Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Radha Gobind Roy Saheb, Roy Bahadoor v. *Inglis and another, from the High Court of Judicature at Fort William, in Bengal; delivered the 6th July* 1880.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE suit out of which this Appeal arises was brought by John Taylor, the owner of a talook called Khaneh Alumpore, who sought a declaration of his right to and to be restored to possession of a certain quantity of land appertaining to a mouzah named Julkur Khuluk Shajai, part of the talook, his case being that this was a mouzah originally covered with water, and so forming a large bheel or lake; but that in recent times a portion of the land so covered had become dry and cultivable during, at least, a part of the year: and he sought to set aside certain orders of magistrates whereby the question of possession had been decided against him. The Defendant, who is the owner of a neighbouring talook called Gobindpore, denied the Plaintiff's title to the soil of this Julkur Khuluk Shajai; he made some claim to it himself; he disputed that the land in question had ever formed a portion of the mouzah, if it was one; he also relied upon adverse possession for more than 12 years before the bringing of the suit. The Subordinate Judge decided all the points in favour of the Defendant; his judgment was reversed by the High Court, who found that

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the Plaintiff had a title to the soil of the bheel, and, therefore, to the land reclaimed therefrom; that the Statute of Limitation did not bar him; and gave to the Plaintiff, though not the whole of the relief which he sought, the land within a certain line which will be hereafter referred to.

From this decision the present Appeal has been brought. During the proceedings Mr. Taylor has died, and he has been succeeded on the record by Mr. Inglis, and Mr. Inglis again by his vendee Ghose, who is now the only Respondent.

The first question is that of the title to the soil of Julkur Khulut Shajai. With reference to the Plaintiff's title to talook Khaneh Alumpore there appears to have been no question, for Mr. Justice Morris, in his judgment, says that it is admitted that he is recorded as the owner of that talook. He appears to have obtained it—we do not know quite how and when, but it must be assumed rightly—from one Bibi Luchmi, who, in 1853, was recorded as the possessor of it.

But then comes the question whether the right of the Plaintiff in this Julkur Khuluk Shajai,—the ordinary meaning of julkur being, fishery—was, as the Defendant contends, merely a right of fishery in the bheel, or whether it was, as the Plaintiff contends, the right to a mouzah covered with water. Certain butwarrah papers were put in as old as 1799, whereby this julkur, which was certainly then called a mouzah, was described as belonging to pergunnah Bhatia Gopalpore; but inasmuch as no area is given to it in the description, it is contended that it was treated merely as a fishery right. The original settlement papers of pergunnah Bhatia Gopalpore are not on the record. If it had appeared therefrom that all which at the time of the perpetual settlement had been settled for with the then zemindars of the pergunnah was a right of fishery,

that might afford an inference that the soil of the bheel remained in the Government; or that, at all events, any land reclaimed therefrom would be subject to a fresh assessment of revenue. But that circumstance would give no title to the proprietor of one part of the pergunnah against the proprietor of another part of it. It is not suggested that the law relating to land gained from a river by gradual accretion applies to land left dry by the partial recession of the waters of the bheel. Again, if what was originally settled was the land covered by the water, treated as a mouzah, the title to that land would pass under the term Julkur Khuluk Shajai to whomsoever that portion of the pergunnah might thereafter be transferred. In the present case, it seems that this pergunnah, including the mouzah, was divided among three persons, and that one of them was an ancestor of the Defendant, and another a person through whom the Plaintiff derives his title. An argument has been founded on the fact that one of these persons made a sale sometime afterwards of her share of this mouzah. It is contended that the selling only her share of it indicated that it was impartible, and this contention is said to be strengthened by the fact that she appears to have sold the entirety of a certain other mouzah. It may not be easy to find a satisfactory explanation of this circumstance upon this record; but their Lordships think it is of little weight when set against the other facts proved in the cause. From the early part of the present century down to 1853 the history of this mouzah is a blank; but it appears to their Lordships enough, for the purpose of proving the Plaintiff's title to the soil, that there is an extract from the Mehalwari Register in that year, in which Bibi Luchmi, from whom he derives his title, is entered by the Govern-

ment as possessor of the talook Khaneh Alumpore, and this same Julkur Khuluk Shajai is described as one of the mouzahs of that talook and containing an area of 6,275 acres. This Mehalwari Register was made in pursuance of and in accordance with a survey in 1847, one of the maps of which is before their Lordships, in which this very mouzah is laid down as containing an acreage corresponding with the statement of acreage in the Mehalwari Register. It would therefore appear that, as between him and the Government, Mr. Taylor has clearly a title to the soil of the bheel; he has also a title as against the Defendant. It is stated by Mr. Justice Morris that at the time of the survey the Defendant made no claim whatever for this mouzah, and the entries of the Mehalwari Register which follow that which has been read show that in 1847 and 1853 no part of it appertained to the talook of Radha Gobind Roy, the Defendant.

A word must be said upon the question of boundary. When the case was before the Subordinate Judge, an Ameen was directed to make a map laying down the boundaries of the disputed lands. It seems, indeed, that the map of the Ameen gave no great satisfaction to the Judge or to either of the parties. But he was not examined in Court, nor was he directed to make a new map, nor was he superseded by the appointment of another Ameen. This map has been taken as, at all events, some evidence in the cause. According to the statement of the Ameen, he intended the black line drawn upon this map to be in accordance with the survey line of 1847. He states that, the Defendant not being satisfied, and contending that he based the line upon erroneous data, he took the data given him by the Defendant, and thereupon drew a yellow

line which is drawn further in towards the lake, and would therefore be more favourable to the Defendant; and the High Court state in their judgment that the Plaintiff, by way of concession, agreed to take the yellow line as his boundary, thereby relinquishing above half of what he originally claimed, and the High Court further state that that line had been assented to by the Defendant. It is now, indeed, stated that that is not so; but their Lordships cannot help observing that the High Court do not seem to have had their attention directed to any misapprehension, if there was one, as to what appears to have been conceded by the Counsel for the Defendant, and under the circumstances they cannot but give credit to the statement of the High Court, that this yellow line was practically admitted by him to correspond with the boundary line of the mouzah as laid down in the survey map.

The question remains, whether the disputed land, which must now be taken all to lie within the yellow line, had or had not been occupied by the Defendant for 12 years before the suit was instituted, so as to give him a title against the Plaintiff by the operation of the Statute of Limitation. On this question, undoubtedly, the issue is on the Defendant. The Plaintiff has proved his title; the Defendant must prove that the Plaintiff has lost it by reason of his, the Defendant's, adverse possession. The High Court came to the conclusion that the Defendant had not satisfied the burden of proof thrown upon him, and their Lordships are not prepared to reverse that judgment.

There is undoubtedly some force in the observation of the High Court that most of the witnesses of the Defendant proved too much; some of them a possession, not of 12 years, but of 20, 30, and even 40 years, and

some possession from time immemorial. There were those who denied that there had been any change whatever in the boundaries of the lake. The Subordinate Judge does not appear to have had his attention directed to the very important question when the new land formed. He goes the whole length of finding that, for time very much beyond that required by the Statute of Limitation, the Defendant and his ryots and his lessees had been in possession of the disputed land. The High Court suggested as an explanation of this, that a large portion of the evidence may apply to land outside the disputed land; but there is undoubted evidence on the part of the Plaintiff, by witnesses who do not appear to be impeached by the Subordinate Judge, and have been believed by the High Court, that the land in question, that is, the land within the yellow line, has all been formed quite recently, within six or seven years, or at all events within less than 12 years, before the commencement of the suit; and if the High Court are right in that finding, of course the Statute cannot apply. On the whole, their Lordships have come to the conclusion that the High Court was right on both points,—on the question of title, and on the question of the application of the Statute.

On these grounds they will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this Appeal with costs.