Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of—

Rajah Sahib Perhlad Sein v. *Baboo Budhoo Sing*,

Kaleepershad Tewarree v. *Rajah Saheb Perhlad Sein*;

Rajah Sahib Perhlad Sein v. *Doorgapershad Tewaree*;

Rajah Sahib Perhlad Sein v. *Run Bahadoor Singh and others*; *and*

Rajah Sahib Perhlad Sein v. *Maha Rajah Rajender Kishore Sing*;

from Bengal; *to be delivered* 12*th March*, 1869.

Present:

Lord Chelmsford.
Sir James W. Colvile.
Sir Joseph Napier.

Sir Lawrence Peel.

THEIR Lordships have now to dispose of five Appeals in which the same person, Rajah Perhlad Sein, is an actor, being in four of them the Appellant, and in the fifth the Respondent. Though the cases are not otherwise connected with, or dependent on each other, it will be convenient to state certain facts relating to the Rajah and his title which are common to all. He is now in undisputed possession of the Raj and Zemindary of Ramnuggur, the title to which was in litigation from 1835 until 1858. He originally sued for them as guardian on behalf of his infant son

under a deed of gift; they were at the same time claimed by Run Murdun Sein as a son of the former Rajah, Umur Purtab Sein, and by other parties under different titles. Ultimately the right of succession of the present Rajah as the nearest collateral heir of Umur Purtab Sein was declared by a Decree of the Zillah Court dated the 27th of February, 1845, and that Decree was affirmed on appeal by the Sudder Court on the 9th of September, 1846. From that date the litigation was confined to the Rajah and Run Murdun Sein, who alone preferred an appeal to Her Majesty in Council, which was finally determined in the Rajah's favour in January 1858. The estate was in the possession of one of the widows of Umur Purtab Sein from the time of his death in 1834, until February 1840, when she died. The Collector of the district was then directed to keep it under attachment until the title to it should be determined in the pending litigation. After the Sudder Court's Decree in 1846, an order was made that the Rajah should be put into possession on giving security to abide the event of the appeal to England; but owing to delays in perfecting that security, he did not obtain actual possession until June 1848. The security afterwards failed; the Rajah was unable to give fresh security to the satisfaction of the Courts; an order was made on the 18th of May, 1854, that the property should again be attached by the collector; and it remained under attachment from that time until possession was restored to the Rajah in 1858, upon the determination of the appeal in his favour. Having stated these facts and dates, their Lordships will proceed to deal with the several appeals in their order, beginning with that in which Budhoo Singh is Respondent.

The suit out of which this Appeal has arisen was brought to recover from the Appellant (the Rajah) possession of a four-anna share of certain specified property, comprising the whole, or a very considerable part of the Zemindary of Ramnuggur. The original Plaintiff was a Mussulman lady, claiming to be, at least for the purposes of the suit, the sole representative of her late husband Sultan Jan, who was the sole representative of one Kajah Hossein Ally Khan. After the institution of the suit she sold all her interest therein to the Respondent, who

has been substituted as Plaintiff on the record, and may be taken to have all the rights in the subject matter of the suit which could have been successfully asserted either by Kajah Hossein Ally Khan, or by Sultan Jan.

His title is founded on a kowala or bill of sale of the property in dispute, which is admitted to have been executed to the Kajah by the Appellant on the 23rd of September, 1844, and therefore at a time when the latter neither was in the possession of the Zemindary, nor had established in any Court his title thereto. The case of the Respondent is that this bill of sale expresses the real contract between the Appellant and the Kajah, which was one for the absolute sale by the former and purchase by the latter of a four-anna share of the specified property for the price of 75,000 rupees, and that that sum was actually paid down in cash when the instrument was executed.

The case of the Appellant is, that being in want of funds to carry on his suit for the Raj and Zemindary, and for his own support, he applied to the Kajah, who agreed to make advances for those purposes on condition of having the bill of sale executed, registered, and duly notified in the pending suit; that no part of the expressed consideration or sum of 75,000 rupees was paid on the execution of the instrument; and that though the Kajah from time to time advanced small sums of money, the whole amount of his advances fell far short of 75,000 rupees; that afterwards the Kajah absconded from Patna on a charge of disaffection to the Government; whereupon it was agreed between his son, Sultan Jan, and the Appellant, that a bond for 76,000 rupees hypothecating the whole of the property in question, and not merely a twelve-anna share of it should be substituted for the instrument importing the absolute assignment of the four-anna share; and that, accordingly, such a bond was executed by the Appellant to Sultan Jan on the 7th of March, 1846; but that the 76,000 rupees was merely a nominal consideration, of which no part was paid, the real contract being one to secure moneys already advanced with future advances which Sultan Jan undertook but failed to make.

The questions thus raised between the Appellant and Respondent are not now litigated for the first

time. In August 1848, Sultan Jan instituted two suits against the Appellant, of which one, being almost identical with the present, was brought to recover possession of the four-anna share of the property under the title founded on the bill of sale; and the other was for the recovery of the 76,000 rupees purported to be secured by the bond which he alleged to have been advanced in addition to the 75,000 rupees said to have been paid on the execution of the instrument of September 1844.

Both these suits were dismissed by the Zillah Judge (Mr. Hathorn). He held that the Plaintiff's story in one suit as to the payment of the 75,000 rupees, and in the other as to the payment of the 76,000 rupees was false; and in his Judgment in the Bond suit he expressed an opinion that the Appellant's account of the transactions was substantially the true one. There was an appeal to the Sudder Dewanny Adawlut against both Decrees. The Appeal in the Bond suit was absolutely dismissed. On the other Appeal the pleaders for the Respondent (the present Appellant) unfortunately raised a question as to the sufficiency of the stamps on certain documents which had been put in evidence; and the Sudder Court, avoiding the decision of the case upon its merits, directed the suit to be dismissed on that ground only; and consequently gave to the Plaintiff, Sultan Jan, all the advantages which a Judgment of nonsuit has over a Judgment for the Defendant.

The result, however, of that litigation was a conclusive decision against Sultan Jan in the Bond suit; whilst in the other suit a decision on the merits was passed against him in the Zillah Court, which was only so far qualified by the Decree of the Sudder Court that he was left at liberty to bring a new suit. The date of that Decree was the 4th of January, 1853.

In this state of things the present suit was instituted on the 22nd of August, 1856. It was brought in the Court of the Principal Sudder Ameen, who dismissed it with costs; and on appeal his decision, except as to costs, was confirmed by the Zillah Judge (Mr. Atherton). Both decisions proceeded upon the assumption that the Respondent's case as to the payment of the consideration of 75,000 rupees was false, and the Appellant's true. And both

Judges, conceiving that their decision on this point was sufficient to determine the suit, omitted to decide an issue which expressly raised the question whether the bond for 76,000 rupees of 1846 had been given in substitution for the absolute bill of sale of 1844. According to the practice of the Courts of India, these two decisions were final in India on questions of fact, though on questions of law or procedure there lay a special appeal to the Sudder Court. Such an Appeal was in fact preferred. It is unnecessary to state any of the grounds of it, except the 4th; which is to the following effect:—"If for argument's sake it be admitted that the Defendant did not receive the full price, yet by reason of his acknowledging to have executed a bynamah (bill of sale), a Decree in this suit would be just and indispensable, because the Defendant has the power to sue for the recovery of the balance of the purchase-money."

On that Appeal the Sudder Court, on the 27th of September, 1860, made the Decree which is the subject of the present Appeal. Though bound by the finding of the Courts below that the 75,000 rupees had not been paid as alleged by the Plaintiffs, the Judges who sat on the Appeal nevertheless, proceeding upon a statement in Mr. Atherton's Judgment to the effect that the advances made to the Appellant probably amounted to about 18,000 or 20,000 rupees in all, arrived at the conclusion that the real and final contract between the parties was one of absolute sale and purchase, upon which there had been a partial payment of the purchase-money. They further held that in these circumstances a complete title to the lands passed to the Kajah by virtue of the bill of sale on its execution; and (by a supposed application of the doctrines of English Courts of Equity) that the vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money; and was to be held accountable as a mortgagee in possession for the rents and profits. They accordingly remitted the cause to the Judge, with directions "to decide it *de novo* in his Court, on the points now mooted, or upon others which fairly arise on the pleadings."

Before they consider whether the principles upon which the Judges proceeded were sound in them-

selves, or applicable to a transaction of this nature between Hindoos or between a Hindoo and a Mussulman, their Lordships must observe that this application of them assumed a state of things which was not consistent with the case made by either party, and was certainly not necessarily implied by the findings of the Courts below upon the issues of fact. For even if those Courts had found that advances within a certain limit had been made, it did not follow that they were made in part payment of the consideration for a subsisting contract of sale, and not, as the Rajah insisted, upon a contract for security. And, indeed, the Decree under appeal, by remitting the cause for trial upon the points fairly arising on the pleadings, including the undetermined issue as to the substitution of the bond for the original contract, left this very point open.

Their Lordships, however, are of opinion that even if this question of substitution had been determined in favour of the Respondent, the Decree of the Sudder Court would nevertheless have been erroneous.

It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the Sudder Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract and upon the facts found by the Courts below, according to equity and good conscience. They seem to have ruled that the effect of the execution of a bill of sale by a Hindoo vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the instrument the effect of a conveyance operating by the statute of uses. Whether such a conclusion would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review; in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish

a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency; of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do. In the present case the purchaser had alleged that he was in that condition, having paid the whole of the price at the date of the execution of the instrument; but that allegation had been found to be false. Nor, if the fact had been, as assumed by the Sudder Court, that part of the purchase-money was paid upon the execution of the contract, and the purchaser had come into Court alleging such part payment and tendering the balance, does it follow that he would have been entitled to a Decree for specific performance; for the contract sued upon is an eminently speculative, not to say a gambling, one. On the face of it, the vendor agrees, in consideration of a sum presently paid, to sell that which he has not, and may never have; and the price is presumably fixed upon a calculation of the risk undertaken by the purchaser, at a sum far below the real value of the thing sold. But if the purchaser under such a contract has retained part of the price for several years and until the risk has been determined by the happening of the contingency, he has *pro tanto* diminished the risk which he contracted to bear; and the vendor has *pro tanto* lost that for which he stipulated—the present use and enjoyment of the money. The contract, therefore, has become incapable of being performed according to the true meaning and intent of the contracting parties. Their Lordships are therefore of opinion that the Decree made by the Sudder Court upon their assumption of the facts was in every point of view erroneous, and cannot be supported.

They have now to consider not only what Decree the Sudder Court ought to have made on the special Appeal, but what ought to be the final Decree in the suit; since in order to do complete justice between the parties, they have allowed the learned Counsel for the Respondent to impeach the Decrees of the two Lower Courts, and to argue the whole case upon the merits. And it has been so argued very ably by Mr. Bell. The first and most material question is, whether it has been

correctly found that the 75,000 rupees were not paid as alleged by the Respondent upon the execution of the bill of sale. That has been so found by three Courts in India; and, therefore, in attempting to disturb the finding, the learned Counsel undertook a more than ordinary burthen. He argued, however, that the two decisions in this suit gave undue weight to the former decision of Mr. Hathorn; and that that gentleman's judgment had not allowed sufficient weight to the presumptions arising from the admitted acts of the Appellant in executing the bill of sale, and the receipt for the purchase-money, and in subsequently recognizing them. Their Lordships fully concede, that though, according to the law and practice of the Courts in India, those acts were not conclusive evidence against the Appellant; the presumptions arising from them ought to have been allowed due weight upon the trial of the issue, whether the consideration had been paid as alleged. They observe, however, that the issue came ultimately to be determined upon the testimony of conflicting witnesses, of whom the Judge held that some were credible and respectable, and others altogether unworthy of credit. Nor, can their Lordships say, after giving full weight to the presumptions in question, and to the other circumstances in the case, that the finding was wrong. They are disposed to believe, that the real arrangement between the Appellant and the Kajah was for advances to be made from time to time; and that the form of the contract was adopted in order to evade the effect of the decisions of the Indian Courts in respect of what they consider champerty. They think, therefore, that there is no ground for disturbing the finding that the 75,000 rupees were not paid as alleged; and it follows, from the reasons which they have already stated, when dealing with the Judgment of the Sudder Court, that if that finding was correct, the suit was properly decided in the Appellant's favour upon it. Their Lordships, however, think it right to add, that upon the evidence, corroborated as it is by the fact, that the Bond hypothecated the whole, and not only three-fourths of the property in question, they think that the issue as to the substitution of that security for the bill of sale would also have been properly found in the Appellant's favour.

Mr. Bell pressed upon their Lordships the propriety of doing complete justice between the parties, by imposing upon the Appellant the terms of repaying the advances actually made to him by the Kajah and Sultan Jan. They do not see how they can do this in the present suit, of which the dismissal will not prevent the recovery of those advances if they are still recoverable. Sultan Jan's proper course was to sue for the repayment of them in the Bond suit, if they were included in that security; or if they were not so included, under his general title as representative of his father. If, in consequence of his failure to do so, or of the lapse of time, the remedy is gone, their Lordships may regret that result; but they do not see how they can supply a new remedy by imposing terms upon the Appellant, who is not in this suit seeking the aid of the Court, but is sued upon a different and inconsistent cause of action. And the difficulty of taking such a course is increased by the circumstance that the Respondent is not the representative of the Kajah or of Sultan Jan for all purposes, but is merely the assignee of the rights which Furkhoonda Khanum has specially claimed in this suit.

Their Lordships, therefore, will humbly recommend to Her Majesty that this Appeal be allowed with costs; that the Decree of the Sudder Court be reversed, and that in lieu thereof an order be made, dismissing the special Appeal with costs. The effect of this will be to affirm the Decree of Mr. Atherton. Their Lordships are not disposed to interfere with the discretion exercised by him in respect of the costs of the suit in the Lower Courts.

KALEEPERSHAD TEWARREE
v.
RAJAH SAHIB PERHLAD SEIN.

In the second Appeal under consideration, Kaleepershad Tewarree is the Appellant, and the Rajah the Respondent.

The suit out of which it arises was brought by the Respondent to set aside a Zur-i-peshgi deed dated the 23rd of December, 1851, which purports to have been executed by him to the Appellant and his brother, Muddun Mohun Tewarree, since deceased, for securing to them the repayment of 49,453 rupees, with interest, by the pledge or mortgage of 15 mouzahs, part of the Zemindary of Ramnuggur. He also claimed Wassilat or the mesne profits of the

property for six years. The Respondent admits the execution of the deed, but says that it was executed as a security for the amount appearing to be due on a bond previously executed by him in favour of the same parties in February 1849; that he never received any consideration for the bond; and that he was induced to execute both documents by his servant, Binda Lall, who was acting in collusion with the Tewarrees.

His story as to the consideration for the bond is, that in the course of the negotiations for procuring the security, to abide the event of Run Murdun's appeal to England, which he had to give when he got into possession of the property in 1848, it was arranged that Ranee Unopoorna, who became his surety and pledged her property by way of security, should receive a bonus of 20,000 rupees; that the Appellant and his brother should pay that bonus, and for so doing should themselves receive another bonus of 20,000 rupees; that the bond was given to secure these two sums of 20,000 rupees; but that the Tewarrees failed to pay the 20,000 rupees to the Ranee, who consequently contrived to escape from her obligations as security by means of a revenue sale and *benamee* re-purchase of the property which she had pledged as security, and so brought about the re-attachment of the Zemindary in 1854. His case, therefore, is, that the deed impeached was obtained from him fraudulently and without consideration.

The case of the Appellant is, that the transactions were what they purported on the face of them to be; that the bond was given to secure advances which had been made in Calcutta to Binda Lall as the agent of the Respondent, with his sanction and on his account; and that the Zur-i-peshgi deed was executed to secure a balance found on a settlement of accounts to be due in respect of the bond debt, and some other transactions.

It is an admitted fact that the Appellant and his brother have been in possession of the property under the deed for several years. The Appellant's case is that he is still in such possession; but this seems to be disputed by the Respondent.

The cause was tried by the Principal Sudder Ameen, who dismissed the suit with costs. His Decree was reversed by the High Court, chiefly on

the ground that the Defendants, the Tewarrees, had failed to prove that they had given consideration for the bond; but the Decree of that Court, though it directed that the Zur-i-peshgi deed should be set aside, refused to award any of the wassilat or mesne profits sued for, and gave no costs.

The Appellant, as the survivor of the two Defendants, appeals against the Decree; and there is also a cross-Appeal against so much of it as rejects the claim to Wassilât, and refuses to give the costs of the suit to the Respondent.

From the foregoing statement it sufficiently appears that the question between the parties is one of fact, viz., which of these conflicting stories is true.

It is obvious, however, that, in the first instance, it lies upon the Respondent, who comes into Court to set aside a security solemnly executed by himself, and perfected by possession, to make out his case. And the first question to be considered is, whether he has done so, at least so far as to cast upon the Defendants the burthen of proving theirs. There has been some argument as to the rule and practice of the Courts in India on this point, and, in particular, upon the ruling of the Sudder Court in its Judgment in the suit of Sultan Jan upon the Bond for 76,000 rupees, which has been made one of the exhibits in this cause. Upon that their Lordships observe that if what was stated by the Sudder Court be read in connection with the context, it does not seem to go beyond what both sides would admit to be the law in India. The Appellant in that case had argued that, unless the "party sued in the bond could establish affirmatively that his signature had been obtained under the influence of force or fraud," he was conclusively bound by that signature, and that a Decree must pass against him. The Court said, in answer to this, that it had become the established practice of the Courts in India, in cases of contract, to require satisfactory proof that consideration had been actually received according to the terms of the contract; and that it had never been held there that a contract made under seal of itself imported that there was a sufficient consideration for the agreement. The latter proposition seems to be indisputable. The

former may be too loosely expressed; and the later cases cited by Mr. Pontifex show that if it is to be taken as affirming that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying on the instrument the burthen of proving payment of that consideration, it is too wide. It is further to be observed that a party who, like the Plaintiff in the case referred to, comes into Court to enforce a bond, is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance.

Their Lordships have no doubt that, in the latter case, the law of India, as of this and probably every other country, casts upon the Plaintiff the burthen of establishing at least a good *primâ facie* title to the relief which he seeks; and they will first proceed to consider how far the Respondent has affirmatively made out the case upon which he relies.

Now, what are the facts which are either common to the cases of both parties, or are proved beyond dispute?

In 1845 Binda Lall was in Calcutta, as the agent of the Respondent, looking after the Appeal in the great suit for the Raj which was then pending in the Sudder Court, and possibly other law business. He remained there after the Sudder Court's Decree of the 9th September, 1846, had been made in the Respondent's favour. The principal business which he had then to perform was to procure the security which the Respondent had to give in order to get into possession. Whilst he was so resident in Calcutta he certainly had some transactions with the Tewarrees, one of whom, Muddun Mohun, was or had been the Vakeel, or *quasi* Diplomatic Agent of the Maharajah of Nepaul; but who also carried on there some kind of mahajunny, or money-lending business. On the 27th December, 1847, Ranee Unopoorna executed the security bond pledging her property; and on the same day entered into an agreement with Binda Lall as the Respondent's agent, by which it was stipulated that for her protection her manager should be allowed to make

the zemindary collections from Ramnuggur, paying thereout an allowance to the Respondent, but keeping the surplus moneys in deposit. There is not a word in this subsidiary agreement about the bonus of 20,000 rupees. The Respondent seems to have objected to the arrangement so proposed, and for that, or some other reason, it was not carried out. The security itself was, in the first instance, rejected by the Zillah Judge, Mr. Hathorn; but on Appeal to the Sudder Court was admitted as sufficient. The delay caused by these proceedings accounts for the interval of time between the date of the security bond and June 1848, when the Respondent was actually let into possession. The proceedings put in by the Respondent show that in September 1848 Ramchund, and very shortly afterwards, Unopoorna herself, made an application to have the security bond set aside, and Unopoorna and her property released therefrom. The final order of the Sudder Court refusing to release her was, however, not made until the 19th of February, 1851. Thereupon she took the steps which have been already mentioned to release herself. The property which she had pledged by way of security was sold for arrears of revenue on the 11th of October, 1851. Notwithstanding this sale, the Respondent remained in possession of the zemindary until May 1854. Run Murdun's first application for fresh security was not made until August 1853; fresh security, the nature of which does not appear, was then tendered, and was finally rejected in May 1854. The Respondent, whilst still in possession, received from the Tewarrees, for at least two years, the rent payable to him under the Zur-i-peshgi deed. After the attachment, the following circumstances occurred. The Collector in the first instance attempted to make the gross collections from the zemindary irrespectively of all interests intermediate between the Zemindar and the Ryots which had been created by the Respondent. A remonstrance was made by many of those claiming such interests, though not, so far as the evidence goes, by the Tewarrees. The Commissioner directed that such interests should be respected pending the attachment. In consequence of this the Collector issued an order to the Respondent, calling upon him to specify what

mouzahs he had given in Mokurruree, and under simple leases and Zur-i-peshgi deeds; and in answer to that Order he filed a report, stating, amongst other things, that the fifteen mouzahs in question were under Zur-i-peshgi to Muddun Mohun Tewarree. Thereupon the tenure and possession of the Tewarrees was confirmed by an Umuldustuck of the Collector dated the 7th of June, 1855; and, on the 8th June, 1855, two Mooktears filed in the name of the Respondent a petition in answer to some remonstrance of Run Murdun Sing's, affirming among other things the *bona fides* of this transaction with the Tewarrees, and repudiating the imputation that they were servants of the Respondent holding for his benefit. In August 1856, under orders of the Collector, confirmed by the Commissioners, the Tewarrees obtained a refund of 1,883 rupees 9 pice 2 annas, the amount of the collections deposited in the Collectorate in respect of the rents and profits of the fifteen mouzahs received between date of attachment and that of the Commissioner's order above referred to. This proceeding seems to have elicited from the Respondent the first suggestion of the case now made by him. On the 18th of October, 1856, a petition was presented by a Mooktear, professsing to act in his name, complaining of the order for the refund, and setting up against the Tewarrees a case substantially, but not altogether, the same as that now made. The petition was referred to the Respondent in order to ascertain whether it was really his act; and by another petition signed, not by himself, but a Moonshee, he adopted it generally, though he disputed the accuracy of some of its statements, and insisted that the fifteen mouzahs ought to be re-attached. It does not appear by any evidence what, if anything, was done on the petitions; but the mouzahs were certainly not re-attached. The Tewarrees remained in possession of them up to the time when the Respondent recovered possession of the Zemindary in 1858; if not up to the day of the commencement of this suit.

What, then, is the case proved by the Respondent, and how far is it consistent with these established facts?

It is not very easy to make out from the plaint and the depositions of the Respondent in support of

it a clear or consistent story touching the alleged undertaking of the Tewarrees to pay the bonus to the sureties. His case must be tried by the testimony of his witnessess, of whom Binda Lall, though treated as having colluded with the Tewarrees, and made a Defendant to the suit, is the most important, and certainly not the least friendly. He is, moreover, admitted to have been restored, whatever his former delinquencies may have been, to the Respondent's service.

According to that testimony the history of the transactions in question is this :—

Before the security bond was drawn up, *i.e.*, before the 27th December, 1847, Binda Lall had agreed with Unopoorna, or with Ram Chund on her behalf, to pay the bonus of 20,000 rupees as soon as the Respondent, upon the acceptance of the security, should be put into possession. After the execution of the security bond, but before it was tendered to Mr. Hathorn, Muddun Mohun Tewarree, on Binda Lall's application, agreed to become responsible for the payment of the bonus on the condition that he and his brother should receive the further bonus of 20,000 rupees to be paid out of the rents of the estate.

The undertaking, therefore, was given some time before the 18th June, 1848, and ought to have been performed at that date. The bond was executed in February 1849. The witnesses who speak to that transaction all admit that the Respondent then knew that the bonus had not then been paid to the surety. They do not explain why, in these circumstances, the bond was taken for 40,100 rupees, or bore interest from its date.

According to Beharry Lall and some of the witnesses it was in consequence of the failure of Muddun Mohun to perform the promise of payment which he renewed at the time of the execution of the bond that the surety first made her attempt to be released from her security. But the documentary evidence already adverted to, shows that she had applied to be released before the bond was executed. Again, the witnesses who speak to the execution of the Zur-i-peshgi deed, equally prove that the Respondent then knew that Muddun Mohun had not paid the bonus which they say he had undertaken to pay. They allege that he then renewed his promise

to pay it, and that on the faith of that promise the Zur-i-peshgi deed was executed. They represent that in consequence of the non-performance of this last promise, the surety caused her pledged property to be sold at the auction sale. Yet the documentary evidence proves that it had been so sold more than two months before the date of the Zur-i-peshgi deed. The Respondent himself admits that he executed that deed to secure the amount of principal and interest due on the bond. But neither he nor any of his witnesses give any explanation why interest was thus allowed upon a sum which, to his knowledge, had not been paid. Again, Binda Lall says that when he finally discovered that the surety had not been paid the bonus and had escaped from the liability, he wrote to the Respondent not to give the Tewarrees possession under the deed. Yet the documentary evidence proves that they were put into possession, and that the Respondent repeatedly recognized them as *bonâ fide* Zur-i-peshgidars in possession, until, in the autumn of 1856, he was induced to put forward some such case as that now made.

The learned Counsel for the Respondent sought to account for the discrepancies above mentioned by various ingenious suggestions; but these were all more or less speculative, and inconsistent with the depositions of their witnesses. They also contended that their case was established by the admissions made by the Appellant in his deposition.

Their Lordships, however, are of opinion that these admissions cannot fairly be taken to amount to more than that the Appellant and his brother, or one of them, took some part in the negotiations with Ram Chund and Unopoorna for procuring the security; that they knew the surety was to receive a bonus, and believed that she did in fact receive 18,000 rupees from Binda Lall, partly directly and partly through them; that is, out of the advances which they made to Binda Lall on the Respondent's account. If there is any doubt as to what really took place between Binda Lall and the Tewarrees on the one side, and Ram Chund or Unopoorna on the other, and in particular whether, as suggested at the Bar, there were negotiations after the sale of her property for the renewal of that particular security,

it lay upon the Respondent to clear all that up by examining, as he might have done, the two last-named persons, or one of them.

Upon this evidence the Principal Sudder Ameen came to the conclusion that the Plaintiff had failed to prove his case, and dismissed the suit. The Judgment of the High Court proceeds on the ground that the Respondent had at all events established such a *primâ facie* case as threw upon the Appellant the burthen of proving his own, and that he had failed to do so. Their Lordships cannot assent to the reasoning by which the Judges of that Court have arrived at the first of these conclusions. They seem to their Lordships in some passages to substitute speculation for proof; in others, as for instance in all that relates to Unopoorna's security, which they treat as subsisting down to 1854, to proceed upon a misconception of the facts proved; and in others to draw inferences from facts proved or admitted, which are not the necessary, or even the legitimate, consequences of those facts.

Their Lordships do not deny that if it lay upon the Appellant to prove the truth of his case, he has very imperfectly done so, and that exceptions might fairly be taken to the non-production of his books of account, and to the non-appearance of Muddun Mohun as a witness. But considering that it lay upon the Respondent to establish a clear and consistent case for setting aside his own deed, and that the evidence in the cause wholly fails to do so, their Lordships are of opinion that the conclusion to which the Principal Sudder Ameen came was just and proper, though the reasons which he gives for it may not be altogether satisfactory. The order therefore which in this case they will recommend to Her Majesty is, that this Appeal be allowed; that the Judgment of the High Court be reversed; and that, in lieu thereof, an order be made dismissing the Appeal to that Court with costs; and further that the cross-Appeal be dismissed. The Respondent must pay the costs both of the Appeal and of the cross-Appeal.

RAJAH SAHIB PERHLAD SEIN
v.
DOORGAPERSHAD TEWARREE.

In the next case to be disposed of the Rajah is Appellant, and Doorgapershad and others, the representatives of Muddun Mohun Tewarree, deceased, are the Respondents.

This suit was brought by the Appellant on the 31st of December, 1861, to recover possession of two mouzahs forming part of his Zemindary of Ramnuggur, from the Respondents, "in reversal of an allegation of Mokurraree, and proceedings of the Deputy-Collector and Collector, dated the 9th and 16th June, 1856." He also claimed a refund of a small sum of money, being collections in deposit paid to Muddun Mohun under those proceedings, and the mesne profits of the mouzahs between 1264 and 1269.

His case was that in 1849-50 he made over these villages, or their produce, to Muddun Mohun Tewarree, who "lived with him," in consequence of the execution of the security bond by Rance Unopoorna "in lieu of allowance" for his rendering service; that no Mokurraree grant of them was ever made by him; that some time in 1857 he discharged Muddun Mohun from his service for bad faith, whereupon his tenure determined; and that the moneys in deposit in the Collectorate had been paid out to Muddun Mohun upon a false allegation of the existence of a Mokurraree grant, which the Revenue officers had never seen.

The case of the Respondents was, that Muddun Mohun Tewarree held the villages under a Mokurraree (*i.e.*, an hereditary tenure at a fixed rent) granted by the Appellant on 5th Falgoon, 1256 (February 1849), as a reward for services already rendered; that Muddun Mohun never lived with the Appellant as a servant, in the proper sense of the term, but was the vakeel of the Maharajah of Nepaul, and resident in Calcutta. The substantial issues settled in the suit were—1st. Whether the suit was barred by the law of limitation; 2ndly. Whether the property in dispute was possessed by Muddun Mohun by virtue of a Mokurraree grant, or as payment for service from 1257 Fusly; and if by the Mokurraree grant, whether that grant was valid or not; 3rdly. Whether Muddun Mohun Tewarree was a servant of the Appellant, or a vakeel of the Maharajah of Nepaul, residing in Calcutta.

The Zillah Judge found that the suit was barred by the law of limitation, having been instituted more than twelve years after the date of the pottah set up by the Respondents, and the commencement of Muddun Mohun's possession. And dealing also with the other two issues of fact, he found that the

Defendants had had possession since 1256 Fusly, by virtue of the Mokurraree grant, and that that grant was genuine and valid. He therefore, on both grounds, dismissed the suit.

Their Lordships will here observe, that it is upon the latter finding alone that this decision can be upheld. For, if it be not established that Muddun Mohun, in fact, held possession under a Mokurraree tenure, there is no evidence at all that the Appellant knew that he claimed so to hold it at any time before 1856, and his suit would be in time. On the other hand, if that fact be established in favour of the Respondents, they are entitled to a Decree upon the merits. The nature of Muddun Mohun's tenure is, therefore, the only real question in the cause.

The High Court, on Appeal, affirmed the Decree of the Zillah Judge. The grounds assigned by the Judges were, that the Appellant had failed, in their opinion, to establish the precise case set up by him; that there was no proof of any lease other than the Mokurraree pottah; and, therefore, that Muddun Mohun must be taken to have been in occupation of the lands, either under no engagement at all, which was highly improbable, or under the pottah propounded by his heirs: and the Judgment ends with this sentence—"We incline to think that the probabilities are in favour of the latter view of the case; and as we are not satisfied that the decision of the Court below is wrong upon the merits, we see no reason to interfere with the Judgment, and dismiss the Appeal."

The result of these Decrees, if they stand, will be to establish against the Appellant, and all who claim under him, the right of the Respondents and their successors to hold the villages in question under a perpetual hereditary tenure at a fixed rent. Their Lordships proceed to consider how far this conclusion is justified by the evidence taken in the cause.

The witnesses of the Appellant do not greatly differ from those of the Respondent as to the origin of the transaction. They differ somewhat as to the date of it, but all speak to a visit of Muddun Mohun to the Appellant, and to a demand by the former of something for his support. Again, those for the Appellant, whilst they treat what was given as being

a retainer for future services, admit that it was also a reward for past services, including that of procuring the security on which the Appellant had obtained possession of his estate. It is, moreover, clear that Muddun Mohun was not in the ordinary sense of the term a servant of the Appellant; that he was or had been the Vakeel of the Maharajah of Nepaul; that his residence was in Calcutta; and that whatever services he had rendered or was to render to the Appellant were rendered or to be rendered there. On the whole, the weight of the evidence on this part of the case is in favour of the conclusion that whatever was given was given as a reward for a past and special service; and that the gift was not a mere assignment in the nature of wages to a servant for continuing services determinable with those services at the will of the master. The chief and irreconcileable discrepancy between the witnesses is as to the subject of the grant. Those for the Appellant say that the mouzahs in question were then under lease to two ticcadars, and that in answer to Muddun Mohun's demand the Appellant caused letters to be written to those persons directing them to pay their rents to Muddun Mohun and his brother Munnoo Tewarree, who was to remain at Ramnuggur. From one of the proceedings which will be afterwards mentioned, though not from the testimony of the witnesses, it appears that for the assignment of those rents, which amounted together to nearly 1,000 rupees per annum, Muddun Mohun and his brother were to pay the Appellant a reserved rent of 81 rupees per annum. And it has not unnaturally been asked why, if this case be true, is it not corroborated by the production of the letters to the ticcadars, or by some evidence on their part, or by proof of a Kuboolyat from the Tewarrees undertaking to pay the reserved rent of 81 rupees.

On the other hand, the witnesses for the Respondents depose that in answer to Muddun Mohun's demand of a reward the Appellant caused a Mokurraree deed of the two villages to be then and there drawn in the name of Muddun Mohun, and signed and sealed it himself. And the Respondents produce a deed which purports to grant to Muddun Mohun a Bekh-birt Mokurraree of the two villages on an annual jumma of 136 rupees to be enjoyed by the lessee from generation to generation. It appears

to have been originally on plain paper (for the memorandum at the foot of it shows that the Respondents before filing it in this suit had to pay a penalty for getting it stamped). It was never registered; and as set out at page 39 of the Record it does not appear to bear the Appellant's signature. It was contended at the Bar that the impression of his seal is also wanting. Their Lordships cannot think that if this were really the case, both the Courts below would have omitted to comment on these material defects in the document, of which the original was before them. On the other hand, their Lordships are bound to say that the evidence before them, so far as they have hitherto considered it, is far from being satisfactory proof of the grant of a Mokurraree tenure.

The Respondents have also produced the Farkhuttee or receipt (No. 24, p. 39). The importance of it is that the Appellant thereby purports to admit the receipt of the rent of the villages from 1256 to 1261 (1849 to 1854) from Baboo Munnoo Lall Tewarree Mokurrareedar. The date is the 10th of Bysack, 1261. But, in their Lordships' opinion, this document and the evidence in support of it are extremely suspicious. On the face of it, it does not bear the Appellant's signature, but that of some other person. It was written on plain paper. It does not specify the amount paid, and it treats Munnoo Lall, who is not named in the Mokurraree deed, as the Mokurrareedar. Again it is a general receipt for rents which would in ordinary course have been paid on separate receipts at different times during four or five years. The witnesses who speak to it say that it was signed by the Rajah on a settlement of accounts between him and Munnoo Tewarree, and that the Rajah then requested Munnoo to give him the receipts or letters which he had received. If these receipts were returned, they are not produced; if they were retained, no sufficient reason is assigned for their retention. And this piece of evidence appears to be so far from advancing the Respondent's case that it throws additional suspicion upon it.

The degree in which the proceedings which took place after the re-attachment of the *Zemindary*

tend to corroborate the case of either party remains to be considered.

On the 26th October, 1854, the Collector called upon the Appellant to make a return of the Mouzahs of which he had given Mokurraree, simple ticca, and Zur-i-peshgi ticca leases. On the 13th November, 1854, the Appellant made a return of the Mokurraree tenures created by him, in which there is no mention of that which is now in dispute. He did not then send a list of the ticca leases, but promised to do so thereafter. On this the Collector passed an order that the collections should be made from the attached estate, without regard to the tenures created by the Appellant. The persons affected by this appealed to the Commissioner, who, on the 27th of December, 1854, passed an order reversing that of the Collector, and directing that such rents only as the Appellant would have been entitled to had he remained in possession should be collected by the manager. Amongst the Appellants, whose names and claims are stated in the Commissioner's proceeding Muddun Mohun Tewarree is not found; and on the other hand, certain persons claiming to be simple ticcadars of the villages in question are so found. On the 14th of March, 1855, the Appellant in obedience either of the original Perwannah of the 26th October, 1854, or some subsequent Perwannah, sent to the Collector the Urzee (No. 6, p. 16) in which he says he has, on inquiry into his records, had prepared a detailed statement (which he forwards) of all the Mouzahs in Raj Ramnuggur, containing the names of the ticcadars and Zur-i-pesghidars, and the names of servants to whom particular Mouzahs have been assigned in lieu of wages and other particulars. And the Exhibits Nos. 4 and 5 (pp. 15 and 16) were treated by the Appellant's Counsel as extracts from that statement. These relate to the two Mouzahs in question, state that Muddun Mohun is the ticcadar of both at jummas which make up the sum of 81 rupees; and further that each village is held "on conditions of service." There is in these Exhibits also a statement of sums under the head of expenses, which their Lordships feel some difficulty in explaining, or in reconciling with the hypothesis of either party. On the other hand, Mr. Pontifex for the Respon-

dents, relies strongly on the Exhibit No. 29, which is signed by one Binda Lall as the Roojoonovees on the part of the Rajah, and was filed in the Collectorate on the 17th of October, 1854. In that document Muddun Mohun Tewarree is stated to be Mokurrareedar of the two villages; and the rents payable by him amount to 81 rupees.

There are some receipts which show that the Surbarakur afterwards received rent from Muddun Mohun as Mokurrareedar on various occasions; but these receipts being for small sums do not show whether the total annual rent received was 81 rupees or 136 rupees. It is further shown, and this is one of the proceedings impeached by the suit, that, on the 9th of April, 1855, Muddun Mohun, describing himself as Mokurrareedar of the two villages, petitioned for a refund of the rents held in the Collectorate in deposit, and named a sum of 189 rupees as the amount of such rents under an Order of the Commissioner dated the 28th of August, 1856, in which the villages are described as covered by the the Mokurraree deed executed by the Appellant. There is, however, no other evidence that the deed now relied upon was produced before the revenue authorities; and their Lordships doubt whether an unstamped paper would have been received by any such officer. It is further to be observed,—and this fact has been strongly pressed against the Respondents,—that, in his petition, Muddun Mohum described himself as holding the two villages at jummas aggregating 81 rupees, under a Mokurraree deed, whereas the rent reserved by the deed now produced is 136 rupees.

Their Lordships must observe that it is difficult, if not impossible, to extract from the proceedings last adverted to any recognition, binding on the Appellant, of Muddun Mohun as Mokurrareedar of the villages in question under the deed now propounded, or even under any deed.

The Jummabundee filed by the Roojoonovees has been attacked, and the character of the party signing it was impugned by Muddun Mohun himself in his petition at p. 29. It is not shown under what circumstances it was filed; and, in any case, it was filed before the Collector's Order of the 26th of October, 1854, and cannot be treated as binding on

the Appellant in equal degree with the returns made by him in pursuance of that Order. And, lastly, it states that the rent of the villages is 81 rupees, and is, so far, inconsistent with the deed now produced. The Appellant cannot be held bound by the form of the Surbarakur's receipts, or by the proceedings for the refund, to which he was no party.

Their Lordships are not insensible to the defects in the Appellant's proof. They have already intimated that, in their opinion, the evidence preponderates in favour of the hypothesis that whatever was given was given as a reward for past services, and was not recoverable upon the dismissal of Muddun Mohun, of which dismissal there is in fact no proof. They have also pointed out that the Appellant's case as to the nature of the reward might, if true, have been better proved. But even if it be admitted that the Appellant had failed to establish the particular case alleged by him, it does not follow that the Courts below were right in leaping to the conclusion that the Respondents had established their right to hold the lands under their Mokurraree tenure. It is possible that the reward to Muddun Mohun may have been an assignment of the rent of the villages to him for his life, or other life interest.

The Appellant is the Zemindar; as such he has a *primâ facie* title to the gross collections from all the Mouzahs within his Zemindary. It lay upon the Respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships' opinion there is in the record before them no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond, at most, the lifetime of Muddun Mohun Tewarree.

On the other hand, they have felt that the Respondents have the concurrent Judgments of the two Indian Courts in their favour; that some of the doubts thrown upon the instrument produced might have been removed if the original instrument, to which exceptions, which do not seem to have been taken in the Court below, have been taken here, had been before them; and that if that document does purport to bear the Rajah's seal or signature, no evidence to show that it is a forgery has been given.

They have, therefore, somewhat reluctantly come

to the conclusion that the safer course is to remit the cause for further trial on additional evidence. If it shall come to such a trial, the duty of the Court which tries it, will be to require satisfactory proofs of the genuineness of the Mokurraree deed produced; for it is upon that, and not upon the defects in the Appellant's case, that the right of the Respondents to hold these villages under a perpetual and hereditary tenure at a fixed rent must depend. The Order which their Lordships will humbly recommend Her Majesty to make on this Appeal is, that the Appeal be allowed, and the Decrees of both the Zillah and the High Court reversed, and that the cause be remitted to the High Court with directions to retry the same or cause the same to be retried upon further evidence on the first issue of facts, and to decide the same, or cause the same to be decided accordingly. With respect to the costs of this Appeal, their Lordships propose to take the course which has been followed here in similar cases, viz., to cause the costs of both sides to be taxed, and to make it part of the Order to be recommended to Her Majesty that these costs be costs in the cause to be dealt with by the High Court.

RAJAH SAHIB PERHLAD SEIN
v.
RUN BAHADOOR SINGH and Others.

In the fourth of these cases the Rajah of Ramnuggur is the Appellant, and Run Bahadoor Singh and others are Respondents. In this case, as in the last, the Appellant has brought his suit to recover two villages which the Respondents claim to hold on a Mokurraree tenure created by him. Their title is founded on three deeds, of which two are Bekbarut deeds which purport to have been executed by the Appellant as father and guardian of the infant son for whom he originally claimed the Zemindary on the 13th of Juyt, 1250 (being some time in 1843–44); and the third is a Sudruth Puttur or deed of confirmation purporting to have been executed by the Appellant in his own right on the 17th of Bhadoor, 1255 (1847–48). The Appellant impeached these documents as forgeries; and there may have been other questions to be tried concerning them. The Principal Sudder Ameen, however, saw fit to settle one issue in bar in these words, viz.:—"Does limitation apply or not; and when must the cause of action be said to have arisen in this suit;" and on the assumption that the determination of

the suit depended on that issue, proceeded at once to try it.

The question raised by the issue was not whether the deeds impeached were genuine, but whether the Appellant was precluded by the law of limitation from showing that they were not genuine, and the twelve years period of limitation was to be calculated not necessarily from the date of the deeds impeached, but from the time when the Appellant having notice of them might first have brought his suit to impeach them. That time the Appellant alleged to be the 27th of December, 1854, in which case his suit, which was commenced on the 31st of December, 1861, was in time.

The Principal Sudder Ameen, however, found the issue against him, and dismissed the suit. His decision proceeds on the ground that on the 7th of December, 1858, the Appellant, by his Mooktear, had filed a petition before the Collector, admitting that the Respondent Run Bahadoor Sein was Mokurrareedar of the villages in question, and assenting to the payment of some rents in deposit to him out of the Collectorate. The Principal Sudder Ameen held that this was an admission of the deeds impeached, and that the period of limitation was to be calculated from the date of the deeds. His decision was affirmed in effect by the High Court, and the question is whether those decisions can stand. It was almost admitted at the Bar that they cannot. It is obvious that the petition, if taken as mere proof that the Appellant knew of the title asserted by the Respondents in 1858, does not help the case, for he admits that he knew of it in 1854. On the other hand, to treat it as a conclusive admission of th genuineness of the deeds, and thence to infer that the Appellant, having executed them, must have known of their existence at their date, is to determine against him upon one piece of evidence, which may be capable of explanation, the material question in the cause, before the issue raising that question has been settled, and without giving the party the means of bringing forward all the evidence which he may have to adduce upon it.

Their Lordships therefore must in this case advise Her Majesty to allow the Appeal, to reverse the Decrees of both the Courts below, and to remand the cause for trial upon its merits. The miscarriage

being that of the Judge, they think that the costs of this Appeal should likewise be costs in the cause, and should be dealt with in the same manner as those of the last case.

RAJAH SAHIB PERHLAD SEIN
v.
MAHA RAJAH RAJENDER KISHORE SING.

In the fifth and last of these Appeals the Rajah of Ramnuggur is Appellant, and the Rajah of Bettiah is the Respondent.

The suit was brought by the Appellant to recover 5,000 beegahs of land or thereabouts, being the whole or the larger part of the lands included between the yellow and red lines on the Map No. 2, which is one of the exhibits in the cause; and with them the right of realizing certain profits derivable from a bazaar attached to the fair which is periodically held within them at a place called Tribenee. The question between the parties is therefore simply one of boundary, viz., whether the property in dispute lies within the limits of the Zemindary of Ramnuggur or within those of the contiguous Zemindary of Bettiah. The northern boundary of that property is the River Bechund, which in that locality is the frontier line between the territories of British India and the Kingdom of Nepaul.

The suit has been decided both by the Court of First Instance and also by the High Court of Calcutta upon the question of limitation. The plaint was filed on the 31st of December, 1861.

On this point of limitation the Respondent raised two distinct questions. He alleged that the boundaries between the two Rajs had been fixed and adjudicated by a decision of the Thakbust (or Survey) authority, dated the 11th February, 1848; and that under Act XIII of 1848, the Appellant's suit was barred because brought more than three years after the date of that decision. He also alleged that it was barred by the general law of limitation.

The Principal Sudder Ameen, who first tried this case, held that the suit was barred by both the special and the general law of limitation. The High Court entertaining some doubt as to the application of Act XIII of 1848 to the particular case rested its decision upon the general law of limitation alone.

In the course of the argument their Lordships intimated their opinion that this case *was not* within Act XIII of 1848, because the operation of that Act is in terms limited to awards made by the

Revenue authorities under Regulation VII of 1822, Regulation IX of 1825, and Regulation IX of 1833; and the learned Counsel for the Respondent had failed to show that the Thakbust proceeding in question was an award made under either of those Regulations. They now deem it right to observe that having, since the close of the argument, examined the Regulations more closely, they are not prepared to say that the Thakbust proceeding of the 11th of February, 1848, may not be an award under Regulation IX of 1825 within the meaning of the Act. For although Regulation VII of 1822 was originally limited in its operation to what are now known as the North-Western Provinces, many of its provisions were, by Regulation IX of 1825, extended to the Lower Provinces of Bengal; and looking at the 2nd and 3rd sections of the latter Regulation, and at sections 36 to 44 (both inclusive) of the Survey Manual issued by the Board of Revenue, their Lordships think it probable that Mr. Chapman, as Superintendent of Survey, was duly invested with power to determine boundary disputes, by an award under the 34th section of Regulation VII of 1822; and may have made such an award by the proceeding in question. The proceeding seems to have been assumed in the Courts below to be an award within the scope of Act XIII of 1848; and if the determination of this Appeal necessarily turned upon the applicability of that Act to the present case, their Lordships would have had that point re-argued with reference to the Regulations to which they have drawn attention.

Their Lordships, however, have come to the conclusion that the Courts below have properly held that this suit is barred by the general law of limitation.

The Appellant comes into Court admitting upon the face of his plaint that he is out of possession, and has been so for more than ten years; and the date which he assigns to his dispossession is the 20th of March, 1851. Upon the issue as settled by the Court it lay upon him to establish that he was in possession up to that date; or, failing in that, that the date at which he or some former proprietor of Ramnuggur was last in possession is consistent with a right to institute this suit. Act VIII of 1859, sec. 32, shows that the Plaintiff is bound to satisfy

the Court that his right of action is not barred by lapse of time.

In the present case the magistrate's order of the 26th of March, 1851, certainly did not cause the dispossession. As far as its effect can be gathered from the document at page 13, if it proves anything, it proves that the Appellant was then out of possession, and had been so, at all events, since the date of the Thakbust proceeding of the 11th of February, 1848; it does not in any degree prove that he or any former Rajah of Ramnuggur had been in possession at any former period. The Appellant has, however, produced evidence to show that in point of fact he was in possession after the date of the Thakbust proceeding, and up to 1851. But both the Courts below have treated that evidence as unworthy of credit; and their Lordships cannot see any grounds for holding that they were wrong in that conclusion. That there was any possession adverse to the Rajah of Bettiah after the date of the Thakbust proceeding seems highly improbable.

Great stress is then laid upon the Report and Proceedings of the Commissioners who in 1847 settled the frontiers of Nepaul and British India, and on the evidence given in this cause by two of the Nepaulese Commissioners. The effect of the official documents is merely to show that as between the two Governments it was settled in January 1847 that whatever was north of the Bechund, within certain limits beginning from the Tribenee Ghât, and extending to Gurh Somessur, was to be treated as Nepaulese, and all south of that river as British territory. It is true that one document recommends that the Amlah of Ramnuggur should be directed not to make any collections north of the Bechund, and that another speaks of settling the boundary of Ramnuggur. But it is to be observed that if Map No. 2 be compared with any good general Map of India, and the frontier line of Nepaul and the course of the River Bechund be carefully examined, it will be found that a considerable portion of the tract south of the Bechund, which was the subject of discussion, lies beyond the red line on Map No. 2, and within the admitted limits of Ramnuggur. And it was far from improbable that the Commissioners and the Resident should speak of all the lands south of the Bechund as Ramnuggur without

adverting to the precise boundary-line between that and the contiguous Zemindary of Bettiah, with which they had no concern. Again, the testimony of the two Nepaulese Commissioners proves at most that, according to their information at the time, the collections of the Tribenee Fair, and the lands immediately south of the Bechund River at that point, were in 1847 in the possession of the Rajah of Ramnuggur, who has since been dispossessed by the Rajah of Bettiah. The evidence might be worth something if it stood alone; but when opposed by that which is to be gathered from the contemporaneous Thakbust proceeding, it is really worth little or nothing.

From that proceeding it appears clearly that before January 1846, the boundary between the two Zemindaries was in dispute, and that on the 1st of February of that year, Mr. Yule, the ticcadar of Ramnuggur under the Collector, invoked the aid of the Superintendent of Survey, complaining that in the Fuslee year 1253, the Bettiah Rajah had forcibly collected the proceeds of the fair. The inference is, that if he had ever had possession of the lands on which the fair is held, he had then been dispossessed. The Bettiah Rajah, on the 2nd of May, 1846, brought his case before Mr. Chapman, and asserted that the lands in question had been always part and parcel of his Zemindary. The map No. 2 was then made. The Amlah on both sides pointed out what each side considered the boundary line; and these are designated by the red and yellow lines upon the map. Mr. Chapman, however, delayed to make any final order in the matter before the Decree of the Sudder Court affirming the title of the Appellant had been made. It is proved that the Appellant then executed a mookteanamah in the name of Lalla Sohur Dutt, and appeared by that person in the subsequent proceedings; and he must be taken to have then adopted the proceedings of Mr. Yule, who seems, on the Appellant's appearance, to have retired from the contest. The final judgment of Mr. Chapman was on the 11th of February, 1848, as has been already stated. It held, on the proofs of possession before him, that the greater part, if not the whole, of the lands between the yellow and the red lines, with the right to the profits of the fair, belonged to Bettiah, and settled a line of demarkation which, if not identical with the red line, at least includes the

lands which are the subject of this suit within the limits of Bettiah.

Now, whatever be the effect of that proceeding, and whether it were or were not an award under Regulation VII of 1822, it cannot be treated as being other than a material piece of evidence upon the question of possession, now under consideration. To discredit it, their Lordships have been referred to the proceedings before the magistrate on the 21st of March, 1851 (No. 19), and to the Decree in the civil suit which was brought thereon (No. 20). But these seem to their Lordships not to relate to the lands now in question, or to the effect of Mr. Chapman's proceeding, but to other lands, and to a question of boundary settled by some other proceeding. Their Lordships think that this proceeding before Mr. Chapman establishes that the property in dispute was then in the possession of the Bettiah Rajah, and that there is no satisfactory evidence that it has ever since ceased to be so.

They further think that this careful local investigation, conducted in the presence of both parties, and implying that the property in dispute had always formed part of the Bettiah zemindary, casts upon the Appellant the burthen of showing by satisfactory counter-evidence at what precise time, if ever, the Rajah of Ramnuggur was in possession of it. And their Lordships agree with the Judges of the High Court that this he has failed to do. There may have been assertions of right such as were likely to occur in respect of a tract of wild and jungly land on the confines of two large estates; but of an actual legal possession, and of the determination of it at any given time, there is no proof. And their Lordships must observe that it is a fallacy to treat the Appellant, as one of the reasons in the Petition of Appeal seems to treat him, as having necessarily twelve years from the date of the establishment of his title in which to enforce this claim. For he did not come in under a new title; he merely established his right to succeed to the former Rajah of Ramnuggur; and if the right of that Rajah to sue for the property in question was barred by the Law of Limitation, the right of the Appellant was also barred.

Their Lordships, therefore, think that the Decrees

under Appeal may be supported on the ground stated by Mr. Justice Morgan, viz., that even if the Appellant was allowed to deduct the full period during which this suit concerning the Raj was pending, he had failed to show that he had a right of suit which accrued to him during the legal period of limitation.

If, however, it were granted that a right of action accrued to the Appellant at the date of the Thakbust proceeding,—and their Lordships think it impossible on the evidence to fix the dispossession at a later date,—the suit would, nevertheless, fall within the twelve years' limitation, unless the Appellant could show that he is entitled to deduct the whole or some part of the period between February 1848 and the beginning of 1858. And to support this claim to deduction, he must show that during the period to be deducted, he was, in the words of the Regulation, "from good and sufficient cause precluded from obtaining redress."

Their Lordships would have great difficulty in affirming the proposition that such good and sufficient cause had here been shown to exist. The Appellant's title to Ramnuggur was established in the Courts of India in September 1846; he was put in possession of the property in June 1848, though between May 1854 and some day in the beginning of 1858 it was again under attachment. How can it be said that, in these circumstances, he was between 1848 and 1858 precluded from maintaining a suit for protecting his Zemindary, and recovering lands taken from it by encroachment? It would be very dangerous, in their Lordships' opinion, to lay down as a rule that the pendency of an Appeal to England puts the party who, subject to that Appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

The cases in the 7th Moore's I. Appeals which have been cited, are very distinguishable from the present. In Troup *v.* the East India Company, the good and sufficient cause was insanity, a personal disability *ejusdem generis*, with infancy, which is specified in the Regulations. In Rajah Enayet Hussein *v.* Sayud Ahmed Reza the facts are complicated; but it will be found that the decision proceeded on the ground that the title upon which

the Plaintiff sued had only accrued to him on the 15th of January, 1842, when Her Majesty's Order in Council had determined the right of succession to be in the general heirs according to the Sheah law of succession, and that the suit to which the bar was pleaded had been commenced in February 1852. Here the Appellant's title to Ramnuggur, subject to the Appeal to England, was complete in 1846.

Their Lordships therefore must humbly advise Her Majesty to dismiss this Appeal, and to affirm the Decrees of the Courts below, with costs.

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