P. C.*
1886
December
10 *and* 19.

THAKUR HARIHAR BAKSH (PLAINTIFF) *v.* THAKUR UMAN PARSHAD (DEFENDANT.)

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

Custom, Evidence as to—Wajib-ul-araiz—Concurrent findings of Courts below —Construction of a razinama disposing of estate with words "naslan bad naslan."

A custom of inheritance was alleged to prevail in an Oudh clan that, if the branch of a family became extinct, the other branches of it should take the estate amongst them in equal shares without regard to their degrees in kinship to the deceased. This custom was found not proved by the Original and Appellate Courts upon evidence of instances of succession in kindred families and of rights recorded in certain *wajib-ul-araiz*.

If there had been any principle of evidence not properly applied, or documentary evidence had been referred to on which it could be shown that the Courts below had been led into error, the case might have been re-examined on this appeal, but in the absence of such ground this could not be done.

In cases decided on the construction of documents, in which the expressions *mokurari, istemrari, istemrari mokurari,* have been considered upon the question whether an absolute interest has been conferred by such documents or not, it has been taken for certain that if the words "*naslan bad naslan*" had been added, an absolute interest would have been clearly conferred. Accordingly, in construing a *razinama* between parties dividing family estate, and expressly declaring that the shares should descend "*naslan bad naslan,*" *held,* that the insertion of these words was conclusive in itself; the expressed objects of this *razinama* pointing to the same construction, *viz.,* that the estate taken under it was absolute.

APPEAL from a decree 4th April, 1883, of the Judicial Commissioner of Oudh, affirming a decree (3rd September, 1881) of the District Judge of Sitapur.

The appellant, who was plaintiff in the suit, obtained in 1883 special leave to prefer this appeal, on the ground that a substantial question of law was involved in the decision of his suit, which was brought for the possession as proprietor, by right of inheritance, of a taluk named Sarora in Sitapur in Oudh. His suit had been held to be barred under the provisions of s. 13 of Act X of 1877, as amended by s. 6 of Act XII of 1879, by reason of a prior adjudication on the 7th June,

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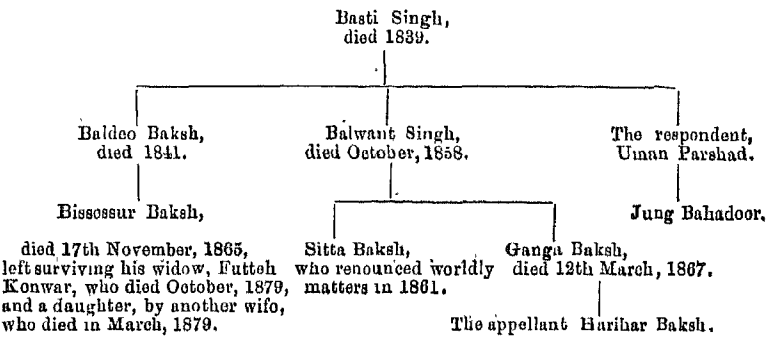
1867. The questions now raised related to proof of an alleged custom of inheritance, which gave the plaintiff a title, and also to the construction of a *razinama*. At the hearing of the suit in the Court of first instance, evidence was given of the custom which was said to prevail in the clan to which the parties belonged, named Panwar Rajputs; and their pedigree was admitted to be as follows :—



In 1839, on the death of Basti Singh, who was the kabuliyatdar of taluk Sarora in the time of the Nawabs of Oudh, his son Baldeo succeeded him. The latter died in 1841, and was succeeded by his son Balwant, who died in 1858. The third and only other son of Basti Singh was Uman Parshad, the present respondent, between whom and Bissessur Singh, son of Baldeo, and Ganga Baksh (son of Balwant abovementioned and father of Harihar Baksh, the present appellant) disputes commenced as to their respective rights in Sarora.

In 1859, at the summary settlement of Oudh, the Deputy Commissioner of Faizabad ordered, and this was confirmed by the superior revenue authorities, that Ganga Baksh, the son of Balwant, should receive the settlement of the taluk, subject to a liability to pay to Bissessur and to Uman Parshad what they had received when Balwant was in possession before annexation.

In 1861 a sanad, dated 11th October, 1860, was delivered to Ganga Baksh, whereby the Chief Commissioner, under the authority of the Governor-General in Council, conferred on him the talukdari of Sarora, and his name was entered in the list, afterwards scheduled to Act I of 1869 (the Oudh Estates' Act). Disputes, however, continued, chiefly as to the maintenance to

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which his uncle and cousin were entitled, and proceedings in the Settlement Court at the regular settlement ensued.

In 1864 all parties came to the agreement in the *razinama*, dated 14th December, 1864, which gave rise to the question of construction in this suit. It was as follows:—

"We are Ganga Baksh, talukdar, and Uman Parshad and "Bissessur Baksh, parties to the suit respecting claim to taluka "Sarora.

"Whereas for several years there has been going on among "us a dispute about the proprietary right respecting taluka "Sarora, and whereas now, at the time of the regular settlement "we have agreed that after coming to an amicable settlement, "we should set the whole dispute at rest, so that whatever ill-"feelings exist between relations the descendants of a common "grandfather may be removed, therefore by mutual consent "it is decided that the whole estate be divided as follows, the "division to hold good for ever and to descend from generation "to generation, *viz.*:—

"Ganga Baksh, half of the estate.

"Bissessur Baksh, quarter do.

"Uman Parshad, quarter do.

"And the entire estate including Pachchimgaon having been "divided into four parts, four lists were drawn up; we Bissessur "Baksh and Uman Parshad took up one each by consent of each "other, and I, Ganga Baksh, took up the remaining two. "There remains no longer any dispute about the division of the "estate. We, Bissessur Baksh and Uman Parshad, shall pay "to Ganga Baksh the present Government revenue, until "the assessment of the regular settlement jama, and I, Ganga "Baksh, shall add on to it my half share of the jama and "continue to pay it to Government. After the regular settle-"ment the jama assessed on each village, whether it be more "or less than the present amount, shall be paid by the party in "possession in the manner above mentioned; but the above propor-"tion (of payment) shall be maintained in respect to the villages "held in common, *i.e.*, we, Bissessur Baksh and Uman Parshad, "shall pay half, and I, Ganga Baksh, the other half, and as there is "a little difference in the quantity of land it will be adjusted

"in the villages held in common, *viz.*, Kathwa, Ghazipur and "Himmat Nagar. In addition to the above we, Uman Parshad "and Bissessur Baksh, shall pay to Ganga Baksh, talukdar, "along with the instalment Rs. 10 per cent. on account of "talukdari right on the present Government revenue, or on such "amount as may hereafter be assessed from time to time. There- "fore this agreement is executed as a deed of compromise "(*razinama*) that it may witness, dated 4th May, 1864."

In accordance with this agreement Uman Parshad and Bissessur were put into possession of villages allotted to them as forming their shares, and were recognized and recorded by the revenue authorities as under-tenure-holders.

In 1865 Bissessur died without male issue. He left a widow and a daughter by another wife, deceased. His share, which he had held under the *razinama* of 1864, was immediately claimed by Ganga Baksh; and the Oudh regular settlement being in progress, which under Act XVI of 1865 (the Oudh Revenue Courts' Act) gave exclusive jurisdiction to the Revenue Courts, the litigation proceeded in those Courts.

On 1st February, 1866, Ganga Baksh, by a petition to the revenue authorities, claimed to recover one-fourth of the whole Sarora estate, which had been in the possession of Bissessur Baksh as against Uman Parshad, who alleged himself to be sole heir to Bissessur. The widow of Bissessur, Futteh Konwar, however, claimed to succeed for her widow's estate. On these contested claims, after the Assistant Settlement Officer, Settlement Officer, and the Commissioner of the division had made decrees in due order, the Financial Commissioner, upon the construction of the *razinama* of 4th December, 1864, decided as follows:—

"On the part of Ganga Baksh it is urged that, as the words "*naslan bad naslan*" are entered in the ikrarnama, it ought to be held that the talukdar's relinquishments of rights enjoyed under the sanad can benefit only heirs of the body of Bissessur Baksh and not collaterals. The Financial Commissioner cannot admit this plea; it is plain that by executing the ikrarnama and compounding for an allowance of ten per cent. the talukdar relinquished all special rights, and the common law of succession must take effect. The Financial Commissioner holds that the

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order of the lower Courts, giving the widow a life interest in her husband's estate without power of transfer, is correct.

"There is, however, a probability that the widow may be tempted to allow the property to be wasted, and it is necessary to make a declaratory order as to the parties with whom the reversionary rights lie."

Upon this judgment the following decree was made:—

"The decree of the Commissioner's Court is affirmed, and it is declared that, after the death of Bissessur Baksh's widow, his estate will be inherited by Uman Parshad and Ganga Baksh in such shares as may be legally due to them. No appeal to Her Majesty in Council was preferred, and Futteh Konwar remained in possession of her husband's share till her death on the 5th October, 1879."

This was the proceeding which gave occasion for the question, whether or not it had been judicially decided, between parties representing the same interests as the parties to the present suit, that the estate taken under the ikrarnama of 1864 by Bissessur Baksh was an absolute interest or only one for his life.

Ganga Baksh died on the 12th March, 1867. The widow of Bissessur lived for twelve years after. On her death the attempt was made on behalf of Harihar Baksh, then a minor, to bring back the share allotted in 1864 to Bissessur to the line of Ganga Baksh. At *dakhil kharij* proceedings ensuing upon the death of Bissessur's widow, right of possession was claimed on behalf of the minor, resulting in a direction by the Deputy Commissioner of Faizabad, under s. 65 of Act XVII of 1876 (the Oudh Land Revenue Act), that Thakur Uman Parshad should be put into possession of the disputed share, pending any order that might be made by a Civil Court. This was followed by the present suit, brought on the 23rd October, 1880, by Thakurani Mohun Konwar as mother and guardian of Harihar, upon whom it was claimed the whole interest that had belonged to Bissessur had now devolved. It was alleged that the whole interest of Bissessur on his death "reverted" to the plaintiff Harihar as sole heir of Ganga Baksh, according to law and also according to the custom of the Punwar Rajputs. In the alternative it was claimed that, if under the *razinama* of 4th

May, 1864, it should be held that Bissessur had taken an absolute interest, then the plaintiff, by the same custom, was entitled to share Bissessur's estate with the defendant, and should take one-half of that share.

The defendant Uman Parshad, maintaining that no such custom existed, and that he by law was entitled to Bissessur's estate, disputing the construction put upon the *razinama* by the plaintiff, relied also on the decree of the Financial Commissioner made in 1867 as affording a bar to this suit for the reason above explained.

This defence of *res judicata* was held good by the District Judge of Sitapur, who dismissed the suit with costs on this ground. He also found as a fact that the custom alleged by the plaintiff was not proved. On both these points the judgment of the District Judge was upheld by the Judicial Commissioner, who quoted from the proceedings above referred to to show that the question whether Uman Parshad had a better title to the estate of Bissessur Baksh than Ganga Baksh was directly and substantially in issue between Ganga Baksh and Uman Parshad in the former suit; that Ganga Parshad then urged that the grant should revert to the talukdar on failure of heirs of the body of Bissessur Baksh; and that the point was decided against him in the Court of the Financial Commissioner, which was a Court of competent jurisdiction. He added: "In this suit the plaintiff claims on the ground that Bissessur Baksh having died without issue, the object for which the said grant or allotment was made has been attained, and the proprietary title in the said property reverts to the plaintiff. This is precisely the point which was directly and substantially in issue in the former suit in the Court of the Financial Commissioner between the defendant Uman Parshad and Ganga Baksh, the father of the plaintiff. The point was finally decided by the Financial Commissioner, and the District Judge has rightly decided that s. 13, Act X of 1877, as amended by s. 6, Act XII of 1879, was a bar to the rehearing of the claim."

Taking the above as the ground of his decision, the Financial Commissioner held it unnecessary for him to consider the effect of the agreement of 1864; and his judgment then went to the

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question whether the custom alleged to prevail among the Punwar Rajputs had been proved.

He continued thus:

"As we cannot go behind the Financial Commissioner's decree of the 17th June, 1867, it is unnecessary to consider whether the District Judge's construction of the agreement of the 4th May, 1864, is or is not correct.

"There remains the question whether the plaintiff is entitled to half the property of the late Bissessur Baksh. The plaint is not very clear as regards custom. In para. 11 it is said that on the death of Bissessur Baksh without issue the proprietary right in the whole property 'according to law and also to a usage prevailing among the Panwar Rajputs reverted to the plaintiff as sole heir of the said Ganga Baksh, deceased.' In the next paragraph it is said that, if Hindu law be held to be against him, 'the plaintiff claims to be entitled to one-half share in the said villages and lands by virtue of a custom prevailing among Panwar and other Rajput tribes, to the effect that on the death of the last representative of one branch of the family, so that such branch becomes extinct, the surviving branches of the said family, without regard to the nearness or degree of relationship, are entitled to the property left by the last representative of the extinct branch in equal shares.'

"The plaintiff thus claims the whole of the estate according to 'a usage prevailing among the Panwar Rajputs and half the estate by virtue of a custom prevailing among Panwar and other Rajput tribes.' The evidence produced was to support the alleged custom by which surviving members divide the property of a deceased relation without regard to the nearness or degree of relationship. The Counsel for the appellant has not contended that any custom has been proved by which the appellant as son of the deceased's first cousin would inherit the whole of the estate in preference to the uncle of the deceased. But the contention is that the uncle and the grandson of another uncle should inherit equally. Several instances were referred to by the plaintiff's witnesses. There were some discrepancies in the depositions of the different witnesses, but

on the whole the evidence shows that in the instances referred to the property has gone to relations standing in different degrees of relationship to the late owner. The one principle common to all these cases is that each branch of the family obtained a share of the property of the person who died without issue without reference to the degree of relationship. Thus, on the death of Aparbal Singh without issue his property went to the descendants of his great uncle Dhan Singh. Dhan Singh had three sons, namely, Sheo Baksh, Chain Singh, and Madari Singh. On the death of Aparbal Singh there were alive one son of Sheo Baksh, two grandsons of Chain Singh and two grandsons of Madari Singh. The property was divided into three shares, one going to the son of Sheo Baksh, another to the grandsons of Chain Singh and a third to the descendants of Madari Singh. So when Dina Singh died half his property went to the son of his uncle, Narain Singh, and half to the grandsons and great grandsons of his uncle Dhulip Singh. This principle was followed by the Assistant Settlement Officer on the 1st August, 1866, when he directed that on the death of the widow of Bissessur Baksh the property should pass in equal shares to Ganga Baksh and Uman Parshad or their heirs. But the decree of the Financial Commissioner left the question open. The same principle was followed by the Deputy Commissioner on the 31st August, 1869, in the case of certain Panwar Thakurs, *Gya Parshad* v. *Dhaukal Singh*, and that decision was affirmed by the Financial Commissioner on the 20th November, 1869. If the principle above referred to were to be followed in this case, the property of the late Bissessur Baksh would be divided between Uman Parshad, son of Basti Singh, and the descendants of Balwant Singh, son of Basti Singh. On the other hand no mention is made of this custom in the Settlement Records. No case has been deposed to in which the first cousin, or first cousin once removed, of a deceased person has shared with the uncle of the deceased person. And the defendant's witnesses have deposed to cases in which the custom was not followed. On the death of Gauri the whole property went to Hindu Singh, the brother, although the sons of a second brother, Mehrban Singh, were alive. On the death of Raghu Singh the property

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went to the families of three cousins, but the family of Ram Parshad, a fourth cousin, got nothing. On the death of Kushal his brothers succeeded, excluding his nephew, the son of a deceased brother. Other examples might be mentioned, but these are sufficient to show that there are exceptions to the custom relied on by the plaintiff-appellant; and seeing also that the custom was not recorded in the settlement papers, I am of opinion that it cannot be held to be so certain and invariable that the Court would be justified in following it in preference to the ordinary law of succession. I must, therefore, confirm the decision of the District Judge that the plaintiff-appellant has failed to prove the custom on which he relies. I can see my way to no other decision, and the result of this protracted litigation is that the property of Basti Singh will be divided equally between the families of his sons Balwant Singh and Uman Parshad, the plaintiff-appellant, as representative of the elder son, being the talukdar, and Uman Parshad, the younger son, holding half the estate as under-proprietor, a result not altogether unsatisfactory."

The appeal to the Judicial Commissioner was accordingly dismissed.

On the present appeal,—

Mr. *J. H. A. Branson*, for the appellant, argued that the Courts below had erred in holding that, under s. 13 of Act X of 1877, as amended by s. 6 of Act XII of 1879, the suit was barred. The first Court had also wrongly construed the *razinama* of 4th May, 1864, and instead of omitting, as he had omitted, to consider the effect of this document, on the ground of *res judicata*, the Judicial Commissioner should have taken it up, and, on the question of construction, decided that the first Court had been in error. It was also contended for the appellant that sufficient *evidence* had been given of the alleged custom.

In regard to the construction of the *razinama* the petitions and orders in the Settlement Department, and the nature of the dispute between the brothers, all tended to show that the intention of the parties, in executing the document of 4th May, 1864, was to secure maintenance for Bissessur Baksh and Uman Prashad. The contention was that the villages were not allotted for an absolute estate to be held therein. True it was that the term

naslan bad naslan might indicate estates of inheritance, but by analogy to what had been held in regard to words so definite as *mokurari istemrari* and *istemrari mokurari*, the construction of a document, in which the term *naslan bad naslan* was used, should depend on the actual transaction without a conclusive effect being attributed to these words themselves. See *Bilasmoni Dasi* v. *Raja Sheopershad Singh* (1), where the decisions on this subject were collected, not that any one of them referred to the use of the words *naslan bad naslan* now in question, but the same opinion was fairly applicable to them.

The descent of the family property in the line of Ganga Baksh would accord with the custom of the clan as to which the evidence was reviewed. The plaintiff, according to the custom, was, at all events, entitled to come in along with the respondent as an heir to one-half of Bissessur's estate. The above points would require decision if, as it was contended, his suit was not barred by the decision given in 1867. In giving his decision the Financial Commissioner had expressed his opinion that the estate was such that it included descent to collaterals, but that question was not necessarily put in issue in order to arrive at the decision of the matter before the Financial Commissioner; and *res judicata* could only be constituted by the decision of a material issue between the parties raising an identical question. Reference was made to Lord Herschell's judgment in *Concha* v. *Concha* (2) and to *Krishna Behary Roy* v. *Brojeswari Chaodhrani* (3).

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—Their Lordships do not think it necessary to call upon Counsel for the respondent.

This case has been put before their Lordships by Mr. Branson with great fulness, and they consider that he has argued it with great lucidity and force, and said everything that is possible in

(1) I. L. R., 8 Calc., 664.
(2) L. R., 11 Ap. Ca., 541, at page 552.
(3) L. R., 2 Ind. Ap., 283; I. L. R., 1 Calc., 144.

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favour of his client; but it is put before them in so clear and perspicuous a manner that they are able to deal with it on the opening.

There are two questions. The first is how the agreement, the *razinama* or compromise, of the 4th May, 1864, is to be construed; and if it is to be construed as giving an absolute interest to Bissessur Baksh, then the second question is, in what shares the inheritance is to be taken by his heirs?

To take the last question first, the plaintiff alleges that, by a certain custom prevalent among the Punwar Rajputs, if a branch of a family has become extinct, the other branches take the estate in equal shares, which means in equal shares as between those branches without regard to their being more or less remote in kinship to the deceased. That question was tried in the Courts below, and both Courts, the District Judge and the Judicial Commissioner, have come to the same conclusion upon it, adverse to the plaintiff. Two lines of evidence appear to have been pursued—one consisting of instances of successions in kindred families, and the other of records of rights in *wajib-ul-arziz*. Upon the first line of evidence the Judicial Commissioner, who seems to have examined the cases with care, has come to the conclusion that, balancing case against case, there is no certain invariable custom proved on this point. He also states, and the District Judge states, that the *wajib-ul-arziz* do not support the custom. In their Lordships' judgment the *wajib-ul-arziz* to which they have been referred seem to go further. The document appearing in page 126 of the record is a specimen, and it states that brothers or nephews of the deceased are to succeed, regard being had to the nearness of kinship. That is a statement contrary to the statement in the plaint and to the custom which the plaintiff alleges. Therefore their Lordships have not considered it proper to go through the mass of oral evidence given in this case, because, if the Courts below concur in their conclusion upon such a matter as a family custom, their Lordships are very reluctant to disturb the judgment of those Courts. If there had been any principle of evidence not properly applied, if there had been written documents referred to on which the appellant could show that the Courts below had been led into

error, their Lordships might re-examine the case; but in the absence of any such ground they decline to do so.

Then the question comes back to the construction of the *razinama*, and that again is divided into two branches. The Courts below have found that the *razinama* ought to be construed to give an absolute interest, because it has been decided that it should be so construed—in fact that the matter is *res judicata*. Upon that point it is unnecessary for their Lordships to pronounce any opinion; but they wish it to be understood that they do not express any agreement with the Court below on this point, and it must be taken that, not having heard the argument on the other side, their minds are completely open upon it.

They rest their opinion upon the terms of the *razinama* itself. After providing that the estate shall be divided into the fractions specified in it, the conclusion of the *razinama* is that the division shall hold good for ever, and to descend from generation to generation—*naslan bad naslan*. Their Lordships have not been furnished with any authority, in fact Mr. Branson has fairly said he can find no authority in which a gift with the words *naslan bad naslan* attached has been held to confer anything less than the absolute ownership. On the contrary, in the various cases in which the expressions *mokurari istemrari*, *istemrari mokurari*, have been weighed and examined with a view to see whether an absolute interest was conferred or not, it seems to have been taken for certain that, if only the words *naslan bad naslan* had been added, there would have been an end to the argument, because an absolute interest would have been clearly conferred. Their Lordships think that the insertion of those words in the *razinama* would be conclusive in itself; but, looking at the expressed objects of the *razinama*, they would come to the same conclusion even if words of a less peremptory character had been used. It was for the purpose of settling a dispute which had been going on for several years about the proprietary right to the taluk Sarora, and it was agreed that the whole dispute should be set at rest. The dispute was not as to maintenance, it was not as to a temporary interest, but it was as to the proprietary right. That is the dispute to be set at rest; and when their Lordships find that such a dispute is set at rest by a

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division of the estate to hold good for ever, and that not a word is introduced which of its own force imports less than an absolute ownership, they find it impossible to doubt that the true intention of the parties was to give to all alike the same amount of interest in the shares conceded to them, *viz.*, that absolute ownership which each was claiming for himself in the whole or part of the property.

On those grounds their Lordships agree with the decision of the Courts below, though not for the same reasons, and the result is that the appeal will be dismissed.

Their Lordships will humbly advise Her Majesty in accordance with that opinion, and the appellant must pay the costs of the appeal.

Appeal dismissed with costs.

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

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

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AMANAT BIBI (PLAINTIFF) *v.* LACHMAN PERSAD AND OTHERS (DEFENDANTS.)

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

Specific Relief Act (*I of* 1877), *s.* 31—*Rectification of instrument.*

A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument; but, on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit, under s. 31 of Act I of 1877 (the Specific Relief Act) to have the instrument rectified was held to have been rightly dismissed.

APPEAL from a decree (10th March, 1881) of the Judicial Commissioner of Oudh, affirming a decree (5th August, 1880) of the District Judge of Faizabad.

The appellant was the widow of the original plaintiff, Malik Hidayat Hussain, who died while these proceedings were pending, and who was talukdar of an estate, named Samanpur, in the Faizabad District. The respondents were bankers of Faizabad, to whom

* *Present:* LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.