be set off and a balance stated, it is no objection to such account that some of the earlier items were barred by the statute of limitations, and that there is no valid acknowledgment within Lord Tenterden's Act, because the agreement to set off operates as payment of the items to which it applies: *Ashby* v. *James*, 11 M. & W. 542; *Clark* v. *Alexander* (8 Scott N. R. 147, 166)."

I may remark that my judgment is in accordance with the decisions of all the other High Courts: *Doyle* v. *Allum Biswas*, 4 W. R. (S.C.) 1, followed by the Full Bench of the A'grá High Court in *Kunbya Lall* v. *Eunsee*, 1 A'grá F. B. 94; *Subbarama* v. *Eastulu Muttusami*, 3 Mad. 378. The reports of all these cases show that *Ashby* v. *James*, was relied on by the defendants, and considered by the Courts.

Special Appeal No. 124 * *of* 1870.

January 19.

DULIA' KA'SAM .....*Appellant.*
ABRA'MJI SA'LE .....*Respondent.*

Revenue Survey Act—Right of Tenant to hold Land upon payment of reasonable Assessment—Usage—Special Contract varying Usage.

Sec. 36 of Bombay Act I. of 1865 applies only to lands to which a revenue survey has been extended under that Act.

Prior to the passing of the above Act, by usage having the force of law, Government was unable to eject an ordinary tenant of land so long as the latter was willing to pay the reasonable assessment upon the land occupied by him.

This usage might be limited or varied by special contract, *e.g.*, by the terms of a lease inconsistent with it.

THIS was a special appeal from the decision of C. G. Kemball, District Judge of Súrat, in Appeal Suit No. 199 of 1869, confirming the decree of the Second Class Subordinate Judge of Olpár.

The plaintiff (and respondent), Abrámji Sále, sued to recover possession from the defendant of 10 *bighás* 17 *pans* and 5 *kathas* of land situate in the *bhágdári* village of Adajan,

* S. A. Nos. 125 and 126 were dependent upon, and governed by, the judgment in this case.

1871.
DULIA' KA'SAM v. ABRA'MJI SA'LE.

with the trees growing thereon. There was also a claim for the value of the crops of the Samvat year 1925.

It appeared that the defendant in 1855-56 had obtained a lease of the lands in question for ten years. (The lease also included certain other lands held by the defendants in the other suits referred to in the judgment of the District Judge.) Before the expiration of the above lease, in the year 1864, the Collector of Súrat required the defendant to enter into an agreement to pay the full assessment upon certain grass-land that was included in the lease, and therein rented at a small assessment. The Collector also informed the defendant, on the expiration of his lease, that he would be continued in the occupation of the land; but a fine was demanded from him, which the defendant refused to pay.

On the 26th of March 1868, the Revenue Commissioner issued an order setting aside the prior order of the Collector, and directing the right of occupancy in the land to be put up for sale, which was accordingly done, the plaintiff becoming the purchaser.

The remaining facts, and the respective contentions of the parties upon the facts, appear from the judgment of the District Court.

The Subordinate Judge made a decree in favour of the plaintiff.

On appeal, the District Judge of Súrat confirmed the decree of the Subordinate Judge, and gave judgment as follows:—

"The facts in this and four other appeals are the same. It appears that in the *bhágdári* village of Adajan there were some 370 *bighás* of Government land entered in the *bhágdár pátil's* name. In 1856 ten persons applied to the Collector of Súrat to give them a ten years' lease of 105 of the said *bighás*, which were lying waste, at a certain fixed rent. The Collector assented, an agreement of lease was executed by the applicants, and they entered into possession, each individual taking as his share a certain portion of the land. At the expiration of the term the lessees were offered a con-

tinuance of the occupancy on payment of a lump sum down, and of increased rent; they, however, refused, and the right of occupation was then sold and bought by the plaintiff. The question for consideration in all these five appeals is whether or no the tenancy was determined at the end of ten years. For the appellant it is argued that, under Reg. XVII. of 1827 and Bombay Act I. of 1865, the lessees, having been once admitted, acquired a right to remain for ever, quite irrespective of any agreement for a definite term: in other words, that their tenancy could only determine with their own consent and by their own act. But there is nothing in either of those laws applicable to such a case as this. Act I. of 1865 has reference only to lands brought under the survey. Had the lessees without more agreed merely to cultivate the land in dispute, then I think the argument now urged would have had great force; but it is clear that they are only entitled to possession in virtue of the lease above referred to, and that lease obviously fixed the moment from which the lessees' right to the possession determined, and the Government's reversion became a right to the possession, both parties having notice of the period of determination. I consider that the lower court rightly decided that the defendant's right of occupation had ceased, and that the plaintiff, having purchased of Government the right of possession, was entitled to eject him. The decision also regarding the trees I consider to be in accordance with the evidence. The decree of the lower court is affirmed with costs on the appellant."

The special appeal was argued before GIBBS and MELVILL, JJ.

Nánábhái Haridás for the appellant.

MELVILL, J.:—In these cases the appellants are tenants of certain lands granted to them in 1855-56, under a lease from the Collector of Súrat. The respondents are the purchasers of the right of occupancy, which was put up to sale by the Collector, under the orders of the Revenue Commissioner, after the expiration of the appellant's lease.

It has been argued on behalf of the appellants that they

1871.
DULIA' KA'SAM v. ABRA'MJI SA'LE.

are entitled to claim the benefits of Sec. 36 of Bombay Act I. of 1865, which provides that an occupant of land shall not be liable to be ejected so long as he pays the Government assessment; and that, even if that Act be held inapplicable, the same principle was recognised in Reg. XVII. of 1827, and was enforced by numerous decisions of the Ṣadr Diváṇi Adálat.

Sec. 36 of Act I. of 1865 applies only to lands to which a revenue survey has been extended under that Act, and it does not appear that at the time of the sale to the respondents there had been any such survey of the lands in dispute.

Previously to the passing of that Act there was undoubtedly a usage, which has been recognised as having the force of law, which prevented the Government, or superior landholder, from ejecting an ordinary tenant so long as the latter was willing to pay such reasonable assessment as might be demanded of him. But it cannot be held that the Government had not the power to limit this usage by special contract. We should be imposing a most unreasonable and arbitrary restriction upon the rights of the Government as landlord, if we were to decide that it is not competent to the Government to let waste land for a term of years, reserving the right to deal with the land as it pleases at the expiration of the lease.

In these cases the lease to the appellants (exhibit No. 70) expressly gave the right of occupancy for a period of ten years, and no more. In the absence of any mention of an intention to extend the right of occupancy beyond that term, we think we must hold that there was no such intention, and no such extension of right. If there be any doubt as to the construction of the lease, it must be construed in favour of the Crown, which is the lessor.

If, then, we only have regard to the lease No. 70, we must, we think, hold that at the expiration of the ten years named in the lease the Government had a perfect right to sell the land to the highest bidder.

But it has been contended that by the subsequent acts of the Government a new contract was created, which superseded the lease No. 70, and placed the appellants in the position of ordinary tenants, not liable to be evicted as long as they paid the assessment.

As regards the grass-land, there certainly appear to be good grounds for this contention. The lease, exhibit No. 70, gave this grass-land at a low rate of assessment from 1855-56 to 1865-66. Yet some time before the expiration of the lease, namely, on the 27th of August 1864, the tenants were required to enter into a new agreement (exhibit 64), by which they covenanted that, in consideration of their not being disturbed in the possession of the grass-land, they would pay the *kamál* or full assessment upon it. This new agreement contains no limitation as to the time. The words are: "We agree to pay the *kamál* rate on account thereof from Samvat 1921" (A.D. 1864-65). It seems clear that the intention of the new agreement was that the tenants should be continued in possession of the grass-land on payment of full assessment after the expiration of the two years which had still to run under the original lease. Indeed, such continuance of possession was the only advantage which the new agreement secured for the tenants, and the only consideration which there could be for the promise to pay full assessment: for during the continuance of the original lease the Collector could have no power to require them to pay more than the assessment fixed by the lease upon the grass-land.

As regards the grass-land, therefore, we think that the lease No. 70 was superseded by a new lease, under the provisions of which the appellants became ordinary tenants, not liable to be evicted as long as they paid assessment. The Revenue Commissioner's order, to which we shall presently refer, does not appear to affect this new lease, and it may be doubted whether he had cognisance of it. At any rate, it would not be competent to him to upset it, after the full assessment had been paid in accordance with it since the year 1864-65. Nor can it be said that the appellants have

1871.

DULIA' KA'SAM v. ABRA'MJI SA'LE.

forfeited their right by any refusal to pay assessment on this land. In point of fact the assessment never appears to have been raised, and all that the appellants have refused to do is, not to pay assessment, but to pay a fine or premium in addition to assessment.

We hold that the appellants are entitled to the possession of the *suḍá* or grass-land, as long as they pay the assessment, and that the sale of this land to the respondents must be set aside.

As regards the other land, we think that the respondent is entitled to recover. It is true that on the expiration of the lease No. 70 the Collector informed the appellants that they would be continued in possession of the land. If the Collector's order had continued in force, it might be held to amount to a new lease, on the terms of ordinary tenancy. But on the 26th of March 1868 the Revenue Commissioner issued an order setting aside the order of the Collector, and directing that the right of occupancy should be put up to sale. Thus the Collector's order became inoperative, and matters were relegated to the same state in which they were on the expiration of the lease No. 70, at which time the Government certainly had the power to sell the right of occupancy.

We do not think it necessary to consider the question whether the appellants were entitled to six months' notice of the determination of their tenancy. This point has not been relied on in the courts below, nor in the memorandum of special appeal, and has only been casually introduced in the course of the pleading.

We amend the Judge's decree, and award to the respondent possession of the land claimed, with the exception of such part of it as may form portion of the 45 *bighás* granted at *suḍá* rates under the lease, exhibit No. 70.

Costs in proportion.

Decree accordingly.