APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Field.

MANO MOHUN GHOSE AND OTHERS (PLAINTIFFS) *v.* MOTHURA MOHUN ROY AND OTHERS (DEFENDANTS).* 1881 *Feby.* 10.

Limitation—Possession—Onus of Proof—Alluvion—Dispossession—Acts of Ownership.

In a suit for declaration of title to, and recovery of possession of, alluvial lands, which had been diluviated more than twelve years before the institution of the suit, the plaintiffs proved their title and possession up to the time of diluviation, and alleged that the lands had re-formed within twelve years, without alleging or proving possession during that period. The defendants, on the other hand, alleged, that the re-formation had taken place more than twelve years before suit, and that they had acquired a title to the lands by adverse possession for that period.

Held, that in such a case the submergence of the lands after diluvion ought to be presumed until the contrary was shown, and that the onus of proving re-formation before twelve years and adverse possession, was shifted to the defendants.

Per WILSON, J.—As a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years.

Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case.

There are many cases in which the party on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favor.

In the case of lands gradually diluviated and gradually re-formed, if the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the re-formation, must at least show that he was in possession down to the date of the diluviation.

Where the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged: probably also afterwards, until he is dispossessed.

Appeal from Original Decree, No. 135 of 1879, against the decree of Baboo Gunga Churn Sircar, Subordinate Judge of Dacca, dated the 28th December 1878.

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Per FIELD, J.—Although, according to the general rule, it lies upon the plaintiff, who is met with the plea of limitation, to show his own possession within twelve years before the institution of the suit, when the property in dispute is capable of actual and visible possession, yet, in the case of property which is not susceptible of actual and visible possession, an exception from the nature of the thing must be made to the general rule. In such cases, when the title and possession have been proved to be in a certain person up to a certain point of time,—when there has been no transfer of the title to any third person,—and there is no evidence that possession was exercised by a person other than the person having the title, so long as actual visible possession was possible, the possession of the person having the title will be presumed to continue until the property has again become susceptible of actual visible possession. Proof of possession is presumptive proof of ownership, because men generally own the property which they possess. And if the ownership of property is proved, and there is nothing to show that the possession of such property is with any other person other than the owner, it may fairly be presumed to be with the owner. Such a presumption then takes the place of evidence to show the plaintiff's possession within twelve years before suit, of a property in which, from the nature of the thing, evidence of actual possession is impossible.

THIS was a suit for declaration of title to, and recovery of possession of, 3,250 bighas of land formed by alluvion on the original site of, and by accretion to, among others, a certain chur known as Chur Rajapore. During the lifetime of the plaintiffs' father, the lands commenced to be diluviated; and, in the rainy season of the year 1866, were wholly submerged. Subsequently, when the rainy season of the year 1871 was over, the disputed land again began to form by alluvion on the original site of the mouzas, and almost all the land had reappeared. The plaintiffs continued to pay the fixed sadr jama, although the land was submerged. On attempting to take possession of the newly-formed lands, the plaintiffs were resisted by the defendants, and proceedings were commenced under s. 530 of the Criminal Procedure Code; and on the 30th June 1875, the Magistrate attached the lands under s. 531. The defendants contended that the boundaries were not correctly stated; that the plaintiffs had sued not only for the attached land, but also for lands which were not included in the attachment; that the suit was bad by reason of misjoinder; and that it was barred by limitation. The Civil Court Amin made

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a local investigation, and prepared a map, on which the land claimed by the plaintiffs was marked A and B. The Subordinate Judge gave the plaintiffs a decree for the land marked A, but dismissed the suit as to the land marked B on the ground of limitation, holding that, although the plot was a part of the re-formed land of which the plaintiffs' father held possession until it was diluviated, it was incumbent on the plaintiffs to prove that the land was thrown up by the river within twelve years preceding the date of the suit, or that they held possession at any time within that period.

From this decision the plaintiffs appealed.

Mr. *Evans* and Baboo *Sreenath Doss*, Baboo *Doorga Mohun Doss*, and Baboo *Boido Nath Dutt* for the appellants.

Mr. *Branson* and Baboo *Kali Mohun Doss*, Baboo *Hem Chunder Banerjee*, Baboo *Mohiny Mohun Roy*, Baboo *Boykant Nath Dass*, Baboo *Bussunto Coomar Bose*, and Baboo *Kashi Kant Sen* for the respondents.

The following judgments were delivered:—

WILSON, J.—This is an appeal from a decree of the Subordinate Judge of Dacca. The suit was brought by the appellants to recover certain chur lands, as being a re-formation on the site of their Chur Rajapore. There is no question that the plaintiffs' father (whose heirs they are) was the owner and in possession of Chur Rajapore until it was diluviated; that the various defendants, or their predecessors in title, were interested in various churs adjacent to Chur Rajapore; that Rajapore and other adjacent churs were, at dates which are disputed diluviated; that re-formations have subsequently taken place; that, from time to time, as re-formation took place, attempts have been made by the parties interested to show that portions of the re-formations were on the site of their own churs; and that, in 1875, disputes having arisen about some re-formed land, the Deputy Magistrate attached certain lands, the extent of which is disputed, leaving the parties interested to sue in a Civil Court. The plaintiffs, therefore, brought this suit, joining as parties all the parties to the attachment-proceedings.

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The land claimed in the suit consisted of two plots, marked in the Amin's map A and B. As to plot A, the plaintiffs have obtained a decree, and that decree is not appealed against. As to plot *B*, two principal groups of defendants resisted the plaintiffs' claim. The defendants Nos. 4, 17, and 18, as interested in a chur known as Adma Munirabad, claimed so much of plot B as lies to the south of a *done*, indicated in the Amin's map as No. 1.

The defendants Nos. 1 and 2 claimed so much of plot B as lies to the north of that *done* as belonging to the chur Baboo Chur. The main defences were the same in both cases:

1*st*. It was denied that the lands in question were re-formation on the site of Rajapore.

2*nd*. It was alleged that, in the year 1869, the present plaintiffs had, in a summary proceeding under s. 318 of the former Criminal Procedure Code, claimed these same lands, and their claim had been disallowed. And it was said that as they had not brought a suit within three years, their right was barred.

3*rd*. Each of these groups of defendants set up a title by adverse possession for more than twelve years under the ordinary law of limitation.

The lower Court held in favor of the plaintiffs upon each of the first two questions; but, upon the third question, held in each case in favor of the defendants; and accordingly dismissed the suit so far as it related to plot B.

The appellants dispute the finding of the lower Court upon the third question. The respondents support that finding. They also seek to support the decree of the Court below, on the ground that its findings upon the first and second questions were wrong.

The main questions for our decision are, whether the findings of the lower Court upon these questions are correct. Some other minor points have been raised which I shall notice subsequently.

Upon the first question, whether the lands in dispute are a re-formation on the site of Rajapore, I agree with the Court below. The survey map of 1859-60 shows at once that the plaintiffs' view of the position of Rajapore is approximately

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correct. And the report and map of the Amin place the matter beyond doubt, if they can be trusted. But it is said that they are not to be trusted. I agree that the reports and maps of Amins in such cases should be examined with caution. In the present case, the work of the Amin bears marks of care and intelligence. He had with him the thak maps of the several thaks in question. He began his work, quite rightly, on the undiluviated lands of Shibsen on the east and north-east of Rajapore, where there were permanent marks easily ascertainable. Having thus obtained trustworthy starting points, he says: —"I have accordingly duly ascertained the distance between the land and the chur from the aforesaid stations, and having successively ascertained the original site of the mouzas mentioned by the parties according to the measurement and bearing of the thak from that place, I have correctly put down the same in the proper place in the map made by me, and demarcated the different mouzas with different colours." His map is before us, and he has annexed his field-book. It is said that his field-book is defective in not giving with sufficient clearness all the details of his measurement. It may be that some points in that field-book might be the better for further explanation. If so, that would have been a good reason for applying in the Court below to have the Amin called and examined. It is no reason why we should upset the finding of the Court below, in the absence of any circumstances throwing doubt upon the correctness of the Amin's method or the accuracy of his results.

The next question is, whether the suit is barred by reason of its not having been brought within three years of the order of the Magistrate in 1869. As to this I agree with the Court below, that the identity of the land then in dispute with that now in dispute has not been established. All that appears is that, among the attempts made by various persons to identify parts of the land gradually re-forming, one was made by persons acting for the present plaintiffs to identify some land as Rajapore. The attempt failed, and the claim was dismissed. There is no reason to think that the land then claimed was, or could be, the same as that now in dispute.

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The next question is, with regard to each portion of plot B, whether this suit is barred by reason of twelve years' adverse possession. As to this the plaintiffs' case is, that the diluviation of their lands began about 1860, and was completed about 1865; that the re-formation began in 1871, and was completed about 1875. The defendants throw back both events to much earlier dates, and say that they have been in actual occupation of the lands in dispute for far over twelve years.

We have first to enquire upon which side the burden of proof lies. The Subordinate Judge cast the burden upon the plaintiffs, and held that it lay upon them to show, either that the lands were re-formed within twelve years, or that they had been in actual possession within that period. In this I think that the Subordinate Judge was in error.

As it has been contended that the authorities upon this subject are in conflict, it is necessary to consider the matter both from the point of view of principle and from that of authority.

Certain propositions of law upon the subject are undoubted.

It is not disputed that, as a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years—*Maharajah Koowur* v. *Baboo Nund Loll Singh* (1).

Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case. In the case of a house actually occupied, or land under cultivation, or yielding a rent, proof of possession is easy. In many cases, as of lands incapable of cultivation, jungle or waste lands, uninclosed plots of various kinds, all the proof that can commonly be given is to show possession taken, or acts of ownership done, at some time, which possession will, in law, continue until the possessor by his conduct shows that he means to relinquish his possession, or he is excluded by some one else. These considerations, however, affect the mode of proof, not the burden of proof. The general rule still is, that the plaintiff must prove that he has been dispossessed within twelve years; see *Pandurang Govind* v. *Balkrishna Hari* (2).

(1) 8 Moore's I. A., 199, 220. (2) 6 Bomb. H. C., 125.

But there are many cases in which the party on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favor. We have to consider whether the present plaintiffs have succeeded in doing so, and for that purpose it is necessary to examine the decisions as to the burden of proof in the case of lands gradually diluviated and gradually re-formed.

As to such cases, a second proposition is, I think, beyond question, that when the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the re-formation, must at least show that he was in possession down to the date of the diluviation.

A third proposition is also, I think, beyond dispute, that where the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged: probably also afterwards until he is dispossessed.

This proposition, however, would not be sufficient to shift the burden of proof. It would leave it upon the plaintiff; but would enable him to prove his case either by showing the dispossession to have been in fact within twelve years, or that the submergence has continued down to within twelve years, so that his possession cannot have been interfered with more than twelve years ago.

But then arises the question, whether we ought not to presume something further in favor of the plaintiffs, whether, when they have proved their possession down to the period of diluviation, and have shown the diluviation to have occurred at such a date and under such circumstances as in this case, we ought not to presume the submergence and with it the plaintiffs' possession to have continued until the contrary is shown. If this presumption can properly be made, then the burden is shifted to the defendants of showing adverse possession for twelve years.

Upon principle, I think, such a presumption may properly be made. The well-known presumption in favor of the continuance of a physical condition, in the ordinary course of things likely to continue, until the contrary is shown, is embodied in s. 114 of the Evidence Act, which section is followed by illustrations

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and explanations. In the present case it appears, that the total area diluviated was very large, and the process of diluviation and re-formation gradual; that, at the date of the thak map of 1859, the river had not touched Rajapore; and from the survey map of 1859-60, that at that date it had affected a portion of that estate. The evidence shows beyond doubt that the process of diluviation went on afterwards. Under these circumstances, it seems to me, on principle, reasonable to presume that the lands in question continued submerged in March 1865 (which is the material date) until the contrary is shown.

The weight of authority seems to me in favor of the same view.

In the case of *Mohunt Chattoorbhooj Bharti* v. *The Government of India* (1), the plaintiffs proved that they were in possession of the lands in question in 1846, and that the lands were soon after that time diluviated. The suit was brought in 1869, and the Court (Garth, C. J., and Tottenham, J.) held, that the burden lay upon the defendants of proving that the suit was barred by limitation. In another case (Reg. App. No. 280 of 1877) it appeared, that the plaintiffs were in possession of the land in dispute up to the diluviation, which took place some time after 1858. The suit was brought in 1876. Pontifex and McDonell, JJ., held, that the burden lay on the defendant to show that the claim was barred.

In *Radha Gobind Roy* v. *Inglis* (2) the suit was in respect of soil which had been part of the bed of a lake, but which, by the gradual drying of the lake, had become cultivable land. The defendants relied, amongst other defences, upon limitation. The Privy Council having held first, that the property in the soil, and not a mere right of fishing, was in the plaintiffs, went on to hold further that it lay upon the defendants to show an adverse title by limitation. It does not appear to me that the Privy Council intended in this case to reverse its earlier ruling in the case to which I have already referred. But that Court does appear to me to have laid down a rule applicable to cases analogous to the case before it, which we are bound to follow in the present case, if it is properly within the analogy. And

(1) Reg. App., No. 185 of 1877, unreported. (2) 7 C. L. R., 364.

I am unable to see any reasonable distinction between the case of land formed by the gradual drying up of a lake and that of land diluviated and then re-formed by the gradual action of a river.

The same rule was followed in a very recent case—*Kally Churn Sahoo* v. *The Secretary of State* (1)—before Garth, C. J., and White and Maclean, JJ.

Two cases have been referred to as authorities to a contrary effect. In *Koomar Runjit Singh* v. *Schoene, Kilburn* (2), the plaintiffs claimed 700 bighas of land, a re-formation on their site. They alleged diluviation between 1263 and 1270; re-formation between 1270 and 1273; that they had been in actual possession in 1273, and been dispossessed in 1274. The suit was brought in 1876, corresponding to 1283. The Court (Jackson and MacDonell, JJ.) held, that the burden of proof was governed by the ordinary rule as laid down in the case referred to in 8 Moore's P. C. And looking at the case as put forward by the plaintiffs themselves, a case of actual possession and dispossession of cultivable lands after their re-formation, this ruling does not seem to me inconsistent with the others to which I have referred. In this case further it was found, that the plaintiffs had not been in possession since re-formation, and that the bulk of the land had been re-formed for more than twelve years. But a point was raised as to some 200 bighas (the exact amount and its situation not being ascertained) which the Court below was inclined to think might probably have been re-formed within twelve years. The learned Judges in this Court held, that it lay upon the plaintiffs to show which, if any, of the lands in dispute had so re-formed within twelve years. I am not satisfied that there is necessarily any inconsistency with the authorities, I have considered, in holding, that where the plaintiffs made their claims upon one ground, and having failed in establishing that case, sought to recover a portion of their claim on a wholly different ground, it lay upon them to show how much they could apply the latter ground to.

In *Mahomed Ibrahim* v. *Morrison* (3), before Birch and Mitter, JJ., the plaintiffs claimed land formed by the recession

(1) I. L. R., 6 Calc., 725. (2) 4 C. L. R., 396. (3) I. L. R., 5 Calc., 36.

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of a river, and at the time of suit under cultivation, as appertaining to their patni. The Court held, the burden of proving that the land formed within twelve years, to lie on the plaintiffs. There is nothing in the report to show whether the plaintiffs claimed the land as a re-formation or as an accretion. If it was accretion, then the case has no bearing upon the present, for the presumption under consideration presupposes prior possession. Whether these two cases are, or are not, in harmony with the other authorities which have been examined, I think we are bound to follow those authorities and to hold that, in this case, the burden of proving the plaintiffs' suit to be barred by limitation lay on the defendants. [His Lordship then proceeded to consider the evidence, and reversed the decree of the Subordinate Judge so far as it related to the plot marked B on the Amin's map.]

FIELD, J.—The plaintiffs in this case sued for declaration of title to, and for possession of, certain lands, which they alleged in their plaint to be re-formation on the site of, and accretion to, their estate Roy Bahadoor Chur. This chur includes Chur Rajapore, Chur Ramchunderpore, and Chur Hogla. The quantity of land claimed by the plaintiffs in their plaint as first drawn, was 1,700 bighas, more or less; but after that the Amin had made a local investigation and prepared a map, they amended their claim (paying additional court-fee), and the quantity now sought to be recovered by them is 3,250 bighas.

During the proceedings in the Court of first instance, the right to recover any portion of the land as an accretion to Roy Bahadoor Chur was abandoned, and the only title upon which the plaintiffs now ask to succeed, is that of re-formation on the original site of their estate.

The Subordinate Judge, adopting the Amin's map and the accuracy of his measurement, has found that the whole of the land included within the red boundary on that map, and comprised in plots A and B, is land re-formed on the original site of Roy Bahadoor Chur. He has given the plaintiffs a decree for plot A; but as to plot B he has held, that the plaintiffs are barred by limitation; and in respect of this plot he has

dismissed their case. He says in his judgment at page 184 of the printed paper book,—"I am, however, of opinion that the plaintiffs' claim to plot B is barred by the general limitation of twelve years. It is true that, according to the finding arrived at by the Amin after careful investigation, the said plot is a part of the re-formed land of Mouza Rajapore, of which their father had possession until it was completely washed away by the river Pudma; still, when the defendants plead that the re-formation took place more than twelve years ago, and that they (the defendants) have since been in possession thereof, it is incumbent on the plaintiffs to prove, for the purpose of removing the plea of general limitation, that the said plot was thrown up by the river within twelve years preceding the date of the suit, or that they held its possession at any time within that period. But the plaintiffs have not been able to show, or even to allege, that, after the disputed chur had formed, it was ever held in their possession; and their endeavour to prove that the re-formation took place within twelve years preceding the date of the suit, has failed in respect of the plot B."

Now the first question which has been raised before us, and which it is necessary for us to decide, is, whether the Subordinate Judge is right in thus unreservedly placing the burden of proof upon the plaintiffs. In the case of *Radha Proshad Singh* v. *Ram Coomar Singh* (1), decided by the Privy Council on the 29th November 1877, it was held, that the principle of *Lopez's case* is not applicable to land in which, by long possession or otherwise, another party has acquired an indefeasible title. The plaintiffs' case is, that the land was wholly submerged in 1865 and 1866; that re-formation began in 1871; and that the whole of the land which forms the subject of this suit was completely re-formed in 1874-1875. If this contention be correct, it is evident that, at the point of time, twelve years before the institution of this suit, the land in question was wholly submerged, and was not therefore capable of actual visible possession. The chief defendants contend that the land was re-formed as far back as 1861, and that they have been in possession, if not during the whole of the period which has elapsed

(1) 1 C. L. R., 259.

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since 1861, at least for more than twelve years before the institution of this suit. If the defendants succeed in proving the case so set up by them, it is clear that, even if plot B is a re-formation on the site of the plaintiffs' estate, the present case falls within the principle of the case of *Radha Proshad Singh* v. *Ram Coomar Singh* (1), decided by the Privy Council. If, on the other hand, the plaintiffs are correct in saying that the land did not begin to be re-formed till 1871, it is clear that the defendants cannot, by adverse possession of twelve years, have acquired a good title; and that the plaintiffs are entitled to succeed in respect of plot B, as well as in respect of plot A. The question then arises, upon which side, in the first instance, should be laid the burden of proof? If the usual rule,—namely, that the burden of proof lies on the party who substantially asserts the affirmative of the issue,—be applied, it may seem that the burden of proof should be laid upon the defendants, who allege that the land was in existence twelve years before the institution of the suit, rather than upon the plaintiffs, who contend that it was not in existence at that time. It will, however, be more satisfactory to examine the question from a wider position. The general rule is, that when a plaintiff sues to recover possession of property, and is met with the plea of limitation, the burden of proof is on him to show that he has been in possession at some time within the period allowed by law after the cause of action has arisen, for bringing a suit upon such cause of action. This is the rule laid down by their Lordships of the Privy Council in the case of *Maharajah Koowur* v. *Baboo Nund Lòll Singh* (2); they say:—"The appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on a dispossession within twelve years next before the commencement of the suit, and, therefore, that he or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would

(1) 1 C. L. R., 269. (2) 8 Moore's I. A., 199.

be involved in the decision of the boundary question in his favor, can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession." In the case of *Gossain Doss Koondoo* v. *Seroo Koomaree Debia* (1), Couch, C.J., said:—"The plaintiff must show that he, or some one through whom he claims, has had possession within twelve years before the suit. If he sues for the recovery of immoveable property on the ground of having been dispossessed from it, he must show that he has come within twelve years from the time when his cause of action arose, the time when he was dispossessed. It is not enough for him to prove his title to the property, which is the subject of the suit, and leave it to the defendant to show that the suit is barred by the law of limitation by proving when the plaintiff was last in possession." The general rule enunciated in these cases has not, so far as I am aware, been doubted or shaken by the authority of more recent decisions. But an exception appears to have been grafted upon this general rule by certain decisions which I am now about to notice. In the case of *Radha Gobind Roy* v. *Inglis* (2), decided by the Privy Council on the 6th July 1880, the plaintiff claimed certain lands included within the limits of a beel or lake. The land so claimed had become dry and cultivable during, at least, a part of the year. The plaintiff was held to be entitled, not merely to the right of fishery in the beel, but also to the soil of the beel. The proprietor of a neighbouring talook was the defendant, and he denied the plaintiff's title to the soil of the beel, and relied on adverse possession for more than twelve years before the institution of the suit. Their Lordships of the Privy Council said:—"The question remains, whether the disputed land had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitations. On this question, undoubtedly, the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his (the defendant's) adverse possession. The High Court came to the

(1) 19 W. R., 193. (2) 7 C. L. R., 364.

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conclusion that the defendant had not satisfied the burden of proof thrown upon him, and their Lordships are not prepared to reverse that judgment." Here there is nothing to show that the plaintiff had at any time been in possession of the dried-up soil of the beel, and so long as the soil remained submerged, it may well be that the possession was deemed to have followed the title. In appeal from Original Decree, No. 185 of 1877, decided by Garth, C.J., and Tottenham, J., on the 21st December 1878, the facts were as follows:—A portion of the land admittedly formed part of the plaintiffs' estate Madharpore as delineated on the Government map of 1846, and the Court was of opinion, that they had made out a *primâ facie* case of title and possession up to the year 1846 to the lands demarcated as theirs on this map, and, therefore, to this disputed portion. The next question was, whether the plaintiffs had been in possession of this portion at any time within twelve years before the commencement of the suit. The Court, observing that the onus of proving such possession was undoubtedly on the plaintiffs, held that, as they had established a *primâ facie* case of possession in 1846, such possession must, under the circumstances, be presumed to have continued until something was proved to have happened to put an end to it. "Take for example," it was said, "the case of a large tract of jungle land granted thirty years ago to a zemindar. He takes possession in the first instance, perhaps, by putting up a few boundary posts or by sending his agent to look over the property. Nothing is done to the land for the next twenty years. It remains in its primitive state of jungle. But then some wrong-doer brings a portion of it into cultivation, and after five or six years claims that portion as his own. The true owner then brings a suit to recover his property. How is he to show his possession within twelve years? He has exercised no direct acts of ownership over the property, and unless the possession which he had at first is presumed to continue, it would be impossible for him to enforce his rights."

In Reg. App. No. 280 of 1877, the following passage occurs in the judgment of Pontifex, J.:—

"Now we are of opinion that the plaintiffs are not barred by

limitation from enforcing their claim to this portion of plot A for this reason. The land, which was a dry chur in 1858, was gradually covered by water, and, according to the case of both parties, gradually re-formed subsequently; and in fact even during the progress of this suit, re-formation on the southern boundary has still been proceeding. The plaintiffs in their plaint allege that the re-formation commenced in 1274. No doubt the defendants (in their written statement) and their witnesses attempt to put back the re-formation to an earlier date; and they have adduced in support of their case certain kabuliats, which they say were given by tenants for the cultivation of indigo. But we are of opinion that the evidence of the defendants is not so precise that we can say that those kabuliats apply to the whole or any particular part of the re-formed lands; they may very well have included only land within plot D; and we think, in a case like the present, where the land has formed gradually on the plaintiffs' site after an equally gradual diluviation, the whole process of diluvion and alluvion occurring some time after 1858 (the date when possession was taken under the decree in the former suit), and before 1876 (when the plaint in this suit was filed), it lay rather on the defendants, than on the plaintiffs, where the exact date of re-formation was in doubt, to show when actual possession of the various portions of these re-formed lands was taken. As the plaintiffs were actually in possession up to the diluviation, and as upon re-formation it might be doubtful how soon the land would be fit for the purpose of cultivation, which indeed might depend on the nature of the crop, and as even upon the defendants' evidence it is doubtful whether the land had been fit for cultivation more than twelve years before suit, we think that in this case it did not lie on the plaintiffs to show they had been dispossessed within twelve years; and we cannot accept as satisfactory the evidence adduced by the defendants as to their possession for twelve years before suit."

I may also refer to the recent decision of this Court in *Kally Churn Sahoo* v. *The Secretary of State* (1).

(1) I. L. R., 6 Calc., 725.

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It appears to me that the principle to be gathered from these cases is, that although, according to the general rule, it lies upon the plaintiffs, who are met with the plea of limitation, to show their own possession within twelve years before the institution of the suit, when the property in dispute is capable of actual and visible possession, yet that, from the nature of the thing, an exception must be made to this general rule in the case of property which is not susceptible of actual and visible possession. In respect of this latter class of cases, it appears to be only reasonable to say that, when the title and possession have been proved to be in a certain person up to a certain point of time,—when there has been no transfer of the title to any third person,—and there is no evidence that possession was exercised by a person other than the person having the title, so long as actual visible possession was possible, the possession of the person having the title will be presumed to continue until the property has again become susceptible of actual visible possession. Proof of possession is presumptive proof of ownership, because men generally own the property which they possess. It may with equal reason be said, that if the ownership of property is proved and there is nothing to show that the possession of such property is with any person other than the owner, it may fairly be presumed to be with the owner. A presumption dispenses with or supplies the place of evidence. If the above be a reasonable presumption, it takes the place, in a case like the present, of evidence to show the plaintiffs' possession within twelve years before suit in a property in which, from the nature of the thing, evidence of actual possession is impossible. There are a few cases which at first sight appear to conflict with the principle which I have endeavoured to evolve from the above cases. In the case of *Koomar Runjit Singh* v. *Schoene, Kilburn* (1), the plaintiff alleged that the lands had re-formed twelve years before the institution of the suit, and that he had exercised actual possession by sowing *khesari*. It is clear that the plaintiff here, by his own allegation, excluded a presumption which could only arise if the lands were not susceptible of cultivation and possession. In

(1) 4 C. L. R., 390.

the case of *Gokool Kristo Sen Moonshee* v. *David* (1), the land had been submerged, and after its re-appearance in 1271 the plaintiff had never been in possession. This being so, the plaintiff's suit failed, because he did not prove *secundum allegata* that his vendor had been in possession before the land disappeared or was diluviated. Apparently the Court thought that, if he had succeeded in proving that he or his vendor was in possession before the diluviation, his cause of action would have arisen when, upon the re-appearance of the land, he was prevented by the defendant from resuming actual possession.

This appears to be the real point of decision in this case; and if this is so, there is nothing which conflicts with the Privy Council decision or the other cases above quoted. In the case of *Mahomed Ibrahim* v. *Morrison* (2), reference was made to a class of cases which supported the proposition that when limitation is pleaded in respect of lands, which are either in a jungly or unculturable state, it is for the defendant to establish his plea by proving adverse possession for more than twelve years; and it was held, that that proposition could not be applied to land brought under cultivation; but that, in this latter case, the plaintiff, in order to get over the plea of limitation, must at least establish, that either the land in suit formed within twelve years or was not in a fit state of cultivation within that period. It is not very clear whether this was a re-formation on the old site, and no question appears to have arisen as to which party was entitled to the site before the formation of the chur.

It appears to me, that none of these cases are in conflict with the principle which I have above adverted to, as deducible from the Privy Council case, and the other cases bearing upon the same point. If otherwise, the decisions which are in conflict with the Privy Council case must be taken to have been overruled by it. The conclusion to which I am then led is, that the burden of proof has, in this case, been improperly laid upon the plaintiffs, and that it should have been laid upon the defendants; in other words, that it is for the defendants to show that, as alleged by them, the lands were re-formed twelve or more years

(1) 23 W. R., 443. (2) I. L. R., 5 Calc., 36.

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before the institution of this suit, and have since been in their possession. [His Lordship then discussed the evidence and concurred in reversing the decree of the Subordinate Judge as to plot B.]

Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice MeDonell.

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March 7.

UMA SUNDARI DASI (PLAINTIFF) *v.* RAMJI HALDAR AND OTHERS (DEFENDANTS).*

Joinder of Parties—Adding Plaintiffs—Consent—Lunatic not so found—Appearance—Act XXV of 1858—*Civil Procedure Code (Act X of* 1877), *s.* 32.

A person alleged to be a lunatic, though not found so under Act XXV of 1858, may appear either by vakeel or in person.

Under s. 32 of the Code of Civil Procedure, no person can be added as a plaintiff, unless he has previously consented thereto; and if a person objects to be added as a plaintiff, the proper course is to make him a defendant.

THIS was a suit for arrears of rent and ejectment, instituted by Uma Sundari Dasi, widow of one Nilmadhub Datta, against the defendants, for the rent of a certain jote held by them under the joint family, of which the plaintiff abovenamed was one of the members. The plaintiff prayed, that a decree should be passed for the whole arrears due with interest; (ii) that the proportionate share of the plaintiff should be awarded to her, together with the costs of the suit; (iii) for ejectment and the recovery of khas possession. The plaint also prayed that, as the defendants did not pay rent separately to the co-sharer, the other co-sharers might be joined as co-plaintiffs; and an application to that effect was made to the Court. Notice of this application was given to all the co-sharers, but only one of them, Nogendro Datta, appeared, and he opposed the application. On the 11th of January 1879, an order was passed making him and the rest of the co-sharers plaintiffs. In the words of the

* Appeal from Appellate Decree, No. 2526 of 1879, against the decree of A. T. Maclean, Esq., Judge of the 24-Pargannas, dated the 7th July 1879, affirming the decree of Baboo Benode Behary Chowdhry, Munsif of Baraipore, dated the 9th April 1879.