Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajah Mahendra Singh v. *Jokha Singh and others, from the High Court of Judicature, North Western Provinces, Allahabad; delivered 14th February* 1873.

Present:

LORD JUSTICE JAMES.
SIR BARNES PEACOCK.
LORD JUSTICE MELLISH.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is a suit which was brought originally by the Respondents to recover the possession of and property in a village called Mouzah Sumaroon. The original Respondents, the Plaintiffs in the suit, claimed to be heirs of a person named Theodeen, and beyond all question they proved that the property in question had been enjoyed by the father of Theodeen, Bhowanee Singh; that on his death it had descended to his son Theodeen; and on Theodeen's death it had gone to his mother as his heir; and that would *primâ facie* be evidence that this was property which went from heir to heir in the ordinary way of Hindoo property.

But, then, in answer to that there is produced the actual pottah by which the property was originally conveyed to Bhowanee Singh; and it is contended that, notwithstanding this property went from him to his son, and then from the son to the mother, it really was only a property which Bhowanee Singh was entitled to hold for his life, and that appears to have been so held by the first Court before which it came, and then by the first Court of Appeal, those judgments having been reversed by the High Court.

Now the words of the grant are:—"I, Surub-

" jeet Singh, do hereby declare that I have given " Baboo Bhowany Singh, Mouzah Simaroon in " Tuffeh Surrou, Pergunnah Ratonpoor Bansee, " with all its cardinal boundaries and the Julkur " Bunkur and roads, as a mafee birt tenure, in " lieu of his share in Mouzah Deorah, and he " can take possession thereof in perfect security, " and continue to do service to me, and that " whoever of my descendants should become " raja, he should maintain this grant."

The High Court in the first place appear to have been of opinion that the words "mafee birt tenure" *primâ facie* import that it is an hereditary tenure, and their Lordships do not dissent from that opinion. As far as an explanation of the words "mafee birt" is given in the authorities, in Wilson's dictionary and so forth, it would rather appear that whatever they may have imported originally, a mafee birt tenure has, at any rate, in a great number of instances, become an hereditary tenure. Their Lordships do not dissent from the opinion that *primâ facie* that would be its meaning.

But then there are various considerations which appear on the facts to support that conclusion. There is what I have already stated, that it has actually descended without dispute from the original donee to his son, and from his son to his mother. That would *primâ facie* tend to show that it was an hereditary property. Besides that it is said to be given "in lieu of his " share in Mouzah Deorah." Well, then, what was Mouzah Deorah, and what were the rights of the parties to that? The Defendant in his written statement says:—"The village in suit, " and another village named Deora, was given in " lieu of service to the ancestor of Bhuwanee " Buksh. When the latter village came into the " possession of the Plaintiff's ancestor in lieu of " service, the village in suit was given to Bhu- " wanee Buksh Singh, the father of Theodeen " Singh, in lieu of service." Therefore it appears

that both the villages, Mouzah Deorah and the village in question, had been, according to this statement, given in lieu of service to an ancestor of Bhuwanee Buksh. If that is so it seems clear that the pottah in question was given for the purpose of dividing that property which they held jointly, and giving Bhuwanee Singh the interest in Mouzah Sumaroon in lieu of the joint interest which he previously had in both properties. That would seem to show very clearly that these two villages had originally been ancestral property, as they were given to some ancestor of Bhuwanee Singh.

Then it is said that they are in lieu of service. No doubt that is stated in this document also. Their Lordships do not think there is anything to show that that was a service of a kind which prevented this being ancestral property descending in the ordinary way.

Well, then, in addition to that some proceedings were taken before the Collector during the time that the widow was in possession of the property; and, as their Lordships read those proceedings, first, there was the petition of the widow, she claiming then to have not merely the birt rights, but claiming to be the zemindar. He disputed that; and, as their Lordships read the answer he made to that petition, he practically admitted that she was entitled to hold it as property which had descended to her, though he denied her the rights of a zemindar. Then, no doubt, these proceedings appear to have ended in a sort of award made by the Collectors, which apparently was made by consent; the result of which was, that instead of paying the Rs. 29, which had been previously paid, she was to hold it rent free and give it up at her death. It is not, in fact, contended that that award can in any way bind the Plaintiffs.

The great argument which has been adduced before their Lordships is that though this was ancestral property—descendible property,—yet it

would descend only to the direct descendants of the original donee. Their Lordships are of opinion that it being proved not to be originally for life only, but to be an hereditary property, and having apparently descended in the ordinary way of Hindoo property, first to the son, and then from the son to the mother, it lies on those who say that it is confined to direct descendants, and that no one can claim it but the direct descendants of the original donee, to prove their case and show that by some custom that was the proper construction. In the absence of that their Lordships agree with the conclusion to which the High Court came, that this was property which went in the ordinary way of Hindoo property.

But, then, it was said by Mr. Leith that the Court below ought to have said on what terms this property was to be held, if it was held at all; and their Lordships are of opinion that though it was originally given rent free, yet that as the original donee ceased to do any services, and paid a rent of Rs. 29 per annum in lieu of those services; that this sum continued to be paid by his son, and then was continued to be paid by the mother, at any rate until she made the agreement; that the proper conclusion therefore is that no service is now to be performed, and that it is to be held on the payment of an annual fixed rent of Rs. 29. Their Lordships think that the decree of the High Court should be varied by inserting this declaration; but that this variation should make no difference as to the costs; and that, subject to that alteration, the Appeal should be dismissed.

Their Lordships will therefore humbly recommend Her Majesty that the decree of the High Court should be varied by inserting a declaration that the property is to be held subject to the payment of an annual fixed rent of Rs. 29, and that, with this variation, the Appeal should be dismissed, with costs.