APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice Field.

NUFFER CHUNDER BHUTTO (PLAINTIFF) *v.* JOTENDRO MOHUN TAGORE AND OTHERS (DEFENDANTS).* 1881 *June* 13.

Damages—Inundation—Embankments — Liability to Repair—Beng. Act VI of 1873—*Regs. II, VIII, and XXXIII of* 1793—*Reg. VI of* 1806—*Reg. XI of* 1829—*Act XXXII of* 1855.

In a suit for damages caused by the overflow of a river through an embankment on the defendants' land, it appeared that the defendants held under a kabuliat from Government, which provided, that the zemindar should not object to pay rent on the score of drought or inundation; that he should bear all losses incurred on that account; and also, that he should do embankment work at the proper time, and should be liable for loss from negligence. It did not appear whether the embankment was in existence when the kabuliat was granted. It was proved that the defendants received an annual sum from Government as a contribution to the repairs of embankments, but such payment was not provided for in the kabuliat, and no evidence was given as to the terms of the agreement under which it was paid.

Held, that there was no common law liability to repair imposed on the defendants.

That, it not having been proved that the embankment in question was in existence at the date of the kabuliat, the defendants were not liable *ratione tenuræ*, and that if the sum paid by Government was in consideration of the defendants' maintaining the embankment in question, and if the terms of the agreement under which it was paid showed that it was intended to impose the obligation to repair for the public benefit, the defendants would be liable.

Regulations and Acts relating to embankments in Bengal considered.

THE defendants in this case were the zemindars of Pargana Rukunpore, which contained a village called Rāmeshurpore, bounded on its west side by the hill-stream or river Daroka. The plaintiff was the patnidar of Belun, lying alongside and to the north of Rameshurpore, and also bounded on its west side by the Daroka. The plaintiff complained that the Daroka

* Appeal from Appellate Decree, No. 363 of 1880, against the decree of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 17th November 1879, reversing the decree of R. K. Sen, Esq, Munsif of Berhampore, dated the 30th June 1879.

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having burst into Rameshurpore through its south side, had thence inundated Belun; and asserting that the zemindars of Rukunpore were bound to maintain embankments to keep out the Daroka, claimed damages against the defendants, on the ground that, in consequence of their neglect to maintain proper embankments along Rameshurpore, injury had been caused to Belun by the invasion of the water through Rameshurpore. The defendants held their zemindari under a kabuliat from the Government, dated the 30th May 1794, which contained the following provisoes:—"I shall not object to pay the full rent on the score of drought or inundations. I shall bear all losses on that account." And "I shall do embankment works of the said mouzas at the proper time. Should there be any loss from my negligence, I will bear the same." The plaintiff contended, that, under these covenants, the defendants were bound to repair. The defendants denied that any liability to repair was imposed on them, and contended that the object of the covenants was to save the Government revenue in case of loss by floods. It was proved that the defendants received an annual sum of Rs. 733-1 from Government as a contribution to the repairs of the embankments in the pargana; but no evidence was given as to the terms of the agreement under which it was paid. The Munsif held, that the defendants were bound to keep up the embankment, and gave the plaintiff a decree for damages. This decree was reversed by the District Judge, and the plaintiff now appealed to the High Court.

Mr. *Branson*, Baboo *Gurudas Banerjee*, and Baboo *Rashbehary Ghose* for the appellant.

Mr. *Bell* and Baboo *Nil Madhub Bose* for the respondents.

The following judgments were delivered:—

PONTIFEX, J. (who, after stating the facts of the case as above, continued):—Now if the defendants are liable, their liability must exist—

1*st*.—By the original or common law of the land, or

2*nd*.—By prescription, or

3*rd*.—*Ratione tenuræ*, or

4th.—Under an obligation of public concern, for the observance of which public money is paid to them.

With respect to 1*st*, the original or common law liability, no authority has been adduced to show that any such liability exists; and even if it did exist, it would scarcely apply beyond the repair of the ordinary or natural bank of the river, and would probably carry with it the correlative obligation of contribution to the expense of repairs by all parties protected or benefited. But the Daroka is a hill-stream liable to sudden freshets: and the plaintiff claims that the defendants are bound not only to preserve that natural bank, but to erect and maintain an artificial embankment without any liability on the part of the owners of Belun to contribute to the expense thereof. I am of opinion, therefore, that the defendants are not liable by the original or common law.

Next, with respect to 2*nd*, or liability by prescription: This could only be established by evidence, and the lower Appellate Court has found, and indeed it is admitted, that there is no evidence to support a liability by prescription.

Thirdly, with respect to 3*rd*, or liability *ratione tenuræ*. If it had been proved that the embankment on the south side of Rameshurpore was in existence on the 30th of May 1794, the date of the kabuliat under which the defendants hold Rukunpore from the Government, I am inclined to think the defendants might be liable at the suit of the plaintiff in the same way as the Corporation of Lyme Regis were held liable at the suit of a stranger in the case of *Mayor of Lyme Regis* v. *Henley* (1).

Now the kabuliat contains two clauses with respect to inundations: The first clause is—"I shall not object to pay the full rent on the score of drought or inundation. I shall bear all losses which shall be incurred on that account."

This clause was evidently intended to protect the Government against any claims by the zemindar for remission of rent on account of losses by inundation.

But at a much later part of the kabuliat occurs this other clause,—"I shall do embankment works of the said mouzas at

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the proper time. Should there be any loss from my negligence, I will bear the same."

If this was intended, as the defendants argue, to protect the Government from claims for remission, it would be surplusage. Another meaning must, therefore, be sought for. It may be said that it was intended only to protect the Government by preserving the security for their rent intact. This might be a fair argument if the zemindari was in the neighbourhood of a large and destructive river, which might not only inundate, but absolutely obliterate it, making it an unproductive waste of water. But this does not seem to be the character of the Daroka, and besides, this argument might be pushed further to show that it was equally the interest of Government to preserve the adjacent settlements. It is difficult to understand why the Government imposed the liability under the 2nd clause, unless it was for the public benefit,—that is, the benefit of all those whose lands would be protected by the embankment; and the fact that the Government made the settlement permanent, would be a sufficient consideration for the obligation.

But though the Munsif held that this particular embankment was in existence at the date of the kabuliat, he seems to me to have arrived at that conclusion upon insufficient evidence; and I am inclined to agree with, as we are bound by, the finding of the lower Appellate Court upon this question of fact, that the embankment in question has not been proved to have been then in existence, and if it was not in existence, I do not think the zemindar would be bound to maintain it by the terms of his kabuliat. I am, therefore, of opinion that the defendants are not liable *ratione tenuræ*.

Lastly, with respect to 4*th*, or liability under an obligation of public concern, with respect to which the defendants have received, and still continue to receive, public money for the purpose of keeping embankments in repair. The defendants admit that they receive an annual sum of Rs. 733-1 anna from the Government as a contribution to the repairs of embankments in Parganna Rukunpore. This contribution must be payable under some agreement subsequent to the kabuliat, because it is opposed to its terms. The defendants do not produce the

agreement, or state for the repair of what embankments the contribution is made. But s. 36 of Beng. Act VI of 1873, referring to this contribution by the Government, speaks of embankments generally, and also refers to any embankment.

Now if the defendants receive this contribution by Government in consideration of maintaining the embankment in question in this suit, and if the terms of such agreement show that it was intended to impose the obligation for the public benefit, I am of opinion that they would be liable at the suit of the plaintiff on the principle of the *Lyme Regis case* (1). If, however, they can show that the agreement under which the contribution is made was solely for the benefit of the zemindars, which, looking to the terms of the kabuliat and the provisions of Act VI of 1873, seems to me, as at present advised, an unlikely conclusion, then the plaintiff would not be entitled to sue.

But no evidence has been given as to the date or terms of this agreement, or as to whether it affected this particular embankment. Assuming the agreement was not for the sole benefit of the zemindar, but was intended to impose an obligation of general and public concern, then, if it was general in its terms and applied only to embankments existing at its date, it would be for the plaintiff to show that this particular embankment did then exist. On the other hand, if the agreement contemplated the construction and repair of all embankments necessary for keeping out the river, it would be for the Court to decide whether this particular embankment was included within its scope, or rather, whether the particular inundation of which the plaintiff complains was caused by the zemindar's neglect of his obligations.

In my opinion, before dismissing the plaintiff's suit, some enquiry should have been made with respect to these matters. But so far as I can see, no issue was raised in the lower Courts for this purpose, although the plaintiff raised the question. I would, therefore, remand the case to the Munsif's Court for the trial of these additional issues:—

1. When was the agreement as to contribution by Government referred to in Beng. Act VI of 1873 made, and what were its terms?

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2. Did it relate to embankments generally, or to such as might be necessary for keeping out the river, or to such only as were in existence at its date?

3. Was the embankment, in question in this suit, in existence at the date of the agreement?

4. Was the obligation imposed by the agreement an obligation of general and public concern, and are the zemindars bound by it to repair the embankment in question so as to make them liable at the suit of the plaintiff for special damage occasioned by its breach?

Having tried these issues, the Munsif will reconsider his judgment; and if, and when, the case goes on appeal to the lower Appellate Court, that Court must also try the issue already decided by the Munsif, but not yet tried by the lower Appellate Court, whether the inundation complained of by the plaintiff was caused by defects in this particular embankment, or was occasioned by defects in embankments at Guthla or elsewhere; and the lower Appellate Court will reconsider its judgment in the whole case. Both parties will be at liberty to adduce fresh evidence, and the costs of suit, including the costs of this appeal, will abide the result.

FIELD, J.—The defendants in this case are the zemindars of Pargana Rukunpore, in which is included the village Rameshurpore. The plaintiff is the patnidar of Belun, a village, which lies to the north of, and adjacent to, Rameshurpore. The plaintiff claims Rs. 506 as damages for the destruction of crops in Belun, which, he alleged, was caused by the fact that the defendants, being bound to repair certain embankments along the bank of the river Daroka, neglected to do so; and, in consequence, the waters of this river broke into Belun and inundated the plaintiff's village.

The plaint is not very scientifically drawn, but we find in it matter which may be construed so as to base the defendants' liability to maintain or repair the embankment upon one of the four following grounds, which are indeed the only grounds upon which it is possible to base it, *viz.* —

1. Common law.
2. Liability by prescription.

3. A duty created by the conditions of the original grant at the time of the Permanent Settlement.

4. A duty arising out of the circumstance of Government making an allowance for the particular purpose of repairing the embankments of the pargana.

Before dealing with these four questions, I propose to consider the Regulations and Acts which have, from time to time, been passed by the Legislature upon the subject of embankments in these provinces, and some of which were referred to in the course of the argument in this case. There can be no doubt that the construction and maintenance of embankments were common in Mahomedan times; and were, to a certain extent, necessary in consequence of the physical features of the country. Many embankments were maintained by Government, and this for several reasons. The necessary works required skill and expenditure which were beyond the resources of private individuals: or the embankments were, especially in the district of Moorshedabad and its vicinity, on a large scale necessary and intended for the protection of the city, which was the seat of the Court, and the surrounding country. Naturally the construction, maintenance, and repair of such works were entrusted to the State officials immediately connected with the Court. Other embankments were maintained by zemindars, who, it will be remembered, were then officers of Government, and who were allowed to deduct the amounts expended by them from the revenue collected for, and remitted to, the Government.

When arranging the terms of the Permanent Settlement, the Government were very desirous that the revenue should be paid in one fixed sum; and that there should be no complication with miscellaneous petty charges, which had a constant tendency to increase. It appears to me that s. 72 of Reg. VIII of 1793 was directed to carry out this intention of Government. This section enacts as follows:—"The settlement is to be made, as far as possible, in one neat sum, free from any charges of moshaira, zemindari, amlah, poolbundi, cutcherry charges, or others of a similar nature, it being intended that all charges incidental to the receipt of the rents of the lands, and independent of the allowances of the officers of Government and

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expenses attending the collection of the public revenue, shall be defrayed by the proprietors from the produce of their lands." I do not read this section as reciting or imposing any liability upon zemindars to construct or maintain embankments as a necessary incident of their zemindari tenure. I think it is concerned with a different object,—namely, that of making the land-revenue payable in one lump sum, not complicated with, or liable to, reduction by miscellaneous or petty charges. At the time of the Permanent Settlement, certain stipulations on the subject of poolbundi were inserted in some of the kabuliats executed by the zemindars. These stipulations were very wide and general, and did not exactly define the liability imposed thereby upon the zemindars who executed such kabuliats. There can be no doubt that the Government was, in 1793, to some extent alive to the importance of the construction and maintenance of these works. We find in the preamble to Reg. II of 1793 the following passage:—"The extensive failure or destruction of the crops that occasionally arises from drought or inundation, is in consequence invariably followed by famine, the ravages of which are felt chiefly by the cultivators of the soil and the manufacturers, from whose labors the country derives both its subsistence and wealth. Experience having evinced that adequate supplies of grain are not obtainable from abroad in seasons of scarcity, the country must necessarily continue subject to these calamities, until the proprietors and cultivators of the lands shall have the means of increasing the number of the reservoirs, embankments, and other artificial works, by which, to a great degree, the untimely cessation of the periodical rains may be provided against and the lands protected from inundation." In the Code of Regulations, all of which were passed upon the same day, *viz.*, the 1st May 1793, we find one Regulation specially concerned with the subject of embankments, namely, Reg. XXXIII of 1793. The preamble of that Regulation is as follows:—

"It being necessary that provision should be made for the annual repair of certain embankments in different parts of the country which have been considered as public works, and have been kept in repair at the expense of Government, in conse-

quence of their great extent, and the damage to which the districts and places, for the protection of which they have been constructed, would be liable from inundation, in the event of their not receiving the necessary annual repairs; and there being the strongest grounds for believing that if the embankments, reservoirs, and watercourses in the estates of individuals, which are not considered as public works, were enlarged or put into a proper state of repair, and new works of the same nature made where necessary and practicable, a sufficient portion of the crops might be preserved in seasons of drought or inundation for the subsistence of the body of the people, and consequently the recurrence of the miseries which this country has so often suffered from famine be prevented, &c." Now this preamble contemplates embankments of two classes:—

1. Embankments which, as public works, were erected and are maintained by Government at its own expense.

2. Embankments in the estates of individuals which were not considered as public works, but which the Government contemplated being enlarged or put into a proper state of repair, and also contemplated the construction of new works of the same nature at the expense of individual zemindars.

Sections 2 to 7 of this Regulation provide for the maintenance and repair of the first class, which may be termed public embankments. The remaining sections (8 to 15) provide for the making of advances by Government to zemindars for the purpose of enabling them to construct new embankments and repair or enlarge the old ones. These advances were to be repaid with 12 per cent. interest; and the Collectors were to supervise the expenditure of the money so advanced. A penalty of 25 per cent. was imposed in case the works were not carried out. This Regulation contains no provisions for compelling zemindars to carry out the general stipulations as to poolbundi which were inserted in their kabuliats (in the kabuliat which has been before us in this case, this stipulation as to poolbundi is generally expressed, no particular embankments being specified as the embankments to be kept in repair). As a natural result, constant disputes arose between the zemindars and the officers of Government as to what embankments were to be repaired by Government and

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what by private individuals. The zemindars were found unwilling to take advances upon the terms provided by the Regulation; and the old embankments were not maintained in proper repair, much less were new works undertaken, as the Government had hoped they would be. Fresh legislation became in consequence necessary within a very few years after the Permanent Settlement; and accordingly we find a new Regulation enacted in 1806, *viz.*, Regulation VI of that year. The preamble to this Regulation contains the following significant recital:—

"Whereas it is essential that further provisions should be made for the more effectual repair of the embankments which the zemindars and talookdars are bound, under the conditions of the Permanent Settlement of the land-revenue, to maintain at their own expense, &c." Sections 2 to 10 of this Regulation provide for the repairs and maintenance of public embankments, and the duty of carrying out these works was to be discharged by Embankment Committees. Then comes s. 11. This section invested the committees with a general control over the embankments which were repaired at the expense of the zemindars and farmers, as well as those which were maintained by the Government, and the section proceeds: "By this rule it is not intended to interfere with the zemindars and farmers in the repair of the embankments situated in the lands held by them, so long as that duty shall be effectually and properly performed. The committees shall, however, be at liberty, whenever they may deem it necessary, to call upon any zemindar or farmer, either by a perwana from themselves or through the Collector, as may be deemed preferable, to make such repairs to the embankments situated in the lands of such zemindar or farmer as may be required. Should any zemindar or farmer, after the receipt of such perwana, neglect to make the necessary repairs, the committee shall submit to Government an estimate of the expense required for that purpose, and the repairs shall, in all such cases, be made by the officer of Government, and the expense recovered from the zemindar or farmer who was bound to keep the embankments in a proper state of repair." The remaining sections of this Regulation provide for

cuts and sluices in embankments, and for the prosecution and punishment of persons damaging or injuring embankments. No provision was, however, made for determining whether any particular embankment was one which the zemindar was bound, under the conditions of the Permanent Settlement, to maintain at his own expense. And further, we find no provisions as to the manner in which sums expended upon the repair of embankments was to be recovered from the zemindars, if they did not discharge them voluntarily. But in those days the rule laid down had only just commenced, and no zemindar would have thought of resisting the perwana of the Embankment Committee, or of the Collector, such a perwana, issued under the express authority of a Regulation, being regarded as an order of the Sirkar or Government. The power of the executive being thus brought to bear directly upon the zemindars in this matter, there appears to have been no further difficulty felt for a number of years, and we find no further legislation till 1829.

Reg. XI of that year merely abolished Embankment Committees, and transferred their duties to such officers as might be appointed by the Governor-General in Council. We have nothing then till we come to Act XXXII of 1855, which repeals the previous Regulations, and substitutes amended provisions therefor. The provisions of this Act are briefly as follows:— A public embankment was defined to be an embankment now or hereafter kept up by the officers of Government at the expense either of Government or of any private individual. In many instances zemindars, in order to escape the responsibility and trouble of maintaining and repairing embankments by their own agents, had compounded with Government to have the work done by the officers of Government who had charge of the public embankments. It is matter of history that the Raja of Burdwan gave up the annual sum of Rs. 60,000, which, at the time of the Permanent Settlement, was deducted from his jama in consideration of his undertaking the duty of poolbundi. But to return to the Act of 1855, a Superintendent of Embankments was appointed under the provisions of this Act, and he was vested with large powers of effecting improvements—(i) by taking over private embankments, (ii) by removing those which

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proved obstructive to drainage, &c., (iii) by changing the line of any public embankment or making a new one, and (iv) by enlarging, &c., any embankment. The Revenue authorities were now for the first time vested with exclusive jurisdiction in all matters provided for by the Act, and the jurisdiction of the Civil Courts was expressly excluded. There was also a provision in s. 6 that the cost of keeping up private embankments taken under Government was to be charged upon persons bound to keep up such embankments. But in this Act, as in previous enactments, no provision is made for deciding in any particular case whether any individual embankment is to be repaired at the expense of Government, or at that of the zemindar in whose estate it is situated. The rest of the Act provides for compensation to persons injured by the works, sluices, and cuts; for specifications and estimates of the expense of keeping up the embankments maintained at the cost of the zemindars and others; and for the recovery of these expenses as arrears of revenue. The law remained in the state in which this Act of 1855 left it until 1873, when Act VI of that year was enacted by the Bengal Council. *This Act repealed* Act XXXII of 1855. It defined a public embankment to be an embankment maintained by the officers of Government. The main features of this Act were these :—(i) The powers of the Superintendent were transferred to the Collector, and enlarged for the construction of new works and for improvements. In fact, by the Act of 1855, and more especially by this Act of the Bengal Council, the Collector was invested with authority similar to that exercised by the Commissioners of Sewers in England under the 6 Henry VI, c. 5; 3 & 4 Will. IV, c. 22; 4 & 5 Vict., c. 45; 12 & 13 Vict., c. 50; 23 & 24 Vict., c. 51, and other Statutes. (ii) The costs of all works executed under the Act were to be borne rateably by the zemindars of the estates in which were situated the lands benefited or protected by the repairs or works executed. Similarly, in England, all persons whose property derives any advantage from the works of the commissioners may be assessed in respect of that property: *Soady* v. *Wilson* (1). The zemin

(1) 3 A. & E., 248.

dars were empowered to levy a certain proportion of these expenses from the tenure-holders who were subordinate to them. Now it may be contended that the adoption of this principle of rateability in this Act amounted to a virtual renunciation on the part of Government of the principle which, as I have pointed out, had existed in former enactments,—the principle, that is, of making individual zemindars personally liable for the cost of maintaining those embankments which were situated in their estates. Now, from what has already been said, it will be seen that the change thus made in the law had the effect of introducing into this country a principle which has long existed in England, and has been recognized and regulated by the Statutes of Sewers, under which the burden of keeping up sea-walls, embankments, and similar works is thrown rateably upon the persons whose property is benefited by the construction and maintenance of these works. (iii) The Engineer was invested with certain powers for the repair of public embankments: these powers to be exercised subject to the control of the Collector. (iv) A specification, to be found in Sched. D of the Act, set out and enumerated, for the first time, the embankments which are maintainable at the expense of Government: and the Lieutenant-Governor is vested with power to enter any new embankment in this schedule or to remove any existing embankment therefrom. (v) Schedule E contains a further specification of certain sums contributed annually in accordance with custom for certain parganas in the Moorshedabad District towards the maintenance of the embankments thereof, and it is to be observed that Rukunpore—the pargana with which this suit is concerned—is one of the parganas specified in that schedule. The jurisdiction of the Civil Courts is excluded in respect of all things done under the authority of the Act.

I now turn to the four questions which, as I have already mentioned, have to be disposed of in order to the decision of this case; and the first of these questions with which I have to deal is, whether there is any common law liability cast upon the defendants to repair the particular embankment with which this case is concerned. Now, in the whole of the legislation which I have just examined, there is nothing to be found which

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presupposes or assumes any such liability; and this point is of the more importance when we remember that the preambles of the old Regulations contain, in very many instances, a recital of what the framers of those Regulations considered to be the antecedent common law of the country. The only liability spoken of is a liability based upon the conditions of the Permanent Settlement, and this is very different from common law liability. If there had been any such common law liability, it would have been unnecessary to insert special stipulations in the Permanent Settlement kabuliats. It would be reasonable to suppose that the proprietor of an estate bordering upon a river should not be allowed to alter the natural condition of the land so as to cause injury to his neighbours by letting the water in upon their lands: but there is nothing reasonable in the supposition that such a proprietor should be compellable to construct and maintain artificial works in order to confer a benefit upon his neighbours by protecting their lands from inundations that would happen in the normal state of things. He might himself receive little or no advantage from expensive works, the benefit of which would be enjoyed by strangers, who had contributed nothing towards their construction or maintenance. According to my view, and so far as I have been able to discover, there is, under the common law of this country, no liability cast upon a riparian proprietor to construct artificial works or keep them in repair. There is no such common law liability in other countries so far as I have been able to discover. In England, it has been decided in the case of *Hudson* v. *Tabor* (1), that, apart from prescription, there is no liability cast on a frontager to maintain walls for the protection of the land. At page 294 of the report in this case, the ancient usage of the realm is discussed; and Lord Coleridge, C. J., says:—The whole of "this procedure is entirely inconsistent with the notion that, at common law, the frontager could be compelled, by action, to repair any part of such defences which had been injured by the outrageousness of the sea." And an examination of the rest of the judgment will show that, according to the view taken by the Court of Appeal in that case, there is cast

(1) L. R., 2 Q. B. Div., 290.

upon a frontager, by the common law, no liability to put fresh materials on the top of a sea-wall, from time to time, in order to keep it up to the proper height. See also the report of this case in the Court below (1). In the case of *Rex* v. *The Pagham Commissioners* (2), it was decided that no obligation lay upon persons occupying lands adjoining the sea to erect works for the protection of their neighbours, and that there was no liability to indemnify them against loss. In the case of *Morland* v. *Cook* (3), there was an acre-scot levied rateably for the repair of these works. It was there based upon a covenant, and this covenant was held to be binding on purchasers without notice thereof. An examination of the cases upon this subject will show that the liability to construct or repair sea-walls was, in some instances, imposed on individuals by covenant amongst themselves; and, in other instances, is regarded as a liability of contributing rateably, imposed by the common law upon all persons benefited by the construction and maintenance of such works. In the case of *Rex* v. *The Commissioners of Sewers for Essex* (4), it was held, that all persons enjoying the benefit of a sea-wall are bound and liable at common law to repair and maintain it in the absence of any special custom or contract for that purpose. This liability is opposed to the supposition of any exclusive liability on the part of an individual to construct or maintain a sea-wall or embankment upon his own land for the benefit of his neighbours' land.

Then, secondly, are the defendants liable by prescription? On this point it may be sufficient to say that no case of prescription has been established by the evidence, and very strong and clear evidence would be necessary in order to establish such a prescription. In the case of *Mason* v. *The Shrewsbury and Hereford Railway Company* (5), a natural watercourse, called Ashton Brook, flowing through the plaintiff's land, had been diverted for upwards of forty years by a canal company under the powers of their Act, and the bed had become silted up, and was no longer adequate to carry off the flood water in its natural

(1) L. R., 1 Q. B. Div., 226.
(2) 8 B. and C., 355.
(3) L. R., 6 Eq., 252.
(4) 1 B. and C., 477.
(5) L. R., 6 Q. B., 578.

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state. The canal was discontinued, and the waters restored to their former course, and the plaintiff's land was thereby flooded and damaged. The Court held that the plaintiff had no legal ground of complaint. Blackburn, J., said:—"Before the canal was made, the person whose estate the plaintiff now has had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state, so far as it was a benefit, as, for instance, to turn his mill or water his cattle; and he was bound to submit to receive the water, so far as it was a nuisance." Now, this is a strong case, seeing that the canal works had been in existence for more than forty years; and notwithstanding this, it was held that the plaintiff had no legal right to the continuance of the benefit conferred upon him by their construction. See also *Hudson* v. *Tabor* (1), where it was remarked, that the mere fact that each frontager had always maintained the wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from his neighbour's land, was not sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the wall for the protection of the adjoining landholders.

I come now to the third question—Are the defendants bound by the conditions imposed upon them by the original grant made at the time of the Permanent Settlement? The stipulation in their kabuliat is as follows:—"I shall make embankment works of the said mouzas at the proper time. Should there be any loss from any negligence, that loss shall be mine." Now I think there can be no doubt that the effect of s. 67 of Reg. VIII of 1793 was to make this stipulation in the kabuliat binding upon them for all future time. It is possible that this stipulation was made in the interests of the ryots and was in furtherance of the policy which the Government of the time enunciated in many of the Regulations—the policy, that is, of protecting and providing for the interests of the ryots. Two points have to be considered in connection with the question with which I am now dealing: *first*, if there was such a liability imposed by the original grant, can the plaintiff maintain this

(1) L.R., 2 Q. B. Div., 290.

suit, seeing that he was no party to that contract, if the term 'contract' may be applied to the agreement entered into between the Government and the zemindar; and *secondly*, is the embankment with which this case is concerned within the provisions of that stipulation? Now, that the plaintiff can maintain this suit, I think the case of *The Mayor of Lyme Regis* v. *Henley* (1) is an authority. In that case, Park, J., said:—"It is, however, further urged, that whatever engagement the Corporation may be under as between them and the Crown, so as to render them liable either to forfeiture of their charter, or any other proceeding by the Crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in the *Mayor, &c., of Lynn* v. *Turner* (2), *Churchman* v. *Tunstal* (3), *Payne* v. *Partridge* (4), and many other authorities which it is unnecessary to cite; because it is clear and undoubted law, that wherever an indictment lies for nonrepair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now, we are unable to see any sound distinction between a liability by prescription and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it necessarily implies some legal origin, and a charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shown, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted, than it is now after a great lapse of time? Certainly not. If then the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between *A* and *B*, nor even of a charter granted by the king, where no matter of general and public concern is involved; but where that is the case, and the king, for the benefit of the public, has made a certain

(1) 1 Bing. N. C., 222.
(2) Cowp., 86.
(3) Hardr., 162.
(4) Show., 255

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grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action." Whether the grant to the defendants in this case was a matter of sufficient general and public concern, is a question which I think it will be unnecessary to decide upon this part of the case, because, upon the second point which I am about to notice, I am satisfied that no liability under the conditions of the kabuliat can be enforced as to this particular embankment. Were it otherwise, I would have no hesitation in deciding that both the grant and the stipulation in the grant were of general and public concern.

The second point to be considered in connection with this third question is, whether this particular embankment is within the covenant contained in the defendants' kabuliat. The Munsif has found that it is, but it appears to me that this finding is based on insufficient evidence; and I concur in the decision of the District Judge upon this point. It was argued before us that the condition in the kabuliat ought to apply, not only to the embankments which were in existence at the time of the Permanent Settlement and which might have been supposed to be within the intention of the Government and the zemindar who executed the kabuliat, but also to all embankments which might at any future time be considered necessary for the protection of the land; but this is an argument in which I am unable to concur. The progress of the country and of engineering skill, and the increase of population necessitating the bringing of fresh land into cultivation, have, within recent years, rendered possible and created a demand for works of reclamation and drainage which cannot reasonably be supposed to have been within the contemplation and intention of the Government and the zemindars of 1793. I think, then, that the only reasonable construction to be put upon the kabuliat is, that the zemindar is bound to repair such embankments as in 1793 and previously had usually been repaired by the zemindar. As the District Judge has found that the particular embankment in this case does not fall within that category, I think that the defendants cannot be made liable to repair this

embankment upon the basis of any stipulation contained in the original kabuliat.

Then, as to the fourth and last point, are the defendants bound to repair by reason that this is one of the embankments for the repair of which they receive a contribution from the Government? I think that there is not sufficient evidence upon the record to enable us to determine this point, and that there ought to be an enquiry as to the circumstances under which, and the objects for which, this allowance has been made by Government; and I concur in the remand order proposed by my learned colleague.

Case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

HURSEE MAHAPATRO (PETITIONER) *v.* DINOBUNDO PATRO (OPPOSITE PARTY).*

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Tributary Mehals—Mohurbhunj—Jurisdiction—British India.

A British subject residing in Midnapore, in Bengal, was charged before the Maharaja of Mohurbhunj with having committed the offence of defamation in Mohurbhunj in the Tributary Mehals. On an application made by the accused to the Magistrate of Midnapore, objecting to be tried by the Raja of Mohurbhunj, the Commissioner of Cuttack, who was also Superintendent of the Tributary Mehals, directed that the case should be transferred to Midnapore and tried by the Magistrate of that district, who had the power of an Assistant Superintendent of the Tributary Mehals. The accused, while being tried, moved the High Court to set aside the proceedings at Midnapore, on the ground that the offence not having been committed within the district, the Magistrate was acting without jurisdiction.

Held, that the proceedings were without jurisdiction.

Per CUNNINGHAM, J.—The Tributary Mehals are now, as they were in 1874, a portion of British India, which the Government of India has been pleased to exempt from the ordinary law and jurisdiction of the Courts, and to govern by means of special officials and enactments. Whatever may be the powers of Government as to Mohurbhunj, those powers do not extend to

* Criminal Motion, No. 27 of 1881, against the order of J. C. Price, Esq., Magistrate of Midnapore, dated the 13th December 1880.