

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakoor Bani Singh v. Rajah Beharee Lall, from the Court of the Financial Commissioner of Oude ; delivered 2nd August, 1872.

Present :

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

SIR LAWRENCE PEEL.

THE Appellant, Bani Sing, was defendant in a suit instituted against him by the Respondent, Rajah Beharee Lall, on the 15th September, 1869, in the Court of the Settlement Officer of Seetapore, in Oude. It will avoid confusion if the parties be designated hereafter as Plaintiff and Defendant.

It appears that, after the annexation of Oude, viz., in the Fuslee years 1264 and 1265, upon the making of the summary settlements, pottahs, or farm deeds, of the Talookah Oolrah, Pergunnah Biswan, Zillah Seetapore, were granted by Government to Moonnoo Singh and his brothers Rugh Nath Singh and the Defendant Bani Singh, who claimed to be the hereditary Zemindars of that Talookah. On the 30th of December, 1858, in anticipation of the summary settlement for 1859, Moonnoo Singh, Rugh Nath Singh, and the Defendant, describing themselves as Zemindars of the Talookah, petitioned the Settlement Officer, representing that the Talookah, consisting of twenty-eight villages, was administered under Zemindaree tenure ; that they held possession of the villages both before and during the rebellion ; that they still held possession of the

same; that there was no dispute about them; and that they were willing to pay the Government demand that might be assessed; upon which Durraio Singh, the Kanoongoe of the Tehseel Bunhoo in which the villages were situate, was called upon to give an account of the estate.

He stated (see page 31 of the Record), "There are twenty-eight villages in this Talookah, which constitute the hereditary Zemindaree rights of Moonnoo Singh, Rugh Nath Singh, and Banee Singh. These villages have always remained in their undisturbed possession. Their possession lasted from the commencement of 1252 Fuslee to 1263 Fuslee. Pottahs were granted to them for 1264 and 1265 Fuslee by the authorities; their names are recorded in regard to these villages. Up to this day they hold possession. During the rebellion also the possession remained with them; they were never out of possession." After hearing the above statement, the Settlement Officer ordered that the Statement A, and the statement of the proposed assessment, be brought forward, and that the settlement of the villages might be made with the then holders;" that is, with the Singhs. That was on the 1st of January, 1859.

In Statement A, Moonnoo Singh was entered as the person who was Malgoozar in the years 1263 and 1264, and at the time of the then settlement. On the 12th January, the case was brought before the Extra Assistant Commissioner, who made the following remarks: "This day the case regarding the settlement of Talookah Oolrah, Pergunnah Biswan, was brought for hearing. I learnt from the statement of Durraio Singh, Kanoongo of Tehseel Bunnoo, that there are twenty-eight villages in the Talookah, which constitute the hereditary zemindaree estate of Moonnoo Singh, Rugh Nath Singh, and Banee Singh, and that it has always remained in their undisturbed possession; that they held possession from the beginning of 1252 Fuslee to 1263 Fuslee; that in 1264 and 1265 Fuslee, pottahs or farm deeds were drawn out in their names; that possession remained with them during the rebellion; also that they still hold possession, and that there is no dispute now about the same." He therefore made the following order: "That acknowledgments (Kabooliuts) be taken in writing for the payment of

5,832 rupees, including incidental charges from Moonnoo Singh, Rugh Nath Singh, and Banee Singh, and that pottahs or licenses be granted them in reference to the administration of this Talookah. The records shall be sent up to the Deputy Commissioner for his sanction."

Upon the Records being taken before Major Thompson, the Deputy Commissioner, he confirmed the Order of the Assistant Commissioner. He said: "This day the Records of the Settlement Case of Mouzah Oolrah, Pergunnah Biswan, prepared in the Court of the Extra Assistant Commissioner, were brought up before me. I find that Moonnoo Singh and Rugh Nath Singh, who are hereditary Zemindars of Mouzah Oolrah, have always held possession. No other claimant has appeared for it." He therefore ordered, "That, as proposed by the Extra Assistant Commissioner, Kabooliuts be taken from the Zemindars now holding possession, binding them to pay as revenue the sum of 5,832 rupees, and that a pottah or license be granted to them as the parties with whom the present settlement is sanctioned."

On the 26th March, 1859, Moonnoo Singh signed the Kabooliut, and engaged for the Government revenue for three years at the sum fixed, viz., 5,832 rupees; and in Paragraph IV of the Kabooliut, which was doubtless prepared by the Government, it was stated that he was the Malgoozar, that he had been restored to possession of his estate on account of his well-known loyalty to the Government, and he promised to render loyal service to the Government for the future; and then the following Order was made: "This day, Moonnoo Singh Lumbardar attended the Court, and authenticated the Kabooliut, agreeing to abide by all the conditions mentioned therein. It is therefore ordered that the Kabooliut be filed with the Records, and that a pottah be granted to him."

Up to this time, as found by the Deputy Commissioner, no claim had been made by any other person to be allowed to settle for the revenue, nor does any claim whatever appear to have been made by any other person before the 1st of July, 1864, a period of eight years after the annexation of Oude, when the Plaintiff presented a Petition to the Settlement Officer, which is set out at page 2 of the

Record. Addressing himself to that Officer he said,—“I beg to inform you that, from the year 1245 Fuslee to 1263 Fuslee, the Talookah of Oolah, Pergunnah Biswan, Zillah Seetapoor, including nine villages as specified below, remained in the undisputed possession of the widow of Roy Tota Ram, the said lady being my grandmother, under a Deed of conditional sale executed by Kunuck Singh, *quondam* Zemindar of the said Talookah, whose seal and signature were duly affixed to it.” He proceeded to say, “It has always been in my ancestor’s possession under that deed of mortgage. “The said widow used to discharge the Government demand. As the aforesaid Ranee was a veiled lady, she, at the time of the summary settlement, could not come forward in person to claim the settlement with her.” But we all know that, although a veiled lady cannot come into a Court of Justice in her own person, and although this veiled lady could not have come in person into the Court of the Settlement Officer to ask for a settlement, she could have employed an agent who would have done it for her if she had intended to assert any claim to the settlement with the British Government. But the fact is, the Ranee never made any claim whatever under this mortgage deed. It was only her heir after her death, and eight years after the annexation of Oude, who made claim. The Plaintiff’s statement went on as follows:—“Hence, without an inquiry into the proprietary possession of the Talookah with reference to the rightful holder, Moonnoo Singh, son of the aforesaid Kunnuck Singh, mortgagor, was allowed to engage, and that settlement was made with the aforesaid Moonnoo Singh.” That statement is not correct, because an inquiry was made as to the proprietary rights of the Singhs and the Kanoongo, reported that they had always been in possession as proprietors. The Petition proceeded—“However, as the Lumbardaree right of the original rightful holder did not become extinct hereby, and can never be done away with at a summary settlement, the determination of the proprietary right to the Talookah was reserved to be made at the commencement of the operations of the regular settlement. As the regular settlement has now commenced, and it is going on, I pray, with reference to the

circular of the Chief Commissioner, that my proprietary title may be taken into consideration and inquired into, and that I may be recorded proprietor of the Talookah in question. The neighbouring Zemindars and the Kanoongoes of the Pergunnah will certify, on inquiry, to the validity of my proprietary title to the Talookah in litigation." But notwithstanding this statement, none of the neighbouring Zemindars and none of the Kanoongoes of the Pergunnah have been called in support of the Plaintiff's title. On the contrary, the Kanoongo who did give evidence proved that the proprietary right was in the Singhs. "Besides," he added, "the deed of mortgage which now stands in the light of an absolute deed of sale I have other documents to establish my proprietary right. I have also a certificate of administration granted to me by the Court, authorizing me to administer the Ranee's estate, and declaring me as her heir and successor." That was the first application which was made by the Plaintiff.

On the 16th of January, 1865, the Plaintiff presented a similar petition upon which this order was passed, "Lalla Pershad, Agent of the Petitioner, on being asked to produce the deed of mortgage, replied that he had not got it in his possession, but that he would produce it shortly. As no inquiry is going on now into cases of proprietary rights appertaining to the Tehseel of Biswan, I direct that the petition in original, after being entered in the official diary, may be returned to Petitioner, to enable him to present it at the time of the commencement of the inquiry of cases of proprietary rights appertaining to the said Tehseel."

On the 10th of April a similar petition was presented and a similar order made.

On the 15th of September, 1869, the Plaintiff filed his plaint, and then he set up a claim upon the deed of mortgage of which no mention appears to have been made previously to 1864, although pottahs had been granted by Government to the Defendant and his brothers. If that deed really had existence or was really intended to operate as a mortgage, which still remained in force, why was it not produced at an earlier period during the life of Ranee? The plaint was in form a suit for possession, the dispossession being alleged to have taken place in Khurreef 1263

Fuslee. The Plaintiff stated, "From 1245 Fuslee to 1263 Fuslee, the Talookah of Oolrah, consisting of the undermentioned nine villages, remained in the undisturbed possession of the Ranee of Roy Tota Ram, deceased, who was Plaintiff's grandmother, under a deed of Bybilwaffa or conditional sale, dated 14th Jumudoolowul 1254 Hijree executed by Kunuck Singh. Every year, during such possession, the said Ranee paid the State revenue regularly as will be testified by the several Dakhilahs, Perwannahs, and other documents bearing the seal of the King's collectors. They will be produced when required by the Court. At the summary settlement, however, the Talookah was settled with Moonnoo Singh, son of the aforesaid Kunuck Singh, without any investigation being made into the title of the party who lawfully held it, as in the interval between a summary and regular settlement, Plaintiff was aware that the title of the rightful party to engage for the payment of the revenue of the Talookah could not be extinguished and that such summary settlement was not revocable, Plaintiff did not come forward with a suit about it. However, Plaintiff addressed two letters or petitions to the Settlement Officer of Seetahpore district, who directed Plaintiff to bring forward his claim at the time of the regular settlement. As the regular settlement is now in progress, Plaintiff prays that, with reference to the circular issued by the Financial Commissioner of Oude, settlement of this Talookah may be made with Plaintiff."

The Plaintiff having prayed that a settlement might be made with him, the Settlement Officer treated the case as involving two suits against Government, in which he treated the Defendant as Plaintiff in Suit No. 1, and the Plaintiff as Plaintiff in suit No. 2. After hearing the Agents on both sides he said: "There is no question but that the Plaintiff No. 1 is the ancestral proprietor. But it is more than doubtful whether Plaintiff No. 1 has ever held the Kabooliut within the term. In respect to the claim No. 2, if the evidence of the Kanoongo is to be listened to, they have been Kabooliutdars since 1246, and hence, if they can show any title for their possession, they will be entitled to a Decree. They have produced a mort-

gage deed, of which Plaintiff No. 1 pleads ignorance, and in respect of their possession as Kabooliudars, the Plaintiff No. 1 pleads ignorance. The issues that appear to the Court requisite to investigate are, (1) Has No. 1 (that is the Defendant) had possession as Kabooliudar within the term? (2) Was there any mortgage in 1245, and is the deed produced genuine and valid?

SUIT No. 2.

(3) Has the Plaintiff had any possession, and from what date? (4) If Plaintiff's mother, Rancee Tota Ram, had possession, on what title did she hold—as Malzamin only, or as mortgagee under the bond filed? The first issue is Plaintiff's No. 1. The other three are Plaintiff's No. 2."

The Kanoongo, who, above all others, was likely to know the real facts, stated upon solemn affirmation—"The village is the ancestral property of Plaintiff No. 1."

Then there is a blank left in the printed case. I suppose he added "and his brothers," Rajpoots. "They held from 1202 down to 1246 Fuslee (that was about the date of the alleged mortgage) as Kabooliudars. In 1246 the village and the Talookah, to which it gives its name, was transferred to the Illaqua Tehseel by the agency of the Rancee of Tota Ram, who was Malzamin. Plaintiff No. 2 is descended from her. The Rancee held in her own name from 1248 Fuslee, down to 1250 Fuslee, the Karinda Heera Lall, held for the Rancee, and, from 1252 to 1262 Fuslee, the Rancee herself held. But all the time the Zemindars remained in possession, and enjoyed all profits and loss. The Rancee got, I suppose, her nuzrana dues."

Much documentary evidence was produced on the part of the Plaintiff, but notwithstanding the statement in his petition of 1st July, 1864, that the neighbouring Zemindars and the Kanoongoes of the Pergunnah would certify on inquiry to the validity of his proprietary title to the Talookah in litigation, he did not call a single Zemindar or Kanoongo to give evidence on his behalf. The Kanoongo who, as before observed, made a statement on solemn affirmation, made a strong case against him, and with that exception the matter rested principally on the documents produced. Amongst the documents

produced was the alleged deed of mortgage, upon which the Plaintiff rested his alleged proprietary title; a pottah, dated 16th Mohurram, 1260 Hijree, bearing the seal of Gholam Hossein Chuckledar to Heera Lall, Agent of Roy Tota Ram, deceased, purporting to be a pottah of Mouzah Oolrah for three years, from 1251 to 1253 Fuslee, on payment of a jumma or revenue amounting to 8,178 rupees, including all kinds of Government demands, rents, and perquisites. Several dakhilahs or receipts were also produced, acknowledging the payment of revenue to the native Government by the Ranee of Tota Ram, and some letters making application to her for payment of revenue for the talook in question, as stated by the Kanoongoe.

It seems to their Lordships that there is no doubt, upon the whole of the evidence, that the Ranee did enter into a Kabooliut with the native Government, but the question is, did she enter into that revenue settlement with the native Government on her own behalf as proprietor, or as a mortgagee becoming proprietor by reason of a breach of condition, or did she merely enter into those Kabooliuts with the native Government, as Malzamin or security for payment of the Government revenue by the real proprietors, the Singhs?

It is very important to consider that, in 1846 (1262 Hijree), Banee Singh, who was the brother of Moonnoo Singh, became security for the payment of the revenue. That bond is found on page 30. He says, "I, Banee Singh, Zemindar of Mouzah Luthee, Pergunnah Biswan, do hereby declare that I have bound myself as surety for the appearance and pecuniary liability of Moonnoo Singh, Zemindar of Oolrah, Pergunnah Biswan, and hold myself, in that capacity and on that account, responsible to the Ranee of Roy Tota Ram, for the payment of the Jumma for 1254 Fuslee, regarding Mouzah Oolrah. This is executed in the presence of Kampta Pershad, the Ranee's agent, and it is hereby stipulated that, if Moonnoo Singh fail to attend the Ranee's residence, or to pay the rents due from him from time to time, the Ranee Sahub will immediately be placed by me in possession of all his proprietary rights and perquisites, and cesses, &c.; and should any of his brothers, or co-parceners, or creditors, prefer then any claim to such rights,

Moonnoo Singh will not be called upon to meet such claims, but that I will be answerable to meet and adjust such claims."

Now, the word "Jumma" is used there in, perhaps, a somewhat ambiguous sense, the same word being used in the pottah from the native Government. It may mean the Jumma reserved upon an under lease granted by the Ranee to the Singhs as farmers; but then, if the Ranee granted a lease of this property to the Singhs as farmers, how is it she did not require them to execute a Kabooliut? If she had entered into the settlement with the native Government to pay the revenue, and had let the property to the Singhs as farmers under her, it was necessary that the amount of rent they should pay to her should be fixed, and in all probability she would have required them to enter into a Kabooliut. If they were farmers, there is nothing to show what rent they were to pay. There is no Kabooliut signed, and the whole matter rests upon certain documents which have been referred to.

The word "rent" and the word "revenue" are frequently used in ambiguous senses. Sometimes the word "revenue" is used as meaning the rent payable to a landlord; and the word "rent" is frequently used as meaning the revenue payable to Government. When we talk of "rent-free" estates, we do not mean lands not paying rent, but estates which do not pay any revenue to Government. Therefore, seeing that the words which are used in this document are ambiguous, it is necessary to ascertain, as far as we can, whether there is any document which will get rid of such ambiguity, and show the sense in which it was used. Now, it appears that, in June 1856, a bond was executed by Moonnoo Singh in favour of the Ranee, which is printed at page 33. It is as follows:—"I, Moonnoo Singh, Malgoozar" (still describing himself as the Malgoozar, which one would suppose the Ranee would not have allowed him to do if he was in possession of the estate as her tenant), "of Oolrah, in the Pergunnah of Biswan, do, by these presents, make known that I have borrowed the sum of rupees 1,970 of Company's coin, half of which is, rupees 985, from the Ranee of Roy Tota Rani, and paid the same into the King's Treasury, in payment of revenue, through Ekramoo Dowlah

Bahadoor, after receiving credit for the arrears of revenue instalments, on account of the village of Oolrah, regarding the Khareef harvest of 1263 Fuslee." There can be no mistake about that. Moonnoo Singh paid the revenue, but he borrowed money from the Ranee in order to enable him to pay it. If the Ranee had been holding in her own right and on her own account as the Zemindar under the Government, Moonnoo Singh would not have paid the revenue, nor would he have borrowed money from her to pay her revenue. It therefore shows that, although the Ranee was holding under a Kabooliat for payment of revenue, she was holding for the benefit of the Singhs, and that Moonnoo Singh and the other Singhs were paying the revenue to the Government. This document appears to get rid of all the ambiguity of the other documents, in some of which he speaks of being indebted to the Sircar. At page 13, No. 34, there is this, "I, Moonnoo Singh, Zemindar of Talookah Oolrah, Pergunnah Biswan, do hereby declare that I am indebted to the Sircar, on account of arrears of revenue, in the sum of rupees 214 : 8 (half of which is rupees 107 : 4), on account of the revenue due for the year 1249 Fuslee, for the aforesaid estate, as detailed below ; I, therefore, promise that, as promised at the foot of this, I will never fail to pay it up." The word "Sircar" is generally used as applicable to Government, but it may be used as applicable to a landlord.

Now, although most of these words are ambiguous, the ambiguity is cleared up by that bond from which it appears that Moonnoo Singh borrowed money from the Ranee, in order that he might pay it into the King's Treasury on account of the revenue. We have then documents which are ambiguous explained by this other document, showing that, although the Ranee signed the Kabooliat, the Singhs paid the revenue. Then we have the evidence of the Kanoongoe, who says it was transferred into her name, but that she was Malzamin ; that the whole of the proprietary rights remained in the Singhs, and that they took all the profits and loss of the Zemindary.

Another question is, whether this alleged mortgage of 1254 Hijree, even if it was executed, did give the Ranee a title by way of conditional

mortgage. The document is set out at page 29 of the Record. It is dated 14th Jumudoolowul, 1254 Hijree, corresponding with 6th August, 1838. It stated that the mortgage was executed for the sum of rupees 1,588 : 2 : 3; that Kunnuck Singh had received the above amount in full, and appropriated it to his own use; that he had placed the agent of the said Ranee in possession of the Talookah; that it was thereby agreed that the said amount of mortgage should, within one year, be repaid by him from any available source to the said Ranee, together with interest at 2 per cent. *per mensem* and thus redeem the mortgage; that should he (the aforesaid mortgagor) fail to repay the loan within the stipulated period, the Ranee would be at liberty to execute to any other party a sub-mortgage of the Talookah in order to raise funds for the payment of the principal and interest due to her, or let the Talookah remain in her possession until the full liquidation." If this was a conditional mortgage to become absolute on the non-payment of the mortgage money within the time agreed, there would have been no necessity for the stipulation that, if the money should not be paid within the period mentioned, the Ranee would be at liberty to execute a mortgage to any one else for the purpose of raising money. Then it goes on, "If the mortgage loan is not paid off" (it does not say "If the mortgage loan is not paid off within the stipulated period") "neither the mortgagor nor his co-parceners, nor his heirs shall have any kind of claim to the profit or loss and proprietary rights relating to the mortgaged Talookah; that should any of his heirs, &c., hereafter prefer any claim about it, or raise any boundary dispute or other contentions against the Ranee or the tenants of the mortgaged Talookah, or should any of such heirs complain thereafter regarding the above to the ruler of the time being, the mortgagor should be held answerable to reply to such contentions, and the Ranee should have nothing to do with such claims or disputes. Hence this deed of mortgage is executed that it may be of use hereafter;" so that if any one should make any contention with her, the mortgagor was to answer those contentions.

It appears to their Lordships that this document was not an ordinary conditional sale to become absolute on the non-payment of the money, and

that it did not destroy the proprietary rights of the mortgagor. There is, however, in their Lordships' opinion, no evidence to prove that the Ranee was ever in possession, or that she ever enjoyed the profits of the estate under the mortgage, and, if not, the mere fact of its being thirty years old, and of its being produced by the heir of the mortgagee, was scarcely sufficient to justify the finding that it was executed. Their Lordships cannot, however, say that there was no evidence of the deed, and that the Financial Commissioner was wrong in holding, upon special appeal, that the deed was proved. But assuming it to have been executed, there is no evidence that the deed was ever acted upon by the Ranee, or that the mortgage debt remains unpaid, nor is there any evidence to prove that interest has ever been paid under it from the time of its execution, upwards of thirty years ago. If the Plaintiff could show that the Ranee entered into the estate as mortgagee, and enjoyed the profits of the estate, by virtue of the mortgage, he would make out a right as mortgagee; but he has not done this. She merely engaged for the Government revenue, but there is evidence that the defendant and his brothers enjoyed all the profits of the estate.

The Assistant Settlement Officer says in his Judgment that they would have been able to show that they had done this, had they only been farmers of the estate under the Ranee, as alleged by the Plaintiff. Of course, if they were merely farmers of the estate under the Ranee, and paid rent to her for the same, the Ranee must be considered as having been substantially in the enjoyment of the estate. But if they were farmers we should expect to find a lease, and to have a *Kabooliut* produced. It is not probable that they became farmers of so large an estate as one paying upwards of 8,178 rupees as revenue, without signing a *Kabooliut*, or that the Plaintiff would not have produced some evidence to show that they paid rent. It is shown that they enjoyed all the profits, but it is not shown that they paid any rent. The Plaintiff did not even attempt to show what the amount of the rent was that they were to pay: and there is this strong fact that the Plaintiffs, after the annexation of Oude, were allowed to enter into a summary settlement with the British Government

for the revenue of the estate in which they were treated as the Zemindars and proprietors, without any one coming forward to dispute their right, or to claim the settlement, until July 1864, when the Plaintiff, after the death of the Ranee, for the first time petitioned for the settlement.

No claim was ever made by the Ranee, or in her lifetime, for the settlement; nor does any claim appear to have been made upon the Defendant or his brothers for rent due from them as farmers of the estate under the Ranee, although it is clear that they have been treated as proprietors entitled to have a revenue settlement made with them, and have actually had pottahs granted to them by Government, and are in receipt of the profits of the estate.

Their Lordships do not think that it has been proved that the Defendants were farmers of the estate under the Ranee, or that they received the profits of the estate in that capacity.

If the Ranee had entered upon the estate under the mortgage, treating it as a mere usufructuary mortgage, or even if she had considered it as a Bybilwaffa, and entered and retained possession as the owner of the proprietary right, the Defendant and his brothers would have had nothing to do with the payment of the revenue to the native Government. But it appears that Moonnoo Singh was from time to time entering into engagements with reference to the revenue.

The mortgage was brought before the Settlement Officer for the purpose of proof, and, in the first instance, he thought it had not been proved; but subsequently he changed his opinion upon a suggestion made by the Pleader, and he admitted the document as proved. He says, in his Judgment of the 19th October, 1869, which is at page 49 of the Record, "There are two claimants to this estate as against Government, viz., Banee Singh Kussoore, as Talookdar of Oolrah, and whose title as ancestral proprietor is not denied, and Rajah Beharee Lall, the grandson and legal heir of Ranee Tota Ram. Banee Singh is termed No. 1 in these proceedings, and is now in actual possession. Rajah Beharee Lall (No. 2) claims on the ground that Moonnoo Singh and Kunnuck Singh (the brothers respectively of Banee Singh) mortgaged the estate to Ranee

Tota Ram in 1245, and as the Ranee held the Kabooliut repeatedly within the term, the Rajah claims that his title is good, both against Banee Singh by virtue of the mortgage of 1,245 Fuslee, and against Government by reason of the possession of the Ranee and the adequacy of the title obtained under the mortgage from the acknowledged proprietors. The issues fixed will be found on Record at page 8 of the file. The first and most important one is whether No. 1 (that is the Defendant) "has held the Kabooliut within the term or not." There he seems to have thought that the mere fact of holding the Kabooliut was important without reference to the title. He proceeds—"This issue, No. 1 (the Defendant) has been unable to prove; indeed, his vakeel has almost said that he never had so held, although he maintains that though he did not give Kabooliut, he remained in possession while Ranee Tota Ram was only Malzamin at Lucknow." It may be admitted, their Lordships think, that the Singhs did not after the date of that mortgage deed hold as Kabooliutdars under the native Government. Then, he says, "I am inclined to think that there is a good deal of truth in the latter part of their assertions, *i.e.*, that the Zemindars remained in possession, for they produced a formidable basket full of Putwaries' papers, extending over a great number of years; but these, of course, they would have been able to show had they only been farmers of their estate as alleged by No. 2 (the Plaintiff)." Their Lordships have already made a remark as to that, that if they had been farmers under the Ranee, some Kabooliut would have been proved, or some evidence at least given that they were paying rent, and it would have been shown what the amount of the rent was which they had to pay to the Ranee. If they had been paying rent as farmers under the Ranee down to the annexation of Oude in 1856, there would have been no difficulty in calling witnesses to prove that the Ranee had actually underlet to the Singhs the estate for which she had entered into settlement with the native Government. And evidence would have been given to show that they had paid rent to the Ranee; but nothing of the sort was proved.

The Settlement Officer, however, decided against the present Defendant (Plaintiff No. 1), upon the ground that he was not the Kabooliutdar under the

native Government. He says:—"In default, however, of proof of possession under our definition of the word which implies of necessity being Kabooliutdar, there can be no doubt that the claim of No. 1 falls to the ground, and he was accordingly informed that he must consider himself out of Court."

The case was appealed, and Major Thompson affirmed the Judgment, upon the ground that the present Defendant (Plaintiff No 1) had failed to show possession within the period of limitation. Afterwards the case came before the Financial Commissioner, who affirmed the Judgment which was that the claim of No. 1 (that is, the Defendant) should be dismissed, and decreed the proprietary right of the Oolrah estate to No. 2, that is to Rajah Beharee Lal, which, under the Act, he had the power to do in the settlement proceedings. It appears to their Lordships, however, that if the Ranee was not in possession under the mortgage deed, but was merely a Kabooliutdar under the native Government as Malzamin for the Singhs, whilst they paid the revenue and enjoyed the profits of the estate, the mere fact that she was the Kabooliutdar would not entitle her heir to be treated as proprietor, and to have the settlement made with him in preference to the Singhs. The Kanongo swore that the Singhs enjoyed the profits of the estate, and there being no evidence to show that they were exercising those proprietary rights as farmers of the Ranee, the inference is that the Kanongo was correct in his statement that they were exercising the proprietary rights in their own behalf, and that the Ranee was really contracting with the Government in the revenue settlement as Malzamin. She was not in of her own right, but merely on behalf of the Singhs, the real proprietors.

Now the question comes, was it necessary under the circular of the Financial Commissioner of 1868, that the person entitled to contract with the British Government under the summary settlement, was the person who had held a Kabooliut under the native Government? If holding a Kabooliut under the native Government was of itself sufficient to entitle the Ranee or her heir to enter into the revenue settlement with the British Government, all the Plaintiff need have alleged was this:—My

mother entered into a Kabooliut with the native Government, and as she was the person who entered into that Kabooliut, she is entitled to enter into the settlement with the British Government without any consideration as to whether she was the proprietor or not, for having entered into the Kabooliut with the native Government she is entitled to enter into the revenue settlement with the British Government although she may not have had the actual proprietary rights. The circular of 1868, referred to in the argument, had reference merely to the disposal of villages to which no one could establish an unquestionable proprietary right. It did not render it necessary that the proprietor of an estate should have been a Kabooliutdar under the native Government in order to entitle him to have the revenue settlement made with him by the British Government after the annexation. The circular was intended to deal with two classes of cases:—First. “Villages settled at the last or both summary settlements with the hereditary Zemindars, but which had not been in their possession within the twelve limitation years from 13th February, 1844, to 13th February, 1856, or, perhaps, for many years previously. 2ndly. “Villages in which the Malgoozars of the last or both summary settlements had no original proprietary title, but which had been held by them more or less continuously prior to annexation. The Singhs were not hereditary Zemindars who had not been in possession for the twelve years next before the annexation of Oude? They were proved by the Kanoongoo to be the hereditary Zemindars. They had been, in fact, exercising the rights of Zemindars, and had been during that period in possession of the proprietary rights, though the Kabooliuts under Government had not actually been in their names, and those rights were not proved to have been held under the Ranee.

Further, by Rule 6, it was directed that no proposals under the circular should be submitted until after the passing of a decree affirming the proprietary right of the Government. There had been no such decree in this case. The point in dispute was whether the proprietary right belonged to the Singhs or to the Plaintiff as heir of the Ranee. If the Ranee's heir had proved that the mortgage had been forfeited and had transferred to her the

proprietary rights, then these proprietary rights might have been decreed to her; or, if it had been proved that the Ranee was in possession under the revenue settlement with the native Government, and that the Singhs, who were apparently exercising proprietary rights, were merely exercising those rights because they held a lease of the Zemindary as her farmers, then those hereditary rights might have been decreed to her. But what is there here except an old mortgage deed to show that the original hereditary rights of the Singhs had been transferred to the Ranee. The Singhs, according to the evidence of the Kanongoo, remained in possession, and enjoyed all the profits of the estate, and there was no evidence that they ever paid either interest or rent to the Ranee. The only thing shown was, that the Ranee entered into the settlement with the native Government. It was said by the Settlement Officer that they might be exercising these proprietary rights, not because they were proprietors, but because they were farmers, but it was not proved that they were farmers. No evidence was given to show that the Ranee from the time of the annexation of 1856 down to the time of the claim being made by the heir at law in 1864, had ever asked the British Government to make the settlement with her. If she had thought herself entitled as the proprietor, would she not have come in and asked for the settlement to be made with her. She allowed the Singhs to obtain that settlement with the British Government, and there is not a vestige of evidence to show that she asked for or received from them a farthing of rent? If she was the real proprietor, why did she not ask them to pay rent, or ask to have the settlement made with her?

Then do they come within this first clause, "When a village of which the hereditary Zemindar got the summary settlement of 1858-59 is decreed to Government on the ground that the hereditary Zemindar had never held as proprietor in the twelve years immediately preceding annexation."

The Commissioner upheld the judgment of the Settlement Officer. He said, "It appears to me clear that the Appellant has failed to show *possession* within limitation, and that being so, he is, as the Settlement Officer remarks, put out of Court alto-

gether, and the suit lies between the Respondent and the Government ; at the same time I think the Settlement Officer was correct in allowing the Appellant to plead on the question of the Respondent's title as against Government. The Government has no interest in pressing its own title, or it may be important to the Appellant that the Respondent should fail, for on that event the Government would possibly waive its right in favour of the Appellant, who appears to be the old Zemindar. I am of opinion, moreover, that the Government would not be justified in pressing its claim against the Respondent merely for the sake of putting the Appellant into possession as a matter of favour, and now that the point has been made of the Respondent's title that the Appellant can partake of it, I think it clear the case of the Respondent is *prima facie* showing that the Government ought not to press its claim against the Respondent if there were no other suitor in the field, and therefore the suit cannot be pressed merely to show that of the Appellant, who has no legal standing in the Court, the claim he has been allowed to make the case as one having a secondary interest in the issue." Upon appeal, the Financial Officer affirmed the decision of the Commissioner, and again, upon a review, he remarked : "It was urged before me, in a special appeal it is true, that the deed of 1245 Fuslee could not be accepted, simply on the grounds that it was thirty years old ; but coupling this with the fact found by the Lower Courts, that the estate had been held by Review Respondent (Plaintiff) all through the period of limitation, I was compelled then as I am now to accept the Lower Court's findings. The transaction was an ordinary one of the Nawabi, but instead of some neighbouring Talookhadar getting hold of the estate, it was transferred to the family of a powerful official at Lucknow. It is to be regretted, no doubt, that Review Appellant's proprietary title should pass away from him, but, under the law, there is no help for it, and the Review Appeal is rejected with much regret."

Their Lordships are of opinion that the mere fact of the proprietor not having become a Kabooliutdar in his own name under the native Government did not disentitle him to have a settlement made with him after the annexation. They consider that the

Singhs were the proprietors of the Talook in question, and enjoyed all the proprietary rights belonging to it up to the time of annexation; that the Ranee entered into the Kabooliut with the native Government as Malzamin, and not in the exercise of any proprietary rights under the mortgage deed; that the Courts below were wrong in decreeing the proprietary right to Beharee Lall, and in putting Defendant out of Court simply upon the ground that he was not a Kabooliutdar under the native Government.

They will, therefore, humbly advise Her Majesty that this Appeal be allowed with costs; that the Decrees of the Lower Courts be reversed; that the Plaintiff's suit be dismissed; and that he be ordered to pay to the Defendant his costs in all the Lower Courts; and that, as between the Plaintiff and the Defendant in this suit, it be declared that the Revenue settlement ought to be made with the Defendant.

