Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nilratan Mandal and others v. *Ismail Khan Mahomed, from the High Court of Judicature at Fort William in Bengal, delivered the 26th July* 1904.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

The suit, in which this Appeal arises, was for ejectment of the Appellants from some 5 bighas of land in Khiderpur, within the municipal boundaries of Calcutta. The Subordinate Judge of the 24 Pergunnahs decided, on 29th March 1900, in favour of the Appellants, on the ground that the Appellants' tenure is permanent. This Judgment was reversed by the High Court on 6th March 1902.

The Respondent is tenant of the taluk Khiderpur under the Matwali of the Hooghly Imambara; and the five bighas in dispute are within the lands held by him. The claim of the Appellants is that the disputed land has been held by them and their predecessors on a permanent tenure for a period which goes back long before the wakf was founded. In support of this contention, the Appellants found on various transmissions of the disputed property beginning with a deed of sale in 1804. There is another deed of sale in 1810; then a deed of gift in 1850; then a deed of sale in 1851; some mortgages in 1873, 1881 and 1882; then a deed

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of sale in 1883. It may suffice to say of the terms of the deeds of sale that they unequivocally purport to convey a heritable and transmissible right and that they all apply to the land in dispute. If it were necessary to go further back than 1804, there is adequate ground for believing that the seller of that year had possessed some land in the mouzah since 1773.

The next question is how far this claim of permanent tenure has been brought home to the knowledge of the Respondent's predecessors in title and has been acknowledged by them.

Now the broader facts of the case are certainly strong. The land has been occupied by the Appellants' predecessors at an unaltered rent for 100 years although its saleable value has been increased from Rs. 300 to Rs. 3,000; they have built on it and have dealt with it, in its earlier and in its enhanced value, by sale and mortgage.

Of more direct recognition there is adequate documentary evidence. Their Lordships will assume against the Appellants that a pottah of 1804 is a forgery, and will come at once to the year 1852. In that year there were executed a pottah and kabuliyat of the lands in question. The kabuliyat (which was produced by the Respondent) sets out that Wali Sarang, who executes it, has purchased the land, and he declares that "I shall enjoy and continue in "possession of the aforesaid land by annually paying the rent." The kabuliyat and relative pottah make anxious mention of a piece of land being taken off for a road and that there is to be no claim to abatement of rent on this account. (This stipulation, appropriate enough to a permanent right, is less appropriate if the title in which it occurs is a fresh grant.)

The High Court find in this pottah a fresh start of title. Now the primary function of the

pottah and kabuliyat would seem to be rather to state the rent payable by the new tenant and to recognise that it is to him that the landlord is now to look for its payment. But some special significance is supposed to lie in the reference in both instruments to an "istifa" or surrender. The istifa is of course by the seller and must have been in the hands of the Matwali; and it has not been produced by the Respondent. This being so, no significance can be attached to what implies no more than that the seller acknowledges that he has parted with the land. The pottah and kabuliyat thus attest no more than that the landlord recognised the sale, with this added significance that, as the Subordinate Judge mentions, (for the translation does not bring it out,) the pottah speaks of the jumma as according to former custom and practice. That the Matwali speaks of his act as operating "so long as my authority will last" bears neither for nor against the Respondent, for this was the necessary quality of all and every of his acts as an administrator.

In these documents of 1852, therefore, their Lordships are unable to find any surrender by the tenant; and, on the contrary, the execution and exchange of those instruments bring home to the landlord knowledge and recognition of the tenants' transmission of the property by sale in an instrument which purports to convey a permanent and inheritable right. Taken along with the other facts of the case, before and after, the proceedings of 1852 tend to establish the Appellants' case. The question here, as in other similar cases, is whether the true inference from the facts is that the tenure is permanent or precarious, the burden of proof being on the tenant. It was somewhat faintly argued by the Respondent that a special local custom must be proved; but, on examination, the authorities

cited relate to Bombay and not to the province from which this Appeal comes.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed, the Decree of the High Court discharged with costs, and the Decree of the Subordinate Judge restored. The Respondent will pay the costs of the Appeal, except the costs of the Appellants' petition for further documents, which costs will be borne by the parties themselves.