Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Alexander John Forbes v. *Meer Mahomed Tuquee and others, from the High Court of Judicature at Fort William, in Bengal; delivered 26th July,* 1870.

Present:

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE Appellant is the owner of the Zemindary right in Pergunnah Sultanpore, and Talooqua Remae, in Zillah Purneah. These mehals were purchased by him in April 1851, from one Pertaub Singh, who, on the 24th of July, 1850, had purchased the estate of which they then formed part at a sale for arrears of Government revenue: and the estate so purchased by Pertaub Singh had once been part of a far more extensive Zemindary which, in 1802, was first permanently settled with one Ranee Indrawatee.

In July 1862, the Appellant commenced the suit which has given rise to this Appeal, in which he claimed against the Respondents, first, the right to resume 9,000 beegahs of land held by them upon the tenure which will be afterwards considered; and, secondly, the right to recover from them 2,000 beegahs of land, described as Towfeer, or excess, being lands which, he alleged, they had wrongfully acquired under colour of their tenure by gradual encroachment or otherwise.

The Court of First Instance allowed the first of these claims, but rejected the second. On Appeal

and cross-Appeal, the High Court of Calcutta rejected both claims, reversing the Decree of the Court below on the first, and affirming it on the second; and dismissed the suit. This Appeal again raises both questions.

The claim of Towfeer may be shortly disposed of. It was very faintly pressed at the Bar. Mr. Leith, it is true, relied upon a passage in the Ameen's report at page 73 of the Record; but the principal Sudr Ameen was of opinion that, on the Ameen's report, taken as a whole, no excess of land was shown to be in the Respondent's possession; but that, on the contrary, they appeared to hold less than 9,000 beegahs in all. The High Court has confirmed that decision, and no grounds have been laid before their Lordships which would justify them in disturbing the concurrent finding of the two Indian Courts on what is, in fact, a mere question of boundary and measurement.

In dealing with the question of resumption, their Lordships desire to state, in the first place, the conclusion to which they have come touching the origin and duration of the tenure on which the lands sought to be resumed are held.

The following is its history:—In 1775 the lands in question were granted by the Sunnud, at p. 100 of the Record, to Meer Syud Ally, a Persian, who had done, and was doing, good service in repressing or preventing the incursion of wild elephants coming from the Morungs or Terai upon the cultivated lands of Pergunnah Sultanpore. This first Sunnud contained no words of inheritance. In 1786 the Meer, being then dead, the Government granted the second Sunnud in favour of Meer Abdool Hossein Khan and Meer Ally Rezza, who reprerented themselves to be the elder brother and nephew of Meer Syud Ally, and as such, his heirs. This Sunnud does contain words of inheritance, and made the grantees and their descendants fixed Jageerdars. It is not shown what, if any, interruption of possession took place between the death of Meer Syud Ally and the date of this second Sunnud. In February 1804 Mirza Mahomed Saduk Goolstana and others brought a suit against Meer Ally Rezza and the widow of Meer Abdool Hossein, alleging that they were the true heirs of Meer Syud Ally, and that the grantees under the second

Sunnud had falsely pretended to be his brother and nephew. The first Decree in this suit declared the Plaintiffs to be the true heirs of Meer Syud Ally, and directed the Defendants to relinquish the possession and enjoyment of the Jageer to them, treating, apparently, the former as trustees for the true heirs. On Appeal, the Provincial Court affirmed this Decree, and dismissed the Appeal. But considering, apparently, that it could not, without the sanction of Government, transfer the benefit of the second Sunnud from the persons named in it to the true heirs of Meer Syud Ali, it directed that the possession of the former should remain undisturbed "until an order should be issued from head-quarters," meaning the Governor-General in Council.

In consequence of these decisions the third Sunnud was granted on the 10th of January, 1807. It recited the two former Sunnuds, and that by the Decrees in the last-mentioned suit the heirship of the Plaintiffs had been proved, and the said Jageer continued to the Plaintiffs. And it went on to state that, under these circumstances, the Government had, on the application of Meer Mahomed Saduk, confirmed the said Jageer lands to the Plaintiffs, from whom the present Respondents derive their title.

Under the three Sunnuds, the lands comprised in the Jageer have been held rent-free for nearly a century.

One of the questions raised in the suit is, however, that, under the circumstances above stated, the title of the Respondents must be held to have been first created by the third Sunnud in 1807; and that inasmuch as the Zemindary, of which Sultanpore was then part, was permanently settled in 1802, the Appellant, who claims through an auction purchaser, is entitled under Act 1 of 1845 to set aside the tenure as one created within his Zemindary since the perpetual settlement.

Their Lordships are of opinion that this contention cannot be supported. It is perfectly clear that the effect of the second Sunnud was to create sixteen years before the settlement of the estate in 1802 an hereditary Jageer tenure; and that the settlement was made upon the assumption of the subsistence of that hereditary Jageer. The

grant was perfectly good against the Zemindar, who could not have come into Court to set aside the second Sunnud on the ground that the grantees had obtained it from Government by fraud or misrepresentation. Nor, in fact, has any Court or any authority ever revoked or set aside that second Sunnud. The Decrees in the suit between the real and pretended heirs of Meer Syud Ali made (subject to the sanction of Government), the latter trustees for the former, and directed them to relinquish the enjoyment of the lands accordingly. And the Government by the third Sunnud sanctioned that arrangement, and confirmed the title of the true heirs. On this view of the transaction, the action of Government, and the inaction of the Zemindar in 1807, become intelligible. For it is not to be presumed that the Government would have assumed the power of granting a new tenure in a settled Zemindary, or that the Zemindar would have submitted to such an invasion of his rights. Their Lordships, therefore, concurring on this point with the High Court of Calcutta, are of opinion that the Jageer of the Respondents must be held to be a tenure created before, and subsisting at the time of, the decennial settlement; and consequently that it is within the exception of the 26th section of Act I of 1845; whether the Appellant has or has not in respect of his estate the powers of an auction purchaser under that Act (as to which their Lordships express no opinion); and whether the lands comprised in it were or were not part of the Zemindary settled in 1802.

Has, then, the Appellant established his right to resume the lands comprised in this ancient Jageer. His case is that they are within the limits of the Zemindary settled in 1802; that as between the Government and the Zemindar they were then treated as mâl or revenue paying lands, and a revenue assessed upon them; although they were then, and have ever since been, held rent-free as between the Zemindars and the Jagheerdars; that under these circumstances they must be deemed to be chakeran or service lands, and that the services on which they were held being no longer required or performed, the right of the Zemindar to resume them has accrued.

Some attempt has been made on the part of the

Respondents to show that the lands comprised in the Jageer are not even within the geographical limits of the settled Zemindary, or, at least, have not been proved to be so. But, looking at the pleadings and the evidence, their Lordships are of opinion that upon this point the Appellant has established his case. He has given strong *primâ facie* proof of the fact, and there is no evidence at all to the contrary.

If this be so, the next question is, How were the lands dealt with on the occasion of the settlement? They were then unquestionably held rent-free, under a subsisting Sunnud, and the presumption is that they would be treated as Lakhiraj. In that case no revenue would be assessed upon them. Nor would the Zemindar acquire any right to question the validity of the title on which Lakhiraj land of that extent was held? That question could only be raised by Government; and having been decided adversely to Government in 1845, the title of the Respondents would now be indefeasible.

On the other hand, it seems to follow that if on the occasion of the settlement revenue was assessed on these particular lands as between the Government and the Zemindar, they must, since they produced no money rent payable to the Zemindar, have been treated as in the nature of chakeran lands within the meaning of the 41st Section of Regulation VIII of 1793, upon the notion that the services to be performed by the tenant were equivalent to rent payable to the Zemindar. It is therefore a very material issue whether, in point of fact, these lands were, on the occasion of the settlement, treated as part of the mâl assets of the Zemindary.

Their Lordships are not prepared to say that the Appellant has established the affirmative of this issue beyond reasonable doubt.

He relies mainly on the evidence afforded by the Quinquennial Register, and the proceedings in the resumption suit, brought by Government against the Respondents, or those through whom they claim, which was finally determined in 1848.

Their Lordships do not concur with the High Court in thinking that the first of these documents has not been properly authenticated. The learned Judges of that Court seem to have confined their

attention to the extract at page 92 of the Record, and to have taken no notice of the fuller document at page 122, which not only bears the Collector's seal, but is shown by the indorsements upon it to have been the identical paper produced by the Jageerdars in the resumption suit. The Appellant's case is, that the lands in dispute are included in the villages Talooka Ramgunge, and Mouzah Gurka, part of Talooka Remae, on which a revenue of 850 rupees appears to have been assessed.

Their Lordships cannot assent to the proposition of the learned Counsel for the Respondents, that Talooka Remae is something different from Pergunnah Sultanpore; and that the Appellant is bound to show that the lands in question are mâl lands within Sultanpore Proper. They think it is proved that Talooka Remae was part of Pergunnah Sultanpore in the larger sense of that denomination. Nevertheless, if the Appellant's case depended solely on the Quinquennial Register, their Lordships would doubt whether it had been sufficiently proved that the lands in question were subject to the assessment. For even if it be assumed that the different villages or divisions of land mentioned in the Chuckbund and Ameen's Report are comprehended within the denominations of Talooka Ramgunge and Gurka, it seems consistent with that Register that those Mouzahs may have included the 9,000 rent-free beegahs in excess of the 5,819 beegahs mentioned in it as the lands in respect of which the revenue of 815 rupees was assessed. But it is argued that the identity of the Jageer lands with the mâl lands in Talooka Ramgunge, &c., has been admitted by the Respondents, or those through whom they claim in the resumption suit. The question then arises, what is the weight to be given to that admission?

Their Lordships cannot agree with the learned Judges of the High Court in treating it as a mere admission or argument at the Bar by a mooktear whose authority to make it is not proved. It seems to them to be the foundation and substance of at least one of the defences deliberately pleaded by the Jageerdars in the resumption suit to the claim of Government. It was not the sole defence, nor can the ultimate decision of the case be said to proceed upon a finding by the Collector that the lands were mâl and not lakiraj. For he seems to have held

that the proof of the Sunnud was of itself a bar to the claim of Government in that proceeding. Nevertheless, the admission appears to their Lordships to be one of a grave character; and though it is not to be treated as an estoppel, it at least casts upon the Respondents the burthen of explaining it, and of showing that what was then deliberately asserted was not the fact. The onus then of showing that the Jageer lands are something distinct from the mâl lands of Talooka Ramgunge and Goorka is shifted upon them. And this fact they have not attempted to establish by direct evidence. They have been content to rest on the alleged insufficiency of the proof on the other side. Their Lordships, therefore, are constrained to say that though the evidence before them is not conclusive, the preponderance of it is in favour of the allegation that the Jageer lands were made the subject of assessment in the settlement between the Zemindar and the Government in 1802.

But is it a necessary consequence of this finding that the Appellant is entitled to resume these Jageer lands? His right to do so must depend on the nature of the tenure; and it is worthy of observation that, so little value did the Zemindar in possession between the years 1835 and 1845 attach to this supposed right of resumption, that he did not intervene, as undoubtedly he might have intervened, to resist the then claims of Government.

The settlement between Government and the Zemindar cannot affect the rights of the Jageerdars. The lands held on this tenure, even if then treated as in the nature of chakeran lands, differ widely from the ordinary chakeran lands contemplated by Section 41 of Regulation VIII of 1793. They seem hardly to fall within the description of "lands held by a public officer or a private servant, in lieu of wages." Neither Meer Syud Ali nor his descendants were by the Sunnuds appointed to an office known as "elephant hunter for the Pergunnah," or by any like description. Still less ground is there for saying that they were the private servants of the Zemindar. Their right, whatever it be, was derived not from any Zemindar, but from the Supreme authority in the State.

Their Lordships have carefully considered the

various authorities cited at the Bar; but they can find none which expressly govern the case.

Of those which have been decided by this Committee, it is sufficient to say that in the Madras case, in 7 Moore, I. A., p. 128, the question really discussed and decided was, whether the tenure in question was enam or amaram, it being established and almost admitted that, if it were the latter, it was resumable at pleasure; and the case in the 10th Moore, I. A., p. 16, decided that lands held in lieu of remuneration by a village Chowkeedar, though unquestionably chakeran within the meaning of Regulation VIII of 1793, sec. 41, were not resumable at the pleasure of the Zemindar, if the public, or the Government representing the public, had an interest in the appointment of the Chowkeedar.

The Indian authorities are not quite consistent with each other, but taken altogether, they do not appear to their Lordships to establish the right for which the Appellant contends in this case.

In the case of the 11th May, 1857, the chakeran lands had been assigned for the maintenance of a Chowkeedar, and the existing Chowkeedar had no connection with them, being otherwise remunerated. Other provision had, therefore, been made for the service to be rendered in return for them.

In the case of the 30th November, 1857, the tenant whose services had been dispensed with, or had otherwise ceased, was clearly the mere private servant of the Maharajah (the Zemindar). He was the person bound to perform all the leather work required in the family.

The case of the 11th December, 1857, was one of Ghatwalee tenure; and one of the learned Judges who decided it (Mr. Justice Trevor), in the subsequent case decided by him and Mr. Justice Campbell, 3, "Weekly Reporter," p. 87; and again in the case decided by the full Bench, 6, "Weekly Reporter," p. 203, concurred in the ruling that all that was laid down in the first-mentioned case, beyond the decision that the Zemindar was entitled to resume, when the Ghatwal had actually failed to render the service which he was bound to render, was mere *obiter dictum*. Both these cases in the "Weekly Reporter" support the

contention of the Respondents rather than that of the Appellant. Both also relate to Ghatwallee tenures. The case decided in 1868, 1 Bengal Law Reports, p. 120, is to the effect that the Government having concurred in the suppression of the office, the son of a Ghatwal, who had held his office, not by hereditary right, but on the appointment of the Zemindar (though practically the son had continually been appointed in succession to the father), could not successfully sue to recover lands which the Zemindar had resumed.

Their Lordships do not think it uecessary for the determination of this case to examine minutely these decisions touching the Ghatwally tenures. And they abstain the more willingly from doing so since it was stated at the Bar that some of them are likely to be brought regularly before this Board by Appeal. But they cannot but express their concurrence in many of the general principles laid down by the Chief Justice in the case in the 6th vol. of the Weekly Reporter.

Another case cited is that at p. 84 of the Sudder Dewanny Adawlut Decisions for 1858. The property, as in this case, was a Jageer. The decision did no more than remand the case for re-trial, with the following intimation of opinion:—"The issue raised by the Plaintiff is not solely whether the grant to the ancestor of the Defendant is hereditary, but also whether it has any condition of service annexed to it or not, and if it has whether that service be still performed; should a condition of service be annexed to the grant the hereditary nature of the grant will not be the test of its present validity but the performance of the required service: and if this service be not performed then, notwithstanding its hereditary nature, the tenure will be liable to resumption."

To this ruling, if it be understood to mean only that where the continued performance of certain services is upon the true construction of the grant the condition on which the lands are to be held, their Lordships conceive no exception can be taken. But if it means that whenever service enters into the motive or consideration for a grant, the grant will become void if for any reason the service ceases to be performed: their Lordships think that the proposition is far too wide.

The conclusion which they would draw from the decided cases, as well as from the reason of the thing, is that in every case the right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant.

They agree with the observation of Mr. Justice Jackson, 6 "Weekly Reporter," p. 209, that there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands.

They have already stated that, in their opinion the grant in question does not fall within the latter category.

Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed, as to make the continued performance of the services a condition to the continuance of the tenure. But in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that the service ceasing, the tenure should determine.

It appears to their Lordships that neither the first nor the second Sunnud is a grant of the kind last mentioned. Each proceeds in part upon the past servces of Meer Syud Ali; nor is the consideration so far as it is unexecuted wholly the keeping up of a body of men to repel the incursions of the elephants, for the grantees are also to cultivate the waste land. The latter stipulation was probably designed to protect the already cultivated districts of Sultanpore by interposing a further belt of cultivation between them and the forest. Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future services. Again, neither Sunnud contains any words which expressly import that the tenure shall cease if and when any of the services cease to be performed. Such a provision is something very different from one which merely casts upon the grantee the performance of certain duties so long as they are necessary. The former makes the grant determinable when there is no further occasion for the services. But, in the latter case, if the operation of any natural cause (as, *e.g.*, the progress

of cultivation which has caused the wild elephants to cease out of the land) removes the necessity for the services, the grantee will hold the lands practically freed from the condition originally imposed upon him. Their Lordships are therefore of opinion that upon the true construction of these sunnuds the grantees, though bound to protect the Pergunnah from the incursions of wild elephants so long as those incursions lasted; and though still bound to do so should, by any chance, those incursions be renewed, and though they may be liable to forfeit the tenure, if they wilfully fail in the performance of this duty are, not liable to have their lands resumed because there is no longer any occasion for the performance of this particular service, "there being now no fear of the depredations of elephants in those places."

Had this been a grant reserving to the Zemindar a small money rent, as well as the services, if indeed the latter are reserved to the Zemindar, their Lordships would have had no doubt upon the case. But it seems to them that the unexplained anomaly of making mâl lands rent-free in the hands of the Jageerdars, does not affect the construction of the Sunnud, or the rights of the parties.

It emphatically lay upon the Appellant, who is seeking to dispossess, or to rack-rent, the Respondents, who by themselves, or their ancestors, have brought these lands into cultivation, and enjoyed them for so long a period; who must have been permitted by former Zemindars to continue undisturbed in such enjoyment long after the incursion of wild elephants had become mere matter of tradition, to make out a clear title to resumption. In their Lordships' opinion he has failed to do so; and therefore, though they dissent from the particular grounds on which the High Court has dismissed the suit, they think its dismissal was right, and ought to be affirmed. They will, therefore, humbly advise Her Majesty to dismiss this Appeal with costs.

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