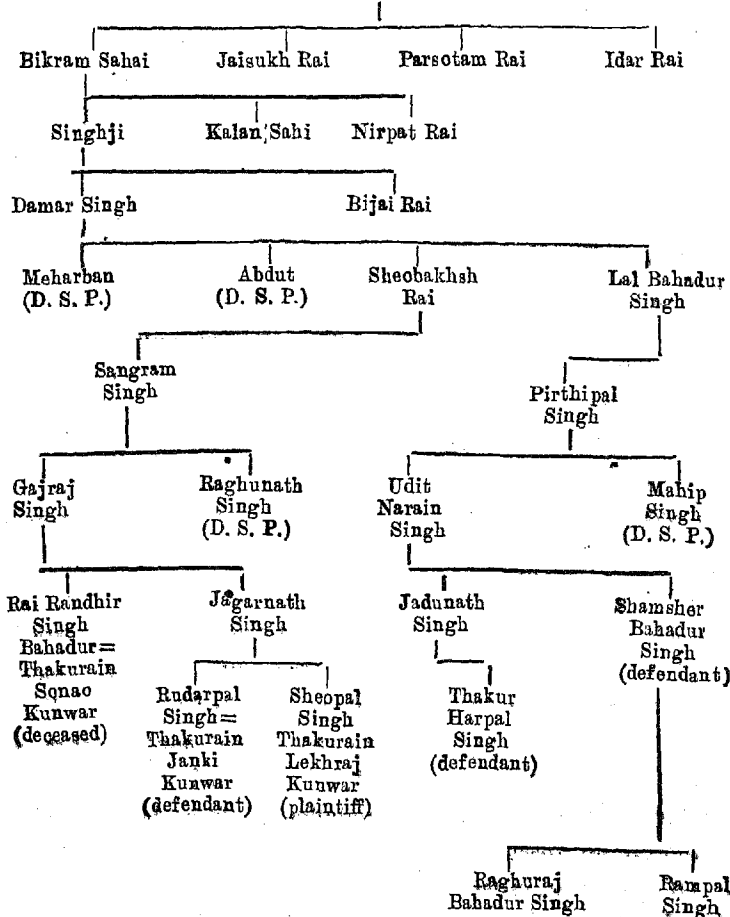
Mr. B. E. O'Connor and Munshi Gokul Prasad, for become  
pondents. here

STANLEY, C. J., and BANERJI, J.—The title to the Singramau estate in the district of Jaunpur, an estate of considerable extent and value, is involved in this appeal. This estate was, up to the date of the death of Rai Randhir Singh on the 4th of January 1895, admittedly impartible. The following genealogical table which is admitted to be correct, will show the relationship of the family.

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## DUKHINT RAI



Abdut, the second son of Damar Singh, died childless in 1795 and was succeeded by his nephew Sangram Singh, and he was succeeded by his eldest son Gajraj Singh, who died in 1857. Bai Randhir Singh, the eldest son of Gajraj Singh, then succeeded

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property. Three weeks before his death he executed a will in favour of his wife Thakurain Sonao Kunwar of all his property. His nephew Sheopal Singh was his nearest male relative at the time of his death, and he, on the 28th of March 1896, instituted a suit against Sonao Kunwar for possession of the estate, alleging that Randhir Singh was not of sound and disposing mind when he made his alleged will. He also averred that the estate was impartible and inalienable, and therefore Randhir Singh had no power to dispose of it as he purported to do. This suit was compromised on the 25th of April 1896, and practically the only question which we have to determine is the effect of this compromise.

The learned District Judge delivered a very elaborate and lengthy judgment, but with many of the topics to which he has referred we think it unnecessary to deal. It is admitted that the estate in the hands of Randhir Singh was an impartible estate, and it is also admitted that Sheopal Singh would have succeeded to that estate if no valid disposition had been made of it by Randhir Singh. Therefore it appears to us to be unnecessary to treat of matters prior to the death of Randhir Singh, except so far as they show the circumstances of the family and throw light on the documents which we have to construe.

Sheopal Singh predeceased Musammatt Sonao Kunwar, dying on the 27th of July 1899. She died on the 20th of June 1904. Sheopal Singh left a widow, the plaintiff Lekhraj Kunwar, and also a daughter, but no son. Upon his death, if it be held that he acquired under the compromise an absolute interest in the estate it still being an impartible estate, the defendant appellant Thakur Harpal Singh would admittedly be now entitled to it according to the rule of primogeniture. We may here mention that a number of villages were appropriated for the maintenance of the junior members of the family a number of years back. Nine villages were set apart for Pirthipal's branch and four for Sheopal. Of the nine villages five were sold, and the members of the family to whom they belonged have now only exproprietary rights therein. The members of the family are still therefore joint in estate, though they are separate in food and worship. Whatever be the rights of the family in these villages,

they form part of the estate, and if the junior branches become extinct will revert to the head of the family. We may also here mention the fact that the junior members of the family did not live in harmony with the members of the senior branch, but on the contrary there was constant ill-feeling and litigation between them. There is no contest between Harpal Singh and Shamsher Bahadur Singh. They have agreed to divide the estate between them in the event of their appeal being successful. The contest is between them and Thakurain Lekhraj Kunwar, whose case is that Sonao Kunwar under the will of her husband Randhir Singh acquired the property as her *stridhan*, and that under the compromise, in the events which have happened, the property has devolved upon her as the representative of Sheopal Singh. On the death of Sonao Kunwar Harpal Singh got possession of the estate, mutation of names having been effected in his favour.

We now turn to the impeached will of Randhir Singh, which is dated the 15th of December 1894. It opens with a detail of the property which the testator was possessed of, and then follows a recital that the testator has no male issue and that there was no sensible and qualified man in the family to look after and manage the estate and acquire fame; that his nephew Sheopal Singh was separate from him, and that his conduct and manners were quite unworthy and incompatible with the position of a *rais* and that he had no hopes that he would maintain the reputation of the family. He then appoints his wife Sonao Kunwar "as legatee of my entire estate and every kind of movable and immovable property of which I am in possession up to this time, and Babu Sridat, whom I brought up from a child, as manager," and then he declared that they should hold proprietary possession of his estate and entire movable and immovable property from the date of his death, and that the legatee, that is, Sonao Kunwar, should have every power as proprietor and Babu Sridat should manage the estate in obedience to and with the advice of the legatee. Then the testator gave a direction that the legatee should keep in view the fact that Sheopal Singh was separate and owing to his misconduct the testator did not eat with him, yet that he had set apart some property for his support and that she should continue the support. This is the substance of the will.

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It is unnecessary for us to determine what estate Musammat Sonao Kunwar took under this will, assuming it to have been a valid will, whether she took an absolute estate or merely a Hindu widow's estate. Sheopal Singh at once disputed the will, and on the 28th of March 1896 instituted a suit against Sonao Kunwar and Babu Sridat to have it declared that the will was void and for possession of the estate of Randhir Singh and mesne profits. The plaint in that suit is to be found in First Appeal No. 25 of 1903, No. 11C of the record. In the first paragraph of it the estate of Sirgramau is described as impartible and untransferable, the custom of the family being that the senior male member is the occupant of the gaddi while the rest of the members are recipients of maintenance, and that on the death of an occupant of the gaddi no right to the estate passes to the widow, but that the eldest son succeeds him and supports all the members of the family with the income of the estate. In the second paragraph the succession is traced from Dukhint Rai to Randhir Singh. Then the fifth paragraph contains an allegation that when Randhir Singh was in a weak and dying condition he was brought to Jaunpur, so as to be taken to Ajudhiaji so that he might end his days there, and that when he was in this condition the defendants obtained from him the will in favour of Musammat Sonao Kunwar. Then follows an allegation that on account of old age, weakness and illness Randhir Singh was quite incapable of forming a rational judgment in respect of his affairs and incapable of making a will. In the sixth paragraph is the allegation that on the death of Randhir Singh, according to old custom and the nature of the property, and also by right of survivorship, the right to occupy the gaddi and take possession of the entire property passed to the plaintiff. Before the institution of this suit Sonao Kunwar had, on the 21st of June 1895, applied for probate of the will of Randhir Singh, and this application was opposed by Sheopal Singh. The suit of Sheopal Singh was compromised, and it is upon the true construction of the compromise that the real question in this appeal depends. The translation of it in the paper book before us has been accepted by both sides, and with the exception of a few words in it which might be otherwise and better translated, and to which we shall presently refer, it appears to be substantially accurate. In view

of its importance we give it *in extenso*: it runs as follows:—

“In the above case a compromise has been effected between the parties in the following way:—

“1. The name of Musammat Thakurain Sonao Kunwar will continue to be recorded in the revenue papers in the same way in which it stands recorded and she will remain in possession during her life-time of all the movable and immovable properties of which Rai Randhir Singh was in possession, exercising the powers of gaddi-nashin (occupant of gaddi) without the power to transfer or charge the estate in any way.

“2. I, Thakur Sheopal Singh, will take the sum of Rs. 12,000 a year at the rate of Rs. 1,000 per month from Musammat Thakurain Sonao Kunwar for all my expenses, and I, Musammat Thakurain Sonao Kunwar, will pay the same. I, Thakur Sheopal Singh, will not interfere with the estate in any way in the life-time of Musammat Sonao Kunwar. After the death of Thakurain Musammat Sonao Kunwar, I, Thakur Sheopal Singh or any representative of mine who may be living at that time, will be the absolute owner of all the movable and immovable properties possessed by Rai Randhir Singh and will occupy the gaddi. In case of non-payment of the fixed annual allowance, I, Thakur Sheopal Singh, will have power to recover the same by instituting a suit and attaching the profits and movable property belonging to Thakurain Sonao Kunwar.

“3. If I, Thakur Sheopal Singh, have to go to any member of the brotherhood, or any rais on the occasion of any ceremony or otherwise, I will have authority to take as much equipage belonging to the estate as I require, and when I go out for recreation *et cetera*, I will take any conveyance I like for my use. Thakurain Sonao Kunwar will have no power to forbid me.

“4. If on any particular occasion any indispensable necessity arise in the estate and it be necessary to take a loan, we, Thakur Sheopal Singh and Musammat Thakurain Sonao Kunwar, will, in concurrence with each other, borrow five or ten thousand rupees and repay the same gradually from the profits of the estate.

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"5. I, Thakurain Sonao Kunwar, also accept all the aforesaid conditions. It is therefore prayed that the case may be struck off as a contested one on the basis of this compromise and the costs incurred by the parties be charged against themselves. This compromise may be embodied in the decree. Musammat Thakurain Shankar Kunwar and Sridat *pro forma* defendants have been exempted.

"The compromise as written is correct."

A decree was passed in the terms of the compromise on the 27th of April 1896.

The contention on behalf of the defendants is that under this compromise a vested interest in the estate in the character of an impartible estate was, subject to the life estate of Musammat Sonao Kunwar, limited to Sheopal Singh, and that upon his death it passed to his next heir according to the rule of primogeniture and not to his widow. On the other side the contention is that the compromise maintained the possession of Musammat Sonao Kunwar under the will, with a restriction only on alienation imposed upon her: that the impartibility of the estate was destroyed by the will of Randhir Singh, and that Sonao Kunwar held the estate as an estate governed by the ordinary rules of Hindu law, and that upon her death, Sheopal Singh having predeceased her, it devolved on the plaintiff respondent as his personal representative.

The learned District Judge held that Musammat Sonao Kunwar took an absolute alienable estate in the property under her husband's will, and that apart from the compromise Sheopal Singh had no title whatever; that any right which he acquired was acquired under, and was referable to, the compromise. His views are thus expressed in the judgment:—"If the question arises under what title A took what was awarded to him under a compromise of doubtful rights between himself and B, it must be ascertained which was the better title before the compromise to the estate awarded to A, A's or B's. The decision of this point will not alter the fact that A took the estate allotted to him under the compromise, but it will determine whether A took it under his own antecedent title or by virtue of the abandonment by B of his antecedent title. We have then to apply this reasoning

to the compromise between Musammat Sonao Kunwar and Sheopal Singh. It has been found that Musammat Sonao Kunwar had an absolute alienable estate and hence that Sheopal Singh had no title whatever in himself except a contingent title in the event of Musammat Sonao Kunwar dying without alienating the estate by gift or devise. Had he survived Musammat Sonao Kunwar, whatever he took under the compromise he would have taken not under his own supposed title as owner, which had no existence, nor even as a reversioner to a widow's estate, which was not the title he set up, for this title too had no existence, but by virtue of Musammat Sonao Kunwar's abandonment of her rights as absolute owner. This was a title arising out of the compromise only—a title by contract, and not a title based on Sheopal Singh's antecedent right."

Does this accurately represent the facts and is the exposition of the law laid down by the learned District Judge correct? If the will of Randhir Singh was not valid, then on the death of Randhir Singh Sheopal Singh became entitled to the estate as his successor. Sheopal Singh impeached the will of Randhir Singh on the ground that Randhir Singh was not a competent testator, and also on the ground that the estate was not merely impartible but inalienable. He claimed the estate as the successor of Randhir Singh according to the rules of primogeniture and he claimed it as an impartible estate. Whether he had sufficient grounds for impeaching the will it is not, we think, material to consider. But in view of the circumstances under which the will was made it would be difficult to hold that his suit was without foundation. The will was made shortly before the death of Randhir Singh, who was a decrepit old man of 74 years of age in a dying condition. The learned District Judge went behind the compromise. He determined what the rights of the parties were before the compromise, the very thing the avoidance of which led to the compromise. He determined the dispute which the parties designedly left undetermined, and held in effect that the will was a valid will and bin ling on Sheopal Singh, overlooking the fact that Sheopal Singh withdrew his opposition to the will on the faith of the compromise. If Sheopal Singh had not

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withdrawn his opposition, it is impossible to say what would have been the result of his suit or of the probate suit.

Now let us see what the provisions of the compromise were, bearing in mind the circumstances which led up to it. It provides in the first paragraph that Sonao Kunwar shall remain in possession of the estate during her life-time "exercising the powers of gaddi-nashin," and in the next paragraph, in which an annuity of Rs. 12,000 a year is provided for Sheopal Singh during the life of Sonao Kunwar, it is provided that after the death of Sonao Kunwar Sheopal Singh will be the absolute owner of the estate and will occupy the gaddi. The words gaddi-nashin and gaddi are only properly applied in connection with an impartible estate, and the use of them in the compromise indicates that the intention of the parties was that the estate should continue impartible, as it had been for generations. In other words, the compromise was a recognition by Sonao Kunwar of the claim put forward by Sheopal Singh that the estate was impartible. Sheopal Singh on his part made this concession to Sonao Kunwar that during her life, subject to the payment of the annuity and to certain other restrictions, she should remain in possession and exercise the powers of gaddi-nashin. It seems to us that by the compromise the parties agreed that the estate should retain its old character of impartibility.

But it is argued that, inasmuch as letters of administration of the estate of Randhir Singh with the will annexed were subsequently granted to Sonao Kunwar, it must be taken that the will had full operation, and that by it the impartible nature of the estate was destroyed, and that, whatever was the interest which Sheopal Singh acquired under the compromise, that was an interest in an estate which was no longer impartible, but an estate governed by the ordinary rules of Hindu law. As to the grant of letters of administration what happened was this. After the execution of the compromise Sheopal Singh withdrew his opposition to the grant of letters of administration with the will annexed. He filed a petition on the 25th of April 1896 in which he stated that he had no objection to the grant, a compromise having been effected. It was no longer any concern to him whether the will was proved or not. His rights were secured by the



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compromise. The suit then proceeded as against Thakurain Shankar Kunwar, another widow of Randhir Singh, who was the sole remaining objector, and the will was established as against her. It is contended that the grant of letters of administration to Sonao Kunwar establishes the case of the plaintiff that the property passed to Sonao Kunwar under the will, and that it must be taken to have devolved on her free from its former character of impartibility. We cannot accede to this contention. The rights of Sonao Kunwar and Sheopal Singh must be determined by the provisions of the compromise and in view of the claim which each put forward. Sheopal Singh having secured for himself the succession to the estate as an impartible estate was no longer concerned with the will of Randhir Singh, and therefore withdrew his opposition to the grant of letters of administration.

Then it is said that in view of the bad feeling which existed between the senior and junior branches of the family, Sheopal Singh, not having male issue, would naturally consider the interest of his wife and daughter in preference to that of the members of a junior branch of the family, and would have preferred to take the estate as one governed by the ordinary rules of Hindu law so that it should pass on his death to his wife and daughter, rather than as an impartible estate which on his death would pass away from these persons. The answer to this is that he and Sonao Kunwar elected to maintain the impartible nature of the estate, as the language of the compromise indicates. At the time of the compromise moreover Sheopal Singh was a young man of 32 years of age, and he no doubt had every reason to hope that he would have male issue. The compromise is the governing proceeding in the case, and it appears to us upon its true construction that it was a recognition by Sonao Kunwar of the impartible nature of the estate and a settlement of that estate upon Sheopal Singh, subject to her own life estate therein, Sheopal Singh on his part giving up his immediate interest in the estate during the life of Sonao Kunwar on payment to him of an annual sum of Rs. 12,000.

But we must advert to another point which has been made upon the compromise by the learned counsel for the plaintiff

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respondent, and that is this. These words are to be found in it:—  
 “After the death of Musammat Thakurain Sonao Kunwar, I, Thakur Sheopal Singh, or any representative of mine who may be living at the time, will be the absolute owner of all the movable and immovable properties possessed by Rai Randhir Singh and will occupy the gaddi.” It is contended that the words “any representative of mine” mean the personal representative of Sheopal Singh, and that the intention was that the estate should devolve on Sheopal Singh in case he survived Sonao Kunwar, but in case of his predeceasing her it should devolve on his personal representative. The translation of the words “or any representative of mine” does not accurately express the vernacular words used. The words in the vernacular are “*kaem makam*,” that is, one who takes the place of another, *i.e.*, a successor. The word which denotes personal representative is “*waris*.” Translating the words “*kaem makam*” as “successor” they would be quite appropriate words to use to denote the successor to an impartible estate whether that successor happened to be a son or a more distant relative. As the representative was also to be his successor on the gaddi, he could not have intended that his widow would be included in that term. The words seem to be used as words of limitation marking out the estate which Sheopal Singh was intended to take, namely, an absolute estate, just as the word “heirs” in English law in, for example, a grant to a man and his heirs, denote a fee simple estate. We do not think, therefore, that there is any force in this argument.

The learned District Judge appears to us not to have correctly apprehended the meaning and effect of the compromise. At the time it was entered into the position was this. Sonao Kunwar claimed the estate of her husband under his will. Sheopal Singh disputed the will and claimed the estate as the successor to Randhir Singh. If the will were established, Sonao Kunwar would be entitled to the estate, otherwise, Sheopal Singh was entitled to it. A clear issue was knit between them, and there was undoubtedly a good fighting case.

In the case of *Rani Mewa Kuwar v. Rani Hulas Kuwar* (1) there were two claimants, namely, Rani Mewa Kuwar and Rani

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Hulas Kuwar, on the ground of heirship to immovable property situate in Rohilkhand and Oudh. By a deed of compromise they agreed to divide the property in certain proportions, and the agreement was carried out in Rohilkhand, but not in Oudh, where the respondent was and continued in possession. After the lapse of nine years from the date of the deed of compromise, the appellant Rani Mewa Kuwar sued for possession of her share of the property in Oudh. The Judicial Commissioner of Oudh decided that the suit was founded on the contract contained in the deed of compromise, or for a breach of it, and was therefore barred by limitation. It was held by their Lordships of the Privy Council that the claim did not rest on contract only, but on a title to the land acknowledged and defined by the contract, which was part only of the evidence of the appellant to prove her case, and not all her case. Their Lordships say, at page 164, referring to the compromise :—" That agreement assumes that the parties were severally claiming by virtue of some right of inheritance the property of Raja Rattan Singh; that there were questions between them which might disturb the rights which each claimed, and it was better, instead of a long litigation, to settle these rights, and they do settle them by arriving at this agreement, which provides that the property shall be held in certain shares and shall be divided according to those shares." Then at page 166, they say :—" The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the appellant to prove her title, and not all her case." The principle laid down in this case has been adopted in several cases in this High Court.

In the case of *Gobind Krishna Narain v. Abdul Qayyum* (1) the title taken under a compromise between persons having mutually exclusive claims was considered. On the death of one Rattan Singh disputes arose between his widow, Raj Kunwar, and Sen Kunwar, the widow of his son Daulat Singh, who had predeceased his father. After the death of the two widows three

(1) (1903) I. L. R., 25 All., 546

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claimants to the estate' arose, namely, Chattar Kunwar and Mewa Kunwar, the daughters of Sen Kunwar, and Khairati Lal, the son of a daughter of Rattan Singh. The conflicting claims of these parties were settled by a compromise by virtue of which Khairati Lal obtained  $7\frac{1}{2}$  annas and Chattar Kunwar and her sister Mewa Kunwar  $4\frac{1}{4}$  annas each out of the property of Rattan Singh. It was contended that Khairati Lal had complete title to the whole of the property subject to the compromise, he being son of Rattan Singh's daughter, and that he made a grant to the two Ranis of more than half the property out of kindly feeling towards them. This argument was repelled as devoid of force. The Bench, of which one of us was a member, held that the parties came together as persons at arm's length, each side claiming the whole estate, through different lines of descent, each side having a good fighting title, and to avoid litigation consented to an amicable division of the disputed estate.

Again in the case of *Bachcho Kunwar v. Dharam Das* (1), which was heard by a Bench of which one of us also was a member, the effect of a compromise was also considered. Two persons named Paras Das and Umrao Singh laid claim to property as reversionary heirs of Pardman Kunwar. Their claim was resisted by Dip Chand on the allegation that he was the adopted son of Pardman Kunwar and as such entitled to succeed to his property. A compromise was entered into according to which the right of Paras Das and Umrao Singh, to one half of the property was recognized, they mutually abandoning all claims to the other half. It is evident that if Dip Chand failed to establish the validity of his adoption, Paras Das and Umrao Singh would as reversionary heirs have succeeded in their claim to the whole of the property of Pardman Kunwar. If, on the other hand, the validity of the adoption was established, the claim of Paras Das and Umrao Singh was bound to fail. It was held that the compromise and decree passed on it amounted to a recognition by Dip Chand of the rights of Paras Das and Umrao Singh as reversionary heirs, as they had previously asserted them, so far as regards one half of the property, and could not be

(1) (1906) I. L. R., 28 All., 347

regarded as conferring a new and distinct title on them; that Paras Das and Umrao Singh in fact under the compromise acquired a moiety of the property in the capacity of reversionary heirs of Pardman Kunwar and in that capacity alone. Reliance was placed upon the judgment of their Lordships of the Privy Council in the case of *Rani Mewa Kuwar v. Rani Hulas Kuwar* referred to above in this judgment.

The same question was considered by another Bench of this High Court, of which also one of us was a member, in the case of *Ram Shankar Lal v. Ganesh Prasad* (1). The facts of that case were these. One Munni Lal died leaving certain property, of which his widow Jasodha Kunwar took possession. Jasodha Kunwar died leaving the property by will to her daughter Anpurna, who also died after making a will leaving the property to her husband Ram Shankar Lal. Both the wills provided that the devisee was to pay off certain incumbrances affecting the property. After the death of Anpurna the property was claimed by the reversionary heirs of Munni Lal. But this claim was settled by a compromise by which Ram Shankar Lal gave certain land to the claimants in consideration of their entirely withdrawing their claim to the rest of the property. It was held that the compromise did not convey to Ram Shankar Lal the title of the reversioners, but that he took under the will of his wife. We find in the judgment this observation in reference to the compromise:—"We think that by this deed the executants of it, in view of the trouble and uncertainty which would attend a suit for possession of the property, relinquished their claim to bring such a suit and admitted the title by virtue of which Ram Shankar Lal was then in possession. It did not, in our opinion, clothe Ram Shankar Lal with all the rights which the executants had as reversioners to Munni Lal's estate."

Mr. O'Connor, in the course of his ingenious and able argument for the respondents, relied on the ruling in *Abdul Wahid v. Nuran Bibi* (2). That was a case between Muhammadans and was governed by Muhammadan law. One Mauzzam Khan died on the 22nd of January 1850 leaving a widow named Gauhar Bibi and also Abdus Subhan and Abdur Rahman who claimed

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(1) (1907) I. L. R., 29 All., 451. (2) (1885) I. L. R., 11 Cal., 597.

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to be his legitimate sons. Gauhar Bibi was in possession of the villages in dispute in the Rae Bareli district at the annexation of Oudh in 1856, and the summary settlement was made with her, and after the general confiscation followed by the restoration and the summary settlement of that year, the settlement of the villages was again made with her. She continued in possession till her death on the 18th of October 1875. In the course of proceedings at the regular settlement litigation took place between the alleged sons on the one side and Gauhar Bibi on the other, resulting in a compromise, by which it was agreed that Gauhar Bibi should during her life-time continue to hold possession and remain proprietor without power of alienation and that after her death the two sons should possess each one half of the property. The two sons predeceased Gauhar Bibi. It was held that upon the true construction of the compromise the title of the sons to succeed was contingent upon their surviving the widow, and that no interest passed to their heirs on their deaths in her life-time. The case came before their Lordships of the Privy Council on appeal from the Judicial Commissioner of Oudh, who held that the effect of the compromise was to give Gauhar Bibi a life interest in the estate, and on the death of Abdur Rahman and Abdus Subhan their heirs took their place and had a right to their property on Gauhar Bibi's death. Their Lordships held that the creation of such a life estate did not seem to be consistent with Muhammadan usage, and that it would be opposed to the Muhammadan law to hold that the compromise created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the life-time of Gauhar Bibi. It will therefore be seen that this decision was based upon Muhammadan law, according to which it is not permitted to limit an estate to take effect after the determination on the death of the owner of a prior estate by way of what is known in English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate. The limitation of such an estate is in no way prohibited by Hindu law, and it appears to us clear upon the true interpretation of the compromise entered into between Sheopal Singh and Scnao Kunwar that Sheopal Singh took an absolute vested estate in the

property, the enjoyment of it being postponed during the life of Sonao Kunwar. We also think that upon the language of the compromise it is not possible to hold that the character of the estate as it had been handed down from father to son for generations was changed. As an impartible estate Sheopal Singh laid claim to it, and the compromise provided that as an impartible estate it should devolve upon him. The concession made to Sonao Kunwar by him was that she should enjoy for her life and sit upon the gaddi as gaddi-nashin, his occupation of the gaddi being postponed. On the death of Sheopal Singh, therefore, the estate in our opinion devolved according to the rules of primogeniture governing impartible estates and did not pass to his widow as an estate governed by the ordinary rules of Hindu law. We therefore think that the suit of the plaintiff ought to have been dismissed. We allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts.

The objections under section 561 of the Code of Civil Procedure necessarily fail and are dismissed with costs.

*Appeal decreed.*

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