Judgment of the Lords of the Judicial Committee on the Consolidated Appeals of Sukh Dei v. *Kedar Nath, Ram Charan, and Bisheshar Parshad, from the Court of the Judicial Commissioner of Oudh; delivered 22nd June* 1901.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD ROBERTSON.
SIR RICHARD COUCH.
SIR FORD NORTH.

[*Delivered by Lord Macnaghten.*]

This is a Consolidated Appeal from the decision of the Court of the Judicial Commissioner of Oudh setting aside three Decrees of the Subordinate Judge of Unao.

The Appeal comes before their Lordships under somewhat singular circumstances.

One Babu Ram Sahai a wealthy Talukdar owning non-Talukdari as well as Talukdari property died on the 5th of July 1890. He left a widow Krishna Dei who is now dead and two sisters-in-law Ram Dei and the Appellant Sukh Dei widows of two deceased brothers.

On his death his widow Krishna Dei took possession of his entire estate.

In the course of mutation proceedings consequent on the death of Ram Sahai Krishna Dei filed a petition alleging that her husband had left a will dated the 4th of June 1890 and registered on the 27th of that month under which she

was solely entitled to all her husband's estate. Afterwards through her Vakeel she stated that her husband had on the 26th of July 1876 made a will in her favour and that she as owner and possessor of the said property under that will claimed to have the property entered in her name. An order in accordance with her claim was made by the Deputy Commissioner on the 25th of October 1890.

Thereupon three persons who claimed to be the reversionary heirs of Ram Sahai and who were or are represented by the three Respondents brought three suits to establish their title against Krishna Dei Ram Dei and the Appellant Sukh Dei alleging that Ram Sahai had died intestate.

Krishna Dei in her written statement denied that Ram Sahai died intestate. She set up both wills but she rested her title on the alleged will of 1876 and declared that the will of 1890 was a "useless" document "inoperative null "and void." The written statement of Ram Dei in effect supported the statement of Krishna Dei. The Appellant Sukh Dei filed no written statement. Against her the suits proceeded *ex parte*.

The Plaintiffs in their replication impeached the alleged will of 1876 as a forgery. They claimed judgment against Krishna Dei and Ram Dei as to the alleged will of 1890 on their own admissions in the pleadings. As against the Appellant Sukh Dei in regard to the alleged will of the 4th of June 1890 they asserted that they would prove "the spurious character of the "said document and the circumstances attend-"ing its preparation and registration . . . "if necessary."

In the result the Subordinate Judge found that the alleged will of 1876 was a forgery. But as regards the alleged will of 1890 which was

said to have been lost he came to a different conclusion. He held that that will was established not upon the ground that the Defendants or any of them had proved its due execution for no proof of that sort was tendered at the trial but upon the ground that the Plaintiffs had declared that they would prove it to be spurious if necessary and that they had produced no evidence on the point. While they were "prepared to call it a "forged document" they "did not dare" he said "to prove" that "assertion." The "pre-"termission" of the Plaintiffs was he held "an "evident ground for the document in question "being genuine."

On appeal to the Judicial Commissioner the Court agreed with the Subordinate Judge in thinking that the alleged will of 1876 was not a genuine will but differed from him as regards the alleged will of 1890. The Court held that the learned Subordinate Judge was wrong in placing upon the Plaintiffs the onus of proving the will of the 4th of June 1890 to be a forgery, and held further that no attempt had been made to prove the genuineness of the said alleged will and that the same was a forgery.

From the decree of the Court of the Judicial Commissioner the Appellant Sukh Dei alone has appealed.

In the opinion of their Lordships the conclusion of the Court below that the alleged will of the 4th of June 1890 was not proved is perfectly correct and it was not necessary for the Court to go so far as to declare that the document was a forgery. The story of the registration of the alleged will and its subsequent loss is most suspicious as the Subordinate Judge himself held but it would have been quite enough for the Court of Appeal to say that the alleged will was not proved. The burden of proof of course lies

upon the person who sets up a will not upon the person who is prepared to impeach it. Now Krishna Dei and Ram Dei threw over the alleged will of 1890 in favour of the alleged will of 1876 which has been pronounced by both Courts to be a forgery. The Appellant Sukh Dei took no part in the trial and of course offered no evidence in support of the alleged will of 1890.

On the Appeal to their Lordships the learned Counsel for the Appellant said everything that could be said in support of the Appeal, but there were no materials on which even a plausible argument could be based. The deceased it seems some four years before his death had a conversation with the Assistant Commissioner of the district, from which it might be inferred that he contemplated making a will some day or other, and then when the Subordinate Judge, for his own satisfaction, enquired into the alleged loss of the alleged will, some persons came forward and said that they had seen the will somewhere, and it was argued by the learned Counsel for the Appellant that the Plaintiffs might have cross-examined these witnesses. So they might with the leave of the Subordinate Judge. But they were not bound to do so. Nor would they have been well advised to have taken such a course. They were perfectly justified in waiting until evidence in support of the will was produced at the trial.

In their Lordship's opinion it is idle to discuss such flimsy evidence as that upon which the Appeal was based. They will humbly advise His Majesty that the Appeal must be dismissed.

The Appellants must pay one set of costs of the Consolidated Appeal, to be apportioned between the Respondents in the discretion of the Registrar in the event of their not agreeing.