PRIVY COUNCIL.

P. C.
1902
July 3. *and*
18.
December 3.

JAGATPAL SINGH (DEFENDANT) *v.* JAGESHAR BAKHSH SINGH AND OTHERS (PLAINTIFFS).

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

Evidence—Admissibility in evidence of statement in writing by person who could have been called as a witness but was not—Statement of deceased persons—Act No. I of 1872 *(Indian Evidence Act), section* 32*—Report of patwari—Native and English dates not corresponding—Limitation.*

Where a person, though alive at the time the plaintiff closed his case, was not called as a witness, statements in writing by such person filed before his death in support of the plaintiff's case were held by the Judicial Committee to be inadmissible in evidence as statements of a deceased person.

A genealogical table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for the purposes of a former suit, was held to be inadmissible in evidence, having been made without the personal knowledge and belief which must be found or presumed in any admissible statement by a deceased person.

In the report of a patwari as to the date of a death, the native date was given and after it what purported to be the corresponding English date. The dates being found not to correspond: *Held*, on a question of limitation, that the substantive statement was that given in the vernacular and that the rest was a miscalculation.

APPEAL from a decree (26th October, 1893) of the Court of the Judicial Commissioner of Oudh, Lucknow, reversing a decree (29th August, 1895) of the Judge of the Small Cause Court of Lucknow (vested with the powers of a Subordinate Judge), by which the respondents' suit was dismissed with costs. The suit raised the question of title to the estate of Dasrathpur, a taluqa in the Partabgarh district of Oudh, which was granted by the British Government in March 1858 to one Thakur Hanuman Singh whose name was entered in lists 1 and 2 prepared under the provisions of section 8 of the Oudh Estates Act (I of 1869), and that Act therefore regulated the succession to the estate. His son Sheoambar Singh predeceased his father, and on Hanuman Singh's death the estate descended to his grandson Rudar Narain Singh, who died a minor intestate and unmarried on the 8th of May, 1869.

Present:—Lord DAVEY, Lord ROBERTSON, SIR ANDREW SCOBLE, SIR ARTHUR WILSON AND SIR JOHN BONSER.

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The plaintiff alleged that Rudar Narain was the last absolute owner of the estate. On his death his mother Kharag Kunwar had possession of it as a Hindu mother until her death on the 29th of July, 1879. Shagunath Kunwar, the step-mother of Rudar Narain, also had her name recorded on the register of owners and she remained in possession after the death of Kharag Kunwar, until the 21st of November, 1881, when she died. Ran Bijai Bahadur then obtained possession of the estate, claiming under a will alleged to have been executed by Shagunath Kunwar, and on the 28th of February 1882, her name was recorded as owner in the Revenue Register. On the 7th of December 1882, the defendant's father Jagmohan Singh (who was insane and sued by his wife as his next friend) and Bisheshar Singh his younger brother, brought a suit against Ran Bijai for possession of the estate. On Jagmohan's death, Jagatpal Singh his son, was brought on the record of that suit and on the 30th of April 1890, obtained a decree of Her late Majesty in Council for possession of taluqa Dasrathpur—see *Jagatpal Singh v. Ran Bijai Bahadur Singh* (1). In that case the Judicial Committee held that the estate was impartible and that its descent was governed by the rule of primogeniture. The present suit was brought by Jageshar Bakhsh Singh and Rajendra Bahadur Singh the son of Ran Bijai Bahadur Singh against Jagatpal to recover possession. The suit was instituted on the 23rd of July, 1891.

The plaint stated that the succession opened on the death of Kharag Kunwar on the 29th of July, 1879, and at that time the next heir of Rudar Narain Singh was entitled to succeed; that that heir was Sangram Singh, the plaintiff, Jageshar's father, all the persons nearer in degree to him and also Sitla Bakhsh of those equal in degree to him, being then dead: that according to the true pedigree, Pahalwan Singh was the eldest son of Zorawar Singh, and Sheo Prasad the eldest son of Pahalwan Singh, and that Sangram Singh died on the 7th of January, 1882. The plaintiff Jageshar then claimed to be descended from the eldest line of those equal in degree. He also claimed that his father was entitled to succeed as being the senior in

(1) (1890) L.R., 17, I. A., 173; I. L. R., 18 Calc., 111.

age of the persons alive when the succession opened, and pleaded that Jagmohan Singh, the father of the defendant, was excluded from inheritance in consequence of his insanity.

The pedigree relied upon by the plaintiff is set out in their Lordships' judgment.

In his written statement the defendant pleaded that Kharag Kunwar, having succeeded under the provisions of Act No. I of 1869, section 22, became a fresh stock of descent, and that the plaintiff was not, and did not claim to be, her heir; that even if the succession opened on her death to the next heir of Rudar Narain Singh, the plaintiff's father was not such next heir; that the true pedigree showed persons other than the parties to the suit and their ancestors, who, if alive, were nearer in degree than the plaintiff; that Sitla Bakhsh did not predecease Kharag Kunwar; that Sangram Singh was not the eldest in age on the death of Kharag Kunwar, and that such circumstance even if true was immaterial; and that Kharag Kunwar died on the 20th of July, 1879, and consequently the suit brought on the 23rd of July, 1891, was barred by limitation.

The first Court held on the main points raised in the suit: (1) that Kharag Kunwar neither under the Hindu law nor the provisions of Act I of 1869 took a larger estate than a Hindu woman's estate of inheritance, and that on her death the succession opened to the next heir of Rudar Narain Singh; (2) that "taking the oral as well as the documentary evidence into consideration," it did not prove that Pahalwan Singh was older than Zabar Singh, that on this issue the documents admissible were the plaintiff's exhibits 1, 2, 9, 10, 32, 33, 36, 45, 46, 54 and 55, and the defendant's exhibit A15, and that no reliance could be placed on the oral evidence produced by the plaintiffs; and (3) that in the previous suit by Jagmohan Singh against Ran Bijai Bahadur, the 29th of July, 1879, had been stated as the date of Kharag Kunwar's death; that the burden of proof was thus shifted to the defendant to establish that she did not die on that date, and that having failed to discharge it, that must be assumed to be the correct date of her death, and consequently the suit was not barred by limitation.

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On the second point (as to the pedigree) the first Court rejected documents produced by the plaintiff and Nos. 5, 6, 12 and 56. As to No. 5 he said:—

"Exhibit No. 5 is a copy of the plaint, dated 12th February, 1868, filed by Beni Bakhsh Singh, son of Sarnet Singh. Plaintiff produces this to show that Pahalwan Singh was older than Zabar Singh. Defendant objects to its admissibility, first, on the ground that in the word 'relationship' senior and junior relationship are not included, about which I have already expressed my opinion. Secondly, on the ground that when this document was filed, Beni Bakhsh Singh being alive, it was not the statement of a dead person. Plaintiff's pleader contends that as the Court is deciding the case now, and the person making the statement is no longer in the world, hence it is admissible. The evidence of plaintiff's witnesses Nos. 6, 7 and 8 shows that Beni Bakhsh was alive when the document in question was filed. The Court is required to see whether the document was admissible at the time it was presented, and not at the time of deciding the case. Beni Bakhsh was alive at the time of the presentation of the document: his evidence was therefore available. It is only when a person who made the statement is dead, or cannot be found or is incapable of giving evidence, that his statement can be admitted in evidence; what I mean to say is that the statement made is admissible when the person making it is not in a position to come to the witness-box. It was never intended that a statement of a person alive at the time of presentation, but who has died since then during the trial of the case, may be admitted in evidence, because the ordinary test of truth afforded by the administration of oath, and by cross-examination, which were available at the time, should not have been made use of, this test is not exercised as the witness is not available; thus, I think, as it is shown that Beni Bakhsh was alive, plaintiff ought to have put him in the witness-box and have subjected him to cross-examination, but he did not do so: he is to blame and nobody else. This exhibit is therefore inadmissible."

Exhibits 6, 12, and 56 were rejected for the same reasons. Another document, exhibit No. 9, was a copy of a genealogical table filed on behalf of Gurdat Singh in a suit brought by him against Drigbijai Singh, and dated the 2nd of December, 1891. This was admitted in evidence by the first Court.

In the result, on the point relating to the pedigree, the first Court dismissed the suit with costs. From this decree the plaintiffs appealed to the Court of the Judicial Commissioner of Oudh, and that court held (1) that Kharag Kunwar took only a woman's estate of inheritance, and that on her death the heir of Rudar Narain Singh was entitled to succeed; (2) that on the question of pedigree it had been proved that Pahalwan Singh was senior to Zabar Singh; that Sheo Prasad was senior to

Sarnet Singh, and that Sitla Bakhsh had predeceased Kharag Kunwar, the plaintiffs, and that the first Court had improperly rejected exhibits 5, 6, 12 and 56 and had applied too severe a test to the oral evidence; and (3) that Kharag Kunwar did not die before the 24th of July, 1879, placing much weight on the statement in the plaint in the suit instituted by Jagmohan on the 7th of December, 1882, which stated the 29th of July, 1879, as the date of her death.

On the second point the Judicial Commissioner said:—

"The Subordinate Judge has held Exhibits Nos. 5, 6, 12, and 56 inadmissible. The circumstances are as follows:—Documents were filed on 1st December, 1891. Their genuineness was admitted on the 2nd of December, 1891. Beni Bakhsh was summoned as a witness by both parties. He did not appear. The Court refused to issue a warrant for his arrest, and ordered that he should be again summoned. Eventually, the plaintiffs closed their case on the 4th July, 1892, without examining Beni Bakhsh. Beni Bakhsh was personally served with a summons on the 31st of March, 1893. On the 30th of September, 1893, plaintiffs applied to have Beni Bakhsh examined. The Court postponed passing orders on this petition until the return of the evidence taken on commissions. Defendant's petition of 21st July, 1894, shows that Beni Bakhsh was then dead. On that date the Court received three documents from the defendant on the ground that Beni Bakhsh was dead, and could no longer give evidence for him. They are: A16, plaint of Beni Bakhsh, dated 7th June, 1871, for declaration of right to village Bahuta; A17, statement of Beni Bakhsh and others as to pedigree, dated 28th of August, 1871, already referred to; and A18, deed of gift by Gurdat to Beni Bakhsh, dated 8th of February, 1871. The Subordinate Judge reserved the question of admissibility of all documents till final argument and judgment. In his judgment he held plaintiffs' documents referred to above inadmissible, because plaintiffs had not called Beni Bakhsh as a witness. The Court subsequently found Exhibits A16 and A17 inadmissible. I can find no ruling as to the admissibility of A18 on the record. The appellants contend that the Lower Court, having accepted documents from defendant in consequence of Beni Bakhsh's death, should also have accepted documents from them, which they might have put to Beni Bakhsh in cross-examination. Section 158 of the Evidence Act lends support to this view, and in this Court the pleader for the respondent was unable to contend that these exhibits were inadmissible under that section. I find these documents, Exhibits 5, 6, 12, and 56, admissible."

As to exhibit No. 9 he said:—

"Exhibit 9 is only said to have been filed 'on behalf of Gurdat.' It shows Sheo Pershad to be younger than Gurdat. I find the statement admissible as that of Gurdat, a member of the family."

On the second point the Court of the Judicial Commissioner reversed the decree of the first Court and passed a decree in

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favour of the plaintiff, and from this decree the defendant appealed to His Majesty in Council.

Mr. *DeGruyther* for the appellant contended that Kharag Kunwar acquired an absolute estate in the property in suit, and formed a fresh stock of descent. On her death therefore her heirs were entitled to succeed her, and not the heirs of Rudar Narain Singh. The question depended on what was the true construction of section 22 of the Oudh Estates Act (I of 1869). Kharag Kunwar took under clause 11 of that section, and was an "heir" within the meaning of that clause. The definition of "heir" in section 2 excluded a widow, but Kharag Kunwar took as a "mother" and succeeded as an absolute heir and owner of the estate, taking a full taluqdari title just as any other member would inherit under the preceding ten clauses of section 22. As to the devolution of an estate under that section: *Brij Indar Bahadur Singh* v. *Jankee Koer* (1), *Dewan Ran Bijai Bahadur Singh* v. *Rae Jagatpal Singh* (2), and *Narindar Bahadur Singh* v. *Achal Ram* (3), and Sykes' Compendium of the Oudh Taluqdari Law were referred to.

As to limitation it was contended that there was evidence which showed that Kharag Kunwar died on the 20th and not on the 29th of July, 1879, and that the respondents had not proved that her death took place within 12 years of the institution of the suit, which, therefore, should have been held to be barred by lapse of time.

As to the pedigree put forward by the respondents, it was contended that the evidence on the record was wholly insufficient to establish it. The oral evidence adduced by the respondents was worthless, and was besides inadmissible. The principal documentary evidence in support of the pedigree was also inadmissible. The documents 5, 6, 12 and 56 which had been rightly rejected by the first Court on the ground that they were statements by Beni Bakhsh, who was alive at the time the respondents closed their case, and yet had not been called as a witness, had been wrongly admitted by the Judicial

(1) (1877) L. R., 5 I. A., 1.
(2) (1890) L. R., 17 I. A., 173; I. L. R., 18 Calc., 112.
(3) (1893) L. R., 20 I. A., 77; I. L. R., 20 Calc., 649.

Commissioners. They should, it was submitted, be rejected, and, if they were held to be inadmissible, there was not sufficient evidence to show that Pahalwan Singh, the ancestor of the respondents, was senior to Zabar Singh, from whom the appellant was descended; and this was a fact in the respondent's case which was essential to their success. On the question of the admissibility of the evidence, oral and documentary, the Civil Procedure Code (Act No. XIV of 1882), sections 138, 142A, 179 and 180, the Evidence Act (I of 1872), section 32, clause 5, and section 158, and *Sangram Singh* v. *Rajan Bahi* (1), were referred to. The Judicial Commissioner's decree should, it was submitted, be reversed and the suit dismissed with costs.

Mr. *Mayne* for the respondents contended that it had been rightly decided by both Courts below that Kharag Kunwar took under section 22 of the Oudh Estates Act only a limited estate, and that the property in suit descended to the senior and the nearest in degree of the members of the family, and not according to the rule of lineal primogeniture. *Ran Bijai Bahadur Singh* v. *Jagatpal Singh* (2) and *Narindar Bahadur Singh* v. *Achal Ram* (3) were refered to.

As to limitation, the Courts below were concurrent on the facts on which the question depended, both Courts having held that Kharag Kunwar did not die before the 24th of July, 1879, and therefore the suit, having been instituted on the 23rd of July, 1891, was in time.

The documents, exhibits 5, 6, 12 and 56, relating to the respondents' pedigree, had been rightly admitted by the Judicial Commissioners. They became admissible at any rate on Beni Bakhsh's death, and at that time when produced they should have been admitted. Documents produced by the appellant were admitted on the ground that Beni Bakhsh was then dead. But even if the above-mentioned exhibits produced by the respondents were wrongly admitted, such admission was merely an irregularity which was covered by section 578 of the Civil

(1) (1885) L. R., 12 I. A., 183; I. L. R., 12 Calc., 219.
(2) (1890) L. R., 17 I. A., 173; I. L. R., 18 Calc., 111.
(3) (1893) L. R., 20 I. A., 77; I. L. R., 20 Calc., 649.

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Procedure Code, and did not cause the suit to be wrongly decided as they were not essential to the respondents' case. There was sufficient evidence without them to establish it. To show this the evidence, oral and documentary, was discussed at length, and it was submitted that the decision of the Judicial Commissioners should be upheld and the appeal dismissed.

Mr. *DeGruyther* replied.

1902, *December 3rd.*—Their Lordships' judgment was delivered by LORD ROBERTSON:—

The subject of the present dispute is Dasrathpur, a taluq in Oudh, which was granted by the British Government in 1858 to a certain Thakur Hanuman Singh. His name was entered in lists 1 and 2, prepared under the provisions of the Oudh Estates Act (I of 1869). It results that the succession is regulated by section 22 of that Act; and, as the first ten sub-sections of section 22 do not apply, the rule is to be found in the 11th sub-section; the estate goes to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar are subject. On the death of Hanuman, his grandson, Rudar Narain, succeeded; and, on Rudar's death in 1869, his mother took the estate of a Hindu mother. She died in July, 1879; and the question in this appeal is as to the descent of the estate upon her death. The interval, however, between her death and the institution of the present suit on the 23rd of July, 1891, yielded important events bearing on the present dispute. On her death, possession was taken by the stepmother of Rudar Narain, who admittedly had no good right, and on her death in 1881, by Bijai Bahadur, who again was a pretender, claiming under a will of the stepmother. He was ultimately dispossessed in favour of the present appellant's father, under an Order of Her late Majesty Queen Victoria in Council made on the 1st of May, 1890. The fact has been fairly commented on that this same Bijai Bahadur, who is proved by deed produced to be the true promoter of the present suit, never raised in this former proceeding the genealogical theory now advanced. But for present purposes it is more important to observe that the decision of the Judicial Committee in 1890 was that this estate

was impartible and followed the line of primogeniture; and in their Lordships' judgment this must be held to be one of the conditions governing the present controversy.

The present suit was instituted on the 23rd of July, 1891; and the present appellant being *de facto* in possession, it seeks possession. The action is therefore one of ejectment and it was for the respondents to establish their title.

Before considering the grounds upon which this claim was based, it is convenient to notice the plea of limitation stated by the appellant. The plaint having been filed on the 23rd of July, 1891, the appellant alleged that the death of Kharag Kunwar occurred on the 20th of July, 1879, more than twelve years before. To this it was answered that the death occurred on the 29th of July, 1879, and that this date had been stated in a pleading of the father of the appellant acting (owing to insanity) through the mother of the appellant, in some former suit.

It appears, however, that in that suit the exact date was of no materiality and that it had originally been left blank. Against this evidence (for it is not pleaded as an estoppel) is to be set the much more deliberate and intentional statement of the date of this lady's death which is contained in the report regarding mutation of names which is on page 206 of the record. The report of the patwari is that she died on Sawan sudi 5th, 1886 Fasli. That day admittedly corresponds to the 25th of July. It is true that the report adds the words "corresponding to the 20th of July." But their Lordships agree with the Court below in holding that in a statement thus made by the patwari the substantive statement is that given in the vernacular, and that the rest is a miscalculation.

Turning now to the case of the respondents on its merits, it may be convenient to set out the pedigree put forward in the respondents' case. It is as follows:—

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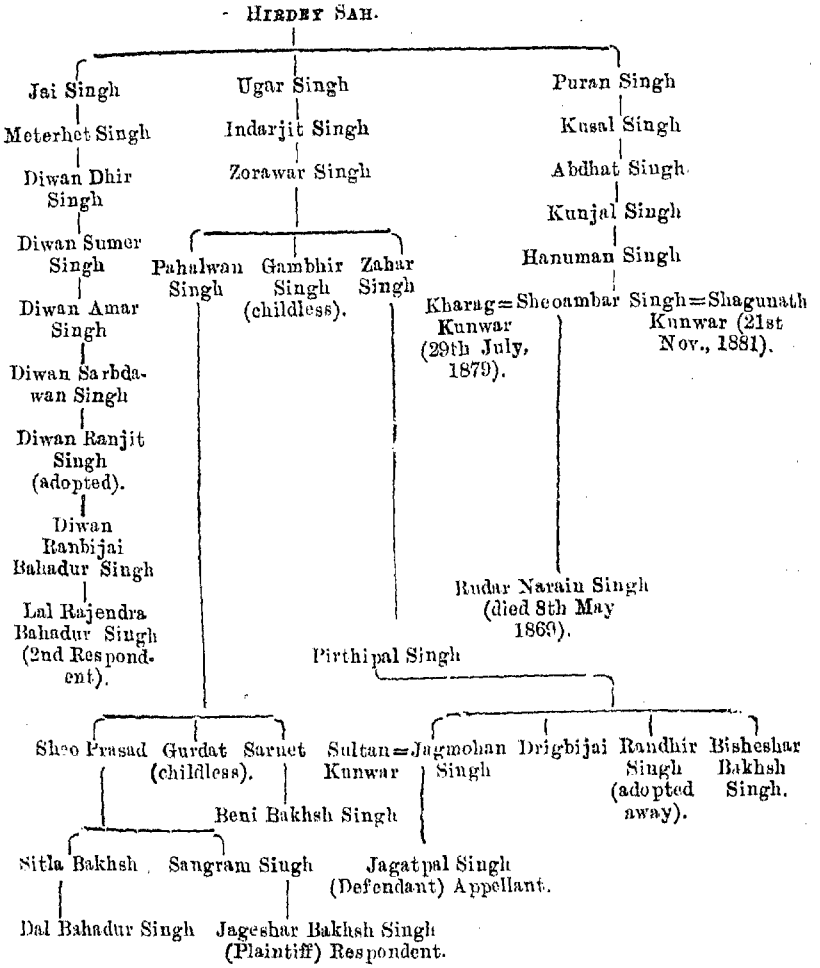

The questions raised by the appellant's written statement were numerous, but it is unnecessary to enumerate these, as the vital controversy came to be on three points, and ultimately on one point, in the genealogical tree of the respondents. That point may be thus stated with reference to the central part of the pedigree:—Were the Judicial Commissioners right in holding that the respondents have established that Pahalwan Singh, from whom they descend, was born before Zabar Singh, from whom the appellant descends? Unless the respondents have made this out, the other highly disputable propositions maintained by them never arise.

Now the Subordinate Judge of Partabgarh who tried the case decided this question against the respondents on the 19th of December, 1895, and in reversing this judgment the Judicial Commissioners largely proceeded on documentary evidence, which the Subordinate Judge rejected as some of it inadmissible and some valueless. At their Lordships' bar neither party attached much importance to the oral evidence; and while the respondents' counsel quite properly declined to admit that the disputed documents were indispensable to his success, they addressed no separate argument to their Lordships on the assumption that the documents in dispute were disregarded. The questions about these documents are therefore of crucial importance.

The first set of documents were filed by the plaintiffs in the suit and are now founded upon by the respondents (as proving certain statements to have been made by one Beni Bakhsh Singh, now deceased). But this Beni Bakhsh was alive on the 4th of July, 1892, when the plaintiff closed his case. He had been summoned as witness by both parties. After the appellant had closed his case the plaintiffs on the 30th of September, 1893, applied for leave to examine a number of witnesses, among them being Beni Bakhsh. This application was refused, and, their Lordships have no doubt, rightly refused. In these circumstances the question is on what ground can the written statements of a person alive when the party founding on them closed his case be received as evidence. It was attempted to distinguish the case on the ground that the appellant had himself on the 21st of July, 1894 (after Beni Bakhsh was dead), filed certain other statements of this same man. But those documents, which were doubtless filed in case the respondents' documents should be admitted, are not evidence; and their production by the appellant cannot be held to compel the Court to depart from the rules of evidence in the decision of the case. The Subordinate Judge held the documents in question to be inadmissible on the ground that the plaintiffs had not called Beni Bakhsh as a witness. On appeal the documents were admitted.

It appears to their Lordships that the reception of those documents cannot be supported, their alleged author having been alive down to the closing of the plaintiff's case.

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The other document stands in a different position. Its alleged author, Rai Gurdat Singh, had died before the trial. But the exhibit in question is merely a genealogical table filed on behalf of Gurdat in a claim made by him for certain villages. The object of Gurdat in this proceeding was to make himself out to be of the eldest branch of his family and this admittedly was untrue. But the fatal objection to the admissibility of the document is that it is in no way brought home to Gurdat except as being an exhibit binding on him for the purposes of that suit. His relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. For aught that appears, the genealogical table in question might never have been seen or heard of by Gurdat personally, but have been entirely the work of his pleader.

These questions being decided adversely to the respondents there remains no substance in their case. The rest of the evidence consists of documents of no importance or authority and oral evidence which their Lordships were not asked to accept. Into such evidence they do not think it necessary to enter. Their Lordships therefore hold that it has not been proved that Pahalwan Singh was older than Zabar Singh, and the respondents' case therefore fails. The burden of proof was on the respondents and that burden they have failed to discharge.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the decree of the Court of the Judicial Commissioner of Oudh reversed with costs, and the judgment of the Judge of the Small Cause Court, Lucknow, restored. The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant.—Messrs. *Young, Jackson, Beard & King.*

Solicitors for the respondents.—Messrs. *T. L. Wilson & Co*

J. V. W.