Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jagdish Bahadur v. *Sheo Partab Singh, from the Court of the Judicial Commissioner of Oudh; delivered* 23*rd March* 1901.

Present at the Hearing:

LORD HOBHOUSE.
LORD DAVEY.
LORD LINDLEY.
SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

The present Appellant is the great grandson and heir of Sitla Baksh the original Plaintiff and was substituted for the latter on his death after the commencement of the suit. The Respondent is the son and heir of Shankar Baksh. Sitla Baksh was the son of Raghunath by his first wife Bish Nath Kunwar. Shankar Baksh was also the son of Raghunath but by his junior wife Raj Kunwar. Shankar Baksh was born before his half-brother Sitla Baksh and was therefore the elder born son of Raghunath.

The suit relates to the succession of the Taluk of Pawansi which after the annexation of Oudh was by a sunnad granted to a lady named Kablas Kunwar the widow of Mahpal Singh. Her name was entered in the first and second lists mentioned in Section 8 of the Oudh Estates Act 1869. In the case of *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (5 Ind. Ap. 1) the succession of the Taluk on the death of Kablas Kunwar was determined by this Board. Their Lordships there held that the sunnad conferred

15785. 125.—3/1901. [13] A

and was intended to confer a full proprietary and transferable right in the estate upon Kablas and her heirs male according to the law of primogeniture and as regards the succession they considered that the rights of the parties claiming by descent must be governed by the provisions of Section 22 of Act I. of 1869. This Board therefore held that under Clause 11 of Section 22 the estate descended to Janki Kunwar the daughter and only child of Kablas Kunwar as the person entitled under the ordinary law to which persons of her mother's religion and tribe were subject.

Janki Kunwar died childless on the 16th December 1888. It is not disputed that the succession must be to the heirs of her father and both or one or other of the sons of Raghunath if living would be entitled to succeed to the Taluk on her death.

The Plaintiff by his plaint claimed to be entitled to the entire Taluk together with all other movable and immovable property of Janki on the ground that being born of the first wife he was entitled to inherit the entire Taluk and other property according to the custom obtaining among his clan and by law. Alternatively he contended that the Taluk was or had become partible and claimed to be entitled to a 9 annas share as son of the first wife of Raghunath or at any rate to an 8 annas share.

The latter claim was maintained on the ground that Janki having succeeded under the provisions of Clause 11 of Section 22 the estate was no longer subject to the provisions of the Act of 1869 but descended from her as an estate under the ordinary Hindu law and not as an impartible estate and was therefore partible between the two brothers. By his defence the Defendant contended that the estate was impartible by custom. A vast amount of evidence

was taken upon this question but in the opinion of their Lordships unnecessarily. The point is concluded by authority. In the case of *Dewan Ran Bijai Bahadur Singh* v. *Rae Jagatpal Singh* (17 Ind. Ap. 173) their Lordships said :—
" A question might arise upon the construction " of Clause 11 of Section 22 whether the estate " descended as an impartible estate. Their " Lordships are of opinion looking to the " provisions of Act I. of 1869 list 2 Section 8 " and Section 22 that it was the intention of the " Legislature that the estate should descend as " an impartible estate."

The only question which remains as regards the succession therefore is whether the original Plaintiff as son of the first wife of his father was either by custom or by the common law is entitled to succeed in preference to his elder brother born of a junior wife. Evidence was taken by the District Judge on the claim by custom and that learned Judge after an exhaustive review of the evidence came to the conclusion that the alleged custom was not proved and that decision was affirmed in the Court of the Judicial Commissioner. There being thus two concurrent judgments on a question of fact their Lordship are relieved from examining the evidence and were not asked by Counsel to do so.

The question involved in the claim of the Plaintiff by law apart from custom has been considered by this Board in two cases. In *Ramalakshmi iAmmal* v. *Sivanantha Perumal Sethurayar* (14 Moo. Ind. Ap. 570) this Board decided that the son of a junior wife was entitled to succeed to an impartible zemindary in preference to the later born son of a senior wife. It is true that in that case the mother of the younger son although married before the mother of the elder son was not the first wife and therefore it is said not to be a direct authority.

In *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru* (8 Ind. Ap. 1) a first-born son though by the fourth wife was held to be entitled to succeed in preference to a younger son born of the third and senior wife whose marriage was subsequent to the deaths of the first two wives. The grounds of the judgment are shown very clearly in the passages which are quoted at length by the Judicial Commissioner (Rec. p. 456) and their Lordships will not repeat them. It was laid down that the principles upon which the Board held in the former case that the first-born was entitled to succeed apply equally to a son of a first married wife and sons of other wives and that being so it lay upon the Defendant to show some positive rule of Hindu law supported either by ancient text or modern decision to the contrary effect which had not been done.

The grounds upon which the learned Counsel for the Appellant endeavoured to escape from the authority of these cases were these. The verses of the Laws of Manu which were referred to by their Lordships are those numbered 122 to 125 in Ch. 9. In Sir William Jones' translation the 122nd and 125th verses are as follows:—"122. " A younger son being born of a first married " wife after an elder son had been born of a wife " last married *but of a lower class* it may be a " doubt in that case how the division shall be " made. 125. As between sons born of wives " equal in their class and without any other " distinction there can be no seniority in right of " the mother but the seniority ordained by law " is according to the birth." The words printed in italics were accepted by Sir William Jones as being and until recently were generally believed to be the interpolation of an ancient commentator of great eminence named Kalluka Bhatta. It is said to have been discovered by the research of

scholars that the interpolation was not made by Kalluka Bhatta but by a later and inferior commentator named Prakash and that statement seems to have been accepted in the Court of the Judicial Commissioner. It is thereupon argued that verse 122 (with the omission of the interpolated words) and the two following verses are inconsistent with verse 125 which thus loses any binding authority.

Their Lordships assume for the purposes of their judgment that Sir William Jones was mistaken in attributing the words interpolated in verse 122 to Kalluka Bhatta. But they observe that Sir William Jones' version was probably founded on the tradition of the time at which he wrote and has been accepted in the Indian Courts without question. *Communis error facit jus* is a sound maxim. Their Lordships however do not rely upon this consideration alone. The Judicial Commissioner has learnedly discussed the various translations which have been proposed by scholars and the interpretations given by them to the four verses in question and their relation to each other, and he refers to the opinion expressed by Dr. Jolly in his Tagore Lectures 1883. The Judicial Commissioner concludes:—"As the correct translation "of verse 123 is doubtful and as Manu's own "answer to the question propounded by him in "verse 122 cannot be clearly ascertained it "appears to me that the Appellant has failed to "establish satisfactorily his contention by the "texts quoted by him."

Their Lordships think this is firm ground for decision. The language of verse 125 is reasonably free from ambiguity while the meaning of the previous verses is at the best ambiguous and doubtful. The plain language of the one ought not to be overridden or controlled by the obscure utterances in the other. They therefore think that no sufficient reason is shewn why they

should not follow the two previous decisions of this Board and that they ought to do so. They therefore hold that according to Hindu law the Respondent who represents the eldest son of his father is entitled to succeed in preference to the Appellant who represents the younger son though born of the first wife. Their Lordships will only add that this decision appears to them as it did to their predecessors to be in accordance with the religious tenets of Hindus. It is by the birth of his first-born son that a Hindu discharges the duty which he owes to his ancestors and obtains spiritual benefits for himself and therefore it is to that son that pre-eminence should be given.

A subsidiary point was raised by the Appellant's Counsel viz. whether any difference is to be made in the succession to the movable property of Janki. No such point was raised by the plaint in which the movable and other immovable property is treated in the same category with the Taluk itself and the same considerations are treated as applicable to the whole property as one corpus. The fifth issue is whether the Plaintiff is by law or custom entitled to the whole of the Taluka with other property pertaining to it. And no issue is directed to any distinction between different portions of the property claimed. The District Judge held that the question did not arise and if it did there was no evidence to show that such property was subject to a different rule of devolution. He also referred to the case of *Thakur Ishri Singh* v. *Baldeo Singh* (11 Ind. Ap. 135 at p. 148) before this Board.

The Judicial Commissioner took the same view and their Lordships entirely agree.

They will therefore humbly advise His Majesty that the Appeal be dismissed and the Appellant must pay the costs of it.