

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Muhammad Imam Ali Khan v. Sardar Husain Khan, from the Court of the Judicial Commissioner of Oudh; delivered 26th July 1898.*

Present :

LORD WATSON.

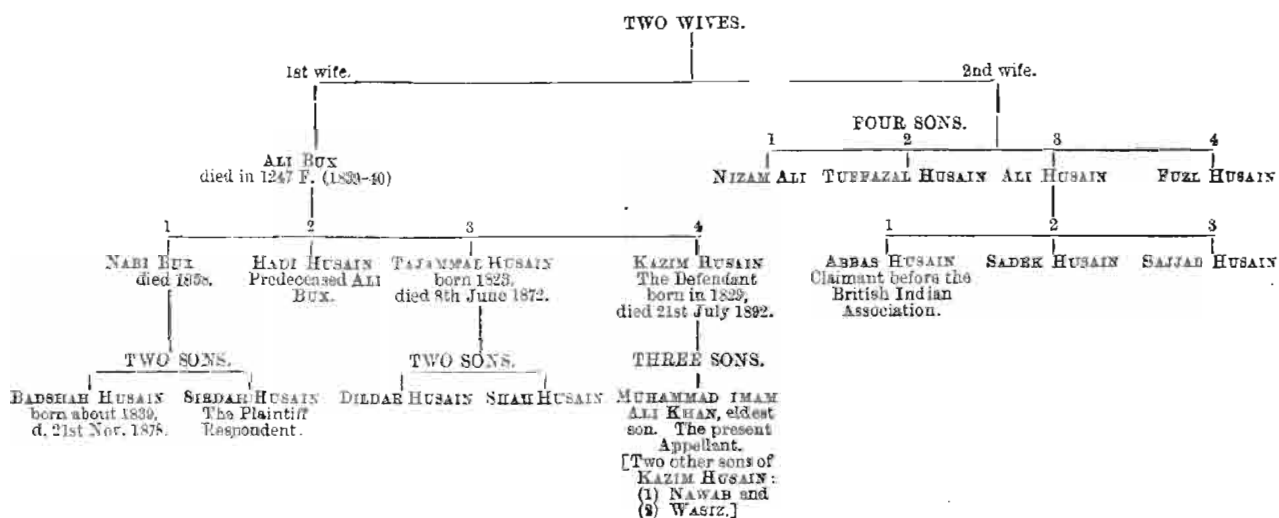
LORD HOBHOUSE.

LORD DAVEY.

[*Delivered by Lord Hobhouse.*]

The subject of this suit is the Talook with the estates of Bhatwamau, and other property said to have belonged to Badshah Husain Khan. The case can be stated more briefly and clearly by inserting a pedigree which is not disputed.

IMAM ALI KHAN.



The Plaintiff, now Respondent, who sues for possession is shown on the pedigree as the brother and heir of Badshah. The original

Defendant Kazim Husain, whose eldest son is now the Appellant, is shown as the Plaintiff's uncle. The Talookdar is entered in List II. of the Oudh Estates Act, viz. as one whose estates according to the custom of the family on and before the 13th February 1856 ordinarily devolved on a single heir. His title was either conferred or recognized by the Mahomedan Government before the annexation. After that event both summary settlements were made with him, and the sunnud was granted to him. He remained legal owner until his death in 1878, when his legal title passed to the Plaintiff. At that time Kazim was managing the estates and receiving the rents. The suit was commenced in March 1889. It is not now contended that the Defendant has had any such possession as creates a bar by time. So far the facts of the case are undisputed.

The Defendant's case is that before the death of Ali Bux this estate, like many others, was suffering from the misrule and disorder which was the proximate cause of the annexation. Rents were unpaid, tenants absconded, cultivation ceased, and the Government officers tried to extort revenue, which was not earned, by harsh measures against the persons of the proprietors. As regards this estate he says that after the death of Ali, Tajammal then a youth was seized and cast into prison, and Nabi the heir was frightened, and preferred seeking safety by deserting the estate, which the Defendant describes as being "lost to the family." He adds that he and his brother Tajammal prevailed on the authorities to recognize Nabi's son Badshah then about 10 years old and to take a kabuliat from him; but he alleges that the real benefit was given to Tajammal and himself who became joint proprietors, Badshah being in effect a benamidar for them. As for

the settlements, he contends that the first was the consequence of Badshah's position as kabuliatdar at the annexation, and that the second and the sunnud were arranged by Tajammal with the British officers, and that whatever legal interests were passed to Badshah were clothed with a trust for his two uncles. And he further contends that after the death of Badshah the Plaintiff did acts by which the Defendant's right of ownership was confirmed or fully recognized.

The questions thus raised are of a kind which is very familiar in Indian land litigation, and which happens to have come before their Lordships frequently during the last few months: questions of benami where there is undoubtedly an ostensible or paper title on one side, and on the other side an allegation of possession in accordance with a real title. As regards the time prior to annexation it is a pure benami case. Afterwards a different element comes in, because the Oudh Estates Act introduces a mode of tenure more nearly resembling the English principle of distinction between legal and equitable estates, and the Defendant has to meet the difficulty that the Plaintiff possesses a legal estate by the force of which he must recover unless a trust can be fastened on it. Still the disputes are throughout strongly analogous to benami disputes, and both sides have adduced, as is usual, a great volume of evidence, including an amount of fiction and falsehood more than is usual even in controversies of this kind.

The District Judge who tried the cause believed the substance of the Defendant's story, and dismissed the suit, but without costs. The Court of Appeal consisting of the Judicial Commissioner and Additional Judicial Commissioner reversed that judgment, and gave the Plaintiff a decree for possession and mesne profits. Their Lordships have now to decide whether the Court

of Appeal is right. They do not find it necessary to go into the numerous intricate discussions of subordinate points which have been elaborated with great care by the learned Judges below. They have been much aided by the fulness and accuracy with which all the broader features of the case have been presented by the Counsel for the Appellants. At the close of Mr. Ross's able argument they had arrived at the conclusion that the apparent title and the real title coincide, and both belong to the Plaintiff.

The history divides itself into three stages; that which comes before the annexation, that which extends from the annexation to the death of Badshah, and that which comes after the death of Badshah.

The first question is what was the position of Badshah at the time of annexation; and it is perhaps the most important of the questions, because without understanding it rightly it is difficult to get a clear idea of the subsequent events. Is the position which Badshah obtained as kabuliatdar to be attributed to the fact that the Talook descended according to the rule of primogeniture so that after Nabi Badshah would be the heir of Ali Bux, or to the fact that Tajammal and Kazim themselves becoming beneficial owners chose him as their benamidar? The first step is to ascertain whether the rule of descent was that of primogeniture. That it descended by custom to a single heir is the common case of both parties. The District Judge is of opinion that it descended by primogeniture not lineal. The only alternative to lineal primogeniture is primogeniture by proximity of degree. But there is no evidence to prove such a mode of descent, and if there were it would not help the Defendant's case. Among those who are equal in proximity the elder in line is to be preferred. During Nabi's life therefore he

was heir by proximity, and if he were to be considered as dead his son Badshah would be heir to him. It has indeed been suggested in argument, mainly with an eye to the last part of the case, that the family could elect one of themselves to be sole owner, but first such a custom is not primogeniture, and secondly there is no evidence of it except that of the Defendant himself and a statement made in mutation proceedings which will presently be examined. Independently however of the failure to show an alternative, there is good evidence in favour of lineal primogeniture.

In the Record (p. 196) is a judgment, signed by Sir Man Sing, of the Committee of Talookdars, who made many awards respecting the provisions to be made for relatives of Talookdars which by Sec. 33 of the Oudh Estates Act became when duly approved and filed legal decrees. Abbas, who was first cousin of Nabi Tajammal and Kazim, sued Badshah for partition; and thereupon arose an inquiry what was the descendible character of the estate. The judgment bears date the 2nd November 1868, and on this point it was as follows :

“ *Secondly.*—The statements made at the time  
 “ of the Summary Settlement and the conclusion  
 “ arrived at by the Settlement Officers from  
 “ inquiries made (into the matter) and the state-  
 “ ments made by the witnesses before the Com-  
 “ mittee, tend to show that the custom of  
 “ succession by right of primogeniture did  
 “ prevail in this family. After Imam Ali Khan  
 “ his eldest son Ali Bakhsh Khan, after Ali  
 “ Bakhsh Khan his eldest son Nabi Bakhsh  
 “ Khan, and after Nabi Bakhsh Khan his eldest  
 “ son Badshah Husain Khan, respectively suc-  
 “ ceeded to the estate and remained as sole  
 “ proprietors.”

The final award was that Badshah should

“ remain in possession under the rule of primo-geniture and the ancient custom,” and that Abbas and other cadets of the family should have a specified amount of land for maintenance.

Besides these decisions which seem to fall strictly within the province of the Committee, they addressed themselves to the question how it happened that the kabuliat the summary settlements and the sunnud were procured by or for Badshah. Leaving out Hindustani words they express themselves thus—

“ Looking into the circumstances of the case  
 “ and from the information obtained from those  
 “ acquainted with facts, it is found that Tajammal Husain Khan and others, brothers of Nabi Bakhsh Khan \* \* \* in spite of their having been  
 “ themselves proprietors, \* \* \* and though it was  
 “ on account of their loyal services that the estate  
 “ was conferred and the sanad granted, out of  
 “ their own free will, in order to keep their  
 “ family usage intact, got the kabuliat made and  
 “ the sanad granted in the name of Badshah Husain Khan. This is no secret and the fact  
 “ is known to ourselves as well as to all the  
 “ officers. It was for this that Badshah Husain Khan was declared to be the owner at the  
 “ Summary Settlement, and Tajammal Husain Khan reserved no part of the estate for himself, although he had power to do what he  
 “ liked, and it was quite possible to do so.”

It is not contended that any part of this award is binding on the parties in the present suit. But it cannot be doubted that a suit for partition in 1868, when Tajammal was at the head of affairs in this Talook, was one in which he took an active, probably the most active, part, though Badshah was the Defendant on the record. In a question of family custom it is impossible to disregard the conclusions of gentlemen who discharged such functions as those of

the Committee. Whether their statements as to the special incidents of the kabuliat and sunnud should be looked at is another question. But the Defendant relies on the passage just quoted as showing that Tajammal was master of the situation, and might have had the kabuliat and the sunnud made to him if he had pleased. The Committee have mixed up the two matters of kabuliat and sunnud together, though they fall under different considerations. But taking it in the Defendant's favour that the Committee really knew the facts and that we ought to receive their account, how does it bear on matters prior to annexation? They say in effect that Tajammal "and others" might have got the kabuliat in their names, but that they deliberately preferred to get it in the name of Badshah "in order to keep their family "usage intact." That opinion does not support the Defendant's claim, but is fatal to it. If Tajammal or he and others had really though secretly become proprietors, the family usage would have been destroyed.

There is no explanation what is meant by "others," nor in what sense the Committee meant to style them as proprietors. There is no proof or probability that Tajammal got any concession from the King of Oudh in his own favour; nor any evidence to support Kazim's story that it was he and Tajammal who got the kabuliat for Badshah because they thought that a young boy would not be so severely treated as Tajammal had been. Nabi was in the service of the King and so remained till the annexation. It is a much simpler explanation of the facts to suppose that the substitution of his son for himself was by his own wish.

Another piece of evidence on this part of the case is the wajib-ul-arz of the village Deokalia which is part of the Bhatwamau estate. This class of document is always admissible in evidence,

being an official village record. Its weight may be very slight or may be considerable according to circumstances. This record was made in June 1871, when Tajammal was still at the head of affairs in the Talook, and was verified by Karamat Khan who is described in it as the agent of Badshah under a power of attorney but is proved to have been the servant of Tajammal and of the Defendant. If any mis-statement was made, it could hardly have been one to the prejudice of Tajammal and Kazim. The document appears to their Lordships to be of substantial weight on the question of descent, and it has been so treated by the Court of Appeal. The history of Deokalia is part of the history of the Talook. The *wajib-ul-arz* traces the descent of the Talook to Ali Bux and then proceeds—

“ After the death of Ali Bakhsh Khan, out of his  
 “ sons the eldest son Nabi Bakhsh Khan became  
 “ the owner of the estate ; and Hadi Hasan Khan  
 “ Tajammal Husain Khan and Kazim Husain  
 “ Khan lived in commensality with Nabi Bakhsh  
 “ Khan. Nabi Bakhsh Khan, in his own lifetime  
 “ got the *kabuliat* of the estate executed in the  
 “ name of his son Badshah Husain Khan the  
 “ present Talukdar, under whom the following  
 “ new villages have been added to the estate ”:—

The Defendant, while admitting that the history of the Talook is correct, declares that the quoted passage is entirely false. But he has no ground for saying so except his own improbable and unverified story as to the mode in which the *kabuliat* was procured. The village record gives an intelligible explanation of the facts which Kazim does not. Their Lordships hold it to be proved : first that the talook was one which according to the custom of the family descended by lineal primogeniture, and secondly that Kazim's story of the loss of the estate, its re-acquisition by Tajammal and himself, and the introduction of Badshah as *kabuliatdar*, must be rejected. The



evidence leads them to think it most probable that Badshah was introduced because his father Nabi was for some reason desirous of relinquishing his position as Talookdar, and wished the next in lineal succession to be substituted for him.

The events after the annexation lend at first sight more colour to the Defendant's claim. Up to the first summary settlement of 1856 we have no more evidence than before. The Company's officers found Badshah, then a youth of about 17 years, in possession under the kabuliat, and for aught that appears they simply acted on the existing state of things. But then came the Mutiny and the confiscations which upset all the settlements of 1856. Nabi joined the insurgents and was killed in 1858. It may well be that when it came to be considered to whom the confiscated estates should be restored, difficulty was felt about reinstating the eldest son of Nabi. About this time Tajammal came upon the scene, and took part in getting back the estate. He too had joined the insurgents, but he had come over to the British side and had made himself active and useful in restoring order. It is clear that he stood high in the opinion of Colonel Barrow who was a valued and trusted officer of great weight in Oudh affairs. Tajammal was a man of strong character, and it is possible that his young nephew might not have succeeded in doing what he did. There is however no evidence, or reason to believe, that he could have got the estate for himself, as is intimated by the Talookdars' Committee. It must be remembered that the British Government made a great point of recognising old titles and of restoring as many estates as they could with due regard for security. They felt that the position of the Oudh Talookdars was a very peculiar and painful one; that the inducement to take up arms was in many cases very strong; and that when the

political necessity of putting down armed revolt had been satisfied, it was both the most prudent course and the most consistent with a fair consideration of the case, to reinstate those who would enter frankly into the new conditions. It is possible and probable that on this point Tajammal was useful in satisfying Colonel Barrow and other officers.

The documents which bear directly on the reinstatement of Badshah are three in number. The first is a rubkar of the Collector of Lucknow dated 9th January 1859.

“Badshah Husain Khan, Talukdar of Bhatwamau, Pargana Fatehpur, appeared before me in camp to-day. By reason of shelter having been given to Munshi Abdul Hakim, Extra Assistant Commissioner, sanction is hereby given that the Taluka be restored to Badshah Husain Khan as heretofore. According to the Settlement of 1264 Fasli, in case the Special Commissioner of Oudh does not sanction the *mustajari* (farming lease). Therefore it is ordered that the Tahsildar be ordered to settle the Taluka with Badshah Husain Khan, according to the terms of the Settlement of 1264 Fasli, and send the Settlement file with *kabuliat* within two days for my signature, and the Sadar Kanungo is to report, within one day, whether sanction for *mustajari* of the Ilaka has been received from Major Barrow.”

The second is a letter from Colonel Barrow dated 27th January 1859. He writes:—

“This Taluka is re-settled with its old proprietor Badshah Husain Khan. Our total assessment is rather above the old Government *jama*.”

And on the 11th October 1860 the sunnud was issued.

It is clear that in intention as well as in form the grant of the estate was made to Badshah. Tajammal probably rendered efficient

service in getting it. Of what Kazim did, if he did anything, we have no evidence. There is much to justify the opinion of the Talookdars' Committee that Tajammal was active in keeping the family custom intact; but there is nothing to show that others were concerned with him, or that he and others were ever proprietors except in the very restricted sense of having some share or interest in the estate for maintenance. We cannot suppose any ownership to have been conferred on him or Kazim unless we first suppose that the British Government lent itself to a benami grant or a secret trust; a thing which nobody has ventured to suggest.

It is certain that during his life Tajammal managed the affairs of the Talook and to a great extent disposed of its revenues. From his age his character and his services he was naturally held in high honour by his nephews. Badshah appears to have been a weak indolent and self-indulgent man, who with a concubine was kept in the residence at Bhatwaman on a sufficiently liberal scale to make him comfortable and who was satisfied with that position. The Defendant indeed asserts that nearly the whole of the revenues were divided between himself and Tajammal, and that Badshah had a small fixed allowance. But he produced no accounts to support his assertion; or rather he did worse; he did tender some accounts which when the time for proof came were withdrawn. We must infer either that he had no accounts relevant to the question, or that having some he found that they would not suit his case. It is true that Tajammal was the principal acting personage; he was frequently addressed as Talookdar, and a great many instances are shown in which he was treated as representing the estate. But all that is consistent with his being manager for Badshah though his position as being eldest uncle and his

character and services gave him exceptional predominance in the family and prominence in the eyes of the world. After his death it seems that Kazim enjoyed the same power and position, at least to a great extent.

Great reliance is placed by the Defendant on two powers of attorney executed by Badshah in the years 1871 and 1873. The earlier of these (Rec. p. 120) was given to Tajammal, and it is a singular document. It commences with a recital.

“Whereas the reins of management of the  
“estate affairs, such as domestic affairs, adminis-  
“tration of the Ilaka, and the conduct of business  
“appertaining thereto, in the Courts detailed  
“below, have always been in the hands and  
“under the control of my respected and virtuous  
“uncle, Raja Muhammad Tajammul Husain  
“Khan Bahadur, who in every way is master of  
“me and the estate in place of my father, but  
“whereas by reason of the number (engagement  
“for payment of the revenue) of the estate  
“and the sanad being in my name, the said  
“venerable has frequently to encounter diffi-  
“culties in formal compliance with orders and  
“conduct of cases relating to the estate, the  
“necessity for executing the (Mukhtarnama)  
“general power of attorney has presented  
“itself.”

Badshah then covenants that “my respected  
“uncle shall have full proprietary powers like  
“myself,” and he personally binds himself to  
maintain his uncle in the engagement of all the  
powers specified in five following paragraphs.  
As to the first paragraph there is doubt about  
the translation which the Court below has  
thought of importance (Rec. p. 57), and their  
Lordships do not comment on it. The 2nd, 3rd,  
and 5th are ordinary powers. The 4th runs as  
follows :—

“ 4. That like myself, the declarant personally,  
 “ he has absolute powers of making transfers by  
 “ mortgage or sale, &c., of the whole or any part  
 “ of my moveable or immoveable property, and  
 “ of executing documents of every description,  
 “ gift, bakshishnama, grant of cash or land,  
 “ tamliknama (deed of settlement) and will; and  
 “ to have them duly registered.”

The later power (Rec. p. 56) was given to Kazim after the death of Tajammal. It is nearly the same with the earlier one, the only substantial difference being that the fourth paragraph asserts not only that Kazim enjoys, but that he has heretofore enjoyed, the powers therein mentioned.

These deeds, as is contended and as the District Judge decided, confer the fullest proprietary powers and are a complete admission of the benami title. To their Lordships it seems that, though obviously framed in the interest of Tajammal and of the Defendant, they do not prove his case. If his story is true, Tajammal and himself were in the year 1871 actually in proprietary enjoyment. Why were such powers necessary? The reason given is that the settlement and sunnud were in Badshah's name. But that according to the Defendant was all a sham well known to the principals and not imposing on the rest of the world. In the ordinary case of benami the holding of a settlement or transfer by the benamidar would not interfere with the real owner's enjoyment. If the sunnud did so, why not throw off the temporary mask and claim the full ownership? Why be at the pains of framing a circuitous and inconsistent document such as that of 1871? It professes to be a power of attorney, and yet has its permanence secured by covenant. It states that Tajammal had the reins of Government in various specified departments, whereas the claim now is that the recital recognizes and that the fourth paragraph confers

full beneficial ownership. It states that Tajammal is "master of me and the estate in place of my father"; whereas the Defendant's story is that Nabi never was owner and had nothing to do with Badshah's ownership. It purports at the outset to give full proprietary powers to Tajammal "like myself," and does the same thing in paragraph 4, so that he has only the powers which Badshah also has. If it was really intended to be an admission of full ownership or to confer full ownership under the guise of a power of attorney, it is a very insidious document, and such as would require satisfactory explanation before it could be permitted to operate as between uncle and nephew situated as Tajammal and Badshah were. Treating it as a power of attorney it goes to show ownership not in Tajammal but in Badshah.

Another remark to be made on these powers is that they do not support but tend to destroy the Defendant's theory of joint ownership. In the deed of 1871 Tajammal is treated as absolute owner, not as joint with Kazim. In that of 1873 Kazim is treated as absolute owner. How did he become so, seeing that Tajammal left sons? Nay not only is he credited with having absolute powers, but with having "heretofore enjoyed" them. How is that reconciled with the enjoyment of absolute powers by Tajammal alone within a few months before? The phenomena are inexplicable on the theory of proprietorship in Tajammal and Kazim. But they are clear enough if we suppose the two uncles to have been managers in exceptional honour and moral authority: "with the reins of management of the estate affairs in their hands"; and that is what their Lordships conclude to be the true state of the case.

After the death of Badshah it seems that the mutual relations which subsisted between

him and the Defendant were continued for a while as between the Plaintiff and the Defendant; for how long, or when dissension began, it is not material to inquire. What is material is to see if the Plaintiff's dealings with the estate after it vested in him have precluded him from making his present claim.

Badshah died on 21st November 1878. Four days afterwards the Plaintiff and his cousin Dildar the eldest son of Tajammal presented an application for mutation of names. They stated as follows :—

“After compliments we beg to submit that  
 “Badshah Husain Khan, Talukdar of the  
 “Bhatwamau estate, breathed his last on 21st  
 “November 1878 and that according to the  
 “usage and custom of *gaddi-nashini* prevailing  
 “in our family, we, the heirs of the deceased  
 “Talukdar, have unanimously with our own  
 “consent appointed Muhammad Kazim Husain  
 “Khan, son of Ali Bakhsh Khan, our own  
 “uncle, the head of our family, our patron and  
 “protector, who is qualified in every way as a  
 “*gaddi-nashin* in place of the deceased.”

And they prayed for mutation to Kazim.

In addition to this application the Plaintiff on the 26th February 1879 filed a written statement which after reference to the application proceeded thus :—

“Even now, without coercion and reluctance,  
 “and of my own free will and accord, I do  
 “affirm the application and give my cordial  
 “assent to the same being granted for these  
 “reasons, namely, first such a conduct on my  
 “part is the natural consequence of the cordiality,  
 “confidence and mutual love and affection pre-  
 “vailing in our family, and similarly it was due  
 “to the cordiality existing between my father  
 “and my uncles, that those persons, though  
 “themselves real owners of the estate, caused

“ the Lambardari of their ancestral and self-  
 “ acquired estate to be recorded in the name of  
 “ my deceased brother Badshah Husain Khan,  
 “ and secondly on account of the same love and  
 “ amity my said uncle was so thick and thin  
 “ with my late brother, as if the two had *only*  
 “ one soul for two bodies ; and my deceased  
 “ brother ratified and admitted for ever the  
 “ absolute proprietary powers exercised, and  
 “ formal proceedings taken by the said uncle  
 “ under the power of attorney, dated 30th April  
 “ 1873, executed in favour of my said uncle,  
 “ which I may call a will, under these circum-  
 “ stances the late Badshah Husain Khan shall,  
 “ as it were be alive during the lifetime of the  
 “ said uncle. The affection and amity of feelings  
 “ prevailing between my late brother Badshah  
 “ Husain Khan and my said uncle were only  
 “ equalled by the kindness shown me by the said  
 “ uncle. I too cherish the same feelings of  
 “ obedience and love to my said uncle, as it was  
 “ my duty to cherish to the said two souls during  
 “ the lifetime of my late brother. Therefore in  
 “ my said uncle, I recognize a living repre-  
 “ sentation of my late brother in flesh and blood.  
 “ I make this request with all pleasure and pray  
 “ that the Government may accede to it, and the  
 “ name of my said uncle may be recorded in the  
 “ Lambardari register. Because of his kindness  
 “ I am quite certain of my becoming a proprietor  
 “ on his demise. Being thus confident why  
 “ should I make any other application (than  
 “ the one I make) against the time-honoured  
 “ customs ?”

Upon these representations mutation was effected in favour of Kazim.

These proceedings seem to have caused great difficulty in the Courts below. Apparently in both Courts it was considered that unless the Plaintiff could displace his statements by showing



his ignorance of their being made or that he was pressed into making them by the Defendant, his case would be defeated, or at least seriously damaged. Indeed the District Judge thought that the Plaintiff must procure formal cancellation of the mutation before he could maintain the suit. Accordingly those questions have been elaborately tried and argued. In order to show first his ignorance and secondly pressure by the Defendant, the Plaintiff has told stories which both Courts have found to be entirely false. The Court of Appeal thought that undue influence might be properly inferred from the relative positions of the uncle and nephew, from the highly suspicious character of the application and statement, and from the false reasons assigned for mutation, especially the false statement of the family custom.

Their Lordships do not enter into this discussion. They do not see how the proceedings bar the right of the Plaintiff to assert his legal title. Supposing that in 1878 he believed them to be true and made them spontaneously, why should he not assert the true state of the case after he has learned it? An Oudh Talook cannot be transferred like an ordinary estate under Mahomedan or Hindoo law, because the Oudh Estates Act requires special modes of transfer. It is not now contended that the mutation operated as a transfer. It would be absurd to suppose that the Plaintiff made any misrepresentation to the Defendant; neither was the situation of the Defendant altered in any way to his prejudice. No consideration was given by the Defendant, nor is there anything in the transaction to create a trust. Possibly it might have given the Defendant a possession on which time would run; but if so time has not run long enough to create a bar. Mr. Ross, who pressed this

part of his case very earnestly though with great fairness, rested mainly, as their Lordships understood, on the admission of title made by the Plaintiff; but a gratuitous admission may be withdrawn unless there is some obligation not to withdraw it; and there is not here any title on which such an admission can rest. If then there is no transfer, no estoppel, no bar by time, no trust, why should not the Plaintiff assert his legal rights, whatever he may, in ignorance of the facts or in deference to his uncle or for any other cause not injurious to the Defendant, have admitted? Their Lordships hold that he can assert them, and they will humbly advise Her Majesty to affirm the decree of the Court of the Judicial Commissioner and to dismiss the appeal. The Appellant must pay the costs.

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