Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Neelkisto Deb Burmono v. Beerchunder Thakoor and others, from the High Court of Judicature at Fort William in Bengal; delivered 15th March, 1869.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
JUDGE OF THE HIGH COURT OF ADMIRALTY.
LORD JUSTICE SELWYN.
LORD JUSTICE GIFFARD.

SIR LAWRENCE PEEL.

THIS is an Appeal from a decision of the High Court at Calcutta which reversed a decision of the Principal Sudder Ameen of the Zillah of Tipperah. The suit was one in the nature of an ejectment brought by the Appellant, the half brother of the late Rajah of Tipperah Essanchunder, against the Respondent, Beerchunder Thakoor, the uterine brother of Essanchunder, and against the other Respondents, to recover a very valuable Zemindary, being that part of the Royal possessions of the Rajah of Tipperah, which lies within the Indian territories of the British Crown. The Rajah of Tipperah, though in respect to these lands subject to the laws and Courts of British India, is in fact an independent Prince with a considerable territory, known as the Tipperah Hills, and as the title to the Zemindary and to the Raj is the same, the dispute respecting the former involves a question of the right of succession to the Musnud or Throne of the independent Principality. The Respondent, Beerchunder, has been acknowledged by the British Government as

de facto Sovereign of Tipperah, but this acknowledgment has been regarded in the Court below as determining nothing more than his present and actual possession of the Throne, and their Lordships will deal with the question between the parties as if the litigation were between two ordinary subjects of the Crown upon a disputed title to lands within the jurisdiction of the Indian Courts.

The Appellant, included originally as Defendants to the suit four persons besides the Respondent Beerchunder, viz., the third, fourth, fifth, and sixth named Defendants in the Appeal, being the spiritual guide, and the servants of the deceased Rajah. He charged that these four Defendants colluded with Beerchunder to obtain by fraud the Raj and the Zemindary in question. Another Defendant, the second on the Record, was made a Defendant on his own Petition. He was an illegitimate son of Kristokishore, the father of the claimant and Beerchunder; and the ladies whose names appear on the Record, being the mothers of infants whose legitimacy was disputed, were made parties by the act of the High Court on a Petition addressed to it in the progress of the litigation. In disposing of this Appeal, however, it is unnecessary, in their Lordships' view, to consider the cases made for or against any of these parties. It will be sufficient, for the purpose of their decision, to treat the suit as being in the nature of an ejectment brought by the Appellant against the Respondent Beerchunder alone.

The Rajah, Essanchunder, had one legitimate son, Brogendro Chunder, who survived him. He was not made a Defendant in this suit. He died after its commencement at some early stage of its progress, but this event affects in no way the questions either of law or fact at issue in this suit.

After Essanchunder's death, Beerchunder claimed and obtained the Throne. His claim was founded on an appointment of him as Jobraj by Essanchunder, the deceased Rajah, who, it was alleged, had the day before his death, being the 16th Shrabun, 1269, or the 31st July, 1862, duly appointed Beerchunder Jobraj, his legitimate son Brogendro Chunder Burra Thakoor, and an illegitimate son Kurta. The fact of this appointment was denied by the Plaintiff, who charged it to be false and fraudulently

concocted between Beharry Gosseen, the family priest, Brojomohun Thakoor, Goorodoss Burdhun, and Bissonauth Goopto, all officers in considerable trust and employment under the deceased Rajah, and who are respectively the third, fourth, fifth, and sixth Defendants on the record.

Before the institution of the Plaintiff's suit, the second Defendant, Chuckerdhuj filed a suit of a similar character with the present against Beerchunder and others, and the present Plaintiff intervened in it as a Defendant. That suit and the present were treated as substantially involving the same questions, and were heard together; much of the evidence in this suit was taken in the other. The suit of the second Defendant, Chuckerdhuj, was dismissed by the Sudder Ameen on the ground of his illegitimacy; he did not appeal from that decision, and his claim may therefore be treated as no longer in question.

It is not necessary to consider minutely the pleadings in the cause, or the issues settled between the parties. Their Lordships will only observe, in answer to an argument of Mr. Field upon these issues, that, in their judgment, they do not in any degree relieve the Appellant from the obligation which lay upon him as Plaintiff in a suit, in the nature of an ejectment, of recovering by the strength of his own title, and of showing not merely that the Defendants title was bad, but that failing that title he, the Plaintiff, was entitled to the possession of the lands in question.

The questions to be determined upon this Appeal are simply these:—

1. Had Essanchunder the power of appointing Beerchunder, Jobraj in preference to the Appellant?

2. Did he in fact so appoint Beerchunder?

3. Supposing there was no valid appointment of Jobraj, who was entitled to succeed to the Raj and the Zemindary in question, or is now entitled thereto?

The two latter questions were decided in favour of the Appellant by the Principal Sudder Ameen; all three questions have been determined by the High Court in favour of the Respondent.

It is admitted that the right of succession to both Raj and Zemindary is governed not by the general law but by koolachar, or family custom. This

custom had been the subject of investigation, trial, and decision in the Courts of the East India Company in the early part of this century. The cases are reported in the 1 Sud. Dew. Adawlut, and in the second and third volumes of the same work. These cases establish that, according to the custom, a reigning Rajah should name a Jobraj and Burra Thakoor, of whom the first succeeds to the Throne, and the latter to the office of Jobraj. Both parties to this Appeal admit the custom so far. It is, however, contended by the Appellant that if Essanchunder appointed a Jobraj, he was bound to appoint him partly on acccount of an alleged promise or intention on the part of the former Rajah, Kristokishore, and partly on the ground that he was the oldest living member of the class out of which, according to the family custom, a Jobraj could alone be selected. On the other hand the Respondent insists that the choice of the reigning Rajah, at least within a certain class, is absolutely free, and cannot be controlled by the wishes of a former Rajah, had any such in fact been expressed in favour of the Appellant.

On the argument of this Appeal before their Lordships, the Appellant's preferential title by seniority to the Jobrajship was sought to be established by evidence of a family custom to be collected from the instances given in the genealogy of actual successions. But where there is evidence of a power of selection the actual observance of seniority even in a considerable series of successions cannot of itself defeat a custom which establishes the right of free choice; and had the instances been uniform and without exception, that alone would not have been sufficient to support the Appellant's case. Such uniformity of practice was, however, not proved, for several instances appear of infants appointed to the office of Jobraj, whilst relatives within the custom, and older in years, were living. This evidence, therefore, failed. Still it was open to the Appellant to contend, as he did, that, in default of any appointment to either office, seniority of age constituted a title by descent to this Raj; and to this latter branch of the argument insisted on by the learned Counsel for the Appellant, their Lordships will now direct their attention.

The question now to be considered is whether, assuming no valid title to the office of Jobraj to have been conferred on the Respondent Beerchunder, the Appellant establishes a title by seniority. It is not denied that his title to succeed must be made out as legal heir to the last Rajah Essanchunder. The Plaintiff is senior in years to Beerchunder, he was the half-brother of Essanchunder, and Beerchunder is Essanchunder's brother by the whole blood. By the general Hindu law Beerchunder would be the heir to Essanchunder, in preference to his half-brother, were it a disputed succession to divided property. The learned Counsel for the Appellant have however contended that this preference of whole blood to half blood does not extend to a Raj, and to support this contention they relied on the rule which obtains in certain cases of undivided ancestral estate, when brothers of the whole and half blood are on the same footing.

The rule on which they insisted is this, that in the case of a Raj or kingdom, or other impartible estate descending by inheritance to a sole heir, the Court must view the property as though it were joint estate, part of an undivided joint ancestral estate, and apply the law applicable to such an estate, with a view to the selection of the eldest from those who would be equal in degree as coparceners. This position was advanced in the High Court without success. The Court observed that no authority had been cited in its support, and treated the doctrine as novel and unknown to them. The argument has been strongly urged by Mr. Bell, and their Lordships will give their reasons for concurring in the opinion which was expressed by the High Court, somewhat more fully than was done in that Court.

The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and estate.

In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things. The family in which a title to a kingdom exists in one member follows this general law, but it follows it in part only, for the succession to a kingdom is an exception to it from the very nature of the thing (see 1 Strange's Hindu Law, p. 198), the family may have property distinct from that

to which a sole heirship belongs, and may continue joint. Still, when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the Throne and the Royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest: for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir. In the Shivagunga case (9 Moore's Indian Appeals), it is stated in a Judgment which underwent the most careful consideration by their Lordships, that there are in the Hindu law two leading rules of inheritance,—that founded on the religious duty, and superior efficacy of oblation and sacrifice; and that of survivorship. Where the latter rule cannot apply, the former must be resorted to. Now this rule of religious obligation and priority marks the brother of the whole blood as preferably heir in succession to the estate of his brother, over the brother of the half blood only. The reason given is that he offers more sacrifices, and benefits more the manes of the dead of his family; in their eyes a real substantial ground of preference. In nature, also, he is nearer, and therefore satisfies the description nearer of kin. Since, then, the custom in this family, where no appointment of Jobraj or Burra Thakoor has been made, requires the union of two things to constitute the legal heir, viz., seniority in age and nearness of kin (which in truth is in conformity with the general law of Royal descent), and the claimant has but one of these qualifications in himself, viz., seniority; he does not entitle himself by the family custom. There is no trustworthy evidence that the custom supersedes the

general rule as to the precedence of the whole over the half blood. The custom is silent on that point. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom: on general principles, therefore, the Hindu law must be resorted to in this case, and that does not favour the Appellant's claim; for unless where survivorship furnishes an exception, the whole blood is preferred.

The decision of this question alone would justify the dismissal of this Appeal; but their Lordships think it right to review also the decision of the High Court on the facts as to the appointment.

The facts stated by the *de facto* Rajah and deposed to by his witnesses on this part of the case, are few and simple. The fact that the Rajah had appointed a day and hour for the celebration of the ceremony of opening a new hall, cannot be doubted. The disputed nomination of the Jobraj is said to have been made on that occasion, and during that ceremony the Rajah is stated to have directed the intended Jobraj, Burra Thakoor, and Kurta to bathe and come to his presence. Dresses had been prepared, it is said, by orders overnight to the bearer. The dresses were brought on silver dishes to the Rajah's presence; the Jobraj, Burra Thakoor, and Kurta were invested with their dresses, appeared, made their salaams, were verbally appointed, gave presents of gold mohurs, and, so appointed, received the customary nuzzurs

This contest is in truth a contest as to the title to reign; a matter, rather, of State policy than one proper for judicial decision. Into such disputes, passions stronger than those which affect the minds of ordinary litigants may well be supposed to enter, and fear and favour may sway in an unusual degree the minds of those who depose on either side. The power of an absolute prince over the fate of those who surround him may enable him to array a body of witnesses deposing to facts to which it may be difficult to offer any positive contradiction. The addition by false testimony of an incident or two, or of a few words, to an actual scene or ceremony, may, if credited, determine the title to a throne; and it is scarcely possible to conceive a case more requiring than this does, the nicest scrutiny and examination of the evidence. The Defendant

Beerchunder is *de facto* Sovereign, and as such has been recognized by the Indian Government, the paramount arbiters in a case of disputed succession. The High Court has founded its Judgment on the positive testimony which was given in support of the appointment. The objections stated by the Court below to the testimony of the witnesses, twenty-one in number, are not that they are of a bad character, or that their manner and demeanour induced the Court to disbelieve them; but they are of such a nature as a Court of Appeal may be well able to judge of without being under any inferiority to the Judge who tried the case. The exact agreement in the story, even to its details, by all the witnesses, the supposed difficulties as to the ready production of dresses and gold mohurs, the dependence of all the witnesses more or less on the Rajah's power and favour, the absence of all mention of the appointment in the early letters of the Gooroo to the Superintendent, the want of notification to the British authorities, and of invitations to the members of the family, absent from the ceremony, though resident in the palace, with the ignorance as to any such appointment stated by ladies of the palace of high rank, the want of the accustomed religious ceremony and non-observance of regal State in the usual throne-rooms,—these, with some minor objections, led the Judge below to discredit a story fully and consistently deposed to by witnesses of a class not ordinarily untrustworthy, nor to be lightly disbelieved. In addition to this, the *de facto* Rajah was considered to be throwing difficulties in the way of the Appellant, who desired to examine the Gooroo, and some other witnesses; and the singular character of the answer of the latter, which avoided any recognition of the titles of Jobraj, or Thakoor, or Kurta, augmented the matter of suspicion. Their Lordships are far from saying, that the objections urged with so much force by the Counsel for the Appellant are undeserving of a very serious and attentive consideration; they appear to have received such consideration in the High Court, and their Lordships, during the argument, and since, have carefully considered and weighed them. The probabilities, however, are, in their Lordships' opinion, strong, in support of the fact of a nomination of the *de facto* Rajah by his deceased brother to the office

of Jobraj. An experience of Indian cases shows that few of them, however true, are free from admixture of exaggeration and invention; and it is not necessary to the affirmance of this Judgment that their Lordships should believe entirely all the attendant circumstances detailed by the witnesses who support the nomination.

The Rajah was infirm in health; his state was evidently one calculated to inspire doubt and alarm; he had two years before declined to appoint to the offices of Jobraj and Burra Thakoor: he was supposed at that time to desire to be succeeded by his own son; but from his reluctance to name him when he was of tender age, he may reasonably be supposed to have considered the appointment of an adult Sovereign the best for his kingdom. When his own health was seriously impaired, it would become not only to him, but to those around him, a subject of anxious thought how the Raj should be preserved. The Appellant had an enemy in the Gooroo, who exercised great influence over the mind of the Rajah, and sickness and the near prospect of death would not diminish that influence. His son was still young; the Rajah might naturally suppose him unable to compete with one who laid claim by right to the succession, upon an alleged superior title. He might dread also the Appellant's influence over the Hill tribes, whether that influence were real or supposed, the offspring of a jealous fear. The Gooroo might think it best to arrange matters with one Thakoor; and the appointment of the two sons of the Rajah, one, though illegitimate, to the office of Kurta, gives an air of probability to the supposition that some arrangement may have preceded the actual celebration of the opening of the Hall, especially as some rumours of an intended appointment appear to have reached the ears of a witness who deposes on the side of the Appellant. Notwithstanding, therefore, the former reluctance of the Rajah to appoint either the Appellant or Beerchunder, Thakoor, the changed circumstances prevent the conclusion that his mind was still opposed to the appointment of one of them, his own brother of the whole blood, whom he might desire to associate with his son, for the advantage of his son, of himself, and of the kingdom. Nor is the concurrence of his spiritual adviser in this view,

under the changed circumstances of the case, an improbable supposition.

The Rajah was not then in a state in which he was likely to resist any strong pressure upon him to make some appointment to secure the succession. Many feelings might exist in a weak and suspicious mind to explain the absence of the usual ceremonies, invitations, and notification. Fear of the Appellant, and of his influence; jealousy of the English officials, and apprehensions, however groundless, of annexation to the British rule; doubts whether some delay or obstruction might be interposed, might induce his advisers to snatch at an opportunity offered by the approaching ceremonial, to add the more important to the less important ceremony. Rival parties appear to have existed in the palace. It seems little credible that a story of an act having been performed before a large audience which never took place should have been adopted by the conspirators in a fraudulent usurpation, as so much larger a scope for contradiction would thereby be given by such a mode of fabricating the story; and the falsehood of the alleged nomination would be needlessly exposed to many persons. It is still more improbable that the conspirators, without the slightest necessity, should be found so dangerously communicative of their conspiracy.

The utter worthlessness of this part of the Appellant's case lends considerable support to the Defendant's story: the Gooroo made no sign till he himself was dismissed or disgraced. And the reliance which the High Court justly placed on the early resistance by the new Rajah to this man, in whose power he would have been had they been common actors in this scheme of fraud, cannot be discarded in considering the weight of the whole body of evidence.

Though, according to the Appellant's story, the Rajah had placed his character, and, perhaps, his power and Throne, at the mercy of the Gooroo, he, before the litigation had ended, appointed another agent, and deposed the Gooroo from power. Can it be supposed that if the plot was really planned, no thought of it had occurred to the Respondent Beerchunder until many hours after the Rajah's death. A moment of time would have sufficed to give rise to the thought that the Throne

might be reached by contrivance, and yet the evidence discloses this man as at once weak, timid, and needlessly communicative, crying and exclaiming that the raj was ruined, and then entering into an inner chamber to concoct a fraud, which some of the conspirators seem immediately eager to reveal. The evidence for the Appellant on this part of the case is inconsistent. One witness stated that the Gooroo told him of the nomination in the afternoon between the hours of 3 and 4 of the 17th Shrabun; whilst the others, speaking of a much later hour of the same day, tell their story of the distress manifested by the Gooroo and Beerchunder because no nomination had been made.

One letter which is treated as a forgery by the High Court, and in defence of which no argument has been advanced before their Lordships, is ascribed to Beerchunder, who is represented by it as informing the Government that he has no hopes of the Raj but from their mercy, whilst at this very time he must reasonably be presumed, if guilty, to have formed the design to usurp the Throne. The family took sides in this dispute, part siding with the Appellant, and part with the *de facto* Rajah. The ladies in the recesses of the palace might well know nothing of their own knowledge of what actually took place at the ceremony in the hall. The story they repeat may have been so represented to them; but this kind of evidence is negative against positive testimony. It is so regarded, and rightly, in the judgment of the High Court. The mother of the legitimate son of the deceased Rajah supports the appointment, and so do the mothers of the two illegitimate sons. To the argument that they are swayed on the side of the Rajah may be opposed the argument, that in these contests of factions in a native palace, little of unbiassed testimony can be looked for. The Appellant seems not to have wanted friends and supporters there, and even Chuckerdhuj found support in similar quarters in favour of his groundless claim.

On the subject of the obstruction offered to the Appellant's procurement of evidence, the Respondent may have feigned a fear of the Appellant's measures at his capital, in order to oppose his being present at the examination of the named witnesses; but, on the other hand, it is idle to suppose that

no one but the Appellant himself could have been found to ascertain the identity of the ladies whom he wished to examine. The Respondent may have feared not the true testimony of the Gooroo, but the effect of a fabricated story on the mind of a Court. Amidst all this mass of conflicting probabilities impeaching or supporting the disputed nominations, the High Court proceeded on positive testimony, weighty enough to decide the issue, if not successfully impeached. Unless native testimony is to be thrown aside entirely, and decisions are to pass on conjecture or suspicion instead of evidence, their Lordships think the High Court did not err in coming to a conclusion that the positive testimony must prevail in this case.

They were able to judge of the sufficiency of the reasons alleged by the Sudder Ameen for discrediting so numerous a body of respectable witnesses. They, it should be remembered, had been the trusted officers of the deceased Rajah, and were continued by Beerchunder in the same posts and at the same salaries. From whom but the servants, officers, friends, and members of the family of the deceased Rajah, could his successor be expected to derive his evidence? These would be the persons most likely to be present at the ceremony of the opening of the Hall: and the objection that all were subject to the will of the Rajah can at most be but an argument, and not a conclusive one, for discrediting such testimony. The case is barren of any opposing evidence of persons of equal value who were present in the Hall, and who state that they saw nothing of the alleged ceremony of nomination. Again, the concurrence of testimony of many intelligent witnesses, without circumstantial variety, where the facts are very few and simple, and all would be naturally attentive observers of the scene, furnishes no ground for suspicion; and if the evidence showed some sign of drilling or tutoring in the mode of narration, that, however improper, would not constitute a sufficient reason for discrediting evidence of many trustworthy witnesses; since the evidence of witnesses to a true story is too often subject in native Courts to such a kind of manipulation.

The reasons assigned, therefore, by the Judges of

the High Court for differing from the Court below, and believing the evidence which the Lower Court rejected, appear to their Lordships to be satisfactory, and they think that the Appellant has not succeeded in showing that the appointment insisted on by the *de facto* Rajah did not in truth take place. For these reasons their Lordships must humbly advise Her Majesty that the Decree of the High Court of Judicature at Fort William ought to be affirmed, and this Appeal dismissed with costs.

PRINTED AT THE FOREIGN OFFICE BY T. S. HARRISON.—25/3/09.