PRIVY COUNCIL.

P. C.* 1888 *November 9 and 14, and December 1.*

BHASBA RABIDAT SINGH (PLAINTIFF) *v.* INDAR KUNWAR AND OTHERS (DEFENDANTS).

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

Oudh Estates' Act (I of 1869), s. 13, sub-section 1—Meaning of "intestate" as there used—Written but unregistered authority to adopt—Registration Act (III of 1877), s. 17—Invalid agreement relating to the estate of the adopted son—Conditional adoption.

The Oudh Estates' Act, 1869, requires the registration of the writing by which an authority to adopt is exercised ; but not the registration of the authority, which is required by the Act to be in writing.

The Indian Registration Act III of 1877, which does require authorities to adopt to be registered, expressly excepts authorities conferred by will.

The word "intestate," in s. 13, sub-section 1, of the Oudh Estates' Act, 1869, means intestate as to the talukhdari estate ; and the use of the word does not exclude from the exception in that sub-section a son adopted under an authority conferred by a talukhdar's unregistered will.

A talukhdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire *riasat*. This power having been exercised, the following objections to the adoption were disallowed : 1*st*, one founded on the will not having been registered, and consequently, the authority not having been registered. 2*ndly*, one founded on the erroneous argument that the adopted son was not within the class excepted in s. 13, sub-section 1, and therefore could not take under an unregistered will.

The adoption was also questioned on the ground that the widow had agreed with the natural father of the adopted son, that she should retain the whole estate during her life. *Held*, that this had not rendered the adoption conditional, and that it did not affect the rights of the adopted son. Even if it had amounted to a condition, the analogy, such as it was, presented by the equities relating to powers of appointment under English law, suggested that the condition itself would have been void, without invalidating the adoption.

APPEAL from a decree (27th March 1886) of the Judicial Commissioner, affirming a decree (19th May 1885) of the District Judge of Faizabad.

The suit out of which this appeal arose was brought to obtain a declaration of the plaintiff's title as heir to the talukhdari and

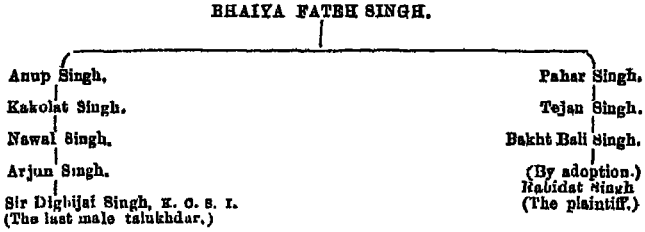
* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR R. COUCH AND MR. STEPHEN WOULLFE FLANAGAN.

other estate of the late Maharaja Sir Digbijai Singh, K. C. S. I., talukhdar of Bulrampur in Oudh, should the plaiutiff survive the widows of the deceased; also, a declaration that the adoption by the late Maharaja's senior widow, the Maharani Indar Kunwar, the first defendant, whereby she had purported, under an authority from her husband in his will, to adopt Udit Narain Singh, a minor sued as under her guardianship, was invalid. The junior widow, the Maharani Jaipal Kunwar, was also made a party defendant.

The late Maharaja died on 27th May 1882, having made a will dated 15th March 1878. He left no issue; but conferred an authority to adopt upon the elder of his two widows. That he did so was decided in the appeal *Indar Kunwar* v. *Jaipal Kunwar* (1). To that suit the present plaintiff was not a party.

The will appears in the judgment of their Lordships on that appeal.

The relationship of the parties was as follows :—



The elder widow adopted Udit Narain Singh on the 8th November 1883.

A deed of adoption, dated 15th December 1883, executed in the presence of witnesses, and reciting that she had, in accordance with the written permission of her deceased husband, adopted on Kahk Sudi, 8th Sambat 1940, corresponding to the 8th November 1883, Udit Narain Singh, minor son of Guman Singh, with due ceremonies, was registered on 5th December 1883.

At that time Guman Singh, the father, had signed an agreement in which, after stating that he gave his son to be adopted, he added :—

"The Maharani Sahiba shall have full control during her lifetime over him, and also over the property, moveable and immoveable, left by the

(1) L. R., 15 I. A., 127; I. L. R., 15 Calc., 725.

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Maharaja now in heaven, and she will be at liberty to punish him, and, if need be, to eject him and adopt in his place some one else from the family of the Maharaja Saheb."

This was dated the 26th October 1883. Afterwards, the Maharani executed and registered another document, dated 28th March 1884, in which she stated the adoption made, adding:

"I further state by this writing that I made this adoption on the express condition and understanding that the said will, executed in my favour, would subsist and remain in force, and that after my demise, or at the time of my death, the said Udit Narain Singh would succeed to the talukhdari estate, *i.e.*, the immoveable property, which was formerly in the possession of my late husband, and which is now in my full proprietary possession."

After stating other particulars, the Maharani declared the deed, dated 5th December 1883, to be null and void, and this document, of 28th March 1884, to be "a *sanad.*"

The District Judge upheld the adoption. He was of opinion that the document executed as his will by the late Maharaja operated, though unregistered, in favour of the Maharani, his widow, because she was one of the class of those persons contemplated in s. 22, Act 1 of 1869. He held to be untenable the argument that Udit Narain having been one of those persons who could not have come in under s. 13 sub-section 1, the document required registration within one month of its execution in order to operate in his favour, and not having been registered, could not be rendered available for authorizing his adoption (1).

(1) Section 13 of the Oudh Estates' Act I of 1869 enacts:—

"No talukhdar or grantee, and no heir or legatee of a talukhdar or grantee shall have power to give or bequeath his estate or any portion thereof, or any interest therein, to any person not being either (1) a person who, under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate, or to a portion thereof, or to an interest therein, if such talukhdar or grantee, heir or legatee, had died intestate; or (2) a younger son of the talukhdar or grantee, heir or legatee, in case the name of such talukhdar or grantee appears in the third or the fifth of the lists mentioned in s. 8, except by an instrument of gift or a will executed and attested not less than three months before the death of the donor, or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution."

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An appeal from this judgment was dismissed. The Judicial Commissioner held that a son, adopted as Udit Narain had been, under an authority on a will, did not take as a devisee or a donee, but as an heir. "It must be recollected, "said the judgment," that the adopted son, as such, takes by inheritance not by devise. See *Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (1)". The Indian Registration Act (III of 1877), s. 17, was referred to. As regards the effect of the agreement between the widow and Guman Singh, the terms signed by the latter, at any rate the latter part, he held to be illegal. The adoption, however, had, as an act completed, taken place before the documents, signed and registered by the widow, were made. The judgment continued thus :—

"An adoption once made is by Hindu law indefeasible, and after the adoption of Udit Narain Singh, the Maharani's power of adoption was, during Udit Narain Singh's lifetime, exhausted (West and Bühler, 3rd Edition, Volume II, page 1152, and Mayne's Hindu Law and Usage, s. 101). There remains the agreement that the Maharani shall, during her lifetime, have full power over the Maharaja's estate. As regards this agreement I observe that the learned Counsel for the appellant has admitted that the adoption ceremonies were duly performed, and in those ceremonies there is no place for a condition of this kind, and I am not prepared to admit that a condition of the kind can invalidate the adoption ; and that, following the analogy of the Full Bench ruling of the Allahabad High Court in *Hanuman Tewari* v. *Chirai* (2), I am of opinion that in any case it must be held that *factum valet*. It is doubtful whether the agreement would bind the son when he comes of age. *Ramasami Aiyan* v. *Venkata Ramaiyan* (3).

After referring to the English law relating to the subject of powers under deeds of settlement, the Judicial Commissioner concluded as follows :—

"Nor am I able to find in the agreement anything repugnant to the terms of the Maharaja's will. It appears to me to have been the Maharaja's intention that till such time as Government should undertake the management of his property his widows should hold it. I can find no fraud upon the power or the will in the matter of the adoption of Udit Narain Singh."

On this appeal, Mr. *J. H. W. Arathoon*, for the appellant, contended that the authority to adopt was invalid. The ordinary Hindu law was not that which regulated this adoption. The provisions of the Oudh Estates Act I of 1869 had superseded in

(1) 10 Moore's I. A., 279 (311). (2) I. L. R., 2 All, 164.
(3) L. R., 6 I. A., 196 (208); I. L. R., 2 Mad., 91.

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regard to succession to a talukdari estate in virtue of adoption the ordinary law. To have fulfilled the requirements of the Act was essential; but there had not been a registration of the authority to adopt, nor of the will, which purported to contain it. He referred to the Law of Registration, as required both by the above Act and by the Indian Registration Acts VIII of 1871 and III of 1877. Again, a further objection was to be found in the fact of the boy whom the widow had purported to adopt not being within the line of succession upon intestacy recognised by the Act I of 1869. For the purpose of deciding this question, the Hindu law could not be invoked, and it could not be said that, because the boy was adopted, he was therefore within the meaning of the clause that he who takes by an unregistered will must be a person who would have succeeded upon an intestacy. As the son of Guman Singh he was outside the line of succession.

[LORD WATSON observed that without regarding the Hindu law as entirely regulating the succession, it might yet indicate to whom the estate would descend after the exercise of a power to adopt.]

The argument was that whatever the validity of the authority to adopt by Hindu law, still in regard to the special provisions of s. 13, sub-section 1, considering the distant connection of the boy's father with the testator, and the fact of the will not having been registered, the adoption was, as a result, unauthorized by the law governing the descent and devise of talukdari estates.

The strongest point against the validity of the adoption was, however, the fact that the widow, purporting to adopt under authority from her deceased husband, had entered into an agreement for her own benefit, with the father of the boy whom she purported to adopt. The terms of the agreement of 26th October 1883 indicated this; and not only in regard to the nature of the act of adoption by a Hindu widow, but in reference to the general rules of law on the subject of the execution of powers, the conduct of the widow must be held to have vitiated the alleged adoption. He referred to *Ramasami Aiyan* v. *Venkata Ramaiyan* (1), *Nilmoni Singh* v. *Bakranath Singh* (2), *Vallanki Vellata*

(1) L. R., 6 I. A., 196; I. L. R., 2 Mad., 91.
(2) L. R., 9 I. A., 104; I. L. R., 9 Calc., 187.

Krishna Rao v. *Venkata Rama Lakhsmi Narayan* (1), *Shoshinath Ghose* v. *Krishna Soondari Dasi* (2), *Duke of Portland* v. *Topham* (3), *Ganga Sahai* v. *Lekhraj Singh* (4), and to Farwell on Powers, Edition 1874.

Sir *Horace Davey*, *Q. C.*, and Mr. *R. V. Doyne*, with whom was Mr. *C. W. Arathoon*, for the respondents, were not called upon.

On a subsequent day (1st December) their Lordships' judgment was delivered by

LORD MACNAGHTEN.—It appears to their Lordships that this case is free from difficulty.

The will of the late Maharaja of Bulrampur, Sir Digbijai Singh, was recently under the consideration of this Board on the occasion of a claim by his junior widow to joint proprietary rights in his estate. Their Lordships then expressed their opinion that, according to the true construction of the will, the Maharaja conferred upon his senior widow (who is the first defendant in the present suit), and upon her alone, a life estate in all his property, and authority to select and adopt such minor male child of his family as she might think fit. The adoption which she was not only authorized but required to make was to be "according to the custom of the family and according to the Hindu law," and the adopted son was to "be in place of an actual son the owner of the entire *riasat*, and the assets moveable and immoveable," the widow taking a provision for her maintenance.

The senior widow selected for adoption a minor male child of the Maharaja's family. It has been admitted in this suit that "the ceremonies of adoption were duly performed." They took place on the 8th of November 1883. On the 5th of December following, the senior widow executed a deed of adoption, which was duly registered, by which she declared that, in accordance with the written permission of her deceased husband, she had

(1) L. R., 4 I. A., 1; I. L. R., 1 Mad., 174.
(2) L. R., 7 I. A., 250; I. L. R., 6 Calc., 381.
(3) 11 H. L. C., 32.
(4) I. L. R., 9 All., 256.

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adopted Udit Narain Singh (who is the second defendant to this suit), and that he would be the proprietor of the Maharaja's estate and property, both moveable and immoveable, like a real son.

The appellant, who is a distant relative of the late Maharaja, and the person upon whom, according to the rules of intestate succession prescribed by the Oudh Estates' Act 1869, in default of any widow of the Maharaja, or any son adopted by her as provided by the Act, or any male lineal descendant of such son, the Maharaja's talukhdari estate would descend, brought this suit for the purpose of having it declared that the adoption of the second defendant was invalid fraudulent and void.

Three grounds of objection to the validity of the adoption were urged before their Lordships.

In the first place it was contended that the adoption was invalid, because the authority to adopt was not contained in a registered document. Their Lordships are of opinion that there is no ground for this contention. The Act of 1869 requires the writing by which an authority to adopt a son is exercised to be registered. It also requires the authority to be in writing. But it does not require that writing to be registered. Act III of 1877, s. 17, which does require authorities to adopt a son to be registered, expressly excepts authorities conferred by will.

In the next place, it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far at any rate as regards the talukhdari property, because the adopted son was not a person who could take the talukhdari property under an unregistered will. It is obvious that this objection, assuming it to be well founded, would not better the position of the appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in the manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still he would take to the exclusion of the appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good, the appellant has to establish the proposition that the adopted son is not within the exception contained in s. 13, sub-section 1 of the Act, that he is not a person who, under the

provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the talukhdari estate or to an interest therein if the Maharaja "had died intestate" The appellant endeavoured to support that proposition by arguing that if the Maharaja had left no will there would have been no authority to adopt in existence. And then, in regard to succession to the estate, Udit Narain Singh would have ranked as the son of Guman Singh. But the word "intestate" in sub-section 1 evidently means intestate as to his estate, that is, his estate as that expression is defined by the Act, the talukh or immoveable property to which alone the Act is declared to extend. This is plain on consideration of s. 13 taken by itself, but it is made still plainer, if possible, by reference to s. 22, which is closely connected with s. 13, and which expresses what otherwise would necessarily be implied, and qualifies the word "intestate" by the addition of the words "as to his estate."

The last point urged on behalf of the appellant was described by the learned Counsel who appeared in support of the appeal as his strongest point. It was this: The senior widow seems to have been unwilling to disregard her husband's injunctions, but at the same time, she was anxious to keep the estate during her life. She obtained from the natural father of the child whom she proposed to adopt a document, dated the 26th of October 1883, in which it was declared that she should have full control during her lifetime over the property left by the late Maharaja. It was not suggested that there was or could have been in the ceremonial of adoption any such condition or reservation, nor is any trace of that condition or reservation to be found in the deed of adoption of the 5th of December 1883. But some months afterwards, on the 28th of March 1884, the senior widow executed what is called a second deed of adoption, by which she purported to revoke the deed of the 5th of December, on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death.

On these facts it was argued that the adoption was a fraud upon the authority to adopt, and therefore void.

This point seems to their Lordships equally untenable.

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The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain that the adoption was made for a corrupt purpose, or for a purpose foreign to the real object for which the authority to adopt was conferred. It may be true, as suggested by Mr. Arathoon, that the child of Guman Singh was selected in preference to the child of the appellant because the senior widow had reason to believe that the selection would be less likely to lead to her position being challenged. But it is difficult to understand how a declaration by Guman Singh or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined. The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is admittedly inoperative. No conditions therefore were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment to which Mr. Arathoon appealed would rather suggest that, even in that case, the adoption would have been valid and the condition void.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal. *Appeal dismissed.*

Solicitors for the appellant: Messrs. *Young, Jackson & Beard.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

P. C. * 1888 *November 7 & 9, December 1.*

BHUGWAN DAS (PLAINTIFF) *v.* THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA (DEFENDANTS).*

[On appeal from the Court of the Additional Recorder of Rangoon.]

Insurance—Marine Insurance—Open cover—Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.

An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN and SIR R. COUCH.