tion 10, Regulation XIX. of 1793. The plaintiff's Counsel refused the remand, and elected to amend the plaint in this Court by striking out the words "Section 30, Regulation II. of 1819," and to proceed to trial on the record as it stood.

The plaint then having been amended, the case before us is simply one brought under section 10, Regulation XIX. of 1793, to recover possession of lands illegally alienated from the permanently settled estate belonging to the plaintiff some time subsequent to the Permanent Settlement. Under the late rulings, it is upon the plaintiff to prove his allegation that the lands in question did, at one time, form part of his estate. He has produced certain quinquennial and measurement papers. It is admitted that the measurement papers do not refer to these lands, and the quinquennial papers prove nothing. They merely comprise the names of certain villages with their area, assets, and jumma. No one denies that the villages mentioned in these papers belong to plaintiff's permanently settled estate; but beyond this the papers go to prove nothing in respect to the land in dispute in this case, whether it formed part of the assessed lands of these villages, and was permanently settled with plaintiff's predecessor. It is clear that the lands now held rent-free may be geographically situated within the limits of plaintiff's permanently settled villages, and yet compose no part of his estate; and the fact of their being so situated is not even *primâ facie* evidence that such lands did at one time form part of that estate. No such presumption arises. It is for plaintiff to prove his case as he amended it, and he has utterly failed even to stir it. It is now said that the oral evidence is in another case No. 42, which has not been sent. It is true that plaintiff, in his petition for review to the Judge, refers to a record bearing that number; but there is nothing in the Judge's proceedings to shew that he ever looked at that record, and the plaintiff cannot shew us that he did. Had the Judge done so, we think he could not have failed to make mention of it in his decision in this case.

We are now asked to remand the case to enable the plaintiff to produce the necessary evidence; and it is said that the defendant held in the double position of former proprietors of the zemindaree and of lakherajdar. Here again we have nothing but assertion; no proof that defendant held this double character is adduced, and the vakeels for the defendant, appellant, deny the allegation. It appears to us that the indulgence now asked for by the plaintiff's Counsel cannot be allowed. The plaintiff was offered by the Court time and opportunity to amend his plaint and supplement his evidence. He refused to do the latter, supposing, we presume, that he had sufficient evidence on the record to sustain his case, and he elected to go to trial on the record as it stood. Now that his case has completely broken down, he asks for permission to amend his shortcomings. This is mere trifling with the Court, and cannot be permitted. As plaintiff has failed to give any proof that the lands in dispute were at any time part of his permanently settled estate, we give a decree for the defendant, appellant, and, reversing the decree of the Court below, dismiss the plaintiff's suit with all costs.

The 11th May 1865.

Present:

The Hon'ble W. Morgan and G. Campbell, *Judges.*

Usufructuary Mortgage—Payments by Mortgagee on account of Revenue assessed on land pledged as Lakheraj.

Case No. 3611 of 1864.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 28th September 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 19th December 1863.

Nurjoon Sahoo (Defendant), *Appellant,*

versus

Shah Moozeerooddeen, and, after his death, Shah Kubeelooddeen (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Messrs. A. F. Lingham and *J. Baptist* and *Moonshee Ameer Ali* for Respondent.

An usufructuary mortgagee to whom was pledged, as lakheraj, land which was not valid lakheraj, and which has since been assessed with revenue, is entitled to a lien against the mortgagor for sums of money paid by the former in discharge of the public revenue.

ACCORDING to the zur-i-peshgee security, the land would remain in the mortgagee's possession until the principal sum borrowed was paid down by the mortgagor. There is no stipulation respecting interest. The question before us is, whether the mortgagor is entitled to redeem on tender of the prin-

cipal alone under the special circumstances of this case. The rule concerning redemption on tender of the principal money, which is contained in Regulation I. of 1798, section 2, is by the terms of that law applicable only to a loan of money on *bye-bill-wuffa* or conditional sale. But it has also been understood to apply to usufructuary mortgages like this, and its application to the present case has not been disputed. The land, which is the subject of this zur-i-peshgee security, was supposed to be lakeraj land when the security was given, but was afterwards assessed with revenue by the Government. The mortgagee, being in possession, has, for many years past and ever since that assessment, paid the Government revenue; and he now claims a lien on the land for the money so paid, which he insists ought to prevail over the plaintiff's right, under the ordinary mortgage law, to obtain redemption of the security on payment of the principal alone Where the property mortgaged is, at the time of the mortgage, land paying revenue to the Government, the mortgagee takes subject to the charge, and the mortgagor intends only to pledge the land and its annual profit as they exist after this annual charge has been satisfied. In such cases the mortgagee in possession pays the revenue, and his payments are afterwards credited to him when the mortgage accounts are adjusted. But the defendant in this suit received the land pledged to him, subject to no such obligation. On the contrary, at the time of the loan, it was taken for granted on both sides that the land pledged was lakheraj, and it is by the subsequent unforeseen act of the Government in subjecting it to assessment that an obligation to pay first arises.

Ordinarily the law gives to a person interested in land a lien against the defaulting owner for sums of money paid by the former in discharge of the public revenue. The payments made by the defendant appear to us to entitle him to a lien within this principle. His equitable claim to such protection is certainly not diminished in this case by the fact that the plaintiff has pledged to him, as lakheraj, land which was not valid lakheraj, and has now been actually assessed with revenue; nor can the plaintiff contend that the annual receipts from the land, which, when it passed into the defendant's hands, were clearly to be appropriated solely to the defendant's use (subject to the mortgagor's right to an account), became subsequently bound for the mortgagor's benefit, although in violation of his express agreement to discharge his estate from the lien of the person who actually paid the revenue. This right is, we think, sufficient to qualify the otherwise undoubted right of the mortgagor to redeem his land on payment of the principal alone. If we gave effect to the latter right in the present suit, we should, in the probable event of the mortgagor requiring no accounts of the mortgagee's receipts while in possession, leave only to the mortgagee a doubtful remedy by suit for the money which he has paid, a great portion of which would be met by setting up the Law of Limitation as a defence.

We reverse the judgment of the lower Courts, and decree this appeal with costs.

The 12th May 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Limitation—Survey award and compromise—Joint undivided estate—Notice.

Case No. 3516 of 1864.

Special Appeal from a decision passed by the Judge of Dacca, dated the 3rd September 1864, affirming a decision passed by the Moonsiff of that District, dated the 28th March 1864.

Hur Lal Roy (one of the Defendants), *Appellant,*

versus

Sooruj Narain Roy and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Prosunno Coomar Sein and *Lullee Mohun Sein* for Appellant.

Baboo Judoonath Mookerjee for Respondents.

A co-proprietor of a joint undivided estate is bound by a survey award and compromise to which the other joint proprietors were parties, where notice of the survey proceedings was served on the proprietors jointly, and not on him individually.

In this case the plea taken in special appeal is that the Lower Appellate Court is wrong in holding that the special respondent is not barred by the special Law of Limitation, on the ground that he was not a party to an award of the survey authorities and to a compromise resulting from the