for, and appearing in the measurement, was *kharija* talook land; and it ought to be in the power of the defendant to give this clear and unmistakeable proof. He must be presumed to possess measurement papers of his own or former time, both of his zemindary and of his *kharija* talooks. If these are not forthcoming, he could prove, by reliable documentary evidence, that the several villages in which the disputed land lies, are villages which appertain to his *kharija* talooks; and he could show that the land is included in those villages, and that it has paid him rent as the owner of the *kharija* talooks. But so little of this has been attempted that the pleader for the defendant would not, in his address to the Court, make the slightest allusion to any evidence on the side of his client.

A plea has been taken before us for the first time that, as respects some of the land in dispute, the suit of the plaintiff is barred under the Statute of Limitations. It seems that the defendant sued some of the ryots, who are allowedly tenants of some of the disputed land for rent. The plaintiff intervened, but the rents were decreed to the defendant. The present suit not having been brought within one year from the date of the decision of those cases, it is said the plaintiff's claim, in regard to the lands occupied by those ryots, is barred.

This plea we cannot listen to at this stage. Limitation is a plea which may be in some sense waived—that is, the parties, by not waiving it when the opportunity existed for adducing evidence on the point, must be taken to admit the fact that the cause of action accrued within the period of limitation. Certainly, it is a plea which ought to be specifically urged. The defendant had ample opportunity, seeing that the plaint makes mention of the very ryots against whom decrees were passed in the rent cases, to urge the plea of limitation; but he never did urge it at any time during the long period that this suit has been pending trial until now. We must consider, then, that the facts of the case are admittedly such as would not bear out that plea, and we cannot permit the defendant to say the contrary now.

Having thus disposed of all the several points involved in this case as they have been laid before us, and seeing no ground for disturbing the judgment arrived at by the Court below, we affirm it, and dismiss the appeal with costs.

The 1st September 1865.

Present:

The Hon'ble Shumbhoonath Pundit and G. Campbell, *Puisne Judges.*

Right to take Water.

Case No. 913 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 20th December 1864, reversing a decision passed by the Moonsiff of that District, dated the 27th April 1864.

Athur Ali Khan (Plaintiff), *Appellant,*

versus

Sekundar Ali Khan and others (Defendants), *Respondents.*

Moulvie Murhumut Hossein for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

The right to take water is governed by established uses. No man can open a new conduit to take additional water to the injury of his neighbours.

We think that there is no sufficient decision by the Lower Appellate Court. The question is not whether the disputed water-course should be called a *bagla* or a *karba*, but whether defendant has an old-established right to the use of it or not. Both *baglas* and *karbas* are, it seems, private water-courses by which water is taken from the common canal. The rule in these cases is that the right to take water is governed by established uses, and no man can open a new conduit to take additional water to the injury of his neighbours. We, therefore, remand the case to the Lower Appellate Court to be tried on the simple issue, whether or not defendant has an old-established right by use of the disputed water-course or not.

The 2nd September 1865.

Present:

The Hon'ble C. Steer and J. B. Phear, *Puisne Judges.*

Lease—Payment of rent to wrong party.

Case No. 1637 of 1865.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 5th April 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 8th December 1864.

Ramchunder Mozoomdar (Defendant), *Appellant,*

versus

Bissumbur Mookerjee (Plaintiff), *Respondent.*

Baboos Dwarkanath Mitter, Bhobanee Churn Dutt, and *Sreenath Doss* for Appellant.

Baboos Banee Madub Banerjee and *Kedarnath Chatterjee* for Respondent.

In 1266, plaintiff took a lease for five years of certain lands from *B.* In 1267, *K.* sued *B.* for a 2-anna share of the property, and the Court appointed a receiver of the whole estate, who gave defendant an *ijara* lease. Plaintiff then became tehsildar to defendant, and in 1268 took a lease from him, and, both as tehsildar and lessee, made payments to defendant. Subsequently defendant's *ijara* lease was pronounced invalid, and *B.* recovered from plaintiff rents due under her lease for the period in respect of which plaintiff had already made payments to defendant, and plaintiff now sues to recover the sum so paid to defendant. HELD that plaintiff could only recover the money sued for, by proving that it was paid on such a mistake of fact, with regard to its being due to defendant, as to render it inequitable as between plaintiff and defendant that the latter should keep it; and that plaintiff was induced to enter into the relation of tehsildar and lessee to defendant through any fraud on the part of defendant, either constructive or actual.

IN 1266, the plaintiff took a lease for five years of certain land from one Bindobasinee Dabee. In 1267, one Kaminee Dabee instituted a suit to recover from Bindobasinee a 2-anna share of this property, and, after the institution of the suit, the Court in the same year appointed a receiver of the whole estate, who gave the *defendant* an ijara lease. The *plaintiff* then became tehsildar to the defendant, and subsequently, namely, in 1268, took a lease from him. Both as tehsildar and lessee he made payments to the defendant. It seems that eventually (but under what circumstances we are not exactly informed) the High Court declared the defendant's ijara lease to be invalid, and thereupon Bindobasinee, by process of law, recovered from the plaintiff rents due under her lease for the period in respect of which the plaintiff has already made the before-mentioned payments to the defendant. On this state of things the plaintiff now sues to recover the sums which he so paid to the defendant. The Court of first instance dismissed his claim, but the Lower Appellate Court decreed it, and hence this special appeal.

We think that the decision of the Sudder Ameen was correct for the reasons given by that officer, and that the Lower Appellate Court has made a mistake in law. It is not pretended that the payments by the plaintiff were procured to be made by fraud or by illegal coercion, or by any unfair conduct on the part of the defendant: indeed, it is admitted that the defendant was and is blameless throughout the matter. The plaintiff in this case then can only be entitled to recover the money which is sued for, by establishing that it was paid on such a mistake of *fact*, with regard to its being due to the defendant, as to render it inequitable as between the plaintiff and defendant that the latter should keep it. Now, so far from there being any mistake on this point, either in law or fact, it seems to us clear that, when the plaintiff paid the money to the defendant (whether as tehsildar or lessee), he was under an obligation to do so, which would have been enforced, if necessary, by a Court of law. It is not enough to support this action merely to show that the plaintiff entered into that obligation under a misapprehension or mistake of facts; neither is it enough to show that some external power has *since* rendered it incapable of performance, or, at any rate, has treated it as a nullity in regard to any bearing it can have upon the rights of third persons. To entitle the present plaintiff to the remedy which he seeks against the defendant, it must at least be shown that the plaintiff was induced to enter into the relation of tehsildar and lesseee to the defendant by something fraudulent on the part of the defendant, either constructive or actual; and, as we have already observed, nothing of the kind is even suggested. We will add that we do not agree with the Lower Appellate Court in thinking that there was any mistake of fact whatever on the part of the plaintiff. On the contrary, he seems to have been perfectly aware of all that had occurred; and the error he made was in concluding that the circumstances which existed, and the events which had happened, gave the defendant any proprietary rights in the land. We take this to be an error of law, and, as such, it would not, even according to the judgment of the Lower Appellate Court itself, give the plaintiff a right to recover.

Whether Bindobasinee, after she had allowed the plaintiff to be evicted by a stranger, and permitted the stranger to exercise the rights of landlord, had any position either in law or equity, which entitled her to claim rent from the plaintiff under her lease in respect of the interval during

which her rights had been so usurped, is not now a question before us. A competent Court seems to have held that she was so entitled, and the inference is that the plaintiff's loss is the consequence of his own blunders only. At the worst, the money must be assumed to be in the hands of the Court which appointed the receiver, and that Court will know to whom it ought to be paid.

The appeal is decreed, and the judgment of the Lower Appellate Court is reversed with costs.

The 2nd September 1865.

Present:

The Hon'ble C. Steer and J. B. Phear, *Puisne Judges.*

Registration—Priority.

Case No. 1510 of 1865.

Special Appeal from a decision passed by Moulvie Itrut Hossein, Principal Sudder Ameen of Sarun, dated the 16th March 1865, modifying a decision passed by the Sudder Ameen of that District, dated the 11th January 1865.

Syud Furzund Ally and others (Plaintiffs), *Appellants,*

versus

Syud Abdoöl Ruhim and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Kissen Succa Mookerjee* for Appellants.

Mr. R. E. Twidale and *Baboos Dwarkanath Mitter* and *Sreenath Doss* for Respondents.

Act XIX. of 1843 does not give a registered kubala priority over a prior unregistered mortgage under which enjoyment has actually taken place.

THE plaintiff sues to recover land, as purchaser, from one Abdool Ruhim, under a deed of sale made on the 4th September 1863.

The defendant is in possession, as he alleges, under a deed purporting to be a conditional sale by way of mortgage made by the same Abdool Ruhim on the 1st August 1862; and the defendant further fortifies his position by the production of a bond, purporting to be made on 26th August 1863 by Abdool Ruhim, and to pledge the same property to the defendant as security for a debt.

The Lower Appellate Court finds both the instruments put forward by the defendant to be genuine, and decrees that the plaintiff is only to obtain possession upon discharging the encumbrances created by them.

Against this decision the plaintiff appeals specially on the grounds—*first*, that the Lower Appellate Court has assigned reasons for holding the mortgage genuine and valid which are not sufficient in law; *secondly*, that, as the mortgage in question was never registered, while the kubala of the 4th September was so, Act XIX. of 1843 gives priority to the latter, and, therefore, the mortage ought not to have had effect given to it.

We are of opinion that there was ample evidence before the Lower Appellate Court upon which it could find the mortgage genuine; and we see no reason for supposing that it did not consider all the evidence bearing on the point. Therefore we consider the first objection untenable.

We are also of opinion that Act XIX. of 1843 does not apply to a case where enjoyment has actually taken place under the first deed.

Under these circumstances we dismiss the appeal with costs.

The 4th September 1865.

Present:

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

Chowkeedaree Chakeran lands—Onus probandi.

Case No. 1885 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 31st March 1865, modifying a decision passed by the Moonsiff of that District, dated the 31st August 1863.

Mooktakeshee Debia Chowdhrain (Plaintiff), *Appellant,*

versus

The Collector of Moorshedabad and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Tarucknath Sein* for Appellant.

Baboo Kishen Kishore Ghose for Respondents.

Long possession of lands as chowkeedaree chakeran affords ground for the presumption that the lands were set apart as such at the Decennial Settlement.

The *onus* of proof that the lands were the private lands of the zemindar not set apart at the Decennial Settlement as chowkeedaree chakeran, is on the zemindar.