Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Alimuddi Howladar and others v. *Babu Kali Krishna Thakoor, from the High Court of Judicature, at Fort William, in Bengal; delivered February 22nd*, 1884.

Present:

LORD BLACKBURN.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

IN this case the Plaintiff, who may be conveniently hereafter called the landlord, was the superior owner of certain chur-land, which was held by the Defendants in howladari tenure. The rights of the parties are determined by a pottah and kubulyut which were executed in 1859. It may be stated generally that the Plaintiff's claim is to recover khas possession of certain land which since that pottah and kubulyut were executed have accreted to the chur of the Defendants. The kubulyut, in the first place, fixes a certain rent for the land then in existence, a rent variable according to the nature of the property and the extent to which it is cultivated or culturable, and gradually rising to a maximum of five rupees, and after a certain number of years amounting in the whole to a sum of Rs. 2,993. The part of it more immediately material in this case is as follows:—"At the "interval of every three years, in the month "of Magh of the fourth year, we will take a "measurement amin from the principal office "appointed by you, cause the land of the said "chur and the whole howla to be measured with

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" the prevailing rod of eight cubits and eight " fingers, and record our presence on the measure- " ment chitta. And of the land which according " to that chitta is found to have accreted in excess " of the settled land of the said howla, we shall " get a deduction of an area of land equal to one " sixth of each of these descriptions of excess " land, *i.e.*, assessed land, culturable land, and *dhali* " chur land; and after executing a separate dowl " kubulyut for the remaining quantity of land " with a kist-bundi similar to the present one, " stating the rents which will be due, *i.e.*, the " rent of the assessed land at the permanent rate " of Co.'s Rs. 5.6.6 pies from the year succeed- " ing that of the measurement, that of culturable " potit land after being rent-free for three years, " and for the next three years paying rent at the " progressive rate "; and then the rent is stated to rise in the succeeding years. Then it goes on :—" If by that measurement the quantity of " land now given be found to be diminished by " reason of diluvion, after deducting an area at " the same rate from the falling off in the " quantity of land, we will get a deduction from " the year succeeding that of the measurement of " an amount which will be due at the rate of " Rs. 5.6.6 pies per kani for the falling off in " the quantity of the talabi land; and separate " deeds shall be executed and delivered, and we " will pay rent accordingly. And until the " whole of the above chur-land is settled accor- " ding to rules, you will continue to receive " separate rent for the *heli* and *hogla* growing on " the said chur. If at the stated time we do " not take an amin and cause measurement, you " will appoint an amin and cause the entire " land of the said chur to be measured. And " no objection shall be entertained that we have " not recorded our presence on the chitta of " such measurement. And if for the excess

" land, after deducting the settled land covered " by our dowl from the land stated herein, " we do not duly file a separate dowl kubulyut, " then we shall be deprived of our right of " obtaining a settlement of such excess land, and " of the land which will accrete in future; they " shall become your khas property." It is under this clause of the kubulyut that the Plaintiff claims. He alleges that the Defendants have not duly filed a dowl kubulyut, as they ought to have done, and that therefore the land has become his.

The facts, so far as material, are these: No measurement was made by either party until the year 1875. Nothing would appear to turn upon that, because neither party appears to have required the other to do it; and possibly there was no necessity for it. In 1875 the Plaintiff caused a measurement to be made. He gave the Defendants notice to attend. They did attend for a day or two; but subsequently they attended no more. He appears to have taken no steps upon that until December 1876, when he gave them a notice, whereby, after recording the terms of the kubulyut, he goes on to say :—" Then, " as you did not take an amin and cause mea- " surement at the stated time, an amin appointed " by me measured the lands of the said chur and " drones. 65.9.2 gundahs of land have been " ascertained to be in your possession; and after " deducting the said quantity of settled land " therefrom, drones 24.1 kani of excess land has " been found. Deducting from the said excess " land an area (rokba) equal to one sixth there- " of, *i.e.*, drones 4.0.3.1.1 krant, according to " the stipulations of the kubulyut, rent and selami " must be received according to the terms of the " kubulyut and pottah dated 8th of Cheyt 1265 " for the remaining drones 20.16.2.2 krants " of talabi land, *i. e.*, drones 12.2.12.2½ krants

" of assessed land, drone 2.11.5.1 cowri of " culturable land putit land, and drones 5.2.18. " 3.2½ krants of dhali putit land "—which is to a great degree waste land. " Therefore, by this " notice you are directed that within 15 days " from the service of this notice you shall appear " before the principal officer of my cutchery at " Kayurhyia, and, according to the terms of the " said pottah and kubulyut, give selami, and file " a kubulyut with a kist-bundi, in respect of the " rent of the excess land found on measurement. " If you fail herein, *i.e.*, if you do not appear " within the term stated in this notice, give " selami, and file a kubulyut by complying " with the covenants as stated, you shall be " ejected from the said excess land, according to " the terms of the said pottah and kubulyut, and " it shall be taken under my possession in khas " right."

Of that the Defendants took no notice whatever, and they did nothing. About twelve months afterwards the Plaintiff brings this action, in which he seeks to obtain khas possession of the land which he had mentioned in this notice; but he also prays for a further inquiry if necessary, and further demarcation of boundaries. " It is " prayed that after demarcating the boundaries " of drones 4.1.82 of land settled with the " Defendants, or the settled lands, with any " portion of the land covered by the pottah which " may be found on mofussil investigation to have " diluviated from the land covered by the " boundaries given below, you will be pleased " to give me khas possession of the excess land, " according to what is stated in the schedule."

The case coming before the Court, the Defendants filed a number of pleas, which gave rise to a number of issues, which were found against them. But upon the last issue, which is in these terms, " What is the quantity of the

" accreted land; and whether, under all the " circumstances, the Plaintiff is entitled to khas " possession thereof?" the Subordinate Judge dismissed the suit of the Plaintiff, upon the ground that the measurement which the Plaintiff had made, and which is referred to in his notice of the 6th December 1876, was in many respects defective. There can be no question that it was defective, inasmuch as an amin of the Court was deputed to make a further inquiry; and his report, which differs from that of the Plaintiff's amin, is adopted by both Courts. The Subordinate Judge appears to have thought that the making of a substantially correct measurement, and giving a substantially correct notice in pursuance of it, was a condition precedent to the Plaintiff's right to insist upon the Defendant's filing the dowl. That judgement was reversed by the High Court; and the effect of the High Court's judgement is, that although the measurement of the Plaintiff was in some material respects defective and wrong, nevertheless that the conduct of the Defendants was such that they must be deemed to have been in default in not filing a dowl kubulyut, as they ought to have done; and that they, having made no objection at the time, or indeed until the action brought, to the measurements of the Plaintiff, could not then be allowed to defeat his action on the ground of the measurement being defective, although they were unable to show what the correct measurements were—measurements on which the Court would act. That is the ground of decision of the High Court, in which their Lordships concur. It appears to their Lordships that the Defendants were in default; that the Plaintiff having made a measurement which is not impeached on the ground of fraud,—if it had been, the case would have been different,—but a *bonâ fide* measure-

ment, in pursuance, as he believed and intended, of the agreement between the parties, it was the duty of the Defendants, if they objected to it, to have stated their objection; but they having made no objection at the time, or indeed until the action was brought, it is too late for them to say that he had no cause of action, although they are entitled to ask the Court to decide what the amount of the property is which the Plaintiff is entitled to recover.

On these grounds their Lordships are of opinion that the judgement of the High Court is right, and they are of opinion that it should be affirmed subject to a slight modification. The High Court direct that a line be drawn on the map from a station marked 12, and so on. It appears to their Lordships that it would be more correct, instead of the Court drawing the line itself, to refer it back to the Subordinate Court to set out so much of the accreted land as, having regard to the nature, quality, and situation, ought to be taken to replace the uzli land which has been diluviated since the date of the kubulyut of the 21st March 1859, so that the Defendants may continue to hold the 41.8.2 bigahs of land, according to the terms of that kubulyut.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgement should be affirmed, subject to this slight variation; the Appellant must pay the costs of the Appeal.