Judgement of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Rajah Run Bahadoor Singh v. *Mussumat Lacho Koer, and Mussamat Lacho Koer* v. *Rajah Run Bahadoor Singh, from the High Court of Judicature at Fort William, in Bengal, delivered 13th December* 1884.

Present :

LORD FITZGERALD.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

In this case Run Bahadoor Singh sued Mussamat Lacho Koer, the widow of his deceased brother, Moorlidur Singh, to recover possession of the property held by Moorlidur, on the ground that the brothers were joint in estate, and that he was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a Hindoo widow's estate in the property. She further maintained that this question had been conclusively determined in her favour in a former suit between her and the Plaintiff.

The Subordinate Judge decided the plea of *res judicata* against her, but held in her favour that the brothers were separate in estate, and gave her a decree.

The High Court determined the plea of *res judicata* in her favour, and, as it applied to the whole action, affirmed the decree. Nevertheless, they inquired into the question of fact, and held that the brothers were joint in estate.

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From this decree Run Bahadoor has appealed.

The widow has not appealed against the decree, nor could she, because it is in her favour, but she has appealed against the finding that the brothers were joint in estate.

It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it, but was made in spite of it. If she had not appealed, she could have supported the decree, on the ground that the Court ought to have decided the question of separation in her favour. But inasmuch as no objection has been taken at the bar to her cross appeal, and as (the appeals being consolidated) practically the inquiry would have taken the same course, and the costs would have been nearly the same, whether she had appealed or not, their Lordships are not disposed, under the peculiar circumstances of the case, themselves to take the objection.

The question of *res judicata* arose in this way.

After the death of her husband she applied for a certificate, under Act XXVII. of 1860, enabling her to collect the debts of her husband. This application was opposed by the Plaintiff, who set up the case of joint ownership, on which he now relies. A certificate was granted to her, and the grant was confirmed on appeal.

Though this proceeding has been relied upon by her as constituting *res judicata*, Counsel at their Lordship's bar have not argued that it has this effect, inasmuch as the only question to be determined in this proceeding is one of representation, not otherwise of title.

Subsequently she brought (in 1874) a suit in the Court of the moonsiff against a tenant for the recovery of rent, to the amount of Rs. 53.

Run Bahadoor intervened, asserting precisely the same title to the property of his brother as he sets up in the present suit, viz., joint interest and ownership. An issue was framed in these terms :—

" Did the Plaintiff or her deceased husband realize the rent of the 8 annas separately and in a state of separation before this, or did the Plaintiff's husband during his lifetime realize the rent with Run Bahadoor jointly, and after him, did Run Bahadoor alone receive rent of the entire 16 annas ? "

Witnesses were called on both sides, and the moonsiff decided in favour of the present Defendant.

On appeal to the Subordinate Judge the decision was affirmed.

The jurisdiction of tne Court of the moonsiff is limited to Rs. 1,000. The only appeal from it is to the District Court, from which there is only a special appeal, on points of law, to the High Court.

By Act X. of 1859, exclusive jurisdiction was conferred on Collectors to determine rent suits, with an express limitation of their power in cases of intervention (s. 77) to determine the " actual " receipt and enjoyment of the rent," with a provision that their decisions should not affect title.

By Act VIII. of 1862, s. 33 (of the Lieutenant Governor of Bengal in Council), rent suits were re-transferred to the ordinary tribunals, to be regulated, like other actions, by the Code of Civil Procedure (Act VIII. of 1859) without any re-enactment of the limitation which had been imposed on the jurisdiction of the Collector.

It has been contended on behalf of the Defendant, that, this being so, the moonsiff had jurisdiction to try the question of title if it were necessary for the purpose of determining to whom rent was due, and that the Plaintiff having intervened and raised an issue directly involving the question of title, is bound by the judgement.

This is the opinion of the High Court.

Their Lordships regard it as having been decided that such a judgment as that of the moonsiff is not conclusive.

The Indian Act in force relative to estoppel by *res judicata* was at the time of the institution of this suit Act VIII. of 1859, s. 2, which is in these terms :—

"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

With reference to this enactment it has been observed by the Board :—*

"Their Lordships are of opinion that the term cause of action is to be construed rather with reference to the substance than to the form of action, . . . and that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata* founded on the principle *nemo debet bis vexari pro eâdem causa*."

The same view has since been expressed by this Board.†

A similar view had been expressed by Sir Barnes Peacock, then C. J. of Bengal, in the well known case of Mussamut Edun *v.* Mussamut Bechun.‡

He there adopted the definition of judgements conclusive by way of estoppel given by De Grey, C. J., in the Duchess of Kingston's case, in answer to questions put by the House of Lords :—

"The judgement of a court of concurrent juris-
"diction directly upon the point is as a plea, a
"bar, or as evidence conclusive between the
"same parties upon the same matter directly in

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* Soorjommee Dayee *v.* Suddanand Mohapattar, 12 Bengal, L.R., 315.

† Khrina Behari Roy *v.* Brodeswari Chowdranee, 2 Law Rep., T. A., 285.

‡ 8 Weekly Reporter, 175.

"question in another Court," and Sir Barnes Peacock proceeded thus to define "concurrent "jurisdiction":—

"In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive."

This doctrine has been expressly affirmed in a recent case before this Board,* decided since the judgement appealed against.

It is true that when the suit in this last-mentioned case was brought the governing statute as to *res judicata* was Act X. of 1877, s. 13, which is in these terms:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally determined by a Court of competent jurisdiction, in a former suit between the same parties, or the parties under whom they or any of them claim, litigating under the same title."

But their Lordships state that if the case had arisen under the law as it existed before the statute, consisting of the previous somewhat imperfect statute supplemented by the general law, their decision would have been the same, and they do not construe the Act of 1877 as having altered the law.

A suit for interest amounting to Rs. 1,600, on a bond for Rs. 12,000, was brought in the Court of an Assistant Commissioner, whose jurisdiction was limited to Rs. 5,000; the Assistant Commissioner held that the real amount for which the bond was given was Rs. 4,790, and not Rs. 12,000, and, interest on the smaller sum having been overpaid, dismissed the suit.

It was held that his judgement was not *res*

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* Misir Raghobardial *v.* Rajah Sheo Baksh Singh, 9 Law Rep., I. A., 197.

judicata as to the amount for which the bond was given, inasmuch as this amount was beyond the limits of his jurisdiction.

Their Lordships approve of the statement of the law by Sir Barnes Peacock above quoted, and proceed to observe :—" In their Lordships' opinion " it would not be proper that the decision of a " moonsiff upon (for instance) the validity of a " will or of an adoption, in a suit for a small " portion of the property affected by it, should be " conclusive in a suit before a District Judge " or in the High Court, for property of a large " amount, the title to which might depend upon " the will or adoption ; . . . by taking con- " current jurisdiction to mean concurrent as " regards pecuniary limit as well as the subject " matter, this evil or inconvenience is avoided."

If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire.

Assuming, therefore, that the question of title was directly raised in the rent suit, their Lordships are of opinion that the judgement in that suit is not conclusive in this.

Having regard, however, to the subject matter of the suit, to the form of the issue (which has been above set out), and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, viz., whether any and what rent was due from the tenant, and that on this ground also the judgement was not conclusive.

It now becomes necessary to consider the question of fact whether at the death of Moorlidar the brothers were joint or separate in estate. Their Lordships agree with the observation of the High Court that the tendency of the Courts in this Country to presume a tenancy in common

rather than a joint tenancy has no application to Indian tenures, where the presumption is generally the reverse.

Although the judgement in the rent suit is not conclusive, still their Lordships cannot help attaching some weight to the decisions of the moonsiff and the Subordinate Judge, both Natives, who heard the same case as that now before us, and a good deal of the same evidence. It may be added that the judgement in the certificate suit, in which the Plaintiff set up the same case was the same; it was the same, also, and the case and evidence much the same, in a proceeding before a magistrate requiring the Plaintiff to enter into recognizances to keep the peace. All the Native Judges who have heard the case—and it has been heard by them four times—have concurred in their judgement upon it.

The following facts require to be stated in order to the understanding of the merits of the case. Bishen Sing was the father of the Plaintiff and of Moorlidur; the three, together with a grandson, formed a joint Hindu family. Bishen was the reversionary heir to the Raj of Tikari, the estates appertaining to which had descended to two brothers, Hetnarain and Modenarain, the former of whom owned 9 annas, the latter 7 annas. Both brothers had died; Hetnarain leaving a widow, Rani Inderjeet, who adopted a son, Ram-Kishen; Modenarain leaving two childless widows. Inderjeet (called in the case "the Maharani") had granted to Bishen a mokurruri lease of a considerable quantity of land, which formed the greater part of the joint property of the father and his two sons. Some time in 1860 or 1861, Bishen left his home on a religious pilgrimage, his whereabouts was long unknown, he was vainly sought by his sons, and did not return until about 1868.

During his absence the following occurrences took place. His two sons brought a suit in his name under the alleged authority of an am-mooktarnama from him against the Maharani, her adopted son, and the widows of Moderain, disputing the adoption and claiming possession of 9 annas of the property, and a declaration of right to 7 annas. That suit had been dismissed in the District Court, and again on appeal in the High Court on the ground that the am-mooktarnama was not genuine.

The Maharani had, on the mokurrury rent not being paid, seized the property, put it up for sale, and bought it herself.

It is further alleged by the Defendant, and denied by the Plaintiff, that the brothers separated in estate in 1862 or 1863 (Fasli, 1260).

It may be as well to say at once that their Lordships agree with both Courts that separation at this time (as alleged on the written statement of Defendant) is not satisfactorily proved; indeed, whatever might have been the desire of the brothers to live and act separately, they could not effect a partition of the family property without the consent of their father; but if the father on his return was informed of their desire to separate, this may have influenced his action in the transaction which has now to be referred to.

The suit of the sons having been dismissed upon the ground that it was brought without their father's authority, he was in no way bound by the result, and might have instituted a similar suit himself. Under these circumstances he came to an arrangement with the Maharani and Ramkishen, which is stated by the Defendant to be as follows:—

Bishen was to admit the adoption and relinquish all claim to the 9 annas, insisting only

on his claim in reversion to the 7 annas. And in consideration of this the Maharani and Ramkishen were to regrant the land (in Patna district), the subject of the former mokurrury, together with other lands in Gya by another mokurrury. Bishen, however, having devoted himself to a religious life, desired to relinquish his property to his sons, whom he described as "men of this world," in equal and separate shares; but according to the inveterate practice of Hindoos desired this to be done in the form of grants to fursidars, one fursidar in each grant to be the servant of and to represent one of his sons, the other fursidar the other son. His reason for this is said to have been to defeat any claim against them by one Moonshi Amir Ali, who had advanced them money to conduct the suit which has been mentioned.

In pursuance of this arrangement Bishen executed two ladavi ikrarnamas, in very nearly the same terms, on 2nd August 1868.

He therein states that he undertook a long pilgrimage after the death of Hetnarain, and proceeds, "Having gone to different tiruths I was so "deeply engaged in the worship of God that there "remained no knowledge of the circumstances "of my native place." He alleges that on his return he found that improper use had been made of his name by his sons in their suit, repudiates that suit, and renounces all claim to the 9 annas share held by Ramkishen, whose adoption he admits, retaining only his claim in reversion to the 7 annas; this instrument was executed also by his sons.

Whereupon the Maharani and Ramkishen execute on the same day another ladavi ikrarnama, admitting his reversionary claim to 7 annas.

The mokurrury pottahs follow on on the 4th of August 1868.

That relating to Gya confers on Bunwari Rawat and Kewal Rewat certain property of large extent, "from generation after generation," "at the definite and consolidated annual uniform "zumma of Rs. 1,709 in equal shares." That relating to Patna is to the same effect, the grant being to Mitan Rawat and Ducki Rawat. These grants are made by the Maharani and confirmed by Ramkishen. The grantees are household slaves, and it is admitted on both sides that they were fursidars. It therefore becomes necessary to go behind the deeds and ascertain the true nature of the transaction.

The view of the Defendant has been stated, viz., that the two brothers were the real mokurruridars, and were to hold separately.

That of the Plaintiff is that they were the real mokurruridars, and were to hold jointly.

The High Court are of opinion that Bishen was the real mokurruridar, a case set up by neither party.

The Defendant called the Maharani the only surviving principal of the transaction except the Plaintiff, Ramkishen having died before the evidence was taken in this suit. But the Maharani and Ramkishen had both given evidence for the Defendant in the certificate and rent suits, and their depositions are on the record. They are witnesses of high station, having no interest in the cause, speaking of transactions in which they were principal parties, their evidence is clear, throughout consistent, and appears to their Lordships conclusive, unless it be wilfully false.

The Maharani deposes (p. 299):—

"Both Babu Run Bahadoor Singh and Babu Moorlidur Sing were mokurruridars in equal shares, *i.e.*, at the time of taking the mokurruri Babu Bishen Sing had divided the property to both the above Babus in equal shares that the brothers might not fall out with each other, and with this view the name of a man of each of them was entered fictitiously in

the mokurruri. . . . Babu Run Bahadoor Sing and Babu Moorlidur Singh were separate, and therefore the name of a man of each of them was mentioned fictitiously."

It is true that the fursidars gave evidence on behalf of Run Bahadoor, the more powerful party (as he has acquired by purchase from the widows of Modernarain a present interest to the amount of 7 annas in the Raj), that they were slaves of Bishen, but, in their Lordships' opinion, this evidence cannot countervail the much stronger evidence that each was the slave of one of the brothers.

The Maharani further states (p. 546) that Bishen had told her that the

"two brothers were fighting with each other; he had made "a partition between them."

Ramkishen states (p. 288) :—

"At the time of taking the mokurruri, Babu Bishen Singh took it in the name of Kewal Rawat, servant of Run Bahadoor Sing, and in the name of Bunwari Rewat, servant of Moorlidur Singh. The Rawats are not the real parties. Babus Run Bahadoor Singh and Moorlidur Singh were mokurruridars in equal shares, . . . for this reason it was taken in the names of the servants of the two persons, that no dispute should arise between the two persons."

Again (p. 291) :—

"Babu Bishen Singh took the mokurruri for Babu Run Bahadoor and Babu Moorlidur. At the consultation held on that and other subjects of jumma and the selection of mokurruri mousahs, Run Bahadoor and Moorlidur were both present. Babu Bishen Singh was the person who actually took the mokurruri."

On being asked,

"How came you to know that Babu Bishen Singh made over the mokurruri to Babus Run Bahadoor and Moorlidur ?"

the witness answered,

"I know, having been told by Bishen Singh and Run Bahadoor and Moorlidur."

In other parts of their evidence these statements are in substance repeated.

Run Bahadoor was called as a witness, and, although he in general terms denied that there

was a separation between him and his brother, he gave no evidence with respect to the above transaction, at which Ramkishen alleged he was present, nor did he deny having said to Ramkishen what Ramkishen deposed to. The rest of his evidence may be described as mainly consisting of witnesses who deposed that the brothers lived and messed jointly, against whom a nearly equal number of witnesses for the Defendant may be set off who deposed that they lived and messed separately.

The evidence of the Maharani and Ramkishen is confirmed by Hafiz Syed Ahmed Reza, a pleader and zemindar, who appears to have long been on intimate terms with the two brothers, and gives the same version of the transaction. He says (p. 596), Babu Bishen Singh said "these men are of the world," therefore, according to his wish, the mokurruri was granted to Run Bahadoor and Moorlidur in the fictitious names of other persons, and he speaks to the negotiations at the time of the preparation of the deed.

Soon after the completion of the transaction Bishen Singh retired to Benares, where he died.

The evidence of the Maharani and Ramkishen, though accepted by the Sub-Judge, has been discredited by the High Court; that of Reza, on whom the Subordinate Judge placed much reliance, has been altogether discarded.

With respect to the Maharani and Ramkishen the High Court observe, "They, no doubt, have "deposed to statements made by Bishen Sing, "Run Bahadoor, and Moorlidur admitting "separation; but we think their evidence in "this respect, though important, must be taken "with very great reserve. They were both "witnesses in the rent suit, and it is not often "that in a suit of that character people of their "standing come forward to give evidence, unless

" they have a strong feeling in the matter. " Reading their evidence we find, in our opinion, " a strong bias in favour of the Defendant."

Their Lordships are unable to concur in these observations.

If the Maharani and her son knew and were able to prove that Run Bahadoor was setting up a false case against his brother's widow, it appears to their Lordships greatly to their credit instead of their discredit that they should overcome their reluctance to give evidence in order to protect her. Bias in a witness may be inferred from his being found to misstate facts, from his telling monstrous or improbable stories, or showing malicious temper against one of the parties. But nothing of that kind can be imputed to either of these witnesses. They appear to have answered the questions put to them straightforwardly, and their Lordships are unable to detect bias in their evidence unless it is to be inferred from the fact that the evidence tells strongly against the Plaintiff, but to infer this is to beg the question in dispute.

Another reason for discrediting the Maharani is that the Plaintiff had declared his intention, and instituted a suit, to set aside the compromise, whereby it is assumed that he had incurred her hostility.

The answer to this is, that she had given substantially the same evidence in the rent suit, before he had declared such an intention.

With respect to Syed Ahmed Reza, the High Court observe :—

" The Subordinate Judge has relied on the following statement by the witness :—' At the time of the execution of the ' mokurruri there was a talk between Run Bahadoor and ' Moorlidur, with respect to the mention of the names of the ' benami persons, each inquired of the other which of his men ' would stand benamidar for him. At last the names of those ' nominated by each of them were entered.' But the Subordinate Judge has failed to consider this gentleman's statement in cross-examination, ' I do not recollect whether I had ' made a draft of the mokurruri pottah in favour of the Plaintiff

'and Moorlidur. I do not know where that deed was engrossed 'in stamp, or where it was signed, but several had witnessed 'it here. When the deed was written and read I was not at 'Tikari (the place of execution) when the deed was presented 'to our signature as witnesses there was no mention made as 'to whose benamidars are the persons who names are mentioned 'in the deed.'

"So this gentleman contradicts himself, and though practising as a vakeel, seems wilfully to have followed the too common custom of this country of attesting a deed subsequently and at a different place to its execution."

For these reasons they place no reliance whatever on his evidence.

The High Court suppose Reza to have been a witness to one of the mokurruri pottahs, but this is a mistake, he was a witness only to the ladavi ikrarnamas, therefore the accusation of having witnessed a deed where it was not executed, together with the contradiction in his evidence, disappear. But even if the supposed contradictory statements related to the same deed they seem by no means irreconcileable. The consultation as to the choice of benamidars must almost necessarily have been before the actual execution of the document, and the witness, speaking of a transaction many years ago, may well have meant by "the time of execution of a "deed" the time when it was being prepared for execution.

Their Lordships regard it as dangerous for a Court of Appeal to reject an important and respectable witness, who has been believed by the Court who heard his evidence, on some supposed discrepancy in the record of it which did not occur to that Court, and which if his attention had been called to it he might have been able easily to explain.

Their Lordships adopt the evidence of these witnesses as credible and uncontradicted as to the circumstances attending the grant of the mokurruri pottahs, which they regard as the crucial point in the case, and are of opinion that whether the brothers had or had not separated,

or attempted to separate, before, they received the mokurruri grants in severalty, and were separate from that time.

The rest of the evidence is mainly in accordance with this view. With respect to the relations of the brothers, and the dealing with the property between the execution of the pottahs and the death of Moorlidur in February 1872, it is enough to say that in the opinion of their Lordships the evidence of the Defendant preponderates; proof is given of separate payments by some tenants, and separate receipts, and some jumma wasil baki papers are produced by tenants showing that they held under separate landlords.

Their Lordships cannot concur with the High Court in accusing the Defendant of "manufacturing" certain jumma wasil papers; the rent accounts, not having been made up for the last years of her husband's life, were made up by her directions after his death, but there was no attempt to represent them as other than they were, nor do they appear to have been relied upon by her; the term "manufacture" is not applicable to them.

After Moorlidur's death there is no question that his widow remained for more than two years in possession of her late husband's share of the property undisputed by Run Bahadoor till her application for a certificate in 1874, when, for the first time, he set up his present case. During that time Run Bahadoor only claimed the right to deal with his own half share; he raised money on mortgages of that half share only; he brought several actions in the name of Ducki Rewat, his fursidar, in respect of that share only, in the plaints to which actions it is stated that the property was held in separate moieties. He let 2 annas of certain property in which he and his late brother had held 4 annas, leaving the widow to deal with the remaining 2 annas. Indeed the High Court find, in agree-

ment on this point with the Lower Court, that, after Moorlidur's death, the Plaintiff and Defendant enjoyed the property separately. But the High Court explain this by the supposition that "Run Bahadoor, who seems to have been a "somewhat easy going person, was willing that "the Defendant should enjoy the 8 annas by "way of maintenance."

An "easy going person" appears an expression singularly inapplicable to a man who was bound over to keep the peace towards the widow on account of continued oppression and cruelty. It is to be observed that this was not his case—that he denied the fact of her possession which has been found by both Courts against him.

Their Lordships adopt the view of the Subordinate Judge, who observes, "After the death "of Moorlidur Singh, Run Bahadoor Sing, for "some time considering him separate, took pro-"ceedings only in respect of a moiety."

For these reasons their Lordships are of opinion that the direct evidence of the transaction in 1868, the form of the grant, "in equal shares," and the subsequent dealing with the property, all point to the conclusion that the brothers were separate at and before the death of Moorlidur, that consequently the finding on this question of the Subordinate Judge was right, and that of the High Court was wrong. Therefore, although the Defendant is not entitled to a decree on the issue of *res judicata* on which the High Court have given it her, she is entitled to a decree on the issue of separation of estate, and the decree in her favour will stand. The only order which their Lordships can humbly advise Her Majesty to make is, that the decree be affirmed, and both appeals dismissed. As the Defendant has succeeded on the merits of the case, she should have the costs of these appeals and the costs of the appeals to the High Courts.