Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakur Rohan Singh v. *Thakur Surat Singh, from the Court of the Judicial Commissioner of Oudh; delivered 6th December* 1884.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR RICHARD COUCH.

THIS case is one relating to title to immovable property, and their Lordships think the parties should present their case with some degree of substantial accuracy, and prove it as alleged; in other words, that their Lordships should deal with the case on the allegation and the proof.

The Plaintiff, Thakur Surat Singh, seeks to resume his right as to two villages, Newada and Gadiana. His petition, which will be found at page 3 of the Record, puts his case thus:—"That "Thakur Bharat Singh is the sanad holding "Talukdar of Taluka Atwa and Nasirpur, which "includes the villages of Newada and Gadiana. "According to the sanad granted to him by "Government under Act 1 of 1869, he possessed "all proprietary powers over the said villages, "and consequently he has made over in gift to "Plaintiff all his Taluka under a deed of gift "dated 31st August 1878." The allegation is that Surat Singh became the assignee of Bharat Singh's rights. The sanad gives him all proprietary rights subject to the rights of occupation, and other rights of parties who were in possession at the time of the grant, and which they might have established either as a matter

A 15483. 125.—1/85. Wt. 2406 E. & S.

A
45

of under-proprietary right or sub-settlement, or a right to be continued in occupation. So far, there is no controversy. He then alleges that the Defendant was lessee of the said villages under a lease for an unlimited term, —(it has been agreed in the course of the argument that "unlimited" is to be read as "undefined")—"at an annual jama of Rs. 1,628, the lease "having been granted by Thakur Bharat Singh "(the donor), whose successor Plaintiff is under "the deed of gift." If that were in controversy, their Lordships think there is evidence in the case which establishes that allegation; for whether the holding of the two villages was originally a separate holding of each, or a joint holding for Rs. 1,454, by the transaction which took place in 1865, at the time of the General Regular settlement of Oudh, that rent had been increased under circumstances to which their Lordships will refer, to Rs. 1,628 for both, without distinction, and would seem to have constituted a tenancy at that date, in 1865, of both villages at the consolidated rent of Rs. 1,628. The remainder of the petition of the Plaintiff is this. He alleges in substance that he had a right to resume possession; that he gave notice of his intention to resume; and the Defendant denied his right. These facts not being controverted, *primâ facie* establish the relation of landlord and tenant between the Plaintiff and Rohan Singh, who himself would be the lessee in 1865, and is the successor of the original grantee. Unfortunately there is no written statement on the part of the Defendant, but there is a verbal statement made at the Bar, very much resembling the old Common Law pleading "*ore tenus*." There is a verbal statement made by Mr. Sykes, counsel for Defendant, taken down by the Judge, which is tantamount to this:—"I admit your *primâ* "*facie* case, but my case displaces yours, and I

" will tell you what it is." Accordingly at page 15 we find that:—" Mr. Sykes states " the parties are descended from a common " ancestor, one Nuggar Sah. Defendant's adop- " tive father, Kesri Singh, got the property in " dispute"--that is the two villages—" in A.D. " 1826 (1233 F.) on a contract from Gunga " Baksh: that Kesri was to hold for ever, " at a rental which was a certain percentage " above the Government Revenue." Now that is a clear and precise case, and if the Defendant has sustained it in proof, he has a right to succeed here.

Their Lordships have considered the case, in the first instance, on the circumstances antecedent to the time, in 1858, when the confiscation of Oudh was declared. The main point to consider is, what title the Defendant had immediately before that confiscation. Mr. Sykes then, in his statement adds, " The amount payable during the Nawabi " being Rs. 1,454, at this rate Kesri Singh paid " during Nawabi, and up to 1271–72 F. In " 1272 F. (*i.e.* at regular settlement), on the " revenue assessment, on the whole Taluka being " increased, a corresponding increase in the " amount payable by Rohan Singh was made, " bringing the demand up to Rs. 1,628." With this explanation the rent is said to have been unchanged since 1826. " Prior to annexation " Kesri Singh had acquired sub-proprietary title " in this holding, and maintained that position " subsequent to annexation, and through his " successor up to date." The parties met before the Judge to discuss the case and settle issues. The Defendant's case was an admission that he had paid rent, and that the Plaintiff was the Talukdar to whom he had paid it; and that *primâ facie* imported the relation of landlord and tenant, which carried with it the right to resume possession on proper notice to quit. The Judge

very properly said to Defendant :—" The onus is " thrown upon you. You allege in answer to " that *primâ facie* case that you are a grantee of " a particular character, and I proceed now to " settle the issues between you." Ganga Singh had been the Talukdar under the Nawabi, and was the party entitled to the Taluk at the time of the grant to Kesri, and the Plaintiff is his successor of Ganga. The two real issues are, " Did " Kesri in 1826 acquire from Ganga Singh an " under-proprietary tenure (granted as compen- " sation for death of a relative in battle) in these " two ' villages,' subject to payment of a percen- " tage above Government revenue, and is such " tenure maintainable under present law?" Then secondly, " Independent of the specific grant " alleged, has the holding of Kesri been such as " to entitle him to an under-proprietary right?" Both issues lay on the Defendant.

Their Lordships would not be inclined to construe these issues adversely to the Defendant as to the terms, proprietary right, or otherwise, but they will consider whether he has established a right to remain as he is, paying the rents for these villages, and to remain there for ever; whether you call it a right to sub-settlement, or an under-proprietary right, or a right not to be disturbed, is not material. If the Defendant has shown a right to remain there undisturbed by the Plaintiff, their Lordships will give effect to that right.

It is remarkable that though the beginning of this grant is shown, we have not, on either side, a shred of documentary evidence to establish what it was. It is admitted that at its inception there was no writing. No documents, no accounts, have been produced. This case, extraordinary in its character, rests entirely on the parol evidence of two old witnesses, whose statements are said to be confirmed by the character of the

enjoyment. Their Lordships do not find it necessary to consider the law of Oudh under the Nawabi. It was said in the course of the argument that under the Nawabi a grant might have been made of the character which the Defendant seeks to set up unevidenced by writing. Their Lordships may entertain doubt as to whether such was the law of Oudh, but for the purposes of this case only, they will assume that the law under the Nawabi, was as alleged, that is to say, that such a claim as the Defendant sets up might have been established and maintained, though unevidenced by any written evidence, or any writing, or written contract, or grant. It is not pretended that there was any grant in writing; and the Defendant's witnesses gave evidence that there was none. Further, their Lordships cannot forget that the Defendant rests his title to both villages on one and the same grant, in perpetuity, at a rent to be varied at a certain percentage according to the Government Revenue.

Their Lordships will first deal with the case of the village Gadiana. That came into the possession of Kesri in 1838. There is not a word of evidence to establish what the circumstances were connected with the grant of that village. It plainly was not made in respect of the death of the two relatives, for if the statement which is made is to be believed, they died in battle over 12 years before. The grant as compensation in respect of their deaths would have been the grant of Newada. No witness tells us any circumstance connected with the grant of Gadiana, save that in 1838 Kesri got the village of Gadiana from Gunga Baksh at a rent originally of Rs. 400, afterwards increased to Rs. 450. The time or circumstances of the increase from Rs. 400 to Rs. 450 do not appear; Kesri continued to hold the village of Gadiana. He paid that rent, and was living at the time of the confiscation of 1858.

What was Kesri's title at the time of the confiscation to the village of Gadiana? He got it in 1838. He had been 20 years in possession. His possession appears to have been the ordinary possession of any person paying rent, that rent having been increased between the time of the original tenure of 1838 and 1858 from Rs. 400 to Rs. 450. It is said also that light is thrown upon the character of his possession by the fact that he exercised the zemindary rights. The evidence upon that is by no means satifactory. Nothing precise or specific is shown; and there is a mass of evidence on the other side, that in that particular district of country it was common for an ordinary lessee, who had no rights beyond those of a lessee, to exercise what are called zemindary rights. Nothing specific, however, is made out.

It appears to their Lordships that, as to Gadiana, it would be impossible to come to any other conclusion, consistently with the evidence, than that the allegation of the Defendant that he held this village from 1826, or even from 1838, under a grant for ever at a rent varying only with the amount of the Government Revenue, has not been proved. It appears to their Lordships that the case as to Gadiana is too plain to admit of discussion or argument; it utterly fails. Their Lordships will subsequently consider what took place after 1858, and see whether it could have conferred upon Defendant any greater right than Kesri had in 1858. The case fails as to Gadiana. One might say that, failing as to that, the Defendant failed as to the whole of his allegation, but their Lordships would be very slow to bind the Defendant in that way. If he has proved a case which entitles him to be protected from ejectment as to the other village, Newada, their Lordships would be prepared to give effect to that right, whatever it may have been; but they cannot shut

their eyes to this, that the allegation as to Gadiana has wholly failed, and it must reflect, and powerfully reflect, on the case that is made as to Newada.

The evidence as to Newada consists of the verbal statement of two witnesses, Myku Lal and Jhubbu. The one will be found at page 18, and the other at page 19 of the record. It must not be forgotten that the case of the Defendant is a perpetual grant out and out, once and for all, from generation to generation, of this village of Newada, at a certain rent. The evidence shows that the rent originally payable was Rs. 900, and probably an allowance for the chaukidar, subsequently increased, under circumstances to which their Lordships will hereafter allude, to Rs. 1,628, when joined to Gadiana. One witness is 75, and the other is 80 years of age, and they make a statement which it was not possible to contradict. Myku Lal, aged 75, says, "I knew Kesri Singh. He died about a "year after the mutiny. He held Newada and "Gadiana till his death. He had held for many "years—perhaps 50 years ago from this date. "Rohan Singh, Defendant, succeeded him." Then he states the circumstances of the fight, in which persons of the name of Mán and Chain figured. They were Dacoits. There is evidence in the case that those Dacoits were killed, 90 or 100 years ago The witness then gives an account of the fight in which two relatives of Kesri were killed. "On "the 11th day (ekadasa) Bhabuti Singh offered "Kesri money for his relations. Kesri said "he would not take money, but land. Newada "was at that time waste." That probably means waste and unoccupied—"and so Bhabuti "Sigh placed Kesri Singh there, telling him to "locate cultivators there, pay the Government "Revenue, and enjoy the zemindari rights. "Since that time Kesri Singh alone has exer-

" cised rights in Newada. He has granted maffi " and planted groves. I was servant of Kesri " Singh for one year when I was twenty years " old; I was present in the fight. Kesri Singh " paid the Chaukidar. The Patwari's pay came " from the Talukdar. Rohan Singh is own " nephew to Kesri Singh, who had no son. " Rohan Singh has succeeded to Kesri Singh's " property. Defendant takes all proprietary " rights in Newada and Gadiana." Cross-examined, he said:—" Nothing was written by " Bhabuti Singh in favor of Kesri Singh. Kesri " Singh was to pay the Government Revenue; " the amount was not stated. I do not know if " the village of Newada was assessed at all. " Kesri and Rohan did not engage direct with " the Government. I cannot say what amount " the Defendant and Kesri paid the Talukdar. " The Talukdar appointed the Patwari and Chau-" kidar." Now it will be observed that the statement made by that witness is not the creation of a holding at a rent; it is the statement of a verbal grant, in which not a word is said about rent: no rent at all of any kind; but he put him in possession with these absolute rights, and he was to pay the Government Revenue. That was the sole obligation imposed on him—not at Rs. 900—but to pay the Government Revenue. The evidence given absolutely contradicts that case. Their Lordships do not mean to say it contradicts it in this respect, that in some right or other Kesri then got Newada, but that he got it in the right which this witness describes under such circumstances as that a grant for ever might be implied from it is absolutely contradictory. His statement is, that he was to exercise the zemindari rights and to pay the Government Revenue, but no more.

The second witness, Jhubbu, says:—" Kesri " Singth held them till his death, and after him

" Rohan Singh. Defendant Kesri first got pos-
" session 50 or 55 years ago. On the 'Ekadasa.'
" Bhatubi Singh came to Kesri and offered him
" some money. This was declined. Bhabuti
" Singh then located him in Newada, and told
" him to get cultivators and enjoy the zemindari
" rights and pay the Revenue," and about a year or two afterwards he got Gaciana. The evidence of that witness is in substance the same as the evidence of the other. It shows, if they are to be believed, a grant under circumstances from which fairly some implication might be made of a continuing grant, but which, in its main particulars, is contradicted by the other evidence in the case. It is now proved beyond doubt that, so far from getting the village subject to no rent, Kesri was to pay the Talukdar Rs. 900, with an allowance of Rs. 50 to pay the Chaukidar, and that he did not pay the Government Revenue; at all events there is no evidence that he ever had dealt with the Government. The evidence is that it was subject to a rent of Rs. 950, and that rent he paid.

It remains now to consider whether, upon the evidence of these two witnesses, contradicted as it is by the other evidence in the case, and supported only by the alleged exercise of zemindari rights, which have already been adverted to, their Lordships could fairly draw any inference that the village of Newada had been granted, or was intended to be granted by Gunga Singh, or his son, to Kesri for ever, to hold from goneration to generation, at a fixed rent, variable only according to the change that might take place in the Government Revenue? Their Lordships would be very willing indeed to draw any reasonable inference in favour of a party who has so long enjoyed certain rights; but what their Lordships are here asked to do is to invent a grant, to define its terms, to define the rent not

mentioned at the time of the original supposed grant, and further to come to the conclusion that Kesri had got a grant for ever. There is nothing intermediate. It is not alleged to be for the life of Kesri, or for the life of Rohan. It is either an ordinary lease granted by the Talukdar to Kesri, as a reward for the services of his family, at a rent profitable to him, but with the incident that it might be resumed upon proper notice by the Talukdar, or it is a grant for ever. Their Lordships are now asked, in a case where the commencement of Defendant's title is shown, to invent a grant in all its terms, and convert it into a holding for ever, by the descendants of Kesri. Their Lordships feel, dealing with the title of Kesri as it stood in 1858, and quite irrespective of the subsequent increase of rent, there are no circumstances from which they could reasonably come to the inference that in 1858, even as to the village of Newada alone, Kesri had any such title as alleged.

In 1858 came the confiscation of Oudh; the result of which was the determination of all existing interest, and taking them into the hands of the Government. But the Government of India did not intend any such injustice as an absolute confiscation of those rights. In certain instances, where Talukdars or others had been guilty of great crimes, absolute confiscation did take place; but otherwise it was intended, under certain regulations, to settle and restore the Talukdars, and to protect, as far as necessary, by sub-settlement, or by some other process, the existing rights of the occupiers. It will therefore be seen how necessary it is to inquire what those rights were at the time of the confiscation; for though in the letter of Lord Canning in 1859, and in the subsequent circulars which were issued from time to time, every intention is shown to do justice to all the parties, and to

compel the Talukdars to do justice to the occupiers, yet there is nothing to show any intention to advance beyond what the rights were at the time of the confiscation, and the intention was generally to restore and to protect those rights. The Defendant says:—"But I had a right to a sub-settlement of some kind or other." Their Lordships will not at present go into the distinction between a sub-proprietary right or a right to a sub-settlement, and a right to be protected in the occupation which a person already had, nor bind the Defendant too nicely by those terms; but they will take it that, if he had a right, he might have protected it under the Act of Settlement of Oudh, or some one of the circulars and rules which are adopted and confirmed by that Act. He might have protected that right by either getting a sub-settlement or a recognition of his existing title or possession. What took place was this, and it also depends on the evidence of two witnesses at pages 22 and 23. The possession, it is to be observed, was not disturbed by the confiscation. The Talukdar remained as he was, and the occupying tenants remained as they were. Then came the Settlement of 1861, which was only temporary. The witness Canogi says, "Rohan Singh, after the mutiny, wanted to file "a petition, but Bharat Singh said, 'There "'will be confusion in the estate; pay what "'you used to pay'"—and that in consequence of that he did not file a petition to protect his right, whatever it might have been. Again, a subsequent witness, Omaid Singh, says:—"At "the settlement after the mutiny, Bharat Singh "came to Naihra, and stopped at the well. "Rohan Singh said the Government called for "petitions. Thakur Bharat Singh said:—'If "'you petition, my Taluka will be broken up. "'Do zemindari as hitherto, and remain in the "'Taluka.'" The Defendant relies upon that

evidence. Bharat Singh was not produced as a witness, There is objection on the part of the high class Hindoos to appear as witnesses in a Court of Justice. The more pregnant observation to be made is that this equitable contract, or whatever it is, was made with Rohan Singh, on whom the issue lay, whose title, if he has any, may rest upon this altogether; and he is not called as a witness. Their Lordships cannot tell whether he was present at the trial or not, but it strikes them as a very remarkable fact that Rohan Singh, the Defendant and party to this alleged agreement, was not called. Well, then, it rests on the conversation represented to have been overheard by two witnesses, nearly 20 years before the institution of this suit, and being uncontradicted, their Lordships would be quite prepared to consider it; but it is obvious it could only take effect to establish such right as Kesri Singh had before the confiscation. As has been pointed out, the real point, therefore, for their Lordships to inquire into, is, what title had Kesri at the time of the confiscation? Their Lordships have been obliged to come to the conclusion upon the evidence that Kesri at that time had no more than a lessee's right, subject to resumption at the will of the landlord upon giving proper notice. The view their Lordships take of it is this, putting it in the largest way for the Defendant, that the parties at that time probably did not understand exactly what this sub-settlement or re-arrangement was; that Bharat Singh, anxious to get his Taluk in safety, was unwilling that there should be any petitions; and what he says is substantially this: "It might create disturbance, it might break up "the Taluka; and whatever rights you now have "I will preserve;" and to that extent their Lordships would be fully prepared to give effect to this agreement, if such it can be called,

but unfortunately in giving effect to that, they could only give effect to and protect the interest which the lessee had in 1858. The case goes a step further, because it is alleged that a transaction took place subsequently which established the right of the Defendant to hold these two villages for ever. The allegation in the defence is that there had been an agreement between Bharat Singh and the present Defendant; that the Defendant, agreeing to pay an increased rent, should hold two villages for ever at that increased rent. Let us see what that transaction was, and whether, in place of supporting the Defendant's case, it does not go far to destroy it. It is thus described by the two witnesses:—"At "the Regular Settlement Rohan Singh went to "Hakaura," (the Regular Settlement was in 1865, four years after the alleged conversation) "being called by Bharat Singh, who said "that the Revenue had been assessed heavy;" not that Rohan Singh's was heavy, but that the Talukdar's Revenue had been assessed heavy; "that "he had to pay Rs. 1,022 on Newada and Gadiana, "and he demanded from Rohan Rs. 511, Rs. 48, "for Chaukidar, and Rs. 47 for Patwari; since "that Rohan Sigh has paid Rs. 1,628." The exact sums are, Rs. 1,022; Rs. 511; Rs. 48; and Rs. 47, which just make up the Rs. 1,628. There is not a word said to this effect:—"If you will "pay the increased rent, I will maintain you in "possession." It is the simple case of a Talukdar whose payment to the Government had been increased going to his tenant and saying:—"I "must now increase your rent I have to pay "more myself, and you must pay me more," and in addition to paying for the Chaukidars, he pays for the Patwari, and he pays such a sum as, above the Government Revenue, and over those two payments, will leave a clear profit of Rs. 511 at least going into the hands of the Talukdar. But

it is not shown what the increase of Government Revenue was. It is not shown that the increase of rent by Rs. 174 had any relation, or what relation to the increase of Government Revenue. It simply shows that the two villages appear to have been consolidated, and that they are held together at a consolidated rent which exceeds by Rs. 174 annually what had been paid before. Their Lordships have already stated their view that he had only the title of an ordinary lessee, subject to the acknowledged right of the landlord to resume upon giving due notice. If there was a contract in 1861, it was a contract only to maintain Rohan Singh in that which his ancestor had at the time of the settlement, and nothing more; and the transaction of 1865, in place of establishing any title greater than that of an ordinary tenant in Rohan Singh, simply shows that he agreed to hold at an increased rent, and without any stipulation that his tenure was to be, as it is now alleged to be, a tenure for ever.

Their Lordships do not consider it necessary to express any opinion on the questions of law which have been raised. The facts of the case establish that the decision of the Judicial Commissioner of Oudh was correct, and that the Defendant failed to establish his case upon the facts. Many cases have been cited, and a very interesting argument has taken place upon the effect of the rules and Legislative Acts with regard to confiscation in Oudh. Their Lordships have also had these rules illustrated by a number of decisions to which Mr. Sykes referred. It appears to their Lordships quite unnecessary to deal with any of those decisions, or any of those cases. This Defendant has not been protected by any sub-settlement. There has been no Government recognition of his right. Their Lordships arrive at the conclusion that he is probably in as good

a position as if his right, whatever it was, had been recognised in some way under the rules regulating the settlement of Oudh. But what was that right, to which only we can give effect? Their Lordships have already pointed out what the right was in 1858, and nothing that has occurred since that has given greater effect to, or increased that right.

Their Lordships therefore think that the decision of the District Judge was erroneous, especially when he says that while holding there was no evidence of any grant, and the evidence entirely failed, he still comes to the conclusion that time and undisturbed enjoyment had ripened this holding into a species of ownership; and again, Defendant had acquired by prescription a holding such as to entitle him to all under-proprietary right. Such propositions are wholly inapplicable to such a case as this, where the origin of the tenancy is shown at a rent twice increased, and paid down to the commencement of the suit. In such a case, length of enjoyment, coupled with the payment of rent, can give no greater force to Defendant's right than it originally possessed. Their Lordships have come to the conclusion that the decision of the Judicial Commissioner of Oudh was correct. They do not adopt some of his reasons, but they adopt his conclusion.

Their Lordships will therefore humbly advise Her Majesty to affirm the Decree of the Judicial Commissioner, and to dismiss this Appeal. The costs will be paid by the Appellant.