Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hurropersaud Roy Chowdhry and another v. *Shamapersaud Roy Chowdhry and others, from the High Court of Judicature at Fort William in Bengal; delivered* 19*th January* 1878.

Present:

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

THE transaction out of which this suit arose occurred nearly half a century ago, and from it has flowed a continuous stream of litigation, not in all respects creditable to the earlier tribunals of India, down to the present day. A history of that litigation, given shortly and clearly, will be found in a report, in the 8th volume of Moore's Indian Appeals, of a Judgment of this Committee, which was delivered on the occasion to be hereafter mentioned. Their Lordships deem it enough to refer to that case without recapitulating the history, inasmuch as the facts necessary to the determination of the points now before them need no very lengthened statement.

Two brothers, Doorgapersand Chowdhry and Tarapersand Chowdhry, of whom Doorga was the elder, entered into an agreement of compromise for the purpose of settling disputes then pending between them on the 4th of April 1829. That agreement of compromise may be sufficiently described for the present purpose as one whereby in substance the elder brother took ten sixteenths of the ancestral property, and the younger

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brother six sixteenths. Tara, the younger brother, disputed this compromise upon various grounds; but it was affirmed by the Court, which was then called the Provincial Court, on the 2nd of September 1829. Tara appealed from that decision to the Court of Sudder Dewanny Adawlut, and the Court of Sudder Dewanny Adawlut affirmed the decision of the Provincial Court and directed possession to be given to Tara of his portion of the property. Tara accepted this decision and endeavoured to obtain his rights under it, and his first step for that purpose was to apply to Mr. Ross, one of the Judges of the Court of Sudder Dewanny Adawlut, who, in concurrence with Mr. Walpole, each sitting alone, had given the Judgment affirming the decree of the Provincial Court, to order wasilat to be given him. The decree had only decreed possession. The application was made under a circular order, which empowered the Court in such cases to award wasilat to be recovered by proceedings in execution; and it claimed wasilat from the date of the decision of the Provincial Court. Mr. Ross so far complied with this request as to order wasilat, not from the date when it was claimed, but from the 4th July 1832, the date at which the decision of the Sudder Dewaney Adawlut Court had been given.

The history of the litigation during the next 20 years may be thus summarised. Tara pursued every legal means in his power to obtain his rights under that decree; that is to say, to obtain possession of the property and wasilat or the mesne profits for the period during which possession of it had been withheld. The elder brother Doorga endeavoured to defeat his claims by a variety of excuses and pretences, all of which have been found to be false. Tara succeeded in obtaining from time to time possession of certain portions of the property, but he

never appears to have succeeded in obtaining any wasilat. It may be enough, however, to pass on to the year 1853, when Tara obtained an order from Mr. Money for a sum of Rs. 40,000 wasilat, and a considerable amount of interest. Doorga appealed against that order on the ground, which he appears to have raised then for the first time, that Mr. Ross, who made the original order in respect of the wasilat in 1832, had acted without jurisdiction, inasmuch as he could not make the order without the concurrence of his colleague Mr. Walpole, and the Court of Sudder Dewanny Adawlut gave effect to this objection. So that the Court of Sudder Dewanny Adawlut in effect ruled that all the litigation which had gone on for 20 years was absolutely fruitless.

Under those circumstances Tara instituted the present suit in December 1853. Tara and Doorga have long since died, and this appeal is now prosecuted and defended on behalf of their representatives.

The suit came on to be heard before the Principal Sudder Ameen of the day, and he decided that the Statute of Limitations was a bar to the claim of Tara to wasilat for more than 12 years before the commencement of the suit. But for those 12 years he gave him wasilat, calculated upon the footing of certain hustabood papers which were put in by the Plaintiff. The Plaintiff contended that he was entitled to avail himself of those hustabood papers on this ground: he said "the hustabood " is my rent-roll of a certain portion of lands " which have been made over to me by my " brother. This is some evidence in the absence " of contradictory evidence of what the rent " was before it was handed over, and therefore " of the wasilat or mesne profits to which I am " entitled." These hustabood papers had been received in the abortive proceedings which

have been referred to, and were received in this case by the Principal Sudder Ameen. There were cross appeals from this judgment, and the case came before the Sudder Dewanny and Adawlut in the year 1857, whereupon that Court reversed the decision of the Principal Sudder Ameen, holding that the Statute of Limitations was not a bar to any portion of the claim, and remanded the case to be retried *ab initio*, as they expressed it. This judgment of the Sudder Dewanny Adawlut was on appeal affirmed by this Board in the judgment before referred to; their Lordships holding that the Statute of Limitations did not apply to Tara's demand, because he had instituted *bonâ fide*, though ineffectual, proceedings for the purpose of obtaining his rights,—not, as they expressed it, under the agreement alone, but under the judgment enforcing it.

The case was then tried on the remand by another Principal Sudder Ameen. He found that the Plaintiff was entitled to wasilat from the date of the first judicial decision, in September 1829, of the Provincial Court. On the question of the amount of wasilat he rejected the hustabood papers, and valued the land at one rupee per beegah. With reference to the question of interest, he decreed interest to the Plaintiff from the date of the decree, holding that the claim of wasilat must be considered as then for the first time settled and liquidated.

From that decree there was an appeal to the High Court, which varied the decision of the Principal Sudder Ameen as to the time from which the right of the Plaintiff to wasilat commenced, decreeing that it commenced not from the decision of the Provincial Court in 1829, but from the decision of the Sudder Dewanny Adawlut Court in 1832; they affirmed the decree in other respects. From that judgment

of the High Court the present appeal is preferred.

The questions now before their Lordships are—first, from what time the right to wasilat commenced; secondly, what should be the amount of wasilat; and thirdly, what the amount of interest, if any, upon the wasilat. Upon the first question it is desirable to look to the terms of the two judgments that have been referred to. The first judgment affirming the compromise is to be found recited (it is nowhere found separately) in the judgment of the Court of Sudder Dewanny Adawlut in these terms: "It is ordered that the deed of "compromise and release be admitted, that the "case be struck off the file of this Court, "and that the parties conform to these stipula-"tions. The Court on becoming acquainted with "it shall enforce the observance of the same on "the refusing party."

Now one of the stipulations was that Doorga, the elder brother, who was in possession of the property, should relinquish to his younger brother six sixteenths. It therefore appears to their Lordships that the direction to conform to these stipulations is a direction, though possibly an informal one, that Tara should be put in possession of that property. This decision was confirmed in these terms by the Court of Sudder Dewanny Adawlut: "There-"fore, in concurrence with the aforesaid gentle-"man"—that is the Judge of the previous Court—"Ordered, that the appeal preferred by "the Appellant be dismissed, and that the "decision passed in the Provincial Court of "Appeal, dated the 2nd of September 1829, be "affirmed; that should the Appellant, agreeably "to the deeds of compromise, not have received "possession of his share, he be put in possession "of the same on the execution of the decree."

It appears to their Lordships that this decree of the Sudder Dewanny Adawlut must not be taken as establishing for the first time any new right of either of these parties, but as simply affirming, with an explanation, for it is nothing more, the former decree. The rights of the parties, therefore, depend upon the former decree, and it is the former decree which is effective, and which had to be executed. It appears to their Lordships, therefore, that Doorga after the first decree, receiving as he did all the rents and profits of the property, received the rent of six sixteenths of it for the use of his brother, and that he is bound to account to his brother for those rents and profits. They, therefore, agree with the view taken by the Principal Sudder Ameen upon this question, and disagree with that taken by the High Court.

The second question is as to the amount of wasilat. It has been contended that the Principal Sudder Ameen was bound to accept those hustabood papers as fixing the rate of wasilat, which undoubtedly was a good deal higher than the rate which he allowed. He was bound to do so, it is said, because they had been accepted by the previous Sudder Ameen, and by the Courts in former proceedings. But their Lordships do not concur in this view. It may be well here to read the terms in which the judgment of the Court remanding the case is couched. "As "this judgment reopens the question of wasilat "from the date of the deeds of adjustment, "the whole evidence on that matter will require "reconsideration. We therefore remand the "case, that the whole question of wasilat may "be taken up and considered *ab initio*."

If the Court had expressed themselves satisfied with the award of wasilat within the last 12 years, and only directed an inquiry as to the additional wasilat accruing before that time, they

might have so expressed themselves, but their Lordships think it probable that they expressed themselves as they have because there was a cross appeal, in which the validity of these hustabood papers would have been disputed, abstaining from giving judgment upon that question, and remitting the whole matter to the Principal Sudder Ameen. The Principal Sudder Ameen expressed himself as dissatisfied with those hustabood papers, which appear to have been put in, but of which, as far as it appears, there does not seem to have been any proof given to him, although some proof seems to have been given of them on former occasions. He describes them as concocted at home by the Plaintiff, and questions their genuineness chiefly on the ground that they give an annual value to the property greater than that which it bore at the time of his judgment; the value of land having notoriously very much increased since the wasilat claimed had accrued. He also observes that he directed, for the benefit of the Plaintiff, an inquiry before an Ameen as to the value, which the Plaintiff declined. Under these circumstances he forms, undoubtedly, a somewhat rough estimate of the annual value of the property as one rupee per beegah. It may be that, under the circumstances, the Principal Sudder Ameen might have been justified in accepting and acting upon these hustabood papers, but it is quite another question whether their Lordships are to say that he was bound to act upon them. It appears to their Lordships that this is a decision upon questions of fact, namely, the genuineness of these hustabood papers, and the actual value of the land, and that decision having been affirmed by the High Court they see no sufficient reason to take this case out of the ordinary rule, whereby they affirm a decision on a question of fact, come to by two Courts.

The remaining question is that of interest. And here it may be as well to refer to the terms of the statute, Act XXXII. of 1839, very much in accordance with the statute of 3 & 4 William IV. in this country, which has given rise to a great number of decisions, all of which are not easily reconcilable. The words of the section are: "It is therefore hereby enacted "that upon all debts or sums certain, payable "at a certain time or otherwise, the Court before "which such debts or sums may be recovered "may, if it shall think fit, allow interest to the "creditor at a rate not exceeding the current "rate of interest from the time when such debts "or sums certain were payable, if such debts or "sums be payable by virtue of some written "instrument at a certain time, or if payable "otherwise, then from the time when demand "of payment shall have been made in writing, "so as such demand shall give notice to the "debtor that interest will be claimed from the "date of such demand until the term of pay-"ment." If the statute had stopped here it might be that the Principal Sudder Ameen and the Court were right in saying that there was no actual ascertained or liquidated demand until the wasilat was determined by the decree. But these words follow: "Provided "that interest shall be payable in all cases in "which it is now payable by law." And that refers their Lordships to the state of the law and the practice in India independently of the statute. They have taken some pains to ascertain what that law and practice has been, and have been referred to a number of cases upon the subject. It may be enough now to quote a case, which is to be found reported in Carrau's cases in the Presidency Sudder Court of the date of 1850, where certain resolutions were come to at a sitting of all the Judges of the Court, and among those resolutions was this:

" Interest on mesne profits may be awarded as " of course from date of suit in a decree; when, " however, interest is awarded from an earlier " or from a later date than of suit special reasons " should be assigned in the decree." Their Lordships find that this resolution has been, to a great degree, acted upon in subsequent cases, indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided. But having regard to the circumstances of this case, and among them may be stated the very great delay, which has not been thoroughly explained, in the prosecution of this Appeal, their Lordships think it enough that the Plaintiff should have a decree for interest upon the mesne profits decreed to be calculated from the commencement of the suits up to the date of the decree. The decree will carry interest on the whole amount decreed from its date, at the usual rate of 12 per cent.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Principal Sudder Ameen be affirmed as to the amount decreed to the Plaintiff for mesne profits, and reversed as to the residue, and that it be ordered that the Defendant pay to the Plaintiff interest on the amount decreed for mesne profits at the rate of 6 per cent. per annum, to be calculated from the date of the commencement of the suit to the date of the decree of the 18th February 1861, and that the costs in the first Court be ascertained and be paid by the parties respectively in proportion to the amount to be decreed and disallowed by the decree so to be amended, and that the Defendant do pay interest at the rate of 12 per cent. per annum upon the total amount to be decreed by the

decree so to be amended as aforesaid, from the date of the decree of the 18th February 1861 to the date of realization; that the costs of the appeal in the High Court be assessed and ordered to be paid by the parties to that appeal respectively in proportion to the amounts to be decreed and disallowed by the decree to be amended as aforesaid. And it will be ordered that the Respondents do pay the costs of this Appeal.