Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajah Raj Kishen Singh v. *Ramjoy Surma Mozoomdar and Others, from the High Court of Judicature at Fort William in Bengal; delivered 26th November*, 1872.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS suit was originally brought by Rajah Prankishen Singh against Hurrosoondree Dabee, widow of one of his brothers, Gopeenath Singh, and some purchasers from her, to recover possession, "by right of family custom," of one-third of 14 annas of Pergunnah Soosung.

Rajah Prankishen died during the progress of the suit, and the present Appellant is his eldest son. Hurrosoondree is also dead; the Respondents, Buroda Debia and Pranoda Debia, are daughters of Gopeenath and Hurrosoondree; the Respondent Gour Kishore Lahoree is their grandson, being a son of Buroda Debia.

The plaint states that, "according to family custom prevalent in the raj or estate, the right of the Plaintiff, as proprietor, accrued to the estate since the death of his father, Rajah Bishonath Singh."

The claim is rested entirely on the ground of family custom, under which it is alleged that the estate was descendible on the eldest son, to the exclusion of the other sons.

It appears that the entire 16 annas of the Pergunnah were at one time enjoyed by the ancestors of the family, but 2 annas were afterwards alienated, and it appears to be assumed on both sides that these 2 annas were a long time ago given as dower on the marriage of a daughter of one of the possessors.

Rajah Raj Singh, the grandfather of the Plaintiff Prankishen, died in 1822, leaving three sons, Bishonath (the father of the Plaintiff Prankishen), Gopeenath, and Juggernath; and it is undisputed that on his death the three sons presented a joint petition to the Collector, describing themselves as the heirs of their father, and proprietors of the Pergunnah, and praying to be registered; and that they were so registered for the 14 annas.

Gopeenath held the one-third of the estate until his death; his widow Hurrosoondree succeeded to the possession, and when the present suit was commenced against her in 1861, Gopeenath, and she as his widow, had been in possession for nearly forty years, viz., from 1822 to 1861.

The Appellant contends not only that the estate is descendible on a single heir male, but also that it is impartible and inalienable.

The High Court came to the conclusion that the Plaintiff had failed to establish by evidence the exceptional family custom on which he relied, and reversed the contrary decision of the Principal Sudder Ameen.

The two main questions argued at the bar were—1st. Whether the family custom had been proved? and, 2nd, if so, what was the effect upon it of the acts and conduct of the family on Rajah Singh's death in 1822, and subsequently?

There is, undoubtedly, evidence which leads reasonably to the belief that, formerly, the estate was held, from time to time, by individual male members of the family; but the evidence leaves in obscurity the character and nature of the estate, and the tenure by which it was held under Mahometan rule. Some firmans and other documents, filed in a former suit, and which were sought to be made evidence in the present to show the early title, are referred to by the Principal Sudder Ameen and the High Court in the following manner.

The Principal Sudder Ameen says:—

"It appears by a decision of the Sudder Court of the 12th May, 1856, filed by the answering Defendants, that the Zemindaree above-named was formerly acquired as a jageer by Rajah Ramjibon, by a firmaun of the year 1650 A.D., granted by the Emperor Shah Jehan, and at his death that jageer was conferred upon his son Rajah Ram Singh by a firmaun of the year 1680, granted by the Emperor Shah Alum Ghir; and after his death it was conferred as a jageer upon Rajah Kisshore Singh, son of Rajah Run Singh, by a firmaun of the year 1749, granted by the Emperor Ahmed Shah."

The High Court, referring to these documents, say:—

"It may be admitted, as held by the Judges who disposed of the case on the 12th May, 1856, that there is something peculiar in this property. It is not improbable that it was, as alleged by the Plaintiff, a jageer for military services, and as such held by one of the members of the family, usually the eldest son or brother, and that women were excluded from the succession, as being incapable of performing the duties required from the jageerdar. This succession, however, was not regulated by any family custom, but by the will of the sovereign power, and on referring to the Judgment of 1856, we find mention made of three firmauns from the Mahomedan Government, only one of which is forthcoming in the present case, which prove that the property was held as a military fief, and that the holder succeeded not by right of primogeniture, but by the will of the sovereign."

And again:—

"The copies of the firmaun, bearing date 29th Shaban (1st Juloss), of Ahmed Shah, and of the hibanamah from Ram Singh to Run Singh, cannot be looked at, no reason having been assigned for the absence of the originals, which are said to have been filed on a former occasion. The grant of Kissore Singh to Raj Singh, dated 25 Maugh, 1169, is clearly an untrustworthy document, and has only seen the light for the first time since this case was remanded; and even if genuine it proves nothing, so we are thrown back upon one single document, bearing date the 22nd year of the reign of Mohomed Shah, which is denounced by the opposite party to

be a forgery. This document purports to be a firmaun from the Emperor Mohomed Shah to Run Singh, confirming the jageer of Soosung to him, and requiring him to keep up a certain body of troops, consisting of cavalry and infantry. Admitting, for the moment, that this document is genuine, it really proves nothing in support of Plaintiff's allegation. It does not prove the property to be raj, for no such name is used. It is termed a jageer, a tenure to be held as compensation for military service, and which might be transferred, at the will of the ruling power, to any other person on the same or different terms. The grantee, also, is not styled or in anywise recognized as a Rajah, but simply as a Zemindar, so that this document establishes nothing which the Plaintiff seeks to prove. But, looking at the document, we have little doubt that it never came out of the royal office, either at Delhie or elsewhere. It is written on common paper, and stamped with an oval seal, which could be prepared in any bazaar of India, and nothing is shown by which we might test the genuineness of the seal."

Their Lordships find great difficulty, upon these judgments pronounced by Judges who had greater opportunities than they possess of testing the genuineness of the documents, in drawing any safe conclusion from them; and the learned counsel for the Appellant felt the same difficulty, and did not press them, contending they were not material to his case.

If these documents could at all be relied on, their Lordships agree with the High Court in thinking that they point to the conclusion that the estate was held under the Mahometan rulers as a military jagheer on the tenure of military service, by virtue of grants made from time to time to individual members of the family, and was not strictly an inheritable estate. If, on the other hand, reliance cannot be placed on these documents, then it is left altogether in doubt what was the original character of the estate, and the nature and conditions of its tenure.

Although much of what appears in the Record, including the elaborate pedigree, must be rejected, there is still evidence that the manner of succession,

relied on by the Appellant, however originating, did, in fact, prevail for sometime in the family.

On the death of Rajah Kishore Singh in 1784, a perwannah was issued to his younger brother, Rajah Raj Singh, by the East India Company, who then held the grant of the Dewanny. It was addressed to him as "Zemindar of 14 annas share of Pergunnah Soosung," and states the death of the late Rajah; and goes on thus: "The Zemindary of Kismut, 14 annas of Pergunnah Soosung, which were fixed on your brother, has, according to custom, been confirmed to you."

It thus appears that Rajah Kishore Singh had a living brother, and this perwannah was properly relied on as affording evidence that the deceased Rajah Kishore Singh had, notwithstanding, held the Zemindary as sole possessor. Rajah Kishore had no sons, but left a widow, and the fact that she did not succeed to the Zemindary, and that his brother Rajah Raj Singh was confirmed in it on his death, also points to the conclusion that the custom was supposed to prevail at the time of Rajah Raj Singh's accession in 1784.

Rajah Raj Singh continued to hold the Zemindary until his death in 1822. He was recognized as Zemindar by the British Government at the time of the Perpetual Settlement, and the settlement of the 14 annas share of Pergunnah Soosung then was made with him at the old Peshkush (tribute), and not on a newly calculated jumma. It should, however, be observed that it appears from the accounts of the collectorate that the other 2 anna shares, formerly severed and alienated, were settled with the Zemindars who owned them, precisely in the same manner.

In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military jagheer, requiring the render of services, if any such ever existed, were as conditions of tenure, implicitly, at an end; and that the Zemindary, so far as relates to tenure, was thenceforth held under the Government as an ordinary Zemindary free from any such conditions.

The settlement would not, however, of itself, have operated to destroy a family usage regulating

the manner of descent. It would not have had this effect in the case of a well established Raj (see Baboo Beer Pertab Sahee *v.* Maharajah Rajender Pertab Sahee, 12 Moore, I. A., 1), and even in the case where the origin could not be shown, it may be assumed that it would not, of itself, affect an existing family custom.

Regulation XI, 1793, was passed soon after this settlement. That regulation has been held not to be applicable to the succession of a well-established Raj. (See 12 Moore, 1, and 6 Moore, 161-7). But the Respondents contend that, notwithstanding the qualification placed upon it by Regulation X, 1800, it does govern a case like the present, where the claim rests only on a continuing family usage, and not on the peculiar character of the Zemindary itself or on a local or district custom (see Rajah Deedar Hossein *v.* Ranee Tuhooroon Nissa, 2 Moore, I. A., 441).

Their Lordships do not think it necessary to give any opinion on the positive effect of Regulation XI, 1793; for they think that, in the present case, there is sufficient ground for the presumption that, after the settlement and this regulation, the family were induced to regard the former state of things, and the ancient tenures, whatever they were, as at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that, in fact, they did so consider and treat it.

Their Lordships propose to refer to the most important of these acts. It has been already stated that, upon the death of Rajah Raj Singh in 1822, his eldest son Bishonath, and his two younger brothers, Gopeenath and Juggernath, presented a joint petition to the Collector. It was a public act, and the document is distinct and unequivocal in its terms. The three Petitioners, who are each described as Rajah, and sons of Rajah Raj Singh, state that the Raj of 14 anna shares of Pergunnah Soosung was recorded in Serishta in their father's name, and that he being dead, "they are the heirs and proprietors" of the property, and they pray to be so registered, and were registered accordingly as joint proprietors.

It is plain that this was not a merely nominal Petition; for there is clear evidence that the three brothers took and enjoyed in equal shares the profits

of the estate. The three brothers also agreed by a document, in which they are described as " in possession and proprietors," to pay the Government revenue of 17,240 rupees.

In 1829 Juggernath died, and thereupon his widow, Ranee Indromonee, was registered as joint owner with Rajahs Bishonath and Gopeenath.

In April 1832, Rajahs Bishonath and Gopeenath, and the Ranee Indromonee, presented a joint petition praying for time to pay the amount of a Decree obtained against them. The petition describes them as " Zemindars of the Pergunnah."

Afterwards, Rajah Gopeenath died, and his widow, Ranee Hurrosoondree, was also registered as owner for his share.

In 1839, and again in 1841, suits were brought against tenants by the Rajah and the two Ranees for rents due, and in 1842 a joint suit was instituted by the three for possession of part of the estate.

The transactions above enumerated show a series of important acts in dealing with the estate as joint family property, extending over a period of twenty years, all founded upon the footing that the ordinary rules of succession governed the descent.

It is now necessary to advert to some subsequent litigation.

It is alleged that, in 1843, Hurrosoondree and a son she had adopted, brought a suit against Rajah Bishonath and Indromonee for a partition of the Zemindary, in which the Rajah set up as a defence that the Raj was impartible, and descended on the eldest male heir. It is said that this defence was successful. But the proceedings in this suit were not satisfactorily proved, and the attempt to rely on it as an estoppel failed.

Other litigation followed, raising the same question, but with a different result.

Indromonee, the widow of Juggernath, died, leaving an alleged adopted son, whose guardian claimed the possession for him. This was opposed by Bishonath on the ground of the family custom, but, in the end, possession was awarded to the guardian. In 1847 Bishonath commenced a regular suit to obtain the one-third share of Juggernath, on the ground that the alleged adoption was invalid; and also again setting up the family custom of primogeniture. In this suit, which went

on appeal to the High Court, a full Bench decided against the existence of the custom.

Rajah Bishonath died in August, 1853. After his death, his son, Rajah Prankishen (the Plaintiff in the present suit), did not prosecute an Appeal to Her Majesty in Council, which had been commenced against the above decision of the High Court, but brought another suit against the guardian of this adopted son of his uncle Juggernath on the ground that the adoption was not *bonâ fide*, and claimed one-third of the estate as heir to his uncle. This suit is founded on the assumption that the custom had been negatived in the former one, for Prankishen now claimed, not on the footing of the custom, but as heir to his uncle, according to the ordinary rule of succession, and upon the ground that the adoption was not *bonâ fide*, he succeeded in the suit.

Various considerations were put forward by the learned Counsel for the Appellants to destroy or diminish the effect of the facts which have just been adverted to. It was suggested that Bishonath may have allowed his brothers to take, each, one-third share for maintenance, but their Lordships are of opinion that the evidence points very clearly to the conclusion that the brothers were admitted to the possession as co-heirs and co-sharers, not on sufferance merely, but as of right. The learned Solicitor-General, indeed, admitted that the acts of Bishonath amounted virtually to a grant to his brothers of one-third shares during their lives, but he denied that they amounted to more. In their Lordships' view, however, Bishonath, admitted his brothers to the succession, intending them to have full, complete, and equal ownership of the estate with himself.

It was then contended, for the Appellant, that if this were so, it was an attempt to do what the Hindoo Law would not allow.

It has already been stated that the acts of Bishonath and his brothers, on his father's death, afford strong ground for the belief that they did not regard the manner of succession, if it ever prevailed, in the light of a family custom, but as an incident or condition of tenure which had been determined by the settlement, and consequently assumed that thenceforth the succession would conform to the ordinary law. Their conduct, indeed, goes far to

disprove that a family custom, properly so called, ever existed; but assuming it to have once existed, their Lordships think it was of a nature which could, without any violation of law, be put an end to, and that it was, in fact, discontinued.

It was urged that this could not be done without the consent of the sovereign power, viz., the British Government. There is no question, in the present case, of the maintenance of a raj or principality, or of a tenure differing in its general qualities from an ordinary estate under the British Government. Their Lordships are certainly not prepared to hold that descent on single male heirs was, after the settlement, a condition of the tenure on which this estate was held, requiring the assent of the sovereign power to a change in the manner of succession, and giving to the Government the right to resume the estate upon its violation. Their Lordships consider that, at the highest, no more has been alleged and proved in this case, than a family custom regulating the descent *inter se*, and which, if existing, the settlement, of itself, did not disturb.

It was also urged that the effect of the custom was to create successive life estates in the heirs male of this family, analogous to a feudal entail, which could not be barred, and which prevented alienation, or any change in the manner of descent, which it was contended would be a virtual alienation. It will be collected from what has been already said, that their Lordships do not consider that such is, as a question of tenure, the nature of the estate, and in their view the family custom alleged in this case has not this effect.

Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage may not be discontinued; so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally

brought about by the concurrent will of the family. It would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind, after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon.

Their Lordships can have no doubt that in this case the special custom of descent, if it ever existed, was designedly discontinued after Raj Singh's death by Bishonath and his brothers—and that in fact the estate was enjoyed by the brothers and by their widows according to the ordinary law of succession, and on the footing that the custom was at an end—and not only that there was this enjoyment in fact, but that the parties were registered in the public registers, and suits were brought against third persons by the brothers and the widows, on the assumption that they were co-heirs and co-sharers of a joint family estate.

Prankishen, the Plaintiff in this suit, appears at one time to have been disposed to dispute what had been done, and to set up the special mode of descent; but in the suit brought by himself against the alleged adopted son of his uncle Juggernath, already referred to, he claimed the one-third of the estate which Juggernath held, as his heir, and succeeded in setting aside the alleged adoption, and established his own right as heir to his uncle. He thus abandoned in that suit the custom which, in the present, he asserts to be still in existence. Supposing, therefore, that Prankishen had any inchoate right to the customary succession as the eldest son of Bishonath, their Lordships consider that the suit referred to affords proof of his ultimate adoption of what his father had done; and the presumption of acquiescence is strengthened by the fact that he did not prosecute the Appeal in the suit brought by his father Bishonath, in which the custom had been negatived.

Their Lordships are glad to be able to uphold the judgment of the High Court, since by doing so, they confirm the possession and enjoyment of this estate as it has existed since the death of Raj Singh, and maintain the order of succession which has in fact prevailed since the settlement in 1790.

In the view which their Lordships have taken of the case it becomes unnecessary to consider the point

that the suit was barred by the Law of Limitation of suits.

Their Lordships being of opinion, for the reasons above given, that the Decree of the High Court ought to be upheld, will humbly advise Her Majesty to affirm it, and to dismiss this Appeal with costs.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—30/11/72.