Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Protab Chunder Burrooah v. *Ranee Surnomoyee and others, from the High Court of Judicature at Fort William in Bengal; delivered 2nd April,* 1873.

Present :

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THE question which their Lordships have to determine on this Appeal is whether the Plots Nos. 1, 2, 3, and 4 of Chur land delineated on the map which, in the Judgments of the Courts below, and throughout the argument at the Bar, has been called Map No. 3, belong to the Appellant's Zemindary Jumeera, or to the Respondent's Zemindary Bahur Bund. The suit originally embraced the land marked as Plot No. 5 on the same map; but that parcel was claimed by the Appellant (the Plaintiff in the suit) as a reformation on the site of a diluviated village called Chalitabarree; and it is now admitted that he failed to identify the site in question as that of his lost village, if the latter ever existed and formed part of his Zemindary.

The lands which remain in dispute are admitted to have been in the Respondent's possession since the year 1852, when, in the course of certain Thackbust proceedings, which will be more particularly considered hereafter, they were determined to lie within the limits of Zillah Rungpoor and the estate of Bahur Bund, and not within the limits of Zillah Goalparah, and the estate of Jumeera. The correctness of this determination, and the anterior

possession of the lands, are questions contested in the cause.

The difficulty, and it is always considerable, which their Lordships feel in determining appeals of this description is, in this particular case, increased by the conflicting opinions concerning the title to the land in dispute which have been expressed in India. This suit to impeach the Thackbust award in favour of the Respondent and to recover possession of the lands, was commenced by the Appellant in May 1855. For some unexplained reason, it was not brought to a hearing until October 1863, when Mr. Fowle, the Zillah Judge, made a Decree dismissing it. In March 1865, a division bench of the High Court, consisting of two Judges, reversed that Decree and remanded the cause for re-trial on certain specified issues, with a direction that there should be a further local investigation. The Sudder Ameen who was deputed to make that investigation, made, on the 10th of June, 1865, a careful and elaborate Report, which was in favour of the Appellant as to the four plots now in dispute, but against him as to the fifth. Mr. Robinson, however, who had succeeded Mr. Fowle as Zillah Judge, did not adopt or act upon that Report; but, coming to the conclusion that the Plaintiff had failed to establish a title to any of the parcels claimed, again dismissed the suit by a Decree dated the 8th of July 1865. The appeal against his decision came before the Judges of the High Court who had directed the remand, but they were divided in opinion; and, according to the then existing practice of the Court in such cases, the Decree under appeal was affirmed. For the Appellant, therefore, we have the officer who made the last local investigation, and one of the Judges of the High Court; whilst for the Respondent we have the other Judge of the High Court, the two Zillah Judges, and the officers who conducted the Thackbust proceedings.

Their Lordships now proceed to consider more particularly the case made by the Appellant. He does not claim all the four plots of land by precisely the same title. It appears that, as early as 1810, the then zemindars of Jumeera, and Bahur Bund, and a third party, the zemindar of Bheetur Bund, were all litigating the title to a large chur which had formed between two branches of the Burrumpootur.

The facts found in the case, as shown by the Report in 2 S. D. A. Reports, p. 269, and the rude map thereto annexed, which in these proceedings has been called Map No. 1, were the following:—The Burrumpootur flowed on all sides of the disputed land; the Plaintiff's zemindary (Jumeera) lay on the east and north sides thereof, and on the west side extended as far south as the River Suntose (in these proceedings called Sunkosh); the zemindary of Bahur Bund extended from the River Sunkose to the River Isamuttee; and the zemindary of Bheetur Bund from the River Isamuttee to the southward beyond the limits of the contested chur. The Judge who tried the cause in the first instance, declared his inability to decide with certainty from whose lands the chur had been formed; and accordingly made, what he termed, an equitable division of it between the contending parties.

His ruling is stated in the Report as follows:—"He was, therefore, of opinion that the most equitable mode of decision would be to give to the parties respectively the land adjoining to their respective estates; and ordered that the land to the northward of a line drawn east and west from the River Suntose to the Plaintiff's boundary should be taken by the Plaintiff (the Zemindar of Jumeera): that the remaining portions to the southward of that line should be divided by a line drawn from north and south; and that the land to the eastward of that should belong to the Plaintiff, and that the land to the westward should be taken by the Zemindars of Bahur-Bund and Bheetur-Bund, according to their respective boundaries." This decision, after going through all the courts was finally affirmed by the Sudr Dewanny Adawlut on the 9th of September, 1818.

This decree, though admitted to be a binding adjudication of right, failed to determine the disputes between the parties. We find them in 1827 again disputing as to the direction and position of the boundary lines defined by the Decree. And in that year Dr. Scott, a gentleman holding a high civil office in the Zillah of Goalparah, went upon the land, laid down the boundaries as he conceived them to run according to the Decree, and put the parties in possession accordingly. On that occasion he also made a map, of which that produced by the

Appellant, and marked No. 7, purports to be a true copy. The correctness of this copy is, however, disputed by the Respondent, and has not been proved. According to Map No. 7 a considerable change had taken place in the course of both the Sonkosh and the Burumpootur between the years 1818 and 1827; the western branch of the latter having travelled considerably to the eastward.

It is, however, clear that, whatever were the precise boundaries laid down by Dr. Scott, plots Nos. 1 and 2 are the only parcels of the land now in dispute which formed part of the land which was apportioned by him, and was the subject of the Decree of 1818. For both parties are agreed that what was in 1818 the western branch of the Burumpootur, and, therefore, the western boundary of the Chur then in dispute, is shown on Map No. 3, by the old channel running from A to B; and we have therefore now to consider what is the title which the Appellant asserts to lots Nos. 3 and 4.

The Zemindary Jumeera contains two Mouzahs called Takeemaree and Patwamaree. Bahur-Bund contains two Mouzahs called Balar-Hat and Koneармutty. In 1832 or 1833, a dispute arose between the then zemindars whether certain chur land ultimately ascertained by survey and measurement to consist of 1,478 begahs, 15 cottahs, and 5 doors, which had been thrown up by the River Sonkosh, was a reformation of parts of the two former, or of the two latter mouzahs; and, therefore, whether it belonged to Jumeera or to Bahur-Bund.

This question was, in the first instance, fought in the Fouzdary Courts, and the result of the proceedings there was that the Magistrate on the 17th July, 1835, made an award in favour of the Appellant, which was affirmed by the Commissioner on the 31st of December following. The Map No. 6, which is in evidence in this suit, was made in the course of those proceedings. In 1843 the Zemindar of Bahur-Bund brought a suit in the Civil Court to set aside the Magistrate's award, and recover the land comprised therein; the Map No. 5 was made on the occasion of a local investigation ordered in that suit; and, on the 20th March, 1845, a Decree was made in the Plaintiff's favour by the Principal Sudder Ameen. That Decree was, however, reversed, and the suit dismissed by a Decree of the S. D. A. on the 26th of September,

1847. The result, therefore, of that litigation was to affirm the title of the Zemindar of Jumeera to the land in question in that suit whatever it may have been. And in this suit the Appellant claims lots Nos. 3 and 4 as the land so decreed to him in 1847.

By the Decree of the High Court directing the remand, against which neither party appealed, the title to all the four plots of land was made to depend on the determination of a single issue; and, in order to see how that came about, it is desirable to consider briefly the Judgment of Mr. Fowle, and the first Judgment of the High Court.

Mr. Fowle found that the whole face of the country had been changed since 1818 or 1810, when the decision, on which the title to plots Nos. 1 and 2 rests, was passed; that the statements of neither party in respect of the different changes were supported by any evidence worthy of credit; and, consequently, that the only thing for the Court to do was to compare the different maps, and on that comparison, he came to the conclusion that the Plaintiff (the Appellant) had failed to prove his case. Both parties, however, seem to have admitted before him (or if not before him, before the High Court on the first Appeal) that, whatever had been the changes in the course of the Sonkosh, its true channel in 1810 or 1818 was identical with that which is traced on Maps Nos. 5 and 6 as its dry channel, and the southern boundary of the land then in dispute. From this admission it followed that, if the true site of that channel could be ascertained, it would determine the title to all the four plots of land, since all that was north of that line would belong to Jumeera, and all that was south of it to Bahur-Bund. And their Lordships think that both parties must be taken to have agreed to be finally bound by the finding on the issue directed by the High Court, viz., whether the line F G or the line P P on Map No. 3 was the old bed of the Sonkosh.

It does not, however, appear to their Lordships that the effect of the remand was to shift or affect the burthen of proof, or to prevent a failure to determine the true line of the old bed of the Sonkosh, if such should take place, from being fatal to the Appellant, who had to make out his title to disturb the possession of the Respondent.

The earlier judgments in this cause, and their own examination of the maps, have satisfied their Lordships that the attempt to determine the issue above stated by a mere comparison of these so-called maps is hopeless. None of them, unless it be Map No. 4, have been made by scale or compass. They are rather rude diagrams than maps in the proper sense of the term. To fix by a comparison of them a disputed line in a country of which the face had never changed would not be easy. But it is admitted that during the half century which they cover, the locality embraced in them has been the subject of frequent, and more or less violent, changes, and has probably been affected by almost every annual flood. And their Lordships must express their surprise and regret that suitors in India, who obviously do not shrink from carrying on litigation of this kind at enormous cost, should not be at the pains of causing the maps, which are supposed to be essential to its right determination, to be prepared on something like a scientific principle.

The cause went back after the remand. A Sudder Ameen was deputed to make the local investigation directed to be made; he filed his report; and the argument of the learned Counsel for the Appellant may almost be summed up in the proposition that it was the duty of the Courts below, and will be the duty of their Lordships to adopt, and act on that report.

The Sudder Ameen, after admitting that by means of the alteration in the features of the country it had become "most difficult to arrive at any correct conclusion in the matter," reported that, on a careful comparison of the maps with the disputed locality, he had come to the conclusion that F G was the old bed of the Sonkosh, and then proceeded to give in detail the grounds on which he had come to that conclusion.

It is obvious that the special value of his opinion must depend on the degree in which the comparison of the maps has been aided by actual observation of the locality, and of undisputed landmarks within it. So far as it rests on mere comparison of maps, or inferences drawn from former proceedings, it is of less weight than the Judgment of the Judge, who is, presumably, as competent as the Sudder

Ameen to compare the maps, and must speak with greater authority as to the effect to be given to the documentary evidence in the cause.

The reasoning contained in his first ground seems to depend almost wholly on a comparison of the maps, particularly maps Nos. 2, 5, and 6; on the assumed admission by the Respondent of the correctness of the two latter maps; and on the effect to be given to the replication of her predecessor in title in the suit of 1844.

The correctness, however, of Map No. 2, as a copy of that from which Map No. 1 was made, has been directly impugned in this suit, and has not been established by the Appellant. The delineation therein of Chalitabarree, of which there is no trace in Map No. 1, certainly casts considerable suspicion upon it. And even if it were authentic it would, in one important particular fail, to support the Appellant's case. For it places the confluence of the Sonkosh with the western branch of the Burrumpootur north of Kaladangah, which is marked as north of Bullabhur Kas; and even a little to the north of the Konearmutty Dara, or, at all events, in the immediate vicinity of that dara. And so far it seems to be in favour of the propositon that P P, rather than F G, indicates the site of the old bed of the river.

Again, the principal argument founded on Maps Nos. 5 and 6 is that both place the Konearmutty Dara considerably to the north of that which each represents to be the old bed of the Sonkosh forming the southern boundary of the land then in dispute. But it is admitted that the place assigned by these maps to the house of Neemchund Sircar (an undisputed landmark) cannot be reconciled with the place assigned to the Konearmutty Dara; and the Sudder Ameen assumes that the maps are accurate as to the site of the dara, but inaccurate as to the site of the house. It seems however to their Lordships that, if inaccuracy in one of these particulars is established, little dependence can be placed upon the maps. It is mere matter of speculation whether one site or the other is misplaced; it may be that both are misplaced.

Of these two maps, it is further to be observed generally—1st, that where they differ (and the Sudder Ameen has found that they do differ from

each other in some respects), greater credit should be given to the Magistrate's map No. 6, than to the Ameen's map No. 5, because the final Decree of the Sudder Dewanny Adawlut in 1847 upheld the Magistrate's award against the Ameen's report; and, 2ndly, that the principal question then in controversy, and with reference to which these maps were made, was not so much what was the southern boundary now in dispute, as whether the Sonkosh, higher up in its course, had not shifted its bed, so as to give the present Appellant (the Plaintiff in that suit), a right to claim land to the west of the then flowing river as parcel of his village Takeemaree; a question which was ultimately decided in his favour.

The latter observation affords an answer to the argument of the Sudder Ameen, which is founded on the statement made by the Plaintiff in that suit in his replication to the effect that the River Sonkosh had not changed its course for thirty to thirty-five years. For the question here is not what case the Respondent or her predecessors in title may heretofore have put forward, but where, in fact, was the old bed of the river; and the final Decree of 1847 is inconsistent with the proposition that the Sonkosh had not then shifted its course, and must be taken to be a finding against it.

Map No. 4, so far as it bears upon the present question (a point which will be afterwards considered), is treated by the Sudder Ameen as being in the Respondent's favour.

In his second ground the Sudder Ameen relies on a supposed admission in the answer of the Respondent in this suit. But Mr. Kay showed, as their Lordships think successfully, that this argument of the Sudder Ameen is founded on a misconstruction of the term "the western stream of the Burumpootur mixed up with the Sonkosh," which he treats as indicating the actual point of confluence of the two rivers; whereas it may, and probably does, mean merely the course of the Burumpootur after it has received the waters of the Sonkosh.

Another part of the Sudder Ameen's report, which is extremely unsatisfactory, is his attempt to explain the great difference between the quantity of the land comprised within Plots 3 and 4, viz., 5,431 beegahs, and that decreed to the Appellant in 1847, viz., something less than 1,479 beegahs. This

fact affords a strong argument against the identity of the two parcels. Yet almost all that the Sudder Ameen says of it is, "Moreover, there seems no reason why the lands to the northward of the line F G should not belong to the Plaintiff because they exceed the quantity before," by which he probably means the quantity formerly claimed. Again, the Sudder Ameen has either failed to identify the Isamuttee of the Decrees of 1810 and 1818, or he has placed its site so near the line F G as to make it difficult to see how, between the confluence of the Sonkosh and that of the Isamuttee with the western branch of the Burumpootur at that time, there could have been lands of Bahur-Bund *ex adverso* to the disputed chur, sufficient to support the assignment to Bahur-Bund of so much of that chur as the decrees of 1810 and 1818 gave to that zemindary. This circumstance was strongly pressed by the learned counsel for the Respondent, and there appears to their Lordships to be much weight in the argument.

A more material consideration is the following: It is clear, as the Zillah Judge, Mr. Robinson, has pointed out, that whether the old bed be at P P, or at F G, the true line, if prolonged nearly due west, ought to strike the northern extremity of the boundary line drawn (speaking roughly) from south to north, by Dr. Scott, in 1827. Therefore, how far that boundary line extended in a northerly direction, is a question most material to the determination of the present issue. And it is upon that point that the report of the Sudder Ameen seems to be most directly in conflict with the result of the earlier local investigation in 1852. Their Lordships cannot but think that a strong case is required to destroy the effect of those Thackbust proceedings. The investigation involved the fixation of the boundaries not merely of the two Zemindaries, but of two conterminous Zillahs, Rungpore and Goalparah. It appears to have been made by the Revenue Department with considerable care, the collectors of both Zillahs being parties to it. Their award seems to have been the subject of appeal to the Board of Revenue, which confirmed it; but the grounds of that appeal, which might have thrown some light on the present controversy, are not found in the record. Mr. Bedford's map, No. 4, is by far the most scien-

tific of those produced. He appears to have gone upon the ground, to have mapped it, to have ascertained what lands were in dispute between the rival Zemindars, and to have referred those disputes to the Collectors of the two Zillahs. Several parcels of land, besides those in question in the cause, were then in dispute. The two Collectors went upon the spot and determined the boundary wherever it was disputed. Their investigation was treated in the argument as perfunctory, but their Lordships do not think it deserves that character. They seem to have examined the ryots on the ground; and as to one of the disputed points (not however one of those now in question) they differed in opinion, and had to refer that case for determination to higher authority. The remarkable thing is, that according to the concurrent statements of both Collectors the Zemindar of Jumeera almost gave up his case as to the parcels of land which are the subject of this suit. It was argued that the suit itself is an answer to those statements. But it seems to their Lordships to be more probable that the Zemindar should as an afterthought have determined to disavow his agents, and try the chances of a civil suit; than that the Collectors should have so grossly misapprehended what had passed before them. The result of these proceedings was that the boundary was fixed by prolonging the admitted boundary line of Dr. Scott to the north-east, as is shown in map No. 4. Again, from the Collector's report it may be inferred that evidence was thus forthcoming to show that the Zemindar of Bahur-Bund was actually in possession of the land in question. And this is confirmed by the finding of Mr. Fowle (Appendix, p. 1053) on the evidence before him as to the anterior possession.

Their Lordships are of opinion that the report of the Sudder Ameen made 13 years afterwards does not afford a sufficient answer to their Thackbust proceedings. They are not satisfied of the correctness of his assumption that the tree which he found standing, whether Asoodh or Pykar, marked the northern extremity of Dr. Scott's boundary line. It may have been merely a point in that line, and the Revenue Officers may have been correct in prolonging that line as they did.

Their Lordships have not been insensible to the

difficulty, so strongly urged by Mr. Joshua Williams in his reply, of finding any land to correspond with C in map No. 1, consistently with map No. 4. But considering that C was in 1810 the extreme portion of a chur surrounded on all sides by the Burumpootur, they do not think that its disappearance in the course of half a century would be altogether unaccountable. Nor can they lay much stress on the attempt of the Respondents' Mooktear to identify it with Kaem land. A native Mooktear is very apt to clutch at a false explanation, rather than admit his inability to explain a circumstance which seems to militate against his case.

On the whole, their Lordships have come to the conclusion that the Report of the Sudder Ameen fails to establish that the line of the old Sonkosh was at F G. They do not feel that, in coming to that conclusion, they are departing from what has been laid down in other cases touching the weight to be given to a Report made by an officer deputed to make a local investigation, and stating conclusions drawn from what he has actually found and observed on the ground. Enough has been said to show that the Report of the Sudder Ameen, in this case, is not exactly of that character. But if it were, their Lordships, in treating it as insufficient to destroy the effect of the Thackbust proceedings, would be only applying in favour of the Respondent the *ratio decidendi* which was applied in favour of the Appellant by the Sudder Dewanny Adawlut in 1847, viz., that where the results of two local investigations are conflicting, the earlier is to be preferred. The principle is reasonable; since in the interval between the two investigations the features of the locality may have changed, and evidence of possession may have been lost.

If it were necessary for their Lordships, in dealing with this voluminous record, to determine affirmatively where the line of the old Sonkosh was, they would be disposed to prefer the line P P to that of F G. But it is not necessary for them to do this. It is sufficient for them to hold with Mr. Justice MacPherson, that the Appellant has failed to establish that F G was the true line, by evidence on which a Court of Justice ought to disturb the possession which the Respondent has had of the lands

in question; certainly since 1852, and probably for a much longer period.

Being of this opinion, they will humbly advise Her Majesty to affirm the Decree under appeal, and to dismiss this Appeal with costs.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—3/4/73.