Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Upendra Krishna Mandal, Executor of the Will of Kali Krishna Mandal (deceased) v. Ismail Khan Mahomed, from the High Court of Judicature at Fort William in Bengal; delivered the 26th July 1904.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

(*Delivered by Lord Robertson.*)

The lands in dispute in this suit, which are about two bighas in extent, are situated in Khiderpur, a suburb of Calcutta within municipal limits. They are now covered for the most part with tiled huts and a one-storied building occupied as a house or shop. Some apparent complications are introduced into the case by a sub-division of the property; but this partition may be disregarded for the purposes of the present question.

The disputed ground admittedly falls within the confines of a lease granted to the Respondent in 1895 by Syed Ashraf-ud-din Ahmed, who was Matwali of the Hooghly Imambara; and the theory of the suit of ejectment brought by the Respondent is that the Appellant is a tenant at will. The Appellant's answer is that he has, as against the Respondent, an independent permanent right to the ground in dispute.

Various questions, much discussed in the Courts below, have been eliminated from the controversy, and it is no longer necessary to

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discuss the Bengal Tenancy Act, which does not apply. The true matter of controversy is whether the Appellant has not made out that he and his predecessors have held under a grant of a permanent transmissible and inheritable right.

The case of the Appellant rests, in the first place, upon a series of transmissions of the property by sale and mortgage which go back as far as 1826, and the continuous possession of his predecessors in title at an unaltered rent. It is unnecessary to examine these transmissions in detail; it is sufficient to say that what is sold and bought and what is mortgaged purports in each case to be a permanent inheritable right. The answer of the Respondent is that these transactions are not recognised by his predecessors in title and are not binding on him; and the Respondent has produced a kabuliyat, dated 18th February 1830, which he represents, and the High Court has held, to be the creation of the present holding of the Appellant. Its terms therefore require close examination; and their Lordships are of opinion that, so far from supporting, it goes to negative the Respondent's case.

The kabuliyat is, in the first place, presented to the Matwali by one Udoy, who announces himself as the purchaser under a bill of sale. But then, say the learned Judges, the bill of sale is referred to as a sale only of the fixtures and structures. This, however, is quite a mistake; what is described in the bill of sale as "situate "in the village of mouzah Khiderpur within "kismut pergunnah Magura under the possession "of the Saheb," is "former holding of Jagomohan "Shaha deceased, fixtures and structures," Jagomohan Shaha having been, in fact; the predecessor (and husband and brother) of Udoy's vendors. And the kabuliyat goes on to describe the subject

of his purchase (which the High Court think was only fixtures and structures) as "amounting "to 2 bighas 18 cottahs," and afterwards as "the "said land." The whole document is only some 20 lines of print, and is free from any ambiguity.

This kabuliyat is, therefore, a distinct recognition by the Saheb of the bill of sale as a transmission of the right. If, but only if, the kabuliyat was the origin of the Appellant's title and was a fresh grant by the Matwali, the limited nature of the granter's own rights would have to be considered. But the true view of the kabuliyat is that it is a recognition of an already existing right, over which the Matwali had no control. Accordingly, this having occurred so long ago as 1830, and the receipts proving uninterrupted payment of the same rent, the question is whether (in the absence of evidence to the contrary) the Appellant has not made out his case, and their Lordships consider that he has.

Their Lordships will therefore humbly advise His Majesty that the Appeal ought to be allowed and the Decrees of both Courts set aside, and the suit dismissed with costs in both Courts. The Respondent will pay the costs of the Appeal.