

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of—

HURPURSHAD AND OTHERS - *Appellants,*

v.

SHEO DYAL AND OTHERS - - *Respondents;*

RAM SAHOY - - - - - *Appellant,*

v.

SHEO DYAL AND OTHERS - - *Respondents;*

BALMOKUND - - - - - *Appellant,*

v.

SHEO DYAL AND OTHERS - - *Respondents;*

from Oude, Consolidated Appeals; and

RAM SAHOY - - - - - *Appellant,*

v.

BALMEO KOOND AND OTHERS - *Respondents;*

from the North Western Provinces of Bengal; delivered May 30th, 1876.

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE first three of the above-mentioned Appeals are from a Decree of the Judicial Commissioner of Oude, in a suit commenced in the Court of the Deputy Commissioner of Lucknow, in which the Respondent, Sheo Dyal, was the Plaintiff; and the fourth is from a decision of the High Court of Judicature for the North-western Provinces, in a suit commenced in the Court of the Subordinate Judge of Cawnpore, in which the Appellant, Ram Sahoy, was Plaintiff.

The former suit will hereafter be referred to as the Oude suit, and the Record in the first three appeals as Record No. 1. The other suit will be referred to as the Cawnpore suit, and the Record in the appeal in that suit as Record No. 2.

The parties, both Plaintiffs and Defendants, were members of an undivided Hindoo family, of which Koonhoo Lall was the common ancestor. He left three sons, Chundun Lall, Moonnoo Lall, and Gunga Pershad. About the year 1832, Moonnoo separated from his two brothers, Chundun and Gunga Pershad, who continued undivided, lived in commensality, carried on business as bankers, and thereby acquired and amassed considerable property.

Chundun had five sons: 1. Chotay, who died in the lifetime of his father; 2. Gouree Shunkur; 3. Baharee Lall; 4. Kunhya Lall, the father of Sheo Dyal, the Plaintiff in the Oude suit; and 5. Jankee Pershad. Chundun died in 1854; Gunga Pershad died in Chundun's lifetime, having had three sons, Sheo Pershad, and Ram Sahoy, who survived him, and Ram Pershad, who died without issue in his father's lifetime. Sheo Pershad died without issue in 1863, leaving his brother Ram Sahoy, the Plaintiff in the Cawnpore suit, his heir, him surviving.

Chotay Lall, the eldest son of Chundun, had three sons: 1, Balgobind, who died some years ago; 2, Balmokoond; and 3, Banee Pershad, of whom the last two were defendants in both suits.

Gouree Shunkur, the second son of Chundun, also had three sons; Hurpurshad, Ramchurn, and Bisheshur Pershad, Defendants in both suits, and Appellants in the first Appeal.

There were other descendants of Chundun through his sons Chotay Lall, Beharee Lall, and Jankee Pershad respectively, to whom it is not necessary to refer more particularly. They are shown so far as is necessary in the genealogical table set out in the case of the Appellants in the first appeal (p. 4.)

It appears from the above statement that the family consisted of two branches; the descendants of Chundun, and the descendants of Gunga Pershad.

Sheo Dyal, the Plaintiff in the Oude Suit, which was commenced on the 14th December, 1869, claimed as the representative of Kunhya Lall, one

of the five sons of Chundun, one-fifth of the whole property in suit by excluding altogether Ram Sahoy, the sole descendant of Gunga Pershad (Record, No. 1, p. 2); whilst Ram Sahoy, who intervened in the Oude Suit, and was the Plaintiff in the Cawnpore Suit, which was commenced on the 21st of December, 1869, claimed, as the sole descendant of Gunga Pershad, one-half of all the property.

It was contended that Ram Sahoy had separated before the commencement of the suit, and had received twenty-seven villages and other property as his share. It was, however, considered by the lower Courts that that fact had not been proved. Their Lordships are of opinion that there is no sufficient evidence of the fact, and that the decision was correct. That point may be treated as having been disposed of. It was also considered by the lower Courts, and admitted by the learned Counsel for the Appellants in the first Appeal, that although Chundun was the active member of the family, and the property was acquired principally through his ability, energy, and exertions, no part of it could be considered as his "self-acquired property," that is to say, as having been acquired within the meaning of the *Mitácshará*, through his own exertions alone and without the use of any part of the family funds.

Their Lordships are of opinion that the above view is correct, and their Judgment will proceed upon the basis that the family was an undivided Hindoo family, and that no portion of the property was the self-acquired property of Chundun or of any other member of the family within the meaning of the *Mitácshará*.

The most important questions raised in the Oude suit are what was the effect of Lord Canning's well-known Proclamation of March 1858, of the sunnud to Gouree Shunkur, of the summary settlements, of Act 1 of 1869, and of the documents called Gouree Shunkur's will, upon that portion of the property which was included in the above-mentioned sunnuds and summary settlements.

It was contended on behalf of the sons of Rajah Gouree Shunkur, the Appellants in the first Appeal, that all the estates included in the sunnud and summary settlements, whether previously joint property of the family or not, became the separate self-

acquired property of Rajah Gouree Shunkur, that he was the sole malgoozar thereof, and that he and his sons were the sole beneficial owners of it; that he had no power to transfer it by will or by alienation *inter vivos*; and as to the twenty-seven villages, it was stated that although in April, 1858, the summary settlement with regard to them was made with Kunhya Lall (p. 211), there was afterwards a mutation of them into the name of Rajah Gouree Shunkur (395, l. 45).

It was also stated on their behalf that many, but without specifying which, of the villages included in the sunnud and summary settlements were never part of the joint family property.

By the 8th paragraph of the Proclamation it was declared amongst other things that Chundun Lall, Zemindar of Mourawan, and five other persons therein mentioned, were thenceforward the sole hereditary proprietors of the lands which they held when Oude came under British rule; and it was further declared by the 9th paragraph that, with those exceptions, the proprietary right in the soil of the province was confiscated to the British Government. (Record No. 1, p. 12.)

It was held by the Judicial Commissioner, in his Judgment before remand, that the words Chundun Lall in that paragraph (probably the words used were Chondi Lall, as stated by the Judicial Commissioner, Record 1, p. 140)—were used as the generic name of the undivided Hindoo family (*id.*, p. 142, l. 15), and that the title of the constituent members of that family, as it existed in 1858, to whatever landed estates were held by them or their agents, directly or indirectly, on the 13th February, 1856 (the date of the annexation of Oude), was maintained to them, and was not conferred upon Rajah Gouree Shunkur, notwithstanding any wording of the Sunnud or the fact of his executing a kaboollyat for the estates between the 1st April, 1858, and the 10th of October, 1859, but that the remaining portions of the estate rested on a different basis (*id.*, p. 142, l. 34; p. 381, l. 11). As to those portions he was of opinion that they "must be held to have been *primâ facie* the sole property of Rajah Gouree Shunkur, and that as a consequence of this (confirmed by section 4, Act 1, of 1869), he had power to alienate it by act *inter vivos*, or to bequeath

the whole or any part of it" (p. 142, lines 42 and 48 ; p. 381, l. 28).

The former portion, he held, would follow the custom of the family, whilst the other portions would be regulated by the bequest of Rajah Gouree Shunkur, if he had made one, or, failing that, by Act 1, of 1869. "The succession," he adds, "to the personal property is independent of all special considerations, and must be regulated by Hindoo law and by family custom" (Record, No. 1, p. 143, l. 9). Again he says, "So far as concerns the ancestral estate of personal moveable property the will has no effect, for, over that, Rajah Gouree Shunkur had no testamentary power" (*id.*, 144, l. 19).

The same views are expressed in the Judgment under appeal (*id.*, 380, 381).

Their Lordships concur with the Judicial Commissioner that the 8th paragraph of the Proclamation applied to that portion of the estates of Mourawan which belonged to the family at the time when Oude came under British rule, notwithstanding Chundun's name was inserted in that paragraph. Chundun died in 1854, long before the mutiny. He personally could not have been referred to in the 7th paragraph of the Proclamation as one of those whom the Governor-General declared it to be his intention to reward for their steadfast allegiance at a time when the authority of Government was partially overborne, and who had proved it by the support and assistance which they had given to British officers. But Gouree Shunkur was one of those who had given support and assistance to Government, and not only Gouree Shunkur, but also Sheo Pershad and other members of the joint family. The Gomashtas of the several banking firms of the family were also loyal, and rendered good service to Government (Record 1, p. 279, l. 10).

It can scarcely be supposed that the Governor-General intended to injure any member of this loyal family, and by confiscation and regrant to transfer the beneficial interest in the joint estates of the whole family from the several members of it to a single member of the family for his own sole benefit.

As regards, therefore, the estates which were exempted from confiscation, the sunnud and summary settlements were a mere grant by Government

to one member of the family of property which belonged to the family jointly. They could not of themselves affect the rights of the family.

As regards that part of the property granted to Gouree Shunkur which, if any, was not previously part of the family estates, it cannot be held to have been the separate self-acquired property of Gouree Shunkur within the meaning of the Hindoo Law. It was granted as a reward for loyalty and for the support and assistance rendered to British officers; such services as those referred to in Gouree Shunkur's petition (Record No. 1, 279), could not have been rendered without the use of funds which must be presumed to have been those of the joint family.

This point, however, is not very material, for even if some part of the property was self-acquired by Rajah Gouree Shunkur, he, according to their Lordships' views, hereafter stated, transferred it to the family.

With regard to Act 1 of 1869 the Judicial Commissioner held that it did not confiscate or confer title in landed estate (Record 1, p. 379, l. 36). He says: "The preamble expressly recites that the title in taluquas has already been conferred: the Act declares what in the sight of Government are 'taliquas,' regulates the order of succession to such; and defines and, perhaps, creates certain special interests." Their Lordships, however, cannot concur with the Judicial Commissioner in his view that the Act did not confer title.

By section 2 the word "taludkar" is defined; it is declared to mean "any person whose name is entered in the first of the lists mentioned in section 8." Rajah Gouree Shunkur's name was entered in that list (Record No. 1, p. 122, l. 3; *id.* supplement, p. 3, No. 19, p. 9, No. 2), and section 10 made the list conclusive evidence that he was a taludkar within the meaning of the Act.

By section 3 it was enacted that every Taludkar with whom a summary settlement of the Government revenue was made between the 1st day of April, 1858, and the 10th day of October, 1859, or to whom, before the passing of the Act and subsequently to the 1st day of April, 1858, a taludári sanad had been granted, should be deemed to have thereby acquired a permanent, heritable, and trans-

ferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabúliyat executed by such taluqdár when the settlement was made, subject to all the conditions affecting the taluqdár contained in the orders passed by the Governor-General of India on the 10th and 19th days of October, 1859, and republished in the first schedule thereto annexed, and subject also to all the conditions contained in the sunnud under which the estate was held.

Section 4 is as follows:—

“Every person whose lands the Proclamation issued in Oude in the month of March, 1858, by order of the Governor-General of India, specially exempted from confiscation, and whose names are contained in the second schedule hereto annexed, shall be deemed to possess in the lands for which such person executed a kabúliyat between the 1st day of April, 1858, and the 1st day of April, 1860, *the same right and title which he would have possessed thereto if he had acquired the same in the manner mentioned in section 3; and he shall be deemed to hold the same subject to all the conditions affecting taluqdars which are referred to in the said section, and to be a taluqdar for all the purposes of this Act.*”

Gouree Shunkur's name was not contained in the 2nd schedule annexed to the Act, but Chundun's was.

Summary settlements were made with Gouree Shunkur between the dates specified in section 3; and a talúqdarí sanad was granted to him before the passing of the Act, and subsequently to the 1st of April, 1858, viz., on the 11th of December, 1859, by which the Government bound itself to maintain him and his heirs as sole proprietors of the estate (Record No. 1, page 21).

Chundun did not enter into a kabúliyat for the lands to which the suit relates, but Gouree Shunkur did. It therefore appears to their Lordships that Gouree Shunkur came within section 3 of the Act. If he did not, he came within section 4. It makes no difference, however, in the result which is the section within which the case falls, for both sections confer the same right and title.

Their Lordships are consequently of opinion that Gouree Shunkur must, in consequence of the Act, be deemed to have *acquired a permanent heritable and transferable right* in the estates to which the suit relates, being those which comprised the villages named in the lists attached to the agreements, or

kabooliyats executed by him when the settlements of the different portions of the estates were made ; and this, as regards both the villages which were, and those, if any, which were not, previously part of the family property.

They are, however, also of opinion that Gouree Shunkur had power by will or by alienation in his lifetime to transfer the estates which, by virtue of the Act, were not merely heritable, but transferable.

By section 11, it was enacted that, subject to the provisions of the Act, and to all the conditions under which the estate was conferred by the British Government, every taluqdar and grantee, and every heir and legatee of a taluqdar and grantee, of sound mind and not a minor, should be competent to transfer the whole or any portion of his estate, or of his right and interest therein, during his lifetime, by sale, exchange, mortgage, lease, or gift, and to bequeath by his will to any person the whole or any portion of such estate, right, interest, &c.

The remainder of that section, and sections 12 and 13, contain provisions relative to such transfers which do not apply to the present case.

Section 14 enacted that if any taluqdar or grantee shall *heretofore have transferred or bequeathed*, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath, the whole or any portion of his estate, to another taluqdar or grantee, or to a person who would have succeeded according to the provisions of this Act to the estate, or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions, and to the same rules of succession as the transferor or testator.

Then comes section 15, *which is very important*, and which enacts that—

“If any taluqdar or grantee *shall heretofore have transferred or bequeathed*, to any person not being a taluqdar or grantee, the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to

the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of, and the succession to, the property so transferred or bequeathed shall be regulated by the rules which would have governed the transfer of, and succession to, such property, if the transferor or legatee had bought the same from a person not being a talugdár or grantee."

The next question is how and to what extent Rajah Gouree Shunkur exercised the power of alienation conferred by the Act.

All the Courts in the Oude Suit, as well as the Subordinate Judge of Cawnpore, have given effect to the Documents called the will of Rajah Gouree Shunkur; but they put different constructions upon them.

The following is a translation of one of the documents dated 7 February, 1860, Record No. 1, page 28, l. 19 :

"I, Rajah Gouree Shunker, Talukdar and Zemindar of Hurha, Targaon, &c., in the district of Oonao, who have received from the British Government the proprietary right of Hurha, Targaon, &c., in the district of Oonao, in perpetuity, have been requested by Government to submit an application on the subject of primogeniture, with a view that the Talukah may not be split into pieces, as I would wish. Now, the custom that has been followed in my family, for generations past, is this—that the eldest member of the family continues to be the head, while the others remain obedient to him; but every one possesses a share in the Talukah. Under the custom of the family the other brothers are at liberty to have their share separated, should they wish it. The head has no power, under the old custom, to alienate the estate without consulting every sharer. I, therefore, wish that the old custom of maintaining the share of each shareholder be preserved, in opposition to the one in accordance with which one member of the family is allowed to succeed."

The other documents applicable to property in other districts are similar in effect, though not in the identical words. (Record No. 1. p. 28, l. 44, and p. 29, and *id.* p. 438, &c.)

Other material documents are those called the tabular statement and Chundun's Chit.

The document called the tabular statement, and the letter in which it was submitted, are at pages 30 and 31 (Record No. 1). The following are translations of the letter and tabular statement :—

"To the Tehsildar,

"Sir,

"I received your former letter, together with the form of a statement of succession, desiring me to fill in the columns, and also your latter communication, calling for the statement. As

directed by you, the statement is herewith submitted, duly filled in.

" Pray make no objection to the entry, sons of Lallah Chotay Lall, and son of Lallah Jankee Pershad, deceased.

" The object desired is attainable by such an entry.

" Yours faithfully,

" (Signed) RAJAH GOUREE SHUNKER,

" *Banker of Mourawan.*"

" May 13, 1860.

STATEMENT INCLOSED.

Name of Talooka.	Number of Persons in the Family fit to Succeed.	Summa of the Estate.	Name of Persons in favour of Succession of one Member of the Family.	Name of Persons against the Succession of one Member of the Family.
Jubroulee, &c.	<p>Sons of Lalla Chundun Lall, deceased:—</p> <p>1. Son of Lalla Chotay Lall, deceased;</p> <p>2. Rajah Gouree Shunker;</p> <p>3. Lallah Beharee Lall;</p> <p>4. Lallah Kunhia Lall;</p> <p>5. Son of Lallah Jankee Prasad.</p> <p>Sons of Lalla Gunga Prasad, deceased:—</p> <p>1. Lalla Shiva Prasad;</p> <p>2. Lalla Ram Sahoy.</p>	Rajah Gouree Shunker.

" *Remarks.*—The following rule has prevailed with regard to succession in the family of Rajah Gouree Shunker:—The eldest son in the family is regarded as the head, with the consent of all the sharers, and the others remain subject to him; but all the sharers retain their shares, and in case of disagreement between them, each sharer is at liberty to have his share separated."

The translation of Chundun's Chit is at page 10 (Record No. 1). It is as follows:—

" Let documents be drawn out, under the instructions herein conveyed, and then you will be at liberty to live together or separate from each other. Each sharer will take his share, half in money, and half in gold, silver and debts due from parties. Any member of the family may take me to live with him, or all the members may manage it, so that they may divide among themselves the expenses which may be incurred on account of the necessaries of my life.

" My brother Gunga Prasad .	..	20,000
" Chotay Lall will get double share	..	30,000
" Gouree Shunker .	..	15,000
" Beharee Lall	15,000
" Kunhya Lall	15,000
" Jankee Prasad	15,000

" All the females and children should certainly go to the Ganges, and bathe there. They may go either to Nujuf Gurh or Cawnpore, or Bruhmawart.

" Any members wishing to live together may do so, while others may live separate, and pursue their occupation. Each member will supply his own family with food, clothing, and jewels. Marriages, &c., should be celebrated after consultation with all the members.

" Koonwar Soodee, 10th 1892 Sumbut, or 1243 Fuslee."

In the Cawnpore suit the High Court held that none of the documents amounted to a will.

They said, "We have no hesitation in assenting to the contention that neither the reply as to the custom of primogeniture, nor the tabular statement which followed it, can be regarded as testamentary. They contain no devise or bequest, nor any language from which a devise or bequest can be inferred." And again: "It cannot be supposed that in replying to the inquiries made by the Deputy Commissioner the Talookdars of Oude set themselves to make their wills. It appears to us that the Rajah Gouree Shunkur intended no more than to inform the authorities of the custom of inheritance prevailing in the family of which he was a member, and to indicate the persons interested as sharers of the family property. *Moreover, whatever may have been the power of disposal which the Rajah possessed over the property in Oude, which point it is not necessary for us to determine, he neither had, nor does it appear that he assumed to have, any power to dispose of the property in suit,*" that is, the property in the North-Western Provinces. These remarks were very appropriate in the case before the High Court in the Cawnpore case. It is clear that the documents had no reference to property in the North-Western Provinces, and that they did not contain a bequest or testamentary disposition of any part of such property. But with regard to that part of the property in Oude, to which they related, the case is very different. That which was not a will in the ordinary sense of the word, might, in their Lordships' opinion, have amounted to a will within the definition of Act 1 of 1869. By section 2 of that Act it is declared that the word "will" means "the legal declaration of the intention of the testator with respect to his property *affected by this Act*, which he desires to be carried into effect after his death." It appears to their Lordships that the document of the 14th February, 1860, and the other documents, which were very similar, did declare the intention and wishes of Gouree Shunkur, which he wished to be carried into effect after his death with respect to all the estates which the Government had assumed to confer upon him by the sunnud, &c., including that part which was ancestral, as well as that which was granted to

him for the first time. Gouree Shunkur, as an honest and just man, and as a conscientious Hindoo, did not wish that after his death the property which belonged to the family jointly should pass to his eldest son as his heir, and continue to descend according to the rules of primogeniture. He wished things to go on as before, and that that which had been joint family property should continue joint family property.

It appears, from the Judgment of the Judicial Commissioner, that documents, such as those which have been called the will of Rajah Gouree Shunkur, have been treated and spoken of by the Talookdars of Oude as their wills.

He says, Record No. 1, p. 381, l. 38 :—

“ In ordinary cases this could hardly be construed as a ‘ will,’ for there is no direct allusion to the death of the executor, nor can it be said that there is a distinct direction as to the devolution of his property after his death.

“ But in Oudh it is a matter of notoriety that the letter to which these documents are answers were expressly intended to elicit and register the wishes of each Talookdar as to the descent of his landed estate after his death, and the replies are to this day spoken of by Talookdars as their will *when no other has been made*.

“ Its form is immaterial *as it was made prior to the passing of Act. I of 1869*, and the power of Hindoos to make even nuncupatory wills has been decided in repeated Judgments submitted by the Lords of the Privy Council.

“ I find that this document correctly describes the intention of the Rajah in respect to the devolution of his Talooka after his death, and that it is correctly described as a ‘ will.’ ”

Their Lordships concur in this view. They go further, however, and are of opinion that the declaration in those documents of the wish of Gouree Shunkur, acted upon as it was by him and by the other members of the family in his lifetime, and coupled with the tabular statement, was evidence sufficient to prove an alienation *inter vivos*, which in Gouree Shunkur’s lifetime transferred the property to the family, to be held by them as joint family property. No evidence was given to show that the rents and profits of the estate did not continue, even during the life of Gouree Shunkur, to be brought, like the other assets of the family, to the family treasury, for the use of the undivided family. In the Cawnpore case, Mohun Lall, one of the sons of Chotay, said, “ Every one used to take out of the profits as much as he required.” (Record

No. 2, p. 145). In the tabular statement sent in in May 1860 Rajah Gouree Shunkur entered his own name not alone, but with the other members of the family, as the persons fit to succeed: he could not have intended to devise to himself by a will or codicil—he clearly meant, by entering his own name as one of the sharers, to express his wish and intention that the estates should be held jointly during his own life as well as after his death. (Record No. 1, pp. 30, 31).

Their Lordships are of opinion that the transfer of the property to the joint family was complete in the lifetime of Gouree Shunker, and that it was acted upon in his lifetime as well as after his death. Beharee Lall and Kunhya Lall, and the other members of the family succeeded to the estates, not by inheritance, for they were not Gouree Shunkur's heirs, but by survivorship, and Beharee Lall and Kunhya Lall, respectively, became managers, according to the custom of the family, and as they would have done if no change had been effected by Lord Canning's Proclamation, &c. The beneficial interest continued in all the surviving members of the joint family.

In his petition, dated 28th June, 1867, Rajah Beharee Lall stated that all the present members of the family acquiesced and consented that the tabular statement (in one part of the petition called a "testament," and in another "an instrument"), which was filed during Rajee Gouree Shunkur's incumbency, was binding and effectual. (Record No. 1, p. 323.)

No special mode of transfer is required by the Hindoo law, even a verbal transfer is sufficient.

It may be urged that section 16 of the Act enacts that no transfer of any estate, or of any portion thereof, or of any interest therein, made by a taluqdár or grantee, or by his heir or legatee, *under the provisions of this Act*, shall be valid unless made by an instrument in writing signed by the transferor and attested by two or more witnesses. But that section was not intended to be retrospective or to affect transfers made previously to the passing of the Act. Sections 14 and 15 speak of transfers "heretofore made," and it never could have been the intention of the legislature to render void sales or transfers made before the passing of the Act by one

talukdar to another talukdar under section 14, or by a talukdar to any other person under section 15, if not made by a writing signed by the transferor in the presence of two or more witnesses. If Gouree Shunkur had in his lifetime sold the estate and conveyed it by deed to another talookdar, Act 1 of 1869, passed after Gouree's death, would not have rendered the sale void. Sections 17 and 18 are clearly not retrospective, and section 19 applies only to future cases, and it provides expressly that nothing shall affect wills executed before the passing of the Act. Section 16 applies to transfers, and section 19 to wills, but both sections use the words "*made under the provisions of the Act*;" they cannot be held to apply to a transfer made by deed, will, or otherwise nine years before the Act was passed.

For the reasons above stated, their Lordships are of opinion that the claim of the sons of Rajah Gowree Shunker to exclude the other branches of the joint family from any share in the Taluqdaree estate cannot be supported, and that the conclusion of the Judicial Commissioner in his first judgment to the effect that the same law of succession must be applied to the entire landed estate, and to the moveable property, is correct. It is hardly necessary to remark that Ram Sahoy, if he seeks to take the benefit of the ruling, must bring into the common stock the Taluqdaree property, which was ostensibly granted to his brother Sheo Pershad, or which stands in the name of Sheo Pershad, or of himself.

The next question is what is the rule of succession to be applied.

Upon the first hearing before the Deputy Commissioner, he rejected the claim of Ram Sahoy altogether, and awarded to the Plaintiff one-fifth share of all the property as that to which he was entitled under the will of Rajah Gouree Shunkur. Upon appeal the Commissioner modified that decree, and, putting a different construction upon the so-called will, awarded to the Plaintiff a one-seventh share of all the property, movable and immovable.

Upon special appeal to the Judicial Commissioner he remanded the case for the trial of certain issues of fact, of which the only important ones to be considered are the 6th and 7th. They are as follows :—

“6. What is the measure of the share of each party. In the personal property? In the estate now found to be ancestral? In the acquired estates?”

“7. What is the family custom as to succession?”
—(Record No. 1, p. 145.)

Under those issues fresh evidence was given as to Chundun's chit, which had been found by the Deputy Commissioner not to have been proved.

It is always dangerous to allow parties to make a new case, and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially is it so in the Mofussil Courts in India. But the parties not only gave fresh evidence upon the issue as to Chundun's chit, but they were allowed to set up an entirely new case and to enter into evidence to prove that Ram Sahoy and other members of the family had actually signed copies of the letter and had agreed to be bound to take upon partition of the immovable estate, shares corresponding in extent with those specified in Chundun's chit, as to the 110,000 rupees therein mentioned. That was a new case altogether, which had never been suggested or raised by any of the parties in either of the lower Courts in Oude, or even before the Judicial Commissioner on appeal, and in support of that case witnesses who had been examined upon the first trial were examined *de novo*, and materially altered and added to their former evidence.

As the ultimate decision of the Judicial Commissioner after the remand turned upon Chundun's chit, their Lordships will proceed to consider the evidence given with reference to that document. Before doing so, however, it will be well to go back and refer with more particularity to the proceedings in the Oude suit.

The Plaintiff claimed one-fifth of the whole property, movable and immovable, basing his claim on the will of Gouree Shunkur.

Hurpershad claimed to be entitled, as the eldest son of Gouree Shunkur, to succeed to the whole of the Mowrawan estate (Record No. 1, p. 75, l. 20), whilst the other sons of Gouree Shunkur contended that the wishes of Gouree, as expressed by the document (in one place called by them a will, and

in another a deed), were that the property should be divided amongst all of his sons. (Id., p. 76, l. 9 and 11.) The only parties in the Oude suit who relied upon the paper called Chundun's chit were Rugburdial, Mohun Lall, Ram Dyal, and Kashee Pershad, grandsons of Chotay Lall, and great grandsons of Chundun, and Balmookund and Bane Pershad, sons of Chotay and grandsons of Chundun. They said that the talooka could not, under the will of Baharree Lall, be broken up (p. 77, l. 12), and they set up Chundun's chit merely as to the movable property, houses, and gardens. They never stated or alleged that any of the members of the family had signed copies of it or had assented to, or agreed to be bound by it. It was contrary to their case that it was intended to apply to any part of the immovable estate. Their pleader, Kali Pershad, stated, in the fifth ground of their defence, as follows:—

“According to a letter of Lulla Chundun Lall Chotay Lall, was entitled to one-third of the movable property, houses, and gardens. Plaintiff is therefore entitled to one-sixth.” (Record No. 1, p. 77, l. 13). This was by putting Ram Sahoy out of the case altogether, and claiming to divide the movables amongst the five sons of Chundun and their descendants, and giving Chotay a double share under Chundun's chit. In this way they reduced the Plaintiff's share in the movable property from a fifth to a sixth, and set up a claim for Chotay's descendants in the movables, houses, and gardens, to two-sixths or one-third, being a double share. Balmookund, by the same pleader, stated that he, and not the sons of Gourae Shunkur, was entitled to succession, meaning, no doubt, that he was entitled to the whole of the immovable estate as talookdar. (Record No. 1, p. 77, l. 44.) That claim, however, has since been abandoned.

Ram Sahoy, the descendant of Gunga Pershad contended that the Plaintiff, as representing one of the five sons of Chundun, was entitled to a one-tenth share, that is to say, to one-fifth of a half, only, he himself claimed the other half, as representing Gunga Pershad's branch of the family. He was not originally made a defendant in the Oude suit, but he intervened and was allowed by the Deputy-Commissioner to

contest the Plaintiff's claim only so far as it related to a share in the twenty-seven villages which stood in his name, leaving him the option of making good by a separate suit any further claim he might have (Record No. 1, p. 86, l. 41).

The only issue in the Oude suit in the Court of the Deputy-Commissioner which raised any question as to Chundun's chit was the 11th (Record No. 1, page 87), and this had reference to the movable property only. The issue was as follows:—

“Are the descendants of Chotay Lall entitled to one-third of the movable property, houses and gardens,” and the onus of this issue was stated to be on the descendants of Chotay Lall.

Upon that issue the Deputy-Commissioner found that the alleged chit was not genuine, and very properly so upon the evidence then before him, for the original had been withdrawn and was not produced. It has already been stated that the Deputy-Commissioner in his judgment before remand awarded the Plaintiff one-fifth of the property, and that upon Appeal by Ram Sahoy to the Commissioner that Decree was modified and one-seventh awarded to the Plaintiff.

The Judgment of the Commissioner was delivered on the 7th of May, 1870, in Ram Sahoy's Appeal only. On the 6th of May, only the day before the Commissioner gave judgment in Ram Sahoy's Appeal (Record No. 1, page 120, l. 26), the Defendants Balmookund and other descendants of Chotay, including Mohum Lall, presented another Appeal (*id.* 108), and on the 12th May, 1870, five days after the Judgment of the Commissioner the Defendants Ramohurn and others preferred a third Appeal (Record, page 118), both of the last two appeals being against the decision of the Deputy-Commissioner of the 28th of March, 1870. The appeals appear to have been out of date (Act 8 of 1859, section 333) unless there was great delay in granting a copy of the Decree appealed against. Be this, however, as it may, the Appeal of Balmookund and others was admitted and judgment was pronounced upon it by the Commissioner, who upheld the Judgment he had given on Ram Sahoy's Appeal.

One of the grounds of the Appeal by Balmookund and other descendants of Chotay, including Mohum

Lall, to the Commissioner from the decision of the Deputy Commissioner was, not that upon the evidence the Deputy-Commissioner ought to have found in favour of Chundun's chit, but that they had had no opportunity of proving Chundun's chit put in evidence by them on the first hearing of the suit. (Record No. 1, p. 109, l. 34, and p. 121, l. 21).

The Commissioner expressed no opinion upon the point though he stated generally that nothing had been advanced to shake the propriety of his Decree in the other Appeal, which in fact gave no effect to Chundun's chit.

From that decision a special Appeal was preferred to the Judicial Commissioner by Balmookund, Mohun Lall and others, in which they set up a ground of Appeal as regards Chundun's chit similar to that which had been stated in their Appeal to the Commissioner (Record No. 1, p. 136, l. 4); but they still claimed in their Appeal the right for Balmookund, as the eldest member of Chundun's family, to succeed to the whole of the immovable estate (*id.* p. 135, l. 37). With regard to the custom of the family and Chundun's chit, they said, "The Appellants have had no opportunity to produce evidence *with reference to the custom of the family*, the will of Rajah Beharee Lall, and the writing of Chundun, and to file the latter" (Record No. 1, p. 136, l. 4). The Judicial Commissioner expressed no opinion with reference to that ground of appeal, though he ought to have done so. If he had expressed a judgment upon the point, he ought to have held on special appeal that, as a matter of law, there was nothing in the objection. The Appellants had not, nor had any one of the parties to the suit, set up a custom in the family with regard to the extent of shares to which brothers and the descendants of deceased brothers were entitled on partition of immovable estate. They had every opportunity to do so if they wished, and to prove it, if they could. With regard to Chundun's chit, they not only had an opportunity of filing it, but they actually did file it in the Court of the Deputy-Commissioner, but they afterwards withdrew it before the hearing (Record 1, p. 96, l. 15); and they also gave such evidence as they thought fit respecting it, but did not produce the original.

Sheo Churn, on the first trial before the Deputy-

Commissioner, stated that two copies of the letter, that is, Chundun's chit, had been made and signed by Hurpershad, Beharee Lal, Ram Narain Kunhya Lall and Madho Pershad, and he afterwards added, and by Baboo Ram Sahoy (*Id.* p. 84).

Mungul Sing said (*Id.* p. 84):—

"I was sitting near the Baradurree one morning in Magh, 1275 F., Rajah Beharee Lall, Ram Churn, Beni Pershad, Mohun Lall, Hupershad, Ram Sahai were there; Belmokund was having his hair dressed at a little distance. They all agreed to abide by Lalla Chundun Lall's letter, and went away. A Hindee Chit was written (he does not say a copy of Chundun's Chit was made) by Rajah Beharee Lall, and Kunya Lall, Ram Sahai, Beni Pershad, Hurpershad, Ram Churn, Madho Lal signed it. I cannot write or read.

"*Cross-examination.*—Hurpershad took this letter away. Beni Pershad took the original of Chundun Lall. Ram Sahai took away another. I was there by chance. I never was sent for before."

As regards the evidence given after the remand respecting Chundun's chit, their Lordships consider that the Deputy Commissioner was correct in stating that, with the exception of the testimony of Beni Pershad and Deenanath, the additional evidence (*Id.* p. 351 to 357), merely goes to show the existence of the document (*Id.* p. 373, l. 3). That fact is now admitted. Deenanath's evidence is at p. 358.

He says at l. 17: "I have seen with Beni Pershad and with Hurpershad a chit purporting to be written by Chundun Lall a year before I entered his service. I saw the letter during Chundun's life, and he spoke to me about it, and said he wished Gunga Pershad's sons to get 20,000 rupees, Chotay Lall's, 30,000 rupees; and the others 15,000 rupees each (*Oude Record*, p. 358, l. 18).

This shows that Chundun's intention when he wrote the document was that the several members of the family should each receive the particular amount set opposite to his name. Chundun, certainly, according to that evidence, does not appear at that time to have inserted the amounts as expressing the proportions in which the property of the family was divisible by custom or was at all times in future to be divided if partition should take place. Deenanath, however, added that the conversation was casual, and in answer to the Court said "In the conversation above described I under-

stood from Chundun Lall that he meant the whole property to be divided amongst the kinsmen in those proportions; the word 'Ursalha' was used by him. The conversation arose at the time of Golam Ali Khan driving the family across the Ganges in 1255 Fuslee." That was about the year 1848, and the conversation applied to the property as it existed at that time.

The statement as to what the witness understood from Chundun in 1848 to be his meaning is too loose and unsatisfactory to be acted upon; it was never mentioned or even alluded to either in his examination or cross-examination at the first trial; is quite at variance with the statement in his examination in chief that Chundun had told him that he wished Gunga Pershad's sons to get 20,000 rupees, Chotay Lall's 30,000 rupees, and the others 15,000 rupees each, coupled with his statement in cross-examination that Chundun's property consisted of 400,000 or 500,000 rupees when the paper was written.

The Deputy Commissioner in his Judgment, referring to this statement of Deenanath, says:— "This evidence is not sufficient to justify the Court in attaching to the document a meaning different from that on the face of it," and their Lordships entirely agree with him.

Deenanath did not, on his examination after remand in the Oude Suit, speak to the fact of copies having been made or signed by other members of the family. His evidence was given on the 19th of August, and it will be seen that, when examined before the Subordinate Judge in the Cawnpore Suit on the 10th March, 1870, he swore not only that copies had been made and signed, but that after finishing the copy the following sentence was added thereto: "Every one should divide and take his share, according to the letter of Lalla Sahib" (Record No. 2, p. 148). He is the only witness who spoke to that fact. Beni Pershad, one of the sons of Chotay, who was interested in acquiring a double share for his branch of the family, said:— "Two copies of the letter were made by Behari; one copy was given to Ram Sahoy, and the other to the descendants of Chundun;" but he did not state that any sentence was added thereto, or that the copies were signed by any of the members of

the family, though he is one of the persons who was said by Mungul Singh to have signed them. He went on :—" The chit of Chundun should regulate the partition of the property of every description " (368, line 28). But this was mere matter of opinion. He did not at that time state that any agreement to the effect was ever entered into by the family, and it is quite at variance with the defence which he had set up.

The Deputy Commissioner, in his Judgment on remand, found that there was no ascertained custom as to partition (Record, No. 1, p. 369, line 5), and putting Chundun's chit out of the question their Lordships are of opinion that that finding was correct.

With respect to Chundun's chit, the Deputy Commissioner, after giving his reasons in detail, and amongst others that the original document had not been produced, said :—" I am still of opinion that the proof of the genuineness of the document is insufficient ; and even admitting its genuineness, I cannot set any value upon it." He said :—

" It has been found that Chundun Lall and Gunga Pershad were a joint undivided family, and hence Chundun Lall had no legal power to deal with more than his own share, *i.e.*, one-half of the joint property.

" For these reasons I set aside altogether *the so-called writing of Chundun Lall*. It has been found above that no ascertained family custom respecting partition has been established, and I find, in consequence, on the issue, that the measure of the share of each party *in the personal property* is Hindu law, under which *Babu Ram Suhai will take one-half ($\frac{1}{2}$), and the sons of Chundun Lall, or their representatives, each one-tenth ($\frac{1}{10}$)*. In the ancestral estate, and that acquired up to the 14th February, 1856, I find that the measure of the share of each party is also Hindu law, and that under it Babu Ram Suhai will take one-half, and the sons of Chundun Lall, or their representatives, each one-tenth. I find that in *the acquired estate of Babu Sheo Pershad, i.e., Bunthur Taluka, Babu Ram Suhai is entitled to the sole ownership, the measure of his share being Act 1, 1869 and in the acquired estate or 'grant' of Gouri Shunker, as previously explained, I find that the measure of the share of each of the parties is the will of Rajah Gouri Shunker, under which the sons of Chundun Lall, or their representatives, and Babu Ram Suhai, will each take one-sixth.*"

The finding of the Deputy Commissioner, taken on remand, afterwards went before the Judicial Commissioner. He found that Chundun's Chit was genuine, not that all or any of the parties had signed a copy

or copies of it, or had agreed to be bound by it; but he considered that the document set forth the custom under which the ancestral estate had been held, and to which both Rajah Gouree Shunker and Baboo Sheo Pershad in their wills, and Rajah Behari Lall, in his petition, alluded.

The following is an extract from his Judgment, p. 384, l. 23, Record 1 :—

“The Court of First Instance would apply to the ordinary Hindu law, but it appears to me that such a ruling would not only be in direct contravention of the repeated declaration of this family for many years, that the joint estate was subject to family custom; but in direct opposition to the expressed wishes of the two grantees, Rajah Gouri Shunker and Baboo Sheo Pershad, in respect to the estates over which they respectively had a power of testamentary disposition.

“Had these latter intended that their grants should be divided according to Hindu law, nothing could have been easier or more natural than for them to say so. But what they do say is, “We have a custom under which we now hold family property, and by that custom we wish the succession to our acquired estate to be regulated.”

“I think it impossible for any member of the family to say that the division should be by law, rather than by family custom.

“The difficulty is to decide what is that custom.

“The two instances of separation in previous generations do not assist us, for they are evidently not regulated by a common law, but were friendly agreements, the amounts given off being determined amicably, and based probably on facts known to the parties concerned, and to no one else.

“It is hardly disputed that the greater portion of the property held prior to the recent grants was acquired by Chundun Lall and his eldest son, Chotay Lall; *and I myself can speak, from many years' experience, to the veneration in which the Burra Lalla (Chundun Lall) was held by the joint family, and to the fact that all agreed that though the family lived and hoped to continue as undivided, yet that Chundun Lall had made a division prior to his demise, which was preserved in the family archives, and recognized by them.*

“A paper, purporting to be a copy of the record of the division so made in Chundun Lall's own handwriting, has been produced in this suit, and it is admitted that it is a copy of the document filed in the Court of Cawnpore.

“Some ridicule has been cast upon this paper, and the Court of First Instance deemed it unnecessary to inquire into its genuineness or its validity.

“The ridicule was misplaced, for the points which, to the ignorant, appear ridiculous, are precisely those which prove the paper to be a genuine production of the patriarchal head of an undivided Hindu family.

“In this Court there has been no real attempt to deny its genuineness, nor evidence offered to refute it, and as it has been found by the highest Appellate Court to be genuine in a suit between some of those parties in respect to properties held by

them in the north-western provinces, and not subject to the special law of Oude, I think it unnecessary to remand this case again for trial of that issue, and, under my special power of review, I find that the document produced as Chundun Lall's is genuine.

"Finding that, I have no doubt but that that document sets forth the custom under which the ancestral estate has been held, and to which both Rajah Gouree Shunker and Baboo Sheo Pershad in their wills, and Rajah Behari Lall, in his petition, allude."

He then declared his finding on the several issues directed on the remand, and on the 6th and 7th. He said, on the 6th, "I find that the measure of the division of the personal property, the ancestral and the several acquired estates, including the Bhuntra Taluqna, is the custom of the family; and on the 7th, that the family custom is set forth in the writing of Lalla Chundun Lall, and that by it there falls of the entire estate divided into 22 portions, to the heirs of Gunga Pershad, 4 portions; to the heirs of Chotay Lall, 6 portions; to the heirs of Rajah Gouree Shunker, 3 portions; to the heirs of Rajah Behari Lall, 3 portions; to the heirs of Kunhya Lall, 3 portions; to the heirs of Jankee Pershad, 3 portions."

And he concludes thus:—

"I therefore find that plaintiff, Sheodyal, as the only son of Jalla Kunhya Lall, is entitled to a share equal to three out of twenty-two equal portions of the entire estate, and cancelling the decrees of the Commissioner of Lucknow, dated 7th May and 2nd June, 1870 (as before), I amend, as above, the decree of the Deputy Commissioner of Lucknow, dated 28th March, 1870, said share to be enjoyed by said Sheodyal, subject to and in accordance with the will of Rajah Gouree Shunker, deceased; and, considering the courteous and liberal manner in which the advocates of all parties have in this Court consented to the arrangement which enables the interests of all concerned to be determined in one judgment, I rule that when finally taxed in this Court all the costs in all the Courts in this case shall be costs against the estate."

The finding upon the 7th issue is altogether at variance with the cases set up by the several Defendants in the suit, none of whom—as before observed—with the exception of the descendants of Chotay Lall, ever relied upon Chundun's claim, and they, only as regards the movable property.

The genuineness of the document is now admitted, but it does not of itself prove a custom.

A custom is a rule which in a particular family or

in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly. But Chundun's chit did not allude to or prove a usage in the family, or profess to lay down a certain definite rule which could be applied to any other state of facts than that which existed at the time it was written. It was not, and could not be, acted upon or applied to all cases of partition amongst brothers or descendants of brothers. It was a mere proposal for the division of 110,000 rupees amongst certain then existing members of the family. What general rule can be extracted from it? Is it that in all cases where there are two brothers, the eldest having five sons, shall take nothing (for that was the case as to Chundun, by his own chit), that his eldest son shall take six twenty-seconds or three elevenths, the rest of his sons three twenty-seconds each, and his brother four twenty-seconds, and what is to be the case where there are more than two brothers or the descendants of more than two? Their Lordships are of opinion that Chundun's chit did not declare, was not intended to declare, and was not evidence of, a valid family custom. There was no evidence in the Oude case of an agreement by which the parties bound themselves to act upon it on any future partition of the family property, movable or immovable. The Judicial Commissioner did not rest his judgment upon the fact that an agreement between the parties had been proved, but upon the fact that Chundun's chit set forth a custom under which the ancestral estates had been held, and to which he stated Rajah Gouree Shunker by his will alluded. He referred to his own experience with regard to the veneration in which Chundun was held, and to his knowledge that the family had recognized a division which Chundun, prior to his demise, had made.

It ought to be known, and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. If the means of knowledge of the Judicial Commissioner of the facts spoken to by him in his judgment, as depending upon his own

knowledge, were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not have been admissible if he had been examined as a witness. But even if the Commissioner's statement of facts from his own knowledge be taken as evidence, Chundun's chit did not establish a custom as to the extent of shares upon partition, especially as regards immovable property. As to such property the terms of it were not applicable. It expressly says, "Each sharer will take his share half in money and half in gold, silver, and debts due," and if the translation in the Cawnpore case is to be relied upon, it says, "half the estate consists of cash, and the other half of silver, gold, and debts" (Record 2, p. 94); which shows that it was intended to apply only to property of that description.

The Judicial Commissioner not only found that Chundun's chit set forth the custom as to the shares in which the family property was divisible, but he interpreted the documents called Gouree Shunkur's will, and the tabular statement, as referring to a family custom by which the extent of the shares of the different members of the family was regulated. Their Lordships do not put that construction upon those documents. No such custom was set up by any of the parties to the suit in answer to the Plaintiff's claim. The custom referred to in the documents called a will was merely that "the eldest member of the family continues to be the head;" "that everyone possesses a share; that the other brothers are at liberty to have their shares separated if they wish it; that the head has no power to alienate without consulting every shareholder;" and a wish was expressed that the old custom of maintaining the share of each shareholder should be preserved in opposition to the rule of primogeniture. But there is no allusion to any custom under which the different members of the family were entitled upon partition to shares other than those provided by the rules of the Mitáchará.

Deenanath, in his evidence, says, "The custom of the family was that the eldest member had the direction." Gouree Shunkur did not state in the tabular statement, any more than in the documents called a will, that there was a custom as

to the extent of the shares to which the several members were entitled upon partition. In the tabular statement he divides the members of the family fit to succeed under two heads, "the sons of Chundun" and "the sons of Gunga Pershad." He does not number them from one to seven; but he numbers Chundun's sons from one to five under one heading, and Gunga's sons one and two under the other; he puts himself down as one of the five, and inserts grandsons in the place of deceased sons, thus: "The sons of Chotay Lall, deceased," and "the son of Lalla Jankee Pershad, deceased." He does not state that Chotay's sons will take two shares, but puts them down as representing their father as one of the sons of Chundun; and he also puts down Jankee Pershad's only son as representing his father, as another of the sons of Chundun.

The entry is as follows:—

Sons of Lalla Chundun Lall, deceased :

1. Sons of Lalla Chotay Lall, deceased.
2. Rajah Gouree Shunkur.
3. Lallah Beharee Lall.
4. Lallah Kunbia Lall.
5. Son of Lallah Jankee Prosad.

Sons of Lalla Gunga Prosad, deceased :

1. Lalla Shiva Prosad.
2. Lalla Ram Sahoy.

See also tabular statement, Record No. 1, p. 71, in which the words "descendants of Chotay Lall" are used instead of the words "sons of Chotay Lall."

Their Lordships consider that the proper interpretation of that document is that Gouree Shunkur considered, represented, and declared that it was his wish and intention that the property should be divisible *per stirpes*, and that is clearly the mode in which, in the absence of a family custom, the property being joint, would have been divisible under the *Mitácshará*. See the "*Mitácshará*" on Inheritance, chapter 1, section 5, par. 12.

It is not likely that Gouree Shunkur, who had had the sunnud granted to him, and been allowed to engage for the Government revenue, intended to say, and it is clear that he did not say, that it was his wish that his nephews,

Chotay's sons, as representing their father, were entitled, by custom or otherwise, to a share double the amount of that to which he himself was entitled. He certainly did not refer to Chundun's chit, and he could not have referred to the copies which are alleged to have been made and signed after his death.

The Judicial Commissioner's judgment as to what was the nature and extent of the custom is founded entirely on Chundun's chit. The custom spoken of by Rajah Gouree Shunkur in the documents called his will, is a custom said to have existed in his family for generations past. There certainly was no evidence of any partition in the family in which the property had been divided in the proportions specified in that document. The evidence, such as it was, was all the other way. It showed, so far as it went, that upon the partition between Chundun and Gunga Pershad and Moonnoo each took one-third. See Runjeet Singh's evidence (Record No. 1, p. 352, l. 7; *Id.*, l. 20, p. 353). Ram Sahoy swore that Rajah Behari Lall told him that the documents showed that upon the separation of Moonnoo two-thirds of the property was reserved for Chundun and Gunga Pershad (Record No. 2, Supplement, p. 4). Deenonath, in his evidence, says, "when Jubboo separated he got a 4 annas share, and Chundun 12 annas of joint property. I have often heard this. When Monnoo separated, out of 4 annas he got 1 anna 3 pie; Gunga, 1 anna 3 pie; and Chundun, 1 anna 6 pie. The 12 annas was not divided, it was left to meet expenses of the business."

The evidence in the Oude suit cannot be supplemented by that which was given in the Cawnpore suit in December, 1870, long after the final decision of the Judicial Commissioner, of October, 1870, was pronounced.

Reliance was placed upon Ram Sahoy's letters, as showing his own admission that he had no right to any share in the family estate. It cannot now be disputed that he is entitled to a share, though the extent to which he is entitled is a matter in dispute. Their Lordships agree with the view which the High Court took of those letters. They consider that, regard being had to the circumstances, an admission that he was not entitled to anything cannot be fairly drawn from them. He probably was

under the impression at the time they were written that by virtue of Lord Canning's Proclamation, and the sunnud which had been issued, his beneficial interest as a sharer had been confiscated, and that Behari was the beneficial owner of the whole of Mourawan. The letters, if they amount to an admission at all, amount to an admission that he was not entitled to any portion of the Mourawan estates, they certainly cannot be evidence to show that he was entitled to only two-elevenths of it.

Their Lordships having decided that the property which was granted to Rajah Gouree Shunker by Sunnud, &c., was transferred by him to the family to be held as joint family property, the whole of the property in dispute in both the suits must be governed by the same rules. Their Lordships are of opinion that neither by custom, usage, contract, nor by any other means, has the property in dispute in the Oude suit at any time become divisible upon partition in any other manner or in any other shares than according to the rules of the Mitácshará. They are of opinion that the finding of the Judicial Commissioner on the sixth and seventh issues, that the measure of division of the personal property, the ancestral and the several acquired estates, including the Bunthra estate, is the custom of the family, and that that family custom is set forth in the writing of Chundun Lall, and his decree founded upon that finding are erroneous, and that the property must be divided according to the rules of the Mitacshará. There is not sufficient evidence to warrant a finding that Ram Sahoy was to take the Bhuntur estate and the twenty-seven villages as his share of the property; and their Lordships are of opinion that the twenty-seven villages must be held to form part of the joint family estate, and must accordingly be divided as part of it.

It was agreed at the hearing of the Appeals that their Lordships should decide whether the Bunthra estate is part of the joint family property, and is divisible in the same manner as the Mourawan estate. They are of opinion that it is. Sheo Pershad to whom it was granted, having signed documents similar to those which were signed by Gouree Shunker as to the Mourawan estates (Record No. 1, page 27, l. 30), Bunthra became part of the undivided family estate.

With regard to the property which is the subject of the Cawnpore suit, their Lordships are of opinion that Chundun's chit does not apply to it ; and that it is not satisfactorily proved that the members of the family ever agreed that upon partition it should be divided in the proportions specified in Chundun's chit with respect to the 110,000 rupees therein mentioned.

Banee Pershad's evidence in the Cawnpore suit, given on the 19th December, 1870 (Supplemental Record in that Suit, page 2), is very different from that which he had previously given on the 23rd August, 1870 in the Oude suit after the remand.

He was greatly interested in the result as one of the descendants of Chotay Lall, and his evidence in the Cawnpore suit was given after the last judgment of the Judicial Commissioner had been pronounced on the 29th October in that year.

He then stated for the first time that copies of Chundun's chit were signed by six members of the family, that is to say by the eldest son of each stock.

But even that would fall short of proving that they had agreed that upon any future partition of immoveable property, their shares should be adjusted in the same proportions as those in which the 110,000 rupees mentioned in Chundun's chit were to be divided. None of the witnesses corroborated the evidence of Deenonath given in the Cawnpore suit (Record No 2, page 148), that an additional sentence was added to the copies of Chundun's chit which the parties are said to have signed.

Chundun's chit had reference only to movable property, and, without some addition, could not be applied to the partition of immovable property.

Banee Pershad went on to say that the signed copies were delivered, one to Hurpurshad, and one to Ram Sahoy (Supp. Record Cawnpore Case, p. 2, l. 18), the persons above all others whom it was necessary to bind by them. The story is most improbable. Ram Sahoy (Record No. 2, Supplement, page 4) swore that an arrangement was come to by which Bunthur and other property was to be taken by him as his share, and in this he was corroborated by Banee Pershad. The latter, after stating that copies of Chundun's chit were signed, said "After this Ram Sahoy got the 27 villages in Oude,

and took the profits. Ram Sahoy took the 27 villages in accordance with the arrangement. The chitta on account of the whole estate was not made up, but these villages were given to Ram Sahoy to receive the full profits, while the remaining villages continued to be attached to the Koothee at Oonao (Id. Supplemental Record, page 2, l. 25, &c.).

Further he said Rajah Behari did not sign the paper which I have deposed was drawn up in his lifetime, he wrote the copies and his son signed it. (Id. p. 3, l. 1.)

Again "at the meeting of the family at which the document executed by all of us was prepared, there was no mention made of any other paper but the document of Chundun."

Hurpurshad denied that a copy of Chundun's chit was signed by the family. (Record No 2, page 180).

Ram Narayun said he did not know whether he had ever signed such a paper. He said "If I see the paper I can say," but none was produced.

Mohun Lall who was interested in obtaining a double share for the descendants of Chotay, of whom he was one, on his first examination before the Subordinate Judge (Record No. 2, page 143), did not corroborate the other witnesses as to the delivery of the signed copies to Hurpurshad, and Ram Sahoy respectively, but he corroborated Ram Sahoy and Ram Pershad as to an agreement having been come to by which Ram Sahoy was to take the 27 villages, &c., in lieu of his share. He said in his evidence, taken 18th March 1870, (Record No. 2, page 146, line 3) "about two and a half or three years ago Rajah Behari Lall, Hurpurshad, and Ram Pershad were looking at the document—*i.e.* Chundun's chit—and I was present there," but he does not say that copies were made or signed by any of the family.

Deenonath in his first deposition in the Cawnpore suit (Record No. 2, page 148), said the copies were signed in 1274 Fuslee, which would be about the time above mentioned by Mohun Lall. In his deposition in the Oude suit after remand (Record No. 1, page 358) he speaks of the chit, and not of the copies. In his examination before the High Court after adjournment, he said the copies were made in 1275 Fuslee.

Mohun Lall in his deposition taken on 7th December, 1870, after the adjournment, says, "I first saw it about three years ago," that would be in 1867.

Further, in his first examination in the Cawnpore suit, Mohun Lall, speaking of Chundun's chit, said (Record No. 2, p. 143, l. 29):—"It is in the handwriting of Chundun;" and he went on—"Subsequently in the time of Rajah Behari Lall a partition deed was executed by the members of the family, and signed by all of them. Rajah Kunhya Lall, Baboo Ram Sahoy, Lalla Balmokund, Madho Pershad, Hurlpurshad and Ram Narayun attached their signatures to the document. It is probably with some of the members of the family" [here some of the words are omitted, probably "it was agreed that the family"] "should divide the property according to the directions of Lalla Chundun Lall, contained therein." Here he speaks of a deed of partition, which was probably with some of the members of the family. He could not refer to the copies of Chundun's chit which, in his examination after adjournment by the High Court he said were given, one to Hurlpurshad and one to Ram Sahoy (Record No. 2, p. 182). He proceeded:—"Leaving out the property in Oude, the Plaintiff, that is Ram Sahoy, is entitled to those estates which are situate in Cawnpore and Futtehpore districts, and in respect of which his name is entered in the register. I mean, that the Plaintiff's share is equal to all the estates in respect of which his name has been recorded in conformity with the letter executed by Lalla Chundun Lall. The Plaintiff's share in the firm is, in my opinion, equal to two-elevenths, according to the letter referred to above," &c. Again he says (p. 144):—"In the petition of Rajah Behari Lall, bearing order dated the 14th January, 1868, which was presented to the Deputy Commissioner of Oonao, it is stated that the entry of the names should be effected in conformity with the Memorandum of Lalla Chundun Lall. The Memorandum referred to therein is the document marked C. (Chundun's chit), and the Razeenamah or Agreement mentioned therein is the Agreement of which I have spoken above. It was in conformity with this petition of Behari Lall, that is, in compliance with the provisions contained therein, that the Plaintiff caused his name to be entered in column 9 of the

Revenue Register of the district of Oonao in respect of the twenty-seven villages.”

The High Court, in their first Judgment, speaking of the agreement mentioned in the petition of Behari Lall of the 9th February, 1868, say :—

“ There is other evidence to show that such an agreement was made. Mohun Lall deposed that a deed of agreement was drawn up in the lifetime of Behari Lall, and signed by the members of the family, including the Plaintiff. Deena Nath, the head gomashta of the firm at Morawan, states that Behari Lall sent to Hurlpurshad, who had the key of the cash room, for the paper drawn up by Chundun Lall in October, 1835 and had a copy made of it which was signed by all, it being agreed that a division of the property should be made in accordance with its provisions. Sheo Churn Lall states that the copy was made in his presence, and signed by all the members of the family. Shunker Buksh deposes that he heard from the Plaintiff that Behari Lall had recently written a paper which was signed by all parties ; and Mahadeo deposes that the Plaintiff informed him on two occasions that he would take his share in accordance with the paper written by Chundun Lall.”

Again—

“ It is much to be regretted that the Court of First Instance did not examine the Plaintiff as to the making of the Agreement to which the witness referred ; and if the Court had been satisfied that such an Agreement was in fact made and reduced to writing, it should have called upon the parties to produce it, for it would have had a material bearing on the plea of the Defendants, that the Plaintiff had assented to the arrangement” (see Record No. 2, p. 178, l. 36 ; and p. 179).

Further they say :—

“ There remains only the question,—was the principle of division indicated in the paper written by Chundun Loll assented to by the Plaintiff, or those from whom he claims, or was there any other arrangement assented to, with respect to the division of the property, at variance with the ordinary rules which govern the partition of joint property ? This issue was not distinctly raised in the Court below ; and although there is some evidence on the record on which we might determine it, to enable us to do so satisfactorily, we deem it essential *that the agreement to which reference has been made by several witnesses as having been prepared in the lifetime of the Rajah Behari Loll, should be called for, and, if it exists, be put in evidence.* At present we have only secondary evidence of its contents, and, although no objection was taken to its admission in the Court below, we hesitate to act upon it until we are assured that no better evidence exists. We, therefore, call upon the Defendants to *produce the document to which we have referred, and to give proof of its identity with that spoken to by the witnesses ;* and if the Plaintiff desires to contradict the evidence of the execution of the document which may be adduced by the Defendants, he is at liberty to tender himself for examination.”—(Record No. 2, p. 279, l. 21.)

The evidence of Mohun Lall (Record 2, p. 143) and of Beni Pershad appears to refer to a document containing an arrangement by which Ram Sahoy was to take the twenty-seven villages, &c., and probably, according to Beni Pershad, Bunthur and other property as his share. The document may have referred in terms to Chundun's chit, and for these reasons copies of it may have been made and signed by the family for identification. If the parties intended that all the property should be divided in the proportions mentioned in Chundun's chit, it is improbable that they should have signed only copies of the chit when it referred to specific movable and not to immovable property. In their second Judgment, delivered on the 21st August, 1871, the High Court say: "We adjourned this case in order to obtain the production of the copies of the document alleged to have been written by Lalla Chundun Lall in October 1835, which, as we observed in the former part of our Judgment, was deposed to by several witnesses. We have, however, failed to obtain its production."

In their former Judgment the Court stated that they adjourned for the production of the agreement spoken to by Mohun Lall, not merely for the production of the copies of Chundun's chit. The Defendants did not produce the deed of agreement, nor either of the copies of Chundun's chit, which were said to have been signed; nor did they sufficiently account for the non-production of them if they existed. The High Court did not find that it was out of the power of the Defendants to produce the agreement or the alleged copies of Chundun's chit, and unless that was the case there was no excuse for Chotay's descendants not producing them if they existed. The issue as to whether a rule for partition of the joint family property, other than that provided by the Hindoo law was agreed upon, was entirely new. None of the Defendants set up as a defence that a special rule for partition had ever been fixed by custom or agreement, or that any arrangement had ever been come to by the family to divide the property in the proportions fixed by Chundun's chit with reference to the 110,000 rupees mentioned in it. Chotay Lall's descendants set up quite a different case, viz., that

the property was all Chundun's, and that Chundun had by his chit voluntarily assigned to Ram Sahoy a two-eleventh share in some of the property. Hurpershad and others of the Defendants also set up that, excluding the estates granted by Government, which belonged to those to whom they were granted, the descendants of Chundun were entitled to the whole of the property, and that the Plaintiff, Ram Sahoy, had no right to any share in it. (See Record, No. 2, p. 10, 11, 12).

The High Court, although they had failed to obtain production of the copies of Chundun's chit, or the agreement spoken to by Mohun Lall, to which they alluded in their first Judgment (Record, No. 2, p. 178), allowed several of the parties and other witnesses to be examined not merely for the purpose of accounting for the non-production, but as to the fact that such documents had been executed. It was the interest of Hurpershad to show that Ram Sahoy was not entitled to a half share, and for that purpose to produce the document, if it ever existed, and had been delivered to him. But he upon his oath denied it altogether.

The High Court remarked that they could not say that any of the witnesses gave their evidence in a manner which impressed them very favourably.

In a case of conflicting evidence of witnesses who do not commend themselves by the manner in which they give their evidence it is a safe rule to look to the conduct of the parties. In the present case the High Court did not attach sufficient weight to the conduct of the parties, nor confine them to the defences set up by their written statements, but they suggested a rule for the partition of that of which the parties alleged that the Plaintiff had no right to a share (Record No. 2, pp. 11, 12, &c.). They not only did that, but they allowed witnesses who had been examined before to be recalled and examined *de novo*, and thereby enabled them to amend their former evidence. If all the heads of the several branches of the family, including Ram Sahoy, the Plaintiff in the Cawnpore suit, Sheo Dyal, the Plaintiff in the Oude suit, Hurpershad, who claimed the whole of Mourawan, and Balmokund, who made a similar claim, had in 1868 agreed that the whole property, movable and immovable, should be divided in the same proportions as the 110,000 rupees mentioned

in Chundun's chit, their conduct in making claims and setting up defences such as they did in the Oude case in 1869, and in the Cawnpore case in 1869 and 1870, and in endeavouring to exclude Ram Sahoy from any share in the property, was wholly inconsistent with the alleged agreement. If the Court intended to call for fresh evidence, they ought to have recorded their reasons for doing so. This is a rule laid down by Act 8 of 1859, and is one which this Tribunal has frequently held ought to be strictly adhered to. But the Court did not adjourn the case for the purpose of taking further evidence and allowing witnesses who had been examined to be recalled and to amend their former evidence, but simply for the production of a document, with liberty to call witnesses to prove its identity. Even this was a course which ought not to have been adopted. The case set up was entirely new, and there was no reason to give the parties an opportunity of producing a document upon which they had not relied in their claims or defences, and which, if they had relied upon it, they ought, according to the provisions of Act 8 of 1859, to have filed with their other exhibits, unless they could prove that the document was not in their possession.

Their Lordships are of opinion that the High Court were in error, after adjourning the case, as they did, for the production of a document, in allowing witnesses and several of the parties who were interested in the result, and had been previously examined, to be recalled, and to add to and vary the evidence which they had previously given, in order to prove a case which they had not set up.

Their Lordships also think that the conclusion at which the High Court arrived upon the evidence, in the absence of the production of the documents for the production of which they had adjourned the case, was also erroneous.

Upon the whole their Lordships are of opinion that there was no custom in the family nor any agreement proved which disentitled the several members of the family to receive, on partition of the joint family property, the shares to which they were entitled under the Mitácshará. According to that law, the property was divisible *per stirpes*.

(See The Mitáchshará on Inheritance, cap. 1, sec. 5, para. 12).

The Plaintiff in the Cawnpore suit, as the sole descendant of Gunga Pershad, was consequently entitled to one-half, and the sons of Chundun and their descendants respectively each to the fifth of a half, or, in other words, to one-tenth of the property in that suit, according to the rules of the Mitáchshará.

Their Lordships are of opinion that the parties are entitled to those shares in all the property movable and immovable in both suits, and also in the twenty-seven villages and in the Bunthur estate; and they will humbly recommend Her Majesty to reverse the decrees of the Judicial Commissioner and of the High Court respectively, and to decree to Ram Sahoy, the Plaintiff in the Cawnpore suit, one-half of the property in that suit, and to decree to Sheo Dyal, the Plaintiff in the Oude suit, a fifth of one-half, or, in other words, one-tenth of all the property in that suit, including the twenty-seven villages, and also to award and direct that the Bunthur estate be divided in the same proportions as the other property, that is to say, *per stirpes*, one-half to Ram Sahoy, and one-tenth to the descendants of each of the five sons of Chundun respectively, according to the rules of the Mitáchshará.

Their Lordships will not interfere with the Decree of the Judicial Commissioner so far as it relates to the costs in the Courts in Oude. They are of opinion that they should be paid out of the property to which the Oude suit relates. They are also of opinion that, under the circumstances, the costs in both the Courts in the North-West Provinces ought to be paid out of the property to which the Cawnpore suit relates.

They will therefore further humbly advise Her Majesty that the costs in all the Courts below, both in the Oude suit and in the suit in the North-West Provinces, be ordered to be paid out of the property to which those suits respectively relate.

The costs of all the parties in these Appeals will be taxed here, and must be paid out of the properties to which the suits respectively relate.