Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mantappa Nadgowda v. Baswantrao Nadgowda from the High Court of Judicature at Bombay; delivered 20th January, 1870.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE first question raised in this case is as to the existence of a custom in the Nad Gowdki family by which, on descent, where there was more than one brother, it is alleged that the younger brothers did not, according to the ordinary law, share with the elder in a division of the property, but received maintenance, or an allotment of property in lieu of maintenance, in place of sharing in the whole property. Their Lordships observe in the first place that this custom has not been pleaded by the Defendants, and they would therefore feel a difficulty in knowing exactly what the precise terms of the custom are which the Appellant desires to rely upon. But further than that, after considering the evidence, their Lordships find no sufficient evidence of any custom of the kind alleged at the bar to have prevailed in the family. They therefore think it unnecessary to consider the question raised by the High Court in India as to whether in this part of India a custom of the kind suggested might or might not be valid. That is a question which would properly arise for determination as soon as it was ascertained that in point of fact such a custom had prevailed. Their Lordships, however, find quite sufficient materials upon which to dispose of this case in the dealings that

have taken place between the Appellant and the Respondent.

It appears that there were three brothers, the Appellant being the eldest, the Respondent the second, and another brother, not a party to this record, who was the third. It appears that upon the descent of the family property, the brother, who is not a party, received an allotment of land in lieu of maintenance, and did not claim to be and was not allowed to be a sharer in the family property. It appears further that the Respondent, on the 17th of October, 1852, entered into an engagement, evidenced by a deed of that date, between himself and the Appellant, his elder brother, to this effect. The deed is addressed by the Respondent to the Appellant:—"I, Baswantrao, "son of Kidiganappa, resident at Kasba Kelur, "execute a Deed of Release to the following ef- "fect: As differences arose in the family between "me and you, I live separate, my continuance in "the house being impossible. As it was custo- "mary from the time of our ancestors for grants "for maintenance to be allowed, I asked for land "for the support and maintenance of my family, "and accordingly you have given me for mainte- "nance the land and houses described below." Then follows a description of the property, and the deed continues:—"You have thus made me a "grant of land and a house. I shall have no con- "nection with the payment of the debts contracted "both by ancestors and by yourself. Whatever "debts there may be, you will pay or receive pay- "ment. You, as being born in the elder line, will "in the same manner as the first-born descendant "used to do from the time of our ancestors, enjoy "the Nad Gowdki Wutton, the Boodihall, and "Kadapaty estate, the Halli Chaorat land, the "Chaorat of this Kasba, the land of Gowdki "Wutton, and whatever else may be, together "with the Rasoom [cash allowance or fees] Hak- "Bab, and the rights and privileges [of the heredi- "tary office]. I have no right to claim them. "You will continue to pay as heretofore the Nad "Gowdki, Mahal Joodee, and the Gowdki Joodee, "and enjoy the whole of the Wutton for yourself. "You will allow no dispute to be raised about the "land and house now granted to me. I shall en-

"joy the said house and land and live in peace, "with the exception of the two, namely, the fields "and the house, I have no right over the rest of the "Wutnee land and property; you will not be liable "for the payment of any debts, etc., which I may "contract. As there was no stamp available for "the occasion, I have drawn this up on plain paper. "I promise to get the stamp within eight days from "this date, and write the deed upon it, and take "this paper back. In case I should fail to procure "the stamp, and give the deed written upon it, I "agree to pay all the expenses and the penalty "which may be incurred for getting this paper "stamped. To this effect I deliver and sign this "deed of release of my own free will and in my "sound mind."

Now if that is a valid deed, if it is not impeachable on the ground of fraud or any other ground, it appears to their Lordships that here is a clear and distinct contract between the Appellant and the Respondent, by which the Respondent accepts an allotment of specific land, obtains certain benefits by being relieved from the family debts, and makes stipulations with his brother which are binding and enforceable,—which would be binding and enforceable probably in any case, but are still more so when the transaction is one in the nature of a family arrangement. It is true that the arrangement is made upon the expression of belief on the part of the Respondent that he was acting in accordance with the custom of the family. It is very probable that that belief was founded upon fact, and the existence of that belief on his part does not in any way detract from but rather adds to the stringency and the effect of the family arrangement. It ought to be added that this deed having been executed on the 17th October, 1852, the Respondent appears to have entered into possession of the allotted property, to have remained in possession until the year 1861, when the plaint was instituted, without any complaint except that the portion allotted to him by way of maintenance was too small, which complaint again appears to have been met by an increased portion allotted for the purpose of increased maintenance.

Therefore, I repeat, if this be a valid document, and not open to challenge on the ground of fraud,

or upon any other ground, their Lordships would be slow to fail to give effect to a family arrangement of the kind thus expressed, followed, as it has been, by enjoyment and possession for a period of ten years.

Well, then, is there any ground for impeaching this document? Now, in the first place, it is to be observed that in the plaint filed by the Respondent there is no challenge of this document whatever. It is not sought to set aside the document on the ground that he was misled, that he had not sufficient advice, or that he was ignorant of his rights at the time he executed the release. But when the document was presented as a defence on the part of the Appellant, then the Respondent challenged it, not upon the ground of fraud or ignorance of his rights, but upon the allegation that the document never had existed at all, and that he never had signed such a document. Upon that issue, evidence was entered into on both sides. The two Courts before whom the case was first heard, the Court of First Instance and the Court of First Appeal, weighing that evidence, considering it very fully and very carefully, disbelieved the evidence of the Respondent, and held that the document was beyond doubt a genuine document executed by him. The second Court of Appeal did not differ from that conclusion arrived at by the first two Courts, but the second Court of Appeal made this objection to the document. It appeared that in the first instance it had not been stamped at all: indeed, on the face of it, it professed to be a document written on plain paper, the stamp for which was afterwards to be supplied by the Respondent. After it was first produced it appears to have had a stamp of two annas put upon it, and the High Court took notice that that was an insufficient sum to cover the amount of the property at stake. Now, admitting that the stamp was insufficient, which may be assumed, it appears to their Lordships that there were two courses which might have been taken by the High Court. They might have refused to admit the document for want of a stamp. Their Lordships do not say that that would have been a correct course. But it would have been a possible course. They might

have refused to admit the document for want of a stamp, or they might under the Acts and Regulations for that purpose, have required the document to be properly stamped, and the penalty paid into Court for the purposes of revenue. As to rejecting the document *in toto* for want of a stamp, there would have been this serious difficulty, that there does not appear to have been any objection raised to its admission in either of the first two Courts, and it is difficult to see how, that being the case, it would have been a just course to have rejected *in toto* the document in the Court of Last Appeal. However, the Court of Last Appeal did not take either of those courses. It did not reject the document. It did not do what obviously would have been the more correct course, require the deed to be stamped and the penalty to be paid, but it left the deed as part of the evidence in the case, just in the way in which it had been placed among the evidence by the Court of First Instance, and it qualified its effect, and the extent of its operation, by making it a deed of release, releasing so much of that which the Plaintiff might otherwise claim, as would be covered by the insufficient stamp of two annas. Their Lordships cannot do otherwise than express their surprise at the course thus taken, which appears to their Lordships to be entirely without precedent, without principle, and without authority.

Their Lordships, therefore, find the deed as part of the evidence in the case. They are prepared to say that, being evidence in the case, they think the full and natural weight should be given to it as part of the evidence in the case; and being of that opinion, they have already said that the deed not being challenged on the ground of fraud or on the ground of any ignorance of right, is the expression of a valid family contract between the brothers, acted upon by both and not now to be disturbed.

Their Lordships, therefore, will humbly advise Her Majesty that this Appeal should be allowed, that the decision of the High Court should be reversed, and the first decision which dismissed the plaint of the Respondent, be restored, and that the Appellant should have his costs of this Appeal as well as of the hearing in the Court of Second Appeal in India.