Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sir Maharajah Drig Bijai Sing v. *Gopal Datt Panday, from the Court of the Judicial Commissioner, Oudh; delivered 5th December* 1879.

Present:

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

IN this case the Plaintiff made a claim to a settlement in virtue of his under-proprietary right, which he describes as that of a "birt zemindar," in 28 villages; but that claim has now been reduced to a claim in respect of two villages and half of a third. It was at first dismissed by the Settlement Officer, on the ground that inasmuch as Plaintiff did not prove that he had been in possession in 1262 and 1263 Fusli—in other words, in the year 1855, the year before the annexation of Oudh—his claim could not be entertained. The Commissioner of Oudh not being satisfied with the decision on this ground, remanded the case; and upon remand, first the Settlement Officer, and secondly the Commissioner, found that the Plaintiff was entitled to the right he claimed, which is sometimes described as a "birt shankallap" right, sometimes as a "shankallap" right, (some kinds of shankallap being almost identical with that of birt, some being different from it,) and an under-settlement was decreed to him. The Judicial Commissioner, in pursuance of a power which he possessed, allowed an appeal to this Board upon a point of law, which he states to be whether paragraph 5 of ruling 5 of the Judicial Commissioner, which he sets out,

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was or was not correct. The ruling is in these terms: "In the investigation of this and all "cases of the same nature it must be re- "membered that the extension of the term of "limitation made by Act XVI. of 1865 is "founded only on the agreement of the taluk- "dars, and does not apply to tenures originating "in favour. A claimant who cannot prove "possession of his shankallap holding in 1262- "1263 Fasli has no *locus standi* in Court." This ruling appears to be based upon a circular of 1861, which their Lordships will assume to have had at the time the force of law. The passages in that circular on which the ruling is supposed to be founded are principally these: The first section enacts, "Though the settle- "ment recently concluded with the talukdars "has been declared final and perpetual, subject "only to revision of assessment, it has at the "same time been provided that the rights of the "under-proprietors, or parties holding inter- "mediate interest in the land between the "talukdar and the ryot, shall be maintained "as these rights existed in 1855." Then follows section 24, which relates to birt tenures, and is in these terms: "Where the birteeah "has lost possession there is no more to be said. "We are not to restore it to him. But the Chief "Commissioner is clearly of opinion the bir- "teeahs who are found in direct engagement "with the State at annexation, or who have "uninterruptedly held whole villages on the "terms of their pattahs under the talukdars, "must be maintained in the full enjoyment of "their rights in subordination to the taluk- "dars." Then come other sections which illustrate the meaning of birt. Section 25 says: "The meaning of the term 'birt' is "a 'cession.' It was the purchase of the pro- "prietary rights subordinate to the talukdar

" on certain conditions as to payment of rent " which were held to be binding, though un- " doubtedly often violated by superior power." Section 26 runs thus: "Instructions are also " required regarding the treatment of shan- " kallap at settlement. Some shankallap is of " much the same nature as birt, and there- " fore will be governed by the same rules; " but it differs so far from 'bai-birt' that it " is a condition of the former tenure that the " talukdar can redeem it at any time by repay- " ing the purchase money. The option of " availing himself of this condition should be " afforded him at settlement. Other 'shan- " kallap,' that which is styled kooshust and " is usually given to Brahmins and Pandits, is a " pure maafi tenure given by the talukdar and " will be treated like other rent free grants by " talukdars." The latter words refer us back to section 20, which is in these terms: " Those birts conferred by favour, or " 'regatte' birts, as they are styled, in contra- " distinction to the former, or bai-birts, are not " birts in their essential characteristics, but are " identical with the rent free grants made by " talukdars, and therefore liable to resumption " by them at regular settlement, when the " Government will take its full share of the " rental, as has already been explained in " paragraph 14 of the maafi rules."

Their Lordships observe that the ruling referred to by the Judicial Commissioner draws a distinction in reference to the application of the term of limitation (as it is called) to birt tenures, and to tenures in the nature of shankallap, which are to some extent different from birt tenures, and are assumed to be held at the option of the talukdar; but their Lordships find no such distinction in the circular of 1861. The words

treated as words of limitation in section 24 apply to all birt tenures. If a shankallap be a birt tenure they apply to it; if it be not a birt tenure they do not apply to it, and it follows that there is no term of limitation in the Regulation applicable to shankallaps. But it must be assumed for the present purpose that this is a shankallap to which the term of limitation, as it is called, applies; that is to say, that it is a shankallap of the nature of a birt, which seems to be the effect of all the holdings in this case.

Sections 1 and 24 enact in effect that if a birteeah is out of possession in the year 1855 his claim cannot be recognized. They are not, in the technical sense, enactments of limitation, though their effect is in some respects the same, viz., to prevent the owner of a birt tenure being heard to support his claim; and they appear to be treated as enactments of limitation by the authorities in Oudh, and to some extent by the Legislature itself. We then come to a statute, No. 16 of 1865, which is intituled "An Act to remove doubts as to the juris-"diction of the Revenue Courts in the Province "of Oudh." Section 5 is in these terms: "No "suit relating to any under-tenure which shall "be cognisable in any Revenue Court under "this Act"—and claims of this kind come under that category—"shall be debarred from "a hearing under the rules relating to the "limitation of suits in force in the Province "of Oudh if the cause of action shall have "arisen on or after the 13th day of February "1844," that is, 12 years before the annexation of Oudh, which occurred on the 13th February 1856. Act 13 of 1866 followed, which is very much *in pari materia*. The 1st section, after re-enacting in almost the same words the provisions of the 5th section of the former Act, goes on to

say, "And any suit or appeal relating to any "tenure, and cognisable as aforesaid, which "may have been rejected or dismissed upon "the ground that the suit was barred under "the said rules, may be revived and heard on "the merits if the cause of suit shall have "arisen on or after such day," that day being the 13th February 1844. It appears to their Lordships that whether the provision in the Regulation referred to be considered a provision of limitation or not, it was in effect repealed by these statutes, and that the suit of a birteeah became cognisable, notwithstanding that he may not have been in possession in 1855. Therefore, as far as any objection could be raised on the question of limitation, their Lordships are of opinion that these two statutes are an answer to it.

But it has been contended that the disability, which it is said the Plaintiff labours under to prove his title, is not in effect a disability under a Statute of Limitations, but a disability affecting the title itself. Act No. 26 of 1866 is relied upon for this purpose. It is entitled, "An "Act to legalise the rules made by the Chief "Commissioner of Oudh for the better determination of certain claims of subordinate "proprietors in that Province;" and it enacts, "Whereas certain rules have been made by the "Chief Commissioner of Oudh for the better "determination of certain claims by persons "possessed of subordinate rights of property in "the territories subject to his administration; "and whereas it is expedient that such rules "shall have the force of law, it is hereby enacted "as follows:—1. The rules for determining the "conditions to which persons possessed of "subordinate rights of property to taluqas in "the territories subject to the administration of "the Chief Commissioner of Oudh shall be

" entitled to obtain a sub-settlement of lands, " villages, or sub-divisions thereof which they " held under taluqdars on or before the 13th " day of February 1856, and for determining " the amounts payable to the taluqdars by such " subordinate proprietors, which rules were " made by the said Chief Commissioner, sanc- " tioned by the Governor-General of India in " Council, and published in the Gazette of India " for September 1st, 1866, and which are re- " published in the schedule to this Act, are " hereby declared to have the force of law."

It has been contended that the rules which have the force of law under this schedule bar the Plaintiff's claim. The chief reliance has been placed upon sections 1 and 2. The first section is to the effect that—" The " extension of the term of limitation for the " hearing of claims to under-proprietary rights " in land makes of itself no alteration in the " principles hitherto observed in the recognition " of a right to sub-settlement." Rule 2 goes on to say, " When no rights are proved to " have been exercised or enjoyed by an under- " proprietor during the period of limitation, " beyond the possession of certain lands as seer " or nankar, no sub-settlement can be made. " But the Claimants will be entitled, in ac- " cordance with the rules contained in the " Circular Orders which have hitherto been in " force in Oudh upon this subject, to the recog- " nition of a proprietary right in such lands." That does not apply to this case. " To entitle the " Claimant to obtain a sub-settlement, he must " show that he possesses an under-proprietary " right in the lands of which the sub-settlement is " claimed, and that such right has been kept " alive over the whole area claimed within the " period of limitation." So far it appears to their Lordships that the finding of the Courts is

in favour of the Plaintiff. He must be taken to have kept alive his rights until he was ousted in the year 1851, which their Lordships find upon the evidence was the time when he was ejected by the Rajah. Then follow these words on which reliance has been placed: "He must also "show that he, either by himself or by some "other person or persons from whom he has "inherited, has by virtue of his under-proprie- "tary right, and not merely through privilege "granted on account of service or by favour "of the taluqdar, held such lands under "contract (pucka) with some degree of "continuousness since the village came into "the talooka;" and the next section explains what is meant by "some degree of continuousness." It has been argued that inasmuch as this is a shankallap tenure of the kooshust description, and held merely by favour, and not as of right, the Plaintiff is excluded by the above words. Their Lordships are of opinion, however, that he is not so excluded; they adopt the findings of fact of the different Courts. The claim of the Plaintiff is treated in the first place by the Settlement Officer, who orignally dismissed it on the grounds which have been stated, as a claim not to "kooshust," but to "birt shankallap." The judgment of the first Court upon remand is to this effect: "I consider it proved that there were "five shankallap villages held by the Plaintiff's "family; that about 1256 Fusli" (it is agreed that that should stand 1258 Fusli) "they lost "possession when Jadunath executed the con- "ditional deed of sale. There is proof that "Plaintiff held his share separately, from the "Defendant's own written note on the wajibularz "presented by Jadunath; and as the Defendant "neglects to produce the deed, there is no "evidence to shew that Jadunath did or could

" legally convey the rights of Gopal Datt; " that the Rajah had no right to eject him in " 1856 Fusli, and he is now entitled to regain " possession and to hold as an under-proprietor." That decision is confirmed by the Commissioner, Mr. Capper.

It appears to their Lordships that the effect of the finding is that the Plaintiff did hold, not merely in the words of the section, " through " privilege granted on account of services or by " favour of the talukdar," but by an under-proprietary right which is distinguished from a holding through privilege in favour; that he was entitled to hold, not merely during the will of the talukdar, to which the latter part of the section appears to point, but *in invitum;* and their Lordships are of opinion that from the length of his holding, which appears to be considerable, and the circumstances which have been found in the case, it may fairly be inferred that he held pucka or under contract, or at all events under an arrangement from which a contract might be inferred. That being so, their Lordships are of opinion that he is not excluded, by the words which have been read, from the right of coming before the Court and proving his case.

It has not been seriously disputed that if this be so, he has held with that degree of continuousness which is required by the Act.

For these reasons their Lordships are of opinion that the decision appealed against is right, and they will humbly advise Her Majesty that the judgment of the Commissioner be affirmed.