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But I think that the chitta *per se* is not evidence in this suit; and that the Subordinate Judge was right in so dealing with it.

The appeal will be dismissed with costs.

MACPHERSON, J.—I concur in dismissing the appeal. I think that the chitta, standing by itself, furnishes no proof that the particular land, which is the subject of this suit, was resumed by Government. If the plaintiff wished to prove the resumption of these lands, he ought to have filed the resumption proceeding itself.

Appeal dismissed.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

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MAHOMED ALI KHAN AND OTHERS (PLAINTIFFS) *v.* KHAJA ABDUL GUNNY AND OTHERS (DEFENDANTS.)*

Possession—Dispossession—Adverse Possession—Presumption—Onus Probandi—Limitation—Joint owners, Adverse possession between.

Under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within twelve years.

Possession is not necessarily the same thing as actual user.

When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be *presumed* that it did so continue, and that the previous possession continued also until the contrary is proved.

Such a presumption is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of that case.

Many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction.

* Full Bench Reference made by Mr. Justice Mitter and Mr. Justice Norris, dated the 14th August 1882, in appeal from Appellate Decree No. 2378 of 1880.

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THIS case was referred to a Full Bench by Mr. Justice Mitter and Mr. Justice Norris, on the 14th August 1882, with the following opinion :—

"The facts of this case are briefly as follows: At the time of the permanent settlement, Pergunnah Attea was divided into the following zemindaries, the *towzi* numbers of which are 10, 11, 12, 16, 5031, 5032, 5033, 5034, 5035, 5151, 5152 and 5153. The lands of these zemindaries were separate and distinct, with the exception of a large area of jungle land consisting of 491 mouzahs, which went by the name of Araipara. The dispute in this case relates to 50 khadas of land alleged by the plaintiffs to lie within one of these mouzahs, *viz.*, Kazlah. The plaintiffs in this case are the proprietors of some of the zemindaries mentioned above. They allege that they were in possession of the disputed lands, by receipt of their share of the rent derivable from the sale of timber, &c., *i. e.*, such rents as are recoverable from jungle lands. Then they further allege that gradually a portion of the disputed lands was reclaimed and ryots were settled upon it; but that the defendants, who are the owners of one of these zemindaries, *viz.*, 5032, dispossessed them on the 12th April 1868. The defendants, alleging that the land in dispute was not in Kazlah, but in mouzah Narina Alukdia, exclusively appertaining to their zemindari No. 5032, and further alleging that they have been in possession of the disputed lands for more than twelve years, amongst other pleas, pleaded limitation as a bar to the plaintiffs' claim. The Court of first instance dismissed the plaintiffs' suit on the plea of limitation as well as on the merits. On appeal, the District Judge is of opinion that the decision of the Court of first instance, on the merits of the case, was not correct. He says that, if it had not been for the fact that the claim was barred by limitation, he would have deputed an Amin to hold a local investigation upon the question, whether the land in dispute appertains to Kazlah or to mouzah Narina Alukdia. On the plea of limitation, he finds that Kazlah was thaked in 1859 as the joint property of the proprietors of all these zemindaries and as in their joint possession; but that the plaintiffs have utterly failed to prove their possession of the land in dispute within twelve years. Upon these findings of fact, the

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District Judge has dismissed the plaintiffs' claim as barred by limitation (1).

(1) The following is that portion of the District Judge's judgment which bears on the question of limitation: "I will now come to the issue as to limitation. In suit No. 61 (for about two-thirds of the whole claim), the plaint was filed on the 24th August 1878, in suit No. 12 it was filed on the 27th May 1879, in suit No. 639 on the 6th August 1879. In all, the cause of action, namely, forcible, fraudulent, unjust, and illegal dispossession, is said to have accrued on the 12th April 1868, so that by the admission of the plaintiffs, the earliest suit is within one year and eight months of being barred by possession admittedly adverse, and the latest suit is within eight months and a few days of being so barred. As to a 'forcible' dispossession, which apparently alludes to some specific act, there is not a word of evidence tendered. It clearly rests with plaintiffs to prove that a possession, which they admit to have been continuously adverse for upwards of ten years before the bringing of the first suit, did, during the preceding one year and eight months, not exist at all, or did not exist in adverse form: they must prove that a state of things different from what they admit to have existed for so many successive years did, as defendants allege it, not exist at any time during the two previous years. On the inability of the plaintiffs to do this, I concur with the lower Court. I also concur with the lower Court in finding that defendants have not proved the lands in dispute to appertain to their separate zemindari.

"Plaintiffs are for the most part large and wealthy zemindars, by no means slow to assert their rights, yet they admit that they have unaccountably slumbered over these rights for upwards of ten years. Plaintiffs, mainly for the purpose of proving their possession (joint with defendants) prior to 1275 (1868), rely on an ijara kabuliat, which they have filed. This document the lower Court has discredited; but without looking to its genuineness, it is sufficient to say that it is dated 1271 (1864) and was for 1271, 1272, 1273, and 1274 (1864—1867); and that it, of itself, forms no evidence whatever that possession followed upon it, or continued into 1275 (1868). The plaintiffs also rely on some chalans filed not in suit No. 61, the heaviest and most important one, but in suit No. 12 which was commenced many months afterwards. They purport to have been given by Ram Jiban Joypal, one of the ijaradars, and are for rent of 1271, 1272, 1273, and 1274 (1864—1867); but in his evidence this man states that his ijara only extended up to 1272 (1865), and that he never went to Kazlah after 1272. His subsequent answers to the contrary, when pressed by plaintiffs, appear to me deserving of no weight. Plaintiffs in suit No. 61 examined seven witnesses, and in No. 12 they examined three witnesses. These witnesses do not appear to know anything about Kazlah, a very small

"It is now contended before us that, having regard to the nature of the land in dispute, which was jungly waste and uncultivated at the time of the Thakbust measurement, the plaintiffs' claim should not be thrown out as barred by limitation, unless the defendants prove adverse possession for more than twelve years. If it were an admitted fact that the land in dispute is still unclaimed, we have no doubt that this contention would be right. But it is admitted that a portion of the land in dispute is now under culti-

fraction of the whole group, although some of them assert that defendants, by settling ryots and clearing the lands, had dispossessed them.

"There can be no doubt that limitation in such a suit as this runs from the commencement of an adverse possession. The plaintiffs have distinctly alleged (and this position is admitted by their vakeel), that the exclusive actual possession of defendants has throughout its existence been of an adverse character. It is for them then to prove that this sort of possession only commenced within the twelve years prior to their suit. They allege that it commenced in the month of Bysak 1275 (April 1868.) They have quite failed to prove that allegation.

"I find that the plaintiffs have failed to discharge the onus on them, and to prove even *primâ facie* that the adverse possession of the defendants commenced within twelve years of any of these suits. There is no evidence that clearances and settlement of the ryots began only in 1275; they admittedly existed in 1275, and the evidence is to the effect that they existed before that. Moreover, the plaintiffs have set up a case of actual possession and enjoyment by the receipt of rents for jungle produce down to 1275. They therefore cannot, as they would wish to do, plead that this is a case in which possession must be taken to go with the right.

"Plaintiffs' vakeels have relied much on a ruling by MACPHERSON and MORRIS, JJ., *Shurfunnissa Bibee Chowdrain* v. *Koylash Chunder Gungopadhya* (1), but that decision only defines the time at which possession by a co-sharer is to be held to become 'adverse.' It does not in any way say that a co-sharer cannot possess adversely, or that adverse possession by a co-sharer for twelve years is not a complete bar.

"Had I not held that plaintiffs were barred by limitation, and that, therefore, the appeals must be dismissed, I should have held that they, as ijmali sharers, were entitled to the joint possession they claim; and that the defendants having in no way established that they had expended a single rupee on reclamations, are in no way, in equity, entitled to defeat that right of the plaintiffs and to hold exclusive possession of even the cleared portion of the lands in suit. I should also have held that there was no private arrangement proved, whereby the other sharers consented to allow the defendants to hold exclusive possession of the lands in suit."

(1) 25 W. R., 53.

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vation. Having regard to this fact, the question raised before us, in our opinion, becomes one of peculiar difficulty, so far as the cultivated lands are concerned. The decisions bearing upon this point—*Nawab Nazir Sidhee Ali Khan* v. *Womesh Chunder Mitter* (1); *Boolee Singh* v. *Hurobuns Narain Singh* (2); *Lall Singh* v. *Baboo Modhoosoodun Roy* (3); *Busseeroonnissa Chowdhrain* v. *Rajah Leelanund Singh* (4); *Syud Ameer Ali* v. *Maharanee Inderjeet Koer* (5); *Gossain Doss Koondoo* v. *Siroo Koomaree Debia* (6); *Niljaree* v. *Mujeeboollah* (7); *Shaikh Ozeer Ali* v. *Shaikh Mukbool Ali* (8); *Kalee Narain Bose* v. *Anund Moyee Goopta* (9); *Gokool Krista Sen* v. *David* (10); *Lutchoo Khan* v. *Foley* (11); *Mahomed Kobeer* v. *Abdool Azeem* (12); *Khoda Newaz Chowdhry* v. *Brojendro Coomar Roy Chowdhry* (13); *Koomar Runjit Singh* v. *Schoene Kilburn & Co.* (14); *Radha Gobind Roy* v. *Inglis* (15); *Kally Churn Sahoo* v. *Secretary of State* (16); *Mahomed Ibrahim* v. *Morrison* (17); *Mano Mohun Ghose* v. *Mothura Mohun Roy* (18); *Pandurang Govind* v. *Bal Krishna Hari* (19); *Maharajah Koowur* v. *Baboo Nund Loll Singh* (20)—appear to us to be contradictory. We therefore refer the following question to the decision of the Full Bench:

"It being assumed by the lower Appellate Court, for the purpose of deciding the question of limitation, that the land in dispute at the time of the Thakbust was jungle and in the joint possession of all the zemindars of Pergunnah Attea, including the plaintiffs' predecessors in title, and it being found that the plaintiffs have failed to prove their possession of the disputed land, which is partly jungle and partly under cultivation, within twelve years from the date of suit, whether the plaintiffs' claim is barred by limitation."

(1) 2 W. R., 75.
(2) 7 W. R., 212.
(3) 8 W. R., 426.
(4) 14 W. R., 135.
(5) 15 W. R., 43.
(6) 12 B. L. R., 219; 19 W. R., 192.
(7) 19 W. R., 209.
(8) 19 W. R., 282.
(9) 21 W. R., 79.
(10) 23 W. R., 443.
(11) 24 W. R., 273.
(12) 24 W. R., 315.
(13) 24 W. R., 417.
(14) 4 C. L. R., 390.
(15) 7 C. L. R., 364.
(16) I. L. R., 6 Calc., 725.
(17) I. L. R., 5 Calc., 36.
(18) I. L. R., 7 Calc., 225.
(19) 6 Bom. H. C. A. C., 125.
(20) 8 Moore's I. A., 199 at p. 220.

Mr. *Evans*, Baboo *Srinath Das*, Baboo *Jogesh Chunder Roy*, and Moonshi *Serajul Islam* for the appellants.

Baboo *Chunder Madhub Ghose*, Baboo *Rash Behari Ghose*, and Baboo *Kaloda Kinker Roy* for the respondents.

The following judgments were delivered :—

The judgment of MITTER, MCDONELL, PRINSEP, and WILSON, JJ., was delivered by

WILSON, J.—In these suits the plaintiffs sought to have their rights declared to shares in 50 khadas of land, and to be put in possession of them jointly with the defendants. The defendants denied the plaintiffs' title and also pleaded limitation. The lower Appellate Court has decided in favor of the plaintiffs on the question of title, holding them entitled to be put into possession, but for limitation. It has, however, held that their claim is barred by limitation. The question before us is whether the rule of limitation has been correctly applied.

The facts found or admitted, so far as they are material for the present purpose, seem to be these : The plaintiffs and the defendants have a good title to the lands in question jointly. At the date of a Thakbust in 1859 they were in joint possession. The whole of the lands were then jungle, yielding, however, some kind of profit, which has been variously described.

At some time or times subsequent to that date, but more than ten years ago, a portion of the lands was brought under cultivation, and of the lands so reclaimed the defendants have been in possession from the time of their reclamation. It would appear that the amount reclaimed is some 10 or 12 khadas out of 50, though perhaps what the District Judge says on that point does not amount to an actual finding.

With regard to the law, the District Judge says : "It clearly rests with plaintiffs to prove that a possession, which they admit to have been continuously adverse for upwards of ten years before the bringing of the first suit, did, during the preceding one year and eight months, not exist at all, or did not exist in adverse form. They must prove that a state of things different from what they admit to have existed for so many successive

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years did, as defendants allege it, not exist at any time during the two previous years." And again: "The plaintiffs have distinctly alleged (and this position is admitted by their vakeel) that the exclusive actual possession of defendants has throughout its existence been of an adverse character. It is for them to prove that this sort of possession only commenced within the twelve years prior to their suits." And he concludes: "I find that the plaintiffs have failed to discharge the onus on them, and to prove even *primâ facie* that the adverse possession of the defendants commenced within twelve years of any of these suits."

It appears to us that the application of the law of limitation to cases, such as the present, requires considerable care.

There is no doubt as to the general rule: That under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and that it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, it has more than once been held by the Privy Council that the plaintiff is bound to prove possession and dispossession within twelve years—*Maharajah Koowur Singh* v. *Nund Lal Singh* (1); *Raja Saheb Perhlad Sein* v. *Budhu Singh* (2); *Beer Chunder Jobraj* v. *Deputy Collector of Bhullooah* (3).

We think further that as a general rule the plaintiff cannot, merely by proving possession, at any period prior to twelve years before suit, shift the onus to the defendant. In the case already cited, *Maharajah Koowur Singh* v. *Nund Lal Singh* (1), the plaintiff had adduced evidence to show possession earlier than twelve years before suit; but the Privy Council treat it as immaterial, saying at page 220: "The lands in question may have been part of mouzah Gopalpur, and, as such, may have been enjoyed by his (the plaintiff's) ancestor, and yet he may have lost, by lapse of time, his right to recover them." To this extent we are unable to concur in the view indicated by the Chief Justice in *Kally Churn Sahoo* v. *The Secretary of State for India* (4).

(1) 8 Moore's I. A., 199, at p. 220.
(2) 12 Moore's I. A., 275, 337: S. C. 2 B. L. R. P. C., 111.
(3) 13 W. R., P. C., 23. (4) I. L. R., 6 Calc., 725.

But possession is not necessarily the same thing as actual user. The nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed.

Lands again may by natural causes be placed wholly out of reach of their owner; as in the case of diluvion by a river. In such a case, if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the lands continue to be submerged. *Kally Churn Sahoo* v. *Secretary of State for India* (1); *Mono Mohun Ghose* v. *Mothura Mohun Roy* (2).

When lands which have been in such a condition as to be incapable of enjoyment in the ordinary modes are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land, the exact date at which its condition became altered. And as the plaintiff, who has complied with the conditions we have indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains

(1) I. L. R., 6 Calc., 725. (2) I. L. R., 7 Calc., 225.

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unchanged, it is essential to inquire on whom the burden of proof of the date of the change lies.

The true rule appears to us to be this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in s. 114 of the Evidence Act.

It remains to consider the case of *Radha Gobind Roy* v. *Inglis* (1) decided by the Privy Council. We do not understand that case as establishing the broad proposition contained in the head note, which would be in conflict with the earlier decisions of the same tribunal. The land in dispute in that case had formed part of the bed of a bhil or lake; the title to the bhil and its bed was found to be in the plaintiff, and he had been in possession so long as the land was covered with water. The bhil gradually dried up and the defendant occupied the land so formed. The date of the drying up of the land and of its occupation by the defendant were in controversy, but these things had certainly happened recently. Their Lordships, having disposed of the other questions which were raised, say: "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 Limitation. 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. And immediately below it is said: "The Subordinate Judge does not appear to have had his attention directed to the very important question when the new land formed." The present case is in its facts closely

(1) 7 C. L. R., 364.

analogous to that case; and the view which we take of the law certainly accords with the decision of the Privy Council.

The presumption of which we have spoken is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of the case; and it is always liable to be rebutted by evidence. But having regard to the time at which the whole land was jungle, and the comparatively small quantity which up to the time of suit seems to have been cleared, we think that it ought to be considered in this case together with all the evidence; and we remand the case to the lower Appellate Court in order that the question of limitation may thus be again considered.

We desire to abstain from saying anything that might seem to fetter the judgment of the learned Judge in dealing with the question upon the whole materials before him; but there are two matters which may have an important bearing upon the case, and to which we think it right to draw attention. In the first place the nature of the profit derived by the joint owners from the land as jungle should be considered. If it should be that they were in receipt of a settled rent, regularly paid like an agricultural rent, the presumption in question might have little, if any, bearing on the case; if the profit was of a different description, the result might be materially different. Secondly, in considering any transaction prior to the time from which the plaintiff admits the defendants' possession to have been adverse, it should be borne in mind that the case is one between joint owners, and many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction.

GARTH, C.J.—I am sorry that I cannot concur entirely with the view which has been taken of the law by my learned brothers.

So far as the result of this particular case is concerned, and the order which my learned brothers have made in remanding it to the Court below, I am quite content to defer to their judgment. It may be, and I trust that in the generality of cases it will be, that the difference of opinion which exists between us may not

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tend to much diversity of practice. But what I cannot regard as sound law, (although I shall of course duteously accept it after this judgment as our rule of action), is the principle which has been laid down by the rest of the Court upon the subject of presumption.

We are agreed that under the old, as well as the present, law of limitation, the plaintiff is bound in cases of this nature to prove a possession and a dispossession within twelve years before suit; and we are also agreed, as I understand, that this proof need not always consist of evidence of acts of possession on the one hand, or of the act of dispossession on the other.

Thus it is admitted that in the case of jungle land, or of land covered by water, the Court may, and generally should, presume, in the absence of evidence to the contrary, that a possession enjoyed by the plaintiff before the twelve years, has continued until within the 12 years; and in the same way, when the plaintiff has proved his possession within the twelve years, and the defendant has been afterwards found upon the land, the act of dispossession by the defendant may be properly inferred.

But what I do not understand, and what I confess I cannot bring myself to believe is, that there exists in this country an arbitrary rule of law, applicable to *jungle land* or *to land covered by water*, or in fact *to land of any particular kind* or *character*, which does not also apply, according as the circumstances of each case may render it necessary, *to land of all kinds*.

I know of no law in this country, whether statutory or otherwise, which lays down or justifies such an arbitrary rule; the Privy Council, so far as I am aware, have never suggested such a rule, and it seems to me that the true solution of the question is to be found in the well-known principle of law, which, so far as I know, prevails, and may be applied here as properly and beneficially as it is in England, that a seisin or possession of land, which is once proved to exist in a particular person, may be, and often should be, presumed to continue until the contrary is shewn.

This is only one branch of the still more general rule, which is laid down in s. 114 of the Evidence Act, that a state of things once proved to exist is presumed to continue—(See Taylor on Evidence, s. 98 and s. 123, Edition of 1848.) The

particular rule, as applied to seisin or possession of land, is thus shortly laid down by Mr. Best in his book on Evidence, page 505: "Where seisin of an estate has been shown, its continuance will be presumed."

Of course this is only a disputable presumption, and one which is entitled to more or less weight, according to the circumstances of each case; and it must be applied at all times with discretion and caution. Where land is actually used and occupied, and the occupier, whoever he may be, is well known in the neighbourhood, there is rarely any occasion to resort to presumption.

And where the Court has every reason to believe, that the plaintiff would have no difficulty in proving by direct evidence a possession, if it had been really enjoyed, it would naturally attach little or no weight to any rule of presumption. But if it is shewn on the other hand, even in the case of cultivated land or house property, that the plaintiff, who had formerly been in undisputed evidence, had died, or had left the country, or for other reasons was unable, or unlikely to be able, to produce actual evidence of possession, the presumption might then legitimately be resorted to, and entitled to more or less weight according to circumstances.

This I understand to be the view of Mr. Justice Melvill in the case of *Pandurang Govind* v. *Bal Krishna Hari* (1) in which, after affirming what we all admit to be the law, that the burthen of proof in cases of this kind is upon the plaintiff, that learned Judge says: "The burden of proof being upon the plaintiff, what is he required to prove? Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a plaintiff in an action of ejectment must prove that he has been in possession within twelve years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it or to build upon it, or formally to take possession of it; nor, if he do formally take possession of it, is he bound by subsequent acts to proclaim the continuance of his possession. So long as the land remains unoccupied, his rights are not interfered with,

(1) 6 Bom. H. C. A. C., 125 at p. 128.

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and he is not called upon to assert them. He has no cause of action, and there is no person whom he could sue. His cause of action accrues when another person takes possession of the land, and not before. If he has omitted to take possession of the land himself, he may not be able to treat the intruder as a trespasser; but he can bring an action to eject him at any period within twelve years from the date of the intruder's occupation of the land." I do not understand these expressions to apply exclusively to waste land, or to land of any other special character; but to all cases where the production of direct evidence of possession is either difficult or impossible.

I observe that Mr. Justice Melvill in a later case, *Moro Desai* v. *Ramchandra Desai* (1) seems to consider that the Privy Council in the case of *Radha Gobind Roy* v. *Inglis*, had proceeded upon a view of the law, which was inconsistent with some earlier decisions of that learned tribunal, and also with what had been the practice in the Indian Courts for many years.

I am sorry to say that I myself fell into a similar mistake, if it was a mistake, in the case of *Kally Churn Sahoo* v. *The Secretary of State for India* (2) which has been alluded to in the judgment of my learned brothers. I supposed, but on a closer examination of the cases I think I erroneously supposed, that there was some difficulty in reconciling their Lordships' view in *Radha Gobind's* case with that which they had laid down in the case of *Maharajah Koowur Singh* v. *The Secretary of State for India* (3) and other cases alluded to by my brother Wilson.

I endeavoured in the case of *Kally Churn Sahoo* to explain this apparent inconsistency, but I think I was wrong, and for this reason: this last case, as I now believe, proceeded upon the well known rule to which I have alluded, that a title and seisin when once established must be presumed to continue in those cases at any rate where there is no direct evidence of possession, and where such evidence is, from the nature of the case, either difficult or impossible to obtain. In *Radha Gobind's*

(1) I. L. R., 6 Bom., 508, at p. 510.
(2) I. L. R., 6 Calc., 725.
(3) 8 Moore's I. A., 199.

case the defendants, who apparently had first brought the bed of the bhil in question into cultivation, were presumably better able than the plaintiffs to prove when and how the cultivation had commenced; and the case, when one looks at the circumstances of it, was just one of those in which the legal presumption with which I have been dealing might be usefully and properly applied.

On the other hand, in the case of *Maharajah Koowur Singh*, we find that so far from evidence of possession not being forthcoming, a considerable body of evidence was adduced on both sides. No less than eight witnesses were examined on that subject for the plaintiff, and nine or ten for the defendant, and their Lordships, after considering that evidence and the balance of probabilities on either side, decided in favor of the defendant. It is obvious that this was not a case in which the sort of presumption, which I have described, could properly or reasonably have been applied, and I may observe before leaving the consideration of that case that I do not read one part of their Lordships' judgment in the sense that has been attributed to it by my learned brothers—I allude to the sentence: "The lands in question may have been part of mouzah Gopalpur, and, as such, might have been enjoyed by his ancestor, and yet he may have lost by lapse of time his right to recover them." I do not understand this to mean, and upon looking at the context I think it clearly does not mean, that in the view of their Lordships the plaintiff's ancestor *had ever in fact been in possession*. They meant to say that even if he had been in possession, he might have lost, by lapse of time, his right to recover the property.

And I think also that the two other cases decided by the Privy Council, *Rajah Sahib Perlhad Sein* v. *Budhoo Singh* (1), and *Beer Chunder Jobraj* v. *Deputy Collector of Bhullooah* (2), must be looked at in the same light. In both of those cases we find that evidence was called on both sides; and that their Lordships came to a distinct conclusion upon that evidence. There was no necessity, therefore, and no reason, so far as I can see, for acting upon the principle for which I am now contending.

(1) 12 Moore's I. A., 275: S. C., 2 B. L. R. P. C., 111.
(2) 13 W. R. P. C., 25.

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But in *Radha Gobind's* case there was reason for acting upon that principle, and it appears indeed to have been the first case, amongst all those to which our attention has been called during the argument, in which it became necessary for their Lordships to resort to that principle. It will be found that in the generality of cases of this kind, the parties as a rule can and do produce more or less direct evidence of possession, and when they do so, the Court naturally and properly acts upon that evidence without resorting to any principle of presumption.

For these reasons I hope, as I stated in the first instance, that the difference which exists in this case between my learned brothers and myself will prove to be one rather of principle than of practice.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

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April 17.

ANUND CHUNDRA MUNDUL AND ANOTHER (DEFENDANTS) *v.* NILMONY JOURDAR (PLAINTIFF).*

Hindu Law—Inheritance—Descent of lands purchased by widow out of income of life-estate.

Land purchased by a Hindu widow with money derived from the income of her life-estate passes, when undisposed of by her, to the heirs of her husband as an increment to the estate, and not to her heirs as property over which she had absolute control.

Baboo *Mohiny Mohun Roy* for the appellants.

Baboo *Shoshee Bhusun Dutt* for the respondent.

THE facts of this case sufficiently appear from the judgment delivered by

MACPHERSON, J.—The question raised in this appeal is, whether land purchased by a Hindu widow with money derived from the income of her life-estate, passes, when undisposed of by her, to

* Appeal from Appellate Decree No. 2003 of 1881, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Jessore, dated the 27th June 1881, affirming the decree of Baboo Behari Lall Mukerjee, Munsiff of Jhineeda, dated the 14th February 1881.