Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakur Sheo Singh, and on his death, Raj Indra Bahadur Singh v. *Rani Raghubans Kunwar and Narendra Bahadur Singh, from the Court of the Judicial Commissioner of Oudh; delivered the* 18*th May* 1905.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This Appeal relates to taluka Mahewa, and the conflicting claims to succeed to it of those who allege themselves to be the heirs of the last owner, Thakur Balbhaddar Singh, who died on the 12th December 1898.

Before the annexation of Oudh, and the proclamation of confiscation, the taluka was held by Thakur Gajraj Singh, and with him summary settlement was made. To him, it was not disputed, was also granted a sanad of the 19th October 1859; and as will be shown later on, that sanad must have been one in the form in use under the sanction of Government at the time when it was granted, that is to say, a sanad to the grantee and his heirs, without indication of the line of inheritance. These are the material facts down to the death of Gajraj, which occurred in January 1860.

Gajraj at his death left surviving him two brothers, Girwar Singh and Dunia Singh, of whom the former was childless, while the latter had two

sons, Balbhaddar Singh and Sheo Singh. Girwar succeeded to the property on the death of Gajraj, and remained in possession until his death in 1865. He died childless, and by his will he left the estate to his nephew Balbhaddar who accordingly succeeded him. During Balbhaddar's time of possession the Oudh Estates Act (I. of 1869) was passed. In the lists framed under Section 8 of that Act the name of Gajraj, though he had long been dead, and though another descent had in the meantime occurred, was inserted in the first list as a person to be considered as a talukdar, and in the second list as one whose estate according to the custom of the family ordinarily devolved upon a single heir. He was not in the third list. And it is a matter of familiar knowledge that such entries of dead men's names in the lists were not uncommon.

Balbhaddar remained in possession of the estate until his death childless, which took place, as already stated, on the 12th December 1898. And he left surviving him his widow and his brother.

The usual controversies followed before the Revenue authorities upon the application for mutation of names, in which the brother was successful. And ultimately the present suit was brought by the widow, the now principal Respondent, against the brother, now represented by the Appellant, to recover the estate.

The Plaintiff based her case upon the ordinary rules of Hindu law, under which she claimed to succeed as heir to her husband; and of course, if those rules are applicable to the case, she was right. She further alleged that Balbhaddar had been adopted by his uncle Girwar.

The Defendant denied the adoption and made two specific answers to this claim: first, that by the custom of the family females were excluded from inheritance; secondly, that the succession was governed by Section 22 of the

Oudh Estates Act, and that under that section the brother was entitled in priority to the widow.

These pleadings raised two definite questions of fact, one, as to the custom excluding females from inheritance, the other, as to the adoption of Balbhaddar by his uncle Girwar. On both of these questions of fact the Subordinate Judge who heard the case decided in favour of the Respondent, holding that the custom was not proved, and that the adoption was. He thought that the right of succession was governed by the ordinary Hindu law, and that even if it fell under the Act, Balbhaddar having been adopted by his uncle Girwar, Sheo Singh, his brother by birth, was no longer his brother in the eye of the law but his cousin, and, though undoubtedly the nearest male heir, came in after and not before the widow in the list of heirs under Section 22. And he gave a decree in favour of the Plaintiff, now the first Respondent.

Against this decree an Appeal was brought to the Court of the Judicial Commissioner. That appeal was heard by two learned Judges. They agreed with the Subordinate Judge as to the custom and as to the adoption. They thought that the succession was governed by Section 22 of the Act. One of the learned Judges agreed with the Subordinate Judge in thinking that Balbhaddar's adoption by his uncle Girwar precluded Sheo Singh, his brother by birth, from succeeding as a brother in priority to the widow; the other learned Judge differed on this last point. And there being this difference between the learned Judges on a question of law, the Appeal to them was dismissed and the decision of the First Court affirmed. It is against that decision that the present Appeal has been brought.

The questions as to the alleged custom and as to the adoption which occupied so much of the

time and attention of the Courts in India have been disposed of by concurrent findings of those Courts; and their Lordships have not been asked to re-open them.

The question upon which the learned Judges differed, as to the meaning of "brother" in Section 22 of the Oudh Estates Act, only became material because it was considered that the succession to the taluka on the death of Balbhaddar was governed by that section. But that could only be if Balbhaddar were regarded as a legatee of a talukdar as the term is used in the section. In *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh*, 31 I. A. 132, a case decided by this Board after the present case was disposed of in India, it was held that a legatee who succeeded as such before the passing of the Act is not a legatee within its meaning.

The real contention before their Lordships on behalf of the Appellant was that, assuming the Act not to be applicable to the case, the succession to the taluka is governed, not by the ordinary rules of Hindu law, but by the terms of the sanad under which it is held, that that sanad is one granted to Thakur Girwar in substitution for the earlier sanad in favour of Gajraj, and that by the terms of Girwar's sanad the taluka descends, on the death of the holder, to the nearest male heir according to the rule of primogeniture. Therefore, it was contended, the Appellant was entitled to succeed on the death of Balbhaddar to the exclusion of his widow. It was not disputed that Sheo Singh was the nearest heir male of Girwar and Balbhaddar, whether there was an adoption of the latter or not.

In order to make this aspect of the case quite clear it will be well to refer very shortly to one or two points in the development of the policy of Government in connection with the Oudh talukas. This is matter of history, and the

whole story is to be found in Sykes' Compendium. It is sufficient here to notice two stages in that development. Down to the end of 1859, the sanads granted for talukas of the class to which the present belongs, that is to say talukas which by family custom descended to a single heir, but not necessarily to a male heir under the rule of primogeniture, were in a form sanctioned by the Government of India and printed at page 385 of Sykes' Compendium. It is a grant to the talukdar and his heirs, without specifying any particular rule of inheritance. These sanads appear to have been issued through the then Chief Commissioner, Mr. (afterwards Sir Charles) Wingfield, whose name they bear. The sanad to Gajraj must from its date have been of this kind.

In 1860 a further development took place. It was considered desirable to encourage the settlement of talukas so that they should descend to male heirs only, under the rule of primogeniture. And a new form of sanad was approved by Government, embodying this rule of descent, which is printed at page 386 of the same book. Such sanads appear to have been issued by Mr. (afterwards Sir George) Yule, then officiating as Chief Commissioner. It was further thought desirable to communicate the new form of sanad to talukdars already holding sanads in the older form, to point out its advantages, and to offer to such persons the option of taking the new type of sanad in place of the old. This appears to have been carried out through the usual channel of communication, the local officers of Government. And from an official paper quoted at pages 100 and 101 of Sykes' Compendium, it would appear that a large number of such exchanges were carried out.

With regard to the case as now presented on behalf of the Appellant, it was objected in the

first place that this was a new case, that in the mutation proceedings the Defendant based his claim on other grounds, that in his written statement in this suit no sanad to Girwar is mentioned, and that no specific issue was settled as to such a sanad. And all this is true. But the issues as settled were sufficiently wide to cover the case now presented. And what is of more moment, from an early stage of the case down to the latest, all parties appear to have been alive to the importance of such a document if it was in fact granted, and if its contents could be ascertained. The Defendant included it in his first list of documents, he tried hard to obtain its production, he endeavoured to trace it into the possession of the other side. He produced evidence to show that there was such a sanad. He sought to show its contents by means of proof or of presumption, but in this latter endeavour he failed in the First Court. Each Court considered both the question of the grant of the alleged sanad and its legal bearing upon the rights of the parties.

Their Lordships are satisfied that the Respondents are not unfairly taken by surprise by the manner in which the case is now presented, and that there is no danger of doing injustice by disposing of this Appeal upon that footing.

The next question is whether Girwar did in fact accept such a sanad. It was proved at the trial that he received the invitation to do so, addressed to him in common with other talukdars whose titles were similar to his own, and who had received from Sir Charles Wingfield sanads in the earlier form. It was proved that on the 19th April 1861 he elected to accept the new form of sanad, and applied for it to the proper authority. It was proved that in 1873 his successor, Balbhaddar, borrowed money from

the Land Mortgage Bank on mortgage of the taluka in question, and that on that occasion his title deeds were produced and examined by the Agent of the Bank. And in the mortgage deed then executed by Balbhaddar it is recited that "Raja Girwar Singh was proprietor at the time "of his death. . . . The estate, villages, "hamlets, hypothecated under this deed, were "granted under the Government sanad, sealed "and signed by George U. Yule, Esq., Officiating "Chief Commissioner of Oudh." Neither of the Courts in India seem to have entertained any doubt that such a sanad was in fact issued. And their Lordships are of opinion that that fact has been established.

Then have the terms of the sanad been ascertained? It is clear that nobody has been able to find the original document, and the case is one in which, as was recognised in both Courts, secondary evidence of the contents was admissible. In the Court of the Subordinate Judge the Defendant, in spite of his efforts, failed to procure such evidence. But while the case was before the Court of the Judicial Commissioner, the Defendant produced what the learned Judges state to be a certified copy purporting to be a copy of the sanad in question, obtained, it would seem, from one of the offices of Government. The learned Judges admitted this document in evidence, and their Lordships think rightly. It proves to be the ordinary form of primogeniture sanad as printed at page 386 of Sykes' Compendium. And that the sanad must have been in that form is confirmed by the date at which Girwar asked for it, the 19th April 1861, and by the recital in the mortgage deed already mentioned that the sanad was one issued by Mr. Yule. Their Lordships think the terms of the sanad to Girwar are proved.

About the meaning of this sanad, and about its effect, if the right of succession is governed by it, there is no room for doubt. It says expressly "It is another condition of this grant "that in the event of your dying intestate, or "of any of your successors dying intestate, the "estate shall descend to the nearest male heir "according to the rule of primogeniture."

But it was held by both Courts in India that such a sanad could not in point of law operate to substitute the line of descent prescribed by it for the line prescribed by the earlier sanad. The Subordinate Judge said: "Sanad was granted "to Gajraj Singh, and he could have consented to "have it changed, and if he had done so, it "would have been binding on his heirs and "successors, but if Girwar Singh got it con-"verted into a primogeniture sanad he could "not, by doing so, himself derive any benefit or "confer any benefit on his heirs and successors."

In the Appeal Court the view was thus expressed: "The fact which renders the sanad on "which the Defendant relies absolutely useless "is the fact that the estate had already been "conferred by the Government on Gajraj Singh "and his heirs for ever when it professed to give "it to Girwar Singh and his heirs for ever."

Their Lordships are unable to concur in these views. They involve two points, the power of Girwar to surrender the estate conveyed by the old sanad and the power of the Government to grant that conveyed by the new. The Subordinate Judge dwells on the first point, the learned Judges in Appeal on the second. As to the power of Girwar, it appears to their Lordships that when he succeeded as the heir of Gajraj, he became the absolute owner of the taluka with full power of alienation, and their Lordships see nothing to prevent his entering into an

arrangement with the Government by which he surrendered the estate he held under the first sanad and received it back again under the terms of the second, assuming that the Government on its side had the necessary power.

With regard to the power of the Government to do what it purported to do, the objection taken in the Appeal Court in India was that the Government having granted the estate in 1859 to Gajraj and his heirs, had nothing left to grant to Girwar at a later date. But that objection does not seem to apply to a transaction by which Girwar, the person absolutely entitled by inheritance to everything that passed under the earlier grant, surrendered it in consideration of a re-grant of the same estate on new terms.

In the argument before their Lordships another objection to the powers of Government was raised. It was suggested that though in the earlier troublous times many things were effectively done by Government as acts of State, still, in or after 1861 (which is the earliest possible date for Girwar's sanad, for it was in April of that year that he asked for it) no executive act of the Government could have created an estate descending by any rule of inheritance other than that laid down by the law, and the law in the present case would be the Hindu law.

The Crown Grants Act, 1895.

Whatever force such a contention might otherwise have had appears to their Lordships to be removed by the Act to which their attention was called, Act XV. of 1895. That Act recites, amongst other things, that doubts have arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers made by it or under its authority, and it is expedient to remove such doubts. And Section 3 enacts that "all provisions, restrictions, con-" ditions, and limitations over contained in any

" such grant or transfer as aforesaid shall be " valid and take effect according to their tenor, " any rule of law, statute, or enactment of the " Legislature to the contrary notwithstanding."

The present Appeal relates mainly to taluka Mahewa, and the argument before their Lordships dealt only with it. The principle adopted in this Judgment only applies to that taluka, including, of course, any property that may have accreted to it since the date of the Sanad under which it is held. It has been pointed out by Counsel that the Suit out of which the Appeal arises related also to property said to have been acquired apart from the taluka.* It seems clear that their Lordships have not materials before them to enable them to define what property, if any, other than the original contents of the taluka now passes as part of it.

It would hardly be safe to rely for the present purpose upon the admission mentioned at page 887 of the Record.

Their Lordships will therefore humbly advise His Majesty to make a declaration that the taluka Mahewa, as constituted at the date of the Sanad, with accretions (if any) or properties (if any) appurtenant to the taluka, has passed to the Appellant, and that as to any other property of the deceased the Decrees of the Courts below are not affected, and to order that it be left to the Court of the Judicial Commissioner, if it be found that there is real controversy on the point, either itself to determine what property falls under one category and what under the other, or to remit the case for inquiry to the Court of the Subordinate Judge, and to order that so far as may be necessary to give effect to the first part of the foregoing declaration the Decrees of the Courts below ought to be discharged, and the suit dismissed, but that, in the special circumstances of the case, the costs of

* *See* paragraphs 8 and 9 of the Plaint; Record page 2.

the parties on both sides in those Courts should be paid out of Balbhaddar's estate. The first Respondent will pay the Appellant's costs of this Appeal.

The second Respondent, another son of Sheo Singh's, was, on his own application, added as a party by Order in Council, but he has not lodged any case, nor did he appear by Counsel before their Lordships. There will be no order as to the costs of his application, and any costs incurred by him in the Appeal must be borne by himself.