Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gunga Gobind Mundul and others v. *The Collector of the 24 Pergunnahs, Prince Gholam Mohammed, and others, from a Decree of the High Court of Judicature of Calcutta; to be delivered on the 4th March, 1867.*

Present:

MASTER OF THE ROLLS.
SIR JAMES WILLIAM COLVILE.
SIR RICHARD T. KINDERSLEY.

SIR LAWRENCE PEEL.

THIS is an appeal from a decree of the High Court of Judicature, at Calcutta, which reversed a decision of the Civil Court of the 24 Pergunnahs in favour of the Appellants. The suit, the decision in which gives rise to the present Appeal, was brought by the Collector of the 24 Pergunnahs on behalf of the Government of India, against Gunga Gobind Mundul, and Sree Mutty Rurmonee Dossee, described as Defendants, and Prince Gholaum Mohummud and certain other persons, members of the Mundul family, named in the plaint, and described as the occupiers of five cottahs of the disputed land, who, together with the Prince, are also described as *pro formâ* Defendants.

The Prince, though called a *pro formâ* Defendant, is really one of the persons principally interested in the subject in dispute. His title is adverse to that of the Munduls, and he is making common cause with the Collector. On what ground he is inserted as a Defendant, it is not easy to discover.

The Prince had instituted three suits for the recovery of the property which is the subject of this suit, against the Appellants. He divided his claim into three suits, in conformity to the Rules

of Procedure established in the Courts of the country, in consequence of the separate interests of different members of the Mundul family, in portions of his property, of which his claim embraced the whole. The suits of the Prince, numbered 43, 44, and 45 of 1857, raise precisely the same question as that which is raised in the suit of the Collector before-mentioned, viz. whether the lands sought to be recovered formed part of holding No. 1, and were part of that portion of Colonel Green's estate, which, as the Prince contends, has passed to him by title. In all the four suits, the decision was against the Plaintiff in the Civil Court. In the Judgment of the High Court it is stated, "It has been admitted by the Counsel on both sides, that in the Court below all parties agreed that this Appeal (that is, the Appeal in the Collector's Suit) and Appeals No. 122, 123, and 124 (that is, in the Prince's causes) should be heard together and treated as one consolidated case, and that all the evidence should be taken as in one cause."

In the Collector's suit alone is there any appeal. That suit, though it asks "a declaration overruling the plea of a rent-free tenure," which is not properly the subject of that jurisdiction, is properly treated in the Civil Court as an ejectment suit, and it was admitted by Mr. Forsyth, who appears for the Collector, to be a suit in the nature of an ejectment suit. For such a suit, which supposes that the Plaintiff was put out of possession, it is necessary for him to allege and prove his title to the possession. The Collector sues for the Government, being entitled to sue to enforce their claim to the possession. It appears, however, in this suit, that both the Prince Gholam and the first and second Munduls claim derivatively from the same person, Mr. Johnson; the Judgment of the High Court finds, as a fact, that "the property was originally the property of Mr. Johnson." By this word 'property' here, is evidently meant absolute ownership; though it may be by a grant from the East India Company, as the Zemindars of the 24 Pergunnahs. The well-known cases of *Gardner* v. *Fell*, and *Freeman* v. *Fairlie* (see 1 Moore's Indian Appeals, pp. 299, and 305), and the observations of Lord Lyndhurst in the latter case on the subject of pottahs, exclude any supposition that such abso-

lute ownership of lands by private persons could not exist at that time in that part of India, as against any claim of the Government to possession of the lands. In the latter case, his Lordship terms "the rent," "a jumma or tribute," and says "the pottah therefore proves no part of the title; it is the conveyance that gives parties a right to claim the pottah." The pottah is evidence of title. If there were anything in the nature of the title of the Government to lands in the 24 Pergunnahs, or any usage or custom in force there, which gave a less permanent interest to the possessors of proprietary right, some authority for, or some evidence of such a variation from, and limitation of the general law, should have been adduced to their Lordships. Their Lordships themselves are aware of nothing to take these titles out of the operation of the principles established by the cases above referred to; consequently, upon the evidence in this cause, it appears that the Government had not, at the time of Johnson's possession of block No. 1, any title to the possession of these lands. If, as the Government contend, these lands were rent-paying lands, the title of the Government was simply to the rent, the nature of which was that of a jumma or tribute; and if the holders of these lands asserted then, or subsequently, a groundless claim to hold them free of rent, as La Khiraj, that claim would not destroy their proprietary right in the lands themselves, but simply subject their owners to liability to be sued in a resumption suit, the object of which is, not to obtain a forfeiture of the lands, but to have a decree against the alleged rent-free tenure, involving the measurement and assessment of the lands, and the liability of the person in possession, if he wishes to retain possession, to pay the revenue so assessed. If, at any period during Johnson's possession of these lands, or subsequently, a title to the possession of the lands themselves had accrued to the Government, by any act or omission on the part of the owners of the lands working a forfeiture, that title should have been alleged and proved. But so far from this being attempted to be established, the Collector treated the lands as belonging, by title, to the holding of the Prince, and the Prince as fulfilling the ordinary obligations of the owner of

the land, to pay the rent or jumma of them. The title of Richard Johnson existed in 1783, and from that time downwards there is no proof of any Act entitling the Government to take possession of the lands; there is no evidence, on which any reliance can be placed, that the title of the Munduls, be it what it may, commenced by violence; but assuming that such proof existed, in what way can a dispute between two private owners, whether as to boundaries or lands, divest the title of either to possession in favour of the Government, if the latter have merely a rent or jumma? The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; see Sel. Rep. vol. vi. p. 139, cited in Mr. Macpherson, 3rd ed. p. 81. Now, in this case, the family represented by the Appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred; and the effect of that bar must operate in favour of the party in possession.

The title, then, of the Prince to recover these lands as against the Munduls is extinguished; then how can the extinction of the proprietary owner's right in favour of the party in possession, confer any right to possession simply on another person not having a title in remainder, if he had not a title to possession whilst the right and remedy remained? Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favour of a remainderman or a reversioner, the present case has no resemblance to that. The interest of the person in possession is not a limited but an absolute interest; the title to the lands is one inheritance, the title to the khiraj or rent is another. Though these lands are termed khas mehals, yet there is no proof in this case of any relation of landlord and tenant ever existing between Johnson and the Government; Johnson appears to have been the absolute owner, and no reversion to have existed in the Government. It is not the case of a lease at all, still less of a lease of temporary duration; it is the case of an absolute ownership of the lands; and

the title of the Government rather resembles a seignory than that of a lessor with a reversion.

In the Civil Court, the title of the Collector to sue was put upon the ground of the relation of landlord and tenant; and of the right of the landlord to sue in order to protect his tenant, and to assert his title as landlord. But such is not the real relation between the parties which the evidence discloses. Prince Gholaum took, by conveyance, from Brown; he states his title to have been derivative from Johnson, who conveyed to Green, who conveyed to Brown, who conveyed to the Prince a title to the absolute ownership never interrupted.

There is no relation of landlord and tenant in such a case between the Government and the owner; the absolute owner is the landlord to the ryots, and is not himself a ryot. The Government has a title to the rent or jumma. By whatever name it be called, the right and title is to the rent substantially; it does not include a right to the possession of the lands, though such a right might arise by forfeiture, or extinction of the ownership.

It is of the utmost consequence in India that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands,—contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety; but, if the party out of possession could set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is, the legal right of the Government is to its rent; the lands are owned by others: as between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of jumma is unaffected by transfer simply of

proprietary right in the lands. The liability of the lands to jumma is not affected by a transfer of proprietary right, whether such transfer is effected simply by transfer of title, or less directly by adverse occupation and the law of limitation.

Their Lordships are therefore of opinion that this dispute as to the identity of the lands, which is substantially the cause of action of the Prince alone, cannot be kept alive longer than the legal period of limitation of twelve years, by the expedient of inducing the Collector to make common cause with him. The Judgment appealed against says, "if the Government recover against the Defendants, the Prince substantially recovers also." But the Prince has never surrendered or intended to surrender his estate to the Government. He has simply taken a new pottah; that pottah is not the title, but the evidence of title. If the title of the Prince to possession was inconsistent with a title in the Government to the possession, and the law of limitation has extinguished that title of the Prince in favour of the Munduls, the Defendants, their Lordships are entirely at a loss to see in the arrangement between the Collector and the Prince, any ground in law or equity for making a decree which substantially restores him to what he has lost by laches, supposing the title under which he claims to have been originally good.

If, however, it were considered that the Collector could sue for the possession of the lands upon the title shown to be in the Prince, or that the Prince by reason of the suit being in the Collector's name, could get the benefit of the sixty years' limitations, the question whether the Respondents have proved a title sufficient to evict the Appellants from the lands in dispute would still remain to be decided. The Collector rests on the title of the Prince. That title is derivative through mesne transfers from Johnson. The place, the Sahiban Bageecha, is said to have been the residence of European gentlemen. It seems probable that both Johnson and Green were British subjects; if they were British subjects these lands could not have been orally conveyed by Johnson to Green. It is not shown therefore by the Plaintiff, on whom the burden of proof lies, that the entries in the register could of themselves operate as a conveyance. They must, at the highest,

amount only to evidence from which, with other matters, a conveyance might be presumed. Had the possession of the lands been enjoyed by virtue of and consistently with the title asserted by the Plaintiffs, there would have been legal grounds for making such a presumption; but there has been a long adverse possession, and there is no sufficient proof of a contemporaneous possession consistent with the title insisted on by the Plaintiffs. The presumption of a conveyance is resorted to, when such presumption is made, to support a long possession; but here it would be applied to defeat a long possession. If possession be not consistent with a title, which is to be supported by a presumption of a former conveyance, that very possession would furnish ground for building another presumption on the first, viz. of a subsequent retransfer or reconveyance. In such a case, therefore, as the present, the defective link in the claimant's title cannot, in the opinion of their Lordships, be supplied by presumption. Then, as it is not shown that these lands could have been transferred orally, and as no direct evidence exists of a conveyance, and as the state of the possession does not support a presumption of one having existed, the question which is asked by the Judge of the Civil Court as to the missing link, is at once pertinent and unanswered. Again, the title from Green to Brown, the immediate vendor to the Prince, has not been traced or proved. It has been assumed that it is sufficient for the Respondents to establish that the lands were part of the rent paying lands comprised in Holding No. 1. But even this fact has not, in their Lordships' opinion, been satisfactorily made out. Both parties agree that the lands in dispute lie in block No 1, which, by the chittas of 1783, appears to have belonged to Johnson, and to have contained 46 beegahs 10 cottahs. The inference which the Respondents draw from the Register book at p. 213 is, that this parcel of 46 beegahs 10 cottahs, was subject to a jumma of Rs. 39:13:0; that it had been transferred, before 1816 from Johnson to Green; that a fresh pottah for it was then granted in the name of Green; and that it is identical with the joint holding mentioned in the Terij of 1833 under the head of Pergunnah Khaspore at p. 38 of the Appendix. It is, how-

ever, clear on the face of the Terij, that that holding had been supposed to comprise only 30 beegahs; that on a re-measurement it had been found to comprise 42 and a fraction; and that in consequence of the re-measurement the jumma of Rs. 39 : 15 had been raised to Rs. 56 : 14 : 1. But no satisfactory or consistent explanation has been given how or why a holding which, in 1816 was taken to contain 46 beegahs 10 cottahs, and as such was assessed at Rs. 39 : 15, was at some intermediate period between that date and 1833 taken to contain only 30 beegahs; and having, on re-measurement, been found to contain 42 beegahs and 16 cottahs, was treated as subject to a higher jumma than that assessed upon it when it was supposed to be 46 beegahs 10 cottahs. Mr. Forsyth thought that there must have been two measurements, of which the first, being inaccurate, had reduced the quantity of land to 30 beegahs,—and that the first estimate of 46 beegahs 10 cottahs was a conjectural one. It does not, however, seem probable that if this original estimate had been tested by measurement, the measurement would have been so inaccurately made. Again, Sir Roundell Palmer's theory is that the original block No. 1 may have contained some 16 beegahs and 10 cottahs of rent-free lands; that the rent paying lands were therefore taken to be only 30 beegahs, but were found, on re-measurement, to be 42 beegahs and 16 cottahs. This theory implies that block No. 1 contained, in fact, about 59 beegahs of land. The learned Judges of the High Court admit the difficulty, but say that it is not insuperable, and seem to incline to some such explanation as that offered by Mr. Forsyth. These hypotheses, which are not consistent, are all in their Lordships' opinion, of too conjectural a character to be received in explanation of an admitted difficulty, in order to defeat a title founded on long possession. It may be observed, too, that all of them, and indeed the Register book itself, are not consistent with the case made by the Collector in his plaint, which is founded upon the transfer of the 46 beegahs 10 cottahs, less 3 beegahs and a fraction, from Johnson to Green. The question of the identity of these lands appears to their Lordships to be one of extreme doubt and difficulty. They are by no means prepared to say

that the Appellants have made out that the lands in dispute are identical with the parcels of the conveyance under which they claim title; or have proved a title under which they could recover if they were out of possession. But the burden of proof is on the Respondents,—it is for them to establish, by sufficient and satisfactory evidence, the identity of the lands conveyed to the Prince by Brown with those sought to be recovered from the Appellants; and their Lordships are of opinion that they have failed to do so. If their Lordships had thought otherwise, and that the cause was to be determined upon proof of this identity, they would have felt it very difficult to refuse to send the cause down for a new trial. For the strength of the Respondents' case is the Register book;—that book was first produced in the Appellate Court, under circumstances in which the Appellants may have been, in some measure, taken by surprise; and they may, in the documents produced in support of their unsuccessful application for review, have the means of meeting the inferences to be drawn from that book. Objection to reception of those documents here was taken and allowed; and their Lordships have excluded them from their consideration. Upon the whole case, however, and for the reasons already given, their Lordships are satisfied that the suit of the Collector was properly dismissed by the Zillah Court; and that this Judgment, notwithstanding the fresh evidence produced, ought to have been affirmed by the High Court.

Their Lordships wish it to be understood that this Judgment leaves the subject of the liability of these lands to be assessed for jumma wholly untouched. All that they decide, is the question of proprietary right, as between the contending private owners.

It may be right to observe that, in their Lordships' opinion, the provision in the Code of Procedure, which requires the Judges who admit fresh evidence on an Appeal, to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought at all times to be strictly complied with. It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of litigation,

and the statement of the reasons may inspire confidence and disarm objection. Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed with costs; and that the decision of the Civil Court, so far as it dismisses the Plaintiffs' suit with costs, be affirmed, and that this Appeal be allowed with costs.