

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Maha-
rajah Juggernath Sahee and Baboo Gopal
Sahee v. Mussumut Ahlad Kowur and others,
from the High Court of Judicature at Fort
William in Bengal ; delivered 21st January
1873.*

Present :

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

THIS was a suit brought by the Plaintiff to recover possession of certain lands upon the ground that those lands were granted by an ancestor of his to one Pryag Roy, to be held in jageer tenure, that is, to Pryag Roy and his lineal descendants, that Pryag Roy's lineal descendant had failed, and therefore the Plaintiff was entitled to resume possession.

A good deal has been said on the subject of the burden of proof in this case. It is manifest that the Plaintiff could not, by merely alleging that a grant had been made, and that that grant had failed, entitle himself to a decree : some burden of proof must rest upon him : and the only real question is, what amount of proof could be reasonably expected from him, so as to shift the burden of proof upon the Defendants. Their Lordships are clearly of opinion that it was necessary for him to prove the grant which he alleged in his plaint, without which the plaint would have shown no cause of action, namely, a grant to Pryag Roy ; for on whomsoever the burden of proof may lie with respect to the subsequent part of the case, whether it lies on the Plaintiff to prove that the descendants of Pryag Roy had failed, or upon the

Defendant to prove that they still lived, it is necessary to ascertain to whom the grant was made in order to determine the subsequent question to be tried; namely, whose descendants have or have not failed.

It appears by the Plaintiff's own showing that this tenure was created in the proper and usual manner; namely, by a pottah and kobooleut, the pottah being the grant itself, which would be presumed to be in the possession of the Defendants,—the kobooleut being also an original document, whereby the grantee acknowledges the grant, and that he holds upon the terms of the grant; this would be in the possession of the ancestors of the Plaintiff, and would be expected to be found among his muniments of title. The Plaintiff alleges that such a kobooleut did exist, but he has failed to give any proof of it whatever. He has not produced the kobooleut, he has not given secondary evidence of it; he has not even laid the foundation for giving secondary evidence, if he had secondary evidence of it in his possession. He does not call anybody who has the custody of his muniments of title, or who is acquainted with them or with their place of custody, for the purpose of showing that search has been made, and that no such kobooleut has been found. Indeed, it is not inconsistent with the Plaintiff's case that such a kobooleut or some kobooleut under which this property was granted may at this moment be in his possession. He has contented himself with putting in certain criminal proceedings instituted by him in 1842 against his then Canoongoe, wherein he complained that the Canoongoe had abstracted his records. It appears, by those proceedings, that the Canoongoe was convicted and sentenced to imprisonment until he should deliver them up, but it is not shown that that sentence was ever executed, or if executed to any extent, whether it had or had not the effect of inducing the Canoongoe to give up all or any of the records. But it would

appear from this proceeding, that, at all events, according to the Plaintiff's showing, the koboolent was in existence at no very distant time, namely, in the year 1842; and it appears to their Lordships that there would be or ought to be no very great difficulty in proving that such a koboolent did then exist, and that it was one of the documents which were abstracted by the Canoongoe (if, indeed, it were so abstracted); because in these criminal proceedings no less than three witnesses were called, who gave a general description of the documents said to be abstracted, though they do not, indeed, specify this. None of these witnesses are now called, nor is any explanation given of their not being called. It is not shown whether they are dead or absent, or whether it is impossible to call them; and the Plaintiff himself, who instituted these very proceedings, and who may be supposed to be cognizant of a document of such importance, if it existed among his records, does not think fit himself to give evidence.

Under these circumstances there is an entire failure of proof of the koboolent. No evidence either primary or secondary is given of it, nor indeed, as before observed, has even the foundation been laid for giving secondary evidence.

But it has been contended on the part of the Plaintiffs that the absence of this proof may be supplied by other evidence in the case. It is said that the nature of the tenure is proved by the admissions of the Defendants, and so far their Lordships are disposed to agree with the counsel for the Plaintiffs. But then it is further alleged that it has been shown that Pryag Roy was the first person in possession of this property under the grant. And if it had appeared that Pryag Roy was in fact the first jageer in possession of this property, and that it had descended from Pryag Roy through father and son to the last owner, Deo Persaud, then it might have been that some evidence was given of the nature of the tenure

and of the person to whom it was granted, independently of the kobooleut, so as to shift the proof upon the Defendants; but their Lordships are of opinion that it is not proved that Pryag Roy was the person originally in possession, and that, therefore, the absence of the kobooleut is not supplied by evidence of the description referred to.

That being so, in their Lordships' opinion the Plaintiff has altogether failed to prove the very foundation of his case, namely, the grant to Pryag Roy; and therefore it becomes unnecessary to consider the questions which would have arisen if he had given this proof. It becomes unnecessary to determine whether or not the descendents of Pryag Roy have failed, or on whom the burden of proof lies with respect to this issue. It is unnecessary to determine whether or not the Defendants have shown that the grant was, as they allege, made to Anund Roy, nor to determine the truth or falsehood of the charge of forgery which has been preferred against them. If indeed the Plaintiff had given any evidence whatever whereby he brought himself into Court, then the conduct of the Defendants might have been material, for in such a case proof of the fraud and forgery on their part might have assisted the Plaintiff's proof; but until the Plaintiff has given evidence sufficient to bring himself into Court, all the subsequent questions become immaterial and unnecessary to be inquired into. This their Lordships understand to have been substantially the view of the High Court, who declined to go into these questions.

For these reasons their Lordships are of opinion that the Plaintiff has failed to prove his case, and that the judgment of the High Court is right; and they will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this Appeal dismissed, with costs.