Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tekait Doorga Persad Singh v. *Tekaitni Doorga Konwari and another, from the High Court of Judicature at Fort William in Bengal; delivered May 17th*, 1878.

Present:

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

THIS is a suit brought by Doorga Persad Singh, son of Gopi Nath Singh, alleging himself to be the proprietor of Talook Guddi Chakai and other property in Zillah Monghyr. The suit is against Tekaitni Doorga Konwari, widow of Futteh Narain Singh, deceased, and mother of Gurbh Narain Singh deceased, and also against Maharaja Joy Mungul Singh. It was brought first, to obtain possession from the widow by adjudication of the right of inheritance of the Plaintiff in accordance with koolachar or family usage in reference to the property in suit left by Tekait Gurbh Narain Singh, son of the late Tekait Futteh Narain Singh. Secondly, for an adjudication and order with respect to the right of reversion to the said estate, that a deed which had been executed by the widow in favour of the Defendant Joy Mungul Singh should be declared illegal and inoperative after the decease of the widow, the Defendant No. 1.

The property was formerly the property of Dhurm Narain Singh, and their Lordships think it must be taken to be joint ancestral family property although impartible. Upon the death of

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Dhurm Narain Singh, who left several sons and other lineal descendants, the property descended to his grandson, Loke Narain Singh, the father of that grandson, Juggernauth Singh, having died in the lifetime of Dhurm Narain. Upon Loke Narain Singh's death the estate descended to Futteh Narain Singh, the husband of the present Defendant No. 1. Futteh Narain Singh left three widows, who upon his death claimed to have the estate registered in their names. The present Plaintiff intervened before the Collector and objected to the registration of the property in the names of the three widows, but the Collector decided in favor of the widows, and their names were registered as the proprietors of the estate upon the death of Futteh Narain. After that registration the present Defendant gave birth to a son, Gurbh Narain Singh, who lived for a short time and died in his infancy. The Plaintiff claims that upon the death of Gurbh Narain he was entitled to succeed to the estate, and that the widow was not entitled, according to the mitakshara law and the custom of the family, to succeed as the mother and heiress of her son.

With regard to the claim to recover possession from the widow, the answer set up is that a former suit was brought by the widow after the death of her son for the purpose of recovering possession of two thirds of the property from the other two widows with whom the present Plaintiff, who was a Defendant in the former suit, was said to be in collusion, and also to have her possession confirmed as to her own one third. A decree was given in that suit in favour of the present Defendant, the widow, who was the Plaintiff in that suit. The plaint in that case is not in evidence, but it is to be collected from the judgment of the Court of First Instance in that suit that it

was brought by the present Defendant as mother and heiress of Gurbh Narain Singh, deceased. The present Plaintiff as Defendant in that suit in his written statement, which is set out in the record, page 145, set up the following defence. He said "The Plaintiff is not "entitled to succeed to the properties left "by Tekait Futteh Narain Singh. The afore- "said Tekait during his lifetime, and, after "his death, his widows and the minor son "which was born to him, lived in commen- "sality with me the Defendant. The whole of "the property in suit is ancestral, hence, "according to the mitakshara shastra, after "the death of the said Tekait and his "minor son, I the Defendant, the paternal cousin "of Tekait Futteh Narain Singh, am entitled "to the ancestral estates." He goes on in the fourth paragraph, "On the 13th Jayt "1274 Fusli, I the Defendant on account "of my being the rightful party was "by the consent of all the three widows "of Tekait Futteh Narain Singh, the amlahs, "ryots, and lessees and others installed, as the "Gadinashin of Talook Chakai according to the "usage which has prevailed of old. Since that "date I have been enjoying possession of all "the mouzahs in suit." He there says that he was installed according to the usage, and therefore it may be taken that, notwithstanding the estate was joint family property, he claimed to be installed because according to family usage it was an impartible estate to which he as the eldest branch of the family was entitled to succeed. The Court of First Instance in that suit decided that the claim of the Plaintiff be decreed with this specification, "That the Plaintiff afore- "said do recover possession of two thirds of "the estate claimed," that is, the two thirds which were held by the other widows with

whom the Defendant was alleged to be colluding, "and that her possession of one third be confirmed." There was therefore a decision in that suit between the Plaintiff, who is the present Defendant, and the present Plaintiff, who was the Defendant, that the widow was entitled to succeed as the mother and heiress of Gurbh Narain Singh her son. An appeal was preferred to the High Court, and the High Court affirmed that decision.

The question now is, whether in the face of that adjudication the Plaintiff is entitled in this suit to recover the possession of the property upon the ground that he and not the Defendant as mother of Gurb Narain was entitled to succeed upon his death. It is contended on behalf of the Plaintiff that he did not in that suit set up the family usage which has been set up in the present suit, and that consequently the adjudication in the former suit is no bar to his recovering possession. The case of *Hunter* v. *Stewart*, 31st Law Journal, Chancery, 346, was cited, in which Lord Westbury held that as the allegations and equity in the first suit were different from the allegations and equity in the second suit, the decision in the first suit was no bar to the proceeding in the second. But there it was expressly stated that the equity in the second suit was different from that which had been set up in the first suit, and that the allegations were also different. In this case, although the allegations are different the claim is the same. The claim on the part of the widow in that suit was based upon her title to succeed as the mother and heiress of her son. The present Plaintiff who was the Defendant in that suit relied upon his own title, and denied that of the mother, the present Defendant No. 1, but it was adjudged against him, that the mother was entitled to succeed as the heiress of her son.

In a case which is referred to in the judgment of the High Court, reported, 11 Moore's Indian Appeals, 73, it is said, in the judgment pronounced by Lord Westbury, "When a "Plaintiff claims an estate, and the Defendant "being in possession resists that claim he is "bound to resist it upon all the grounds that "it is possible for him according to his "knowledge then to bring forward." If the Defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time. The decision in the former suit would be utterly useless if the present suit could be maintained. The Plaintiff in his present suit, in the 8th paragraph of his plaint, says, "on "the strength of the aforesaid decree, the "Defendant No. 1," that is the widow, "put "your petitioner out of possession." If that decision was correct she was entitled to put him out of possession. But in the next paragraph he says, "the cause of action arose "from the said date when your petitioner's dis-"possession took place." In effect, he says, that although the mother took possession under the decree in the former suit, the taking of possession under that decree gave him a right to sue her to recover the possession back again from her. If such a suit could be maintained there would be no end to litigation.

A case was referred to from the Madras High Court Reports, page 320, in which Chief Justice Scotland seems to have been of opinion that if the same facts were not set up in the former suit a decision in that suit would not be a bar in the second suit. The ground, however, upon which Chief Justice Scotland thought that the former judgment could be impeached was

that the Court had refused in the first suit to allow the party who wished to impeach the judgment to go into the case which he set up in the second suit.

In the 2nd Law Reports, Indian Appeals, 283, a similar question was brought before the Judicial Committee. It is said, in the judgment delivered by Sir Montague Smith, "It "was suggested by Mr. Cave that the former "judgment ought not to be binding, because "certain witnesses having been examined before "the present Appellant intervened in the suit "he was refused the opportunity of cross-exa- "mining them. Their Lordships think that "such an objection is no answer to the defence "arising from the former judgment. If there "had been any miscarriage of that kind the "matter was one for appeal in that suit. The "objection does not appear to have been raised "in the Appeals that were successively made in "that suit to the Civil Judge and to the High "Court; but whether it was so raised or not, "their Lordships think that that cannot affect "the operation of the final judgment, which "must be taken to have been rightly given."

But it appears at page 166 of the Record in the present case that the family custom was brought before the Court in the former suit. They say: "As to the third ground, "Doorga Persad Singh attempted to give evidence "that there is a family custom or koolachar, by "which, in this family, females were excluded "from inheritance. He did not make any "averment to that effect in his written state- "ment, and, therefore, did not, perhaps would "not, pledge himself to it on oath or solemn "affirmation. He did not give the Plaintiff any "warning that she would have to meet any such "case. No issue was raised on it, and down to "the time when he examined his witnesses, and

" even in his written grounds of appeal before " us, there is no statement of the particulars of " this custom or koolachar, the existence of " which he now suggests. He does not even " aver in his written grounds of appeal that such " a custom is proved."

It was contended that the cause of action in the suit in which the present Defendant was Plaintiff was not the same cause of action as that which is set up by the Plaintiff against her in the present suit. A similar point was considered in the case reported in 2 Bengal Law Reports, Indian Appeals, to which reference has already been made. It was there said: " Both the Courts below have " held that the present suit is barred by reason of " the judgment in the former one. The ground of " the present Appeal is that they are wrong, " inasmuch as it is said that the case does not " come within section two of Act VIII. of 1859. " Now the section is this: 'The civil courts " 'shall not take cognizance of any suit brought " 'on a cause of action which shall have " 'been heard and determined by a court of " 'competent jurisdiction in a former suit " 'between the same parties or between parties " 'under whom they claim.' Their Lord- " ships are of opinion that the expression 'cause " of action' cannot be taken in its literal and " most restricted sense. But however that may " be, by the general law, when a material issue " has been tried and determined between the " same parties in a proper suit and in a com- " petent court as to the status of one of them " in relation to the other, it cannot in their " opinion be again tried in another suit between " them. It is not necessary for their Lordships " to go at length into the reasons for their " decision because those reasons appear in a " recent judgment of this Board in the case " of *Soorjomonee Dabee* v. *Suddanund Mohapatter*.

" In that judgment it is said, after reference to " the second clause of Act VIII., 'Their Lord- " 'ships are of opinion that the term "cause " 'of action" is to be construed with reference " 'rather to the substance than to the form " 'of action, and they are of opinion that in this " 'case the cause was in substance to declare " 'the will invalid on the ground of the want " 'of power of the testator to devise the " 'property he dealt with. But even if this " 'interpretation were not correct, their Lord- " 'ships are of opinion that this clause in the " 'Code of Procedure would by no means " 'prevent the operation of the general law " 'relating to *res judicata* founded on the prin- " 'ciple "nemo debet bis vexari pro eâdem " 'causâ." This law has been laid down by a " 'series of cases in this country with which " 'the profession is familiar. It probably has " 'never been better laid down than in a case " 'which was referred to in volume 3 of " 'Atkyns, *Gregory* v. *Molesworth* (1), in which " 'Lord Hardwicke held that where a question " 'was necessarily decided in effect, though " 'not in express terms, between parties to the " 'suit, they could not raise the same question " 'as between themselves in any other suit in " 'any other form; and that decision has been " 'followed by a long course of decisions, the " 'greater part of which will be found noticed " in the very able notes of Mr. Smith to the case " of the 'Duchess of Kingston.' A decision of the " High Court of Bengal has been referred to, " the case of *Sheikh Rahmatulla* v. *Sheikh* " *Sarintulla Kagchi* (2) as having a contrary " tendency. All their Lordships desire to say " of it is that, as reported, it does not appear " to be consistent with their judgment in the " former Appeal to which they have referred, " nor with their opinion in the present case.

" The decision is of so recent a date that they " desire to say no more upon it."

Their Lordships think it clear that the decision in the former suit, that the Plantiff as mother was the heiress of her son, and that she as such heiress was entitled to possession, is conclusive against the present Plaintiff, who was a party to that suit, that she was so entitled, and that she having taken possession under that decree the Plaintiff is barred by the adjudication from recovering the possession from her upon the ground that she is not the heiress, and that he was entitled to succeed to the property upon the death of her son.

As to the second portion of the claim, namely, whether the Plaintiff is entitled to have it declared that the deed which the widow executed in favour of Joymungul is void and invalid as against the reversionary heirs, the Plaintiff must prove that he is the person presumptively entitled to succeed upon the death of the Defendant No. 1. No doubt the family custom might be set up in this suit for that purpose, for although the Plaintiff is barred by the former adjudication from setting it up for the purpose of showing that he is entitled to possession during the life of the Defendant No. 1, he is not thereby barred from showing that upon her death, he, if he survives, will be entitled to succeed her. See the case of *Barrs* v. *Jackson*, 1 Young and Collier, 582.

The Plaintiff in his plaint says: " The aforesaid " estate was originally the ancestral property of " the ancestors of Tekait Dhurm Narain Singh, " the ancestor of Plaintiff. The aforesaid pro- " perty as a raj is not divisible, and according " to the ancient family usage the succession " has always run in this manner, that the eldest " heir male of the superior branch succeeds " to the entire estate to the exclusion of other

" male heirs of the inferior branch, who only " receive suitable maintenance; no widow or " any female heir after the decease of the pro- " prietor acquires a right to succeed. In the " event of the decease of the proprietor of the " mehal in dispute leaving a female heir or female " heirs who have descended from females, the eldest " heir male of the eldest branch of the second " degree, which said branch may have descended " from males, becomes the heir and successor, to " the exclusion of females and the aforesaid heirs. " In fact, this practice obtains in other zemin- " daries, known as Gadis in Pergunnah Chakai " and Khurugdiha in the neighbourhood of " Talooka Chakai, the proprietors and occupants " whereof are of the same caste as the Plaintiff " and his ancestors. Conformably to this ancient " usage, the property in suit passed to the late " Tekait Futteh Narain Singh, and after him to " the late Gurbh Naraing Singh, son of the " aforesaid Futteh Naraing Singh. Tekait " Gurbh Naraing Singh died a minor unmarried " in the month of Cheyt 1272 F.S., leaving " Plaintiff the eldest male heir in the eldest " branch of the second degree of the said family, " and, according to the family usage, your peti- " tioner is entitled to succeed to the disputed " property." Then he mentions the former suit, and says: " Should your petitioner not be held " entitled to immediate possession of the property " in suit, he, as the next heir, is entitled (consis- " tently with the practice of succession referred to " above) to the reversionary right in the property " after the decease of the Defendant No. 1. " The alienation of the said six annas, which is " alleged to have been made for the payment of " bond debts, was not made for such a purpose " by which, in the event of the Defendant No. 1 " being a female heir, such alienations would be " binding upon the reversioner, nor was it made

" under legal necessity, which entitles the pur-
" chaser to hold possession for a longer period
" than the lifetime of the vendor. Your peti-
" tioner therefore prays that he may be put in
" possession of the property in suit; but should
" the Court not deem him deserving of this
" relief, that an order be passed in reference to
" the aforesaid alienation, declaring the said
" alienation ineffectual after the demise of the
" Defendant No. 1, and that the reversioner is
" not bound by it."

In the present case there are other members of the joint family nearer in degree to the deceased Gurbh Narain than the present Plaintiff, and who, in the absence of family custom, might be entitled (under the ordinary mitakshara law) to succeed to the estate, assuming it to be joint family property; indeed, that fact was not disputed. The impartibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate. The rule upon this subject was stated in the Shivagunga case, 9 Moore's Indian Appeals, 588. It is there said: " The zemindary is admitted to be in the nature
" of a principality--impartible and capable of
" enjoyment by only one member of the family
" at a time. But whatever suggestions of a
" special custom of descent may heretofore have
" been made (andthere are traces of such in the
" proceedings), the rule of succession to it is
" now admitted to be that of the general Hindoo
" law prevalent in that part of India, with such
" qualifications only as flow from the impartible
" character of the subject. Hence if the zemindar
" at the time of his death and his nephews were
" members of an undivided Hindoo family, and

" the zemindary though impartible was part " of the common family property, one of the " nephews was entitled to succeed to it on the " death of his uncle. If, on the other hand, " the zemindar at the time of his death, was " separate in estate from his brother's family, " the zemindary ought to have passed to one " of his widows and failing his widows to a " daughter, or descendant of a daughter " preferably to nephews; following the course " of succession which the law prescribes for " separate estate. These propositions are in- " contestible; but Gowery Vallabha Taver's " widows and daughters have advanced a third, " which is one of the principal matters in " question in this Appeal. It is that even if the " late zemindar continued to be generally un- " divided in estate with his brother's family, " this zemindary was his self-acquired and " separate property."

The same rule was laid down by their Lordships in a recent case which was decided on the 12th February in the present year, the case of *Periasami* v. *The Representatives of Salugai*, at page 5 of the printed report: " It may be " desirable before their Lordships approach the " direct question to be decided briefly to re- " capitulate some of the facts relating to this " estate. Oiya Tevar, the then zemindar of " Padamattur, died in 1815. He was succeeded " by his eldest son, Muttu Vaduga. That person " had two brothers, and, therefore, whether Oiya " Tevar were previously joint with his brother " Gouri Vallabha, the Istimirar zemindar of " Shivagunga, in respect of Padamattur or not, " the later estate must be taken to have de- " scended to Muttu Vaduga, as ancestral estate. " He would therefore necessarily be joint in " that estate so far as was consistent with its " impartible character with his two younger

" brothers, the latter taking such rights and " interests in respect of maintenance and possible " rights of succession as belong to the junior " members of a joint Hindoo family in the case " of a raj or other impartible estate descendible " to a single heir. Hence there can be no doubt " that the estate though impartible was up to " the year 1829 in a sense the joint property " of the joint family of the three brothers."

Unless then the Plaintiff can establish the family custom or koolachar which he has set up, he is not entitled to sue for a declaration in respect of the deed. Two issues were raised as to the alleged custom. First, "Is there a " koolachar in the family by which females are " excluded from succession or not?" And secondly, "Does the law of primogeniture " regulate the succession to property in the " family or not?" The Judge of the first court did not decide them. He merely ordered that a decree be passed in favour of the Plaintiff in this way; that the Plaintiff should be taken to be the next heir after the death of Mussumat Doorga Konwari the Defendant and that at that time he would be competent to bring a suit for the cancelment of the deed of sale executed in favour of Maharajah Joymungul Singh. He came to that decision upon the ground that other nearer heirs had not come in to dispute the Plaintiff's right, but he did not express any opinion as to the evidence which was given in support of the custom.

Upon appeal from that decision to the High Court, that Court found that the custom had not been proved. They say at page 237, " We are of opinion that no family usage or " koolachar, either excluding females or giving " the preferential right of succession to direct " proved. Nearly the whole of the instances " descendants in the eldest male line, has been

" adduced by the witnesses as proof of koolachar " must be referred to succession to undivided " estate under mitakshara law." In a subsequent part of their judgment they say, " In " fact all the witnesses rely principally " on local custom as applying to Soorujbunsi " Rajpoots. But the evidence shows that in " Pergunnah Purra, a Ghatwali zemindari in " Beerbhoon held by Soorujbunsi Rajpoots, a " woman had succeeded. We are of opinion " that the evidence fails to prove any family " or local custom excluding the succession " of females, and also fails to prove a koolachar " or local custom whereby the succession goes " otherwise than under the ordinary mitakshara " law, as applied to impartible estates, under " which it is admitted that the Plaintiff would " not, under existing circumstances, be the " next reversioner, inasmuch as there are at " least two persons who would be preferential " heirs to him. With respect to local custom " even if the Plaintiff were entitled to raise " that question in this case, which we think " he is not."

This is not a case in which the Court was called upon to set aside the deed. It was merely asked to declare that the deed to Joymungul was not binding against the reversioner. It is entirely a matter of discretion whether to make any declaration of that kind or to leave the question open until the widow's death.

There is very conflicting evidence with regard to the deed, and as to the existence of such a necessity for the first Defendant's alienating a portion of the estate as would render the deed in favour of Joymungul valid against a reversionary heir. If it could be proved that there was a legal necessity for raising a portion of the money which formed the consideration for the deed, but not the whole

of it, the deed would not be wholly void as regards the Plaintiff, but would be valid as against him to charge the estate for the amount necessary to be raised. The evidence is not such as to enable their Lordships to determine what, if any, portion of the advances made to the Defendant No. 1. were made for purposes for which according to Hindoo law she would as an heiress have been entitled to alienate the estate. Therefore even if their Lordships should affirm the findings upon the first and second issues of fact in favour of the Plaintiff, it would be necessary to remit the case to the Lower Court to inquire whether all or any, and, if any, what part of the advances which formed the consideration for the deed were made for purposes for which the Defendant No. 1. could lawfully alienate a portion of the estate; a course which was adopted in the case reported in 8 Moore's Indian Appeals, 556.

Such an inquiry would be attended with considerable expense, and would cause great delay, and if the inquiry should result in a finding favourable to Joymungul, the decision might not be final in his favour, because the present Plaintiff might die in the lifetime of the widow, and the estate might never come to him. Further, there are others who might prove a preferable title to the Plaintiff and to the Defendant No. 1., and who would not be bound by any decision in this or in the former suit to which they are no parties. It appears, therefore, to their Lordships that they would not be exercising a sound discretion in sending the case for a further inquiry, which, after causing considerable expense and delay, would not be binding upon the whole family.

Under these circumstances, therefore, their Lordships think that they ought not to advise

Her Majesty to make a declaratory decree with respect to the deed executed in favour of Maharajah Joymungul Sing. In this view of the case any finding upon the first and second issues of fact becomes unnecessary, and their Lordships abstain from expressing any opinion as to the finding or rather the expression of the opinion of the High Court upon those issues, so that it may be left open to all parties hereafter to raise the question as to the family custom set up by the Plaintiff. Their Lordships will therefore humbly advise Her Majesty to set aside the finding of the High Court upon the first and second issues of fact as being unnecessary, and to affirm their decree dismissing the Plaintiff's suit. It will then be open to any of the parties to raise the question of family custom hereafter, if they deem it necessary, and the decree in this suit will not be *res judicata* as to the first and second issues of fact. Their Lordships think that the Appellant, having failed in his Appeal, the great object of which was to recover possession from the widow, must pay the costs of this Appeal.