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given with reference to the provisions of section 6 of Act IX of 1847 relating to the boundary disputes in cases of alluvion. The section provided for the finality of the orders of the Board of Revenue on those matters. "Their Lordships desire to make it clear, however, that the proceedings of the assessing authorities may be still subject to being quashed in the ordinary course of law, if they had been tainted by fundamental irregularity." The finality imposed by the provisions of section 6 of the said Act upon the orders of the Board of Revenue obviously did not affect and raise the question of jurisdiction, but this is the question which arises in the present case. Further the two mistakes, if they were mistakes, which the Land Record Officer is said to have made and which we have already mentioned, cannot in our opinion amount to fundamental irregularity. The decision relied upon is, therefore, inapplicable. Accordingly we dismiss this appeal with costs.

Stuart, C.J., and Hasan, J.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Wazir Hasan.

RAI KRISHNAPAL SINGH (PLAINTIFF-APPELLANT) *v.* THAKURAIN SRI RAJ KUNWAR AND OTHERS (RESPONDENTS.)*

1928 *November*, 7.

Oudh Estates Act (I of 1869), section 10—Taluqdari Estates entered in List II—Presumption of impartibility about List II estates—No presumption that a taluqdar holding List II estate was senior in age to his brothers.

The presumption raised by the entry of an estate in List II and the provisions of section 10 of the Amended Oudh

*First Civil Appeal No. 90 of 1927, against the order of Mr. C. M. King, Judge of the Chief Court of Oudh, at Lucknow, dated the 7th of April, 1928.

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Estates Act is limited to a presumption of impartibility and does not go further. It does not raise any presumption that the person who had held the estate was senior in age to his other brothers. If it were shown that he did as a matter of fact possess the estate on the basis of a competition of title based on inheritance, presumption may be raised that he was the most senior in age. *Narindar Bahadur Singh* v. *Achal Ram* (1), *Rae Bisheshar Bakhsh Singh* v. *Dewan Ran Bijai Bahadur Singh* (2), and *Rai Jagatpal Singh* v. *Raja Jageshar Bakhsh Singh* (3), referred to.

Messrs. *A. P. Sen*, *Ali Zaheer*, *M. H. Kidwai* and *S. C. Das*, for the appellants.

Messrs. *Bisheshwar Nath Srivastava* and *Avadh Behari Lal*, for the respondent No. 1.

The Government Advocate Mr. *G. H. Thomas*), for the respondent No. 7.

STUART, C. J. and HASAN, J. :—These are the plaintiff's appeals from the decrees, dated the 7th of April, 1927, passed by Mr. Justice KING sitting on the original side of this Court. They respectively arise out of two suits which the appellant instituted for obtaining the relief of a declaration as to his reversionary title to the estate of Uriadih, situate in the district of Partabgarh in the province of Oudh. Thakurain Sri Raj Kuar, defendant No. 1 in both the suits, is the widow of Lal Bankateshwar Bahadur Singh the last male holder of the aforesaid estate, and is in possession of the same. On the 18th of January, 1922, she executed a perpetual lease in respect of certain lands situate in three villages comprised in the said estate in favour of Babu Ram, Ram Bharos, Nand Kumar, Parbhu Nath, Raghunath and Sri Nath, defendants Nos. 2 to 7 in one suit, and a sale-deed on the 26th of June, 1919, in respect of village Sindhaura, within the estate in question, in favour of Rani Jaggi Kumari, defendant No. 2 in the other suit.

(1) (1893) L.R., 20 I.A., 77. (2) (1890) L.R., 17 I.A., 173.
(3) (1903) L.R., 30 I.A., 27.

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Rani Jaggi Kumari died during the pendency of the suit and on her death the Deputy Commissioner of Partabgarh as Manager in charge of the estate of the deceased and Pashpat Partab Bahadur Singh, Tej Partab Bahadur Singh, Diamond Raj Kumari, Lath Raj Kumari and Kumari Sahiba Raj Kumari, minors, were impleaded as defendants.

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The plaintiff attacks the validity of these two deeds and bases his right to do so on his reversionary title to the estate. The primary and the only question for determination in the appeals is the said title of the plaintiff. The validity of the alleged title solely depends upon the proof of a pedigree which the plaintiff filed together with the plaints of the two suits. It is admitted that the plaintiff is not the reversioner nearest in degree to the last male holder, but he claims title under the provisions of clause (10) of section 22 of Act I of 1869 as amended by the latest enactment (Act III of 1910) of the Legislative Council of the United Provinces of Agra and Oudh. The clause is as follows:—

> "or in default of or on the death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture subject as aforesaid."

The plaintiff has, therefore, to prove that he is the nearest male agnate according to the rule of lineal primogeniture. According to the decision of the learned Judge of the trial court the plaintiff has succeeded in proving every step in the pedigree, but he has failed to prove the primogeniture of one Zabar Singh in relation to his two brothers Pahalwan Singh and Gambhir Singh. On this ground the learned Judge has dismissed both the suits and the appeals before us, both in the memoranda and the arguments were confined to the last-mentioned matter alone.

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Zabar Singh was the father of the plaintiff's grandfather, Pirthipal Singh. After the annexation, the taluqa of Uriadih was settled with Diwan Harmangal Singh, whose name was entered in Lists I and II of the lists prescribed by section 8 of Act I of 1869 in respect of that estate. By virtue of the statutory effect and the character of List II, the estate of Uriadih must be deemed to be an impartible estate.

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We may mention at the outset that at the hearing of the appeals the respondents' learned Counsel challenged the correctness of the finding of the learned trial Judge in respect of one step only in the pedigree propounded by the plaintiff. Zabar Singh, mentioned above, was the son of Zorawar Singh. The learned Judge has found that Zorawar Singh was senior in age to his brother Bhup Singh. This is the finding which has been impeached by the respondents. We have come to the conclusion that the finding of the learned trial Judge that the plaintiff has failed to establish that Zabar Singh was the first born son of Zorawar Singh must be upheld. Having regard to this conclusion we refrain from deciding the matter relating to the seniority of Zorawar Singh in relation to his brother, Bhup Singh. Obviously the onus lies on the plaintiff to establish the fact that Zabar Singh was senior in age to his other brothers. If we are satisfied, as we are and as the learned trial Judge was, that the plaintiff has failed to discharge that onus it is not necessary to consider other pleas urged in defence.

Apart from the evidence which is really very slender in proof of the fact, that Zabar Singh was the first born of the sons of his father it was argued on behalf of the appellant that having regard to the entry of the estate in List II and the provisions of section 10 of Act I of 1869, there is a conclusive presumption that Zabar Singh

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having held the estate in his possession at the time of his death was senior in age to his other two brothers Pahalwan Singh and Gambhir Singh. In support of this argument reliance is placed upon the decision of their Lordships of the Judicial Committee in the case of *Narindar Bahadur Singh* v. *Achal Ram* (1). The estate involved in that case was an estate placed in List III of section 8 of Act I of 1869 and not in List II, as is the case here. In delivering the judgment of the Committee Lord HOBHOUSE said :—

> " The effect of that is that the estate is labelled as one which, according to the custom of the family, descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over line according to the classification under the Act; though if two collaterals, or persons in the line of heirship are equal in degree, then, as the property can only go to one, recourse must be had to the seniority of line to find out which that one is."

The precise line of the argument before us is that Zabar Singh being equal in degree with his two other brothers must be presumed to have been the most senior in age for the reason that according to the rule of family custom stated by their Lordships of the Judicial Committee the most senior of the brothers had the title to the estate. It may be that the argument is correct in

(1) (1893) L.R., 20 I.A., 77.

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one aspect only, and that is, that in a case of competition of titles based on inheritance, Zabar Singh, if he were the most senior in age of his brothers, would succeed to the estate under the rule of the family custom, and if it were shown that he did as a matter of fact possess the estate on the basis of such a title, presumption may be raised that he was the most senior in age. But there is absolutely no evidence on the record to show this. True there is some evidence that the family held some property, for instance exhibit A71, the *wajib-ul-arz* of Raipur Bichaur, which recites the tradition :—

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> " Thereafter in pargana Patti, Nahar Singh's son Dula Rai and his son Basant Rai and his son Bhagwat Rai and his son Jagdish Rai and his son Hirday Shah succeeded one another as single owners. In short when the time of Hirday Shah was reached a fresh series of partitions commences . . . In short, the facts as to the separation and division of taluqas of pargana Patti and as to the acquisition of this taluqa are described in this way that Hirday Shah the common ancestor of the owners of Patti, contracted two marriages, the first was Moong Dei while the second was Parbati. Musammat Moong Dei the first wife gave birth to three sons : (1) Jai Singh Rai, among whose descendants are the taluqdars of Oriadih, 9 shares and 11 shares, (2) Pran Singh whose descendants hold taluqa Dasrathpur, (3) Ugrasen Singh. Ugrasen Singh's son was Indarjit Singh whose son was Zorawar Singh whose son was Rai Zabar Singh and his son is Rai Pirthipal Singh the present possessor of the taluqa."

On the basis of this recital it may be held that there was some ancestral property, and having regard to other evidence on the record, equally consisting of tradition, it may further be held that Zabar Singh in his time held the nucleus of the estate of Raipur Bichaur. But this is not enough. Zabar Singh was the most intrepid adventurer as compared to his three brothers, and there is also the tradition, as appears from the evidence on the record, that his possession of the estate originated in bloodshed. The learned Judge of the trial court is of opinion, and we think rightly, that Zabar Singh acquired the estate by force or otherwise, but not by inheritance. Further the presumption raised by List II and section 10 is limited to presumption of impartibility, and does not go further. We accordingly reject this argument.

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As to the evidence in support of the case that Zabar Singh was the most senior in age, we have already remarked that it is very slender and inconclusive. We will now briefly refer to such of this evidence as we consider to be of any importance.

Exhibit 123 is an order, dated the 1st of June, 1869, passed by the Settlement Officer of Partabgarh in a case between Beni Bakhsh and Rai Bisheshar Bakhsh Singh, son of Rai Pirthipal Singh, taluqdar of Raipur Bichaur. Beni Bakhsh had claimed maintenance from the taluqdar on the ground of his relationship as appears from his application, dated the 7th of September, 1868 (exhibit A104). Within this order is contained a pedigree as stated by Beni Bakhsh. Zabar Singh's name is mentioned first, Pahalwan Singh's name is mentioned second, Gambhir Singh's name third and Basawan Singh's name fourth as the sons of Zorawar Singh in this pedigree. Beni Bakhsh's claim was utterly repudiated by the defendant's agent and was dismissed as appears from the same order. At the most this pedigree

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may be treated as the statement of Beni Bakhsh Singh, since deceased, and being the statement of a member of the family and made before any controversy on the precise point of Zabar Singh's seniority as against his other brothers had arisen, is admissible in evidence. But we are unable to attach any value to the statement of Beni Bakhsh Singh for the simple reason that he made contradictory statements in this behalf from time to time.

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Exhibit A87 is a plaint filed by Beni Bakhsh in a suit which he had previously instituted in the court of the Settlement Officer of Partabgarh against the same Rai Bisheshar Bakhsh Singh. In paragraph 1 of the plaint he stated that Zorawar Singh had three sons—first, Pahalwan Singh, second, Zabar Singh, and third Gambhir Singh. Again in his written statement (exhibit A89) which he filed in the same suit to which the plaint just now mentioned relates he mentioned the three sons of Zorawar Singh in the following order:—first, Pahalwan Singh, second Zabar Singh and third, Gambhir Singh; and again in the pedigree (exhibit A88) which he had dictated to the Settlement Officer in the same suit and had signed he gave the second position to Zabar Singh. Beni Bakhsh's statement in this behalf is, therefore, wholly unreliable.

Other evidence in this connection is a pedigree, exhibit 152, which was filed by Rai Jagmohan Singh, the plaintiff's grandfather in a suit against one Diwan Ran Bijai Bahadur Singh for possession of the estate of Dasrathpur which originally belonged to a member of the same family, Hanuman Singh, whose name was entered in Lists I and II of Act I of 1869. This case was finally decided by their Lordships of the Judicial Committee in the year 1890, and the judgment of their Lordships is reported in *Rae Bisheshar Bakhsh Singh* v.

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Dewan Ran Bijai Bahadur Singh (1). The pedigree seems to have been admitted by the opposite party Dewan Ran Bijai Bahadur Singh. In this case no question arose as to the seniority of Zabar Singh. The claim which eventually succeeded was founded upon nearness of degree and the pedigree by itself does not more than mention the three sons of Zorawar Singh and mentions Zabar Singh's name first. Obviously it will be highly unsafe to base a finding in favour of the plaintiff's case on such a slender foundation.

Finally we have three judgments in a case which arose in the year 1895. This was also a claim by a member of the same family, one Jageshar Bakhsh Singh, for possession of the taluqa of Dasrathpur. The plaintiff in that case founded his title on the seniority of Pahalwan Singh, brother of Zabar Singh. The trial court dismissed the suit on the finding that it was not established that Pahalwan Singh was senior in age to Zabar Singh (*vide* exhibit 30). On appeal by the plaintiff a Bench of the late court of the Judicial Commissioner of Oudh reversed the decree of the court of first instance and decreed the suit (*vide* exhibit A122). The defendant then appealed to His Majesty in Council and his appeal was allowed by their Lordships of the Judicial Committee and the suit was eventually dismissed. The judgment of their Lordships is reported in *Rai Jagatpal Singh* v. *Raja Jageshar Bakhsh Singh* (2). The finding of their Lordships was :—

> "It has not been proved that Pahalwan Singh was older than Zabar Singh, and the respondent's case therefore fails. The burden of proof falls on the respondents, and that burden they have failed to discharge."

Much stress was laid on this decision of their Lordships, but we are unable to construe the finding quoted

(1) (1890) L.R., 17 I.A., 173. (2) (1903) L.R., 30 I.A., 27.

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above as a finding in favour of the seniority of Zabar Singh. The case was dismissed on the sole ground that they had failed to discharge the onus of proof which as plaintiffs they were bound to sustain. We are taking the same view of the burden of proof in the present case, and in agreement with the finding of the learned trial Judge we hold that the appellant has failed to discharge that burden.

Stuart, C.J., and Hasan, J.

It now remains to say a few words as regards the oral evidence tendered on behalf of the plaintiff. We may mention that the appellant's learned Counsel read to us the names of witnesses on whose evidence he wanted to rely in support of the appeal. We have ourselves read the evidence of those witnesses and are unable to disagree with the opinion which the trial court formed in respect of it, that it is wholly unconvincing and worthless.

Before we take leave of the case there is one important matter which must be stated. The plaintiff who is the appellant before us, had brought another suit on the original side of this Court for a declaration of his reversionary title in respect of the estate of Patti Saifabad *hissa* 11, coupled with a declaration that the adoption of Dewan Rameshar Prasad Singh made by the widow, Thakurain Gaj Raj Kuar was invalid. To that suit both Thakurain Gaj Raj Kuar and Dewan Rameshwar Prasad Singh were parties. The courts in India held that Dewan Rameshwar Prasad Singh was validly adopted by Thakurain Gaj Raj Kuar and the plaintiff's appeal to their Lordships of the Judicial Committee has also been dismissed. It is admitted on behalf of the plaintiff that Dewan Rameshar Prasad Singh in his character of an adopted son of Dewan Rajinder Bahadur Singh, the deceased husband of Thakurain Gaj Raj Kuar, has a preferential reversionary title to the estate of Uriadih

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now in question as against the present plaintiff. There is no doubt that the decision in that suit constitutes *res judicata* as between the plaintiff and Dewan Rameshar Prasad Singh in the matter of the title founded on pedigree, to the estate of Uriadih. This being so it is obvious that the present appeal is wholly frivolous and is prompted by the litigious spirit of the appellant. We were asked by the respondent to admit in evidence the judgment of our court in the previous suit and we have acceded to their prayer. There was no objection on behalf of the appellant as the judgment was delivered four days after the decision of the two suits, out of which these appeals arise, by the trial court.

Stuart, C.J., and Hasan, J.

We accordingly dismiss these appeals with costs. The Deputy Commissioner of Partabgarh was separately represented before us in appeal No. 90 of 1927 by the Government Advocate of this Court. He would, therefore, be entitled to his separate costs in that appeal.

Appeal dismissed.

REVISIONAL CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge.

RAM HET SHUKUL (DEFENDANT-APPLICANT) v. RAM RATAN (PLAINTIFF-RESPONDENT).*

1928 *November*, 8.

Provincial Small Cause Courts Act (IX of 1887), articles 34(ii) and 43(A)—Bailee's refusal to return moveables deposited with him—Suit for specific performance, maintainability of—Suit for damages for breach of contract, whether cognizable by the court of small causes—Jurisdiction of court of small causes.

Where the plaintiff deposited certain money and certain papers with the defendant as a bailee but he refused to return

*Section 25, Application No. 32 of 1928, against the order of Pandit Girja Shankar Misra, Munsif of Tarabganj as Judge of Small Cause Court, Gonda, dated the 17th of September, 1928, decreeing the plaintiff's claim.