Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Partab Narain Singh v. *Triloki Nath* (*No.* 12 *of* 1882), *from the Court of the Judicial Commissioner of Oude; delivered* 23*rd July* 1884.

Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR ARTHUR HOBHOUSE.

This appeal arises in a suit brought by the Respondent, in which he sought a declaration that he was entitled to succeed to the large taluq of Mahdona in Oude, and other property which belonged to the late taluqdar, Maharajah Sir Man Singh. The District Judge of Fyzabad dismissed the suit, but, on appeal, the Officiating Judicial Commissioner reversed his decree, sustained the Respondent's suit, and made the declaration he prayed. This declaration is directly opposed to the declaration made by the Queen in Council on the report of this Board in a former suit brought by the present Appellant, in which substantially the same issues relating to the succession to the taluq as those arising in the present suit were raised and decided.

The first question to be considered, therefore, in the present appeal is, whether the Respondent is bound by the judgement in the former suit, for, if so bound, the question on the merits need not be discussed.

It has scarcely been denied that the cardinal issues which were decided in the former suit are identical with those raised in the present; and the principal dispute arising on the defence of *res judicata* has been, whether the Respondent is bound either as party, or privy to that former suit.

The facts relating to the succession are fully stated in the judgement of this Board in the former appeal (*see* L.R., 4, Indian Appeals, 228). But it will be convenient for the elucidation of the question of *res judicata*, to which their Lordships' observations will be confined, to re-state some of these facts.

The late Maharajah was one of the great landholders of Oude, whose status and rights are the subject of Act I. of 1869. He died on the 11th October 1870, leaving a widow, the Maharanee Subhao Kooer, a daughter by a deceased wife, and a grandson (the Appellant), son of that daughter. He also left two brothers surviving him, both having sons; one of these brothers, Raghubar Singh, being the father of Lachmi Nath, and of Triloki Nath (the Respondent), the latter being the younger.

Some years before the passing of Act I. of 1869, viz., on the 22nd April 1864, the Maharajah executed a will, and deposited it with the Commissioner of the district. This will (using the translation given in the judgement of the officiating Judicial Commissioner, which was adopted at the Bar), is in these terms :—

"In the name of the Mighty Lord Ganesh.

"I am Maharajah Man Singh Bahadur, Kaim Jang, talukdar of Raj Shahganj, Raj Gonda, and other places.

"Whereas my intention as regards making any boy representative has not yet become fixed, I, therefore, for the present, declare my aforesaid Maharani representative, and proprietor, of my estate, and property, moveable and immoveable; until she make some one representative, let her remain representative, like myself, without power to aliene; and as regards my roperty, moveable and immoveable, no sharer or partner has

any claim. Therefore, having written these few words of the nature of a will, I have deposited with the Government, that it may remain a record, and be of use in time of need."

About two years after the Maharajah's death, and on the 16th August 1872, the Maharanee executed a document, of which the following (also taken from the above-mentioned judgement) is a translation :—

" I am Maharani Subhao Kunwar, widow of Sir Maharajah Man Singh Sahib Bahadur, Kaim Jang, K.C.S.I., Talukdar of the Raj of Mahdona, Gonda, &c.

" Whereas the late Maharajah Sahib Bahadur, my husband, departed this life on the 11th October 1870, corresponding with Katik Badi 2nd, Sambat 1927 ; and from that time up to date I am, under the will executed by my husband on the 22nd April 1864, in proprietary possession of the entire Raj and estates, and of the property, moveable and immoveable, of the Maharajah, my husband; and whereas life is uncertain, and after my death disputes may arise with regard to the succession to the Raj and dignity of the late Maharajah my husband, it is therefore right that I should make a will regarding the appointment of an heir and representative, after myself, in place of the Maharajah, now in heaven, my husband.

" I, therefore, being in good health, and of sound mind, have, of my own entire free will, and under no pressure or compulsion, appointed the youth Triloki Nath, son of Rajah Raghubar Singh, Sahib, deceased, nephew of my husband, heir and representative, in place of my husband, of all the rights and dignities conferred on the Maharajah Sahib Bahadur, now in heaven, by the British Government, and of the entire estate, and all property, moveable and immoveable. The said youth shall, after my death, remain, from generation to generation, in the enjoyment of all the rights and dignities, in place of the Maharajah Sahib Bahadur, now in heaven; and the said youth will also own, and enjoy, the property belonging to me, moveable and immoveable. I will fix such maintenance as I may think fit for the youth Partab Narain Singh, and for Darogah Sham Dhar. These allowances shall continue to be paid by the said youth, and by his successors, for ever, after my death ; and the said youth, and his successors, shall also discharge any money debts, or verbal contracts, binding on me, or on the estate. I have, therefore, written these few words of the nature of a will, that after my death they may be of use when required."

At the time the former suit was commenced, viz., on the 7th November 1872, the Respondent's title, if any, rested entirely on these documents;

for, as the younger son of a living brother of the late Maharajah, he was not entitled to succeed to the taluq as heir.

The claim of the Appellant, the son of a daughter of the Maharajah, rested on a clause inserted, at the instance of the Maharajah himself, in Act I. of 1869, providing that, in default of a son or son's descendants, taluqs should descend to such son, if any, of a daughter of the taluqdar, "as has been treated by him "in all respects as his own son." (Sect. 22, clause 4.)

The former suit was brought by the Appellant, against (1) the Maharanee, (2) the Respondent, alleged to be represented by Lachmi Nath, his brother and guardian, (3) Darogha Sham Dhar, brother of the Maharanee, (4) Lachmi Nath. The Appellant, in his plaint, asserted his title to succeed to the taluq as heir, by virtue of Act I. of 1869, being, as he alleged, a daughter's son, who had been treated by the Maharajah as a son, and prayed that the above-mentioned documents of the 22nd April 1864 and the 16th August 1872 be cancelled.

This plaint is very general and informal, but it appears from the judgement of the Deputy Commissioner of Fyzabad that (in his own words) "the pleadings gave rise to the following issues, "which, as amended at the suit of the parties, "ultimately stood thus." The 1st, 2nd, and 4th are as follows :—

(1.) Did the Maharajah leave a will, and if so what was the effect of it?

(2.) Did he ever direct the destruction of the will?

(4.) Was Plaintiff ever adopted as a son by the Maharajah, or treated by him as his own son?

Evidence having been given on these issues, both the Courts in Oude decided that the Maharajah had left a will, and had not revoked

it, and thereupon dismissed the suit of the Appellant.

The Appellant appealed from these decisions to Her Majesty in Council, and obtained their reversal.

In the judgement of their Lordships, the questions for decision are thus stated :—

"It is now admitted, if it were ever seriously doubted, that the Appellant can only succeed in his suit by establishing both the following propositions :—

"1. That the testamentary disposition which the Maharajah had undoubtedly power to make, and did make in 1864, was revoked or became inoperative in his lifetime.

"2. That the Appellant is entitled to succeed to the taluk as the son of a daughter of the Maharajah, who had been treated by him in all respects as his own son, within the meaning of the 4th clause of Section 22 of Act I. of 1869."

After careful consideration of the evidence bearing on these propositions, this Board came to the conclusion that the Appellant had established both ; the result being, that the affirmance of the first destroyed the foundation of the Respondent's title, which rested on the Maharajah's will, whilst the affirmance of the second established the right of the Appellant to succeed to the taluq as heir. This Board therefore advised Her Majesty to reverse the decree appealed from, and to declare that the will of the Maharajah was duly revoked by him in his lifetime, and that the Appellant was entitled, under Act I. of 1869, to succeed, as *ab intestato*, to the taluqdaree estate of the late Maharajah. A declaration to this effect was accordingly made by Her Majesty in Council.

On the 3rd January 1879 the present suit was brought by the Respondent, raising the same issue upon the revocation of the will as that stated in the judgement of this Board and decided against him, the fourth prayer in the present plaint being that it may be declared that the will of the Maharajah was not revoked, but was a good and valid will at his death.

The Respondent contends that he is not bound by this judgement, because he was a minor when the former suit was commenced, and Lachmi Nath, who is represented on the Record to be his guardian, was not duly appointed.

It appears that the Respondent was of the age of 16 years and 10 months when the former suit was commenced, and did not attain his legal majority, which in Oude is the age of 18, until the 7th February 1874, after both the judgements in Oude had been given. This is not disputed by the Appellant, nor is it contended that Lachmi Nath was properly appointed as guardian *ad litem*. But it is insisted that the Respondent is bound by the judgement in the former suit in two ways :—

1st. By having, with knowledge that he was nominally a party to the suit, taken upon himself the prosecution of the appeal to the Queen in Council, not only after he had become of full age, but after the taluq had been actually transferred to him by the Maharanee by an instrument to be presently adverted to, and so had waived the defect of a due appointment of guardian, or was estopped from setting it up.

2nd. That, if he be not bound as a party to the suit, the Maharanee fully represented the estate in the previous litigation, and consequently that the judgement in the former suit against her binds the Respondent.

With reference to the first of these points, which was that first argued at the Bar, their Lordships at once intimate that they do not propose to discuss it at length, as their decision will not turn upon it. But to complete the history of the former suit, and to show the position of the parties when the present was commenced, it will be necessary to refer shortly to some further acts and proceedings. Evidence was given in the present suit that the Respondent

was personally served with the original summons in the former one, and that from time to time he was present with the legal advisers for the defence when the case was discussed; but as all these things took place whilst he was still a minor, they are only material to show his knowledge of the earlier proceedings when he prosecuted the appeal to Her Majesty in Council.

After the Appellant had obtained leave in the former suit to appeal here in that suit, and during the pendency of that appeal, the Maharanee, on the 20th May 1875, transferred by deed the full ownership and immediate possession of the taluq to the Respondent, who, at the same time, executed a counter deed pledging himself to obey her as a son, and to carry on the business of the estate according to her advice. The Respondent having thus become the owner of the taluq, as far as the Maharanee could make him so, appears upon the evidence to have corresponded with Mr. Wilson, the solicitor engaged in the appeal, upon the conduct of it, and to have supplied funds for its prosecution. Although it seems that no formal appearance was entered for him, his name appears in some of the proceedings as a party to the suit. Whether in thus carrying on the appeal he should be deemed a party to it, and bound as a party by the final order of the Queen in Council, their Lordships, as already intimated, do not think it necessary to decide. It may here, however, be observed, that although after the transfer of ownership of the taluq had been made to him, *pendente lite*, by the Maharanee, he carried on the appeal in the manner just mentioned, he did not think fit to bring that transfer to the notice of this Board until the Order in Council had been issued, and upon his application for a rehearing.

Their Lordships now proceed to consider the second question, viz., whether the Maharanee

fully represented the estate in the former suit, which mainly depends on the construction and effect to be given to the will of the Maharajah, and to the first instrument executed by the Maharanee.

There can be no doubt that the will of the Maharajah is a testamentary instrument. According to the translation of it before set out, he states as a reason for making it, that his intention as regards making any boy representative had not become fixed. "Therefore, for the present," obviously pointing by this expression to the possibility of his making another disposition before his death, he declared the Maharanee "representative and proprietor of my estate; "until she make some one representative, let her "remain representative, like myself, without "power to aliene." This language in its natural meaning plainly discloses an intention to vest the whole estate in the Maharanee, until she should divest herself of it "by making some one else representative," and the words are sufficient and apt words to accomplish this intention.

As if to leave no doubt of his wish to make his widow proprietor of the taluq, until by her own act she appointed another, the Maharajah adds that until she does so she is to remain representative "like myself;" the plain meaning of these words being that until such appointment she was to own and represent the estate as fully as he himself owned and represented it.

It is not necessary to consider whether the prohibition against alienation was or was not an effectual restraint; for, however that may be, it is clear that this provision would not prevent the vesting of the whole estate in the Maharanee.

In what manner the succession would have gone, under this peculiar will, if the Maharanee had died without appointing a representative to the estate is a question which does not now arise.

It is sufficient for the present purpose to hold that, until she had appointed another to be owner and representative, the Maharanee's estate in the taluq was sufficient to constitute her the full representative of it in the former suit. Her estate was at least as large as that of a Hindoo widow in her husband's property. What was said by this Board of the widow's estate in the Shevagunga case is applicable to hers. "The whole estate would, for the time, be "vested in her absolutely for some purposes, "though, in some respects, for a qualified "interest, and until her death, it could not be "ascertained who would be entitled to succeed; ". . . . it is obvious there would be the "greatest possible inconvenience in holding that "the succeeding heirs were not bound by a "decree fairly and properly obtained against the "widow." (*See* 9 Moore, I. A., p. 604.)

The Officiating Judicial Commissioner did not disaffirm the proposition that, assuming no appointment had been made by the Maharanee, she would have fully represented the estate. He rests his judgment on the ground, "that with "reference to the conditions of the Maharajah's "will, the Maharanee divested her estate by the "execution of the document of 1872, and the "Maharajah's estate became, so far as it could "then become, *in bonis* of the nominated "successor." This is the principal ground on which his decree was sought to be supported in the arguments at the Bar. It was contended for the Respondent that the document of 1872 was a present irrevocable appointment; whilst the contention for the Appellant was that it was a will taking effect only on the death of the Maharanee, and ambulatory and revocable in her lifetime.

Their Lordships are of opinion that the latter is the true nature of the document. It commences

with a recital of the will of the Maharajah styling it "a will." The Maharanee then says that life is uncertain, and that after her death disputes might arise as to the succession to the Raj, and proceeds, "It is therefore right that I "should make a will regarding the appointment "of an heir and representative, after myself, in "place of the Maharajah; I, therefore, being of "good health and sound mind, have appointed the "youth, Triloki Nath, nephew of my husband, "heir and representative." She proceeds to say that the youth will enjoy the property after her death. She also bequeaths to him her own property. She says she will fix allowances for maintenance to relatives, which are to be paid after her death by Triloki Nath, who is also to pay her debts. She concludes by saying she has written these few words "in the nature of a "will," that after her death they may be of use.

The document, both in its beginning and its end, is expressly styled a will. In the beginning, it is so styled after reference to the Maharajah's "will," and an instrument of the same nature as his was evidently contemplated. It is also plainly declared by the Maharanee that Triloki Nath was to become representative only after her death, and there is no indication whatever that she intended to divest herself of her husband's property during her lifetime, any more than of her own, which she also bequeaths.

It is to be observed that, when the Maharanee sent a copy of the document to the Superintendent of the Court of Wards to inform him that she proposed the Respondent to be successor of the Maharajah after her death, she calls it "a will."

It was argued that the document was evidence that she had made an immediate appointment, because the words "I have appointed" are used. There is no pretence for saying that she had appointed the Respondent otherwise than by the

instrument itself. These words therefore can only have operation according to the nature of the instrument. They are not in themselves inconsistent with a disposition by will, and are altogether insufficient to countervail the express description of the document as a will, and its general tenor.

It was but faintly contended that the Maharanee had no power to make the appointment of a successor to the taluq by will, and therefore, to give effect to the instrument of 1872, it must be construed as a present appointment. But it would be impossible to give effect to the instrument contrary to the intention of its author. Treating it then as a will, which their Lordships hold it to be, the Respondent took no estate by virtue of it; and, of course, if the Maharanee had no power to appoint by will, he never could have taken any. The estate therefore, assuming the Maharajah's will had been unrevoked, would have remained in the Maharanee until the execution of the deed of 22nd May 1875, which, being made *pendente lite*, cannot affect the present question.

An objection to the efficacy of the judgement in the former suit was made during the argument, on the ground that the manager of the estate, appointed under "The Oudh Taluqdars' Relief "Act" (XXIV. of 1870), had not been made a party to it.

On the 4th December 1870 the Maharanee presented a petition under the above-mentioned Act, which, after stating that she had succeeded to the estate of her husband, prayed that the estate might be placed under the management of the Government; and, on the 3rd June 1871, an order was made by the Officiating Chief Commissioner, appointing the Deputy Commissioner of Fyzabad to be manager.

The objection was rested on the 25th section

of the above-mentioned Act, which is as follows :—
" Nothing in this Act precludes the Courts of
" the Province of Oudh having jurisdiction in
" suits relating to the succession to, or the rights
" of persons claiming maintenance from, any im-
" moveable property brought under the operation
" of this Act, from entertaining and disposing of
" such suits ; but to all such suits the manager
" of such property shall be made a party."

It appears that in settling the issues in the present suit, the District Judge was asked to frame an issue raising this point. The Judge declined to do so, and the point apparently dropped out of the suit. However that may be, their Lordships think the omission to join the manager as a party does not affect the validity of the decree as between the Appellant and the Respondent. The appointment of the manager did not vest the estate in him. It remained in the Maharanee as before. Nothing in the previous part of the Act takes away the jurisdiction of the Courts in suits relating to succession, and the 25th section expressly declares that it is not taken away. The Defendants to the suit might have objected to the non-joinder of the manager, or the manager might have intervened under the provision at the end of this section, but the section does not enact or purport to enact that judgements given in such suits shall be void as between the parties contesting the right to the succession.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgement appealed from, and to order that the suit of the Respondent be dismissed, and that he do pay the costs in the Courts below. The Respondent must also pay the costs of this appeal.