Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Imdad Husain v. *Aziz-un-Nissa and others, from the Court of the Judicial Commissioner of Oudh, Lucknow, delivered 7th December* 1895.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The object of the suit, in which the Appellant is Plaintiff, is to recover a village called Cheton, which the Defendants hold in possession. The history of the Plaintiff's dealings with the property is long and complicated, but the facts material to the decision of the present question may be concisely stated.

In the year 1854, when the Mahomedan dynasty was still in power, one Hafiz Ali was owner of the ilaka of Jiapur, which comprised the village of Cheton. He made an usufructuary mortgage of the ilaka to Tafazzul Husain to secure Rs. 2,000. Tafazzul was thus inpossession of the ilaka, and so remained during the annexation, and the confiscation, and the subsequent restoration of proprietors. In the year 1860 summary settlement was made with him, and a sunnud granted to him as talookdar of Samanpur, in which village Cheton was then included.

Hafiz Ali died in or about 1857, leaving the Plaintiff his son and heir. It seems a strange

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thing, but it is proved, that the mortgage of 1854 so passed out of the knowledge of the parties interested, that the Plaintiff spent some years over three separate law suits, in which, treating Tafazzul or his heir as proprietor, he attempted to establish sub-proprietary rights against him. All these attempts were defeated. Then the mortgage of 1854 turned up; and in the year 1881 the Plaintiff sued for redemption of the whole ilaka, which was decreed in his favour by the Judicial Commissioner in 1884. That decree was confirmed on appeal by Her Majesty in Council in 1888.

Under that decree the Plaintiff appears to have possessed himself of the ilaka excepting the village of Cheton, which the Defendants claim to retain by a title valid against both Tafazzul's heir and the Plaintiff.

In November 1865 one Afzal Husain filed a plaint against Hidayat Husain, the heir of Tafazzul, alleging that Cheton was his hereditary Zemindari, and claiming to have the settlement made in his name. On the 31st July 1866 an agreement for compromise was signed by the agent of Hidayat, and by Afzal who is therein described as sub-settlement holder of Cheton. On the same day a decree was passed in the following terms:—

"The claim of the Plaintiff (Case II.) is admitted by the " Defendant, and an agreement is filed under which it is " arranged that, after payment of the Government demand and " setting aside 10 per cent. therein on account of the Patwari " and Chaukidar, whatever remains of the gross rental assumed " by the assessing officer is to be divided in the proportion of " 6 annas to Defendant and 10 annas to Plaintiff.

"Case II.—Decreed by consent as against Defendant, and " the agreement as to profits is confirmed."

It is not disputed that sub-settlement was made with Afzal, or that he and his successors have held possession ever since in accordance with the decree. The position of the parties then was this. By the confiscation of 1858 all rights were

swept away, whether Tafazzul's proprietary rights in possession, or the Plaintiff's right to redeem, or Afzal's sub-proprietary rights. Sub-proprietary rights were restored by the orders of October 1859. The right of redemption was restored by Act XIII. of 1866, which was passed in March of that year. At the date of Afzal's suit Hidayat was the only person who could represent the proprietary interest as against a person claiming to be sub-proprietor. At the date of Afzal's decree, the Plaintiff had a legal right to redeem the ilaka of Jiapur, but it was wholly unknown to him, and apparently to everybody else, and he was then prosecuting claims of a different nature, claims as clearly adverse to the proprietary right as were those of Afzal.

The plaint in this suit was filed in January 1887, after the Plaintiff's right to redeem Jiapur was established by the Judicial Commissioner, but before his decree was affirmed by Her Majesty in Council. Documents were filed and issues settled, but nothing further was done till after Her Majesty's decree. Then the District Judge considered it expedient not to take further evidence until it was settled whether or no the suit was barred by lapse of time. The case was heard with reference to that question on the documents and undisputed facts; and the District Judge decided against the Plaintiff and dismissed the suit. In discussing the case he came also to the conclusion that the decree of 1866 was binding on the Plaintiff.

The Plaintiff appealed to the Judicial Commissioner. Among other grounds of complaint was the ground that the District Judge, while professing to decide the suit on the question of limitation, had in effect, without taking full evidence, decided another issue, viz., that the Plaintiff was bound by the decree of 1866. The Judicial Commissioner finding that the record

sufficed for deciding the point of limitation, overruled the Plaintiff's objection, which has not been renewed here; and he confined his decision to the one point of limitation. His opinion is that the decree of 1866 established Afzal as the owner of a sub-proprietary right; that he thereby became entitled either to a settlement or a sub-settlement; that such a position is and must be adverse to anyone claiming to be talookdar or superior proprietor of the same estate; and that possession taken in virtue thereof is a possession adverse to all the world. Therefore as the Defendant's possession dates back to 1866 at latest, and as the suit was not brought till 1887, the lapse of time is fatal to it.

It was urged in the Court below that the decree of 1866 was made by collusion between Afzal and Hidayat. But the plaint makes no such charge; no issue was framed upon it; the District Judge does not mention it; and the Judicial Commissioner rightly refused to take it into consideration.

The only new argument presented to their Lordships by Mr. Mayne is founded on the heading of the decree of 1866, which is, "Claim, "Sub-proprietary title as mortgagee." Thereupon it is argued that Afzal took with an admission that he was mortgagee only. That is at best a slight ground for the desired conclusion. It is not easy to explain the heading; but it cannot refer to the mortgage by Hafiz Ali to Tafazzul because that was unknown to the parties till more than ten years later. And it is quite inconsistent with the claim made by Afzal in his plaint, and with the solehnama or deed of compromise on which the decree is founded.

There is in fact no answer to the reasoning of the Judicial Commissioner. It is not necessary to discuss what would have been the Plaintiff's

position as against Afzal if he had known his rights against Hidayat during the suit of 1865–66, and had intervened then or immediately after the decree. Time has run against him, and his appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty in accordance with this opinion.