proceeding, until about fifteen months after it had been acted upon. In our opinion the objection is not a *bonâ fide* one, and is made solely for the purpose of gaining time. We think therefore that no effect should be given to it.

We accordingly set aside the decision of the Subordinate Judge, and direct that the execution do proceed.

The judgment-creditors are entitled to their costs.

S. C. G. *Appeal allowed.*

PRIVY COUNCIL.

IMDAD HUSAIN (PLAINTIFF) *v.* AZIZ-UN-NISSA AND OTHERS (DEFENDANTS.)

P. C.* 1895 *Nov.* 13 & *December* 7.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mortgage—Mortgage dating from before the annexation of Oudh—Redemption Act XIII of 1866—Under-proprietary rights of third parties in adverse possession, with a sub-settlement, of one of the villages mortgaged—Limitation under Act XV of 1877.

In 1854, before annexation (1856), the owner of a *taluka* of ten villages made a usufructuary mortgage of the entire *ilaka* to a neighbouring *talukdar*. The mortgagor died in 1857, leaving a minor son, to whom, during the events that followed, the mortgagee was unknown, and whose attempts to establish an inherited right to the mortgaged *ilaka* against the *talukdar* were ineffectual, whilst that ignorance lasted.

The confiscation of 1858 had, at one time, swept away all rights, whether of the *talukdar*, who was mortgagee, or of the mortgagor's heir to redeem, or of any under-proprietors on the *ilaka*.

This effect was thus counteracted: In the settlement of 1859-60 adjustments were made of the ownership of property, and in this case settlement was made with the *talukdar* of his larger *talukdari* estate, in which the mortgaged *ilaka* was, at the same time, incorrectly included as part. The right of redemption was restored by Act XIII of 1866, the mortgagor's heir being, however, unaware of his title to redeem any mortgage. Under-proprietary rights were restored by order of Government in 1859. Such rights were, with a sub-settlement, decreed by a Settlement Court on 31st July 1866, in one of the villages of the mortgaged *ilaka*, in favour of a claimant, through whom the defendants in this suit now made title.

In 1881 the mortgagor's heir, having by that time discovered the existence of the mortgage of 1854, sued the heir of the mortgagee to enforce

* *Present*: LORDS HOBHOUSE, MACNAGHTEN and MORRIS and SIR R. COUCH.

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the right to redeem. He obtained against the *talukdar*, as such heir, a decree for possession of nine of the villages in the *ilaka* (1), but the tenth was in the hands of the under-proprietors abovementioned, whom he sued for possession of it in 1887.

Held, that, inasmuch as the defendants were, by the decree of 1866, established as owners of an under-proprietary right, becoming thereby entitled to a sub-settlement which they had obtained, their possession was adverse to any one claiming to be *talukdar*, or superior proprietor, of the same estate as well as to others. The defendants' possession, with title, dating from 1866, at latest; the lapse of time barred this suit under Act XV of 1877.

APPEAL from a decree (30th July 1889) of the Judicial Commissioner affirming a decree (30th July 1888) of the District Judge of Faizabad, dismissing the appellant's suit.

The plaintiff, now appellant, brought this suit on the 20th January 1887, claiming from the defendants, now respondents, proprietary possession with mesne profits of *mauza* Cheton, one of ten *mouzas* making up one entire *ilaka*, in the Faizabad District, named Jiapur, mortgaged in 1854 by the plaintiff's father, Hafiz Ali, to a neighbouring *talukdar*, Tafazzul Husain. The mortgage was usufructuary, and was redeemable on payment of Rs. 2,000. The mortgagee was to have possession, paying one-seventh of the profits to the mortgagor and his heirs, the rest to be credited for interest.

The present suit, for one village, was the sequel to a redemption suit which was finally decided by this Committee on the 16th March 1888 against the representative of Malik Hidayat Husain, the brother and successor of Tafazzul. That appeal was *Amanat Bibi* v. *Imdad Husain* (1), in which the right to redeem the above mortgage was decreed to the present plaintiff, and possession of nine villages of the mortgaged *ilaka*. But the tenth *mouza* Cheton was held by third parties, the present defendants, claiming to be under-proprietors with a sub-settlement, as decreed to them, in the course of a settlement in 1886, by a Settlement Court on the 31st July in that year. To complete possession of the entire *ilaka* mortgaged in 1854 by obtaining possession of Cheton, was

(1) I. L. R., 15 Calc., 800 : L. R., 15 I. A., 106.

the object of this suit; and the principal question was whether it was barred by limitation; that depending upon whether the defendants had held for the period of limitation by a title adverse to that of the plaintiff.

Hafiz Ali died in 1857, leaving the plaintiff, his son, then a minor. Tafazzul Husain remained in possession of Jiapur, and, after property in Oudh had undergone the general confiscation proclaimed by Lord Canning in 1858, followed by the restorations of 1859, at the summary settlement, Tafazzul obtained settlement of the *talukdari* of Samanpur, and of the *ilaka* of Jiapur as part of it; afterwards getting a *sanad* which covered both. However, litigation arose. Claimants of the family of Hafiz Ali, among whom was Imdad Husain, the plaintiff, then brought suits to have it declared that they had interests in Jiapur. But the plaintiff was unaware that the transfer of Jiapur to Tafazzul had been made by mortgage, and put his claim, which he preferred in July 1865, on the erroneous ground that he was entitled to have sub-settlement of the *ilaka* made with him, as having inherited an under-proprietary tenure therein, which had existed under the Nawabs. This he was unable to prove, and in 1868 his suit was dismissed.

In the report in I. L. R., 15 Calc., 800, an account is given (pp. 802, 803) of the various attempts made by Imdad Husain to obtain recognition of a right on his part to Jiapur. At length, after litigation carried through 1866, 1867 and later, Imdad Husain was a party in 1877 to a suit brought by one Mehdi Ali, his cousin, against Hidayat Husain, the heir and successor of Tafazzul; and in that suit Mehdi Ali alleged that a mortgage in the terms above stated had been executed in 1854 by Hafiz Ali, as agent for him. It was found that Hafiz Ali had not acted in the transaction as an agent, and the suit was dismissed.

Imdad Husain, thus having been informed of the existence of the mortgage, brought his suit on the 25th January 1881 for the redemption thereof, with the result that he obtained a decree for the possession of the whole *ilaka* of Jiapur (the mortgage having paid itself off), save one village, now the subject of this suit.

As to this village, Cheton, one Afzal Husain, father of

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Muhammad Husain, the first defendant in this suit, and husband of the respondent, Soghra Bibi, filed his petition on the 10th November 1865, in the Court of the Settlement Officer, alleging that Cheton was his ancestral zemindari, and claiming a sub-settlement of it with himself.

Afzal Husain's claim was admitted by Hidayat Husain; and the decree made on the 31st July 1866 directed that Afzal as sub-settlement holder should have five-eighths of the profits of the village, and that Hidayat should, as *talukdar*, have three-eighths. After Afzal's death, his widow and son, with the respondents, Fazl Husain and Mumtaz Husain, whom they admitted as partners, continued to hold the village.

The plaint, alleging the mortgage, claimed that Cheton was part of the mortgaged *ilaka*, and that the plaintiff, not having been a party to the decree of the Settlement Court of 31st July 1866, was not bound thereby. Muhammad Husain, who died while this suit was pending, was succeeded on the record by his widow Aziz-un-Nissa and his sister Kobra as his representatives. They, with Soghra, widow of Afzal, set up their title in defence as under-proprietors with sub-settlement right, decreed on 31st July 1866, in a Settlement Court; and relied on limitation as the result of their adverse possession since that date. Issues were fixed on these points.

The District Judge in his judgment pointed out that by the confiscation of 1858, the rights, both of the appellant's father and of Tafazzul Husain, the mortgagee, had been swept away. He was of opinion that the settlement of 1859, with Tafazzul, had given to the latter the *talukdari* rights; and that the right of the appellant to set up and enforce his equity of redemption did not exist until the passing of Act XIII of 1866, an Act which was not passed until after Afzal had instituted his suit for a declaration of his under-proprietary right against the *de facto talukdar*. The judgment added that the rights of the sub-settlement holders were derived from the Government who, while granting the *talukdari* rights to the *talukdars*, had reserved the former tenures for the under-proprietors. These latter rights had never existed in that estate which had descended

to the appellant; but if he had inherited an estate from his father which, as redeemed from the heir of the mortgagee, might perhaps comprehend a title paramount to that of the sub-settlement holders, still there was the adverse possession which they had held from the 31st July 1866, the date of the decree obtained by Afzal. In the twelve years between that date and the 31st July 1878 the title of the defendants in the suit had, by adverse possession, become, in his opinion, complete. Accordingly he dismissed the suit with costs.

The Judicial Commissioner affirmed this decision on appeal.

In his judgment he considered the nature of the holding of the under-proprietors. He described "sub-settlement" as a term used to describe a tenure, which was a creation of British administration, adopted from the revenue system of the North-Western Provinces, but a tenure founded on a right existing in those who possessed village lands when settlement operations commenced. He referred to the "Compendium of Oudh Talukdari Law," by Mr. J. G. W. Sykes, where it was said to be "an under-proprietary right in a village, hamlet, or *chak*, subject to a rent proportional to the Government revenue, or to the profits, being variable, and to be determined under the Sub-Settlement Act XXVI of 1866."

The judgment continued thus:—

"'In explanation of this it is instructive to refer to the directions for Settlement Officers,' a standard work of authority, compiled under the orders of the Lieutenant-Governor, North-Western Provinces, and republished in 1858.

"Para 110. It being decided that there are in one village or in any number of villages two separate properties of different kinds, it is open to the Government to form a settlement either with the superior or the inferior party. If the former, the inferior proprietor must be protected by a sub-settlement. If the latter, the right of the superior must be compensated by a money allowance in lieu of his share of the profits.

"Para 111. If the settlement be made with the superior proprietor, he must be allowed a sum equal to his share of the profits of the estate and such as will cover the cost and risk of collection, and the sub-settlement will be formed with the inferior proprietor at an amount so much in excess of the Government demand. This sum should never be less than 10 per cent. upon the Government demand for profits and five per cent. for expenses of collection, but where the estate is small it may be more.

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"Para. 112. The inferior owners are thenceforward bound to pay their revenue to their superior according to fixed instalments which should be regulated so as to be a month in advance of the Government instalment.

"This description of sub-settlement clearly shows that it is a proprietary right altogether independent of the superior lord and recognized by Government fully as distinctly as that of the *talukdar* himself. I am altogether at a loss to understand how any one familiar with the tenures of this part of India could for a moment contend that sub-proprietors of this description derive their title from the overlord. In by far the great majority the direct reverse was the fact, the inferior proprietors being the ancient and hereditary proprietors, while the overlord's connexion with the estate was often a matter of very recent origin and due to the fact that the sub-proprietor in the troublous times of the last eighty years prior to British rule put themselves under the *ægis* of some powerful lord possessing an estate in their vicinity. And so when the British Government after the general confiscation of all landed property in Oudh reconferred their estate upon the *talukdars*, it was on the distinct condition that the interests of the under-proprietors were distinctly reserved from the grant. See the letters of Government, dated the 10th October 1859 and 19th October 1859, printed in the first schedule to Act I of 1869, and especially paragraph 4 of the second letter, which clearly assert the independent character of the inferior holding and the direct action of Government in dealing with the inferior proprietor as well as with the superior proprietor.

"No doubt it was the practice of the Settlement Courts in Oudh usually to array the *talukdar* as defendant against any claimant for sub-settlement or other under-proprietary right, and it was a convenient practice so to do. But this is a very different thing from saying that a sub-proprietary tenure, especially when of the nature of a sub-settlement, was an estate carved out of the *taluka*, and that when there was a suit, the suit was in the nature of a suit for ejectment against the superior lord. It was plainly nothing of the sort, but was a claim upon Government to ratify the claimant's title by the formality of a decree. The *talukdar* no doubt had a right to be heard on the matter, but rather, as the lower Court puts it, as an objector than as a defendant properly so called.

"In the present instance I think it is clear that the sub-proprietary tenure confirmed by the decree of 31st July 1866 was a sub-settlement to all intents and purposes."

The views of the Judicial Commissioner were in effect the following:—

1. That a sub-settlement is a right of property altogether independent of the superior lord, and recognised by Government fully as distinctly as that of the *talukdar* himself; and that the sub-proprietary tenure confirmed by the decree of 31st July 1866 was a sub-settlement to all intents and purposes.

2. That on the 31st July 1866 Malik Hidayat Husain was *de facto talukdar*, subject only to the rights of under-proprietors, which were reserved to them by Government; and that after the 23rd March 1866 the mortgagor of a mortgaged *taluk* could have sued to redeem his property, that being the date when Act XIII of 1866 became law.

3. That the possession of the defendant-respondents was adverse to the plaintiff ever since the 31st July 1866, for the plaintiff might have claimed possession then; and if it be answered that he could not have claimed possession then owing to his own ignorance of his rights as superior proprietor, such ignorance was his misfortune, but does not seem under the law to extend the period of his limitation.

4. That plaintiff's right to sue did not first accrue on the redemption of his mortgage. The respondents are not assignees of Malik Hidayat Husain, but persons holding on an independent title founded on a decree by a Government officer, which decree was good against all the world until properly set aside by a competent Court, and the plaintiff's right to sue accrued on 31st July 1866. But even if we should hold that the plaintiff's right to sue to set aside the settlement decree first accrued to him in 1877-78, when the facts entitling him to sue first came to his knowledge (Articles 91 and 120, Schedule II., Act XV of 1877), the plaintiff is still time-barred, for the longest limitation provided by these Articles is six years, and this suit was not brought till January 1887.

The suit, accordingly, was dismissed with costs. The plaintiff appealed.

Mr. *J. D. Mayne* for the appellant contended that the judgments below were based on an entire misconception of the order of the 31st July 1866. The plaintiff in that case claimed no sub-proprietary right, except such as arose from the relationship of mortgagor and mortgagee between himself and Malik Hidayat Husain. That relation had been created solely by the act of Hidayat. And his right to create it arose from the fact that Tafazzul had obtained the land as mortgaged to him by Hafiz Ali in 1854. The holder of that mortgage had a right to make a sub-mortgage, which was no more adverse to the claimant under Hafiz Ali than the original mortgage was. In July 1866 Afzal Husain claimed nothing, and the Court awarded him nothing, which was inconsistent with the rights of Hafiz Ali, or this appellant. As to limitation the appellant could not have sued before he had sued to redeem the mortgage of 1854. As soon as he had obtained a decree for the redemption of the mortgage of 1854,

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the sub-mortgage came to an end, and with it, the decree affirming it. Then, for the first time, the respondent's possession became adverse. The Court ought to have held that the respondents never had any title except as sub-mortgagees under Hidayat as mortgagee. The heading of the decree of 1866 was as follows: "Claim, sub-proprietary title as mortgagee." Thus it appeared that Afzal got the decree on an admission by him that he was entitled on a mortgage. That mortgage had been derived from the appellant's mortgagee. The appellant's suit was not barred by limitation, because during the continuance of the mortgage, the respondent's holding was derived from the appellant's action, or that of the mortgagee, through whom the respondent's possession was derived; so that their possession was not adverse to the appellant. The decree dismissing the suit should be reversed.

Mr. *J. H. A. Branson* for the appellant was not called upon.

On a subsequent day, 7th December, their Lordships' judgment was delivered by:—

LORD HOBHOUSE.—The object of the suit, in which the appellant is plaintiff, is to recover a village called Cheton, which the defendants hold in possession. The history of the plaintiff's dealings with the property is long and complicated, but the facts material to the decision of the present question may be concisely stated.

In the year 1854, when the Mahomedan dynasty was still in power, one Hafiz Ali was owner of the *ilaka* of Jiapur, which comprised the village of Cheton. He made an usufructuary mortgage of the *ilaka* to Tafazzul Husain to secure Rs. 2,000. Tafazzul was thus in possession of the *ilaka*, and so remained during the annexation, and the confiscation, and the subsequent restoration of proprietors. In the year 1860 summary settlement was made with him, and a *sanad* granted to him as *talukdar* of Samanpur, in which village Cheton was then included.

Hafiz Ali died in or about 1857, leaving the plaintiff, his son and heir. It seems a strange thing, but it is proved that the mortgage of 1854 so passed out of the knowledge of the parties interested that the plaintiff spent some years over three separate law suits, in which, treating Tafazzul or his heir as proprietor,

he attempted to establish sub-proprietary rights against him. All these attempts were defeated. Then the mortgage of 1854 turned up, and in the year 1881 the plaintiff sued for redemption of the whole *ilaka*, which was decreed in his favour by the Judicial Commissioner in 1884. That decree was confirmed on appeal by Her Majesty in Council in 1888.

Under that decree the plaintiff appears to have possessed himself of the *ilaka*, excepting the village of Cheton, which the defendants claim to retain by a title valid against both Tafazzul's heir and the plaintiff.

In November 1865 one Afzal Husain filed a plaint against Hidayat Husain, the heir of Tafazzul, alleging that Cheton was his hereditary zemindari, and claiming to have the settlement made in his name. On the 31st July 1866 an agreement for compromise was signed by the agent of Hidayat and by Afzal, who is therein described as sub-settlement holder of Cheton. On the same day a decree was passed in the following terms:—

"The claim of the plaintiff (Case II.) is admitted by the defendant, and an agreement is filed, under which it is arranged that, after payment of the Government demand and setting aside 10 per cent. therein on account of the *patwari* and *chaukidar*, whatever remains of the gross rental assumed by the assessing officer is to be divided in the proportion of 6 annas to defendant and 10 annas to plaintiff.

"Case II.—Decreed by consent as against defendant, and the agreement as to profits is confirmed."

It is not disputed that a sub-settlement was made with Afzal, or that he and his successors have held possession ever since in accordance with the decree. The position of the parties then was this: By the confiscation of 1858 all rights were swept away, whether Tafazzul's proprietary rights in possession, or the plaintiff's right to redeem, or Afzal's sub-proprietary rights. Sub-proprietary rights were restored by the orders of October 1859. The right of redemption was restored by Act XIII of 1866, which was passed in March of that year. At the date of Afzal's suit Hidayat was the only person who could represent the proprietary interest as against a person claiming to be sub-proprietor. At the date of Afzal's decree, the plaintiff had a legal right to redeem the *ilaka* of Jiapur, but it was wholly

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unknown to him, and apparently to everybody else, and he was then prosecuting claims of a different nature, claims as clearly adverse to the proprietary right as were those of Afzal.

The plaint in this suit was filed in January 1887 after the plaintiff's right to redeem Jiapur was established by the Judicial Commissioner, but before his decree was affirmed by Her Majesty in Council. Documents were filed and issues settled, but nothing further was done till after Her Majesty's decree. Then the District Judge considered it expedient not to take further evidence until it was settled whether or no the suit was barred by lapse of time. The case was heard with reference to that question on the documents and undisputed facts ; and the District Judge decided against the plaintiff and dismissed the suit. In discussing the case he came also to the conclusion that the decree of 1866 was binding on the plaintiff.

The plaintiff appealed to the Judicial Commissioner. Among other grounds of complaint was the ground that the District Judge, while professing to decide the suit on the question of limitation, had in effect, without taking full evidence, decided another issue, *viz.*, that the plaintiff was bound by the decree of 1866. The Judicial Commissioner finding that the record sufficed for deciding the point of limitation, overruled the plaintiff's objection, which has not been renewed here ; and he confined his decision to the one point of limitation. His opinion is that the decree of 1866 established Afzal as the owner of a sub-proprietary right ; that he thereby became entitled either to a settlement or a sub-settlement ; that such a position is and must be adverse to any one claiming to be *talukdar* or superior proprietor of the same estate ; and that possession taken in virtue thereof is a possession adverse to all the world. Therefore as the defendant's possession dates back to 1866 at latest, and as the suit was not brought till 1887, the lapse of time is fatal to it.

It was urged in the Court below that the decree of 1866 was made by collusion between Afzal and Hidayat. But the plaint makes no such charge ; no issue was framed upon it ; the District Judge does not mention it ; and the Judicial Commissioner rightly refused to take it into consideration,

The only new argument presented to their Lordships by Mr. Mayne is founded on the heading of the decree of 1866, which is, "Claim, sub-proprietary title as mortgagee." Thereupon it is argued that Afzal took with an admission that he was mortgagee only. That is at best a slight ground for the desired conclusion. It is not easy to explain the heading; but it cannot refer to the mortgage by Hafiz Ali to Tafazzul, because that was unknown to the parties till more than ten years later. And it is quite inconsistent with the claim made by Afzal in his plaint, and with the *solehnama* or deed of compromise on which the decree is founded.

There is, in fact, no answer to the reasoning of the Judicial Commissioner. It is not necessary to discuss what would have been the plaintiff's position as against Afzal, if he had known his rights against Hidayat during the suit of 1865-66, and had intervened then or immediately after the decree. Time has run against him, and his appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson, Beard & King.*

Solicitors for the respondents: Messrs. *Barrow & Rogers.*

C. B.

CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr. Justice Rampini.

JHOJA SINGH (PETITIONER) *v.* QUEEN-EMPRESS (OPPOSITE PARTY).*

1896 *February* 24.

Criminal Procedure Code (Act X of 1882), section 340—"Accused," Meaning of—Right to be heard.

The word "accused" means a person over whom the Magistrate or other Court is exercising jurisdiction.

Under the provisions of section 340 of the Criminal Procedure Code a Sessions Judge is bound to hear the pleader appointed by a person who

* Criminal Revision No. 86 of 1896, against the order passed by H. Holmwood, Esq., Sessions Judge of Gya, dated the 3rd of January 1896, confirming the order passed by R. A. N. Singh, Esq., Deputy Magistrate of Gya, dated the 27th of December 1895.