Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Maharajah Koonwur Nitrasur Singh v. *Baboo Nund Loll and others, from the Sudder Dewanny Adawlut of Calcutta; delivered 30th July,* 1860.

Present:

LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THE parties to this cause are the proprietors of two contiguous zemindaries in Zillah Bhagulpore. For many years the zemindary called Pergunnah Nursingpore Koorah, which includes the village called Mouzah Gopaulpore, has been held by the Appellant or his ancestors; whilst the family of the Respondents has been in possession of the zemindary called Naredegur, which includes the village called Mouzah Rampoor.

That litigation concerning the boundaries of the two estates has been frequent, if not incessant, sufficiently appears from the record of proceedings set forth in the Appendix. In 1792 there was a suit to settle the disputed boundaries of Mouzah Surseeah, part of the Appellant's zemindary, Nursingpore Koorah, and Mouzah Jyepoor Puckree, part of the zemindary of Naredegur. This was determined in accordance with the award of an Ameen, appointed with the consent of both parties, and named Khoda Yaar Khan, which fixed, or ought to have fixed, the boundaries between the

two mouzahs, and, so far, those between the two zemindaries. It may be proper to mention, though the circumstance is not now material, that this suit was between an ancestor of the Appellant and one Deo Raj, who appears to have dispossessed at that time the Respondents' ancestor of Naredegur.

In 1816 two suits were pending between Mohun Singh, the grandfather of the Respondents, and Maharajah Chuttur Singh, the grandfather of the Appellant. In one of them Mohun Singh, as Plaintiff, claimed as part of Mouzah Rampoor 251 beegahs of land, which the Maharajah, as Defendant, insisted formed part of Mouzah Gopaulpore. In the other, the Maharajah, as Plaintiff, claimed as part of Mouzah Gopaulpore 400 beegahs of land, lying to the north and west of the lands in question in the other suit, and Mohun Singh, as Defendant, insisted that they were comprised in Mouzah Rampoor. In the first suit the Zillah Judge, proceeding in part upon the old award of Khoda Yaar Khan, of which both parties admitted the accuracy, drew a boundary line between the two mouzahs, and gave to the Plaintiff so much of the land claimed as fell within Mouzah Rampoor thus defined. The suit of Chuttur Singh he simply dismissed, inasmuch as the whole of the 400 beegahs claimed by him were clearly within Mouzah Rampoor as defined by the other decree. Both decrees were, on the appeal of Maharajah Chuttur Singh, confirmed in 1818 by the then Court of Appeal at Patna. [The proceedings in these suits will be found in the Appendix from page 38 to page 43.]

In 1834 there was a summary proceeding in the Criminal Court under Regulation XV of 1824, touching the possession of 200 beegahs of land which were claimed on the one side by the then proprietors of Naredegur as part of Mouzah Rampoor, and on the other by two widows who had acquired an interest in Mouzah Maholee, a village forming part of Nursingpore Poorah, and either identical with or contiguous to Mouzah Gopaulpore, which, in these proceedings, is sometimes called Gopaulpore Maholee. The decision of the Magistrate was to the effect that the proprietors of Naredegur were in possession of the lands in question, and ought to be maintained in it. To

this proceeding, which bears date the 24th of May, 1834, and is set forth at page 14 of the Appendix, no person whom the Appellant represents was directly a party. He has, however, produced it for a particular purpose, and made it part of his case. It is unnecessary, at least for the present, to go more fully into those earlier proceedings, because, if material at all, they can only be material as evidence upon one or other of the issues raised in the present suit.

This was instituted in August 1845 by the father of the present Appellant. It is for the recovery of 700 beegahs of land, alleged to have been part of Mouzah Gopaulpore, but admitted to have been in the possession of the Respondents, though by wrongful title, since May 1834, or for a period commencing soon after that date. The case made by the Plaintiff on his pleadings was shortly this:—That the 700 beegahs in question were within Mouzah Gopaulpore as defined by the Decree of 1816; that the Defendants had taken possession of them, under colour of the award of the 24th May, 1834, some time in the year 1835, and had ever since continued in possession; but that during these ten years, and in order to prevent the institution of a suit against them, they had repeatedly admitted the Plaintiff's title, and promised to restore the lands.

The Defendants' case, on their pleadings, was to this effect:—That the 700 beegahs claimed were within the boundary of Mouzah Rampoor as defined by the Decree of 1816; that they were, in fact, the aggregate of the 251 beegahs and 400 beegahs, which were the subject of the two suits finally determined by the confirmation of that Decree in 1818; that the title to them was therefore *res judicata*; and further, that in any case, the Plaintiff and his father had been out of possession of them for upwards of twelve years next before the institution of the suit, which was, therefore, barred by the Regulation of Limitation.

On the statements, therefore, of the two parties, it appears that the substantial questions of fact in dispute between them were:—

1. What was the boundary-line laid down by the Decree of 1816, to which both appealed.

2. Was the Plaintiff or his father Chuttur Singh in possession of the lands claimed at any time

within the period of twelve years next before the institution of the suit.

The words of the Decree of 1816 (see Appendix, p. 42) are: "It is, therefore, ordered, that from the edge of the old bandh eastward, which is in the map of the Plaintiff, and from the old pokhur, which is in the map of the Defendant, and all along to Lullahee Ghaut southward, which is in the map of the Plaintiff, and which the Defendant states to be Ghaut Suspatee, the boundary is fixed of Mouzah Rampoor, the Milkeut of the Plaintiff, from Mouzah Gopaulpore Moohonee, the property of the Defendant."

The parties to the present suit were agreed as to the position of Ghaut Suspatee or Lullahee, but differed materially as to the position of the two other points. It might well be supposed that this contention could be settled by the production of the two maps referred to in the Decree. Unfortunately, the Appellant impugns the genuineness of the map (No. 6) which is put in by the Respondents as that produced by Mohun Singh, the Plaintiff in 1816; and on the map (No. 5) put in by the Appellant as the map produced by Chuttur Singh, the Defendant in 1816, there appear to be several pokhurs or tanks and an oval mark which, though it contains no description but the words "peepul tree," the Appellant now contends denoted the old pokhur referred to in the Decree. Hence the common appeal to the Decree of 1816 does nothing more than settle one of the termini of the boundary line, and resolve the general issue of the boundary into the two particular issues, where was the old bandh? and where the old pokhur?

The Principal Sudder Ameen, before whom this suit was pending, took the evidence which each side tendered touching either the possession of the disputed lands or the boundary question. He also, by a proceeding dated the 5th of May, 1847 (Appendix, p. 10), directed one Lallah Sheeb Lall, the Record Keeper of his Court, to visit the spot and make a plan of the disputed land in the presence of both parties. To the character and mode of proceeding of the Lallah objection is no longer taken. He visited the spot and made the map or plan marked No. 1, and the Report, which is set forth at page 11 of the Appendix. Upon these materials and the

evidence taken previously, the Principal Sudder Ameen made his first Decree in favour of the Appellant. It is dated the 28th of December, 1848, and is set forth at page 12 of the Appendix. From that Decree the Respondents appealed to the Sudder Dewanny Adawlut. In the Appellate Court a preliminary objection was taken to the Decree on the ground that the Principal Sudder Ameen had omitted to draw up the issues in the suit in conformity with section 10 of Regulation XXVI of 1814; and the Court saw fit to remand the cause to the Judge below, with a direction to lay down the issues in the regular way, and "having called upon both parties for proofs and refutations of those issues, to try and determine the cause *de novo*." The cause went back; and the Judge laid down the issues, which were, substantially,—Whether the lands in question were within the boundaries of Mouzah Rampoor as defined by the Decree of 1816, and whether the Plaintiff's suits were within the period of limitation or not. By the same proceeding, which was dated the 4th of December, 1852 (Appendix, p. 63), he ordered that the parties should be called upon for their proofs. The Appellant took no advantage of the opportunity thus afforded to him of giving fresh evidence; but, by Petition, prayed for judgment on the evidence, oral and documentary, already given. This petition is at p. 64 of the Appendix. The Respondents only filed certain judgments of the Sudder Dewanny Adawlut, given in other cases, for the purpose of showing the invalidity of Sheeb Lall's investigation and Report,—a point now given up. The Principal Sudder Ameen therefore made upon the old evidence a second Decree in favour of the Plaintiff in the suit. This bears date the 17th of December, 1852, and is at page 70 of the Appendix. Against it the present Respondents renewed their appeal to the Sudder Dewanny Adawlut.

The Appellate Court was divided not so much on the merits of this case as upon the proper method of determining them. Two of the Judges, without entering into the boundary question, or impugning the decision of the Court below on that point, were for reversing the Decree, and dismissing the suit on the ground that the Plaintiff had failed to prove his possession of the disputed lands at any time between 1816 and the commencement

of the suit, or his alleged dispossession of them at any time in or after May 1834. The dissentient Judge did not go the length of saying that the Decree below ought to be affirmed. He seems to have thought that the finding of the Court as to the boundary line might shift the burden of proof as to the time and manner of dispossession on the Defendants; that on both issues there had been a mis-trial, and that it was proper to remand the case for another trial after the preparation of a more intelligible map, and taking further and better evidence on the question of possession, particularly that of the parties under the provisions of Act XIX of 1853. The opinion of the majority of course prevailed, the Decree of the Court below was reversed, and the Appellant's suit dismissed. Against that Decree of the Sudder Court, the present appeal has been preferred.

The learned Counsel for the Appellant have not strongly contended that the proper order to be made on this appeal, is one remanding the case for re-trial in the manner suggested by Mr. Torrens, in the Sudder Court. They have rather insisted that on the materials now before their Lordships, he is entitled to have the Decree made in his favour by the Principal Sudder Ameen affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the Sudder Court was right in treating the cause as ripe for final decision. The Appellant had had, at all events from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on those issues if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular it is not for him to complain of an irregularity committed at his instance or with his consent. And the suspicion, however probable, of the Judge that a party who has failed to prove his case, may be more successful on a second and fuller investigation, is no sufficient ground for directing a new trial.

Again, their Lordships concur with the majority of the Sudder Court in thinking that the issue of possession is the first to be considered in this case, and that it is wholly independent of the boundary ques-

tion. The Appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of Defendants who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on a dispossession within twelve years next before the commencement of the suit; and therefore that he, or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would be involved in the decision of the boundary question in his favour, can relieve him from this burthen, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession. The lands in question may have been part of Mouzah Gopaulpore, and as such may have been enjoyed by his ancestor, and yet he may have lost, by lapse of time, his right to recover them. Their Lordships therefore propose to consider, in the first place, what evidence there is that the Appellant, or any person through whom he claims, was in possession of the lands in question at any time within twelve years next before the commencement of the suit.

There are eight witnesses on the part of the Appellant. They all agree in stating that his grandfather Chuttur Singh was in possession of the lands in question until some time in the Fuslee year 1242, corresponding with A. D. 1835, and was dispossessed under colour of the Magistrate's award of May 1834. All of them, with the exception of the second, Baboo Ram Mundur, speak of this dispossession as "forcible;" as effected with more or less of violence, and in the face of opposition on the part of the occupiers of the land. They do not agree as to the fact whether or no a peon from the Magistrate's Court was present to give effect to the order of May 1834. They are pretty well agreed that the disputed land was, before the alleged dispossession, for the most part under cultivation; that the cultivated portion of it was rented at from 2 rupees to 2 rupees 6 annas per beegah, and yielded from 1,100 to 1,300 rupees per annum. Some of them give the names of the cultivators: some, but not all, speak as if the whole land had been farmed by one Tajaen, who, in such case, would have paid

a gross rent to the zemindar, and have made the collections from the ryots on his own account. No such person was produced as a witness; nor is the oral testimony supported by the production of any paper purporting to be lease, pottah, kuboolyat, or receipt for rent,—the usual *adminicula* of proof in such cases. Again, most of the witnesses concur in saying, that, before the alleged dispossession, there was but one hamlet on the disputed lands, the inhabitants of which deserted it upon the dispossession; and that the Defendants had, year by year since 1835, established three or four new hamlets upon them.

The Appellant's witnesses are contradicted by some nine or ten on the part of the Respondents. The general scope of this latter testimony is to show that the disputed lands are within the boundary of Rampoor as defined by the Decree of 1816, and have ever since that date been in the possession of the Respondents' family; that they are identical with the 400 and 251 beegahs which were the subjects of the two suits of 1816; that the 251 beegahs, or part of them, were also the subject of the dispute with the widows of Tej Narain Singh which was settled by the award of May 1834; and that there are three hamlets on the lands in question in the suit, of which the latest in date had, in 1847, been established for upwards of twenty years. This testimony is also unsupported by documents: but the last of the witnesses seems to be somewhat more respectable in point of station than the Appellant's witnesses. Let it be granted, however, that the oral evidence on the part of the Respondents is no better than that on the part of the Appellant. It must still lie on the Appellant to make out his case; and their Lordships have next to consider whether he has done so by the greater probability of the tale told by his witnesses.

Their Lordships are of opinion that the balance of probabilities is decidedly against him. His witnesses agree that the land was for the most part under cultivation, and yielded a considerable revenue. They treat the dispossession as a single and forcible act. These admissions exclude the hypothesis, which was sometimes suggested in the course of the argument, that the Respondents'

possession may have been gradually acquired by *squatting* on waste land. Again, the theory is that possession was gained under colour of the award of May 1834. The 200 beegahs which were the subject of that award are either included in the 700 beegahs now in dispute, or are distinct from them. On the latter assumption it is not easy to see (and this difficulty is wholly unexplained) how an order maintaining one man in the possession of certain lands can be made an instrument for turning another man out of the possession of other lands. The former assumption implies that 700 beegahs were taken under an award for only 200 beegahs; that the proceeding before the Magistrate, who had only jurisdiction to determine the fact of possession, was had between two parties neither of whom was really in possession; and that he, in whose favour the award was made, successfully used it to eject the actual possessor of the lands, who being no party to the proceeding was not bound by it. Such doings may not be without example in India; but those aggrieved by them do not ordinarily acquiesce in them. Lastly, in any view of the evidence there was a palpable, if not violent, invasion of Chuttur Singh's possession, known to him at the time. Is it conceivable that one so prone to litigation as he is shown to have been would not immediately have sought redress either by a summary proceeding under Regulation XV of 1824, or by regular suit. To account for his unnatural acquiescence the Appellant and his witnesses have recourse to a very common subterfuge of falsehood. They say that the Respondents admitted their adversary's title, and promised to restore the land. The plaint alleges that there were repeated assurances of this kind. The witnesses only depose to one *ante litem motam;* but add that ten years afterwards, when the suit had been commenced by Chuttur Singh's son, the Respondents again offered to relinquish the lands on being released from the claim for mesne profits. Their Lordships consider this part of the Appellant's case simply incredible. And on the whole evidence they are of opinion that he has failed to give that proof of the alleged possession of Chuttur Singh which is essential to the maintenance of this suit.

This being so, it is unnecessary to go into the

boundary question. Upon that, although sensible of the force of Mr. Palmer's observation that questions of that kind are presumably best determined by local Judges, their Lordships are by no means satisfied that the Principal Sudder Ameen has come to a correct conclusion, or that the lands in question are within the limits of Mouzah Gopaulpore as defined by the Decree of 1816. But they do not decide this question. Their decision of the other is of itself sufficient ground for the recommendation, which they propose to make to Her Majesty, that this appeal be dismissed with costs.