Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhai Narindar Bahadur Singh and another v. *Achal Ram, from the Court of the Judicial Commissioner of Oudh; delivered February 3rd*, 1893.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

THE question in this case has come to a very simple point indeed after all this litigation. The estate is in Oudh, and was granted by the Crown to one Pirthi Pal after the Confiscation, and it is placed in Class 2 of Act 1 of 1869, and not in Class 3. The effect of that is that the estate is labelled as one which, according to the custom of the family descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over the line according to the classification under the Act; though if two collaterals, or persons in the line of heirship, are equal in degree, then as the property can only go to one, recourse must be had to the seniority of line to find out which that one is.

Pirthi Pal died in the year 1859. He left a widow and a daughter, but no son. There was no question as to the right of his widow to succeed; the Act of 1869 provides for that. She

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succeeded, and held during her life, and died in the year 1870, and the first question is whether on the death of the widow, the daughter succeeded. If she did not, the succession opened to collaterals of Pirthi Pal at the death of his widow; and there is no doubt therefore upon the pedigree that one Harbaghat would then be the nearest collateral to take, and the Plaintiff Bhai Narindar is his heir. Therefore it is the Plaintiff's interest to show that the succession to collaterals did open at the death of the widow in 1870; and for that purpose he attempts prove a family custom to the effect that females shall not succeed. The only proof of such a custom is the production of certain Wajibularzes. But it is not shown that the villages of which they were recorded are villages now in suit, and it is not shown that they belong to the same family as the family which is now disputing the question of succession. There is therefore no proof of the custom before their Lordships. Besides this there are concurrent findings in the Courts below in favour of the sucession of Pirthi Pal's daughter which, though they do not in terms negative the custom alleged, are absolutely inconsistent with it, and must be taken as concurrent findings against the custom. Therefore the succession opened at the death of the daughter without issue, which happened in the year 1879. By that time Harbaghat was dead, and the two nearest collaterals were the son of Harbaghat, who is the Plaintiff, and his cousin Jubraj; those two being both sixth in descent from the common ancestor of themselves and Pirthi Pal. But Jubraj comes of a branch senior to the branch of the Plaintiff; and therefore if the estate can only go to one, it will go to that one who represents the senior branch.

Sir Horace Davey has suggested rather than argued on behalf of the Appellant that in a case of distribution ordered by the 11th sub-

section of the 22nd section of the Act of 1869, the family custom is not to be taken into account. Their Lordships consider that the effect of the 11th sub-section is simply to refer the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted. That law clearly takes in the family custom, and that law will in this case carry the estate to the one single heir, and that single heir must be pronounced to be Jubraj in preference to the Plaintiff.

Their Lordships have not got Jubraj before them, and do not know whether there are other claimants; but the Plaintiff's own evidence shows that Jubraj comes in before him, and therefore the Plaintiff cannot maintain this suit.

The result is, that their Lordships will humbly advise Her Majesty that this appeal must be dismissed with costs.