Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Wise and others v. *Ameerunnissa Khatoon, and Wise and others* v. *the Collector of Backergunge and others* (*two Consolidated Causes*), *from the High Court of Judicature at Fort William in Bengal*; *delivered Friday, December* 19*th*, 1879.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is a suit brought by Mr. J. P. Wise, and other persons of the name of Bysack, against several Defendants; first, the Government represented by the Collector of Backergunge; secondly, Amirunnissa Khatun; and thirdly, Krishna Chunder Chatterjee, for himself and as guardian of the widows of Bykunt Chunder Chatterjee. Certain other persons as the representatives of Moulvi Wahed Ali and of Moulvi Abdool Ali were afterwards, on the application of the Plaintiffs, added as Defendants on the record.

The suit relates to certain plots of land, B., C., D., E., and F., marked in an Amin's plan made previously to a settlement in 1868. The Plaintiffs claim 10 annas of B. and C., the whole of D., and the whole of E. and F. They allege that the plots B., C., and D. were reformations of lands which belonged to them, and that E. and F. are accretions to D., or to B., C., and D. They also contend that, even if they failed to establish this title, they had, under the circumstances to be hereafter stated, obtained a

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title to what they claim in this suit by prescription. The case was tried before the Judge of Backergunge, and it was found by him, and that portion of his judgment was affirmed by the High Court, and it is not now disputed, that the Plaintiffs altogether failed in making out their title by re-formation. The only substantial question which remains is, whether they are entitled to recover upon the ground that they had obtained a title to the 10 annas of B. and C., and to the whole of D., by prescription. The first Court found that the Plaintiffs had obtained such a title; but that decision was overruled by a judgment of the High Court from which the present Appeal has been preferred. The long course of litigation with regard to the lots in dispute, and also with regard to a lot A., which is not now in dispute, is thus shortly described by the Judge in his judgment at page 121 of the Record. He said, "It seems necessary here to refer "to the portion marked A., which, though not "the subject of the present claim, has been "the subject of similar litigation between "the Plaintiffs and the Defendants 2 and 3. "It will be seen on the map that A. is "the northernmost portion of the series of "churs of which B., C., D., E., and F. are "the portions now in dispute. A., it is said, "first formed as an island in 1261, and the "Plaintiffs took possession of it as having re-"formed on the site of the diluviated kismuts, "Chur Selimpore, &c. Defendant No. 2 claimed "it as an accretion to Andar Chur, which is a "part of Chur Kalkini, and was held by Defen-"dant in ijara from Government. A case was "instituted under Act IV. of 1840, which re-"sulted in the Plaintiffs being maintained in "possession. Subsequently B. and C. formed "in 1858 or 1859, and similarly in a case under

" Act IV. of 1840, the Plaintiffs were maintained " in possession. In 1859 and 1861, Defen- " dants Nos. 2 and 3 and Abdul Ali "—2 and 3 being Ameerunnissa and Bykunt Chatterjee, who is now represented by the other Chatterjees— " brought suits in the Civil Court to set aside " these Act 4 awards. Defendant No. 2, in " suit No. 85 of 1859, sued to establish her " title to A.; Abdul Ali, in No. 366 of 1861, " sued to establish his title to two annas of A.; " and in No. 283 of 1861, Defendant 3, or rather " his predecessor in interest, Bykunt Chunder " Chatterji, sued to establish his title to six " annas of A., B., C., D. The principal Sudder " Ameen, whose decisions were affirmed by the " High Court (*see* 11 W. R., 34 and 127), decreed " all three suits except in regard to D. So " that by these judgments the whole of A. was " decreed to the Defendants 2 and 3 and Abdul " Ali, and six annas of B. and C. were decreed " to Defendant 3." The Plaintiffs remained in possession of 10 annas of B. and C., the whole of D., and the whole of E. and F. up to the year 1868, when they were ousted therefrom on behalf of Government by the Collector who settled them with the Defendants. The High Court in their judgment upon appeal from the decision of the first Court, say (*see* First Supplemental Record, p. 4): " As regards the question " whether the awards under Act 4 of 1840 in " favour of the Plaintiffs, and the failure of the " Defendants Nos. 2 and 3 to set aside these " awards by civil suits instituted by them, have " given Plaintiffs such a title as will enable them " to recover possession, it was urged that the " Plaintiffs had not been in possession of any of " the land claimed long enough to give them a " title by prescription, for that the first re- " formation of any of the land did not take place " until 1859, and the Plaintiffs were admittedly

" deprived of possession in 1868. Further " that the Plaintiffs' title by prescription " would not avail against Government; that it " was clear that all these churs were formed in " the bed of a navigable river, and were not " re-formation of the Plaintiffs' villages; that " first they appeared as an island, and then " became fordable from the Kalkini side; that " first the portion of the chur marked A. " appeared and subsequently became annexed " to Kalkini, and then that the other portion " joined on to A.; and thus that, irrespective of " the Government right to these as an island " forming in the bed of a navigable river, they " also became accretion to a Government estate, " for Chur Kalkini belongs to Government, and " A. and the other lands accreted to it." It had been held in a decision of the High Court that when lands are formed as an island in the middle of a river, and are surrounded by water which is not fordable, they do not belong to Government, if before the Government takes possession any portion of the water round the island becomes fordable from an adjacent estate; and the before-mentioned suits, in which the Defendants succeeded, were decided in accordance with that ruling. But that decision was overruled by the High Court in a Full Bench decision in Volume 14 of the Full Bench Rulings of the Weekly Reporter, page 28, and the High Court referring to it, say: "The " Full Bench Ruling of the 17th August 1870 " (reported in W. R., Vol. XIV., page 28, Full " Bench Rulings) was referred to as showing " that under the terms of clause 3, section 4, " of Regulation XI. of 1825, these lands being " at the time of their first formation the pro- " perty, or to use the words of the Regulation, " at the disposal of the Government, they could " not subsequently become vested in the Plain-

" tiff or any one else. On the other hand, for " the Plaintiffs, it was argued that the Lower " Court's decision was right, that there had been " constant litigation between the parties, that " Ameerunnissa had always failed to prove her " title, that Mr. Wise had been declared entitled " to retain possession, and that his possession " under an Act IV. award of the re-formed " lands for more than three years revived " his right to those lands. From the above " statement it will be seen that the Plaintiffs do " not seriously dispute the finding of the Lower " Court, that they have failed to establish their " title to any portion of the lands in dispute, " on the ground of re-formation on the original " sites belonging to them; but Plaintiffs argue " that the Judge was right in holding that their " title by prescription had been made out. Now " the Judge in deciding this point appears to " have overlooked the fact that the Government " have been made the principal Defendants, " that it was the Government who dispossessed " the Plaintiff and who settled the land with " the other Defendants, inasmuch as their title " by prescription will not avail them against " the Government, for it is clear that the taking " possession by a party not entitled will not " give them a title unless the possession has " been of such duration as to extinguish the title " of Government. In the present case it has been " found that the lands only began to re-form in " 1859, and as the Plaintiffs were admittedly " dispossessed in 1868 they had not been in pos- " session 12 years when dispossessed." The High Court, therefore, overruled the decision of the Lower Court that the Plaintiffs had obtained title by prescription.

It appears that Kalkini was originally gained from the river Arialkhan, in the district of Backergunge, and that Government had assessed

it, as they had a right to do, under Regulation 11 of 1825. It was settled as an accretion to lands which belonged to Ameerunnissa and Mahomed Wasil; 8 annas with Ameerunnissa for 20 years from the 3rd May 1848, and 8 annas with Mahomed Wasil for 20 years from the 10th May 1848. Mahomed Wasil failed to pay the revenue as to his 8 annas, and the Government took possession and granted a lease of it to Ameerunnissa for 12 years, which expired in 1867. The settlement of Kalkini having expired in 1868, the Government re-settled it and included the whole of the lands, B., C., D., E., and F., as part of Kalkini in the new settlement. It was found by the Ameen, who was deputed to make a local investigation, that the lands were formed in the bed of the river. They, therefore, according to the Full Bench ruling, reported in the 14 Weekly Reporter, Full Bench Rulings, p. 28, belonged to Government, who were entitled to take possession of them. The Plaintiffs say in their plaint, "The Defendant No 1,"—that is, the Collector,—"on the occasion of the re-settlement "of Chur Kalkini on the part of the Government, "caused the entire area of the said chur"—that is, the whole of the lands which are claimed in the declaration—"to be measured with Chur "Kalkini, and ousted us therefrom in the begin- "ning of 1275, and made a settlement thereof "with the Defendants Nos. 2 and 3, after dis- "allowing our objections." Ameerunnissa did not act in violation of Act 4 of 1840. It was the Government who were entitled to the property, who took possession of the land and put Ameerunnissa and the other Defendant into possession of it under the new settlement.

It was contended that the Government could not in consequence of the provisions of Act 9 of 1847 include the lands which are now in

dispute with Chur Kalkini without a new survey. The matter was referred to the Commissioner, and the Commissioner thought that the Government had no right to make the settlement; but the Defendants, having been put into possession by the Government, they proceeded under section 318 of the Criminal Procedure Code, which had been substituted for Act 4 of 1840, and obtained an order against Wise and others by which they were to be retained in possession. That is also stated by the Plaintiffs in their plaint. They say: "The Collector " having ousted them from the lands in dispute, " made a settlement thereof with the Defen- " dants Nos. 2 and 3 after disallowing our " objections. The Commissioner, on our appeal, " ordered the said land to be excluded from " the said settlement, but a suit was instituted " for possession under section 318 of the Cri- " minal Procedure Code, and on the 9th August " 1869 it was ordered that the land should " remain in possession of the Defendants Nos. 2 " and 3. Moreover, under the orders of the " Revenue Board, dated the 31st October 1870, " the said lands have again been brought under " settlement." The case had come on appeal from the Commissioner to the Board of Revenue, and they had held that the Government was justified in making a settlement of the lands as a part of Kalkini.

Even if the Government was not entitled to assess the lands in consequence of Act 9 of 1847, they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, and they were entitled to oust the Plaintiffs, who were tres- passers, and to put the Defendants into possession.

It is quite clear that the Plaintiffs have failed

to make out a title. The Defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate under the Code of Criminal Procedure to be retained in possession. If the Plaintiffs had wished to contend that the Defendants had been wrongfully put into possession and that the Plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under section 15 of Act 14 of 1859; but they did not do so. The High Court, with reference to this point say (and, in their Lordships' opinion, correctly say): "Further, *de* "*facto* possession having been given to the "Defendants under section 318 of the Code "of Criminal Procedure, in accordance with "the Deputy Collector's award, the Plaintiff will "not be entitled to a decree until and unless he "can show a better title to these lands than the "Defendants. The fact that the Plaintiffs' "possession as regards B., C. and D. was con-"firmed under Act 4 of 1840, and that the "Defendants Nos. 2 and 3 unsuccessfully "endeavoured to disturb them by regular suit, "does not bar the right of Government. Sec-"tion 2 of Act 4 of 1840 only affects persons "concerned in the dispute. If Kalkini had "belonged to a private individual he might "have reduced into his own possession lands "which had accreted to the estate and which "undoubtedly were his. But lands to which "he is unable to make out a title cannot be "recovered on the ground of previous possession "merely, except in a suit under section 15 of "Act 14 of 1859, which must be brought "within six months from the time of that dis-"possession."

Their Lordships are of opinion that the High

Court was right in holding that the Plaintiffs had failed to prove a right by prescription. Act 14 of 1859, section 1, clause 7, enacts that, "To suits brought by any person bound by "any order respecting the possession of pro- "perty made under clause 2, section 1, Act 16 "of 1838, or of Act 4 of 1840, or any person "claiming under such party for the recovery "of the property comprised in such order, the "period of three years from the date of the "final order in the case." This, however, is not a suit brought by Ameerunnissa and the other Defendants, but it is a suit brought against them. Act 4 of 1840 had nothing whatever to do with title, it merely regarded possession. The Magistrate was not to inquire into title, but merely to ascertain who was in possession *de facto*, and to retain him in possession. Their Lordships are of opinion that, independently of the title of Government to the lands which appear to have been originally formed as an island in the bed of the river, possession for three years under an order of a Magistrate in a proceeding under Act 4 of 1840 does not create a title by prescription.

The Plaintiffs' suit was therefore properly dismissed as to B., C., and D. As regards plots E. and F., it was found by the first Court that they were not originally accretions to D., and that the Defendant Ameerunnissa had satisfactorily established the fact that they belonged to her (Record, p. 128).

The Plaintiffs, upon the appeal of the Defendants to the High Court, objected to the decision of the first Court as to E. and F. upon the ground that they were entitled to them as accretions to B., C., and D.; but the High Court held that as they had found that Wise had no title to B., C., and D., his claim must fail as to E. and F. (Record, p. 137). The Appellants having appealed to Her Majesty against the

judgment of the High Court as to B., C., and D., appealed also as to E. and F. upon the ground that they were accretions to B., C., and D. (Appellant's case, p. 26). But their Lordships, having affirmed the judgment of the High Court as to B., C., and D., it follows as a matter of course, upon the Appellant's own contention, that the decree as to E. and F. must also be affirmed.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decree of the High Court.