Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Prankishen Paul Chowdry v. *Mothooramohun Paul Chowdry; delivered* 15*th December*, 1865.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THEIR Lordships are of opinion that no ground has been shown for disturbing either of the decisions below, and, therefore, they do not think it necessary to call upon the Respondent's Counsel.

The case turns almost entirely upon the construction to be given to the deed of Ongshobodhareet, at page 10 of the Record. That deed not only defines the rights and obligations of the parties, but it contains a narrative of the facts of the case upon which we can rely, as it is a statement in which both parties joined, at a time when there was apparently no difference between them.

It appears, then, from that deed, that this was a joint Hindoo family, consisting of the Appellant and the Respondent, and a younger brother of the half blood, who was a minor, and is since deceased. They were, in all respects, a joint and undivided family. In the year 1254 there were disputes between the adult brothers, and they separated, but there was no regular partition of the estate. The effect of the separation was that the lands remained undivided, but each brother, being no longer a member of a joint Hindoo family, took his share of the rents.

It appears from other parts of the Record, and although it is not very distinctly stated in the deed,

it would almost follow from the nature of the case, that the younger brother had then a large claim against the elder brother, who had been the manager of the estate, in respect of the rents and profits received previous to the partition. That is stated distinctly in the Judgment of the Sudder Court, where the Judges say, " We find that the Plaintiff's pleader admits that up to 1253 his client, as elder brother, made all the collections, and held all the joint funds of the family. That although a separation took place in 1253, and the Plaintiff was bound to give a full and honest account of his management, no such accounts were ever rendered for the satisfaction of the brother Defendant."

The separation of the two brothers continued for little more than eleven months; they then agreed to come together again, and this deed was executed. The deed states that, during that period, the elder brother had entered into a treaty for the purchase of the putnee talooks, the price of which is the subject of the present contention; and further, that the youngest brother having died, and his mother having taken his share by inheritance, Prankishen Paul Chowdry had purchased that share from her, subject to an annual payment of 1,200 rupees.

On the reunion of the two brothers, which of itself remitted them to their former status as members of a joint Hindoo family, it was expressly agreed that those acquisitions which the elder brother had made whilst the separation continued, should all go into the joint fund, and the deed provides the terms upon which that should be done.

Now, the material parts of the deed with respect to these transactions are these: first, there is a recital " that I, Prankishen Paul Chowdry, by contracting loans, negotiated to take in putnee Turruff Munsebpore and Dhee Rajapore benamee, in the name of my relative Sumboodchunder Singh, inhabitant of Dowlutgunge, and advanced the byana, or earnest money." Then it states, " Afterwards a settlement was effected between us brothers, and again the entire property came into our ijmallee possession, as it had been before, and the putnee, &c., that had been recently purchased also came under the ijmallee settlement, and of the balance of the consideration or purchase money of the afore-

said Munsebpore, &c., taking no putnee, some was paid by us two from our private funds and some portion by loans raised in bonds given by us respectively, and by granting durputnee pottahs, and we obtained a pottah of the said putnee, and both brothers remained in ijmallee possession, having taken from the aforesaid Singh an ikrar or acknowledgment of the benamee; at present we two brothers having brought under ijmallee the entire hereditary and acquired property, and that which has been recently acquired as putnee, and all real and personal property, have made this condition and settlement that from hence the whole is to remain ijmallee, and that such property of the share of Ramkishen Paul as I, Prankishen Paul, had purchased and held under a perpetual pottah was likewise to become ijmallee and held by us in possession in equal shares, and that we two brothers will pay the profits of the said property to our stepmother, and that whenever we, or our heirs, share and take the aforesaid and other property, we, or our heirs in such case, shall equally share and take our said deceased half brother's property, and not more, and the shares of the same shall never be more or less."

In short, it is expressly provided that the entire property, whether ancestral, or then acquired, or thereafter to be acquired, is to be joint, and enjoyed in equal moieties. Then follow certain directions for the management of this joint estate, including provisions for giving the elder brother a larger share in such management, all of which are immaterial to the present case.

Then follows that which appears to their Lordships to be one of the most important provisions in the deed. It is to this effect, "All the money that has been borrowed on our joint bonds, and that which I, Prankisto Paul, had borrowed, during the time of our separation, on bonds given in my own name, and which said money has been paid as the consideration or purchase-money for the putnee of Turruff Munsebpore and Dehee Rajapoor, shall all be accounted as our ijmallee debt, and the said ijmallee debt shall be liquidated by us out of the profits of the ijmallee property." As their Lordships understand that stipulation, it provided that whatever Prankishen Paul had borrowed on bonds given in his name, or whatever the two had borrowed on their joint

security, in order to provide the consideration money paid for the purchase of these two putnees, should be a charge on the joint estate, and should be liquidated out of the joint property; but they can find in that no provision whatever for the repayment, out of the joint property, to the elder brother, of any funds which he might have advanced, or might have alleged that he had advanced, on the same account, out of his private money. The deed is, upon that point, entirely silent, and, as one of their Lordships observed in the course of the argument, it would be a strange thing to infer from this silence an implied promise to pay the sum sought to be recovered in this suit.

Then follow provisions to which we shall afterwards refer, providing for the event of a subsequent disagreement between the parties, and a second partition, and then comes this stipulation:—"No party shall make any claim hereafter upon the other on account of any cash having reference to the former ijmallee period, that is, for the time anterior to the year 1254 B.S. I, Prankishen Paul, have no claim upon you, Nobokishen Paul, on account of the price of the real and personal property of Ramkishen Paul's share, for which I had obtained a perpetual pottah, and which I had obtained in the way of a purchase, and whatever writings have been executed and given by me to our step-mother, we both shall be bound to comply with the conditions thereof." Now those last words show that although Prankishen Paul may have paid out of the money which he had collected formerly, or out of private resources, or in any way, for the share of his half-brother, yet he throws all that into the joint concern, and there is no claim to be made upon the younger brother in respect of that acquisition. That is express. Again, there is, no doubt, a general covenant or agreement that no claim shall be made upon him in respect of any monies for which he may have been accountable in respect of those earlier collections. And Mr. Leith relies upon that as an answer to that portion of the Respondent's case which rests upon the assumption that the monies which are in dispute came out of these former collections, and were applied by Prankisken Paul to the purchase of the putnee talooks. But it seems to their Lordships that the whole deed must be taken together, and as one general com-

promise; and if they are right in their construction of the former clause, that there was no provision made for the payment, or the adjustment of the price of the putnees, except in so far as it consisted of borrowed money, which was to be paid out of the assets of the joint estate; then, when they find afterwards an agreement that there shall be no account in respect of the former collections, the two must be taken together, and must be construed to import that whilst, on the one hand, the elder brother makes no claim in respect of any monies which he may have applied in that way, so, on the other hand, the younger brother says, I will make no claim for any monies *ultra* that, and I will treat the whole account as settled and closed by this arrangement.

Therefore, upon this deed if it stood alone, it would be very difficult to say how the present claim could be supported.

We find, however, that the case which the parties contemplated really happened, and that after a short period of reunion they again separated, and the deed of partition, which, though not printed in the record, has been produced to-day and is now before us, was executed. We find in that deed no provision at all for such a claim as this, while we do find a provision for the payment of those debts which, upon the construction which we have put upon the clause at line 20 of page 11, really would fall upon the joint estate. That provision imports, "that the money borrowed under simple and mortgage bonds is to be liquidated by both in equal portions." Therefore the subsequent deed of partition seems to be entirely consistent with what was contemplated by the former deed, and does not in any way reopen any of the accounts settled by that deed.

It would, then, as it seems to us, be extremely difficult to support the case made by the Appellant, even supposing that the funds in question were really his private funds. If, indeed, the sums mentioned in the jumma khurruch, which seems to have been used originally to meet the fraudulent claim of the trustee, to hold the putnee talooks as his own, if those sums, though described as coming from the private funds of the Appellant, had been alleged and proved by him in this suit to have been money actually borrowed on bond or otherwise, and had

been so brought within the stipulation of the deed, the case would have been very different. But no such issue was raised by the Appellant.

The issue of fact upon which the parties went to trial was raised by the other side, and, as ultimately settled, was this, "whether it was true that the Plaintiff had, out of his own funds, paid the sum of 20,120 rupees, or that the said amount had formed a part of the ijmallee funds of the two parties." The Appellant gave no evidence on this issue; the Respondent examined four witnesses upon it, and it was found in his favour. Their Lordships have no doubt of the propriety of that finding. It is not even alleged upon these proceedings, that the parties originally had any separate property; the presumption of Hindoo law in such cases is, that property not shown to be separate is joint; and it is an admitted fact that the Appellant was long in the management of the joint estate, had received the collections from it, and was accountable for them to his younger brother. And if the monies employed in the purchase of the talooks formed part of those so drawn from the joint estate, it follows that the Respondent on the reunion was entitled, upon the general principles of Hindoo law, and independently of the express provisions of the deed, to share in them, as acquisitions made by the use of the joint funds.

Their Lordships are therefore of opinion that the Decrees of the Courts below were right; and they have no difficulty in determining humbly to recommend to Her Majesty that this Appeal be dismissed with costs.