Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussamut Khoob Conwur, Mother and Guardian of Baboo Bijnauth Persaud, the Minor Son of Baboo Deanut Roy, deceased, Baboo Joykurrun Laul, and Mussamut Cheyt Conwur, and Tek Conwur v. *Baboo Moodnarain Singh and, after his death, Mussamut Ismedia Conwur and Sundup Conwur, the Widows of the said Baboo Moodnarain Singh, from the Sudder Dewanny Adawlut at Calcutta; delivered December* 21, 1861.

Present at the hearing of the Appeal:

LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JOHN T. COLERIDGE.

SIR LAWRENCE PEEL.
SIR JAMES COLVILE.

THE facts upon which this Appeal arises may be thus stated. In the year 1795 Maharajah Mitterjeet Singh Bahadoor, who appears to have been a person of considerable position in the province of Behar, granted a Mokurrury Istemraree lease of the property, which is the subject of this suit. That the grant was by a Sunnud in the Persian language; and that the instrument produced in the cause, being the original of the Exhibit No. 145 in the Appendix, is that Sunnud, and bears the genuine seal of Rajah Mitterjeet Singh, are undisputed facts. It is also admitted that the only grantee described by name was Lalla Hoonooman Dutt, the eldest son of Roy Prithee Singh, who, at the date of the grant, and for many years afterwards, up to the time of his death, was the Dewan of the grantor. But the

substantial question in the cause is, whether the grant was expressed to be to Hoonooman Dutt solely and simply, or to him "together with his uterine brothers from generation to generation;" in other words, whether the Persian words which now appear on the face of the Sunnud, and import the addition in question, have, as the Respondents contend, been fraudulently substituted for other words, or, as the Appellants insist, have always formed part of the document.

On the former hypothesis the tenure would, as the law has been settled by a course of decisions, commencing at latest in the year 1817, have determined with the life of Hoonooman Dutt. The addition of words importing "from generation to generation," would make the grant one of a perpetual lease to Hoonooman Dntt and his heirs. The further addition of the other words in question would, of course, make it one to him and his brothers jointly, and to their respective heirs. Hoonooman Dutt had two brothers, Gumess Dutt and Mahadeo Dutt; and some time in 1806 or 1807 a partition of the property comprised in the Sunnud was made between the three, by or with the sanction of their father, Roy Prithee Singh. He died in 1839. His son, Hoonooman Dutt, certainly predeceased him, and though the precise date of his death is not clearly proved, there seems no reason to doubt that it took place, as stated by the Appellants, in or about the year 1819. In 1839 Rajah Mitterjeet Singh granted to his son, Moodnarain Singh, a Teeka lease of his interest in certain Mouzahs, including those in question in this suit; and the latter were then treated as being still the subject of a subsisting Mokurrury tenure. In 1840 the Rajah died leaving two sons, Hetnarain Singh and Moodnarain Singh. They made a partition of his estate, and the property in question fell to the share of Moodnarain Singh. On that occasion it was again treated as held by a subsisting Mokurrury tenure, a circumstance which must have been considered in estimating the share to be allotted to each brother.

In 1841 Moodnarain Singh instituted three separate suits, conformably to the devolution of the property under the Appellants' version of the original lease, for the recovery of arrears of Mokur-

rury rent alleged to be due in respect of certain Mouzahs, parts of the property comprised in the Sunnud, and claiming to have the Mokurrury tenure in those Mouzahs respectively cancelled, on the ground of the arrears. These proceedings, therefore, assumed the existence of the Mokurrury tenure in the lands in question in 1841; and also that they were thus held in severalty by the descendants of Roy Prithee Singh, recognizing to that extent the partition of 1807. In one of these suits, and on the 9th of February, 1841, the original Sunnud was produced by the representatives of Hoonooman Dutt. On the following morning, if not on that night, it was inclosed in an envelope sealed with the seal of the Court. It was certainly from the time of its production up to the 22nd of March in the custody of the Court. On the last named day the envelope was opened in Court in the presence of the Vakeels of both parties. The appearances which cast suspicion on the Sunnud were then for the first time discovered. On the 30th of March, 1842, the Sudder Ameen, before whom the case was pending, passed a decree in favour of the Plaintiff for a small sum of arrears, but dismissed his suit so far as it sought for the cancellation of the tenure. On the same day he proceeded to hold an inquiry into the supposed tampering with the Sunnud whilst in the custody of the Court. His proceeding is set forth at page 43 of the Appendix, and resulted in the dismissal of the Record keeper.

There were various other proceedings in these suits of 1841 by way of appeal to the Sudder Adawlut, and of remand to the Court below, and in the course of the litigation Moodnarain Singh appears to have raised, by petition of amendment, some new issues founded on the appearance of the Sunnud. The three suits, however, seem to have been finally disposed of by the Decree of the Sudder Ameen set forth at p. 55 of the Appendix, and dated the 17th of June, 1846. The effect of the decision was that the Plaintiff was entitled to some arrears of Mokurrury rent, though to considerably less than the amount claimed by him, and that he had shown no ground in those suits for the cancellation of the tenure.

From 1846 to 1851 Moodnarain Singh took no step; in June of the latter year he commenced the

present suit, which embraces the Representatives of all the three sons of Roy Prithee Singh, and is for the recovery of the whole property comprised in the Sunnud, with mesne profits since 1842, and for the cancellation of the Sunnud as spurious.

His case, so far as it is necessary to state it, is that the Sunnud as granted by his father was a grant of a Mokurrury Istemraree lease to Hoonooman Dutt alone, and therefore that the tenure legally determined on Hoonooman's death; that the document has been fraudulently altered by those who claim under it, the Persian words importing a grant in favour of his brothers jointly with Hoonooman, and of the heirs of all in perpetuity, having been written in substitution of words descriptive of Hoonooman or of other words *erased*, and words in the singular number having throughout been converted into words plural, wherever the alteration was necessary to make the instrument consistent. He tries to explain the continued enjoyment of the lands, as under a Mokurrury tenure, after Hoonooman's death; and other circumstances which are apparently inconsistent with his theory of the original grant by the alleged influence of Roy Prithee Singh over the Maharajah; and malversations in office by him and his grandson and successor in the Dewanship.

The case of the Defendants is also that the Sunnud as it now exists has been tampered with, but they contend that this tampering took place whilst the document was in the custody of the Sudder Ameen's Court in 1842, and was the act of the Plaintiff's agents in collusion with the Record keeper; that it consisted only in disfiguring certain material passages of the instrument without altering its tenor, in order to cast suspicion upon it, and to give colour to the case now made against it. They also insisted that the present suit was barred by lapse of time under the regulations of limitation.

It does not very clearly appear whether there has been any adjudication on this last plea. The Sudder Adawlut treated it as decided by the Sudder Ameen against the Defendants, who had not appealed against his decision. But in the proceedings before this Committee there is no trace of any order of the Sudder Ameen on this plea against which the Defendants could have appealed. His final Decree of the 5th of August, 1854, is in their favour.

Proceeding much upon the finding of his predecessor on the inquiry of the 30th of March, 1842, into the conduct of the Record keeper, he adopts the Defendants' theory of the tampering, and thereupon dismisses the Plaintiff's suit, declining to consider any of the other issues in the cause. He relied also on a copy of the lease bearing the Cazi's seal, which was given in evidence by the Appellants and is consistent with their case.

On appeal this decision was reversed by the Sudder Adawlut, which held that there had been a fraudulent alteration of the terms of the Sunnud, and decreed in favour of the Plaintiff. On a second hearing of the case upon a petition for review of judgment, the Court adhered to its former decision, and rejected some fresh evidence that was tendered on the part of the Appellants. The propriety of that rejection is not now questioned, but against the substance of the Decree of the Sudder Adawlut the present Appeal is preferred.

The decision of the Sudder Court rests entirely on the evidence which, in the opinion of the Judges, the inspection of the document and the consideration of its contents afforded of the falsity of the explanation of its suspicious appearance given by the Appellants. Their printed Judgment affords no ground for concluding that the corroborative proofs in support of the Appellant's case had been duly presented to the Court, and overruled by them. Their Lordships, however, think this case cannot be properly decided without weighing the whole evidence on either side, and applying the presumptions from conduct thence fairly arising to the consideration of the opposite statements or theories with respect to the alteration of the instrument that have been put forth by the respective litigants. It may be conceded, that in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document.

But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative

proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document. Moreover, the peculiarity of the present case is, that one of the issues to be determined is, what was the condition of the document when it was first produced by those who claim under it. The Appellants may fairly contend that the rule above stated is not applicable to them, until this question has been decided against them.

In dealing with the whole evidence, their Lordships will first consider that derived from the actual inspection of the document.

After close and careful examination, they are unable to concur in the conclusion of the Judges of the Sudder Adawlut that such inspection alone affords decisive proof of positive alteration by erasure. It would, in the opinion of their Lordships, be a most difficult, if not impracticable, task to efface by erasure, on paper such as that on which the Sunnud is written, words covering the space which a full line would occupy, without plainer signs of that mode of tampering, than any which this document presents. Their Lordships would expect to find on paper of this quality so dealt with, more breaking of the surface, more running of ink into blots, and a more decided attenuation of the substance of the paper, discernible from a view of its reverse side when held to the light. They are also struck by the apparently insurmountable difficulty of so completely erasing so many words that no trace of original words or letters should be discernible with the aid of a strongly magnifying glass. The nature of the particular paper and ink seems to render so perfect an erasure so improbable that success in the attempt is not readily to be conjectured. Yet the fact of alteration by erasure is essential to the Respondent's case.

Again, the addition of a plural termination to the pronoun "khud," an addition totally unnecessary on either theory of the original import of the instrument, is capable of being attributed to either side. If a falsifier of this instrument had grammatical skill enough to see the propriety of converting the singular nouns and verbs into the plural, it is reasonable to suppose that he would know, as their

Lordships believe to be the case, that the pronoun "khud" was applicable to either number. To add a plural inflection to it would be to impose upon himself in that place an additional difficulty. The existence of a single noun in the singular where the strict sense required it to be in the plural, would, in a case unattended with suspicion, naturally be ascribed to oversight or ignorance, or to the use of a singular noun in a collective sense. The word "mukurrereedar" remains in this instrument in the singular where the plural termination "an" should have been added. This, it was contended, proved that the document, as it originally existed, had contained only the name of a single person as "mukurrereedar." That argument assumes that the falsifiers had overlooked in a short instrument an important word, and whilst altering the other words had by oversight neglected to convert that word into the plural. Such an oversight certainly may have occurred; but it is at least as probable a conjecture that the word stood originally in the singular, and was either advisedly used in a collective sense, or was inserted by misadventure in the singular instead of the plural number. The words in the singular, though ungrammatical, would not have been inconsistent with the operation of the instrument for which the Appellants contend; their existence now in the plural cannot be relied on as in itself alone decisive evidence to turn the scale in a doubtful case against the Appellants, the Respondent's theory of erasure presenting, on the inspection, difficulties no less grave. The case on the argument founded on mere inspection cannot be viewed as other than a doubtful one.

The Appellants meet the arguments against them with those which the appearance of the letters as blurred over and painted, the improbability of so great an erasure leaving so faint a trace, and the presence of the trace of the letter "mim" above the line, afford in confirmation of their theory of the tampering. The appearance of the paper in that part is certainly favourable to the supposition that that letter there existed, and its existence there is not reconcilable with the theory that words of mere description occupied originally the place where the disputed words are now found. On the whole, then, the inspection appears to their Lordships to

furnish no certain or satisfactory grounds for deciding the case.

The next material inquiry is, what evidence is there as to the state of the instrument when first produced? This, so far as it goes, is in favour of the Appellants. If the document was fraudulently altered by them, it must presumably have been so altered before it was produced in Court in 1842. It is not conceivable that they would produce an instrument destructive of their own title, which in the ordinary course would be examined on its first production, on the chance of being able fraudulently to alter its tenour whilst it was in the custody of the Court. Again, if the alteration was made before its production in 1842, the document must then have presented appearances even more suspicious than those which it now presents; since the lapse of eighteen years, and frequent manipulations in Court, must have tended to soften rather than to aggravate the marks of tampering. Those appearances could hardly have escaped the attention of one conversant with the Persian language who then examined the instrument. The Sudder Ameen, however (a Mussulman by his name, and, therefore, presumably the more conversant with Persian), has in a solemn proceeding declared that he did carefully peruse the paper when it was produced; that it did not present the appearances which it afterwards presented; and that, if these had then existed, he must have observed and would have recorded their existence. He added that his attention to this part of his duty was well known. The Solicitor-General sought to avoid the effect of this statement by suggesting that the Sudder Ameen, conscious of having neglected his duty, sought to avoid responsibility by stoutly asserting its performance, and throwing blame upon an innocent subordinate, his record keeper. It is to be remarked, however, that his argument assumes the point in dispute, and it is further to be observed that the Judge followed up his declaration by an important act, the dismissal of the officer; and that there is no trace of any appeal from that act to any superior authority. The argument then assumes a violation of duty, of which there is no proof; and their Lordships cannot treat the declaration of this Native Judge, so solemnly and publicly made, as undeserving of credit.

It is next to be considered whether the Respondents have satisfactorily accounted for the non-production of evidence which would naturally be in their power, and would conclusively show what were the terms of the original grant. The evidence for the Respondents shows that there was, as in the ordinary course of business there would be, a Kuboolyut, or counterpart of the Mokurrury lease executed by the grantee to the grantor. His witnesses state that in 1839, when Moodnarain Singh took the Teeka lease from his father, inquiry was made about this Kuboolyut; and that Nujeeblall, the grandson of Prithee Singh, who then acted as Dewan, stated that it was lost. The imputation on Nujeeblall seems to be that he or his grandfather abstracted this and other papers. The explanation, however, cannot be accepted as satisfactory. It is said that at the time it did not satisfy either the Maharajah or his son; and it is not easy to see why the latter, who seems even then to have been sufficiently alive to his own interests, did not take other steps either to enforce the production of the paper, or to ascertain by other means what was the purport of the original grant. The statement of Nujeeblall was calculated to excite rather than to allay suspicion.

It is, moreover, difficult to conceive that, independently of the Kuboolyut and of the copy in the missing register-book, there has not been in the family of Rajah Mitterjeet Singh's clear knowledge of the terms of the original and admitted grant of the tenure in question, at least during a considerable part of the long period of enjoyment under it. It is no doubt suggested that the Maharajah was, in the latter part of his life at least, incapable of attention to business, and much under the influence of his Dewan. But there is no proof, and hardly a suggestion, of such incapacity in 1795, or for many years afterwards.

It is consistent with the habits of men of his rank to attend to and have a knowledge of their affairs, and to hold a sort of domestic forum for the transaction of business in their cutcherries. The grant of a Mokurrury Istemraree lease to the son or sons of the Dewan, and probably in recognition of his services, was an act likely to take place with some pomp and publicity. The terms of the grant would be notorious to many; they are not likely to have

soon slipped from the memory either of the Rajah or of those of his dependants to whom they were known. Yet when we come to test the truth of the conflicting statements as to those terms by the presumptions arising from the conduct and acts of both families, what do we find? Their Lordships would not lay much stress on the mere fact that some of the family of Roy Prithee Singh continued in the enjoyment of the tenure after the death of Hoonooman Dutt. This, though *primâ facie* inconsistent with the Respondents' case, might be referred to the favour shown by the Maharajah to the family of the Dewan. But in 1807, when the grant was still comparatively recent, we have the partition between the sons of Roy Prithee Singh. That was a transaction perfectly consistent with the Sunnud as it now stands, but utterly inconsistent with the hypothesis that the grant was to Hoonooman alone, and for life only. It was a transaction which can hardly have escaped the knowledge of the Rajah, or of those who would soon have made it known to him. If it were known to him, he could not have treated it as other than an impudent usurpation, and an alteration of the terms of his grant to his prejudice effected by his Dewan, unless he was conscious that it was in fact consistent with the true import of the grant, and authorized by it.

Again, this partition was clearly known to Moodnarain Singh when he commenced the suits of 1841, if not when he took the Teeka lease in 1839. The very form of his proceedings recognized this partition, and admitted the subsisting rights of Mokurudars, though long after the death of Hoonooman Singh, and this at a time when he was hostile to them. This act of his is conceivable if the terms of the grant were known to be what the Appellants say they were; inconceivable, if they were known to be what the Respondent says they were; and highly improbable if they were then doubtful.

It is also obvious that when the partition took place between Moodnarain Singh and his brother, the traditions and belief of the late Rajah's family must have been in favour of the existence of a valid Mokurrury tenure in these lands; and the fact that they were held in severalty by the divided branches of Roy Prithee Singh's family must have been notorious.

Here again is a solemn act of the grantor's family which is consistent with the Appellants' case, and inconsistent with that of the Respondents. The evidence of the Respondents' witnesses as to the Kaboolyut is also inconsistent with a statement in his pleadings concerning them, which was remarked upon by Mr. Forsyth in his reply.

Their Lordships think that by the presumptions thus arising from the acts and conduct of the parties during a long series of years, this case must be decided. They do not say that it is free from difficulty, or that either side has succeeded in explaining satisfactorily the state of the Persian Sunnud. But against whatever inference to the prejudice of the Appellants may be drawn from that circumstance (and it is at least doubtful whether any such can fairly be drawn), may be set the presumption arising from the non-production of the Kaboolyut by the opposite party. The actors in the original transaction are all long since dead, and the Respondent is seeking to recover the property from those who have been for many years in the enjoyment of it. In any view of the case, he has been guilty of great laches in the assertion of his alleged rights. The difficulties (if any) which arise from the loss of evidence, and the other consequences of lapse of time, ought, in justice, to fall on him.

It is essential to his case to establish that the original grant was to Hoonooman Dutt alone, and for life only. The weight of the evidence, independently of the disputed Sunnud, seems to their Lordships to be against this allegation, and in favour of the title insisted upon by the Appellants; that preponderance of proof is also necessarily in favour of the Appellants' theory of the alteration of the document.

The copy of the lease, verified by the Cazi's seal, cannot be treated as any corroboration of the Appellants' case, as there is a total absence of evidence concerning the time, mode, and cause of its execution and presentation to the Cazi.

This being their Lordships' view, it is unnecessary to consider whether the plea that the suit was barred by lapse of time and the regulations of limitation is still open to the Appellants, or could have been successfully maintained by them.

Upon the merits of the case, their Lordships propose humbly to recommend to Her Majesty that

the Appeal be allowed, that the decision of the Sudder Adawlut be reversed, and that of the Zillah Court affirmed; and that the Respondents do pay the costs of the Appeal to the Sudder Adawlut and of this Appeal.