Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ahmud Hussein Khan v. *Nihaluddin Khan, from the Court of the Commissioner of Fyzabad Division, Oudh; delivered March 16th*, 1883.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THIS is a suit between two brothers, the sons of Mahomed Hossein Khan, who died in November 1863. The Plaintiff in the suit, the Respondent before their Lordships, was the second son of Mahomed Hossein Khan, and the Defendant, the Appellant, was the elder son. It appears that upon the death of their father there was considerable litigation between the brothers with regard to the right to the estate of the father. That litigation began in 1863, and the result of it was that the Defendant, the Appellant, was declared to be entitled to the estate. After that the Respondent brought a suit against his brother in which he claimed to recover Rs. 19,600 for arrears of maintenance for 11 years and 8 months, viz., from the 1st July 1866 to the end of February 1878, at Rs. 140 a month, and a declaration of his right to maintenance in perpetuity, and to have it judicially declared that the maintenance was a debt due from the estate of Kalispur, situated in the Lucknow district, as also from Mamni and Motka, being the estates which the Defendant had recovered by means of the litigation. He

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appears to have fixed the 1st July 1866 for the beginning of this claim for maintenance, and claimed arrears from that date, as being the day on which he was himself dispossessed of the estate and the Defendant got possession of it. His case was that he was legally entitled to maintenance at the rate of Rs. 140 a month from the estate of his deceased father; and in his plaint he founded his claim upon an order of the Deputy Commissioner of Lucknow in a suit between the father and Mussumat Bibi Fatima his grandmother and the present Defendant, who was the Plaintiff in that suit. He also said that he was dispossessed of the property under an order dated 29th June 1865, which was upheld by Her Majesty in Council. The Defendant, by his written statement, set up various answers to the claim. The material defences were that the Plaintiff was not entitled to any maintenance as the son of Mahomed Hossein; that the claim was barred by limitation, as the Plaintiff himself said that he had not received maintenance since September 1863, and that the Defendant was not bound by the document which was filed by Bibi Fatima, being a document alluded to in the plaint, nor by any document filed by Mahomed Hossein; and lastly, in the 11th paragraph of his written statement, he alleged that the claim was barred by the fact of its being *res judicata*. Issues were settled which raised what are the substantial questions between the parties, and they were: 1, Is the suit barred by *res judicata?* 2, Is the suit barred by limitation? and, 3 and 4, which may be taken together, Was the Plaintiff entitled to the maintenance, and if so at what rate, and from whom? Both the Lower Courts have made decrees in favour of the Plaintiff, and the Defendant has appealed to Her Majesty in Council from the decree of the Commissioner which affirmed the decree of the First Court.

With regard to the first question, whether the suit was barred by *res judicata*, the document which is relied upon by the Defendant appears to be an order made in a suit brought by the Plaintiff against Mahomed Hossein the father, in which he claimed to be entitled to a monthly allowance for maintenance founded on some Ikrarnama, which would appear to have been executed by the grandmother, who had the management of the property in consequence of Mahomed Hossein being incapable of taking care of his affairs. That is clearly not an order which would be *res judicata* in the present suit. It was not an adjudication between these parties but between the Plaintiff and his father, and it was altogether upon a different sort of claim. There is no ground for saying that the Lower Courts were wrong in deciding against the Defendant upon that issue.

Another question was raised which perhaps it may be well for their Lordships to notice. It was said that, there being an agreement, which will be presently mentioned, and which was put in as evidence on behalf of the Plaintiff, a suit should have been brought upon that and not in the present form. If there had been ground for this objection, it might and should have been taken when the Defendant appealed to the Commissioner. It was said that he could not know of the objection when the written statement was filed, because the agreement was produced for the first time at the hearing of the cause when evidence was given, and it had not been filed; but after the hearing, and after the production of the agreement, the Defendant knew perfectly well that it was being used against him, and when he made his appeal to the Commissioner he could have taken this objection. If there is any ground for the objection it cannot be taken in the present stage of the proceedings.

The next question, in the order in which the issues were framed, is the law of limitation; but perhaps it will be better first to consider the other, which is the main question in the case, and which arises upon the third and fourth issues, namely, whether the Plaintiff is entitled to receive the maintenance.

The Lower Courts have come to this conclusion upon that question: As to his being entitled to receive the maintenance. The officiating Deputy Commissioner says:—"Moreover it appears to "me that the Defendant, as Maafidar, merely "takes that estate in trust, subject to the rent-"charges, and that he is bound to pay the "stipends with which the estate is charged. "Sanad or act of government does not absolve "him from this charge. As regards Plaintiff's "right to the allowance claimed, there is, in my "opinion, no doubt; the documentary evidence "referred to and filed fully establishes this fact, "that the cadets of the family were assigned "certain specified allowances, payable to them "from the estate by the eldest male member "managing the estate." The Commissioner says, "Regarding the payment of the allowance, I "consider the evidence in the file of the Lower "Court amply sufficient. It clearly establishes "that the cadets of the family were assigned "certain allowances payable to them from the "estate by the eldest uncle in possession." There is this finding of both the Courts to the effect that the allowance for maintenance was charged upon the estate; and there is evidence in the case upon which they might well come to that conclusion.

It appears that in December 1869 the parties came to an agreement. The Defendant's part of agreement states "That Mohammad Neha-"luddin Khan"—that is, the Plaintiff—"has "waived his claim to succession of the

" estate, and, having filed a registered deed of " compromise (Razinama) in Court, has caused " the suit to be withdrawn. That for his " personal expenses I have fixed an allowance of " Rs. 75 per mensem for a term of one year, and " then for the next six years Rs. 100 a month; " and as at present I am very much in debt, " owing to the law expenses incurred, so much " so that many of my Maafi (revenue-free) " villages are mortgaged and hypothecated and " the estate yields very little profits, I cannot " afford at present to pay the old allowance of " Rs. 140 per mensem to Mohammad Nehaluddin " Khan. But after the expiration of the afore- " said term of seven years I shall continue to " disburse the old pay of Rs. 140 a month in " perpetuity. If at any time I may offer any " objection or hesitate in paying up each of the " three descriptions of monthly allowances, " Mohammad Nehaluddin Khan will be at liberty " to realise the same by a suit in Court. If for " my own necessity I may mortgage or hypo- " thecate the Maafi villages, so that the property " left may be insufficient to meet the monthly " allowance fixed, I will in that case pay the " said allowance out of the estate Khalispur " Ameliha." And there is a corresponding agreement, of the same date, by the Plaintiff, which recognises this agreement. This document was put in by the Plaintiff, and formed a very important part of the evidence in support of his case. Besides that, there was evidence of some previous proceedings with reference to this estate and the allowances for maintenance, in which there was a report of the Extra Assistant Commissioner of Lucknow made under the order of the Deputy Commissioner, stating that, in the opinion of the Extra Assistant Commissioner, it was proved that the parties mentioned received the allowances shown

opposite to their names. There is mentioned the name of "Nihalooddeen Khan, Rs. 140," which would seem to be the allowance that was at one time paid. Their Lordships think that the Lower Courts, with this evidence before them, were quite justified in finding that the Plaintiff was entitled to an allowance for his maintenance as a charge upon the property which had come from the father, Mahomed Hossein Khan. If that is the case, the plea of the law of limitation is answered, because it is shown that the maintenance was a charge upon the property, and 12 years is the term which is applicable to the suit. The Plaintiff only seeks to recover arrears from the 1st of July 1866, which is within the 12 years. Therefore the issue raised as to the law of limitation was properly found against the Defendant.

But there remains this question: Although it would appear that at one time Rs. 140 had been paid monthly for the maintenance, when the parties came to the agreement which has been read, in consequence apparently of the state of the property, the Plaintiff was willing to receive less than the Rs. 140 for a part of the time. It was then arranged that Rs. 75 should be paid from the date of that agreement for the year 1870; that Rs. 100 should be paid up to the 14th December 1876, and after that time that the Rs. 140 should be paid. Now the Plaintiff's case was mainly supported by this agreement, Exhibit A.: it was put forward at the outset of the case as his evidence by the pleader who appeared for him; and it does seem right that he ought not to be allowed to recover more than he agreed by that document to receive. If he had had to sue upon the agreement he could only have recovered that. He has sued in a different

way; but their Lordships are of opinion that this is all that he ought to recover in the present suit.

The consequence will be that their Lordships will humbly advise Her Majesty that the decree which has been made in the Plaintiff's favour by the Lower Courts should be altered by giving to the Plaintiff the arrears, calculated in the manner provided for in the agreement, with interest upon those arrears from the date of the decree at the same rate as has been given by the Lower Courts upon the sum which they awarded. The decrees of the Lower Courts as to the costs will stand, and with regard to the costs of this Appeal the Respondent has really substantially succeeded in it. The objections of law which were taken by the Appellant, and without which he would have had no right of appeal, have entirely failed, and their Lordships therefore think that the Appellant ought to pay the costs of the Appeal.