Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Court of Wards (representing the Maharajah of Durbungah) v. *Rajah Leelanund Sing and Cross-Appeal, consolidated, from the High Court of Judicature at Fort William in Bengal; delivered 17th December,* 1875.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THIS Appeal and cross Appeal are the close of a litigation in which the parties, or those whom they represent, have been engaged for more than twenty years concerning the ownership of a large tract of land lying between lands admitted to form part of their respective zemindaries, and consisting, for the most part, of hills and forests.

The dispute is essentially one of boundary. The facts out of which it arose, and the earlier history of the litigation which has been the consequence of it, are very fully stated in the report of the case on the former Appeal to Her Majesty in Council, to be found in the 10th volume of Mr. Moore's Indian Appeals. And their Lordships, to avoid an unnecessary recapitulation, will, whenever it is requisite to do so, refer to that statement as if it were incorporated in the present Judgment.

The first, and not the least, material question to be now determined is what was decided by the Judgment of the Judicial Committee on that former appeal, and the Order of Her Majesty in Council

made thereon; and what issues were left open for the determination of the Indian Courts under that Order, so far as it was one of remand.

The Appeal was that of Rajah Lelanund Sing, the Plaintiff in the suit. By his plaint he had parcelled out the disputed land in definite areas, treating them as appurtenant to different Mouzahs which had been recorded as forming part of the Nizamut or settled Mehals, and claimed to recover them as lying within the boundaries of those Mouzahs. He had never, as is now admitted, been in possession of any part of the land which is now in question. He adduced a considerable body of evidence in support of the case made by his plaint. The Judge of First Instance, however, held that he had entirely failed to make out that case, or to establish a title to disturb the possession of the Defendant, and dismissed the suit. On Appeal, two of the Judges of the then Sudr Court affirmed that decree of dismissal. They, too, were clear that the Plaintiff had failed to prove his title as alleged. On the other hand they seem to have admitted that the Defendant could have no title to anything that was not included in the settlement of Havelee. They considered, however, that that settlement did include something in excess of the lands comprised in Captain Ellis' map, and within the disputed territory; that the extent of such excess was undetermined; and that it lay on the Plaintiff to show what he was entitled to recover, which he had failed to do. The third and dissentient Judge, Mr. Sconce, would have given a decree in favour of the Plaintiff. But his *ratio decidendi* was not so much that the Plantiff had proved his case as alleged (though he seems to have thought that some of the specified Mouzahs had been shown to have lain, if not still to exist, wholly or partially in the disputed territory), as that the Plaintiff, as purchaser of the Nizamut Mehals, was presumably entitled to all that was not included in the settlement of the resumed Pergunnah Havelee; and that no part of the disputed territory, nothing in fact beyond the confines of Ellis' map, had been included in that settlement. The committee that determined the former Appeal in 1864 clearly affirmed the findings of the two Indian Courts as to the insufficiency of the Plantiff's evidence to establish the case made by him. The

judgment at page 111 of Mr. Moore's Report says distinctly—

"We agree, indeed, with the majority of the Indian Judges, that the Appellant has failed to prove that no part of the disputed territory was included in the settlement, and that he has failed to prove, by independent evidence, his right to recover the mouzahs as specified in the Plaint."

It is important to remark upon the concurrent judgments of the two Indian Courts, and of the Committee of 1864, on this particular point; because the Judgment of Mr. Justice Norman, which is now under Appeal, whilst it admits (p. 644) that the new evidence taken on the remand did not carry the Plaintiff's original case any further, proceeds almost entirely on the effect of the old evidence, and thus seems to re-open a question concluded by the former Judgments.

If there is one thing more clearly expressed than another in the Judgment of the Committee of 1864, it is that "the decision of the suit depended on the question whether the land claimed, or any, and if any, what, defined part of it was included in the Havelee Settlement" (10 Moore, pp. 87, 88).

Upon this question the Committee had to pronounce between the joint Judgment of the two Judges of the Sudr Court, and the conflicting Judgment of Mr. Sconce. To that end it addressed itself to a careful examination of the settlement proceedings, particularly those of Mr. Piron. In the course of that, it found that two Mouzahs, named the one Gormaha or Kormaha, the other Ghorakhore, which lay partially, if not wholly, within the disputed territory, had been advisedly relinquished by the revenue authorities pending the resumption proceedings, as part of the Nizamut Mehals; and accordingly that so much of the disputed land as was appurtenant to these Mouzahs belonged to, and ought to be adjudged to the Plaintiff. On the other hand, it came to the conclusion that the final settlement of Havelee, under the head of "Bunkur and Boondee Mehal, besides the Putwarrie's papers, whatever came to light by the depositions of farmers and persons informed, and by perusal of Pottahs, &c., S. R., 1,116," did include "the revenue arising from Ghauts Marug Kurrailee, and other Ghauts" (10 Moore, I. A., p. 103) The Committee next proceeded to consider "what was

this property, and whether the ownership of it implied the ownership of any land in excess of the measured area, and beyond the confines of Ellis' map."

Upon this point they appear to have satisfied themselves that the Ghauts in question, or some of them, were geographically beyond the confines of Ellis' map, and within the disputed territory; but to have felt unable to come to a clear conclusion as to the nature and character of the Bunkur and Boondee Mehals, and of the revenue arising from the Ghauts, and upon the question whether the rights included in the settlement involved the proprietorship in the soil of any, and what, part of the lands in dispute. It accordingly, finally deciding some of the questions in the cause, but leaving others open to further inquiry, recommended Her Majesty to make the order under which the subsequent proceedings have taken place.

That Order declared, 1st, that the Plaintiff was entitled to Mouzahs Kormaha and Ghorakhore and the lands comprised therein and belonging thereto, and to all such other parts of any of the lands in question in the suit as were not included in the settlement of Havelee; 2ndly, that the settlement of Havelee comprised only the measured area of 123,207 beegahs, and so much of any of the land in dispute as upon the inquiries after directed might appear to belong, or be properly attributable to, the Bunkur and Boondee Mehals in the pleadings mentioned, or to the Ghauts, of which the same in part consist; and that the rights of Havelee in respect of Bakum did not extend beyond a certain quantity of land there specified. It then directed an inquiry "what was the nature and character of the Bunkur and Boondee Mehals, and of the Ghauts comprised therein respectively which were included in Piron's settlement, and were therein estimated at 1,116 sicca rupees; and whether the same or any and which of them, included any and what part of, or any and what right or interest in the land in question in the suit. And it finally declared that so much of the land in question as might upon such inquiry appear to be comprised in the said Bunkur and Boondee Mehals or Ghauts belonged to Havelee, and that the Plaintiff was entitled to recover the residue of the land in question.

It appears to their Lordships that the broad, if

not the sole, issue which this order left to be determined between the parties was what portion of the land in dispute was comprised in Mr. Piron's settlement under the item already set forth. It has, however, been strenuously argued at the Bar that even if the terms of Mr. Piron's settlement import that he included therein some part of the disputed land, it was open to the parties under this order of remand to show that such inclusion was unintentional or improper ; in other words, to question the propriety of the settlement, and its binding force upon the Plaintiff. Their Lordships cannot so construe the order. That it was not the intention of the Committee of 1864 to leave any such questions open plainly, as their Lordships' think, appears from several passages in the Judgment. It is said at p. 89 of Mr. Moore's Report, " In considering what was included in Havelee the Court below could only deal, as we upon this Appeal must deal, with the Havelee Settlement as it stands. For the purposes of this suit that settlement must be considered as valid and subsisting." Again, at p. 99, " We think, indeed, that the settlement of 1844 affords the only safe criterion for determining what belongs to Havelee, and what to the Nizamut Mehals." And at p. 103 of the same Report it is said, " It must be taken, then, that Mr. Piron not only included, but properly included, the revenue arising from Ghauts Marug, &c., in his settlement."

It is said that this conclusion of the Committee was, as a passage in the preceding page indicates, partially at least, founded on a misconception, arising from an error in printing the former record, to the effect that certain village papers which were in fact part of the defendant's evidence, had been put in by the Plaintiff. The Judgment, however, seems to their Lordships to treat these documents rather as corroborative of the conclusion to which the Committee had come than as the foundation on which it rested.

Again, that the Committee of 1864 may reasonably have determined to conclude the question of the propriety and binding nature of the settlement appears from this consideration. The Plaintiff, if entitled to impeach that settlement, could only do so by proving clearly that it covered lands included in the perpetual settlement of the Nizamut Mehals. He had failed

to do this, because he had failed to establish his title to the lands in dispute. The Committee, however, said in ease of him, "You shall not be concluded by your failure to prove the title alleged against the Defendant in possession. He cannot be entitled to anything that is not included in the settlement of Havelee; and you shall have the benefit of the presumption that what is not so included belongs to the Nizamut Mehals." The rights of the parties being thus stated, the issue between them necessarily becomes, "What was in fact included in the settlement of Havelee." Their Lordships, however, do not rest upon expressions in the Judgment of the Committee as conclusive. If there be any inconsistency between them and the terms of Her Majesty's Order in Council, the latter, which is in the nature of a Decree, ought to prevail. On the other hand, if that has concluded the question now under consideration, neither the Courts in India, nor their Lordships sitting here, can go behind it. And looking to the terms of the inquiry directed, which assumes that the Bunkur and Boondee Mehals, and the Ghauts, are included in Piron's settlement, and seeks only to ascertain their character and nature, and what they covered; and also to the final declaration that so much of the land as should be found to be comprised in these Mehals and Ghauts belongs to Havelee, their Lordships are clearly of opinion that the question of the propriety of Piron's settlement and of Piron's intention in making that settlement, are no longer open to the Plaintiff in this suit; and that the only question between the parties is what that settlement as it stands included in fact. This view of their Lordships necessarily disposes of a considerable portion of the argument addressed to them at the Bar, and of Mr. Justice Norman's Judgment.

Under the Order in Council, as construed by their Lordships, the task of the Indian Courts upon the remand was plainly limited. They had to ascertain, 1st, whether the Bunkur and Boondee Mehals, and the Ghauts included in Piron's settlement, or any and which of them, lay beyond the confines of Ellis' map and within the disputed territory; 2nd, whether the rights so settled involved the proprietorship of the lands over which they were exercised; and, if so, 3rd, what portions of the disputed territory

represent such lands, and are, therefore, to be taken to be included in the settlement. For the purposes of these inquiries, they were at liberty to direct such local investigations as they might consider desirable, and were bound to give due effect to what had been laid down by the Committee of 1864 concerning the general burthen of proof.

Unfortunately, however, the Indian Courts have not thus restricted their action; they have allowed the parties to enlarge the scope of the fresh litigation by re-opening questions that had been decided; and it now becomes necessary to consider more particularly how the case stands on their conflicting judgments.

The cause was first heard on the remand by Mr. Craster, the officiating Judge of Zillah Bhaugulpore. In his Judgment he states that the main questions for the consideration of the Court were, first, were the Bunkur and Boondee Mehals and Ghauts which form the subject of the present suit, included in Mr. Piron's Settlement of Pergunnah Havelee; and second, what was the nature of those Mehals, and did they include any, and (if any) what portion of the lands now in dispute. The first issue does not precisely accord with the terms of the inquiry directed by the Order in Council: but if we are to understand the term "Mehals and Ghauts which form the subject of the present suit," to import Mehals and Ghauts within the disputed territory, the inquiry was legitimate, because the Order in Council had not conclusively determined the geographical positions of all the Ghauts, of which the revenue made up the sum of S. Rs. 1,116 mentioned in Piron's settlement; and, in fact, as will be shown hereafter, some of those Ghauts now turn out to be within the confines of Ellis' map.

Upon these issues, however, the Plaintiff seems to have succeeded in re-opening and re-arguing at great length upon the former as well as upon the fresh evidence, the original question of title. Mr. Craster's opinion on this part of the case was in favour of the Defendant. But with that opinion, and the reasons on which it is founded, their Lordships, for the reasons above stated, have on the present occasion little concern. Mr. Craster next proceeded to dispose of the contention before him that Mr. Piron not only

did not intend to include "the Mehals and Ghauts in question" (meaning it must be assumed Mehals and Ghauts in the disputed territory) in his settlement; but was apparently not even aware of their existence; certainly had no knowledge of them as assets of Havelee.

On this point, again, he found in favour of the Defendant that the Ghauts mentioned in the proceedings were included, and rightly included, in the settlement of Havelee, and that they were situated beyond the limits of Ellis' map, and within the disputed territory.

He then addressed himself to the inquiry as to the nature of the property, and whether the ownership of it implied the ownership of any land in excess of the measured area, and beyond the confines of Ellis' map. And for the reasons stated at pp. 608 and 609 of the new Record, he came to the conclusion that the Bunkur and Boondee Mehals comprised in Piron's settlement included the full proprietary right and interest in the lands from which the revenues appertaining to those Mehals was derived, that is to say, of the lands situated within and about the Ghauts comprised within those mehals. And applying this principle, he held that, inasmuch as the positions of the Ghauts had been determined to be beyond the confines of Ellis' map, and within the disputed territory, it followed that "the lands within and about them were those in question in the suit."

A new element of confusion appears to have been introduced into the cause whilst it was before Mr. Craster by an understanding or arrangement between counsel that, as to that portion of the disputed land which is south of the Karmeg Hill, there should then be no trial of title; the Plaintiff intending to rely on his right to recover it as part of the village of Gormaha in the execution proceedings to be taken in order to enforce that part of the Order in Council which had adjudged to him that Mouzah. Mr. Craster's decree dismissed the suit, so far as it sought to recover any of the property claimed, except that portion of it to which the Plaintiff had been declared by the Order in Council to be entitled.

The cause then went on Appeal to a division Bench of the High Court, consisting of Mr. Justice Norman and Mr. Elphinstone Jackson. Those

learned Judges arrived at different conclusions; but, according to the course of practice, the Judgment of the senior Judge prevailed, and the result was the decree which is under Appeal.

In his long and elaborate judgment, Mr. Justice Norman appears to their Lordships to treat the case sometimes as open to him upon all the original issues; and at others, as partially concluded by the Order in Council.

At page 631, line 34, he says, "And, 1st, I think it must be assumed that, notwithstanding anything Piron might have done, nothing can be said to have belonged to, or to have been properly attributable to, the Bunkur and Boondee Mehals settled with Maharanee Wuhjonissa, which can be shown to have been comprised in the perpetual settlement of Pergunnah Purbutparah, and to have been held or enjoyed as part of such perpetually settled estate down to the time of the Plaintiff's purchase.

2ndly. That when Bunkur and Boondee rights are to be enjoyed over lands which would appear to have formed part of the Lakhiraj estate of Havelee, and not to have been comprised within Pergunnah Purbutparah, the settlement of Bunkur rights would show, or assume the existence in the person with whom the settlement was made, of a title to possession of the soil itself, subject only to such rights as the Government may have had on the expiration of the settlement for twenty years, to demand an increased Jumma in respect of the rights to the soil.

3rdly. That when the Bunkur and Boondee Mehals, mentioned in Piron's settlement, are found to exist in tracts in which there is nothing to show that the land was not part of Pergunnah Purbutparah, according to the Decree of Her Majesty in Council, the property in the soil and the right to the rents and profits of any portions of it, cultivated, or to be cultivated, must be taken to belong to the Plaintiff as appertaining to Pergunnah Purbutparah, and the Bunkur and Boondee as effectually settled with Havelee under Piron's settlement.

Having thus defined the *ratio decidendi* which he proposed to adopt, the learned Judge, after reviewing the whole of the evidence in the cause, and particularly that taken before the remand, came to the conclusion that the accounts and other docu-

mentary evidence produced by the Defendant on the original hearing of the cause, were false and fabricated (an opinion then for the first time expressed), and that, on the contrary, the evidence for the Plaintiff was trustworthy, and established that "from the time of the Decennial settlement down to the time of the resumption of Havelee, there was within Pergunnah Purbutparah, a Bunkur Mehal called the Bunkur of Morekhut, and Tetroun, that the owner of this Mehal was entitled to, and either personally received the profit, or leased out the right to take the jungle products over all the hill tracts lying to the east of the cultivated lands of Tuppeh Lodhweh; that the settlement of Purbutparah in 1790, amongst the assets of which the Bunkur Mehal was set down, included the right to the absolute property in the soil in the entirety of the hills in question; that the Government retained no right or interest in the land in question at the time of Piron's settlement, and that no right or interest in this portion of the land in dispute passed, or could be passed, to Maharanee Wujhoonissa under that settlement.

He found, moreover, secondly, that as regarded the land to the north and east of the road through the Amjhur Ghaut the Plaintiff was clearly, and in any view of the case, entitled to a Decree, because neither the Bunkur Mehal of the Amjhur Ghaut, nor the Boondee Mehal of Bhorekund Chuckabore were included in Peer Khan's pottah, and consequently could not be taken to be included in Piron's settlement. These findings were confined to that portion of the disputed land which the Plaintiff claimed as appurtenant to Tuppeh Lodhweh.

The learned Judge next proceeded to deal with the claim of the Plaintiff to recover possession of Soogee, and the land to the north and west of the village marked by that name in Captain Sherwill's map. He held that the Plaintiff's evidence had made out no title to recover this; that, on the contrary, the evidence that Soogee as far as Ghaut Marug was really part of Havelee was very strong; and, consequently, though unable to account for its not being included in Ellis' map, he awarded this portion of the land in dispute to the Defendant.

He next proceeded to consider the Defendant's title in respect of the Ghauts west of Soogee and south of Simroun, viz., Gooreya, Sehla Mela,

Sikhole, and others. The portion of the land in dispute which belonged to, or is represented by those Ghauts, had been claimed by the Plaintiff as appurtenant to Tuppeh Simroun.

He failed, however, in Mr. Justice Norman's Judgment to give any trustworthy evidence that the land ever formed part of Tuppeh Simroun, or that the farmers of that Tuppeh ever exercised any dominion over the land, or that the profits of the Ghauts in question were ever included in the collections of Simroun. He produced no pottahs or kubooleuts relating to the Bunkur of the Ghauts, nor any accounts whatever of Bunkur and Boondee in respect of Simroun. On the other hand the learned Judge thought that the Defendant had failed to show affirmatively by trustworthy evidence that Ellis and Farquharson were wrong in excluding this tract from Havelee. He observed that if he could have given full effect to his own impressions he would have ruled that the inclusion of the Bunkur and Boondee Mehals in Piron's settlement was effected by means of fraud; but that, giving effect to that part of the Judgment of the Committee of 1864 which threw upon the Plaintiff the burthen of proof, and taking the Bunkur, Boondee, and Phulkur Mehals to be included, and rightly included, in Piron's settlement; he thought that, in the absence of any proof that the tract in question had been previously included in the settlement of Purbutparah, or that the owner of that Pergunnah had ever exercised any ownership over the land, he was bound to say that the Bunkur, Boondee, and Phulkur Mehals of the tract in question included all the profits derivable from the soil; and, if so, that the property of the soil was, at the date of the resumption, vested in the owner of Pergunnah Havelee as an integral part of that estate. The learned Judge added, "If the Plaintiff has any right to this portion of the land, it appears to me that, under the directions contained in the Judgment of their Lordships, I must say that he has failed to prove it."

He then proceeded to deal with that portion of the disputed territory which lies south of the Karmeg Hill, otherwise called the Khurwa Dalan. The title to this, as has been already stated, was by the arrangement before Mr. Craster, left to be determined in the execution proceedings to be thereafter

taken. The High Court, however, thought that the question should be determined on the Appeal before them; and gave to the Counsel for the Defendant an opportunity of producing any evidence which, but for the arrangement in question, they would have produced on this part of the case. Of that opportunity they did not avail themselves, but relied on the failure of the Plaintiff under the general burthen of proof that lay on him, to show that this portion of the land was not included in Posun Pasee's lease. The High Court, however, heldthat it was the duty of the Defendant to produce Posun Pasee's lease; and that, in its absence, the land immediately in question must be pronounced not to be included in Piron's settlement; and, therefore, under the terms of the Order in Council, to belong to the Plaintiff.

Mr. Justice Norman gave effect to his findings by defining on a copy of Sherwill's Map by the course of a stream and two red lines the boundaries of the land which he proposed to leave in the possession of the Defendant; and by awarding to the Plaintiff the rest of the land in dispute.

Mr. Justice Elphinstone Jackson, as has already been stated, did not concur with his colleague. He agreed, that the land south of the Karmeg Hill ought to be adjudged to the Plaintiff; but, as to the land north of that hill, he felt that the High Court was bound by the Order in Council, and that Mr. Justice Norman's Judgment was inconsistent with that Order. His own views are thus expressed:—

"It has been argued before us that the decision of the Privy Council leaves the whole question open as to whether any portion of the disputed land is attributable to or is conveyed by the settlement of the Bunkur and Boondee rights. If the Plaintiff could show even now that the Ghauts or hills, the Bunkur and Boondee rights of which were settled with Havelee, were situated in Havelee proper, as measured by Captain Ellis, I think he might still obtain a Decree for the whole land in dispute. But there is no longer any attempt to do this. It is admitted, or, if not admitted, it is quite clear that those Bunkur rights extended over a large portion of the disputed land. There is no doubt or mistake as to the position of the Ghauts in which those Bunkur rights existed. If the Bunkur rights of

Hursa Totya, Baromussia, Kallythan, Marug, Kurrailee, &c., are rightly included with Havelee, they convey also the Bunkur rights of the whole tract of land situated between them and Havelee. If the Bunkur rights carry the land, then they carry with them the right to the whole of the disputed land from the spot where the survey boundary of Lodhweh has been laid down. The sole exception is that portion of the land to the north of the Hursa Totya Ghaut, which is described in the map as Amjhur Hill and Bhorekhund Chuckabo. The Amjhur Hill is not mentioned in any of the pottahs on which the settlement was founded. The road through it does not lead to Havelee. Both the Plaintiff's evidence and that of the Defendant, as given in the original trial, point to this portion of the hills as constituting the position of Morekhut, which is one of the Mouzahs of Tuppeh Lodhweh. Plaintiff has, I think, clearly shown that the settlement of Piron conveys no rights over this portion of the hills. But as regards the remaining portion of the hills, viz., that between Hursa Totya on the north and the hills surrounding Marug on the south, the Plaintiff does not attempt to show that they are not attributable to the Bunkur rights settled with Havelee. It is certainly argued that Bunkur rights do not convey the land. But in such a case as this, where land is wholly jungle and uncultivated, the right to Bunkur would be *primâ facie* proof of the right to the land. I think the Judge was quite correct in this view of the case."

And after some further observations to the effect that the land to which the Bunkur rights attached must go with the Bunkur right; that the Plaintiff had failed to show that he could separate any portion of the disputed land from the land to which the Bunkur rights attached, and had not, indeed, attempted to do so; that it was no longer open to him to dispute the settlement, or to contend that the Bunkur included in it belonged to Tuppeh Lodhweh, the learned Judge came to the conclusion that the Plaintiff's suit to recover the land situate to the north of the Karmeg Hill, and claimed by him as a portion of his Tuppehs Simroun and Lodhweh, should be dismissed, except as to the Amjhur Hills, which should be decreed to the Plaintiff.

It is, no doubt, true that this learned Judge proceeded to intimate that had the whole question as to the right of the Plaintiff or the Defendant to Bunkur rights, as well as the land of the Ghauts, been open to his consideration, he would have concurred with Mr. Justice Norman in decreeing to the Plaintiff the hills north, as well as south, of the Karmeg Hill, with the exception of the portion of the disputed land about Soogee; which, but so far only as it lay at the foot of the hills, or extended up to the slope of Marug Mountain, he thought had been proved to have always belonged to Havelee.

The formal decree was, of course, drawn up in accordance with Mr. Justice Norman's Judgment, and has given rise to the present Appeal and cross Appeal; the Defendant claiming by the former to have the decree of the High Court reversed, and the decree of the Zillah Judge affirmed; the Plaintiff claiming by the latter to have the decree of the High Court varied in so far as it relates to Soogee, and the other lands left in the possession of the Defendant, and to have a decree for the whole of the disputed territory.

It is to be observed that upon the inquiry as to the nature and character of the Bunkur and Boondee Mehals and of the Ghauts, comprised in Piron's settlement, and the right which they included in the land attributable to them, these judgments are all one way. That of Mr. Justice Norman may seem, in some passages of it, to give an uncertain sound; but he, too, came to the conclusion, as in the case of the Ghauts west of Soogee and south of Simroun, and the lands about them, that the Bunkur, Boondee and Phulkur Mehals included all the profits derivable from the soil, and, if so, carried with them the property in the soil. This general conclusion seems to their Lordships to be indisputable. The existence of an incorporeal right in the nature of an easement to be exercised *in alieno solo* implies a grant to the owner of the easement from the owner of the soil. And inasmuch as the resumed Pergunnah of Havelee and the Nizamut Mehals, up to the time of the commencement of the dispute, belonged to the same person, it is not easy to see how any such easement can ever have been created.

Again, the effect of the Judgment is to divide the

disputed territory into two large portions, viz., that which is south, and that which is north of the Karmeg Hills. The northern portion is again subdivided, by Mr. Justice Norman's Judgment, into three portions, viz., that which he has left in the Defendant's possession; that which lies north and east of the road through the Amjhur Ghaut; and that which lies between the two other portions. Mr. Justice Jackson, on the other hand, makes but two subdivisions of the northern portion, viz., that which belongs to the Amjhur Hills; and that which does not fall within that description.

Their Lordships propose to deal first with the land south of the Karmeg Hills. As to that they see no ground for disturbing the Decree under Appeal.

The title of the Defendant rests on the inclusion of the land immediately in question in the settlement of Piron. That settlement, so far as it related to the disputed territory, was founded generally on the depositions and Pottahs of Peer Khan Soubahdar, Durshun Singh, Posun Passee, and others. There is nothing to connect this southern portion of the disputed territory with the holding of Peer Khan.

The holding of Durshun Singh would now seem, from the further evidence which has been elicited on the remand, to have been wholly within the measured area of Ellis' map. This evidence appears to their Lordships to be fairly summed up by Mr. Elphinstone Jackson at p. 676 of the new Record. In any case, there is nothing to show that Durshun Singh's Pottah covered any of the disputed land south of the Karmeg Hills.

Again, neither Posun Passee's Pottah nor his Kubooleut are forthcoming; nor is there any evidence which satisfactorily connects the holding by him which was the subject of Mr. Piron's settlement with this southern portion of the disputed territory.

On the other hand the Order in Council has already affirmed the Plaintiff's title to Gormaha; *i.e.*, to an indeterminate part of this tract of land. It has also limited the Defendant's interest in Mouzah Bakum to the small area lying within the confines of Ellis' map. In this state of the evidence their Lordships are clearly of opinion that there is no proof that this southern portion of the disputed territory, or any part of it was comprised within the

Bunkur and Boondee Mehals or Ghauts settled as part of Havelee; and consequently, that under the Order in Council the Plaintiff is entitled to recover it, whether it is in fact wholly or only partially comprised in Mouzah Gormaha.

As to the northern portion of the disputed territory, their Lordships have already intimated that in their opinion the proper *ratio decidendi* is that which Mr. Justice Elphinstone Jackson thought himself bound to adopt, and not that which was in fact adopted by Mr. Justice Norman.

Again the question what was included in the settlement seems to be almost identical with what at that date was held by Peer Khan Soubahdar. Mr. Elphinstone Jackson held that in the absence of evidence on the part of the Plaintiff to show what parts of the disputed territory were not attributable to the Ghauts about which they lay, the possession of the Defendant must prevail; and that, with the exception of the Amjhur Hill, which will be hereafter considered, the whole of the northern portion of the disputed territory must be taken to be included in the settlement, and to belong to Havelee.

Their Lordships are of opinion that this view is correct. The Ghauts scheduled in Peer Khan's Pottah, from Hursa Poteeah, or Hursa Tooteea, in the north, to Sikhole or Sehla in the south, are all traceable in this tract of land. And, indeed, the conclusion that, on the construction which their Lordships have put on the Order in Council, all the land last mentioned must be taken to belong to Havelee, may be said to be common to all the Judges, since it is implied in the second finding of Mr. Justice Norman at p. 658 of the new Record. The only difficulty that arises concerning it is that which is suggested on the cross-Appeal in respect of Soogee. And, oddly enough, that is the very portion of the land in dispute as to which all the Judges have found that the Defendant has a good title independent of the settlement—a title which Mr. Elphinstone Jackson says was hardly disputed by the counsel for the Plaintiff (p. 676). It may be remarked, moreover, that this fact is inconsistent with the Plaintiff's theory that the possession by the Defendant of any land beyond the measured area of Ellis' map was an encroachment upon the Nizamut Mehals; and the result of a conspiracy between the original

Defendant, the former owner of the whole Khurruckpore zemindary, and is some slight evidence of what was alleged to be the original rights of Havelee.

The difficulty suggested is, however, this: Soogee was not included in Peer Khan's Pottah of the Ghauts. In his deposition before Mr. Piron (Old Record, p. 345 in writing) he speaks of it as held by a separate Pottah. There is no clear proof that that Pottah was afterwards produced before Mr. Piron, or that what it covered was included in his settlement. The rent received by that Pottah does not appear to enter into the sum of S. Rs. 1,116 mentioned in the settlement. It is therefore urged that, under the strict construction of the Order in Council, Soogee and its appurtenances not being included in the settlement, must be adjudged to the Plaintiff.

On the other hand, it is argued that the intention was obviously to include in the settlement whatever was held by Peer Khan under lease from the proprietors of Havelee; that his second Pottah is mentioned in his deposition; that all the evidence shows that he did so hold Soogee and its appurtenances, and that the expression of Mr. Piron in the passage so often quoted from his Report is whatever was found by the depositions of Peer Khan and others, &c. Mr. Cowie has also contended, and his contention seems to be borne out by the schedule to the original plaint, that the Plaintiff has never claimed Soogee as such. In these circumstances, their Lordships think that they would not be warranted in giving the Plaintiff a decree for Soogee and its appurtenances against the Defendant, who is shown to have had from the beginning of the suit both the possession of and title to that village; and that it must be treated as virtually included in the settlement.

The only remaining question is the right to the land lying north and east of the road through the Amjhur Ghaut. The Amjhur Ghaut is not amongst those mentioned in the schedule to Peer Khan's Pottah. *Primâ facie*, therefore, it was not included in Piron's settlement. The land about it has clearly nothing to do with Soogee. The learned Counsel for the Defendant referred their Lordships to a Kubooleut of Peer Khan's at p. 193 of the new Record, in which Ghaut Amjhur is specified as leased

to him; but that document was not before Mr. Piron. It bears date the 15th of March, and was registered on the 18th of March, 1844; whereas the Pottah, which was before Mr. Piron, appears to have been executed in January, 1840 (25 Maug, 1247 F.), and to have been registered on the 13th of January, 1842. It is possible that, in the interval, those interested in enlarging the borders of Havelee may have advanced further into the disputed territory. The Defendant's Counsel have also called in aid an old Kubooleut of 1211 F., at p. 462 W, and a Pottah of 1228, at p. 469 W, of the old Record. But to say nothing of the discredit thrown upon the Defendant's documentary evidence by Mr. Justice Norman, and to some extent by his colleague also, it is sufficient to remark that the same rule which their Lordships have on another part of the case applied to the Plaintiff must also be applied to the Defendant, and that these old documents, tendered to prove the original title of Havelee, have no bearing on the question of what was, in fact, included in the settlement as held by Peer Khan. Reference has also been made to certain proceedings of the revenue officers subsequent to the settlement, particularly to Mr. Quintin's letter, at page 249, O. R., which, referring to a report of Mr. Piron, states that Amjhur Ghaut was included in the settlement. This letter, however, was written in 1849, when Peer Khan seems to have got into possession of Amjhur Ghaut; and what he then held may easily have been confounded, or assumed to be identical, with what he held under the Pottah of 1840, which, in this very letter of Mr. Quintin's, is treated as the basis of the settlement. Subsequent statements of the revenue officers as to the effect of the settlement, cannot, in their Lordships' opinion, avail to supply the evidence which the settlement proceeding itself, and the Pottah on which it purports to be founded, fail to afford. A more important document is the proceeding of Mr. Piron of the 11th of May, 1844, which was had before his signature of the final settlement proceeding on the 20th of June, 1844; though after the grant to Maharanee Wujhoonissa of a lease of Havelee on the basis of the contemplated settlement on the 9th of April, 1844. In that proceeding, which was at the instance of the

Maharanee complaining of a disturbance by Resaz Ali of her possession of the Ghaut included in the settlement, mention is made of Ghaut Amjhur as one of those Ghauts. It is to be observed, however, that that mention is only in the abstract of her petition; and that it is possible that, when Mr. Piron reported to the Magistrate that all the Ghauts so mentioned were settled with Havelee, his mind was not directed to Ghaut Amjhur in particular, or to the fact that it was not specified in Peer Khan's Pottah. The proceeding is not properly part of the settlement proceedings, nor an adjudication of right binding upon the Plaintiff.

On the whole, then, though not without doubt, their Lordships have come to the conclusion that Ghaut Amjhur, with whatever land it covers, has not been shown to have been included in the settlement of Havelee, and that, under the terms of the Order in Council, the Plaintiff is entitled to recover the land north and east of the road passing through that ghaut.

The Order, therefore, which their Lordships will humbly advise Her Majesty to make, is—

1st. To reverse the Decree of the High Court, except so far as it reverses the Decree of the Lower Court; and, in lieu thereof, to declare and decree that in addition to the villages of Gormahah and Ghorakore, in the former Order of Her Majesty mentioned, the Plaintiff is entitled to recover and do recover so much of the land in dispute as lies to the north and east of the road which runs through the Amjhur Ghaut, which road is referred to in the Judgment of the High Court at page 658, line 7, of the printed Record; and further that, as between the Plaintiff and Defendants, the former is entitled to recover and do recover as part and parcel of the Mouzah of Gormahah all that part of the disputed land which is to the south of the line drawn from Kurwah Nath to Kurwa Dallan upon the map annexed to the Judgment of the High Court, and initialled by the said Court on the said map; but that as to all the rest of the land in dispute the Plaintiff's suit should be, and do stand, dismissed.

2ndly. That the Defendants do pay to the Plaintiff the mesne profits realized by them from Gormahah and Ghorakhore, and from such other lands as are hereby decreed to him, from the date of the com-

mencement of the suit up to the date of the delivery of possession, and that the same be ascertained and assessed by the Courts in India in execution of this Decree.

3rdly. That the Defendants do refund to the Plaintiff, or do account for all costs paid by him, the said Plaintiff, to the Defendants from the date of the institution of the suit to the date of this Decree, so far as such costs have not already been repaid or accounted for.

4thly. That the Defendants do pay to the Plaintiff the costs incurred by him in the Indian Courts in proportion to the amount of the land decreed; and that the Plaintiff do pay to the Defendants the costs incurred by him in the same Courts in proportion to the land disallowed; and that each party do bear his own costs of this Appeal, and cross-Appeal, and also of the former Appeal to Her Majesty in Council.

Their Lordships cannot but feel that owing partly to the nature of the subject, and partly to the course which the suit has taken, it is more than usually difficult to make a Decree that is perfectly satisfactory to them. They have done their best, however, to bring this long litigation to an end, consistently with what had been decided by their predecessors. They are anxious that the order to be made should leave as little room as is possible for future dispute; and if the learned Counsel on either side wish to be heard on its form, their Lordships are willing that the cause should be mentioned on the minutes on any day before the Report is laid before Her Majesty for confirmation.

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