Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Chandika Bakhsh v. Muna Kuar (representative of Ratan Singh, deceased) and others, and of Drigbijai Singh v. Muna Kuar (representative of Ratan Singh, deceased) and others from the Court of the Judicial Commissioner of Oudh; delivered the 22nd February 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Macnaghten.*]

The question involved in these appeals may be disposed of in a few words. In the first case the Subordinate Judge of Sitapur found in favour of the Appellant (the principal Defendant in the Suit) on the ground of an alleged family custom that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor. The Judicial Commissioners reversed this decision and adjudged the estate in dispute to the Respondents who were Plaintiffs in the suit holding that the alleged custom had not been made out.

The parties to this litigation are Ahban Thakurs. It seems that the tribe known in Oudh as Ahban Thakurs came originally from Gujarat and settled in Oudh many centuries ago. In Gujarat the Mayukha is recognised as an authority of paramount importance when it differs from the Mitakshara. According to the

Mayukha sons of a brother who is dead share along with surviving brothers. The rule however as found in the Mayukha does not go beyond brothers and brothers' children. Although the migration of the Ahban Thakurs took place before the Mayukha was written it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre-existing custom.

The argument of the learned counsel on behalf of the Appellant was to this effect:—It is to be assumed (he said) that the tribe known as the Ahban Thakurs brought with them from Gujarat the law of the Mayukha: It is quite true that the Mayukha deals only with the case of a deceased brother; but it is a legitimate and under the circumstances a natural extension of the doctrine to apply it to cases of more distant relationship. It is a development of the law which might be expected to grow up among a tribe, settled in a foreign land and there living apart. In support of the Appellant's claim there was in evidence a judgment which was not much to the point, some oral testimony which was anything but satisfactory, certain Wajib-ul-arzes which on examination are found to prove nothing, and 18 instances of succession which were put forward as demonstrating the existence of the alleged custom. The Judge of First Instance considered these instances conclusive. The Judicial Commissioner who delivered the judgment of the Court examined them in detail. He found that four had not been established, that ten must be regarded as doubtful, that two were not necessarily true examples of the alleged custom, and that the remaining two might be taken as proved. But his opinion was that if all the 18 instances had been established the evidence must on the authorities still be held insufficient.

Mr. Mayne for the Respondents contended that the suggested extension of the Mayukha rule would be abhorrent to the fundamental principles of Hindu law. He was willing to concede for the purposes of this case that the Ahban Thakurs settled in Oudh were governed by the Mayukha but if that position was accepted it was he said destructive of the Appellant's case. He discussed the 18 instances and showed that all but three were true examples of the Mayukha rule and nothing more. This result was not really contested by the learned counsel for the Appellant in his reply. He could do no more than add one of the other cases as an instance of the alleged custom contending on the evidence that it was not simply an example of the Mayukha rule.

The result is that in support of the alleged custom four instances at most can be adduced—and those of a comparatively modern date, and that there is no other evidence.

It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation.

The appeal of Drigbijai Singh fails on precisely the same ground.

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed. In each case the costs will be borne by the Appellant.