Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajah Leelanund Singh v. *Maharajah Moheshur Singh, on his decease Maharajah Lukhmissar Singh, the Government of India, and others, from Bengal; delivered 26th May*, 1865.

Present:

LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THE outline of this case is as follows:—At the time of the Perpetual Settlement, the large Zemindary known as the Kurruckpoor Mehals in Zillah Bhagulpoor was settled with Maharajah Kadir Ali Khan, who in or before 1790 was in possession of it. It consisted of twenty-six pergunnahs, of which five were alleged to be and were then held as La Khiraj. Of these alleged La Khiraj Pergunnahs it is only necessary to specify Pergunnah Kurruckpoor Havelee, which has throughout the argument before us been conveniently called Havelee. Of the Malgoozaree or revenue-paying Mehals, it is sufficient to name Pergunnahs Suhrooe, Sukrabadee, and the most important of all, Purbutparah, which was subdivided into Tuppahs Lodhwah and Semroum, Daygee, Mullia, and Bhudra.

The settlement above-mentioned was made, as in other cases, by pergunnahs, without any survey or measurement of the lands comprised in them; and as this vast Zemindary included a great deal of wild, uncultivated mountainous and forest land, it may be supposed that, however well ascertained may have been the boundaries of the whole, those of its component parts, or pergunnahs, *inter se*, were not very clearly defined. The effect of the settlement was to fix

permanently and for ever the revenue payable in respect of the Malgozaree, or, as they are termed in these proceedings, the Nizamut Mehals, and to leave the La Khiraj Mehals free from the payment of revenue, but subject to the right reserved to the Government by Regulation XIX of 1793, to resume and assess the lands, should the tenure, under which they were claimed to be held La Khiraj, thereafter be found to be invalid. Kadir Ali Khan on his death was succeeded by his eldest son Ikbul Ali Khan, who also died some time before 1836, and was succeeded by his brother Ruhmut Ali Khan.

In 1836 the Government impeached the La Khiraj title of the Zemindar. Pergunnah Havelee was resumed and separately settled. The proceedings which resulted in the settlement of it will hereafter be fully considered. At present, it is sufficient to say that they began in 1836, and continued until the 9th of April, 1844, when a temporary settlement for twenty years was made with the Maharannee Wujhoonissa, to whom the interest of her husband Ruhmut Ali Khan had been transferred.

Pending the proceedings for the resumption and settlement of this Pergunnah, Ruhmut Ali Khan suffered the Government revenue on the Nizamut Mehals to fall into arrear, and these Mehals were accordingly sold by public auction for such arrears, and on the 11th of August, 1840, were purchased by the Appellant's father, Rajah Bidianund Singh, and another person, who afterwards transferred his share to Bidianund Singh. This sale of course put an end to the unity of ownership of the Nizamut Mehals and of Havelee. Bidianund Singh thenceforward being the Zemindar of the former, with all the rights possessed by the original Zemindar at the date of the Perpetual Settlement ; whilst the latter, subject to the rights of Government in respect of the revenue to be assessed thereon, continued to belong to Ruhmut Ali Khan, and after him to Wujhoonissa.

In 1845, Wujhoonissa having failed to pay the revenue assessed on Havelee, that estate was also sold for these arrears, and was purchased by Maharajah Rooder Singh, the grandfather of the present Respondent, Lukhmissar Singh, on the 5th of November, 1845.

The estates having thus become separate, boundary disputes took place between the owner of the Nizamut Mehals or his tenants on the one side, and the owner of Havelee or her tenants on the other. It may be necessary hereafter to refer more particularly to the proceedings to which these disputes gave rise. At present, it is sufficient to say that the controversy was continuing during the proceedings of the Government surveyors engaged in making a topographical survey of the Zillah Bhagulpoor in 1846 and 1847.

It appears to have been the duty or practice of the officers employed in this survey to lay down the boundaries of estates or other divisions of land, where there was any dispute concerning them, according to the evidence which they might find of the actual possession of the lands. In the present case they had to deal with a controversy touching the boundary line between Havelee and Pergunnah Purbutparah, and the other Nizamut Mehals contiguous to it. The owner of the latter, on the one hand, insisted that this had been conclusively determined at the time of the settlement of Havelee by a map prepared after actual survey and admeasurement by a Captain Ellis, under the instructions of the settlement officers. The owner of Havelee, on the other hand, disputed the accuracy of Captain Ellis's map, if it purported to be a map of the entire Pergunnah Havelee, and questioned the intention to include the whole of Havelee in that map. The officers of the survey, relying for the most part on the evidence which they had, or thought they had, of actual possession, came to a conclusion adverse to the Appellant's ancestor, and prepared the map known in the proceedings as Captain Sherwill's map, by which upwards of 175,000 beegahs of land in excess of that comprised in Captain Ellis's map was attributed to Havelee, and taken out of the Nizamut Mehals, as laid down in that map. The effect of these proceedings was to leave somewhat doubtful the question whether this land was included or intended to be included in the settlement of 1844, or whether it was a towfeer or surplus which the Government was still entitled to assess *de novo*.

Some further proceedings afterwards took place in the Foujdary Courts and elsewhere, touching the right to the possession of this land; but the effect of

these proceedings was to remit the Appellant, or his father Bidianund Singh, to a regular suit, in which alone the title could be litigated.

The suit out of which this Appeal has arisen was accordingly instituted by the Appellant on the 5th of June, 1851. Its object is to recover as part of the Nizamut Mehals the 175,000 beegahs of land laid down by Sherwill's map as within Havelee, in excess of the land attributed to Havelee by Ellis's map; but the Plaint divides this land in certain proportions between certain specified Mouzahs, the names of which occur in the lists of the villages, comprised in Pergunnahs Purbutparah and Sukrabadee, which were prepared at the time of the Perpetual Settlement, or shortly subsequent to it. The Defendants to the suit, the Respondents to this Appeal, are the Government, Maharajah Lukhmissar Singh, and some of his tenants, and they insist that the 175,000 beegahs of land in question properly belong to Havelee.

The suit was heard first by the Principal Sudder Ameen of Bhagulpore, who by his Decree dated the 9th of July, 1855, dismissed the suit on the ground that the Plaintiff had failed to establish a title to recover the lands in question. This decision was based upon proceedings of the Government surveyors, and seems to imply that the land was Towfeer.

On appeal to the Sudder Dewanny Adawlut, that Court, by a majority of two Judges to one, confirmed the decision of the Principal Sudder Ameen, but did not adopt its grounds. The two Judges appear to have held that something in excess of the lands comprised in Captain Ellis's map was included in the Havelee settlement, that the extent of that excess was undetermined, and that it lay upon the Plaintiff to show what he was entitled to recover, which he had failed to do. The dissentient Judge, on the contrary, held that no part of the land in dispute was included in the settlement of Havelee, that therefore, *ex necessitate*, the whole must be taken to form part of the contiguous Nizamut Mehals, and that the Plaintiff had established his title to recover it.

According to the view, therefore, both of the affirming Judges and of the dissentient Judge the decision of this suit depended on the question whether the

land claimed, or any, and if any what, defined part of it was included in the Havelee settlement; and we think that this was a correct view of the case. It was incontestable that the land in question formed part of the Zemindary which by the perpetual settlement was assured to Kadir Ali Khan; but that Zemindary consisted partly of the Nizamut or revenue-paying Mehals, in respect of which the revenue payable by the Zemindar was then finally settled, and partly of the Mehals, including Havelee, which were alleged to be La Khiraj, and on which therefore no revenue was assessed. The land in dispute is so situated that it must necessarily belong either to Havelee or to the contiguous Nizamut Mehals; but the perpetual settlement unfortunately omitted to define the boundary line between Havelee and these Mehals; had it done so the question in the cause could not have arisen, since, we need hardly say, no Court would disturb what had been fixed by the Perpetual Settlement. The resumption of Havelee afforded a fresh occasion for the definition of these boundaries, even whilst both Havelee and the Nizamut Mehals belonged to the same owner; because Government, by virtue of the resumption, acquired the right of assessing revenue upon all that lay within the boundaries of Havelee, whilst it had no right to assess any fresh revenue upon a single beegah of land within the Nizamut Mehals. Subsequent events severed the ownership of Havelee from that of the Nizamut Mehals, and the question of boundary then arose in this suit not as a question of revenue between the Government and a Zemindar, but as one of title to land between the Zemindars and proprietors of two contiguous and separate estates, the Nizamut Mehals and Havelee.

In dealing with this question it must, as we have said, be assumed that so much of the land in dispute as was not included in Havelee belongs to the Nizamut Mehals; and in considering what was included in Havelee the Court below could only deal, as we upon this Appeal must deal, with the Havelee Settlement as it stands. For the purposes of this suit that settlement must be considered as valid and subsisting. If the boundaries of Havelee ascertained by it are at all capable of being corrected,

they certainly cannot be corrected in a suit of this nature. All that we can determine in this suit is whether, according to the true construction and effect of the Havelee Settlement taken as it stands, the whole or what part of the lands in question belongs to Havelee, or the whole or what part of them is included in the lands which were the subject of the Perpetual Settlement.

In considering this question three views of this Havelee Settlement present themselves for our consideration.

The first is that it included, and was intended to include, the whole of Pergunnah Havelee, and that all which it did include is within the limits of Ellis's map. The second is that it included, and was intended to include, the whole of Pergunnah Havelee, but that some portion of what it did include lies beyond the limits of Ellis's map, and is to be found in the district of which the ownership is now in dispute. The third is that it *did not include* the whole of Pergunnah Havelee, but that either from accident or design, the large district in question, or some undefined portion of it, was omitted from the settlement, as well as from the map, and is now what in these proceedings is called a Towfeer or surplus.

We proceed therefore to consider the intention, extent, and effect of the Havelee settlement proceedings with reference to these views.

The first of these proceedings is that of the 1st of July, 1836 (p. 98). By it Mr. Travis, the Deputy Collector, on grounds which for the purposes of this suit must be deemed sufficient, decided against the claim of Ruhmut Ali Khan to hold Havelee, and the other four pergunnahs to which we have before referred La Khiraj, and affirmed the right of Government to resume and assess them.

There was an Appeal against this order, pending which the Government, not being able to effect an arrangement with the Zemindar as to the intermediate collections of Havelee, assumed the management of it by a Tehsildar of their own appointment (p. 183). The Appeal was dismissed on the 30th of November, 1837, by a special Commissioner acting under Regulation II of 1828 (p. 185), and the title of Government to assess the whole of Havelee thus became complete.

It then became the duty of the Deputy Collector, or the Settlement Officer, under Regulation II of 1819, section 21, clause 4, "to ascertain the limits of the land" (*i.e.*, of the whole of Pergunnah Havelee), and to fix the assessment; and various proceedings were had with this object. Most of these proceedings are found *in extenso* in the first volume of the printed record, and we must refer to the more important of them.

On the 9th of April, 1838 (p. 123), Mr. Farquharson, described as the Superintendent of the Khas Mehals, but acting as the Settlement Officer in the case, held a proceeding as to Havelee. After reciting that the *Surhudbundee* and *Rookbabundee* (the specifications of boundaries and area) were not with the record, it ordered Ruhmut Ali Khan to file a list of the villages of Havelee, and also of Pergunnahs Suhrooe, Sukrabadee, Singhool, and Luckhunpore, Pergunnah Purbutparah (these being doubtless assumed to be the contiguous Nizamut Mehals), accompanied by a Surhudbundee thereof. It also ordered the Putwarries to file the Surhudbundee and Rookbabundee of their respective Mouzahs. The object obviously was to obtain a definition by metes and boundaries both of the whole pergunnah and of its component villages.

At pp. 124 and 125, we have the actual process issued in respect of Rounuckabad, a principal village of Havelee, under this order, and the return to it. The dates are 17th April and 31st May, 1838.

At p. 350, there is a proceeding of the 14th April, 1838, before Mr. Farquharson. It complains of the omission of a village named Bheembandh, though part of Havelee, and that two other villages have been returned as waste, though in fact they were inhabited. It directs the attachment of Mouzah Bheembandh as far as Koh Marug, Tuppah Dighee, and gives other directions that are not material to the present question. It orders notice to be sent to Ruhmut Ali Khan that no settlement will be concluded with him unless he file correct Jummabundee papers.

On the 11th November, 1838 (page 403), Mootee Lall, the Tehsildar appointed by Government, reported to Mr. Farquharson that two Mouzahs adjoining Bheembandh, one named Goormah, the other

Pakum, were west of Beembandh in the hills, and asked for an inquiry concerning them.

This led to Mr. Farquharson's proceeding of the 23rd of January, 1839 (page 414). In that, after stating that it had come to his knowledge that two villages (there called Tolahs) are situate in Bheembandh, but had not been attached, he directs the issue of a Purwannah to Mootee Lall, ordering him to bring these Tolahs under collection, and to explain why they had not been resumed along with Bheembandh.

At page 143 we have the report of Mootee Lall in answer to this order; it is dated the 8th of April, 1839. It appears to be indorsed on the Purwannah, and reports that after the issue of it Mr. Farquharson had arrived at Kurruckpoor and had given a verbal order to relinquish Mouzah Kormaha (which is obviously the same place as that previously called Goormah), and to have the survey of Kita Bakum (before called Pakum) made with Bheembandh: that afterwards a Purwannah of the 23rd of March, directing a separate survey of Bakum, had arrived, and that accordingly Mouzah Kormaha had been relinquished, and Mouzah Bakum would be surveyed. On this report Mr. Farquharson has indorsed "That this be put up with the record: May 16, 1839."

Intermediately Mr. Farquharson seems to have taken the depositions of Meer Dad Khan, a former Tehsildar of Havelee, and of Bhowanni Lall, described as an inhabitant of Havelee, but Peshkar of Pergumah Purbutparah. The former was taken on the 8th of April, 1839, and is at page 125; the other was taken on the 15th of March, 1839, and is at page 141. They may have conduced to Mr. Farquharson's determination to relinquish Kormaha.

At pages 103, 116, and 118, are detailed measurements of the lands of Mouzahs Rounuckabad, Bheembandh, and Mudhobun. The second alone is dated, and as the date is the 24th of March, 1839, it may be inferred that Kita Bakum, which by the report of the 8th of April is treated as about to be separately measured, was not included in this measurement.

On the 15th of April, 1839, Ruhmut Ali Khan (page 208) presented a petition, which, as we under-

stand it, is confined to Bakum as a Kita or part of his Nizamut Mouzah Bhorebhundaree. He protests against its inclusion in Havelee. The petition seems to have been presented to Captain Ellis, then engaged in surveying Havelee and making his map. He on the 22nd of April, 1839 (page 209), directed a copy to be sent to the settlement officer (Mr. Farquharson), who on the 6th of May, 1839 (also page 209), directs the officer (Ellis) to be informed that the case is pending in that Cutcherry. The decision was adverse, for at page 144 we have a further petition from Ruhmut Ali Khan, which (and as it seems wilfully) confounds Bakum with Kormaha, alleging that the former though relinquished had been separately surveyed by Mootee Lall; that the measurement papers of Havelee are being prepared and Kita Bakum inserted in the English map, and stating that he objects to take attested copies of the English map because Kita Bakum (a Nizamut Mehal) is inserted in it. The order indorsed on this petition is dated the 8th July, 1839, and is that it be rejected.

On the 14th of September, 1839, a summary settlement was concluded by Mr. Farquharson with Ruhmut Ali Khan for one year, *i. e.*, from 1st May, 1839, to 30th April, 1840, and this by a subsequent order was confirmed and extended to April 1841. (See page 183.)

It was during the currency of this temporary settlement that the Nizamut Mehals were sold, and Ruhmut Ali Khan's interest became limited to the resumed Mehals.

It is also probable that during the same period Mr. Beadon began the investigation which resulted in the proposal for a permanent settlement, next to be considered, and that, in aid of that investigation, Captain Ellis, by his proceeding of the 30th of June, 1840 (p. 123), directed "the measurement papers of the Mouzahs of Havelee, filed by the Ameens, which had on comparison with the English measurement papers been found to correspond," to be forwarded to the Superintendent of Khas Mehals.

Mr. Beadon's final settlement proceeding is set forth from pp. 182 to 203, and is dated the 16th of December, 1841. It gives a summary of the former proceedings, and states that "whereas a perpetual settlement of that Mehal (Havelee) was pro-

per, and the Mehal having been surveyed by the Revenue Surveyor (who from the mention of his name in the next paragraph is clearly Captain Ellis), the measurement papers are forthcoming in the office. Hence, after inquiring into the Jummabundee, from the statements and papers of the cultivators and putwarries, a perpetual settlement had been, conformably to Regulation VII of 1822, concluded from the 1st of May, 1841."

The proceeding then details at great length the principles upon which this settlement had been effected. It seems sufficient to state that Mr. Beadon took the area as measured at 123,207 beegahs and a fraction. From this he deducted 60,433 beegahs and a fraction as absolutely jungle, waste, and unculturable, leaving a balance of 62,774 beegahs and a fraction. This again, when subdivided, was found to consist of 18,998 beegahs and a fraction of land actually cultivated, and producing, or capable of producing, rent; and of 43,775 beegahs and a fraction of land which, though not cultivated, he describes as "culturable." The annual revenue derivable from the cultivated land he estimated (see p. 199) at sicca rupees 15,517, to which he added sicca rupees 738 2, the amount of Sayers or miscellaneous revenue (a description of revenue which will require further consideration), making the total revenue sicca rupees 16,255 6. The moiety of this being, when converted from sicca Company's rupees, 8,666 and a fraction, he fixed as the revenue payable perpetually, abandoning all further claim to revenue from either the 43,775 beegahs of culturable or the 60,433 beegahs of unculturable land.

It is to be observed that Bakum (spelt Bakhum) is included in the list of villages, its measured area being stated to be 129 beegahs 19 biswas. It follows, therefore, that whether the Bakum resumed by Mr. Farquharson be in Ellis's map or not (a question hereafter to be considered), its measured area is included in the 123,207 beegahs—the basis of the settlement.

It is further to be observed that there is no trace of Goormah or Kormaha in this or the subsequent Settlement Proceeding.

Again, it is to be observed that the total of the miscellaneous revenue, Sayerat, or cesses, was taken by Mr. Beadon to be sicca rupees 738 2, of which

sicca rupees 576 consisted of rents payable by the lessees of the Sayer Mehal, according to the deposition of Ameen Dad Khan, taken on the 14th of March, 1841, which will be found at p. 316, and the rest consisted of the Sayers returned by the Putwarries and Ameens as specified at p. 198. We may here observe, too, that in the sicca rupees 576 is included an item of sicca rupees 400 payable by Rujjib Ali as farmer of "Ghauts Marug and Kurrailee, &c.," touching which we have also his deposition, taken the 24th of March, at p. 317, and the Ummulnameh of 1248 (1841) at p. 318, a document which may be of some importance with reference to the present inquiry; for whilst it gives the names of various Ghauts, as proposed to be included in the lease to which it refers, it seems to indicate that the lease was to comprise not only such tolls as may be conceived to be leviable from persons passing the Ghauts, but Bunkur, which properly is a right of cutting wood, and Phulkur, a right of gathering fruit—rights indicative of a certain dominion over the soil in a given locality.

On the 16th of September, 1843, Mr. Beadon's proposal of a permanent settlement on this basis was overruled by the Commissioner, who on the 25th of the same month made over the estate to Mr. Joachim Piron to be settled *de novo* (p. 204).

Shortly before this, and on the 13th of June, 1843, the transfer of Havelee from Ruhmut Ali Khan to Wujhoonissa had taken place (p. 205).

Mr. Piron's first step was to ask whether he was to make a new measurement. He was told to test the former measurement; to adopt it if he found it to be correct—to make a new one if he found it to be incorrect (pp. 128 and 129).

Mr. Piron's general report bears date the 20th of June, 1844, and is at p. 203; his settlement proceeding of the same date is at p. 334; the Doul Settlement at p. 134. The Report states that he made a settlement for twenty years with Wujhoonissa, of which the other papers give the details and the principles.

His Report, at p. 204, also states expressly that the measurement which he tested was that completed under Captain Ellis; that he found it cor-

rect in every instance; and that his only objection to the former survey regarded the classification of the various qualities of land and the rates assessed thereon.

The result of Mr. Piron's settlement was somewhat different from that of Mr. Beadon. But it is perfectly clear that both officers dealt with the same measured area—viz., the 123,207 beegahs and a fraction defined by Captain Ellis. Mr. Piron, however, making a somewhat different classification of the lands, fixed the amount of revenue derivable therefrom by the proprietor of Havelee at S. R. 20,678 3 17½. In this he included the sum of S. R. 2,336 8 9¾ for Sayerat, cesses or other miscellaneous revenue. Instead of leaving, as Mr. Beadon had done, free from any direct assessment of revenue 60,443 beegahs of unculturable + 43,775 beegahs of culturable land, making together 103,209 beegahs of land, he excludes from assessment only 4,447 old fallow land, + 35,051 rocks, with jungle, + 42,586 8 4 of jungle, making a total of 82,084 beegahs and a fraction of land free from assessment.

The result of Mr. Piron's proceedings was a settlement with Wujhoonissa for twenty years at the moiety of the gross rental as estimated by him, which, when converted into Company's rupees, amounted to C. R. 11,028 12 10.

The documents by which this arrangement was carried out with her are her petition, her Cuboolyat and Mr. Piron's final order, all of the 9th of April 1844, and at pp. 135, 136, 137. In the Cuboolyat she describes herself as occupier of the entire Pergunnah Havelee, and says 123,186 beegahs and a fraction "of land of the said pergunnah have been taken by me from you under temporary settlement at an absolute sum of C.R. 11,128 12 10, being a moiety of the Jumma, including Julkur, Bunkur, Phulkur, &c."

We stop at this point in order to state the conclusions at which we arrive from the proceedings and documents above referred to, in so far as they do not relate to the Sayers or cesses, or miscellaneous revenue—conclusions which in our judgment are no way affected by what has already appeared, or by what we shall presently state as to these Sayers and cesses or miscellaneous revenue. We are satisfied

from these proceedings and documents that the settlement officers throughout intended to resume and settle and assess the revenues of the whole of Pergunnah Havelee, and that they throughout proceeded on the assumption of the correctness of the survey, measurements, and map made by or under the inspection of Captain Ellis. Looking to the great care and the minute attention which was given to the settlement of this pergunnah, it cannot be supposed that any portion of it was designedly omitted from the settlement; and if any portion of it was omitted by accident, this is not a suit in which the accident can be set right. We think, therefore, that the third view of this settlement, to which we have above referred, may for the purposes of this suit be laid out of consideration, and that no part of the district in question can for any of those purposes be considered as Towfeer, or surplus. We are also satisfied from the evidence afforded by these proceedings that Bakum was included not only in the measured area of 123,186 beegahs, but also in Ellis' map. The objection expressed by Ruhmut Ali Khan in his rejected petition at page 144, to take attested copies of the map because it included, or was about to include, Bakum, is, we think, sufficient to prove this to have been the case.

Again, we are satisfied from these proceedings, and especially from the Report of Motee Lall, at page 143, and Mr. Farquharson's mode of dealing with that Report; and from the absence of all mention of Goormah or Kormaha in the subsequent settlement proceedings, that that village was advisedly relinquished by Mr. Farquharson as part of the Nizamut Mehals, and probably as part of Mouzah Bhorebundharee in Pergunnah Purbutparah.

It may be convenient also here to add, although it has no immediate reference to the foregoing proceedings, that from the proceedings at p. 223, the case of Mouza Ghorakhore appears to have been solemnly decided in favour of the Nizamut Mehals, and that in our opinion the proceedings of the Officers of Survey, at pp. 150 and 167, are not entitled to weight as against that decision. We think, indeed, that the settlement of 1844 affords the only safe criterion for determining what belongs to Havelee, and what to the Nizamut Mehals.

It results from what we have already stated that,

looking at this case without reference to the Sayers, cesses, or miscellaneous revenue, we should have come to the conclusion that Havelee as settled consisted only of the measured area of 123,186 beegahs; that this was all comprised within Ellis' map, and that the Appellant, by showing this, had, at least, shifted the burthen of proof, and established a good *primâ facie* title to recover the whole of the disputed territory, but it certainly cannot be denied that what appears upon the record before us as to these Sayers or cesses, and this miscellaneous revenue, raises a very serious question whether some territory in excess of the measured area, and beyond the limits of Ellis's map, does not belong to Havelee, and was not included in the settlement of it. It is necessary, therefore, to see how the case stands as to these Sayers or cesses, or miscellaneous revenue. By Mr. Beadon's settlement the revenue derived from these sources is stated to amount to S. R. 738 2; and we have already shown how that sum was made up. By Mr. Piron's settlement the Sayers or cesses are stated as amounting to 2,336 rupees 8 annas 9¾ pice, made up partly of the sums returned by the Putwarrees and Ameens as the Sayerat of their respective villages, and partly of sums aggregating S. R. 1,116, which were not so returned; this last-mentioned item being thus entered in the settlement proceedings at p. 431:— "Bunkur and Boondee Mehal, besides the Putwarry's paper, whatever came to light by the depositions of farmers and persons informed, and by the perusal of Pottahs, &c., S. R. 1,116." We have here therefore some, at least, of these Sayers or cesses described as Bunkur and Boondee Mehals; and other parts of this voluminous record contain the same or a similar description of them. We are of necessity, therefore, led to inquire what these Bunkur and Boondee Mehals really were; and to some extent, at least, the evidence leaves no doubt upon this point.

Mr. Piron has himself told us (page 342) that the sicca rupees 1,116 was made up of sicca rupees 785 inserted in the Pottah of Peer Khan Soobahdar; of sicca rupees 251 inserted in the deposition of Rajee Singh, son of Durshun Singh; and sicca rupees 80 inserted in the deposition and Pottahs of Posun Pasee and others.

Now, Peer Khan Soobahdar's examination, which seems to have been taken on the 20th of January, 1844, is at p. 345. He is described as farmer of Mehal Bunkur and Boondee Koh Marug, and Kurrailee, &c., Pergunnah Havelee. He professes to hold, but in the name of his son Wahid Khan, Ghauts Marug, Kurrailee, Tabawee, Khuru Khataun, Hursa Poteeah, Burramupea, Shakole, and several other hills and ghauts, for the names of which he refers to the Pottah, at a rent of S. R. 785, and to pay the rent to Ruhmut Ali Khan.

Again, at p. 346 we have the examination of Rajputtee Singh, the son of Durshun Singh, taken on the 30th January, 1844, from which and the proceeding of Mr. Piron of the 26th of that month, at p. 347, we learn that Durshun Singh was farmer of Mehal Bunkur Ghaut Koolurhea, attached to Mouzah Mudhoobun, Pergunnah Havelee; that he during the subsistence of his lease paid a jumma of S.R. 251 to Ruhmut Ali Rhan, who on the expiration of the lease in April 1844, was about to bring that Bunkur Mehal under his personal collection.

The S. R. 80 "inserted in the depositions and Pottahs filed by Posun Pasee and others" we have been unable to trace in the Record.

Again, Mr. Quintin's letter of the 19th October, 1848 (see p. 249), refers to a variety of ghauts as included in Piron's settlement; and so far as we can see they can have been so included only under the head of Bunkur and Boondee Mehals.

Again, it is clear upon the evidence that ghauts Marug and Kurrailee, and possibly other ghauts held by Peer Khan Soobahdar in the name of Wahid Khan at the date of Mr. Piron's settlement, were, at the date of Mr. Beadon's settlement, held by Rujjib Ali, and, indeed, that the whole of the property, whatever it was, the revenue of which Mr. Beadon estimated at S. R. 576, is included in the property of which the revenue was estimated by Mr. Piron at S. R. 1,116.

It is clear, therefore, that Mr. Piron's settlement did include under the head of Bunkur and Boondee Mehals the revenue coming from certain ghauts, of which the most prominent are Ghauts Marug and Kurrailee, and that Mr. Piron was right in including rights in these ghauts as part of the assets of Havelee is, we think, almost proved to demonstration by the

village papers in the second and third volumes to which Mr. Melvill directed our attention.

Some of these are produced by the Appellant, others by the Respondent, and the two classes show, with a correspondence in minute details that proves their genuineness, that long before the resumption the proceeds of these ghauts were uniformly treated by the owners of the whole Zemindary as part of the revenue of the La Khiraj Mehal Havelee. Against this evidence it is vain to set the award of Ruhmut Ali Khan after the date of the resumption at p. 217, or the Kuboolents pp. 261 to 264, or the occasional entry in the village accounts of Morkhut as Marugkhat. They would at most support the theory that there may have been more than one ghaut of the same name, or different rights resulting from the same Ghaut; the two former classes of evidence may, indeed, more plausibly be referred to the desire, after the resumption, to claim these ghauts for the Nizamut Mehals, which, until the sale of those Mehals, it was Ruhmut Ali Khan's interest to do.

It must be taken, then, that Mr. Piron not only included, but properly included, the revenue arising from Ghauts Marug, Kurrailee, and other ghauts in his settlement: but then the question is, what was this property; and does the ownership of it imply the ownership of any land in excess of the measured area, and beyond the confines of Ellis's map?

There is much evidence bearing more or less directly upon this point. There is the Ummul-nameh, to which we have already referred, and there are the various suits and proceedings arising out of the long continued litigation concerning these ghauts.

The earliest of these proceedings which we find is at p. 393, under date the 12th of March, 1842. It was before the magistrate (*i.e.*, in the Criminal Court) under Act 10 of 1840, and arose out of the alleged forcible dispossession of Rujjub Ali, the farmer under Ameer Buksh, of Ghaut Bhoondee, and Koh Marug, &c., by Munniar Rae claiming the same subjects under a Pottah granted by Ruhmut Ali Khan, in his capacity of Zemindar of the Nizamut Mehals. Bidianund Singh intervened in the suit, objecting that it was brought in collusion with the former proprietor of the Nizamut Mehals,

Ruhmut Ali Khan. This may have been the case, but the very objection shows that there was then a dispute whether the parcels in Rujjub Ali's farm, or some of them, belonged to Havelee or to the Nizamut Mehals. The decision as to possession was in favour of Rujjub Ali.

The proceeding of the 24th of March, 1841 (p. 321), before Mr. Beadon, shows that during the investigation which led to his settlement there were disputes between the auction purchaser and the owner of Havelee touching certain stone quarries stated to be with the hill Mar and part of the Boondee Mehal. The Report of the 21st of September, 1841, (at p. 321), was obviously made in answer to a reference made in some suit arising out of the same dispute touching these ghauts, which we have been unable to trace. It shows that as early as the 21st of September, 1841, Mr. Beadon had included the ghauts held by Rujjub Ali in the settlement of Havelee.

The question whether these ghauts belonged to Havelee or to the Nizamut Mehals continued to be litigated in one shape or another during the whole period which elapsed between the dates of the settlement by Mr. Beadon and that by Mr. Piron.

One instance is the suit of Kishna Tewarry, of which the final proceeding is that of the 12th of June, 1845, which gives the history of the whole litigation (pp. 330 to 332). It began with a summary suit brought before the Collector by the Naib of the auction purchasers of the Nizamut Mehals (we presume in their name) against the plaintiff for rent. The Collector has under the regulations no jurisdiction to entertain such a suit unless the relation of landlord and tenant subsists between the parties. He, nevertheless, made a decree against Kishna Tewarry for the sum sued for. Thereupon Kishna Tewarry, alleging that he was not the tenant of the purchasers of the auction Mehals, but a subtenant of the owners of Havelee, brought his suit in the Civil Court (the Moonsiff's) against Bidianund Singh to quash the Collector's Decree as made without jurisdiction. The Moonsiff decreed in his favour. There was an appeal to the Principal Sudder Ameen, who was against him. This was followed by a special appeal to the Sudder Dewanny Adawlut, which remitted the cause back to the Principal

Sudder Ameen, with directions to try the proprietary right. This protracted and animated litigation, ostensibly for a sum of less than 7 rupees, was obviously made a mode of trying the question of title between Bidianund Singh as the purchaser of the Nizamut Mehals, and first Ruhmut Ali Khan, and afterwards Wujhoonissa (each of whom intervene in the suit as an objecting party), as the owner of Havelee. The proceeding (pp. 331 and 332) shows that the real issue was whether certain subjects as to which all parties were agreed, including Ghauts Marug and Kurrailee, belonged to Havelee or to the Nizamut Mehals. The proceeding and report of the 9th December, 1843 (pp. 328, 329), showing that Ghauts Marug, Kurailee, &c. were included in Mr. Beadon's settlement, were before the Court. The decision was that the Moonsiff's Decree should be upheld, and that it was impossible to determine the proprietary right except in a regular suit, in which the two claimants should be Plaintiff and Defendant. Not the least important part of this proceeding is that Bidianund Singh, in his answer in the suit, alleged that the ghauts did not appertain to the rent-free Pergunnah Havelee, *that the Revenue Surveyor had excepted them from the measurement.* The objectors do not contest this last proposition, but insist that they are attached to Havelee, and do not belong to Purbutpurah. Both sides, then, seem to admit that the subject of dispute was beyond the measured area and the confines of Ellis's map. There are similar decisions to the above in other suits at pp. 155, 157, and 359. The last is as late as the 15th of July, 1847.

Another instance of litigation involving the same issue is that in which Syud Reaz Ali, claiming as farmer of Tuppah Lodwah, was the suing party. By a proceeding of the 20th of November, 1843 (p. 323), the Collector of Monghyr, before whom this person had brought a summary suit to recover rent alleged to be due from one Omachurn, then an occupier of part of the Boondee Mehal, the Defendant having pleaded that the property in respect of which he was sued was part of Havelee, and had been settled with Ruhmut Ali Khan, called for the Settlement Proceeding, and, in its absence, for a report from the Collector of Bhagulpore whether Mehal Boondee of Ghauts Kurailee and Komaruk

(obviously the same as Koh Marug) was comprised within the Settlement rights of Ruhmut Ali Khan, or was appended to any other Mehal.

At p. 322 there is a report which was apparently made in answer to this requisition, though there is an inaccuracy in the printed date. It confirms the fact of the settlement as alleged by the Defendant. On this coming in, the suit was finally disposed of by Mr. Vansittart, the Collector (p. 326), who dismissed the suit as one which he was incompetent to try, with liberty to the Plaintiff to sue in the Civil Court, if so advised. By this proceeding, it appears that Wahid Khan, the then farmer of Ghauts Marug, Kurailee, &c., under Havelee, had intervened in the suit against his sub-tenant.

Again the proceedings of the 11th of November, 1843, at p. 324; those of the 9th of December in the same year, pp. 328 and 329; and the proceeding of the 19th of March, 1844, at p. 327, all point to the conclusion that during the investigation which led to the settlement of Mr. Piron, Meaz Reaz Ali claiming title under Bidianund Singh, if not Bidianund Singh himself, was unsuccessfully resisting the inclusion of the Bunkur of Ghauts Maruj, Kurailee, &c., in the settlement of Havelee. The proceeding of the 11th of May, 1844, p. 348, is also some evidence of this.

At p. 395, it appears that Peer Khan Soobahdar delivered over possession of Ghauts Marug, Kurailee, and the other ghauts comprised in his farm, to the purchaser of Havelee at the sale for arrears of revenue in November 1845, or attorned as tenant to him.

These contentious proceedings certainly afford a strong inference that Ghauts Marug, Kurailee, and others which were included in the settlement were something beyond the limits of the measured area and Captain Ellis's map. It is impossible to read them without believing that the parties knew well what they were disputing about, and that each was claiming the same things. It is not probable that these things were within the measured area. Bidianund Singh could hardly push his pretentions so far as to claim anything within that area. On the contrary, as we have seen in Kishna Tewarry's case, his contention was that the things claimed were beyond the measured area, and therefore belonged

to him, and the opposite party seems to have admitted the fact and denied the consequence. Had one of the parties been claiming a ghaut in one part of a mountain range, and the other insisting on his right to retain a ghaut of the same name in another part of the range, it is inconceivable that there should be no trace of such a mistake in the pleadings of the parties, the reports of the Collectors, and the judgments of the Courts. In truth, the mention of the farm sometimes of Rujjib Ali, sometimes of Wahid Khan, in these proceedings, almost establishes the identity of the subject in dispute with the subject of the settlement.

The proceedings of the officers employed in the topographical survey also bear upon this point.

Of the reports of Talib Kurreem, p. 361, and Syud Hossein, p. 362, both in answer to the petitions from Bidianund Singh and the orders thereon, it is sufficient to say that if they have no other value, they at least prove that when these persons passed from admitted portions of Pergunnah Purbutpara in the course of their survey into the disputed territory, they were met by claims on the part of Roodur Singh and his tenants; and a *bonâ fide* contention whether the land on which they stood, which they went to survey, and as to the locality whereof there could be no mistake, belonged to the Nizamut Mehals; or, as appertaining to some of the ghauts in question, was part of Havelee.

Then came the proceeding of Mr. John Brown of the 29th of December, in which both the parties were in presence (p. 240). Mr. Brown's conclusion is no doubt against the view contended for by the Respondent that the ownership of the revenue of these ghauts imports the ownership of land in excess of the measured area, but his proceeding sufficiently shows that what the parties were claiming was in the disputed territory; one witness at least (Lushkurree Lall) p. 242, connects the property claimed with the former holding of Soobahdar Khan; and though Mr. John Brown (p.246) in his eighth reason, suggests that the Ghauts Marug and Kurrailee, that were settled, are within the measured area, he does not point out where they are situated. Nor was there any suggestion on the part of the opposite party that Roodur Singh had shifted the locality of the property, so long in dispute between Havelee and the

Nizamut Mehals. Mr. Brown's decision seems to have been over-ruled by Mr. Quintin, mainly on the ground that it proceeded on his construction of the settlement without regard to the evidence of possession (pp. 170 and 249).

Then followed the proceeding of Surfraez Ali, of the 29th of December, 1847, pp. 160 to 167, in which there may be some false reasoning as to some of the points before him; but which clearly establishes that the ghauts there claimed as comprised in the settlement of 1844 were the ghauts of those names in the disputed territory; and were sworn to by Soobahdar Khan, who seems to have ceased to have any interest in the question, to be the ghauts that were comprised in his lease. It seems very difficult to question the finding of this officer, making a local investigation, that the identity of the ghauts claimed with those settled was made out.

Again, Captain Sherwill was an European officer of rank and of scientific reputation. He is at least entitled to credit for knowing his own business of topographer. He seems to have come by another road to the same conclusion as the Ameens, viz., that a large hilly district belonging to Havelee, and comprising these ghauts, had been omitted from Ellis's map, p. 389. He may be no authority touching questions of property, but he must at least be taken to have laid down accurately in his map the positions of the ghauts known in the district as Marug, Kurailee, and by other names, about which the parties were disputing before the Ameen. His personal examination of the district is recorded in Mr. Quintin's final proceeding of the 24th of June, 1848, at p. 171. On the other hand it is to be observed that Captain Ellis's map does not profess to fix the sites of these ghauts. Their existence within its boundaries is mere matter of speculation suggested by the ingenious and able argument of the Attorney-General, who did not attempt to point out precisely where they were situate.

This evidence, however, seems to us to point for the most part rather to what was claimed as belonging to Havelee than to the nature and character of the Bunkur and Boundee Mehals above-mentioned, and of the revenue arising from the Ghauts, of which, in part at least, they consisted; and certainly it does not satisfy us that Havelee, if entitled to any

part, was entitled to the whole of the land in question in right of these Bunkur and Boundee Mehals and Ghauts. It is to be remembered that we have here to deal with a tract of land of enormous extent surrounded by Havelee and other Pergunnahs, and it is not easy to suppose that so large a tract of land should have escaped the attention of Captain Ellis if the whole of it belonged to Havelee at the time of its being resumed; neither can we easily suppose that this large tract of land could have been intended to have been included in the Havelee settlement under the description of Sayers and cesses, when we find that other land of precisely the same quality and character was in that settlement described as land. We find, too, that the officers of the survey have, as we have already pointed out, given to Havelee more than in our opinion belongs to it, and looking to the whole of the evidence in the case we cannot see our way to conclude judicially that they have been right in giving to it the rest of the land in question.

We agree, indeed, with the majority of the Sudder Judges that the Appellant has failed to prove that no part of the disputed territory was included in the settlement, and that he has failed to prove by independent evidence his right to recover the Mouzahs specified in the Plaint, but we cannot think that they were right in determining the case upon that mere failure on his part to support the burthen of proof cast upon him. Their judgment is not like one in ejectment under the old procedure; it is as final and conclusive between the parties as an adjudication on the merits would be. And its effect, as we have shown, is to give to Havelee some things which on the evidence we think belong to the Nizamut Mehals.

In these circumstances the case, we think, is one which called for further inquiry, but in saying this we by no means mean to intimate that the Appellant can be relieved from the burden of proof. On the contrary, we think that there has been so much of possession on the part of Havelee that the burden of proof must still rest upon the Appellant.

For the reasons which we have given, we think that this Decree cannot be supported in its integrity, and the order which we shall humbly recommend Her Majesty to make upon this appeal will be,—

To reverse the Decree, but without prejudice to any question which may arise upon the inquiries to be made as after directed ;

To declare the Appellant entitled to the Mouzahs Gourmahee and Goruckpore, and the lands comprised therein and belonging thereto, and to all such other parts of any of the lands in question in the suit as are not included in the settlement of Havelee ;

To declare that the settlement of Havelee comprises only the measured area of 123,207 beegahs, and so much of any of the land in dispute as upon the inquiries after directed may appear to belong or be properly attributable to the Bunkur and Boondee Mehals in the pleadings mentioned, or to the Ghauts, of which the same in part consist ; and that the rights of Havelee in respect of Bakum do not extend beyond the 129 beegahs and 19 biswas mentioned in Beadon's settlement, and which are included in the 123,207 beegahs;

To inquire what is the nature and character of the Bunkur and Boondee Mehals, and of the Ghauts comprised therein respectively which are included in Piron's settlement, and are therein estimated at S. R. 1,116 ; and whether the same, or any, and which of them included any, and what, part of, or any and what right or interest in the land in question in this suit ;

To declare that so much of the land in question in this suit as may upon such inquiry appear to be comprised in the said Bunkur and Boondee Mehals or Ghauts belongs to Havelee, and that the Appellant is entitled to recover the residue of the land in question, and to direct the Court to proceed in the suit as upon the result of such inquiry may appear to be just ;

To direct any costs of the suit already paid to be refunded, and the Court to deal with such costs, and all other costs of the suit, including the costs of this Appeal, as may seem just, having regard to the declarations aforesaid, and to the result of the said inquiry ;

To declare that this Order is to be without prejudice to any proceedings which may hereafter be taken for the settlement of Havelee.