Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Fakharuddin Mahomed Ahsan Chowdry v. *The Official Trustee of Bengal* (*No.* 34 *of* 1878), *Fakharuddin Mahomed Ahsan Chowdry* v. *The Official Trustee of Bengal and others* (*No.* 35 *of* 1878), *and Alimunnissa Khatun and another* v. *The Official Trustee of Bengal* (*Nos.* 38 *and* 39 *of* 1878 *consolidated*), *from the High Court of Judicature, at Fort William, in Bengal; delivered June* 16*th*, 1881.

Present:

SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.

THE circumstances which give rise to these Appeals are as follows: Najamunnissa Khatun, a Mahommedan lady, in 1861 brought a suit against her husband for the purpose of obtaining possession, together with mesne profits, of certain lands which she alleged to have been conveyed to her by her husband by a deed described as a kabinnama in lieu of prompt dower. The First Court decided against her. The High Court, on the 27th of July 1864, reversed that decision, and gave her what she claimed. She describes her suit as brought "to "obtain possession of the zemindaries and putni "talooks mentioned in the schedule given below, "and the mesne profits thereof"—claiming mesne profits in a very general manner. It is true that, subsequently valuing the suit, and for that purpose describing her claim in the schedule, she speaks of her claim for mesne profits

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for the period of dispossession, that is to say, some eighteen months before the institution of the suit, as amounting to 48,400 rupees. The High Court, in giving judgment in her favour, on the 27th July 1864, observed:—"It is "unnecessary to make further comment on "the case of the Plaintiff, which I think "fully proved to the extent of the factum "of the kabinnama and her right to "the absolute possession of the lands therein "mentioned, together with wasilat and interest "from the commencement of Srabun 1267, when "she was taken from her husband's house." The decree is drawn up in pursuance of that judgment, and is in these terms: "It is "ordered and decreed by the said Court, that "the decree of the Lower Court be and the "same is hereby reversed, and the Plaintiff is "declared entitled to possession of the land men- "tioned in the kabinnama with wasilat from the "commencement of Srabun 1267; the wasilat "to be ascertained by local inquiry, and to "bear interest at 12 per cent. from date of the "ascertainment of the amount due to date of "payment." From that judgment and decree of the High Court, the husband, Ahsan Chowdry, appealed to this Board; but that appeal did not come on for hearing till the year 1873. In the meantime, the lady being dispossessed, and probably being in pecuniary difficulties, had recourse to a money lender; and on the 17th July 1864, 10 days before the written judgment, but after an oral judgment had been pronounced, she executed a hibbanama or deed of conveyance to Pogose, a money lender, of a 6 anna share in the decree, in consideration of an advance by him, which probably, among other reasons, she would require for the protection of her interests in the appeal. In 1865 Pogose applied, upon the strength of

this hibbanama, to be admitted as a respondent in the appeal. That application was opposed by Ahsan Chowdry, but finally an order was made in 1866, permitting Pogose to be added as a respondent, but declaring it to be open to Ahsan Chowdry to bring an action or any proceeding he may think fit, at any time, for the purpose of setting aside this hibbanama, which Ahsan Chowdry disputed.

The appeal then came on before this Board in 1873, and the judgment of the High Court was affirmed. In 1875 Pogose appears to have taken some steps to obtain execution of the decree; but he made an assignment for the benefit of his creditors, and, having died not very long after, he was and is still represented in this suit by the official trustee, who is now the Respondent. The official trustee in 1876 applied for execution, claiming to be put into possession of a 7 anna share and a little more, and subsequently claiming to be put into possession of a 13½ anna share.

It requires to be explained how the rights of Pogose had grown from the 6 annas to the 13½ anna share. It appears that the lady, the original Plaintiff, had died; thereupon her property devolved upon her heirs, being her husband, two daughters, and a son. Pogose in 1874 bought, by private contract, the share of one of the daughters; he further bought a decree against the mother, which bound her property, and on the strength of that decree he applied for a sale of that portion of it to which the son and the daughter were entitled as heirs of their mother; and under that decree the property was put up for sale in February 1876. Objections were made to the sale on the part of those who then represented the son and the daughter, on the ground of various irregularities. The First Court found

there was no irregularity; but the High Court found there was, and remitted the case to the Court below, for the purpose of ascertaining whether the plaintiffs had proved that they had sustained material damage on account of this irregularity, which it was necessary for them to prove in order to set aside the sale. Both Courts have found that no such damage was proved. An appeal has been brought from the decision of the High Court upon that question, and it is the subject-matter of the third Appeal.

The second Appeal arises in this way:—Ahsan Chowdry in 1875 brought a suit for the purpose of setting aside the hibbanama of 1864, whereby Pogose claimed the 6 annas which were by it conveyed to him. The official trustee appeared as defendant in that suit, and he was satisfied to rest his defence upon two points of law; one limitation, and the other *res decisa*. The latter point has been decided against him; but both Courts have decided in his favour on the question of limitation, and that is the subject of the second Appeal.

The subject of the first Appeal is this:—It has been decided by the High Court that the Plaintiff, representing Pogose, who claimed in right of the original Plaintiff, Najamunissa, was entitled to wasilat or mesne profits up to the time of the delivery of possession, it being contended by the Defendant that he was only entitled in this suit to wasilat up to the time of the commencement of the suit; further questions have been raised as to the amount of the wasilat, and whether there ought not to have been a local inquiry other than that which was instituted. These questions are the subject-matter of the first suit.

Such being the circumstances giving rise to the Appeals, it appears to their Lordships convenient to take the last suit first. The only

question in that suit, viz., whether or not those who sought to set aside the sale have proved that they have been materially injured by any irregularity which occurred in the notification of it, is a pure question of fact. It has been decided by both Courts, and their Lordships on looking through the judgments of those Courts have come to the conclusion, that no evidence of a satisfactory character was adduced on the part of the objectors to the sale proving what it lay upon them to prove, that they had sustained any material damage or injury. In the absence of any such proof the judgments are right, and, their Lordships are of opinion that that Appeal should be dismissed.

The question in the second Appeal arises on the Statute of Limitation, and the point is a narrow one. The deed sought to be set aside, and which is impugned as a forgery, was executed in the year 1864. The suit to set it aside was brought in the year 1875. The question is whether the suit was in time or not. The Act bearing upon this matter, which was in force at the time of the institution of the suit, namely, in 1874, is Act 9 of 1871, and the part of the second schedule referring to the subject-matter is clause 93, which is in these terms:—" Description of suit: To declare the forgery of an " instrument issued or registered or attempted " to be enforced;" for which the period of limitation is three years. This suit undoubtedly was a suit of that description, for in the plaint the Plaintiff declares that the deed was false and fabricated. The words applicable to such a suit are: "Time when the period begins to run; " the date of the issue, registration, or attempt." " Registration or attempt " must be construed with regard to the words in the former paragraph, that is the date of the registration, or the date of the attempt to enforce the deed.

Both Courts have held, and their Lordships think rightly, that when Pogose, in the year 1865, set up this deed, and insisted upon it for the purpose of being made a respondent in the suit, and when that application was opposed by Ahsan Chowdry, and, the parties being heard, Pogose succeeded in his attempt to become a respondent, without prejudice, in the words of the Order, to any action or proceeding to be brought by Ahsan Chowdry, that was an attempt to enforce the deed, and from that date limitation ran. Their Lordships observe further that the words of the section refer also to "the date of registration;" and looking at the deed, they find it was registered two days after it was made. It was made on the 17th, and registered on the 19th; and, therefore, it seems to their Lordships that the Statute of Limitation doubly applies. On these grounds, therefore, they will advise Her Majesty that the judgment in this case be affirmed.

The plaint has been already read in the first case, and their Lordships are of opinion that it is at all events open to the construction that the Plaintiff intended to claim wasilat up to the time of delivery of possession, although for the purpose of valuation only so much was valued as was then due; but be that as it may, they are of opinion that, under section 196 of Act 8 of 1859, it was in the power of the Court, if it thought fit, to make a decree which should give the Plaintiff wasilat up to the date of obtaining possession. Section 196 is in these terms:—"When the suit is for land or other "property paying rent, the Court may provide "in the decree for the payment of mesne profits "or rent on such land or other property from "the date of the suit until the date of delivery "of possession to the decree holder, with interest "thereupon at such rate as the Court may think

"proper." The words of the judgment are, "The Plaintiff is declared entitled to possession "of the land mentioned in the kabinnama, with "wasilat from the commencement of Srabun "1267; the wasilat to be ascertained by local "inquiry" and so on. Wasilat by law is demandable up to the time of possession; and the question is, whether the Court intended to give to the Plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is that the Court, with a view to carrying out the object of the legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession. The view which their Lordships take of the decree is much confirmed by two cases in the 12th Weekly Reporter and in the 22nd Weekly Reporter, to which their attention has been called, wherein it would appear that the High Court have, dealing with words identical or extremely similar, given them the interpretation that possession with wasilat means wasilat up to the time of possession being delivered. Their Lordships cannot but fear that, if they were to hold the contrary, they would throw doubt upon many cases which have been decided and acted upon in India.

Their Lordships do not feel at all pressed by the authority of several cases to which their attention has been called, the doctrine of which has been affirmed by this Board; namely, that where a decree is silent on the subject of interest or of wasilat, interest or wasilat cannot be added in the course of execution. But here the decree is not silent on the subject of wasilat. On the contrary, it is expressly mentioned; and the term "possession with wasilat" appears to them reasonably to bear the construction which has been put upon it by the High Court not only in this but in many other cases. Their Lordships are, therefore, of opinion that the High Court were right in deciding as they did, that wasilat is claimable up to the time of delivery of possession.

The course of litigation in this case was this: Some time after the claim for execution on behalf of Pogose the matter came before Mr. Geddes, a local judge, who took the view of the judgment which has been expressed. An appeal was preferred against his ruling to the High Court, and it was confirmed by the High Court. Subsequently Mr. Peterson took the opposite view, namely, that wasilat was only claimable up to the time of the institution of the suit. The matter was sent back to Mr. Peterson, and he was directed to ascertain the amount of wasilat up to the time of the delivery of possession; and his judgment, giving upwards of 7 lacs of rupees, was affirmed by the decision now under appeal. The High Court in their judgment state:—"The questions which we are called upon "to determine in this Appeal are two: firstly, "whether the decree holder, that is to say, the "person who now stands in the shoes of the ori-"ginal Plaintiff in whose favour the decree has "been made, is entitled to recover mesne profits "upon the estate which was the subject of "dispute down to the period of obtaining pos-

" session, or only for the precise period for which
" wasilat is estimated in the schedule attached
" to the original plaint; and the second is
" whether, supposing that the decree holder is
" entitled to wasilat for the whole period, the
" Court below has assessed it upon a proper
" principle and upon sufficient materials." With regard to the second question there are two concurrent findings of Mr. Peterson, the Subordinate Judge, and that of the High Court; and under those circumstances their Lordships have come to the conclusion that the finding cannot be disturbed. However, a third point has been taken before their Lordships, which, as far as appears from the judgment of the Court, was not taken in the argument below, although it is raised in the grounds of appeal. That point is, that although wasilat may be due and obtainable in this suit up to the time of delivery of possession, and the calculation of the amount may be right, still, inasmuch as the decree directed the calculation to be made by a local inquiry, and there has been no local inquiry,—that is to say, an inquiry held by a Judge or an ameen sitting within the boundary of the land,—the judgment cannot stand. Whether the judgment is to be reversed upon that ground, or the case is to be sent back for another local inquiry, has not been very clearly put before their Lordships; but they are of opinion that there is nothing in the point. The judgment of the High Court undoubtedly directs that the wasilat should be ascertained by local inquiry. An inquiry was instituted by the Judge of the district. The Judge made an order that Ahsan Chowdry should appear before him, and should produce his jumma-wasil-baki papers, which would show the amount of his receipts and expenditure with regard to this property, and would be the best possible evidence, if trustworthy, which

could be obtained, and worth more than the examination on the spot of any number of ryots. He appealed against that order to the High Court; but he made it no ground of appeal that the Judge ought to have gone to the spot, or have sent a commissioner to the spot, or that he ought to have sat on some portion of his land. He made no objection of that kind, and it appears that he attorned, as it were, to the jurisdiction, and sent in certain papers (which were deemed highly unsatisfactory), thereby taking his chance of a decision in his favour by the Judge. It would be, therefore, too late for him to object to the inquiry being conducted as it was, if he could ever have objected. Their Lordships infer from the judgment that no such point was seriously argued before the High Court, probably because the counsel in India felt it to be untenable.

For these reasons their Lordships will humbly advise Her Majesty to dismiss this Appeal, together with the other Appeals, with costs.