that the *ladavi* not having been proved, the plaintiff can have no title to so much of the holding as belonged to the persons who executed that *ladavi*; (3) that the Lower Appellate Court has come to no finding as to whether the plaintiff was in possession within 12 years of suit under the pottah put forward by him; and (4) that as the plaintiff's possession under an ijarah is admitted by the defendant, the Lower Appellate Court's finding is incomplete and does not dispose of the question of limitation.

With respect to the inadmissibility of the pottah on account of its being unstamped, we would refer to the judgment of the late Chief Justice, Sir Barnes Peacock, in Volume XI, Weekly Reporter, page 520.—He says:—"I am of opinion that in regard "to the want of stamp, it is not a ground "for reversing the decision, because I think "that the error, if any, of receiving the do-"cument without a stamp did not affect the "merits of the case or the jurisdiction of "the Court, although it might have affected "the Government revenue."

It has been pressed on us that the admission of the pottah, which is the foundation of the suit and which under the stamp law is said to be inadmissible, really does effect the merits in the present case, inasmuch as if this were withdrawn from the record there is no saying at what conclusion the Courts below would have arrived.

We think that the provisions of the stamp law by which unstamped or insufficiently stamped documents are excluded were never intended to create or put an end to the rights of the parties to a suit, but primarily in the interests of the Government revenue. It is perfectly immaterial as between the parties to a suit whether a certain document does or does not bear a certain mark which goes to show that the Government dues had been paid. The only thing which is necessary to be seen as between them is whether the document is genuine or not. No authority has been shewn to us against the decision quoted above. On the other hand, several other cases may be quoted as following the judgment in Volume XI, and we have no doubt that, as frequently held by this Court, the question of admissibility of a document is one for the first Court to decide, and that question having been decided by the first Court the decision should be final.

On the *second* point, *viz.*, the *ladavi* not having been proved, we think this question is perfectly immaterial. The pottah is in the possession of the plaintiff. The Judge has found that the pottah is genuine; he has found that the plaintiff held possession under that pottah, and under such circumstances it becomes unnecessary to enquire as to how the possession of the whole of the property passed to the plaintiff.

As to the objection that the finding of the Judge below is incomplete, we have only to remark that the Judge has considered at great length the several objections urged before him, and that he winds up in the following words:—"It is needless to "recapitulate all the arguments used by the "Subordinate Judge. I need only say that I agree with him in all material points." Further "I see no other way of accounting "for the plaintiff's possession at any time "otherwise than by the supposition that his "pottah is genuine, or of accounting for the "cessation of that possession otherwise "than by the disturbance against which he "has laid this suit." In other words, the Judge says that the plaintiff had possession; that he produced a pottah under which he said he was in possession, but that the defendant alleged that he held under a *mustajiri* title which however was not proved; and therefore it must be taken that the plaintiff was in possession under the pottah and that alone, and that possession lasted until such time as the defendant dispossessed him as set forth in the plaint. This, it is admitted, brings the case within time, and we think therefore that the special appeal must be dismissed with costs.

The 1st June 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Reviews—New evidence.

Case No. 200 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 17th January 1871, *affirming a decision of the Moonsiff of Arariah, dated the 2nd September* 1870.

Omrao Thakoor (Plaintiff) *Appellant,*

versus

Gocool Mundul and another (two of the Defendants) *Respondents.*

Baboo Tarucknath Sein for Appellant.
No one for Respondents.

A Moonsiff's order granting a review without proof that the new evidence tendered was not available before was held to be illegal, as well as the decision of the Lower Appellate Court confirming that order.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case must be reversed.

The ground pressed upon us is that the first Court admitted a review without complying with the provisions of Section 376 Act VIII of 1859, in respect of being satisfied that the new evidence on which the application was admitted was not within the petitioner's knowledge or could not be adduced by him at the time when the decree was passed, and the Lower Appellate Court has acted illegally in confirming the judgment of the first Court passed on that review.

The first order passed by the Moonsiff on the application for review was that it should be put up with the record. With that application no new evidence was tendered, but it was subsequently. Now, no deposition or affidavit was taken from the defendant or from any one representing him or with knowledge of the facts. No enquiry was made by the Moonsiff as to whether the new evidence tendered was not available before the decision of the case. The application for review was admitted by the Moonsiff without a due regard to these provisions of the law, and the former judgment which was in favor of the special appellant reversed on such review.

The Lower Appellate Court has affirmed the judgment of the Moonsiff without meeting the objection specifically taken by the special appellant, *viz.*, that it was requisite under the law that proof should be given that the new evidence tendered was not available before.

The following cases have been cited by the special appellant in support of his contention that the judgments of the Lower Appellate Courts are erroneous in respect of the above particulars :—Weekly Reporter, Volume II, page 174 ; Weekly Reporter, Volume X, page 432 ; Weekly Reporter, Volume XII, page 536 ; Weekly Reporter, Volume XIV, page 26 ; and we think that the decisions cited support the contention. No one appears on the other side to contest the special appeal, and under the circumstances,—looking specially to the terms of Section 376 which clearly prescribe that a party tendering new evidence as a ground of review should shew that the new evidence " was not within his knowledge or " could not be adduced by him at the time " when the decree was passed," and to the fact that there is no proof of the above particulars in the present case,—we think that the order passed by the Moonsiff admitting the review was illegal, and the decision of the Lower Appellate Court confirming that order equally so.

In this view, we reverse the judgments of the lower Courts and decree this appeal with all costs.

The 1st June 1871.

Present :

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Contribution—Use and occupation.

Case No. 192 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 29th August 1870, *reversing a decision of the Moonsiff of that District, dated the 24th February* 1870.

Gudadhur Chowdhry (Plaintiff) *Appellant,*

versus

Shama Churn Mitter (one of the Defendants) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.
Baboo Issur Chunder Chuckerbutty for Respondent.

The land of a jote jumma belonging to plaintiff and one *D* having been attached in satisfaction of a joint decree for arrears of rent, plaintiff deposited the entire amount of the decree. He then sued *M*, who had obtained *D's* share of the jote, for contribution on the ground that *M* was in use and occupation :

Held that the case against *M* was not met by the plea that he was not a party to the suit in which the decree was obtained.

Bayley, J.—We think in this case the judgment of the Lower Appellate Court must be reversed, and the judgment of the Moonsiff affirmed, with this exception that the decree should in the first instance go against the defendant, Shama Churn Mitter, and not as a lien against the jote, which the Moonsiff directs.