

1872.
 THE JUSTICES OF THE
 PEACE FOR
 THE CITY OF
 BOMBAY
 v.
 THE GREAT
 INDIAN PEN-
 INSULA
 RAILWAY
 COMPANY.

If an allowance be made for depreciation of rolling stock, the fact of such an allowance having been made should be taken into consideration in fixing the rate of tenant's profit.

The letter of the 23rd March 1870, appended to the amended special case and marked A, appears to have erroneously adopted the now exploded mileage principle. The principle to be adopted here is that which, in England, is known as the parochial principle.

The figures in this case will, according to the terms arranged between the parties, be worked out by their mutual referee, Mr. Ormiston, upon the principles laid down in this decision.

The parties will, up to this stage, bear their own costs respectively.

[APPELLATE CIVIL JURISDICTION.]

June 17.

Special Appeal No. 118 of 1870.

THE GOVERNMENT OF BOMBAY *Appellant.*
 GOSVA'MI SHRI GIRDHARLA'LJI *Respondent.*

Reg. V. of 1827 Sec. I., Cl. I.—Allowance not incidental to hereditary Office—Prescriptive right.

In considering with reference to prescription whether an allowance (not being incidental to an hereditary office) is or is not immoveable property, the High Court has generally followed the test :—" Is or is not the allowance a charge upon land or other immoveable property ?"

Where an allowance by Government is neither incidental to an hereditary office nor a charge upon immoveable property and is not supported by a grant from Government, the enjoyment of it for thirty years does not create a prescriptive title to its continuance under Regulation V. of 1872, Section I., Cl. I.

THIS was a special appeal from the decision of the District Judge at Súrat, in Appeal Suit No. 138 of 1869, confirming the decree of S. H. Phillpots, the Assistant Judge.

The appeal was argued before LLOYD and MELVILL, JJ.

Dhirajlál Mathurádas, Government Pleader, for the appellant.

Shántáram Náráyan for the respondent.

The facts of the case and the arguments on each side sufficiently appear from the following judgments :—

MELVILL, J.:—This is a suit to establish the liability of Government to pay in perpetuity an annual allowance of Rs. 20-11-5, and to recover arrears of the same allowance.

The allowance in question was a contribution to the expenses of a temple at Kakroli, a place beyond the British territory. It was originally paid out of the revenue of the village of Kusad, in the Praganá of Ulpár, which was acquired by the British Government from the Peshwa in 1817. From that date up to 1854, the allowance was regularly paid by the village authorities, and was afterwards disbursed from the Mámlatdár's treasury. In 1866, the Government refused to make any further payments.

The plaintiff has not produced any *sanad* granted either by the present or the former Government. He relies upon his long enjoyment as constituting a prescriptive title ; and the statutory provision, on which he founds his claim, is that contained in Clause 1 of Section 1 of Regulation V. of 1827.

The allowance is not incidental to any hereditary office ; and the plaintiff, therefore, has to show that it is immoveable property within the meaning of the section above referred to.

The courts below have awarded the plaintiff's claim, on the ground that it has already been decided by this court in Special Appeal No. 21 of 1868 (*a*) that where a charitable allowance, in connection with a temple, was proved to have been enjoyed by the incumbent, and those under whom he held in regular succession, for more than 30 years, the grantee had acquired a right of property in it under Section 1 of Regulation V. of 1827. That case is no doubt exactly in point ; but the learned Judges, who decided it, appear to have based their judgment on the previous case of *Desái*

1872. *Kallianrái v. The Government of Bombay* (b), the authority of which has been greatly weakened, if not entirely destroyed, by the judgment of the Judicial Committee of the Privy Council in appeal*. It follows that the precedent, on which the Lower Courts have relied, can furnish no guide for our decision.

THE GOVERN-
MENT OF
BOMBAY
v.
GOSVAMI
SHRI GIRD-
HARLAJI.

The plaintiff's case was argued at great length, and very ably, by Mr. Shántarám Náráyan, who, in addition to the two cases above referred to in the fifth volume of the Reports, adduced certain other decided cases, and relied generally on the definitions of immoveable property given by writers on Hindu law.

Most of the cases cited had reference to hereditary offices and allowances incidental to such offices. These cases may be at once dismissed from our consideration, for hereditary offices are distinctly specified as immoveable property in Section 1 of Regulation V. of 1827, and a Full Bench of this court has recently decided in Special Appeal No. 238 of 1871 (c) that allowances incidental to such offices are immoveable property within the meaning of Act XIV. of 1859. The only case, which really tells strongly in the plaintiff's favour, is that of *Bhawani and others v. Hasan Miya* (d), in which it was held (Tucker J. *dissentiente*) that the recipients of an annual allowance for upwards of a century had acquired a good title to the allowance by prescription. If it be a necessary deduction from that decision that any person, who has been in receipt of any kind of allowance for a period of 30 years, acquires a prescriptive right to a continuance of such allowance, then, I must express a most decided dissent from a doctrine which would, as observed during the argument in this case, strike at the root of all charities. It is not very clear on what principle the case was decided; but it does not appear from the report that there was any argument on the question whether or not the allowance in dispute came within the definition of immoveable property.

(b) *Ibid.* 1.

(c) 9 Bom. II. C. Rep. 99.

(d) 1 *Ibid.* 45.

* See this judgment printed at the end of the case.

In considering, with reference to limitation, the question whether any particular allowance (other than an allowance incidental to an hereditary office) is or is not immoveable property, this court has, I think, generally, if not invariably, applied the following test, viz., is or is not the allowance in question a charge upon land or other immoveable property? *Bharatsangji Mansangji v. Navanidharaya Munsukhram (e)*; *Moháránd Fatesangji v. Desái Kalliánraí (f)*; *Ráiji Manor et al v. Desái Kalliánraí (g)*. And from the report which has just reached us of the judgment of the Judicial Committee in the appeal of the *Government of Bombay v. Desái Kalliánraí*, it appears that their Lordships would apply the same test in the construction of Section 1 of Regulation V. of 1827. "Their Lordships," they say, "are unable to concur with the Judges of the High Court in the conclusion that, upon the facts thus stated, the respondent had, under the provisions of the Bombay Regulation No. 5 of 1827, Chapter 1, Section 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to this Palkhi allowance. They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular Pergunnah, can properly be said to be 'immoveable property' within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or since 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dawlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury."

The propriety of the test indicated by the above decisions seems to me to be borne out by the authorities on Hindu Law. Sir T. Strange (Volume 1, page 16) says:—"Real or immoveable property among the Hindoos includes, besides land and houses, slaves attached to the land, and annuities se-

(e) 1 Bom. H. C. Rep. 136. (f) 4 Bom. H. C. Rep. A. C. J. 189.

(g) 6 Ibid 56.

1872. cured upon it, the latter bearing a close resemblance to that species of incorporeal hereditament which we call *corodies*." THE GOVERNMENT OF BOMBAY v. GOSVA MI SHRI GIRIHARLAJI. Macnaghten (page 1) and Grady (p. 74) define *corodies* in a similar manner. Mr. Shántárám has labored hard to prove that the term "corody" (*nibandha*) should be extended so as to include other grants than those secured upon immoveable property. The texts bearing upon the subject have been set forth at length in the recent judgment of the Full Bench in Special Appeal No. 238 of 1871 (*supra*), and it is unnecessary to reproduce them here. It is impossible to read them without seeing that the definitions of the term "corody," which they contain, involve generally the idea of a connection with immoveable property. It is described as "a fixed pension receivable out of mines or the like;" "so many leaves receivable from a plantation of betel, pepper, or so many nuts from an orchard of *æreca*" and so on. It is true that some of the definitions are more vague and comprehensive. Thus "a corody is a gift in this form—'I will give a hundred *Suvarnas* every month of *Kartiki*,' or 'out of this mine, of this village, I will annually give a hundred *Suvarnas*.'"—"A corody (*nibandha*) signifies a permanent allowance received from saleable articles in virtue of an agreement or promise."—"Any thing which has been promised, deliverable annually or monthly or at any other fixed periods." These passages may perhaps tend to show that certain allowances not secured upon land may, for purposes of descent, be included in the term "corody," and rank with immoveable property. But it is clear from them that in order that such property should attain this distinction, it should be shown to be derived from some express and solemn agreement or promise made by the king or other person in authority. "Let a king, having given land, or assigned a corody, cause his gift to be written for the information of good princes, who will succeed him, either on prepared silk or on a plate of copper, sealed above with his own signet. Having described his ancestors and himself, the quantity of the gift, with the penalty of resumption, and set his own hand to it and specified the time, let him render his donation

firm." It may be that an allowance, of whatever description, if thus solemnly promised, would come within the definition of a corody, and that it would descend, and its alienation be restricted in the same manner as immoveable property. But it is unnecessary to decide that point in the present case, in which the question is whether an allowance, unsupported by any promise or grant whatever, is immoveable property.

1872-

THE GOVERN-
MENT OF
BOMBAYv.
GOSVAMI
SHRI GIRI-
HARLA'JI.

Although the allowance was paid for many years out of the revenues of a particular village, the various descriptions of it in the accounts as "Sálábád bhet" (Exhibit 34), "gaum kharch" (Exhibit 35), "gaum Sadar kharch" (Exhibit 36 @ 39), do not indicate that it was a charge against the land. These expressions, as appears from Mr. Mountstuart Elphinstone's Report on the territories conquered from the Peshwa (p. 19), show that it was paid, not out of the land revenue, but out of a contingent fund raised by means of a tax on the villagers. After 1854, it was paid from the Mámladár's Treasury. Thus, to apply the expressions of the Judicial Committee, it never constituted a charge which could be enforced against the land or against the revenues of the land prior to the claim of Government. The utmost right, which there could be, would be the right to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Treasury.

Reference has been made in the course of the argument to the proclamation issued, on the 11th February 1818, by Mr. Mountstuart Elphinstone in regard to the territories conquered from the Peshwa, which contains the following passage:—"All Watans and Inams (hereditary lands), Wursahasans (annual stipends) and all religious and charitable establishments, will be protected and all religious sects will be tolerated, and their customs maintained, as far as is just and reasonable"—(Thomas's treaties, page 541). No argument was founded on this proclamation in the courts below; and if it be within our province to express any opinion on the subject, it is sufficient for me to say that the Govern-

1872.
 THE GOVERN-
 MENT OF
 BOMBAY
 v.
 GOSVA'MI
 SHRI GIRI-
 HARLA'LJI.

ment appears to me to act neither unjustly nor unreasonably in refusing to contribute to the expenses of a foreign temple.

On the grounds that the allowance claimed is neither incidental to an hereditary office, nor a charge upon immoveable property, nor supported by a grant from the present or former Government, I hold that the allowance in question is not immoveable property, and that enjoyment by the plaintiff for 30 years does not create a prescriptive title to its continuance. I would, therefore, reverse the decrees of the courts below with costs on special respondent throughout.

LLOYD, J. :—I also am of opinion that the authorities that have been referred to in the course of the argument do not justify us in holding that the charitable allowance claimed is “immoveable property” within the meaning of Clause 1, Section 1, Regulation V. of 1827; and as the claim is based solely on the alleged prescriptive title, which thus fails, I concur with my learned colleague in reversing the decrees of the courts below.

Decree reversed.

THE appeal in the case of the *Government of Bombay v. Desai Kallianrao* alluded to in the foregoing judgment was argued before Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier. The judgment of the Privy Council was on the 20th April 1872 delivered by Sir James P. Colvile, J. :—

The question raised by this appeal was whether the respondent has an hereditary right to receive, out of the public revenues of the Presidency of Bombay, an annual allowance of Rs. 1,274-4-2, notwithstanding an order of the Government, dated the 28th November 1861, which declared it to be a mere personal allowance, and as such resumable, and that it was to cease on the death of the then recipient, the respondent's father.

The respondent is Desai of the Pergunnah of Broach. His office, once important, is now a mere sinecure, its functions being exercised by other officers. But such as it is, it is

admitted to be held by him, together with an Inam village enjoyed with it, by hereditary right. The allowance in question is, however, not a necessary incident to the office of Desai, nor is it held by the same title as the village. His case as to it is that upwards of a century ago, the then native ruler of Guzerat conferred upon one of his ancestors, and predecessors in the office of Desai, as a reward for distinguished service, the grant of a Palkhi or Palanquin, together with the allowance in question, the latter being the sum fixed for the Palkhi expenses, and charged on the land revenues of the Pergunnah of Broach. He alleges that this grant was confirmed by the different dynasties who have since ruled in Guzerat, and finally by the British Government in 1808; and he insists that the allowance thus enjoyed is hereditary in his family, and now irrevocable by the Government.

1782.

THE GOVERN-
MENT OF
BOMBAY
".
GOSVA'MI
SHRI GIRD-
HARLA'LJI.

The case made by the Government in answer to this claim, as stated at page 10 of the Record, is that the Palkhi right was not granted for Desaiship service; that it is not of the nature of an ordinary Inam; that it was granted to the original holder personally, and was liable to cease on his death; and that to allow, or not to allow, such a right depends on the pleasure of Government. The only issue settled in the cause was whether the right claimed was perpetual, or whether the Government was competent to make it cease whenever they pleased to do so.

The Zillah Judge, who tried the cause in the first instance, determined this issue in favour of Government, and dismissed the suit; his decision was reversed, and a decree made in favour of the respondent by a Division Bench of the High Court of Bombay; and the present appeal is against that decree.

The grounds of the judgment of the High Court are thus summed up by Mr. Justice Tucker: "I consider then that the plaintiff is entitled to succeed in this suit (1) because, in the absence of the original deed of conveyance or grant, the long enjoyment of plaintiff's ancestors, during four genera-

1872.
 THE GOVERN-
 MENT OF
 BOMBAY
 v.
 GOSVA'MI
 SHRI GIRI-
 HARLA'LJI.

tions successively, and for a period of more than a century, creates a legitimate presumption that the allowance was conferred on the original grantee and his heirs; and (2) because the uninterrupted enjoyment of plaintiff's grandfather and father, under the order made by the Government of Bombay on the 7th February 1808, which extended from that date to 1856, gave to the plaintiff a statutory and undefeasible title."

Their Lordships propose to deal, in the first instance, with the second of these propositions; but, before doing so, they will shortly review the proceedings of the British Government with reference to the allowance claimed, because the effect of those proceedings has an important bearing upon both propositions.

The territory of which Broach forms part was annexed, with the rest of Guzerat, to the Mogal Empire, by Akbar in 1572, and, from that time to 1685, was governed by a Nawab or Soubahdar. The sovereignty over it then passed to the Mahrattas, and seems to have been exercised by the Gaicowar until 1772. In that year, Broach was taken by the British, and was held by the East India Company until 1783, when it was ceded to Scindia. That Mahratta power held it until 1803, when it finally became British territory, under one of the treaties concluded with Dowlut Rao Scindia. The office of Desai appears to have been held by the respondent's ancestors during all these changes of dynasty. His grandfather, Dawlutrai, was found in possession of it by the British in 1803, and, it would appear from the Exhibits C. 42, C. 43, and C. 44 (pp. 39 to 41 of the Record), continued to receive the emoluments of office which he had previously received (including for sometime the Palkhi allowance), but subject to the condition of submitting to the orders which the Government of Bombay might pass respecting any increase or reduction of them. On the 31st of May 1807, the Revenue Commissioners at Broach made their report to Governor Jonathan Duncan, upon several matters previously referred to them,

which included the claims of the Desais in the territories in question. That document was not produced in the court below, and the High Court has drawn various inferences, unfavourable to Government, from its non-production. It has, however, been brought before their Lordships in the Supplemental Record, and has been treated as part of the evidence in the cause.

1872.
 THE GOVERN-
 MENT OF
 BOMBAY
 v.
 GOSVA'MI,
 SHRI GIRI-
 HARLAJI.

One of the papers forming the Appendix to this Report, No. 51, is entitled "Statement of the Income assigned to the Desais of the Broach Pergunnah, as taken from separate statements given in by each under their respective signatures." From this it appears that what Dawlutrai claimed was an Inam village under a grant to his ancestor, Khushalrai, from the Gaicowar, in A.H. 1140, corresponding with 1727-8; the Palkhi allowance in question; rights in certain Passaita land; and some other customary allowances or perquisites in money or in kind. The recommendations of the Commissioners in the body of the Report were (para. 34) that the last-mentioned allowances and perquisites should be abolished or reduced; that the right of Desai Dawlutrai's family to the Inam village should be acknowledged; and that they should, for the present, be allowed to hold their Passaita land, subject to such arrangements as Government might think fit to adopt for restoring to the State all illegally alienated land.

Nothing was there expressly said about the Palkhi allowance; but it may be included in the general recommendation contained in these words:—"The amount of such of these (*i.e.*, those fees and emoluments) as Government may be of opinion they (the Desais) have a tolerably fair right to, from the length of time they may have enjoyed them, may be calculated, from the accompanying Statements, Nos. 51 and 52, and a percentage in proportion allowed to them on the Government land revenue, which should be made payable to them from the Collector's office only, in lieu of all secret or avowed perquisites and emoluments whatever."

The action, which the Government of Bombay took on

1872

THE GOVERN-
MENT OF
BOMBAY

v.
GOSVA'MI
SHRI GIRD-
HARLA'LJI.

this report, is shown by the 16th paragraph of a letter, dated 7th February 1808, which is set forth at page 50 of the Record, in these words:—

“ Proceeding next to the Desai's allowances, the village of Kullum, or (as written in the Sanad) Kullub, is confirmed by Government, as you recommend, and on the same grounds the Palanquin establishment with sepoy's, and peon's allowance to Dawlutrai, from the beginning of the current Mrugsal, but without arrears for the time the same has been suspended.

“ The article Sootchumra is to be resumed from him and the other Desais, on the like principle, as ordered in respect to Jee Baboo, and the article of Sadur, as applicable to all those Desai offices, is left to you to confirm or revoke according to your sense of its justice and expediency.”

We accordingly find that Dawlutrai, in his subsequent Kabulayat, or acknowledgment, of the 20th March 1809 (e. 44, p. 50), whilst he admits the receipt of an order for the payment of the money appertaining to the customary allowance (dustoor) and Passaita land, and agrees to treat those allowances as subject to the future orders of Government, ceases to make mention of the Palkhi allowance, obviously treating that as unconditionally confirmed to him.

That it was regularly paid to him up to the time of his death is shown by the revenue accounts of the Collector of Broach, which have been produced, in which, at least after April 1809, it is treated as one of the general charges on the revenue.

Dawlutrai died in 1828. He was succeeded in the office of Desai by his son Hukamatrai, who thereupon applied for the Palkhi allowance to the Collector of Broach. It was paid to him by that officer, without any fresh or distinct grant or order of the Government, the payment continuing as before to be entered in the Collectorate accounts as a general or permanent charge on the revenues of the district. This state of things went on without question until the year 1856. In that year, the right of Hukamatrai to this allowance was

first questioned. He was required to explain how he was in receipt of it, and made, on the 28th of December 1856, the statement at p. 31 of the Record. No final order, however, seems to have been passed by Government on this matter until the 28th of November 1861, when, on the report of the Revenue Commissioners, dated the 3rd of October in that year, it was resolved as follows:—"The allowance is clearly a personal allowance, and should, as recommended by Mr. Peile, be transferred to the head of 'Life Pensions.' It should cease on the death of the present incumbent Hukamatrai."

1872.
 THE GOVERN-
 MENT OF
 BOMBAY
 v.
 GOSVA'MI
 SHRI GIRD-
 HARLA LJI.

Hukamatrai died sometime in 1863. The payment of the allowance then ceased, and in December 1864 the respondent commenced this suit to establish his hereditary right to it.

Their Lordships are unable to concur with the Judges of the High Court in the conclusion that, upon the facts thus stated, the respondent had, under the provisions of the Bombay Regulations No. 5 of 1827, Chap. I, Sec. 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to this Palkhi allowance. They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular Pergunnah, can properly be said to be "immoveable property" within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or, since 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dawlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury.

Nor, again, are their Lordships satisfied that there has in this case been such a possession or enjoyment of the allowance under a claim of hereditary right for thirty years without interruption, as would bring the right, if in the nature of immoveable property, within the operation of the Regulation. The question between the Government and the respondent

1872. is, whether the allowance was enjoyed by hereditary right, or
 THE GOVERN- by virtue of a grant for life, express or implied, to each suc-
 MENT OF cessive taker. So long as Dawlutrai lived, his enjoyment of
 BOMBAY the allowance would be as consistent with the one contention
 " as with the other.
 GOSVA'MI
 SHRI GIRD-
 HARLA'LJI.

A Jahagirdar for life cannot convert his life tenure into a perpetual tenure by living for more than thirty years. The period of thirty years, therefore, would only begin to run from 1828, when Hukamatrai began to receive the allowance without a fresh grant, and, as it may be assumed, under a claim of hereditary right. But it seems to their Lordships that the interruption to this enjoyment may fairly be taken to have begun in 1856.

The right of Hukamatrai was then called in question ; and there was the commencement of an investigation of his title which appears to have lasted until the final order of Government in November 1861. There was, on the part of Government, no admission, express or implied, of his hereditary right after 1856. And for these reasons they have come to the conclusion that the Regulation affords no bar to the trial of the question between the Government of Bombay and the respondent upon its merits.

Again, both the learned Judges of the High Court appear to have acted on a presumption that the title of the respondent to an hereditary grant was founded, not on the documents produced, but on some lost or missing Sanad which contained words of inheritance. In making this presumption, they drew certain inferences against the Government and in favour of the plaintiff from the non-production of the report of the 31st of May 1807. That document is, however, now before their Lordships ; the appeal has been argued as if it were part of the evidence in the cause, and the inferences to be drawn from it must be drawn from its actual, and not from its supposed, contents.

Their Lordships will now consider what is the effect of the evidence in support of the plaintiff's title.

The first trace of the allowance in question is to be found in the Perwannah C, annexed to No. 52, Supplementary Record page 49, which, if not a grant, recites a grant by the Nawab Hyder Joollee Khan to Khushalrai Desai, in recompense of his extraordinary services as Desai, fixes the allowance for the sustentation of that dignity at 1,972 Rupees (being 1,200 Rupees for the Palkhi, and 772 Rupees for the servants), and directs that sum to be paid to him annually. The only date on this document is "the 13th Shaban, in the 9th year of the reign," a date which it would be difficult to fix. But as the grant purports to have been made by the Nawab, and there is no mention of the Gaicowar, it may be presumed that this Perwannah was issued before 1685, when the actual sovereignty over the territories, in which Pergunnah Broach is situated, passed into the hands of the Mahrattas.

This grant, however, whatever its nature, appears to have been afterwards superseded; for, the earliest Mahratta document produced by the respondent in support of his title (being C. 2, p. 3), and said to bear a date corresponding with 1753-54, is in favour of Bhikaridas, the son of Khushalrai, and imports the grant to him by the Gaicowar of a Palkhi, with an allowance of only 1,100 Rupees for keeping it up. This document seems to have been intended to operate both as a Sanad or grant, and as a Perwannah or order addressed to the officers who were to pay the allowance; for, it is stated that, across the Hindee Perwannah, to the officers, there is written a memorandum in Persian to the effect "a Sanad for a Palkhi in the name of Bhikaridas Desai." Bhikaridas was succeeded by Jamiyatrai. Several Perwannahs issued by the Gaicowar during the life of this Desai are produced, but none of them show how his receipt of the allowance began. Those of 1760-61 and 1762-63 refer to interruptions of his existing right, not to the commencement of it. That of 1772-73, at p. 7, contains proof of an augmentation of the previously existing allowance by the wages of seven sepoyes thereby assigned to him. Jamiyatrai died in 1774-1775, and thereupon the Gaicowar of the day issued

1872.

THE GOVERNMENT OF BOMBAY
v.
GOSVAMI SHRI GIRDHARLALJI.

1872.
 THE GOVERN-
 MENT OF
 BOMBAY
 v.
 GOSVA'MI
 SHRI GIRI-
 HARLA'LJI.

what is termed a "a consolatory letter," in the shape of a Perwannah, to the revenue officer at Broach, which contained this passage : " Jamiyatrai Desai is dead. Giving consolation to his son, Dawlutrai Desai, in many ways, you are from time to time to get the business and affairs of the Mehal transacted by his hands, as has been done; and you are to pay from time to time his Palkhi and Sebandi allowances as they now exist." The whole of this document, including the expression that " they" (Dawlutrai and his ancestors) " had from ancient times belonged to the Sirkar," implies the existence of at least a customary right of succession to the allowance with the office of Desai from father to son, though perhaps a right capable of being interrupted or destroyed, like other rights under a despotic Government, by the will of the sovereign.

This is the latest document issued by the Gaicowar; and indeed the date as given in the Record is later than the taking of the city of Broach by the British. The authority, however, of the Gaicowar may, at that time, have continued to exist in the surrounding district.

The next document is the Perwannah of Scindia issued on the application of Dawlutrai in April 1786. It recites the application of Dawlutrai which appears to have been in the nature of a claim by hereditary right, since it refers to the grant to his grandfather, Bhikaridas, as the foundation of his title, making no mention of any intermediate grant to his father Jamiyatrai. The allowance was then fixed by Scindia at Rs. 1,352, and directed to be continued to Dawlutrai as Desai. And a further direction was given to take a copy of the document and to return the original (called a Sanad) to the Desai for his use. This is the last of the native documents, Dawlutrai being still alive and in the enjoyment of the allowance when the territory of Broach was ceded to the British in 1803.

Reviewing these native documents, their Lordships are unable to find any which import, by express words of inheritance, that the Palkhi privilege with its allowance was to be

enjoyed from generation to generation by the original grantee and his heirs. And it is now clear that the report of 1807 does not, as the Judges thought it might, disclose any evidence from which the existence of a Sanad in those terms may be inferred. Their Lordships are disposed to infer from the terms of Scindia's Perwannah, and the earliest of the Gaicowar's Perwannahs, that there was no Sanad other than those documents importing the grant of the allowance to Bhikaridas, and the confirmation of the allowance to Dawlutrai. On the other hand, the documents do not appear to support the appellants' contention that the allowance was merely personal to each taker, and the subject of a separate grant to each in succession.

There is no trace of such a grant in favour of Jamiyatrai. When Dawlutrai succeeded to Jamiyatrai, he was treated as succeeding to the allowance by the same title to which he succeeded to the Desaiship; the confirmation of Scindia is founded on an original grant to Bhikaridas; and the whole tenor of the documents is in favour of the conclusion that, after the allowance was granted, it was treated and considered as part of the emoluments of the hereditary office of Desai.

Their Lordships are not disposed to treat the proceedings of the British Government in 1808, as amounting to a new and enlarged grant. Nor do they consider that the accounts, or the acts of the Government officers, on the death of Dawlutrai, though they afford evidence that Government up to 1856 considered the allowance to be a permanent alienation of revenue in favour of this family, are conclusive against the Government's present claim of a right of resumption.

They think that the reasonable construction of the proceedings in 1807 and 1808 was that the Government of that day intended to confirm, and did confirm, the title of Dawlutrai, whatever it might be, without enlargement, but also without diminution. But the inference which their Lordships draw from the report, and the letter of Government thereon, is that the Government of that day was dealing, and

1872.

THE GOVERN-
MENT OF
BOMBAY
v.
GOSVA'MI
SHRI GIRI-
HARLA'LJI.

1872. intended to deal, not with the mere rights and allowances of the individual Dawlutrai, but with the emoluments of the hereditary Desaiship held by his family. And it is on the special ground that under the native rulers, this allowance was treated as permanently annexed to the office, and was confirmed in 1808 by the British Government as appurtenant to the office, and not upon the grounds assigned by the High Court (from some of which, as they have already intimated, they dissent), that their Lordships have come to the conclusion that they ought humbly to advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

THE GOVERN-
MENT OF
BOMBAY
v.
GOSVA'MI
SHRI GIRD-
HARLA'LJI.

[APPELLATE CIVIL JURISDICTION.]

June 14.

Civil Petition No. 10 of 1872.

NA'RA'YAN bin SIDOJI *Applicant.*

DA'VUDBHA'I valad FATEBHA'I *Opponent.*

Practice—Review of District Judge's judgment after admission of Special Appeal—Cancellation of order admitting Special Appeal—Civil Procedure Code Secs. 376, 378.

After a special appeal had been admitted, the special appellant withdrew it with permission to apply for a review of the Lower Appellate Court's judgment. The District Judge refused to grant a review on the ground that the admission of the special appeal was a bar to his doing so.

The High Court, to remove the difficulty raised by the District Judge, reviewed and cancelled its own order admitting the special appeal and directed that a review (which, it considered, the District Court had now power to grant) should be again applied for.

THIS was a petition for the exercise of the High Court's extraordinary jurisdiction in the matter of an order made by R. H. Pinhey, District Judge of Púna.

The applicant, Náráyan bin Sidoji, preferred a special appeal to the High Court against a decision of the District Court of Púna in Appeal No. 557 of 1866. The appeal was admitted and registered under No. 354 of 1868. On the 15th September 1868, Náráyan applied to, and obtained