Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sreemutty Dossee and others against Rance Lalummonee and others, from the High Court of Judicature at Calcutta; delivered the 19th February, 1869.

Present:

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

Sir Lawrence Peel.

THE suit out of which this Appeal arises was brought by the Respondents, or those whom they represent, to recover possession of the land in question from the principal Defendant, whose title to it is founded on a purchase of some property formerly belonging to a family of the name of Mullick, which was mortgaged to Muttyloll Seal, and sold under the Decree of the Supreme Court.

It is perfectly clear, and, indeed, it has been fairly admitted at the Bar, that one principal question, if not the only question tried in the Courts below, and on which both Courts have found in favour of the Respondents, was whether the alluvial land, which is the subject of the suit, had been the subject of certain revenue proceedings under Regulation 2 of 1819 for the resumption and assessment of some alluvial land, in which a final decision was passed in the year 1833, or whether, on the other hand, they were part of certain lakheraj lands forming part of the mortgaged property, and which, having been the subject of other resumption proceedings, had been decreed to be lakheraj lands belonging to the Mullicks?

The principal question, therefore, which was tried was a question of identity of parcels, and it is difficult to conceive a question which having been very

carefully tried and determined on the banks of the Hoogly, is less proper to be retried on the banks of the Thames. That seems to have been the feeling of the learned Counsel for the Appellants, who have very candidly abandoned any attempt to shake the concurrent Judgments of the Courts below upon that point. They have, however, raised a question whether, assuming the lands in question to have been properly found to have been part of those which were the subject of the resumption proceedings in 1833, the Respondents can be said to have established their title thereto, inasmuch as the settlement for the lands in question was improperly made by the Government with those whom the Respondents represent, whereas that settlement ought to have been made with the Mullicks.

The effect of the resumption proceedings in 1833 was this. The Government had claimed to resume and assess 117 beegahs of land; of those 117 beegahs of land it found that 45 beegahs were, as contended by the Mullicks who appeared on that proceeding, lakheraj land, part of their garden which had been washed away and reformed, and they accordingly released those lands. The remainder of the 117 beegahs, in round numbers 72 beegahs, were held to be subject to resumption and assessment of revenue, and it was directed that the revenue should be assessed upon them according to the Regulations.

That proceeding, it is admitted, was final as between all the parties to it. The usual proceedings were subsequently had. The revenue appears to have been assessed upon these lands in the ordinary way. The Appellants now contend, and it is substantially the only argument urged at their Lordships' bar, that those 72 beegahs, and whatever land may have been added to it by subsequent accretion, is to be treated as an accretion upon their 45 beegahs of lakheraj land, and as land for which the Government was bound to settle with them and with no other person.

A question has been raised, by way of preliminary objection, whether such a case is open to them upon this Record, and their Lordships having considered the pleadings are clearly of opinion that it is not. The principal issue at page 19 is:—"Whether it is true that the disputed land is in-

"cluded in the permanently settled chur Ramkris-
"topore belonging to the Plaintiffs, was in their pos-
"session, and they were dispossessed of the same
"by the Seal Defendant; or that the said land, as
"part and parcel of the garden belonging to Sree-
"nath Mullick, being according to the Order of the
"Supreme Court decreed and sold in auction, it was
"purchased by Sreemutty Dossee, and is in her
"possession?"

Their Lordships construing that issue as it stands, would certainly be disposed to hold that it assumes that whatever was included in the permanently settled chur Ramkristopore did belong to the Plaintiffs, and that the question was whether the disputed lands were within that permanently settled chur, or whether it was to be treated as part and parcel of the garden which belonged to Sreenath Mullick? But if there could be any reasonable doubt on the subject, their Lordships think that doubt is wholly removed if the issue be construed and considered by the light of the principal Defendant's answer, which is found at page 9. At page 10 we have this passage: "Specially when "Sreenath Mullick was alive, with reference to the "133 beegahs, 2 cottahs of lakheraj chur, apper-"taining to the said Ramkristopore, a suit for re-"sumption was instituted by Government, as Plain-"tiff; and it was at first decided in favour of Go-"vernment, in the Collectorate of this Zillah. Af-"terwards on Appeal by the deceased Mullick, the "claim of Government was dismissed, and his Ap-"peal decreed in the Court of the Special Commis-"sioner. The disputed land is comprised within "that." That asserts that the land in dispute was not included in the subject of the Revenue proceedings in 1833, but was the subject of the other Revenue proceedings, which resulted in a decree in favour of the Mullicks, and affirming the land claimed by them to be lakheraj.

But then the meaning of the issue is made still clearer by paragraph 6: "For the purpose of show-"ing their rights, the Plaintiffs have alluded to the "Decision No. 101 of the Special Commissioner's "Court, and to that No. 279 of this Court; but "those allusions are merely allusions. In fact, "there is nothing said in those decisions, that they "are with reference to the disputed lands." There-

fore there is, on the one hand, an affirmance that the land was the subject of other proceedings; and, on the other hand, a denial that they were the subject of the proceedings of 1833.

Their Lordships cannot but feel that it would be most mischievous to permit parties who had had their case upon one view of it fairly tried, to come before this Board, and to seek to have the Appeal determined upon grounds which have never been considered, or taken, or tried in the Court below. It is obvious that if they wished to make the case which they now make, they would, by their answer, have put the case in the alternative, viz. that assuming the land in question to have been the subject of those proceedings of 1833, the title which they now set up was a title under which they might fairly claim to hold. Whether that title could be substantiated, it is needless for their Lordships to consider, because they are clearly of opinion that the question cannot be litigated upon this Appeal, and therefore they abstain from doing so. They would only point out, that considering what was done in the first suit in the Court of the 24 Pergunnahs, considering the lapse of time since the settlement was made, and considering what the Revenue law, with respect to the claims of parties claiming to have a preferable right of settlement, may be, it appears to them that the Appellants would have very considerable difficulty in establishing their case. They do not feel that it would be right to make any special reservation, which would invite further litigation by the raising of such a case. It might have been raised in this suit, and has not been so. If having rested their defence on a false issue they are precluded by the decrees of the Courts below from hereafter raising the case now made, their Lordships do not feel that it would be right to open the door to them. If they are not so precluded, the dismissal of this Appeal will not create a bar to them.

Upon the whole, their Lordships feel that the only order which they can advise Her Majesty to make upon this Record is, that the Decrees of the High Court of Calcutta in the two Appeals, Nos. 721 and 722, affirming the Decree of the Principal Sudder Ameen of Zillah 24 Pergunnahs be now affirmed, and this Appeal dismissed with costs.