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earlier period than he might otherwise have done, has had the benefit of the use of the money. But there is nothing in the evidence to support this, or to show that it was the fact. The question must be left as it has been decided.

Consequently the decision of the lower Courts ought to be affirmed, and their Lordships will humbly advise Her Majesty to affirm it, and to dismiss the appeal; and the appellant will pay the costs of it.

Solicitors for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

THAKUR ISHRI SINGH (PLAINTIFF) *v.* THAKUR BALDEO SINGH (DEFENDANT.)

P. C.* 1884 *February* 8, 12.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

The Oudh Estates' Act I of 1869—Will of a Taluqdar—Customary rule of succession in a family to impartible estate—Primogeniture.

However true it may be that, if there is absolutely nothing to guide to any other conclusion, impartible estate will descend in a family according to the rule of primogeniture, evidence may establish the usage in a family to be that, of several sons, one son, selected without reference to primogeniture, succeeds to the impartible estate. The eldest of three brothers had succeeded to impartible family estate, and to a taluq also impartible, which had been, during the lifetime of their father, entered in the first and second, but not in the third, of the lists prepared in conformity with s. 8 of the Oudh Estates' Act I of 1869. Before his death, this eldest brother made an instrument registered as a will, but using the word "tamlik," and stamped as a deed whereby he gave the taluq to the third brother, reserving an interest on the whole for his own life, and in half for any son that might be born to him with maintenance to his wife on her becoming a widow.

Held, with reference to the indicia of a testamentary character, there being provisions for contingencies which might not be ascertained till the death of the maker of the instrument, as compared with the technical matters attending it, that this instrument was not a transfer *inter vivos*, but was a will, and within the above Act.

Held, also, on the objection that a will or declaration made by the father had fixed a mode of descent which could not be altered by his successor, that s. 11 of the above Act, giving to every heir and legatee of a taluqdar power

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

to transfer, or to bequeath, his estate, is not controlled by the proviso in s. 19, declaring that nothing in that section shall affect wills made before the passing of the Act.

The impartible family property other than the taluq descending, like the latter to a single successor, one of these brothers, the question as to which of them that one should be, depended on the custom of the family. On the evidence adduced as to the custom in this respect, the plaintiff, who was out of possession, and on whom, in order to make out his title, was the burden of proving that the rule of primogeniture prevailed, failed so to do.

APPEAL from a decree of the Judicial Commissioner of Oudh (19th March 1881), affirming a decree of the District Judge of Lucknow (3rd October 1880).

At the settlement of Oudh in 1858-59, the village lands of Kanhmow, Hasnapur, and Nimchaina, in the district of Faizabad, were treated as a taluq named Kanhmow, and settled with Thakur Beni Singh, who, in common with the other taluqdars of Oudh, was requested in July 1861, by the Chief Commissioner, to state what was the rule of succession in his family. Beni Singh replied that the custom of his family was that the family estate should be held by one male member, selected for his fitness, and he asked that after his death the Government would select that one of his three sons, Thakur Maharaj Singh, Thakur Ishri Singh, and Thakur Baldeo Singh, whom it might deem most fit to succeed him.

That answer not having been considered satisfactory by the Government, on the 8th March 1860, Beni Singh submitted another reply, which was as follows:

"Whereas the British Government has granted to me, for generation after generation, the proprietary rights in the Ilaka Kanhmow, situate in Pargana and Tehsil Bari; Taluqa Usri, situate in Pargana Pirnagar, Tehsil Sitapur; Taluqa Hasnapur, situate in Tehsil Biswan; and Taluka Nimchaina, situate in Pargana Maholi, Tehsil Misrikh, I desire and hereby pray that after my *Ilaka* (Estate) be maintained entire and undivided in my family, according to the custom of 'Raj-gaddi' and that the younger brothers be entitled to receive maintenance from the person in possession of the estate (Gaddi-nashin).

(Sd.) BENI SINGH, Taluqdar of Kanhmow, &c., in Tehsil Bari."

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No further correspondence ensued, and after the passing of the "Oudh Estates' Act," I of 1869, the taluq was entered in the first and second of the lists prepared in accordance with the requirements of that Act; but not in the third list (which last includes taluqs descending by primogeniture.)

Beni Singh died on the 19th September 1870, leaving the three sons above mentioned. The eldest son, Maharaj Singh, having been recognized by the revenue authorities as his successor, obtained "dakhil kharij," or entry of his name in the settlement record, as proprietor of the taluq. This was opposed by the second son, Ishri Singh, and pending the determination of the dispute as to "dakhil kharij," Maharaj Singh executed in favour of his young brother, Baldeo Singh, the following document, which having been marked C in the proceedings, is so referred to in their Lordships' judgment.

"I, Maharaj Singh, am the Talukdar of Kanhmow, &c., in the Sitapur District.

"Whereas—I hold and enjoy possession of my estate situate in the Sitapur District, of which the Government revenue is about Rs. 16,000, I, while in the enjoyment of sound health and mind, without reluctance or coercion, assign (tamlik) the said property to my younger brother, Baldeo Singh, subject to the following condition :—

"(1.) That during my lifetime, I shall hold and enjoy possession of it; and that after my death my aforesaid brother, Baldeo Singh, shall hold and enjoy the same like myself;

"(2.) That whereas I am childless, should a legitimate and self-begotten child be born to me, it shall become the owner of one-half of the estate, and Baldeo Singh shall be the owner of the other half;

"(3.) That after my death, Baldeo Singh shall be bound, like myself, to maintain and take care of my wife. Hence I have written out these few words in the way of a deed of assignment (tamliknama) so that it may witness in future. Dated 28th June, 1871."

This document, C, was, on the 3rd July 1871, registered under s. 41 (for the registration of wills) of the Indian Registration Act, VIII of 1871, which came into force on the 1st July of the same year.

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On the 14th April 1872, Ishri Singh, the second son, brought a suit against Maharaj and Baldeo, claiming the taluq. He set up a will in his favour, alleging it to have been executed by the deceased Beni Singh, on the 20th February 1860, shortly before the submission of the reply by Beni Singh above set forth. This suit was dismissed by the Deputy Commissioner of Sitapur on the 3rd October 1872, with a declaration that the alleged will in favour of Ishri Singh was a false one, and that, Beni Singh having died intestate, Maharaj Singh had become entitled to the taluq under Act I of 1869, s. 22.

This was affirmed on appeal, and criminal proceedings having been taken against Ishri Singh, for fraudulently using a false document as true, ss. 467, 471 (Indian Penal Code), he was convicted and sentenced to five years' rigorous imprisonment. Maharaj Singh died without issue on the 19th November 1879, and Baldeo Singh, being recognized as his successor by the revenue authorities, obtained an order for "dakhil kharij" in the settlement record, in his name, on 20th December 1879, whereupon he took possession of the taluq, and of the family estate. This was opposed by Ishri Singh, who claimed as the brother next in the succession to Maharaj Singh, and failing to get possession, brought, in 1880, the present suit against Baldeo.

By his plaint, which was filed in the District Court of Sitapur, the appellant claimed that the order of the Deputy Commissioner of 20th December 1879, might be set aside; that document C, of which he questioned the validity, might be declared void; and that possession of taluq Kauhmow, the property mentioned in schedule A of his plaint, might be decreed to him, as being the person entitled thereto on the death of Maharaj Singh, intestate, and without issue, under the provisions of his father's will of 8th March 1860, and clause 6 of s. 22 of Act I of 1869. He also claimed possession of the family property, moveable and immoveable, of which Maharaj Singh had died possessed, being that in schedule B, of the plaint, by right of succession, according to family custom, on the death of his brother, intestate. For the defence, as regards the taluq, it was insisted that the document of the 8th March 1860 had no reference to the succession of brother to brother, but only to that of Beni Singh's son to

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Beni Singh; that the will of Maharaj Singh, document C, was valid under Act I of 1869; that, as regards all the family property, Maharaj Singh's right of succession had been settled in the prior litigation; and that Baldeo Singh was entitled to the whole property.

This suit was transferred from the Court of the Deputy Commissioner of Sitapur to that of the District Judge of Lucknow, when it had reached the stage of the fixing of the issues, which were principally as to the effect of the "tamliknama," or document of 28th June 1871, marked C; and as to the title of the plaintiff as eldest surviving brother of Maharaj Singh to succeed both to the property in schedule A and in schedule B. The eighth issue raised the question of the plaintiff's title "by family custom or inheritance," and was afterwards altered by the addition of these words, relating to his title, *viz.*, "to the property in B, by inheritance, according to family custom."

At the hearing, *oral evidence as to the revocation* of the document C, of the 28th June 1871, was excluded, as being inadmissible under s. 57 of Act X of 1865, the Indian Succession Act, or s. 92 of Act I of 1872 (the Indian Evidence Act), whether or not such evidence bore on the question of undue influence at the making of the instrument.

The suit was dismissed by the District Judge of Lucknow, and on appeal the Judicial Commissioner confirmed his judgment. The latter held that the document C, of the 8th March 1860, had no effect to take away the right to control the devolution of the taluq, which was given by s. 11 of the Oudh Estates' Act to the succeeding talnqdar, who had exercised that right in making C, the instrument of 28th June 1871, which was a taluqdar's will within the contemplation of that Act. This will had not been executed under undue influence, nor had it been revoked, but it had been acted on. The finding on the eighth issue, as above set forth, was against the plaintiff, who was found not to have shown a better title to the ancestral family estate, including the taluq, than the defendant, in whose favor, accordingly, a decree was made.

On this appeal,—

Mr. *J. T. Woodroffe* appeared for the appellant.

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cable to schedule A. Referring now exclusively to A, neither the document made by Beni Singh, on the 8th March 1860, which was such a document as had been held to be tantamount to a will—see *Hurpurshad* v. *Sheodyal* (1)—nor the document C, executed by Maharaj Singh on 28th June 1871, operated to deprive Ishri Singh of his right to succeed to the taluq. As to the first document, Beni Singh, in declaring that his estate should descend in the mode in which impartible property descended by custom, did not thereby disinherit Ishri Singh, but had indicated a line of succession according to which that son would be entitled to succeed. As to the second document (C) Maharaj Singh had not, in the "tamliknama" C, made an effective transfer. It was *not* a will within the meaning of s. 2 of Act I of 1869, the Oudh Estates' Act. On the contrary, purporting to be a transfer *inter vivos*, it was invalid under s. 17 of that Act, not having been registered within one month from its date, and there having been no delivery of possession within six months.

The effect of document C being thus got rid of, it followed that Ishri Singh was the legal successor to the taluq, according to his title by primogeniture, which was applicable to the schedules both A and B. But document C, considered as a will, could not alter the character of the succession, which was determinable according to the rule presumed to prevail; and this had been indicated in the former will of Beni Singh, referring to the rule of descent.

It was further argued that, it being incorrect to argue from the case of the taluq to that of the other family property, the eighth issue as altered did not raise all that was in contest between the parties. It was the duty of the Court to determine the real issue see *Arbuthnot* v. *Betts* (2). What should have been put in issue, was not only custom, but the question of the operation of ordinary Hindu law of inheritance upon the appellant's claim to the property in schedule B, in the absence of any custom; and this would have given scope to the proposition that the family estate being impartible the existence of a *primâ facie* presumption that

(1) L. R., 3 I. A., 259.
(2) 6 B. L. R., 273.

it descended by the rule of primogeniture rested upon the general Hindu law. This proposition was maintainable, but it had not been brought out upon the issue in the distinct manner in which it should have been. Moreover, oral evidence as to the fact of the alleged annulling of document C (assuming it not to have been a will), had been incorrectly rejected; and whether it was to be taken as a will, or a document *inter vivos*, oral evidence bearing on the question whether or not it was made under undue influence, ought not to have been excluded. For the respondent it was argued that the impartibility of the estate did not carry with it that the estate descended according to the rule of primogeniture; and that there was no evidence to show that the property, either in A or in B, descended to the eldest son according to the custom of this family. The burthen was on the plaintiff. There was, on the contrary, some evidence tending the other way. The evidence of the appellant himself, in the litigation which went before this suit, when he stood in the position of a second son, was that in this family the eldest son did not succeed. The Courts below had rightly held that document C was a valid instrument, and the Commissioner had correctly decided that it operated as a taluqdar's will under Act I of 1869, passing the proprietary right in the property in schedule A to the respondent. As regarded the property in schedule B the appellant had not made out his title, either by family custom, or under the ordinary law of inheritance. Impartibility implied descent to a single successor; but there was no proof in this case, that primogeniture gave the rule, nor was there any implication in favor of it. The views of Beni Singh had been in favor of a power of selection, the exercise of which had been attempted in the making the document C; and the evidence supported the right of the respondent to maintain his possession.

Mr. *J. T. Woodroffe* replied, arguing that, even if C was held a valid instrument, there could be no presumption (in the absence of evidence) that the property in B accompanied the taluq in A, and that the succession to the whole family property went to the taluqdar. The descent of the taluq was regulated by express enactment; and there was no reason why it should attract

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to it the other family property. Lastly, even if the custom could, on the whole case, be held to be that the family estates should belong to a selected member of the family, there had been no selection. However, this could not arise, for there was enough in the case to raise the presumption in favor of the rule of primogeniture.

Their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—This case has been argued so recently that the introductory facts need not be recapitulated. It will be sufficient to bear in mind that the suit concerns property of two classes—that comprised in list A and that comprised in list B—to which quite different considerations apply.

With respect to the property in list A, the whole controversy turns upon the validity and the character of the instrument which is marked as exhibit C in the cause, being an instrument executed on the 28th of June 1871, by Maharaj Singh, for the purpose of effecting a transfer of the property contained in it to Baldeo Singh the respondent. It will be convenient first to consider the character of the instrument, because certain arguments were advanced against its validity depending entirely on the hypothesis that it is a transfer operating *inter vivos*, and their Lordships have come to the opposite conclusion, namely, that it must be considered as a will.

The reasons for considering it to be a will are these: It answers the definition of a will which is contained in s. 2 of Act I of 1869. It was registered as a will; and though that may have been done at the instance of the Registrar, it certainly was done with the full knowledge and assent of Maharaj Singh. It provides for contingencies which are not ascertainable, or may not be ascertained, until the death of the testator: for instance, the contingency of his having a child; which he had not at the time of the will, and the contingency of his leaving a widow surviving him. It does not purport to give to anybody any possessory or present interest until the death of Maharaj the donor. And it makes a gift to the children of Maharaj, which, if it be a deed of transfer operating at once, cannot take effect, because no child was in existence; whereas, if it is a will, the gift may

perfectly well take effect. All those are very strong indicia of a testamentary character; and the question is whether they are overborne by evidence tending in the opposite direction.

As regards judicial opinion, it may be observed that the question of will or deed was an issue between Baldeo and Ishri after the death of Maharaj, before the Deputy Commissioner of Sitapur, upon the application for mutation of names; and he held it to be clearly a will. The Judicial Commissioner in the present case gives no opinion upon the point. The District Judge thinks it is a deed, though he says it is not very material whether it is held to be one or the other. His reasons for thinking it to be a deed are that the donor Maharaj uses the word "tamlik" ("assign") and calls his deed a "tamliknama," and he has it stamped as if it were a deed. It appears that the stamp is not exactly that which the instrument would bear if it were a deed of assignment, but the District Judge says it is not so far distant from it, but that it carries to his mind a conviction that the stamp, coupled with the use of the name, shows that Maharaj intended something different from a will. Then he says that it cannot be a will, because it affects the property in the lifetime of Maharaj; but that seems to their Lordships to be an assumption of the question. Of course if it affects the property in the lifetime of Maharaj it cannot have a testamentary character, but the very question is whether it does affect the property in the lifetime of Maharaj. The District Judge does not assign any additional reason for thinking it does affect the property in that way.

Mr. *Woodroffe* in his argument relied very strongly upon the use of the word "assign," and upon the reservation of a life interest to the donor. No doubt both those circumstances tend towards the conclusion to which Mr. Woodroffe wished to lead their Lordships, but they are by no means conclusive. If they had been the words of an English conveyancer preparing an English instrument, they would have afforded a very strong argument; but the instrument was prepared by Lal Sundar, and we must not construe with too great nicety, or assign too much weight to the exact words that he uses for a transfer of property, as if he were accurately weighing the difference

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between a testamentary instrument and one operating *inter vivos*. We must remember that wills are comparatively new in any part of India, and are of more recent introduction in Oudh in respect to this class of property. So with respect to the reservation of a life interest. The will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted with anything in his lifetime, and their Lordships have seen here instruments which most unquestionably were wills, and intended to operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property until he dies.

Upon the whole, therefore, looking at what are the substantial characteristics of the document which have been referred to, setting aside mere matters of form and what may be considered as technical expressions, their Lordships think that the reasons for holding it to be a will have a decided preponderance over those which would lead them to hold it to be a deed.

It remains to consider the objections to the validity of the instrument considered as a will. First it was said that the disposition made by it was beyond the power of Maharaj Singh, because the property was governed by a previous will or declaration, whichever it may be, of Beni Singh, dated the 8th March 1860, which fixed a character upon the property that no subsequent possessor could depart from. The answer to that is that, Act I of 1869, s. 11, gives not only to the original taluqdar, but to every heir and legatee of a taluqdar, power to transfer or to bequeath the estate which is granted to him. It was suggested that s. 11 is controlled by s. 19, in which there is a proviso "that nothing herein contained shall affect wills made before the passing of this Act." But s. 19 is for the purpose of applying to wills made under Act I of 1869 a number of sections contained in the Indian Succession Act; and their Lordships are of opinion that the proviso only applies to the sections or provisions contained in s. 19, and not to those contained in the whole of Act I of 1869.

Then it is said that there was undue influence used to coerce Maharaj Singh into executing the instrument. On that point there is the finding of both the Courts below against the appellant, and the subject-matter is one on which this Board would be exceedingly reluctant to disturb concurrent findings of the Court below. But it is said that they ought to be disturbed, because evidence of undue influence was tendered and rejected. It becomes important then to see whether there was any evidence tendered for the purpose of showing any undue influence. It is not shown that any such evidence was tendered, excepting what is called a revocation, or an attempt to revoke, by Maharaj, long after the date of the instrument in question. Now of course it might happen that a revocation or an attempt to revoke should be accompanied by circumstances showing that undue influence had been used in procuring the execution of the instrument or throwing light upon that question. But no such circumstances are suggested. In the argument of counsel nothing is spoken of but the bare fact of what is called the revocation, which it is said is a relevant fact corroborative of another relevant fact, *viz.*, the undue influence. On the passage which shows how the Court dealt with the matter the same remark occurs. And the reasons given for appealing to the High Court seem to make it quite conclusive that no other evidence was tendered. There are two separate reasons—one relating to undue influence and the other relating to the revocation. The one relating to undue influence uses this language: "From the time when and the manner in which document C was executed, and the circumstances under which such an unnatural and unusual disposition of a valuable property was unnecessarily made by Maharaj Singh, the presumptions and probabilities are very strong in support of the oral evidence adduced by the plaintiff in proof of the document having been obtained by means of fraud, misrepresentation, coercion, and undue influence. That raises the whole question as to what occurred at the time when the document was executed; and no evidence was excluded on that point. Then the 18th reason for appeal is: "The lower Court is wrong in having excluded oral evidence of the cancellation of the document C by Maharaj Singh;" and

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it goes on to argue that oral evidence of that fact was admissible. So that it is quite clear that the fact alone was to be proved by the rejected evidence, and it is impossible to suggest that the fact standing alone would have any bearing on undue influence used on the execution of the instrument.

All the other arguments against its validity, as to its return into Maharaj's hands, its cancellation, non-delivery of possession, and so on, turn upon the hypothesis that the instrument was a transfer and not a will; and therefore it is not necessary to make any further observations upon them. The consequence is that all the objections to exhibit C fail; and as to list A, the suit must be decided against the appellant.

Now their Lordships come to list B, which comprises things not affected by exhibit C. With respect to that property there was an alteration in the issue settled by the first Court, and a great deal of argument was used to show that there ought to have been no such alteration; but it is quite clear that the appellant is not damnified by it, whether it was right or wrong. If he could claim the whole of the property, and when that was decided against him could fall back and claim half, he might possibly be injured by the alteration of the issue; but he cannot do that, because the impartibility of the property is and always has been common ground between him and the respondent. Treating the property as impartible, the case can be argued in favour of the appellant just as well under the issue as it stands as it could be argued under the issue as it was originally framed.

As the issue stands the argument is presented in this way: Mr. Woodroffe says that as between Beni and his three sons the latter take by way of unobstructed inheritance; that if the property had been subject to the ordinary law of the Mitakshara, on Beni's death the three sons would have taken, but it is an impartible property, and therefore the eldest son Maharaj took the whole; on the death of Maharaj the question comes, who is the heir to Beni; and again, the estate being impartible, the eldest must take the whole. And a passage was read from Mr. Mayne's "Hindu Law," referring to authorities, and saying that in general such estates—that is, impartible estates—descend by the law of primogeniture.

Now, however true it may be that, if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the law of primogeniture, it is impossible to say that there is no such guide in this case. As to the taluq, there is a great deal of evidence to the effect that the law of primogeniture has not prevailed. On the 20th February 1860, Beni Singh, the then taluqdar, being called upon to state what the law of devolution of the estate is, says: "The usage established by prescription in petitioner's family is still in force; namely, that out of several sons an able one had up to this time been selected and nominated as taluqdar, without reference to seniority"; and then he prays that the Government will select an able one. That is to say, according to him, the law which is familiar to us under the name of Tanistry, or something very like it, prevailed in his family.

On the 8th March 1860 Beni Singh executed an instrument by which he states his desire that after his death his estate shall be maintained in his family entire and undivided according to the custom of Raj-gaddi, the younger brothers receiving maintenance from the Gaddi-nashin, the successor to the estate for the time being. That document is not without ambiguity, but it does not assert the law of primogeniture with clearness.

The next document is a parwana, issued by the Deputy Commissioner of Sitapur to Beni Singh on the 19th of August 1861; and it seems to have been issued because the Government had not been told with exactitude what the rule of succession was or was to be. The parwana runs thus: "You are instructed that if the rule of primogeniture or the custom of Masnad Nashin be not in force in your family, it is essentially necessary that you should execute a will naming your successor therein." Now Beni Singh does not reply to that, that the rule of primogeniture was in force in his family, and therefore he did not wish to execute a will; but he answers, "in compliance with your order conveyed in the foregoing letter, I will execute my will in favour of an heir." It does not appear that Beni Singh did execute any will, but he promised to make a will on the footing that the rule of primogeniture was not in force in his family.

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The next act is the formation of the lists of taluqdaries; and in that important operation we find the taluq entered, not in list 3, which contains the primogeniture estates, but in list 2, which contains the estates which go to a single heir.

Now in all these proceedings it is the taluq, or the property comprised in list A, which is the main object, though statements are made in general terms as to the custom of the family. But in 1872 a suit was instituted by Ishri, the present appellant, to recover from Maharaj Singh the taluq, and also moveable property valued at Rs. 84,000. Baldeo Singh was also made a defendant to the suit, so that whatever was decided in that suit was decided between the parties to this appeal. The Rs. 84,000 would seem to come under the same considerations as the moveables in list B in the present suit. It is observable that in the present suit, list A contains no moveables at all. All the moveables are in list B; and though it is not so clear as might be wished, the probability is that the moveables which were the subject of the suit of 1872 were governed by the general custom of the family.

In that suit Ishri filed a written statement in which he says: "On the 20th February 1860 plaintiff's father, by a will of the same date"—meaning the statement made to the Government—"stated the family usage regarding succession, which plaintiff's father desired to be followed after his death." Then he is examined; and in his examination he says: "In my family the eldest brother has never succeeded to the taluq;" and he gives one or two instances to show that such is the fact. In giving judgment the Deputy Commissioner of Sitapur observes that all he has to consider is the plaintiff's title to the taluq Kanhmow. He takes a distinction between the considerations that apply to the taluq Kanhmow and the considerations that apply to Nimchaina,—something which was the subject of a subsequent grant; but he takes no distinction between the considerations that apply to taluq Kanhmow and those which apply to the moveables on which he is deciding.

The case set up by Ishri principally consisted of a document which was held to be forged; and it is remarkable that in that document he continues to put into Beni's mouth the assertion of the principle that the ablest person is to succeed; and after

extolling the intelligence and gravity of temper and other good qualities of Ishri, Beni is made to say in the forged instrument that he desires Ishri to succeed him in preference to Maharaj or Baldeo. But the Deputy Commissioner of Sitapur dismissed the suit on the ground that, though there was evidence that it was the custom of the family for the most able to succeed, there was no evidence that Ishri had been selected as such. Towards the end of his judgment he says: "There is no doubt that this was the custom in most taluqs in this district, and was probably the custom of the smaller taluqs in the greater part of Oudh. Wills however at that time were unknown."

That seems very like a decision with regard to property other than the taluq, that Tanistry rather than primogeniture was the governing rule of the family. Even if the decision concerns the taluq alone, their Lordships consider that the District Judge in this case is quite right when he argues from the law relating to the taluq to the law relating to all the other family property, and says there is a presumption from the actual decisions relating to the taluq that the family property followed the same law, or rather, as he puts it accurately, there is no evidence to show that the other family property followed a line of devolution different from that of the taluq.

Whether the evidence would prove the case as regards list B in favour of the respondent if he were the party claiming and the appellant were in possession, is not now the question. The question is, whether the appellant, having the *onus probandi* on him to show that primogeniture is the law of the family, has proved his case; and he certainly is very far indeed from proving his case, the evidence so far as it goes being the other way.

The appellant, therefore, fails on all his points; and their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Mr. *W. Buttle.*