Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mahomed Ali Haidar Khan and another, heirs and legal representatives of Mahomed Ali Amjad Khan, deceased, v. *The Secretary of State for India in Council and others, from the High Court of Judicature at Fort William in Bengal; delivered the* 31*st July* 1908.

Present at the Hearing:

LORD ROBERTSON.

LORD ATKINSON.

LORD COLLINS.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an Appeal against a judgment and decree of the High Court of Calcutta, dated the 29th March 1904, which affirmed the judgment and decree of the Subordinate Judge of Sylhet, dated the 15th April 1899.

The question raised upon the Appeal is whether Regulation III. of 1891, issued under the authority of the Act 33 Vict., c. 3, can properly be applied in the case of certain lands known by the name of Puber Pahar.

The Regulation in question begins with a most useful preamble, which recites as follows:—

> Whereas the officers who effected the permanent settlements of certain estates in the district of Sylhet included, for the purposes of assessment, among the assets of those estates, under the designation of *jhum* . . . . , the income then derived by the proprietors of those estates from shifting cultiva-

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> tion carried on by them or their dependents beyond the limits of those estates, and from tolls levied by them on forest-produce cut, gathered or enjoyed in places beyond the limits of those estates . . . . ;
>
> And whereas, inasmuch as the said cultivation and the operations of those who cut, gathered or enjoyed the said forest-produce shifted from year to year over immense and altogether undefined areas, the tracts of land over which they extended were not specified at the time of the settlement, and, in consequence of this, rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over immense and undefined areas ;
>
> And whereas it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivation is, in consequence, impeded ;
>
> And whereas it is expedient that the rights, if any, corresponding to the said *jhum* . . . . . assets should be commuted.

Section 2 enacts that :—

> All rights . . in respect of which *jhum* . . assets were assessed in any permanent settlement of land, or which have been at any time acquired by virtue of or under cover of such assessment shall be deemed to have been extinguished.

And Section 3 declares that all proprietors of such estates shall be entitled to compensation.

The nature of *jhum* cultivation is explained in an early official document relating to the hill lands in question :—

> "The dastur of *jhum* cultivation is this :
> " *jhum* is not cultivated in one place every year.
> " When land is found anywhere within these bound-
> " aries *jhum* cultivation is made thereon, and after
> " measurement and assessment the Mirasdars take
> " the rest by apportionment according to their
> " respective shares in the *jhum* revenue at the time
> " of the hastbud measurement."

And that description seems to be correct to the present day.

After the passing of the Regulation the Government of Assam, whose jurisdiction included Sylhet, issued and published orders in due course, extending the Regulation to the areas in question, with others.

The question, therefore, raised in the case and discussed on this Appeal is whether the Regulation can be put in force with reference to the lands to which it is sought to apply it. Those lands have undoubtedly been long in the enjoyment (such enjoyment as is practically possible under the circumstances of the case) of the Appellants' predecessors in title. The Government claims to apply to these lands a Regulation which would have the effect of confiscating proprietary rights, and giving compensation in exchange. Under these conditions their Lordships think it clear that it lies upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation—in other words, that the present case is one in which, at the Permanent Settlement, in making settlement of certain taluqs with the Appellants' precedessors in title, the officers of Government included, for the purposes of assessment, among the assets of those taluqs the income derived by their owners from *jhum* cultivation carried on beyond the limits of the settled estate.

That the taluqs now held by the Appellants were settled at the Permanent Settlement is beyond dispute, and that in estimating the assets of those taluqs the profits of the present *jhum* lands were then brought into account is also beyond dispute. But according to the Appellants those profits were taken into account because the *jhum* lands formed part of the settled estate; while, according to the other side, the *jhum* land profits

were taken into account as assets accruing to the owners of the settled estate, but derived from lands lying outside it. The question is which of these views is to be accepted.

It was contended on behalf of the Secretary of State that the question whether the *jhum* lands lay within or without the limits of the settled estates was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India. This contention their Lordships are unable to accept. In a sense the question is one of fact; but at every point in the process of the reasoning considerations of law have to be regarded.

It was contended on the other side that, under the Regulations in force at the time of the Permanent Settlement, no assets could lawfully be taken into account in settling the jumma of an estate, except those arising out of the estate itself; and that this consideration established a very strong presumption that in any individual case the course in accordance with law had been followed. But this contention was met, and in their Lordships' opinion effectively met, by a reference to the preamble of the Regulation under consideration. That preamble shows that the course said to have been impossible was in fact followed, rightly or wrongly, and followed in a number of cases sufficient to render legislation desirable. It remains, however, to consider, in each case that comes before the Courts, whether the facts bring the case within the operation of the Regulation.

The taluqs in which the lands in question are said to have been included were, no doubt, settled at the decennial settlement, and that settlement was in due course made permanent. But as might be expected after so great a lapse

of time, little now survives of the original official papers, and what does survive is not very easy to construe.

The most important of the early documents are certain Mouzawari papers from 1801–02 onwards. These show clearly that, in assessing the taluqs, the *jhum* assets were taken into account. But this, as has been shown, is a neutral fact consistent with the case of either party. Beyond this it is difficult to carry the effect of those papers.

Those papers were examined in detail by Counsel upon both sides on the argument of the Appeal. It appears to their Lordships unnecessary to repeat that examination. It is enough to say that there are circumstances favourable to one side and circumstances favourable to the other, but that no confident conclusion could be drawn from these papers either one way or the other.

Reliance was also placed upon certain thakbast maps, but these are equally inconclusive.

The only other matter which remains to be considered is the evidence as to possession and enjoyment of the lands in question on the part of the Plaintiff and those who preceded him. In the Courts in India the Plaintiff sought to establish a title by adverse possession for sixty years. In this he was held to have failed, and on the argument of the Appeal no such case was contended for, but the evidence of possession and enjoyment was relied upon as proof of title.

Regarded in this light, that evidence is important and it all points one way. It was shown that from as early as 1837 the Appellants' predecessors in title received kabuliyats from

persons carrying on *jhum* cultivation on the lands in question.

In 1842 and 1843 those predecessors in title succeeded in defeating an attempt to exercise rights over these lands on the part of the persons interested in an adjoining Mouza.

On several occasions in subsequent years the Appellants' predecessors successfully resisted proposals on the part of Revenue Officers of Government to settle portions of these hill lands as ilam lands open for settlement. The most important instance was one that terminated in an order passed by the Board of Revenue (the highest Revenue Authority in the Province) dated the 14th September 1855. It had been proposed to offer for settlement a portion of the lands now in suit as ilam lands. This was objected to by the Appellants' predecessors. The Collector overruled the objection, but the Board of Revenue, concurring with the Commissioner, reversed that finding, and on the ground, as their Lordships understand it, that the lands were included in the Permanent Settlement. After that the possession and enjoyment of the Appellants and those through whom they claim seem to have been continuous.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed, that the decrees of the Courts in India should be set aside with costs, and a decree made granting the Appellants the declaration asked for by the plaint. The Respondent the Secretary of State will pay the costs of this Appeal.