Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Watson and others v. *The Collector of Zillah Rajshahye and others, from the High Court of Judicature at Calcutta; delivered* 15*th July*, 1869.

Present:

Sir James W. Colvile.
The Judge of the High Court of Admiralty.
Sir Joseph Napier.
Lord Justice Giffard.

Sir Lawrence Peel.

THEIR Lordships have formed so clear an opinion on both the points on which the determination of this Appeal depends that they do not think it necessary to prolong the discussion by calling on the other side.

The first question, and that which is the sole question raised by the case of the Appellants is, whether the High Court was wrong in holding that the plea of *res judicata* ought to prevail.

The suit is brought to set aside the sale of a Putnee Talook which took place as long ago as 1849. There was considerable delay, even in the institution of the former suit to set aside that sale, which was not brought till the year 1856. The case is obviously one in which it was the duty of the Courts below, as it is the duty of their Lordships, to look closely to the right of the Appellants, the Plaintiffs in the suit, to impeach proceedings which took place so long ago, and under which so many fresh rights may have accrued.

Be that, however, as it may, the first question is whether the High Court was right in holding that, notwithstanding the reservation contained in the Decree dismissing the suit of 1856, the question was to be treated as *res judicata*.

We have not been referred to any case, nor are

we aware of any authority which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the Plaintiff to bring a fresh suit for the same matter. Nor is, what is technically known in England as a nonsuit, known in those Courts. There is a proceeding in them called a nonsuit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit except in the particular instance that is now before them.

The decision in this first suit was carried by appeal before the Sudder Court. It was treated in the first instance as not being the subject of such a summary appeal as would have taken place in the case of what is ordinarily known as a nonsuit, but as being necessarily the subject of a regular appeal. A regular appeal was accordingly brought, and was heard by three Judges, and, as their Lordships read the opinion of those three Judges, each of them seems to have had very considerable doubt, to say the least, whether it was competent to the Judge in the circumstances to make any such reservation.

The result, however, was that they refused to remand the Suit for retrial, and dismissed the Appeal. They did not, however, make any correction of the reservation, and so the case stood until the question arose again in the present Suit. In the present Suit the principal Sudder Ameen seems to have considered that he was bound by that reservation, and therefore, he decided that issue in favour of the Appellants.

He decided against them on the other question,

which is now to be disposed of, namely, of their title to sue. They, therefore, appealed against his decision, and the High Court, without going into the second question upon which the case had been decided in the Court of first instance, appears to have called upon the Appellants to show that notwithstanding the former decree they were still entitled to sue.

It has been argued that that Decree not having been appealed against by the Respondents in the original Suit, was, at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this Suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court in a case in which the former decree had been pleaded as *res judicata*, and in which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the lower Court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case.

They are of opinion that the appeal must fail upon the first ground. They are, however, further of opinion that the Appeal must also fail, and that the Decree of the Principal Sudder Ameen is to be supported upon the second ground, namely, that the present Appellants have shown no sufficient title enabling them, supposing it was open to any person at this distance of time to do so, to question the propriety of the sale of the Putnee Talook.

It will be convenient to consider first, what has been the ostensible devolution of the Talook; next, what is the nature of such a tenure; and, lastly, how it is sought to establish, that the title to that Talook, and the consequent right to impeach the sale, have passed to the present Appellants.

The Talook was created in favour of Mr. John Compton Abbott, in May 1837, by the instrument

which is at page 101 of the Appendix. It is in the ordinary form, their Lordships apprehend, of a grant of a Putnee tenure, and it provides at line 40 of page 102 for that for which the regulation makes provision, namely, the notice to the Zemindar of any alienation of the talook in order that it may be duly registered. The words are, "If you make a "gift or sale or give away in durputnee the eight "annas of the above mentioned dehee being your "own putnee, you must give instant notice of the "same in my Sudder Cutcherry." On the 7th of Pous 1248, which we are told was in 1841, Mr. Abbott sold, for the expressed consideration of C. R. 11,465 : 12, this putnee to a firm known as French, Hodges, and Company. In the Deed, which is at pages 15 and 16, there is a requisition at line 20 of page 16 to the purchasers to cause themselves to be duly registered in the Archives of the Zemindar, and although the instrument was not registered in the ordinary register of Deeds till 1844, it is probable that they were before that date duly entered and accepted by the Zemindar as the putneedars.

Of this there is some evidence in the Petition which will be referred to hereafter, of the Assignees of Cockerell and Company, for they speak of French, Hodges, and Company as "our benamee owners of "the talook at the time of the sale."

The sale took place in 1849, and the proceedings from the Collector's office show, that it was treated as the sale of a putnee standing in the names of French, Hodges, and Company; inasmuch as it appears from them that the surplus proceeds of the sale passed to and were divided amongst the Judgment creditors of that firm.

That is then the ostensible devolution of the putnee talook. Of course the later Deed of the 4th of April, 1855, in which Mr. Compton Abbott assuming to be the absolute owner of the putnee talook, which had been long previously sold, conveyed it formally to Watson and Company, the present Appellants, can have no bearing on the question of title.

It only shows that if under the Deeds by which the Appellants now endeavour to trace such title or right the putnee talook had got back into Mr. Abbott, or the right to question the sale of

1849 of that talook, belonged to Mr. Abbott, he has transferred that right, whatever it was, to the Appellants.

It has been admitted at the Bar that in order to show that the title to this putnee talook, and the consequent right to question the sale, has passed to the Appellants, it is necessary to rely on certain general words in the various Deeds that transfer certain interests in the Bansbarreah indigo concern, —and to hold that the talook was in fact an incident to the factories, and that those words must be taken to have passed them.

It appears that at the time when the putnee was granted, Mr. John Compton Abbott was the sole proprietor of the Bansbarreah concern,—and it may be conceded that (as Mr. Leith has argued) the general object with which an indigo planter takes this kind of tenure is to acquire that power over the ryots which a zemindar has, and which enables him to stipulate that upon parts of their lands at least they shall grow indigo at his rates for the benefit of his factory. Nevertheless, in acquiring those rights, Putneedars acquire other very considerable rights; they acquire the Zemindar's rights over a large district; comprising lands, all of which do not grow indigo; and it is perfectly conceivable that one partner in a factory may have that sort of talook, and the consequent power which the ownership of the talook gives; that he may use that power for the benefit of the factory, and yet that the talook itself may form no part of the assets of the factory. Then, again, it is to be considered as between the parties between whom this question arises, that the Zemindar who has sold and the purchaser who has bought at the Collector's sale have nothing to do with the motives under which the talook was originally taken,—have nothing to do with those arrangements which the ostensible owner of the talook may make; that the Zemindar has granted a tenure of a particular kind, the incidents of which are well defined by law, to a tenant, and that he has a right to look to the ostensible tenant, and is not bound to take notice of the various interests which may be created otherwise than by an authorized alienation. This much is clear, it is certainly not proved by positive evidence; it is only an inference drawn from the as-

sumed nature of things—that this talook was part of the assets of the Bansbarreah concern.

Now, before going to the Deeds on which the Appellants rely, it may be convenient to look at some of the provisions of the Regulation 8 of 1819, which apply to this kind of tenure. The scope of the Regulation is, first, to legalize the tenure, the legality of which had been doubted; after declaring that Putnee tenures are valid, it provides that they shall be transferable and answerable for the debts of the Putneedar. It next declares that such tenures are not voidable for arrears of rent, but that the Zemindar's remedy, where there is an arrear of rent, shall be a sale under the provisions of the Regulation. It further declares that the Zemindar is not entitled to refuse to give effect to a transfer; and then follow certain provisions which are in favour of the Zemindar. The Regulation provides, that in conformity with established usage, he shall be entitled to exact a fee upon every such alienation. It fixes the maximum fee; it provides that he shall also be entitled to demand substantial security from the transferee, or purchaser, to the amount of half the Jummah rent, or yearly rent payable to him from the tenure transferred, and that the same thing shall happen when the tenure passes in a sale made in execution of a decree or Judgment of Court; that the Zemindar may refuse to sanction a transfer until the fee and security be tendered; that if there is a dispute as to the sufficiency of the security, it is to be determined by Appeal to the civil Court, and it gives him further powers. In the 6th Section there is this express provision, "That the rules of this, and of the preceding sec-"tion shall not be held to apply to transfers of any "fractional portion of a putnee talook, nor to any "alienation other than that of the entire interest; "for no apportionment of the Zemindar's reserved "rent can be allowed to stand good unless made "under his special sanction."

The 11th Section shows what the consequence of one of these sales is. It gives to the purchaser —assuming, of course, that the sale has been regularly conducted—what we may call a Parliamentary title. It declares that the tenure shall be sold "free of all incumbrances that may have "accrued upon it by act of the defaulting pro-

"prietor, his representatives or assignees, unless "the right of making such incumbrances shall have "been expressly vested in the holder, by a stipula- "tion to that effect in the written engagements "under which the said talook may have been held. "No transfer by sale, gift, or otherwise, no mort- "gage or other limited assignment shall be per- "mitted to bar the indefeasible right of the Ze- "mindar to hold the tenure of his creation answer- "able in the state in which he created it, for the "rent, which is, in fact, his reserved property "in the tenure, except the transfer or assignment, "should have been made with a condition to that "effect under express authority obtained from such "Zemindar."

This being so, it seems extremely questionable, whether, if it had been even expressly stated in the various deeds about to be considered, that shares in this putnee talook were transferred in that manner, such transfers of interest would have been binding on the Zemindar; whether he would not have been entitled to look to French, Hodges, and Company as the registered owners of that talook; and whether any of the persons who took these limited interests, some by mortgage, some absolutely, but of portions only, would have been entitled to come forward and say, "We claim to be treated as your putnee- dars." In fact, however, the deeds do not, any of them, expressly purport to convey this talook; and if the dates of the transactions are considered, there is strong ground for inferring that it was the in- tention of the parties to keep the two things sepa- rate, the tenure separate from the Bansbarreah con- cern, probably from a knowledge that the former could not be dealt with in the way in which it is now pretended that it was dealt with.

It has already been stated that Abbott sold the putnee in 1841 to French, Hodges, and Company for value. The foundation of Messrs. Cockerell's interest in the Bansbarreah concern is the deed of the 9th of March, 1842. That is the deed by which Abbott sold out-and-out to Cockerell and Company three-sixteenth shares of the Bansbarreah concern. Now, as he had, the year before, sold the putnee talook as a whole to French, Hodges, and Company, it is difficult to see upon what principle the general words contained in this conveyance

can be construed to include and convey three-sixteenths of the talook, supposing that it was competent to the Putneedar to sell three-sixteenths of the talook separately.

Then on the 23rd of May, 1842, Gilson Rowe French, who probably was one of French, Hodges and Company—though it is not shown distinctly that he was—mortgages to Cockerell five-sixteenths, and a fraction of another one-sixteenth of the Bansbarreah concern. As far as a mere mortgage went, supposing that any interest in the talook passed by the general words, that clearly would not operate as against the right of the purchaser under the sale, because the Regulation provides that the effect of the sale shall be to sweep away any mortgage created by the defaulting Putneedar. Again, on the 30th of May, 1842, Septimus Hodges mortgages two-sixteenths, and the remaining fraction of another sixteenth, of the same indigo concern, to Cockerell and Company; and on the 28th of May, 1847, his executors sell to Cockerell a third absolutely of the Bansbarreah concern, which, I take it, included that which had been already mortgaged by their testator. Therefore, at the date of their insolvency, which, I think, preceded the sale of the putnee talook, and certainly at the date of the sale of the putnee talook, Cockerell and Company, or their assignees, were owners of three-sixteenths and one-third of the Bansbarreah concern absolutely, and were mortgagees of the shares transferred by Gilson Rowe French, and thus either as absolute owners or as absolute mortgagees, were entitled to fourteen-sixteenths of that concern, but the remaining two-sixteenths were still outstanding, and belonged to one Henry Gloster French, and in respect of those two-sixteenths Cockerell and Company seem at most to have been equitable mortgagees by deposit of title deeds.

In this state of things the sale of the putnee talook took place. An application was made by the Assignees impeaching the sale, in which they speak of French, Hodges, and Company as the benamees owners of the talook for them; but at that time, as I have just shown, even supposing that the beneficial interest had passed under the general words of the conveyances of shares in the Bansbarreah concern, they were not absolute owners even of four-

teen-sixteenths of that concern, and they were only equitable mortgagees of two-sixteenths. The two-sixteenths were not vested in them until, I think, the 14th of April, 1853, and probably the difficulty of completing the title to the whole concern was the reason of the very great delay which took place before the Appellants came into Court to impeach the sale in a regular suit.

It is unnecessary to go in detail through the subsequent deeds. The general effect of them is that in 1853, the Assignees, the representatives of Glyn, Halifax, and Company, who had acquired some beneficial interest in this Bansbarreah concern by the pledge of deeds from Cockerell and Company, of London, and a variety of parties, all concerned in getting the whole interest in the Bansbarreah factories into the Assignees of Cockerell and Company, who at the same date transferred it to John Compton Abbott. All these transfers were, however, of nothing but the Bansbarreah concern. Neither the title to the talook nor the right to impeach the sale of it could pass to John Compton Abbott, or from him to the Appellants, unless they were previously vested in Cockerell and Co. It has been shown that, in their Lordship's opinion, the general words in the several conveyances to Cockerell and Co. cannot be taken to have passed even an equitable interest in the talook; which cannot be assumed to have been an asset of the factories merely because it was originally taken by Mr. John Compton Abbott when sole proprietor of the factories. In their Lordships' opinion the putneedars, at the date of the sale, were Messrs. French, Hodges, and Co.; a firm which, although some of its members may have had shares in the Bansbarreah concern, appears on the evidence to have been something distinct from that concern; and is not even proved to have been trustees for it. In these circumstances their Lordships, without laying down any general rule as to the degree of interest which might entitle a party to impeach the sale of a putnee talook under the regulations, are of opinion that the Appellants have failed to show that they have acquired that interest in this putnee talook which entitles them to dispute the sale in 1849, and that the decision, therefore, of the principal Sudder Ameen upon that point, was correct.

They must, therefore, humbly advise Her Majesty to dismiss this Appeal with costs of both Respondents.