Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Doorgapersaud Roy Chowdry v. *Tarapersaud Roy Chowdry, from the Sudder Dewanny Adawlut of Calcutta; delivered on the 20th December*, 1860.

Present:

LORD CHELMSFORD.
LORD KINGSDOWN.
JUDGE OF THE ADMIRALTY COURT.
SIR EDWARD RYAN.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

A SUIT was instituted by the present Respondent in 1853, and the only question in the case is whether the Respondent is barred from the prosecution of his claims in this suit by the Indian law of limitation.

This is an appeal against a Decree of the Sudder Adawlut, dated June 17, 1857, but it is necessary to the correct understanding of this case to state some of the circumstances under which the suit was commenced and the Decree pronounced.

It appears that both the Appellant and Respondent are brothers; their uncle died without issue in 1810; their father died in 1821, having succeeded to the property of their uncle, and he left the Appellant and Respondent, his two sons, joint heirs-at-law. The property which so devolved upon them was very considerable, and much litigation ensued as to the division and possession of that property, which was situated in various districts: to recover each portion of the property lying

in various districts, it would be necessary to institute proceedings in the various Courts having local jurisdiction.

On the 29th of January, 1827, the present Appellant instituted a suit against the Respondent, in the Provincial Court of Calcutta, to recover a certain share in Zillah Jessore, which was, in fact, a very small part of the estates in question. Whilst this suit was pending, the parties to it came to an agreement to compromise their claims, and on the 4th of April, 1829, deeds of compromise were executed and filed in the Zillah Court—they agreed to divide the estate in certain proportions; and it was further stipulated that, in the event of either of the parties not agreeing to act according to the terms of the compromise, they had no objection to the Court's insisting upon and enforcing the observance of the said compromise.

The Respondent applied to the Collector for an Ameen, to make a partition in terms of the above deeds.

On April 24, 1829, the Appellant, who was the Plaintiff in that suit, presented a petition to the Provincial Court, praying that the suit might be struck off the file of the Court, on the ground of the compromise being effected. The Respondent, on April 25, 1829, objected to this petition, and alleged that the compromise was not binding, undue influence having been exercised by the Collector to bring about the same.

The Provincial Court of Calcutta, however, on September 22, 1829, made the following order: that the case be struck off the file, and that the parties conform to their respective engagements; in the event of their not conforming to the same this Court shall insist on and cause them to conform to the conditions of the compromise. The suit was removed from the file on September 2, 1829, and the value of the stamp returned to the present Appellant.

The present Respondent appealed to the Sudder Adawlut. On June 21, 1832, Mr. Walpole decreed that the appeal should be dismissed, and that the Decree of September 29 should be confirmed. He further stated, that the parties were entitled to take possession according to their respective rights under the compromise. On July 5, 1832, Mr. Ross,

another Judge of the same Court, declared his concurrence with Mr. Walpole.

Now as these Decrees were never appealed from, they are, to all intents and purposes, binding Decrees. But before proceeding further, it may be expedient briefly to consider the effect of the proceedings just recited. It is quite clear that the suit commenced on January 29, 1827, was entirely at an end; and having been struck off the file, and the value of the stamp returned, no further proceedings could be had in that suit. But the Provincial Court were of opinion that, by the consent of both parties, they were entitled to take cognizance of the deed of compromise executed on April 4, 1829, and to enforce the observance of the same, notwithstanding that the deed of compromise embraced property out of the Zillah Jessore, and in the Zillah Twenty-four Pergunnahs, and other places, which properties were not sued for in the original suit. Whether this proceeding was strictly regular, or not, cannot now be made a question. Of that opinion are all the Judges of the Sudder Adawlut which had cognizance of the present suit, including Mr. Raikes, who thought that there was an error in the first instance in the Court so taking cognizance.

We will now return to the consideration of what was done by the present Respondent upon the Decrees of the Sudder Adawlut of June 21, 1832, and July 5 of the same year. He lost no time in resorting to the Court for the purpose of recovering the mesne profits; for in September of the same year (1832), he presented a petition, in what is called the Miscellaneous Department of the Sudder Adawlut, praying for mesne profits, agreeably to the circular order of September 11, 1829, which is in the following terms:—

"The Court are of opinion that in all cases where money liable to bear interest is payable under the Decree of a Court, a clause should be inserted in the Decree providing for the allowance of interest until the Decree is carried into final execution, and that in the event of such provision being omitted in a Decree, the Court by which the same may have been passed, is competent to order at any future period the payment of the interest on the amount decreed which may have accumulated subsequently to the date of the Decree, without referring the party to a new suit for the recovery of such interest; and that the same principle is applicable to profits in cases of Decrees for landed property."

The Sheristadar of the Court reported on the back of the petition, that no wassilat had been decreed to the Respondent by the said Decree of the Sudder Adawlut, notwithstanding that it had been applied for. In consequence of the objection so raised by the Sheristadar on September 10, 1832, the matter was again brought by petition before Mr. Ross, one of the Judges of the Sudder Adawlut, and Mr. Ross, then sitting alone, made an order that the Respondent was entitled to mesne profits, from July 5, 1832, to the date of his obtaining possession; and on September 18, 1832, Mr. Ross made another order, again sitting alone, whereby he ordered that a copy of the Appellant's petition, with the decision of this Court, be sent to the Judges of the Court of Appeal at Calcutta, with an order that if the appellant should not have already obtained possession of his proper share under the deed of compromise, possession should then be awarded to him in execution of the decision of this Court; and further, that after awarding wassilat to the Respondent from the date of the decision of this Court to the date of the recovery of possession, a report that this order has been carried out, accompanied with the decision forwarded herewith, should be transmitted to this Court.

We do not find that the Judges of the Court of Appeal of Calcutta took any further notice of these proceedings, and we might, perhaps, be at some loss to discover why, if there was any error in them, some observation respecting that error, some suggestion as to setting it right, should not have been made; however, nothing of this sort was done; various proceedings were had for the purpose of recovering this wassilat before several Judges in the Zillah Court of the Twenty-four Pergunnahs, and these proceedings were in the Miscellaneous Department.

This Court is not very accurately informed what is included under the term "Miscellaneous Department," but for the purposes of the present appeal that Department may be taken to include the carrying into effect decisions made by the Court of Sudder Adawlut, as contra-distinguished from the commencement of an original suit. In one of these proceedings, an order made by one of the Judges was carried up to the Sudder Adawlut, when

that Court, on July 21, 1853, decreed that the order by Mr. Ross, passed on the 10th of September, 1832, in favour of Tarapersaud, for wassilat, was without the concurrence of Mr. Walpole, incomplete and not binding by law, and its execution not obligatory on the Court.

Now this Decree not having been appealed from, must be considered as containing a correct statement of the law, but we may observe that the Court did not pronounce the Decree of Mr. Ross to be null and void, and that the defect, such as it was, was never discovered during the whole of the preceding litigation for one-and-twenty years, though of course, if this had been a palpable defect, there were very numerous opportunities for its discovery; the consequence of this Decree of the Sudder Adawlut of July 21, 1853, was that the present Respondent was thrown back upon the Decrees of June 21, and July 5, 1832, which Decrees had ordered him to be put in possession of his proper share of the property, but had not decreed wassilat.

It might, perhaps, have been a question whether, under those Decrees of June 21 and July 5, coupled with the Circular Order of September 11, 1829, the Respondent had not obtained a Decree giving him a right to wassilat accruing, but, however that might be, in the same year, 1853, the Respondent instituted the present suit, praying that his demand for wassilat should be admitted: one of the defences to that suit was, that his claim was barred by the law of limitation for all wassilat accruing at a period beyond twelve years from the institution of that suit. The Principal Sudder Ameen, amongst other matters which were decided by his Decree, pronounced that the law of limitation did apply; the other matters were decided in favour of the present Respondent. Both parties appealed from this Decree to the Sudder Adawlut, and on June 17, 1857, that Court pronounced its Decree, whereby it decided, by a majority of two out of the three Judges, that the law of limitation did not apply, and remanded the case to the Zillah Court for further consideration.

The question now for their Lordships to advise Her Majesty is, whether the majority of the Sudder Adawlut were right in their view of this case, and it

may be first expedient to state, so far as is necessary, the Indian law of limitation. It is to the following effect:—

"The Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen previous to the 12th of August, 1765, or any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promise to pay the money, or that he directly preferred his claim, within that period, for the matters in dispute to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that either from minority or other good and sufficient cause, he had been precluded from obtaining redress." (Regulation III of 1793, sect. 14.)

Now it appears to their Lordships to be clear that this cause of action cannot be said to arise upon the suit which was struck off the file in 1832, neither do we think that it can be properly said that the cause of action arose upon the agreement of compromise alone; for it is obvious that all the proceedings have been founded upon the Decrees of the 21st of June, and the 5th of July, 1832, decreeing possession to the Respondent. In fact, all the subsequent proceedings are subsidiary proceedings in the same suit, and all for the purpose of carrying into full effect those Decrees, which, though they did not in terms do more than decree possession, yet, taking into consideration the order of September 1829, and the justice of the claim, gave the Respondent a right to wassilat up to the time when the Appellant did justice, and obeyed those Decrees by allowing the Respondent to have possession of the property justly belonging to him. All these proceedings are connected together from the time that the rights of the parties were finally settled by the Decree of July 5: the Respondent was never remiss in the prosecution of his claims; he resorted to the proper tribunals for that purpose, and year after year legal investigations were going on for the purpose of ascertaining the amount to which he was justly entitled. None of the many Judges engaged in these investigations detected any error or irregularity in these proceedings till 1853, when the Court

of Sudder Adawlut for first time discovered that the order made by Mr. Ross was ineffectual by reason of its not being confirmed by a second Judge.

Admitting that such order was ineffectual and that proceedings to enforce it could not avail, we think that such erroneous proceedings did not operate as a total abandonment of the rights under the Decrees of June and July 1832. We think that it may be fairly said that the Respondent was continually endeavouring, by resort to competent Courts, to recover his rights, and that he is not ousted from availing himself of the exception in the laws of limitation by reason that part of the proceedings was erroneous.

We concur with the majority of the Court, and deem it most expedient to found our concurrence upon the reasons we have stated, and do not take into consideration other matters which might admit of more doubt.

We shall humbly advise Her Majesty to affirm the Decree of the 17th of June, 1857, with costs, feeling assured that it is consistent with a just construction of the law of limitation and with the justice and equity of the case.