Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Prince Mirza Jehan Kudr v. *Nawab Badshah Sahuba, from the Court of the District Judge of Lucknow; delivered 17th March* 1885.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This suit relates to certain lands in Oudh which formerly belonged to Mulka Kishwar, the mother of the King who was deposed in the year 1856. She died on the 12th February 1860, leaving three children—her eldest son the Ex-King, the second son who was commonly called the General Sahib, and the Respondent who was the Defendant below. The General Sahib died on the 28th February 1858, leaving one son the Appellant who was the Plaintiff below, and one daughter. The Defendant has for many years been in possession of the lands in question.

The Plaintiff commenced this suit on the 11th March 1875, claiming four fifteenths of the property, as being his share of the share which his father took as one of Mulka Kishwar's heirs. The Defendant alleged that she was rightfully in possession under a deed of gift or exchange executed in her favour by Mulka Kishwar some time in the year 1856.

At the first hearing of the suit the Court,

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without going into the merits, dismissed it on the ground that it was barred by lapse of time, and the same view was taken by the Court of Appeal. It was held that time began to run from the death of Mulka Kishwar. The Plaintiff then appealed to Her Majesty in Council, who remanded the suit to be tried on certain issues, seven in number. On this appeal a distinction was taken between one portion of the property which is situate in the city of Lucknow, and another portion known as the Mouza Sahrawan, which is in the district of Unao. It will be convenient to deal first with the property in Lucknow.

As regards this property the Judicial Committee found that, though it was confiscated in 1858, the confiscation was annulled in July 1863 without any intention on the part of the Government to make a grant in favour of any person, and therefore the case must be treated as if there had never been any confiscation at all. If then the Defendant could prove either the gift she alleged, or possession prior to the confiscation, the Plaintiff's claim would be defeated. But those questions had never been tried, and so issues were directed upon them.

The issue as to the gift was tried by Mr. Lincoln, the Civil Judge of Lucknow, who found that "the property was gifted to Defendant by "Mulka Kishwar. A deed was executed and "lost. That gift is proved, and is valid ac-"cording to law." On appeal to the District Judge Mr. Harington, he found thus: "Although "no deed of gift was executed, the late Mulka "Kishwar did in her lifetime make a verbal "gift of the kind known in India as hiba biliwaz "of all the property in trust in favour of the "Defendant, and this gift was valid in law." Those findings are impugned by the present appeal.

The first observation that occurs is that the Plaintiff seeks to overturn the concurrent judgements of two Courts on a question of fact. To meet this difficulty, it is urged that though the two Courts are agreed as to the gift, they are at variance on the vital question whether the gift was by deed or by word of mouth; that the evidence of a gift is so inseparably mixed up with the evidence of a deed, that to deny the deed is tantamount to denying the gift; that the principal witnesses were not examined in Court, and therefore the first Court had not that advantage over Courts of Appeal which make them reluctant to disturb its findings; and that the issues are not so much upon primary facts as upon inferences from complex groups of facts.

There is so much force in these observations that their Lordships have thought it necessary to hear and consider every part of the case. But the Judges below know the language used by the parties, and they live in the locality, and understand better than their Lordships can what modes of action are probable or improbable for persons in the situation of Mulka Kishwar and her children. And with regard to the variance between the Courts, it is remarkable that Mr. Harington, while rejecting the story of the deed, should yet have felt himself constrained by the probabilities of the case and by the weight of some of the evidence to decide in favour of the gift.

It would require strong and clear proof of miscarriage to induce this Committee to decide against two such findings; whereas the utmost their Lordships can say in favour of the appeal is that the case is attended with so much obscurity that, if it were untouched by previous decisions, they would have great difficulty in deciding it. On the whole however their judgement is in favour of the gift, and they are clear that, if the

evidence proves a gift, it proves a gift by deed. They will indicate the main lines of reasoning which lead to their conclusion.

In the first place, the Defendant has been in open and undoubted possession ever since July 1863. It appears that formal notice of release from confiscation was served on a person who describes himself as agent of the ex-King and for the property of the General Sahib. No claim has been made by the Ex-King or by the Plaintiff's sister. The Plaintiff himself does not allege ignorance or any other disadvantage which might explain why he never preferred any claim till the filing of his plaint. He only says that he was a minor when his father died in February 1858. He had certainly reached majority in 1865, perhaps earlier. In such a case every reasonable intendment must be made in favour of long possession, and of the conclusion that a claim so long delayed is not a just one.

From the month of February 1859 up to July 1863 the Defendant told a consistent story about the gift, and she tells the same again in this suit. It is true that in some petitions put in on her behalf prior to February 1859 by an agent, her claim to Mulka Kishwar's property is rested on gift generally without mentioning a deed. This is one of the reasons why Mr. Harington found there was no deed. But there is no inconsistency between making a claim in respect of a gift, and afterwards, when inquiry is made, stating that the gift was by deed. Seeing that Mahometan law does not require any deed, and the alleged deed was not forthcoming, it was not dishonest or discreditable, though it may have been unwise, to make the first claim on the more general ground. Their Lordships attribute little weight to this circumstance.

The occasion of the alleged gift was one which was very likely to lead to some rearrange-

ment of family property. The exact date is nowhere stated. But it appears to have been after the annexation, and very shortly before Mulka Kishwar departed for London to plead her son's cause. She was going on what to purda-nashin ladies, who had probably never been far beyond the precincts of the palace, must have seemed a terrible journey. The mother and son, who were going away, must have looked at the chance that their parting with the Defendant would be a final one, as it proved to be in fact. It does not indeed follow that because some dealing with the property was likely to take place, it should be the particular dealing alleged; and part of the story, viz., that the daughter's gift of jewels to her mother formed the consideration of the gift by the mother, seems very improbable. But there is no difficulty whatever in believing that the daughter contributed what moveables she could to put her mother in funds which she must have needed, or that the mother made over her immoveable property to the daughter, who alone of her children remained in Oudh.

The witnesses, who have all been orally examined and cross-examined, though not all in Court, have in essential matters told a consistent story. In some incidents they have contradicted one another, or themselves. They have not been drilled into uniformity of statement. But there is no substantial discrepancy with regard to the following allegations: that a few days before her departure Mulka Kishwar sealed a deed making over her immoveable property to the Defendant; that orders were given to send a copy of the deed to Colonel Outram the Resident; and that Jowahir Ali the steward received orders to obey the Defendant as he had been obeying Mulka Kishwar herself. It may be added that the Defendant, though of royal rank, was submitted

to cross-examination by Mr. Thomas the Plaintiff's Counsel, and was not shaken in the essentials of her deposition.

Moreover their Lordships think that the evidence establishes a probability that the copy ordered for Colonel Outram, or some notice of the deed, was actually sent to him. The loss of the deed and of the copy are easily accounted for by the general plunder and wreck which took place when Lucknow was in the hands of the insurgents. It may well be supposed that such places as the palace and the office of the Chief Commissioner would be severely ransacked. Under such circumstances, and after the lapse of 20 years, the Courts below were justified in taking what evidence they could find in the official reports of those who inquired into the case many years earlier.

It seems that towards the end of the year 1858, when the Defendant first applied to be restored to Mulka Kishwar's property, the matter was referred to Mr. Bickers one of the Treasury officers for inquiry. The date of his report is not given. Several witnesses appeared before him to prove the gift, which he calls a bequest. After mentioning this he says, "A "regular deed (since lost) is alleged to have been "executed, and the late Mir Munshi of the Chief "Commissioner's office Tufazul Hosain, declares "that he saw a copy of it in the office, and that "Nawab Afsar Bahu was recognized as the "proprietor of her mother's estate after her "departure." He recommends relinquishment of the property in favour of the Defendant. This report was before Mr. Lincoln and was used by him as evidence in the Defendant's favour.

On the appeal Mr. Harington examined a number of official records not previously produced, and among them a report of Mr. Capper, the Deputy Commissioner of Lucknow, before

whom the question had come. It is dated the 9th February 1863, and so far as appears it was founded on examination of papers, not on any further hearing of witnesses. He mentions that the claimants produce witnesses to the deed and to notice having been given to the Chief Commissioner. He then says that no official sanction was given to any acts of the Ex-King or his relatives at annexation, and adds, "The "evidence only amounts to this, that a letter was "sent to Colonel Outram, and that without "replying he ordered it to be dakhil duftured, "and there can be no doubt that this was not an "official registry of the transaction. Referring to Mr. Bickers' report as having been contained in Captain Perkins' docket of 15th June 1862, he says it is opposed to his previous ones and is inaccurate. But he does not say in what points it is inaccurate, and in one respect he says it is valuable. As regards the property now in suit, he recommends that the confiscation should be withdrawn, and that claimants should be left to make good their claims. As to other property then claimed for the Defendant, he holds that Mulka Kishwar had no power to dispose of it. It does not appear to their Lordships that the inference to be drawn from the specific statement in Mr. Bickers' report is at all displaced by Mr. Capper. The latter officer, while stating that there was evidence of the deed and of notice to Colonel Outram, contents himself with replying that the Government never recognized it. And that appears to have been quite sufficient for the purpose in hand, because the Government had complete dominion over the property by virtue of the confiscation.

In fact the Government did not on this occasion come to any decision on the question of the deed. As to part of the property then

claimed by the Defendant they decided that Mulka Kishwar had no transferable title, and that on her death it reverted to the State. As to other part, the property now in suit, they decided to abandon the confiscation. From the documents now in the Record, it seems that the Government substantially followed Mr. Capper's recommendations, while declining to give any opinion as to the alleged deed of gift.

Mr. Harington founds his opinion against the deed on two grounds. First, the non-mention of it in the Defendant's applications prior to February 1859, which has been before observed on. Secondly, that the Government officers had decided against its existence. It has just been shown that as regards the Lucknow property there was no such decision. But the Defendant also claimed under the gift the sum of five lacs of Government paper belonging to her mother. The decision of the Government was against her. The claim seems to have been disposed of very quickly, certainly before Mr. Bickers's report was made. Nothing whatever appears as to the grounds of decision; but it may be noticed that though Mr. Bickers mentions the decision, he could not have considered that it governed the claim to the Lucknow property, because as to that property he thinks it open to him to advise, and does advise, a decision in favour of the Defendant. Nor do either Mr. Capper or the Government treat the decision upon the five lacs as applying to the Lucknow property. All that can certainly be said is that, if the Government decided upon any ground applicable to the present case, they must have decided not only against the deed, but against the gift, in which Mr. Harington differs from them.

The gift being established, the Defendant's possession is only material if possession was

necessary to sustain such a gift as is here proved. On this it is sufficient to say that, if possession was necessary, both Judges have found the fact in favour of the Defendant, and there is no reason to question their decision.

As regards the Sahrawan property some different considerations arise. The view taken by this Committee in 1878 was that, as the effect of Lord Canning's proclamation was to put an end to all previous titles, the title of either party must depend on some subsequent grant or proceeding of the Government, which again must have been within 12 years of the suit. In the Lucknow case, where there was no settlement to be made, this Committee considered that the Government had withdrawn themselves without making any order in favour of any definite person, and therefore the former title, whatever it might be, was let in. In the Sahrawan case, where a settlement was necessary, they found an order of the Chief Commissioner in favour of "the heirs of Mulka "Kishwar." That is the distinction taken between the two properties.

But the case had been imperfectly tried, and the materials for a complete judgement were wanting. The Committee had before them the extracts from the wajib-ul-arz which tended to show that the settlement was actually made with the Defendant. But no kabulyat was forthcoming. Upon this they doubted whether the order of the Chief Commissioner was ever carried into effect. They desired to know whether there was any evidence that by the indefinite term "heirs "of Mulka Kishwar" the Chief Commissioner intended to include the Plaintiff; and to know with whom the settlement was executed, and, if with the Defendant, whether she took it adversely to the other heirs or as a trustee. In effect the Committee decided that according to the evidence before them the root of the title was in the order

of the 25th October 1863; that therefore no question of limitation could arise; and that the only question was whether the Plaintiff had been let in, or could come in, under the terms of that order. For the purpose of deciding that question, they directed issues calculated to elicit the whole of the facts.

On the second and third issues Mr. Lincoln finds that settlement was made with the Defendant solely and exclusively, and that no kabulyat was executed. Mr. Harington on the contrary finds that the settlement was made not with the Defendant but with the heirs of Mulka Kishwar, and that a kabulyat was executed in the Defendant's name as lumberdar. Such a flat contradiction on two simple matters of fact is somewhat startling, and has caused a good deal of perplexity. There are two documents in the Record which were before Mr. Lincoln, and which, if they were the final documents, would warrant his finding as to the settlement.

One is in page 14 of Record II., and is to the same effect as the extract from the wajit-ul-arz given in page 9 of Record I. It is taken from the Settlement volume, and is called "Statement "of Khawut of village Sahrawan." Under the head "Details of Shares of the Sharers," the Defendant is entered as having 20 biswas, or the entirety of the village.

The other document is a copy of rubkar given at page 15 of Record II., and was not in Record I. at all. It purports to be a "Proceeding "of the Settlement Court, presided over by "Munshi Niamat Ali Khan, Settlement Extra "Assistant Commissioner, held on 21st July 1865."

It runs thus :—

"In the matter of appointment of Lumberdar of village Sohrawan, Janki Parshad, agent of Nawab Afsar Bahu Begum, Lumberdar of Sohrawan, presented himself to-day, and a fard-ê-raz a mandi (record of assent) was drawn up. As Nawab Afsar Bahu Begum, Lumberdar, is the sole proprietor of this village,

and it is a zemindari village, and the Government revenue assessed thereon amounts to Rs. 2,973, it is ordered that Nawab Afsar Bahu Begum Sahiba, the sole proprietor, be appointed Lumberdar, and parwanah be issued for information of Sadr Munserim and tehsildar.

" A copy of this proceeding to be forwarded to the Deputy Commissioner for his information.

" Case to be consigned to records."

And it appears to have been put up with the settlement judicial volume.

Mr. Harington does not take any notice of these documents, but only says that the volume of proceedings produced before Mr. Lincoln was the wrong volume, and of course did not contain the documents wanted. He called for the Final or Kishwar Volume, and treats the rubkar of the 20th September 1865, which is found there, as being the authentic and conclusive record. As regards the kabulyat it appears clear that none was found in the Judicial Settlement Volume, but that there was one duly entered in the final volume. As regards the khewat and the rubkar of 21st July 1865 it is quite unexplained how such instruments have got into the Judicial Settlement Volume, and are unnoticed in the final volume.

Perhaps the difficulty which here seems great is not great to those who know the system of bookkeeping in the Oudh Settlement Office. However that may be, their Lordships think it right to act on the statement of Mr. Harington, which appears to be accepted as correct by the Judicial Commissioner, that the entry of 20th September 1865 in the Final Volume represents the final settlement, and that, though the Defendant was to be lumberdar, it was made in favour of the heirs of Mulka Kishwar in the exact terms of Sir C. Wingfield's order of October 1863.

It remains then to inquire who may claim under this order. On issue 4 the two Courts have again given contrary opinions. Mr. Lincoln holds that the Chief Commissioner meant the heirs of Mulka Kishwar whoever they may have

been, and that the order had no reference to the Plaintiff or any one else in particular. Mr. Harington holds that the Chief Commissioner intended to include the Plaintiff to his own portion of the share which his father would have been entitled to had he been then alive. But there is no further evidence of the intention, and the reasoning of both Courts proceeds on the order of October 1863 and the antecedent circumstances. Both Courts find that the gift of 1858 excludes the Plaintiff.

The language of Sir C. Wingfield is that the decree shall run in the name of the heirs of Mulka Kishwar, and he adds that the Defendant and her other children can claim a share in the property. If these expressions are to be literally construed, it is clear that the Plaintiff can make no claim, for he is neither heir nor child of Mulka Kishwar. Their Lordships agree in the view that the instrument is not one which ought to be construed as if it were using exact terms of art. But if the strict meaning of the terms is departed from, the question arises whether the departure must not be carried to a greater length than is just sufficient to let in the claims of the Plaintiff. That question must be determined on a view of the circumstances under which Sir C. Wingfield made his order.

The course of decision in the Settlement Courts is recited in the rubkar of 20th September, and was as follows. Four parties claimed the settlement,—the old zemindars, Kishen Sahai a person who had spent money on the village, the Defendant as representing Mulka Kishwar, and one Fatima Khanum representing Agha Ahmed. Both the latter claimed as mortgagees, and the question between them was whether the mortgage really belonged to Agha Ahmed or to Mulka Kishwar. On the 2nd January 1863 Mr. Mackonochie decided in favour of the old zemindars, dismissing the other

claims. On appeal from this decision "the late Settlement Officer" (his name does not appear) made a decree, dated 12th March 1863, in favour of Fatima Khanum. A second appeal was then carried to the Settlement Commissioner Mr. Currie, who made his decree of 3rd August 1863 in favour of the Defendant. A third appeal was carried to the Chief Commissioner, who made his decree of the 25th October 1863 which this Committee took as the root of title.

The first observation on these proceedings is that the Settlement Courts were clearly inquiring into the old titles as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted, as Mr. Lincoln suggests, whether in 1863 that effect was realized to the minds of the Government officers, as it has become since the legal decisions which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary, or wholly new, redistribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk of properties, they inquired who would be entitled if no confiscation had taken place, and effected settlements with those persons. Certainly that was the operation in which the three Lower Settlement Courts had been engaged with regard to Sahrawan when the case came before Sir C. Wingfield as the highest Court of Appeal.

The only issue then raised was between the representative of Mulka Kishwar on the one part, and persons claiming adversely to Mulka Kishwar on other parts. There was no contest between different persons claiming under Mulka Kishwar. The only representative of that lady was the Defendant, and it is somewhat significant that in the proceedings she is said to

claim as heir, though it is clear that she was claiming under the gift. Mr. Currie, differing from the Courts below, had come to the conclusion that Mulka Kishwar was the true owner, and he incautiously worded his decree in favour of the only claimant under Mulka Kishwar. Sir C. Wingfield approved the substance of his decision, and, so far as regards all the parties before the Court, affirmed it, but, having regard to parties not before the Court, he modified its language so as to avoid prejudice to others who might claim to represent Mulka Kishwar.

It is true that the ground assigned for the modification is that in another case it had been shown that there was no proof of the alleged gift to the Defendant. The other case is doubtless the Lucknow case, which was before Sir C. Wingfield in the previous July. His recollection of that case served his present purpose, that is, it warned him not to prejudice the pending question in favour of the Defendant, as Mr. Currie's decree would do; but he must have spoken from memory, and his memory was not quite accurate for all purposes. There was evidence of the gift, though whether it amounted to proof or not the Government never decided. They left that question to be decided at law.

Their Lordships think that the same course has been taken in the Sahrawan case. The intention of Sir C. Wingfield was simply to decide the case before him. On an inquiry into the old title he finds, as between Mulka Kishwar and the other parties, that she is entitled. But she is dead, and the decree cannot run in her name, so he uses a comprehensive expression, which is in common use, and which is used elsewhere in these very proceedings, to designate those who take a dead man's property. Their Lordships see no trace of any intention on his part to use exact terms of art, or to

decide in favour of one person or another as between claimants under Mulka Kishwar, or to prejudice the litigation which he contemplated between such claimants, or to do anything but exclude those whose claims were wholly adverse to Mulka Kishwar. If he had been told a month afterwards that the deed of gift had been discovered, or that a court of law had (as has now happened) decided that the gift was established, he would probably not have found it necessary to rehear the case, or to do anything more than adjudicate between the claimants under Mulka Kishwar. It would have been just the same if a will of Mulka Kishwar had been produced, or if she had made a grant of the village to some entirely different person, or if some of the heirs themselves had made an alienation. Sir C. Wingfield could not possibly tell what interests might be set up when the "heirs of Mulka Kishwar" were the only parties in the field, and were called on to claim as against one another. He left all whom it concerned to fight that out. If we suppose him to have meant more than this, we should be attributing to him an intention to do the very thing he was correcting in his subordinate, viz., to decide in the dark, and to prejudice claims which had never been tried.

It has before been pointed out that the difference between the two properties in dispute consists in the circumstance that in the one case a settlement was to be made, and in the other none. It was quite necessary to have the additional materials now afforded as regards Sahrawan; but, having got them, their Lordships find that, so far as regards the form of orders made by the Government, little difference is left between this property and the other. In the Lucknow case the order of 4th July 1863 is,—"The heirs "of Jania Ali will be informed that they have no

" claim against Government, and should settle " the dispute among themselves just as they " like." And the parwana issued the same day directs the Darogah " to inform all the heirs to " the Queen Dowager that the Government have " reserved no claim whatever . . . . , and " that they may mutually settle among them- " selves as they like." Yet in the Lucknow case the question of gift or no gift being decided in favour of the donee, the property falls to the donee.

The same result must follow in Sahrawan. The Plaintiff wholly fails, and his appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty to this effect.