*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ajrawal Singh and others* v. *Foujdar Singh and others, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered Friday, November 19th* 1880.

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Present:

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

THIS was a claim on the part of the Plaintiffs, who are Appellants, to a certain portion of the property, consisting partly of a talook and partly of houses, of one Duswunt Singh, to whom they alleged that they were heirs.

The case presents itself in this aspect: The Plaintiffs allege that they, and the persons constituting another branch of the family whom they make what is called *pro formâ* Defendants, are each entitled to half of the property of Duswunt Singh, who died in the year 1833, leaving a widow, Nagina Koer, who died in 1864, whereupon the succession to Duswunt Singh's property opened to his next heirs.

The Plaintiffs' claim to heirship rests upon the assertion that they, together with the *pro formâ* Defendants, were seventh in degree from a common ancestor when the succession opened, and that the real Defendants, the Respondents, were eighth in degree, and therefore took no part of the property which Duswunt left. The Respondents allege that the Plaintiff and the *pro formâ* Defendants, as well as they themselves, were removed an eighth degree from the common ancestor, and that, therefore, each class took one third of the property.

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But this question again narrows itself to a smaller point. It is agreed by both parties that one Munsa Singh was in the fourth degree from the common ancestor. If the Plaintiffs are right in their assertion that their grandfather, Sheo Churn Singh, was the son of Munsa Singh, they are in the seventh degree; and if the grandfather of the *pro formâ* Defendants, Lal Singh, was also a son of Munsa Singh, the *pro formâ* Defendants are also in the seventh degree. But if the Respondents are right in their contention that Munsa Singh, instead of having three sons, Sheo Churn Singh, Lal Singh, and one Nowidh Singh, (from whom they, the Respondents, are descended,) had three sons named Mahesha, Sheo Dutt, and Nowidh, and that Sheo Churn Singh and Lal Singh were the sons respectively of Mahesha and Sheo Dutt, and therefore the grandsons instead of the sons of Munsa Singh, then the Respondents are right in contending that the Plaintiffs, the *pro formâ* Defendants, and themselves are all in an equal degree. So that the question comes to this, so far as the issue is concerned between the Plaintiffs and the Respondents; viz., whether Mahesha existed, or whether the name has been, as the Plaintiffs contend, interpolated into the pedigree by the Respondents.

The course of the suit was this: The Plaintiffs sued in 1875, eleven years after they allege that their right accrued upon the succession opening on the death of Nagina Koer. Upon the case coming before the Subordinate Judge he thought that the Plaintiffs' evidence on the question which has been been stated was better than that of the Defendants: in other words, that Sheo Churn Singh was the son of Munsa Singh and not the grandson; but he held that the Plaintiffs, having, upon the death of Nagina Koer in 1864, treated the Defendants as having equal rights with themselves and having agreed to their names

being entered as having such rights in the books of the Collectorate, and having further brought suits together with them for the purpose, amongst other things, of setting aside certain mortgages made by Nagina Koer, in all of which proceedings they had treated the Defendants as having equal rights with themselves and as being in an equal degree of relationship to the common ancestor, were estopped from disputing that the Defendants and themselves had an equal title. Therefore *quoad* the talook he dismissed the suit; but he appeared to think that for some reason this ground of decision did not apply to the house property in the suit, and gave the Plaintiffs a decree for it. On appeal, the High Court—there being cross appeals—disagreed with the Judge of the Court below and pronounced wholly in favour of the Defendants, but were induced by the suggestion of fresh evidence having been discovered to grant a remand, whereupon the case went back to the Subordinate Judge. Upon the remand both parties went into a good deal of further evidence, and the Subordinate Judge came to the conclusion that there had been no such person as Mahesha Singh, chiefly on documentary evidence, being unable to give much weight, if any, to the oral evidence on either side. The conduct of the Plaintiffs having been held by the High Court as not conclusive against them by way of estoppel, he seems to have gone to the opposite extreme in treating it as entitled to no weight whatever. Treating the oral evidence as pretty equally balanced, he seems to have considered that the scale was turned in favour of the Plaintiffs by the documents in respect of which partly the remand was granted. But of these some appear to their Lordships not to be evidence at all, and as to the others they are unable to give to them the weight which the Subordinate Judge thought was due to them.

On the case coming again on appeal before the High Court, the High Court differed from the learned Subordinate Judge in his view of the evidence and dismissed the suit. Undoubtedly it appears to their Lordships that the evidence on both sides was, generally speaking, of a very unsatisfactory character, but there are one or two considerations which appear to determine the case. The first and main consideration is that the Plaintiffs undoubtedly admitted the rights of the Defendants immediately after the opening of the succession, and acted upon that admission by permitting the names of the Defendants to be registered in the Collector's office, and by carrying on suits with them in the joint names of all. In short, they appear not to have in any respect disputed the Defendants' title until about eleven years after the opening of the succession.

This course of conduct, although it does not amount to an estoppel in point of law, throws upon the Plaintiffs a heavy burden of proof, which, in their Lordships' opinion, the Plaintiffs have not sustained.

Without going at length into a discussion of the evidence, it is to be observed that in the first instance the Plaintiffs scarcely made any attempt to prove their alleged pedigree. They put in a pedigree without giving any evidence of a satisfactory character to support it, or to support what is their main proposition, that their grandfather, Sheo Churn Singh, was the son of Munsa Singh. On the second occasion the evidence does not appear to have been much more satisfactory. They did indeed call a lady, Narbansi Koer, who had married out of the family, and she gave some evidence in favour of their pedigree; but it appears that this lady had not been altogether accurate on this subject

on a former occasion, although there may be no reason to suppose that she spoke what she did not believe to be true. It is to be observed, however, that neither of the two principal Plaintiffs, Ajrawal Singh and Hari Singh, being both of a considerable age—apparently upwards of 70, if not 80, years of age—has come forward to support their own pedigree, or to say, what would have been admissible in this case, that he had heard from any members of their family that their grandfather, Sheo Churn Singh, was a son of Munsa Singh, or that Munsa Singh was their great grandfather, or that no person of the name of Mahesha had ever been heard of. No evidence of that kind was given. On the other hand, the Defendants did call an old member of the family, Ram Dyal Singh, one of the *pro formâ* Defendants, who spoke against his interest, or at the least was a disinterested witness. He was of the age of 83, and gave some evidence, which the High Court treated as important, in favour of the pedigree of the Defendants, which includes Mahesha, who is therein described to be the son of Munsa Singh, although he admitted that his personal knowledge did not extend beyond Sheo Churn Singh, and that all that he said with regard to the state of the family before his time depended upon hearsay. Their Lordships are not prepared to decide that the High Court was wrong in giving credence to this evidence.

These considerations appear to their Lordships strongly to incline the balance in favour of the judgment of the High Court; and, this being so, they will humble advise Her Majesty that the judgment of the High Court be affirmed, and that this Appeal be dismissed with costs.