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*In re* New Fleming Spinning and Weaving Company (Limited).

mentioned in the latter part of Schedule A aforesaid, and for Rs. 24 notarial charges in respect of such bills, is disallowed. Each party to bear their own costs.

*Order accordingly.*

Attorneys for the Official Liquidators.—Messrs. *Ardesir* and *Hormasji.*

Attorneys for the Bank of Bombay.—Messrs. *Rimington, Hore,* and *Conroy.*

NOTE.—An appeal has been filed in this case. The above report was prepared before the appeal was filed.

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## APPELLATE CIVIL.

*Before Mr. Justice Green and Mr. Justice West.*

*January 21st to April 26th.*

BHASKARAPPA, SON OF MARTOBARAO, BY HIS BROTHER AND HEIR SHRINIVASRAO (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE COLLECTOR OF NORTH KANARA (ORIGINAL DEFENDANT), RESPONDENT.*

*Land tenure in Kanara—Land revenue—Kumri cultivation—Kumri assessments—Rights of vargdars—Korlaya.*

The plaintiff sued to recover possession of four specified tracts of forest land situated in the district of North Kanara from which he alleged he had been wrongfully ejected under an order made by the collector in 1861, and to recover certain sums of money exacted from him between 1849 and 1861 by the revenue authorities as a tax or rent for the exercise, by him, of his propietary rights by way of *kumri* cultivation.

As to three of the tracts of the land in question the plaintiff based his claim on certain *sanads* alleged to have been granted by the officers of Tippu Sultan to his ancestors; and as to the fourth, he claimed a title by prescription, alleging that the land had been in the possession of his family for forty years prior to 1870, the date of the institution of the suit. The plaint contained no indication of a claim which was put forward during the argument of the appeal, that the payment, to the Government, of assessment in respect of *kumri*, pepper and *farmaish*, or in particular of *kumri* assessment, and the entry of such charge in the *chitta* of a vargdar *muli or geni* gives to such vargdar, or at least is a recognition by Government that such vargdar has a right of ownership in the forests in respect of which it was contended such assessment was imposed. The plaintiff admitted a right on the part of Government to take certain kinds of timber from the forests; but subject to this he contended that the timber, as the soil

* Regular Appeal, No. 49 of 1872. See Printed Judgments for 1879, p 37.

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and produce of the forests generally, belonged to him, subject also to the right of Government to levy an increased assessment thereon. Subject to these rights on the part of Government the plaintiff claimed an absolute right to have *kumri* cultivation carried on within the limits specified; that he and no other had a right to cultivate and give in cultivation as rice land jungle land within these limits; and an exclusive right to cut down and dispose of timber within those limits.

*Hindu* by GREEN, J., on the evidence that the *sanads* put forward were not proved to be have been, in fact, executed by any person having authority to execute such documents, and that even if genuine they had never been recognized by the British Government as valid and binding or been made the foundation of the revenue relations between the British Government and the plaintiff's family or those under whom they claimed.

The fact, however, that the plainliff put forward those *sanads* as the root of his title, so far at least as concerned the greater portion of the property claimed, was an admission that at the date of those *sanads* the then Government had the *power* to make the grants they purported to evidence; and, the *sanads* being out of the way, the plaintiff had to establish that he had at the institution of the suit succeded to rights of property which by his own case, at the dates respectively of the *sanads*, belonged to the then Government, and would, in the absence of any private right shown then to exist therein, have vested in the East India Company after the taking of Seringapatam in May 1799, and the subjugation of the country under the rule of Tippu Sultan.

The primary meaning of the world *varg* was "account", and it was only by an extension of the original meaning that it came to be used as indicating the property, to the assessment on which such account relates.

*Kumri* assessment was in its origin an assessment upon or having reference to the actual number of labourers employed cuttingdown forest, and not with reference to any particular portion or quantity of land or its produce.

Originally, *kumri* assessment was inserted in *vargs* only as incidental to rice or garden cultivation, and the entry of such assessment in the plaintiff's *vargs* and its payment for a long series of years did not show or manifest any estate permanent right a all in the forests, as such, as being vested in the plaintiff, even as to such ground as he might have been able to show had been at former time *kumried* by his labourers; and whether or not the Government may have had, or, having had, may had ceased to have, any right to collect *korlaya* (tax on billhooks) direct from the cutters so long as *kumri* cultivation at all is or was carried on, yet it has a right to stop the cultivation altogether (remitting the *kumri* assessment entered in the *vargs* in all the forests of North Kanara including those in question in the present case, not shown to be private property on some other ground than the mere entry of *kumri* assessment in a particular *varg* or number of *vargs*.

The plaintiff's suit, therefore, which was to recover possession of particular tracts of forests on the ground of ownership, shown or evidenced only (apart from the question of the *sanads*) by such entry in his *vargs* of *kumri* assessment, was rightly dismissed. But, even assuming that the plaintiff had established a

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right, exclusive of others and permanent as against the Government, to have *kumri* cultivation carried on in such places as he could show had theretofore been *kumried* by him or by his permission, or even throughout the limits claimed in the plaints; such a right, having regard to the incidents of the cultivation, itself did not necessarily involve general ownership of the soil. Such general ownership, not being in the plaintiff, was with the Government; and the plaintiff, if his right, supposing he had any, were disturbed, either by a stranger or by the Government, ought to have asserted it by a suit for the disturbance of a right *in alieno solo*, and not by a suit to recover possession.

Even had the plaintiff, therefore, established a permanent and exclusive, right to carry on *kumri* cultivation within the limits specified in his plaint, yet his suit, which was directed to recover possession on the ground of general ownership, should have been dismissed. That was the case he put forward to the last, and to which his evidence was directed, and it would be quite inadmissaible for him to fall back on another case, which, if established, would have, as its resulta relief wholly different to that which and which alone he had all along asked, for.

*Held*, also, that the plaintiff's claim was barred by limitation.

*Per* WEST, J.—Though the introduction of British did not extinguish private rights already fully acquired, the principle shart from is, that waste lands belong to the State. The mere fact that a vargdar is charged in the village accounts with an assessment for *kumri*, cannot of itself make him the owner of all the forests within its boundaries. He could not become the owner, in fact, without the active or passive assent of the Government passing its proprietary right tohim Such assant is not to be inferred, as to an extensive tract of forest, from the payment and receipts of some insignificant sum—*e.g.*, a moiety of the rant realized on a small number of acres—which may most naturaly be referred to rateablity, or the mere particination by the State, according to an immemorial rule, in all profits arising from the land. As there must be certainty in a grant as to the area conferred, so there must be certainty as to the area, or at least as to identity of the object occupied, if the occupation is to raise the presumption of a grant, or of acquiescence in a definite occupation. It is not inconsistent with this principle, but rather as complementary to it, that the further rule is accepted, that the possession and the ownership springing from possession of a farm or *varg* as a whole, and within the limits as to which certainty is attainable, are not prevented or destroyed by an undoubted encroachment, or by a want of certainty as to some particular plot of ground or as to precise delimitation here or there of its prope boundary line. A suit to ascertain boundaries does not imply that either of the owners of contiguous estates has no property at all; and as there may be an effective grant of lands in possession though occupied of wrong, so may distinct acquiescence give alike right in the like case; but there can be no grant, no acquiescence in a possession, unless the essential elements of possession, a fixed, a definable, and an exclusive possession exists, and an exclusive possession exists, and are present to the perception of the parties.

In the case of a private owner even the allowance of acts which do not necessarily involve any denial of his ownership, or a grant from him, do not suffice to

create an ownership against him; and the mere non-interference of the State, to which neglect is not to be imputed, is not to be accounted for, if it can otherwise be accounted for, on a presumption of a surrender of its ownership. Such a transaction must be evidenced by an undisguised and effective appropriation assented to or submitted to by some one having due authority, or else fortified by an equivalent law of prescription. Under these conditions a true ownership even of the forests might arise, but the mere payment of the *kumri* assessment would not create it in the case of a vargdar.

Upon the evidence *held* that the *sanads* were not proved, nor had the plaintiff established any exclusive possession of, or proprietary right in, any part of the forest claimed; while the evidence showed a continued and consistent exercise, on behalf of the Government, of its proprietary right over the timber and even the firewood in the forests in dispute from the time that the assertion of the right became a matter of appreciable consequence, and that the plaintiff's family knew this, and submitted to it and themselves applied repeatedly for timber to the revenue officers. From the year 1842 downwards there was no instance which effectively disproved the acquiescence of the plaintiff's family in the ownership of Government. That ownership had not been parted with at all in the opinion of the parties most interested. If it had been parted with and become vested in the plaintiff's ancestors as an integral portion of the estate in the land which the plaintiff claimed was theirs, then the assumption and the exercise of ownership by the Government over the trees from 1841 down to the filing of the suit, was itself a perpeptual ouster of the family from a portion of their estate, and would constitute a complete eviction of the owner as such. If there was such an ouster proved as to the whole by a multiplicity of acts bearing on the several parts of the estate, but all referrible to the same principle or purpose, then the plaintiff had a cause of action in the nature of ejectment so soon as he was disturbed in his possession by any of these acts, in their legal nature such as to contradict and annihilate his right throughout the estate, even though their immediate physical incidence was on but particular parts of it,—a cause of action extending, as to its physical object, to the whole property, because his power over the whole was invaded and overthrown. Regarding the plaintiff's right, therefore, to land, to timber, to *kumri* cultivation, and to reclamation and disposal at his own mere will, parts, so far as the right was concerned, of a single legal unit, the cause of action had arisen more than twelve years before the institution of the suit. The plaintiff's right, so far as it rested on the *sanads*, was not supported but contradicted by the active enjoyment assumed on behalf of the Government thirty years almost before the institution of the suit, of an important part of the advantages conferred by the grants were to be construed as the plaintiff desired, called for immediate action in the Court on his part. The claim was also contradicted by a series of transactions in which the Government officers disposed, from time to time, of portions of land included within the confines of the state of which the plaintiff claimed. His claim, therefore, on the *sanads* was untenable.

Setting aside the *sanads* then, the mere payment of *kumri* tax, however it may have indicated that some land was beneficially occupied by the vargdar, afforded

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by itself no certain evidence either of the place of that occupation or of its nature as temporary or permanent, as held on proprietary right, or as merely casual and precarious. It is the possibility of referring the exaction levied to some particular area, shown to have been actually and exclusively held by the taxpayer, either by extrinsic evidence or by that of Government the accounts themselves, that makes the payment and receipt of a tax a practical assertion and admission of private ownership of the space thus rendered distinguishable.

But private ownership being established, it still remains true that a property in the soil must not be understood to convey the same rights in India as in England. It may be subject to restrictions and qualifications, varying according to the peculiar laws of each country; and those acts which under one system would be necessarily regarded as contradictions of any ownership over the object on which they were exercised except that from which they spring, may, under another system, be quite compatible with an ownership subsisting unimpared side by side with the limited right to which they would be attributed. The reserve of timber generally, as of particular kinds of timber, may be referred to as an instance of this divided dominion.

What the Government intended, and practically intimated through its officers, constituted the bounds which it set to the plaintiff's acquisition through its acquiescence, both as the extent of the rights to be exercised and the local limits within which they were to be exercised. As to the former point, whether the plaitiff's predecessors a general ownership of the soil or not, they either did not gain an ownership of the gained timber, or were wholly ousted from the exercise of that ownership from 1842 downwards.

As to the latter plaint, the evidence showed that the plaintiff's family at vargdars exercised over forest tracts in all the estates to which the present claims extended, though as to some of these tracts these rights could not be referred to any particular space. But, even though there had been no interference on the part of the revenue officers with the plaintiff's free use of the forest, that free use without an exclusive appropriation would not in itself constitute an exclusive right against the State. The right from the State's eminent domain is not extinguished by its mere non-exercise, and its exercise was not called for until some public injurry or inconvenience arose.

The exercise of the plaintiff's dominion had been prevented, except within such limits as the executive officers prescribed, at any rate from 1842; while the ownership of the Government over the forest trees and its proprietary right in the soil had been during the same time at last uniformly asserted, and the plaintiff's suit was, therefore, barred by limitation.

The plaintiff in this case sued to recover possession of four specified tracts of forest land situated in the districts of North Kanara from which, as he alleged, he had been wrongfully ejected under an order made by the collector in the month of March 1861. He also sought to recover in this suit certain sums of money exacted from him by the revenue authorities, between

the years 1849 and 1861, as a tax or rent for the exercise by him during that period of his proprietary rights by way of *kumri* cultivation.

As to three of the tracts of land in question the plaintiff based his claim upon certain *sanads* alleged to have been granted to his predecessors by the officers of Tippu Sultan; and as to the fourth he claimed a title by prescription, alleging that the land had been in possession of his family for forty years.

The defendant denied the genuineness of the alleged *sanads* and the authority of the alleged grantors to make grants. He also alleged that the possession and use of the lands had always remained with the Government, which—except so far as the right to fees for *kumri* cultivation had been farmed to the plaintiff's predecessors—had exercised all the rights of proprietorship by means of the revenue officers of the district. He further contended that the plaintiff's claim was barred by limitation.

The District Judge rejected the claim of the plaintiff, who thereupon appealed.

The appeal came on for hearing on 21st January 1878, and extended over sixty-two days, It was concluded on the 26th April.

*Shantaram Narayan* and *Shamrao Vithal* for the appellant.

*Latham*, *Leith*, *Jardine* and *Nanabhai Haridas*, Government Pleader, for the respondent.

27th January 1879. GREEN, J—Having had the opportunity and advantage, during the last October vacation, of making myself acquainted in detail with the views of my learned colleague on the different branches of the complicated case, and having regard to the circumstance that on two at least important questions (one of which disposes of the case so far as our decree is concerned) I have arrived at the same conclusion as he has, I feel it would be a waste of time to discuss in detail, (though I had arranged the materials for so doing) the large mass of documents in evidence in the case, and I shall restrict myself to stating my opinion on such branches of case as it appears necessary to me to do.

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The suit is mainly for the object of recovering possession of four specified jungle tracts, *i. e.*, as I understand, so much as is jungle or forest within certain specified bounds: one in the village of Goer, in the village of Kaignad, and two in the village of Bhaire, all in the magni (or sub-district) of Kadra, in the taluka of Karwar (the taluka in each Kadra is in the documents generally called Ankola) and in the Collectorate of North Kanara. The plaintiff alleges that he (or rather his family) was disturbed in the enjoyment of this property by the officers of the Collector of North Kanara acting under a certain order, dated the 20th March 1861 (exhibit 22).

The forest tracts claimed are specified in the plaint by boundaries there mentioned. Some of such boundaries being mentioned as boundary marks "lately fixed by the surveyors".

As to the forest claimed in Goer, the estate or interest claimed by the plaintiff is described as "the jungle property of *kumri*, &c., assessed at Rs. 118-8-0 in the *(varg) muli* No. 1 in the village of Goer, in the magni of Kadra, in the taluka of Karwar, standing in the name of my grandfather Sadashivrao, which, according to the *patta* granted in the name of Ganot Desai by Asdoolai al Shekh Budur Amil under orders from the huzur in the Mahomedan year 1226, corresponding with the 12th Chaitr Vadya in the cyclical year called Kalyuktakshi, was enjoyed by him and subsequently by my grandfather Sadashivrao, to whom the same was made over" (or, as it appears, the vernacular plaint may be more correctly rendered "became transferred" or "was made to pass"), "and after him by my father, and after my father myself, thus our enjoyment having continued for sixty years."

As to the interest claimed in the forest of Kaignad, it is thus stated in the plaint as correctly translated; "Out of 17" (the figure 19 being a mistake in the plaint for 17) "*vargs* in the village of Kaignad, in the magni of Kadra, property subjected to jungle assessment on account of *kumri*, pepper gardens and *farmaish*, amounting to Rs. 122-7-0, which Lil Shakh Mahdoom 2nd Majidabad Asaf granted to my grandfather Sadashivrao, and granted a *patta* under date the 13th Rabani in the

Mahomedan year 1226, corresponding with the cyclical year called Kalyuktakshi, for Kahati Hons 155-4-10, or Rs. 478-10-6, received by him, and which has since been in the enjoyment of my grandfather, after him by my father, and then by myself, for a period of sixty-three years on payment of assessment fixed thereon."

As to one of the tracts of forests in the village of Bhaire the interest claimed is thus stated:

"Mir Ahmad Saheb, of the taluka of Sadashivgad, on the 22nd of the month of Dini in the Mahomedan year 1217, corresponding with the 7th of Kartik Bahool in the cyclical year called Saumya, granted a *sanad* to my grandfather Sadashivrao, conveying to him the property consisting of *kumri* and pepper jungle in the *varg*, *muli* No. 10, called Balkrishna Shenvi, situate in the village of Bhaire, in the magni of Kadra, [this property was] enjoyed by my grandfather, after him by my father, and then by myself for a period of seventy-one years on payment of the assessment of Rs 50-4-0, including the *farmaish*, *shaishaptti*, &c., of which Rs. 3-7-7 are remitted as being the *kumri* portion, and the remaining amount is collected." This forest has for convenience been referred to at this hearing as the "Bali forest"—Bali being a village or hamlet subordinate to and included in the village of Bhaire.

As to the other forest in the village of Bhaire, the interest claimed is thus stated: "Jungle property of *geni* No. 23" (the figure 19 in the plaint being a mistake for 23) "in the said village of Bhaire, named Ganoji, now called the *varg* of Narayan Appa, and assessed at Rs. 11-8-0. we have had enjoyment of the same for forty years." This last-mentioned forest has been referred to as "the Bhaire forest" simply.

The forest tracts so claimed are in the plaint valued at Rs. 3,026-14-0, or ten times the annual amount of the Government assessment of Rs. 302-11-0. The plaint claims also to recover the following sums, viz., Rs. 11, 827-14-5 described as "amount held in doposit"; Rs. 695-8-8 being the balance of Rs. 912-12-2 (described as "amount realized on account of the *kumri* assessment for the three Fasli years 1277, 1278 and 1279 subsequent to the date of dispossession") after deducting

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Rs. 217-3-6 (described as the amount "remitted on account of the *kumri*"), and Rs 444-10-11 described as balance "after having deducted a portion which is remitted out of the amount realized by the sale of firewood and timber cut in the said *vargs* and from the honey farms and gallnuts for the three Fasli years 1277, 1278 and 1279." The plaint also claims mesne profits from the Fasli year 1280 up to the date of possession, with interest from this date.

The suit, therefore, is essentially a suit to recover possession of certain specified tracts of forest land, from the possession and enjoyment of which it is alleged the plaintiff's family have been excluded by the officers of Government, and is grounded on an alleged right of ownership, in the plaintiff, of the forests in question arising as to the three first-mentioned forests under *sanads* granted to ancestors or predecessors in title of the plaintiff by the former Government, and dated, respectively, the 12th April 1798, the 18th March 1799, and the 9th November 1789; and as to the forest alleged to belong to *geni varg* No. 23 in the village of Bhaire on "enjoyment for forty years" prior to 1870, the year in which the suit was instituted.

The case, therefore, as put forward by the plaintiff when the plaint was presented on the 21st July 1870, was one of a title by *sanad* as to three forests, and of long-continued enjoyment giving or showing right of ownership as to the fourth, and there is not any indication, on the face of the plaint, of the ground of claim which has formed before this Court the subject of so very large a portion of the argument, viz, that the payment to the Government of assessment in respect of *kumri*, pepper and *farmaish*, or in particular of *kumri* assessment, and the entry of such charge in the *chitta* of a vargdar *muli* or *geni* gives to such vargdar, or, at least, is a recognition by Government that such vargdar has, a right of ownership in the forests in respect of which it is contended such assessment is imposed.

The plaintiff does not complain of any disturbance in the possession or enjoyment of any land in the villages in question under regular cultivation, such as land under rice cultivation, or gardens for cocoanuts, areca-nuts and other fruit-bearing

trees ; his claim is to recover possession of the forest tracts specified by the boundaries mentioned in the plaint, and this as owner by grant or otherwise.

The plaintiff appears to admit a right on the part of Government to take certain kinds of timber ( *e. g.*, teak, blackwood, jackwood, poon and sandalwood) from the forests ; but, subject to this, he contends that the timber, as the soil and produce of the forests generally, belongs to him. He does not, for the purposes of this suit at least, dispute the right of Government to impose increased assessment on the property. For instance, the plaintiff admits that, should he wish to devote any portion of what is now jungle to rice cultivation or garden ground, the Government would have the right to impose on such land an assessment appropriate to rice land or garden ground. But, subject to the liability, under the general revenue law, to pay assessment to Government and to the right of Government to take certain specified kinds of timber, the plaintiff claims full rights over the forests in question; and he claims in particular that, subject as aforesaid to the payment of Government assessment, he and no other has the obsolute right to have *kumri* cultivation carried on within the limits specified; that he and no other has a right to cultivate or give in cultivation as rice land jungle land within the limits aforesaid ; and that he and no other has a right to cut down and dispose of timber within the same limits, subject, perhaps, to the right of Government to take the more valuable trees as above mentioned. At an early stage of the argument, indeed, the learned pleader of the plaintiff stated (according to my note) that he did not contend that an ordinary vargdar, as such, would have a right to cut timber and export it for sale, and that the right of the plaintiff to cut and carry away timber must rest on the *sanads*. With the development, however, of the necessities of the plaintiff's position, brought out during the next succeeding two months' argument, the appellant's pleaders cannot be taken as adhering to this admission. The proposition they have sought to maintain is that whether or not the *sanads* be accepted as genuine or operative, yet that the proprietary right of the plaintiff in the forests claimed is established, and if not created yet is evidenced, at any rate, as against Government by the fact that the plaintiff and those under or in

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succession to whom he claims have from the commencement of the British dominion been charged with and have paid the assessments called *kumri* assessment, pepper assessment and *farmaish*

As to the question whether the three *sanads* put in evidence can have any effect allowed to them by reason either of their genuineness being doubtful, or that they have never been acted on as between the plaintiff's family and the Government, the various points of consideration will be found to have been so fully and satisfactorily dealt with by my learned colleague that I do not think it necessary to do more than state my concurrence in what I understand to be in substance his conclusion, that though the *sanad* relating to Goer village has more to recommend it than the other two, yet that in respect of all three *sanads* it has not been established that they were, in fact, executed by any person having authority to execute documents of such a nature; that there are in evidence, particularly as to the *sanads* for Kaignad forest and Bali hamlet, circumstances in themselves strongly tending to show that these documents were not in existence forty years ago, or, if in existence, were suppressed by those under whom the plaintiff claims; and that as to all three *sanads*, even if genuine, they have never been recognized by any superior revenue officer of the English Government as valid and binding, or been made the foundation of the revenue relations between Government and the plaintiff's family or those under whom they claim, but that, on the contrary, such revenue relations, so far as the evidence shows them, have been regulated as if the *sanads* did not exist. This being so, the result is that this case must be treated as if the *sanads* were out of it altogether.

There is, however, one observation which I wish to make with reference to the *sanads*, that, whether they be spurious documents or not, the fact of the plaintiff putting them forward as the root of his title, so far at least as concerns far the greater portion of the property claimed, is an admission that at the date of those alleged *sanads* the then Government had the *power* to make the grants in question, *i. e.*, that in April 1798 it had power to grant the village of Goer, rice land, jungle and all; in March 1799 to grant all the forests as distinct from cultivated ground of the

village of Kaignad; and in November 1789 to grant the rice lands, jungle and all of the village or mazra of "Balikheda". If, therefore, the *sanads* are out of the way, the plaintiff has to establish that he had at the institution of the suit succeeded to rights of property which by his own case, at the times respectively before mentioned, belonged to the then Government, and would in the absence of any private right shown then to exist therein have vested in the East India Company after the taking of Seringapatam in May 1799, and the subjugation of the country previously under the rule of Tippu Sultan.

On the other question to which I have referred, arising in the defence of limitation, and which, as I have said, disposes of the suit so far as the decree is concerned, I shall hereafter have some observations to make.

The branch of the case on which particularly I propose to express my opinion is the general questions of the right which, as contended, is conferred or shown or recognized to exist in the plaintiff as one of the vargdars of North Kanara by the fact that assessment on *kumri* or pepper or *farmaish* is found entered in the *chitta* of his *vargs* as a a payment to be made by him.

It may be convenient here to state in order the documents which, in my opinion, are the more important ones for consideration in respect to this general *kumri* question. Of course there are many others, and I call them the more important chiefly that they are, or purport at least to be, of dates prior to the time when any controversy or, so far as appears, dispute arose in regard to these villages in respect of the *kumri* question as such. Though other sources of information were referred to in the argument of this appeal, I purpose to confine my attention to such documents, as I find actually in evidence in this particular case, with one or two which were referred to by the District Judge.

The documents in the first instance to be mentioned are prior to the year 1840, and are either official documents and accounts or private accounts produced by the plaintiff. [His Lordship here referred to the documentary evidence, and continued :—]

Without desiring to go over again any ground which may be found to have been fully occupied by my learned colleague, I

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should wish to state in some detail my own observations and inferences in respect of this class of documents; and the point of view I wish to take up in reviewing them is to ascertain how, in fact, *kumri* or *korlaya* appears to have been treated and dealt with, and how far it is possible to apply any general principle as accounting for the different amounts from time to time entered in the *chittas* in respect of *korlaya*, and whether (if at all) such amounts can be referred to any particular localities.

The *jamabandi chittas* appear in themselves to me to support the view that the primary meaning of the word *vary* is, (as Mr. Blane contended) "account", and that it was by an extension of its original meaning that it came to be used as indicating the property to the assessment on which such account relates. The *chittas* are, in fact, themselves nothing but continuous accounts between the Government and the individual, whose name originally stood at the head of them, or has subsequently succeeded to the place of such individual in the *varg* of the amounts chargeable on various heads, and with increases or reductions from time to time and of the sums actually collected.

There are a certain number of instances to be found (though it cannot be said that the phraseology is quite uniform) showing that the *chittas* themselves use the word "*varg*" in the sense of "account". Land is mentioned as being taken into cultivation or becoming or being waste or *kulnasht*, but what really goes into the *varg* or out of the *varg* is a sum of money in respect of it. The documents do not purport to be an account relating to the *varg* of so and so. The word *varg* itself nowhere occurs in the title of the *chittas*, but the *chittas* themselves are an account, or at least display an account, and an account of sums of money, though they also mention items of landed property in respect of which sums are entered or taken out. When in such *chittas* assessment is shown as having been charged or a deduction made in respect of rice land we have in some part of the *chitta* the fields specified by name with estimated produce showing how the amount has been arrived at which is entered in or taken out of the *varg* in respect of rice cultivation.

The words "*vadi*", "*doongar*" (or hill) and "*jangal*" (forest or waste ground) often occur in the papers in this case. It appears from exhibit 77 and exhibit 98 (which purport to be statements of Government jungles in the taluka of Ankola prepared respectively in Fasli 1232 and and 1233) that in the villages of Goera, Kaignad and Buaire were jungle or forest tracts then known by certain names. The names of forests, the witness De Cruz states (speaking of the villages in question here), were taken from the small hamlet (or *vadi*) near each forest. It is evident that the *vadis* are something different in themselves from the jungles mentioned, though the jungles may have taken their names from *vadis* near or within which they were. The *vadis*, it appears consisted of houses more or less in number, or even of a single house, and where more than one, often scattered about in the forest, but with some cultivated fields or garden near such houses or house and with forest tracts identifiable in common understanding or repute at least, though I apprehend not ordinarily, by any actually defined limits, and which forests generally took their names from the *vadis* or hamlets. We find, too, instances of hamlets ceasing to exist as such, and the rice land or gardens connected with them becoming forest again. The names of localities mentioned in the *jamabandi chitta* of Goer (exhibit 48) (and on account of which "*nanebab kumri korlaya*" is entered in the *chitta*), with one exception where the word "*vadi*" does not occur, purport in themselves to be names of "*vadis*", not "jungles". They are ten in number, with some unnamed "portion lying fallow". Ramchandra and DeCruz in their evidence give the names of the *vadis* or hamlets of Goer as now existing. Ramchandra mentions twelve, viz., Goera, Borse, Khote, Tole, Bijoli, Saneke, Kamargaum, Tirvali, Lande, Vope, Awurge and Kanadgi. De Cruz mentions the same names, except that he does not mention the last two. The names of forests appearing in exhibit 77 as names of forests in Goer, and reported in Fasli 1232 as being Government property, are four: "Tirvali Doongar", "Lado Doongar", "Doratem Doongar", and "Borshelka". Their boundaries are stated in the same document, and have been pointed out by four persons, among them being Martobrao Nadkarni, son of Sadashivrao and father of the plaintiff, The incidental appearance of this name in the survey

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as of one who had pointed out the limits of Government jungles in Goer at least is, I think, very noteworthy in connection with the statements of the same person before the reshkar of Sadashivgad in A. D. 1841 when he wished to ignore all value of this survey as having been prepared by a shanbhog, Venkatra Manaya, who was hostile to his family, and "without getting any information from us" (*i. e.*, the family of Martoba). Two of these names of jungles appear connected with names of *vadis* as mentioned in the *chitta* exhibit 48), namely, "Tirvali Doongar" and "Borshelka"; but as to two, "Lado Doongar" and "Doratem Doongar", I am unable to trace any connection. Lado Doongar" is, however, very probably connected with the hamlet of "Lande" mentioned by Ramchandra and De Cruz as one of the present hamlets of Goera. In exhibit 98 three of these names of *doongars*, or forests mentioned in exhibit 77, appear, not the least one, viz., "Borshelka" which is probably the jungle named from the hamlet "Borse" mentioned by Ramchandra and De Cruz, and also appearing as Borsevadi' in the *chitta*, exhibit 48.

As to the village of Kaignad, we find mentioned in exhibit 319 as names of "*vadis*" in respect of which it is said plaintiff's family in the years there mentioned received payments in money and kind from third persons, the names to eighteen different places: in exhibit 338, the names of 19 different places; according to exhibit 77, the names of 22 "jungles" are mentioned for Kaignad village as being Government property. The names of 14 of these jungles appear connected with names of *vadis* mentioned in exhibit 319, and 15 (*i. e.*, the same 14 and one othear) appear connected with names of *vadis* mentioned in exhibit 338, while the names of 6 jungles appearing in exhibit 77 are not, at least apparently, connected with any *vadis* mentioned either in exhibit 319 or 338. As to present names of forests in Kaignad, the witness De Cruz gives us 10 names of forests on the north bank of the Kala Naddi river and 20 on the south bank. Of these 30 jungles the names of 11 appear connected with names of *vadis* mentioned both in exhibits 319 and 338, but 12 names appear in neither exhibit 319 or 338.

As to Bhaire and Bali, however, I can find only the name of one *vadi* mentioned in exhibits 319 and 338, namely, "Godegali'

as a *vadi* in respect of which plaintiff's family claim to have received payment in money or kind. According to exhibit 77 the jungles of "Bhaire" returned as Government jungles, were named as follows: The "Madkarnika and Antrey" jungles, "the jungles called Jhambad in Bali", the "Devalmukhi" jungel and "Hadarge" in Gotegali—Gotegali is here evidently used as the name of a *vadi*, and as such it appears, as I have mentioned in exhibit 316. The names of jungles in Bhaire village as stated by De Cruz are as follows:—Bhaire, Madkarni, Barge, Hobkurni Bali, Goteykalli, Hutteh, Hadurgeh, Murrati Wauda, Bargudde, Kalni and Jhambad.

Now in none of the *jamábandi chittas*, except that for Goer (exhibit 48) and that for village tax No. 2 exhibit 237) and for *varg* No. 36 in Kaignad, (exhibit 231), have I been able to find, except in regard to rice lands and in some cases to garden land (whether of pepper or cocoanuts or areca-nut trees), any reference whatever to names of localities either of forests or *vadis*, or, in fact, any reference to particular lands at all. No doubt, at the head of a certain number of *chittas* for *vargs* of Kaignad there may, at first sight, appear some reference to locality, as for instance—

Tippu Gavda Virje (exhibit 221),
Patu Somagule (exhibit 233),
Govind Hoti (exhibit 224),
Bira Varngule (exhibit 229),
Kabbingule Anandrao (exhibit 232)—

Virje, Somagule, Hoti, Varngule and Kabbingule being names of *vadis* in Kaignad. In the greatet number of *chittas*, however, there is no reference to locality, even in the heading, except as to rice lands. And in these cases it is clear that the name of a *vadi* is added to the personal names Tippu Gavda, Patu, Govind, Bira and and Anandrao only by way of description of those persons as of the hamlets of Virje, Somagule, Hoti, Varngule and Kabbingule.

I have made these observations with reference to the attempt made to connect *kumri* and pepper assessment entered in particular *vargs* of Kaignad with particular localities in the same village. From the correspondence of a certain number of the sums men-

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tioned in exhibits 319 and 338 as received from raiyats, and described as "*ain*", "*sarkar*", "*korlaya*", with the sums mentioned for the same years in the *jamabandi chittas* of particular *vargs* as charged to the vargdar, and from the fact that it appears by the same exhibits 319 and 338 that these sums were received in respect of particular *vadis*, as, e. *g.*, Varngule, Somagule, Konse and Hoti, we are asked to infer that the sums so respectively charged in *chittas* were imposed in respect of the jungle or forest land comprised in such *vadis*. But it is, I think, clear, from a comparison of the names of *vadis* and forests appearing in exhibits 77 and 98 as compared with exhibits 48, 319 and 338, that not only were forests as tracts identifiable by certain names not conterminous with *vadis*, but that tracts of forest appear with names not connected with any *vadis*, and that there are names of *vadis* at least in Kaignad from which according to exhibits 319 and 338, payments for *korlaya* and, pepper were received, which are not brought into any connection even in the way contended for with any *varg* as shown in a *chitta*.

The argument, however, as to Kaignad forests is as follows:—

Payment of *kumri* and pepper assessment shows *ownership* in some forest at least. The plaintiff is owner of the only 17 *vargs* in which such assessment is charged out of the 80 *vargs* connected with the village of Kaignad; therefore he is entitled to all waste ground and forest or jungle,—in fact, to all the land not regularly cultivated as rice or garden by others within the limits of that village.

With respect to the portion of the village of Bhaire comprised in the *varg* No. 10 of Balkrishnappa of Bali, the plaintiff claims the forests, firstly, under the *sanad*; secondly, as being owner of some, at least, of the 22 sub-*vargs* constituted in respect of the *varg*; and, thirdly, on the ground that one of such sub-*vargs* owned by the plaintiff, viz., that in the name of Tilu of Jhambad, is the only one of the 22 in which *kumri* and pepper assessment is charged, viz., 0-0-8 for pepper 0-5-0 for "*kumri katti*".

Then, as to the forest of Bhaire not comprised in the *varg* of Balkrishnappa of Bali, the plaintiff claims by reason of the sum of H. H. 1-9-4 "*nanebab kumri korlaya*" having been charged to

this *varg* as appearing by the *chitta* of Fasli 1228 (see exhibit 238, p. 497),

Except that "jhambad in Bali" appeared by exhibit 77 to have been the name of a forest in Bhaire, and "Hardarge in Gotekalli" of another, and that De Cruz mentions Bali Goteykalli and Jhambad as the present names of three forests in Bhaire, and that the name "Godegadi" appears in exhibits 319 and 338 as the name of a *vadi* in respect of which in the five years between 1833-1838 payments of grain and money were received by plaintiff's family, there is nothing in evidence to connect the charges against the sub-*vary* of "The Jhambad" or against the owner of *geni varg* No. 23 in the village of Bhaire with any particular forest tracts at all.

We find entered in these documents various sums generally described as "*shist* on rice lands", "*bagayat shist*" or *shist* on gardens, and "miscellaneous items of cash" also reckoned as *shist* as contra-distinguished from *shamil*—such miscellaneous items being described as *kumri, kumri korlaya, korlaya,* pepper, pepper grove, pepper gardens and *farmaish.*

When *bagayat* or "garden" simply is mentioned, I understand reference to be made to land used for planting cocoanuts, areca palms (commonly, but improperly, called betel-nut trees,—you might just as well talk of the "strawberry and cream" plant or a pan-sopari tree) and other fruit-bearing trees, as, for instance, jack trees and mangosteens. As to pepper I do not profess to know anything of its cultivation in Kanara except what I gather from th evidence in this case. Being a plant of the creeper class it needs support, and the pepper mentioned in the evidence and documents in this case appears to be either a wild creeper growing up upon trees in the jungle or a creeper growing up upon cocoanut or arecanut palms in enclosed or defined places, and probably more carefully attended to than jungle creepers. Thus in the *azmaish chitta* of Fasli 1232 of the sub-*varg* of Tilu Jhambad in *varg* of Bali (exhibit 174) we have, under the head of "garden' the produce mentioned as so many cocoanut trees bearing fruit, so many "betelnut" trees, so many wild mangosteen trees, so many Jack trees, and then H. H. 0-0-8, in respect of "black pepper

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groves at present existing—not planted but self-grown—60 trees with creepers. Deduct 55 unproductive creepers, there remain 5 creepers producing $2\frac{1}{2}$ *atwas* of pepper at $\frac{1}{2}$ *atwa* per creeper valued at 10 pice at the rate of 4 pice per *atwa*." Though, however, we find in the *jamabandi chittas* sums frequently charged in respect of pepper, pepper-creeper or pepper-groves or gardens, the cultivation or gathering of pepper in the forests in question here does not appear to have been a matter of any moment, in recent times at least. The plaintiff Srinivasrav in his evidence on the 17th October 1871 says: "I have accounts in relation to pepper, and produce account of Fasli 1226—I produce it from my records—it is in the handwriting of Mang Shenvi. He died about forty years ago—I have no other account as to pepper—I have no agreements about pepper." This account is in relation to Kadignad, recorded exhibit 317 (not translated or referred to in argument). "No pepper has grown in the forests, *i. e.*, to a very small extent, within the time of my memory. It is wild pepper. They are old creepers. No new creepers have been planted—we have collected what little has grown in late years, some 5 or 10 *kolgas*"—whatever measure or weight that may be. From these and other indications it may, I think, be gathered that when we find "gardens" simply mentioned, the reference is to pepper or pepper creepers only, that is, wild pepper, or pepper not in enclosed or defined places; but "pepper gardens" or "pepper groves" mean pepper growing on cocoa trees, areca trees or other fruit trees in gardens or in enclosed or defined places and on which "*bagayat shist*" was imposed.

So far as pepper assessment may have been imposed on pepper groves or gardens (*i. e.*, enclosed or defined places containing pepper creepers) it may well be contended that it is an assessment on *land*, though the amount leviable is estimated at so much a creeper, as it was in the case of gardens of cocoanut and betelnut trees on so much a plant; but as to creepers growing in the jungle it appears to me, at first sight at least, impossible to hold that pepper assessment implies any estate in the *land* on the part of the person paying assessment It involves at most, in my opinion, a right to gather the produce of such creepers as there may be in some more or less undefined forest tract while they last, and, as

far as I have observed, the only reference to particular locality where pepper assessment is mentioned, is where gardens or groves are spoken of.

As to the word "*farmaish*", we have a definition or description of it in a very early document, viz., the "Yadast Rekah Zhadati" of Fasli 1215, exhibit 56, accompaniment 55. We read there opposite the word in quesion: "It was customary to make presents of vegetables, &c., (*shak bhaji*) to rajas during minor festivals. This having been stopped the amount is credited." It appears to have been a commutation in money for presents of vegetables or like things customarily made by owners of property, or, for all that appears, by the inhabitants of a certain village to rajas, or, as elsewhere appears, to Government officials. What estate or interest in land can an entry of "*farmaish*" in a *varg* involve? And yet it is entered in all the *chittas* for Kaignad, where it does occur (namely, in 5 of the 17 *vargs*) as an element in the "*kadim shist*" or "ancient standard assessment", and, like *korlaya* and pepper assessment, is, at rate so far as *korlaya* and pepper assessment are, subjected to increase or diminution as forming an element in the total *beriz*.

I have referred to pepper assessment and *farmaish* as in my opinion showing this, that as the fact of finding entries in a *varg* of pepper assessment and *farmaish* does not involve or correspond to any estate of interest in land, so from the mere fact of *korlaya* being entered in a *varg* and being dealt with as one of several elements in the *beriz* and in fixing the *jamabandi*, we cannot conclude that that entry must therefore correspond to and be evidence of any such estate or interest.

It is further to be observed that some of these *chittas, e.g.*, exhibit 48 (as to Goera); exhibits 221, 222, 225, 227, 228, 232, 233 and 236 (as to 8 of the 17 *vargs* in Kaignad); exhibit 376 (as to Bali) and exhibit 238 (as to Bhaire, *geni* No. 23) contain entries of assessment in respect of rice land as well as in respect of *kumri*, *kumri korlaya*, *korlaya*, pepper and *farmaish*, or some or one of them; whereas others of these *chittas* (viz., the *chittas* for the other 9 of the 17 *vargs* of Kaignad) contain, in the opening part at least, no assessment in respect of rice land (though in some years mentioned in the *chittas* there are traces of rice cultivati

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as being carried on and charged in the *varg* ) but have entries only in respect of *kumri, kumri korlaya, korlaya,* pepper or *farmaish,* or some or one of them. Of these 17 *vargs* of Kaignad there are three in which pepper assessment alone is found in conjunction with rice, two in which *kumri* alone is so found, two in which *kumri*, pepper and *farmaish* are so found, and one in which pepper and *farmaish* are so found. Of those without rice assessment at all two have *kumri* in conjunction with pepper assessment and *farmaish,* three have *kumri* in conj unction with pepper alone. and four have *kumri* alone. Three *vargs* out of the 17—those, namely, to which *chittas,* exhibits 221, 228 and 236, relate—have no entry on account of *korlaya,* at least in F asli 1228, the year in which the *chittas* were opened, though relating also to earlier years.

Another general observation is that whenever assessment is entered in or again taken out of the *vargs* in respect of rice cultivation, the rice fields are entered by their proper names—(the custom of particular fields having proper names prevailing apparently in Kanara as in parts of England)—with their respective estimated produce in measures of grain, which in the form of a money valuation is entered in the *varg*; whereas in reference to *kumri korlaya,* pepper assessment and *farmaish,* the *chittas* do not show, and, at any rate, do not always of generally show, any ocalities in respect of which the amounts are entered. This is the case (with two or three apparent rather than real exceptions) always with *kumri korlaya*, always with *farmaish*, and generally the case with pepper assessment. When there is a reference to a locality it is to a grove or garden.

I purpose to go through the aforesaid documents in order to see how *kumri* or *korlaya* in particular is dealt with, and whether the amount of *kumri* and *korlaya* entered and its increase and decrease when specifically mentioned as distinct from the entire *beriz*, is not always, or alwyas for practical purposes, to be referred to a certain principle, namely, that the amount is made up of so many sums of 2 falams 8 tahas (or annas) or of one falam 4 tahas. These are the rates which, as appear from the *chitta* (exhibit 231) of the *varg* constituted in Fasli 1241 in the name of Martoba (the father of the plaintiff) out of waste *kulnasht* land in the village of Kaignad and from other sources, were

assessed in respect of *kumri* cutting per knife used; *i. e.*, in respect of a man and wife wielding a knife, 2 falams 8 tahas were reckoned, and in respect of a single man, I falam 4 tahas. The mode I have adopted in testing the amounts entered at various places for *korlaya* is to turn them into annas and then divide by 40, being the number of annas in 2 falams 8 annas, or by 20 being the number of annas in 1 falam 4 annas; and if these numbers divide exactly, there is an indication that the amount only represents so many knives wielded, as the case may be, by a married pair or single man. The 0-2-8 ane 0-1-4 were, I understand, in Rahati currency; so the amounts to be taken from the *chitta*, and divided, must be in like currency, viz., Rahati.

In the *chitta* for the Goera (exhibit 48) we have a number of rice fields mentioed by name, the estimated produce of which forms the basis of the H. 27-1-4 "*shist* on rice land" Then we find as follows. [His Lordship referred to the documents put in evidence, and proceeded :—]

The names here mentioned on account or in respect of which *korlaya* is entered, purport, except in one instance, viz., "Argali Doongri" (or the hill of Argali), to be names of *vadis* or hamlets, not of fields or forests as such. This *chitta* (exhibit 48) is one of the instances in which we find an entry in a *chitta* of *kumri* or *korlaya* having reference, apparently at least, to a locality or name of a locality. On the other hand, it is to be observed that, dividing the several sums of *korlaya* entered in this *chitta* opposite each *vadi* by the figures I have mentioned, we find the sums correspond to amounts which would have been charged on 20 pairs of cutters for the first *vadi*, 8 pairs for the second, 6 pairs each for the third *vadi* and for "Argali Doongar", and 4 pairs each for the 6 *vadis* next mentioned. The H. 6--00 for the *vadis* or forest "fallen out of hand" would represent 24 pairs of cutters, so that the reference to locality does not involve more than this than that such and such sums were entered in the *varg* in respect of so many knives to be used within particular *vadis*. The basis of assessment is not the *vadi* as such or its estimated produce (as in the case of rice land), but so many knives or pairs of knives to be used in such and such *vadis* respectively. The

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reference to the number of knives, in my opinion, neutralizes any argument to be drawn from the mention of particular *vadis* or *doongar*, as showing that over such and such places the vargdar here was treated as having a general right of ownership. The entry does not involve more than this, that the vargdar was to have a certain right within such *vadis* undefined and general so far as no other limits than those of the *vadi* are mentioned, but limited by the number of knives, *i. e.*, labourers.

The only instance in this *chitta*, except the foregoing, in which I find any mention of *korlaya* or *kumri* produce as such, is in Fasli 1233 (and so subsequently to 1228), where we find added to the amount of collection for the previous year H. 2-5-0 "on account of increase in the produce of *kumri*, &c., for this year." The *chitta* does not say how the increase was estimated ; but the sum of H. 2-5-0 would represent, at $2\frac{1}{2}$ falams a pair, the knives of 10 pairs of *kumri* cutters. But though in only one instance is increase specifically mentioned as being "on account of increase in produce of *kumri*, &c." it is to be observed that the amounts of increase to be found entered, though not specifically described as in respect of *kumri*, do, as a matter of fact, always, so far as this *varg* is concerned, divide by 40 or 20 annas. Thus in Fasli 1231 we find entered H. 4-2-8 "on account of increased cultivation this year," *i. e.*, 17 pairs of cutters." In Fasli 1233 we find the amount 2-5-0, which had been charged in the first instances and which is specifically described as "increase in produce of *kumri*, &c.", is remitted at the investigation by the huzur on account of less produce in the *kar fasal* (first crop . Then in Fasli 1234 we find a reduction of 2-5-0 made on the amount collected for 1233, the 2-5-0 representing 10 pairs of cutters. In Fasli 1236 we find "reduction made by the huzur on account of the produce being less H. 4-3-12." This 4-3-12 represents 35 single cutters, or 17 pairs and one single man. In 1238 we have:—

"Camp Halgi, 20th September. 4-3-12 increase," the *jamalandi* of 27-5-0 including such increase being confirmed by the huzur on 31st October. Then occurs the entry relied on as showing recognition by the revenue authority of the Goers *sanad*-

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"Reduction as written in the huzur *chitta* as represented at Honore on the 10th December. The ancient *mulpatta* having been produced, reduction is made at present as follows, 2-5-0. This being deducted, the balance is the amount of revenue settled, H. 25-0-0-" (1)

If the ancient *mulpatta* here referred to was, in fact, the Goera *sanad*, it seems very odd that a document which fixed the entire assessment on the village of Goera at Rah. H. 30-0-0 (Haid. 23-0-12) should be made use of as a ground for reducing the assessment from Rah. H. 27-5-0 to Rah. H. 25-0-0, or Rah. H. 5 less than the sum fixed by the *sanad*. On the other hand, the reduction of 2-5-0 made at Honore on 10th December, Fasli 1238, does or may in fact represent 10 pairs of *kumri* cutters.

In 1239 H. 5-0-0 are remitted, representing 20 pairs of cutters. In 1242 increase of 10-0-0, reduced however in same year, is made representing properly 4 cutters, and in 1243 taluka increase of no less than H. 12-0-0 is made, reduced, however, by the huzur on investigation by H. 5-0-0, leaving net increase of H. 6-0-0—all these sums of 11-0-0, 5-0-0 and 6-0-0 being, of course, divisible by 40 annas representing so many pairs of cutters. As for the *chitta* for Goera it may be said that not only the amounts entered against the separate *vadis* at the head of the *chitta*, but also *all* subsequent increases or reductions may, to say the least, be accounted for on the principle that the ancient and accustomed *shist* on so many cutters or pairs of cutters of *kumri* was entered into or again taken out of the *varg* having regard to the number of cutters from time to time actually plying their industry.

In respect to the village of Kaignad we may examine as earliest in date, exhibit 56, accompaniment 55 for Fasli 1215 (1805-6) styled "Yadast Rekah Znadati" for the village of Kaignad. Wilson in his Glossary, p. 443, defines "*rekah zhadati*" as being a particular account prepared by order of Munro in Fasli 1210 relating to the whole of Kanara. Here, however, we have a document bearing the same name for Fasli 1215 for the village of Kaignad. the first observstion that arises on this document

(1). The word mulgar is added by the translator, and the phrase in original inimpersonal.

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is that the rice lands of Kaignad must have been considerable in extent, but the pepper garden comparatively small. We find the whole assessment of Haid. H. 424-3-4 particularized as H. H. 386-4-14, *dhanmadi shist* (*shist* on rice land) being the net amount after certain deductions in respect of *inams*, allowances to village officers, &c.; then H. H. 12-8-6 for "*bagayat shist*", or *shist* on gardens (*i. e.*, cocoanut gardens); and then a sum of H. H. 25-0-0 (=Rah. 32-5-1), described as "on account of miscellaneeons [cesses] in cash."

The sum under this head, viz., H. H. 25-0-0, is made up of

H. H. 10-2-9 (or Rah. 13-3-6) "amount on account of planting ragi," &c., on cutting *kumri* jungle."

H. H. 12-6-7 (or Rah. 16-4-6) "amount on account of pepper garden."

H. H. 0-1-14 (or Rah. 0-2-8) "on account of *hackal* ter." (assessment on dry-crop land).

H. H. 1-9-2 (or Rah. 2-4-13) is described thus; "*Farmaish.* It was customary to make presents of vegetables, &c., (*shak bhaji*) to rajas during minor festivals; this having been stopped, the amount is credited." The amount in Rah. H. 32-5-1 entered in this document on account of miscellaneous cash items or cesses does, after deducting Rah. H. 0-2-8 (on account of *hackal ter*), correspond with the amount (also in Rahati) of 32-2-9 mentioned as the total assessment on the subject-matter expressed to be granted by the Kaignad *sanad*. Though an absence of such correspondence would of itself have been fatal to the Kaignad *sanad* its presence does not necessarily show more than this that, admitting the supposition that that document was a fabrication, the fabricator was aware of the exact aggregate amount in 1215 assessed on Kaignad village in respect of *kumri*, pepper garden and *farmaish*; and having regard further to the fact that the plaintiff's case is that he and his family have been in enjoyment for some forty or fifty years past, whether under *sanad* or not, of all the *vargs* in Kaignad paying those descriptions of assessment, the circumstance of the correspondence does not appear to me of any weight at all as telling in favour of the genuineness of the Kaignad *sanad*. It is, however, the fact that the sums for "*dhan-*

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*madi shist*", "*bagayat shist*", and "miscellaneous cash items," if added together make up the amount H. H 424-3-4 at the head of the document described as on account of *kadim shist rekah*, &c. It appears, also, as it does in the *chittas*, that the *dhanmadi shist* and *bagayat shist* had been arrived as on an estimate of the productive capacity in grain of particular lands assessed—the different qualities of land in respect to quantity of grain or the number of cocoa trees planted being referred to, whereas in respect to the "miscellaneous cash items" there is no reference to productive capacity. It will have been observed that in one part of the document we find this H. H. 1-9-2 *farmaish* formerly entered as *samil bab* now entered as *shist*. This example of the arbitrary way in which the name "*shist*" was dealt with in the accounts, would seem to exclude any argument from the fact of *kumri* and pepper assessment being included in that designation, at least as showing that they were necessarily a fixed standard item of assessment from ancient times. So, again, the description of the item H. H. 10-2-9 as "amount on account of planting ragi, &c., on cutting *kumri* jungle" seems to me to point rather to an exercise of industry in respect of land than to any right in the land itself. The assessment on rice land and cocoanut gardens is on land or produce of land as such; the sum of H. H. 10-2-9 is "on account of planting ragi, &c., on cutting *kumri* jungle." In my examination of the remaining *jamabandi chittas* I shall not, as in the case of that for Goera, examine every instance of increase or deduction in arriving at the *jamabandi*, but consider only the instances of entries specifically mentioned in the *chittas* as being in respect of *korlaya* or *kumri*. [His Lordship referred minutely to the documentary evidence, and continued:—]

The result of this consideration of the official accounts mentioned in connection with Goera village, the 17 *vargs* of Kaignad, the *varg* of Baikrishna of Bali, and the village of Bhaire, is that, out of the 74 times or thereabouts in which an amount is entered in the *varg pecifically* in respect of *kumri* or *kumri korlaya*, in about 66 instances it is divisible by 40 or 20 annas; in 4 instances this is not to be done on the face of the translated documents as

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printed, and in the other 4 (in which the reduction cannot be made) doubt is raised, by circumstances appearing on the face of the documents, whether there is not some error or confusion either in the original or the translation as printed. Further, that in the Goora *chitta* (which as being only of rice and *kumri* was a fair specimen) *all* the increases or decreases were so divisible, though not specifically described as in respect of *korlaya*; that in the four instances in Kaignad, not so divisible, the fact may be accounted for by confusion with pepper assessment; and, lastly that in all the purely *kumri vargs* the principle was found applicable. It is also to be observed that these increases and decreases occur as well after Fasli 1228 as before, and cannot be explained on the principle that they are mentioned as being collections before Fasli 1228, stated for the purpose of taking an average. For this, reference may be made to the *chittas*, exhibits 48, 225, 228, 223, 224, 230, 235, 234, 237, 229, 231 and 238.

Then, again, in some cases we find *korlaya* entered in a particular year, when it had not been in a previous year or years, or at the beginning: in others, again, *korlaya* disappears in some years, having been found in earlier years.

The foregoing survey of the *chittas* in evidence in this particular case goes, in my opinion, strongly to support the statement of Mr. Fisher in paragraph 63 of his letter of 30th August 1858 made generally in respect to forest tracts in Kanara. "This *shist*" (*i. e.*, *kumri* paid by vargdars), "moreover, was increased when a new tenant or other individual took up *kumri* cultivation under a vargdar; but the *shist* on the regular estate" (by which he means evidently, looking at the earlier part of the same para., the regular cultivation of a vargdar as distinguished from *kumri*) "was fixed."

Another observation which arises on these accounts taken by themselves is, that rice lands and gardens for fruit-bearing trees, whether combined with pepper creepers or not, were treated as something having localities known and specified by name or sufficient reference—the subject of assessment being so much cultivated land; whereas in the case of *kumri* and pepper as creepers no localities are referred to as the subject of assessment. This, again, supports another observation of Mr. Fisher's in the

paragraph of his letter just referred to, viz., "that with the exception of one taluka" (he refers evidently to Betkul) "*kumri* holdings are altogether undefined, though this is not the case with the regular cultivated portions of estates," meaning evidently rice and garden ground. In the case of *kumri* the subject of assessment is not, so far as appears on the face of these accounts, so much land or the produce as such of land; the assessment is an amount fixed with reference to, and in that sense upon, such and such a number of knives wielded by persons cutting down forest for *kumri* cultivation.

The other class of documents of early date to which I shall now refer, are certain decuments alleged to be accounts kept by or on behalf of Sadashivrao and Mantoba, and are exhibit 319 (an abstract of which is exhibit 5 in appeal), exhibit 338 (abstract exhibit 8 in appeal), exhibits 390, 310, and exhibit 364 (an abstract of which is exhibit 2 in appeal). None of them have been translated in full. The original documents, I understand, consist of separate pieces of paper with accounts and memoranda on them; and it has been observed, on the respondent's behalf, that they appear to be accounts in which entries relating to private affairs of the family appear mixed up with entires relating to collections made in an official capacity. [His Lordship referred to the documents, and continued :—]

I have taken the documents in evidence, bearing date before A. D. 1840, as a class by themselves, as it was only after that time that we find any opinion of revenue officers expressed with regard to the rights of vargdars paying *kumri* assessment; and it is only after this time that we find the subject engaging their particular attention, or as a matter of dispute.

There is, however, a group of documents, dated chiefly in the year A. D. 1841, to which considerable attention is due, as they are comparatively early, and show, in my opinion, that at that time the revenue officers, at any rate, had no notion that Martoba's rights were as extensive as are now put forward on the plaintiff's behalf. What may be called the general *kumri* question, *i. e* the right of Government to regulate, restrict, and finally abolish *kumri* cultivation, though carried on under persons holding *vargs* containing assessment on account of *kumri korlaya*, with which a connexion of a certain kind with jungles in a particular

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district might be shown, had not yet arisen. That question only arose at a latter time; and in 1241 the question was of a much more restricted character, as will be seen.

The large number of documents in evidence of a date subsequent to A. D. 1841 are not, it seems, for obvious reasons, so material to be considerd as those of prior date in reference to the general question of *kumri* right, though many of such later documents are, of course, very material to the question. How far the plaintiff has been excluded from his rights, supposing such rights to have existed, and also so far as such of these documents as the plaintiff's family are connected with, show that they have taken up or acquiesced in a position inconsistent with a then existing *bona fide* belief in the existence, in fact, of the rights now claimed.

The group of exhibits falling chiefly in the year A. D. 1841, to which I have referred, are exhibit 56 (which is a report of the 15th November 1841 of the peshkar of Sadashivgad to Mr. Blair, the Collector of Kanara) and the very numerous accompaniments to that exhibit. The question then dealt with, had immediate reference to increased *kumri* cultivation in "Bali" and "Kaignad", and proposals of Narayan, the shanbhog of Kadra (who had drawn up the memorandum already referred, accompainment 15 to exhibit 56), that Government should collect *kumri* assessment directly from the persons cultivating *kumri*. A question had also arisen regard to timber cutting in the forest of Kaignad, and to a certain amount, H. 5-8-9, of *kumri* assessment which had been found to be *kulnasht* in respect of the village of Kaignad. The immediate question, therefore, was, who was entitled to collect from the cultivators if *kumri* was cultivated; not the more general one as to the extent of the rights involved in the fact of *kumri korlaya* being entered in a *varg*.

The circumstances which led to this inquiry appear (*inter alia*) in exhibit 200 with its four accompaniments. Exhibit 200 is a petition, by the tahsildar of Ankola to the collector, of the 25th April 1841, forwarding two reports of the shanbhog of Kadra to the peshkar of Ankola, and two lists (four documents in al). The shanbhog had reported (accompaniment 1 to exhibit 200 under date 25th February 1841), that whereas in Fasli 1242 an *azmaish* of the *varg* of Balkrishnappa (*i. e.*, Bali) had been made, and 5

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falams entered in the sub-*varg* of Tilu Jhambad as the produce of two knives of his own [referring, no doubt, to exhibit 174], and that the assessment on this sub-*varg* had, at the request of Tilu, been settled with and collected from Martoba, but that from Fasli 1248 till then, *i. e.*, 1250, Tilu had been cutting *kumri* with his own six knives; that, besides this, several others, who had cut *kumri* from Fasli 1248, had been entered in the account of village cesses. As to this, that no *jamábandi* had been fixed, a remark having been written that an inquiry should be made, but that no final order had been passed upon inquiry as to whether the produce of the *kumri* by persons other than Tilu Jhambad belongs to the Government or to the said *varg*, that the patel had also written that in the present year also (*i. e.*, Fasli 1250) 20 persons had cut *kumri*. The shanbhog then asks for inquiry and instructions. He had also reported that, as to Kaignad, two persons had in last year and again in the then present year cut *kumri* in Sulal Baleman in the Kaignad village, and that Martoba claimed that jungle "as included in *varg* No. 36". The shanbhog states, however, that "*kop mazal*" only appears from the accounts to be included in the *varg*. I have already discussed this *varg*, viz., *muli* 36 of Martoba Nadkarni (*chitta*, exhibit 131, p. 455) and the bearing of the fact of "*kop mazal*" being mentioned in the *chitta*. The shanbhog reported further that 20 persons had cut during the then present year in the jungle called Navalgudde, beyond Sankar iri, in the same village of Kaignad. He then writes: "As to this Martoba states that he possesses in the same village a *varg*, called Kabbingule Anandrao, and that as the inhabitants of Kabbingule" (*i. e.*, the *vadi* so called) "have cut *kumri*, the produce thereof should be entered in the said *varg*, called Kabbingule Anandrao; the shanbhog states, however, out of the said 20 *kuls* some live in Kabbingule, some in Kowlal, and some in Kaiga" (evidently the hamlets of these names). "It does not appear to me that the said jungle is included in the *varg* at Kabbingule." The shanbhog then reports, as to "cutting *kumri* by three persons on behalf of one Budgowda of Singvadi on the borders of kasba Kadra, in the said village, that in Fasli 1247, when Budgowda cut *kumri* near the same place where the three persons have now cut *kumri* in

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Singvadi, a *jamabandi* of 1f. 4t. was fixeed and collected; *kumri* has been cut [with] three knives in the same jungle during the present year. Martoba now states that as an assessment of 5 falams had been mentioned in the *varg*, called Bhikka Gowda of Kadra, on account of pepper groves, there is no reason to fix *kumri jamabandi*. The jungle, says the shanbhog, is more than 2 *kos* long and wide" (or about 16 square miles); "there is no fixed place in respect of which assessment is entered on account of pepper groves." He then states his own opinion that "this pretext affords no reason for saying that the place where *kumri* is cut is included in the *varg*." He then asks instructions as to fixed assessment on account of the *kumri* cut by the said three persons during the present year. He states towards the end of the document: "I have been making reports since Fasli 1245 in respect of the determination [of the question] what jungles are Government property and what jungles are included in *vargs*. No final order has yet been received." From the lists, (accompaniments 3 and 4 to exhibit 220,) it appears that the shanbhog reported 12 cutters (1 pair and 11 single men) as having cut in Bali in Fasli 1248, and 9 (*i. e.*, 2 pairs and 7 single men) in Fasli 1249, and 20, or seven double knives, 13 single ones, in 1250. As to Kaignad, that 2 single men had cut in Sulali jungle in 1249 and in 1250, 2 in Sulali, and 20 in the Navalgudde.

Now, without attributing any particular weight to the opinion of this shanbhog, we may at least give credit to what he states as to facts. I do not find that in the subsequent inquiry Martoba complains that the shanbhog had mis-stated facts. what he complains of, is the course recommended by the shanbhog for adoption. It is observable that the shanbhog reports as the ground given by Martoba for contending that the jungle, called Navalgudde, was included in the *varg* Kabbingule Anandrao, was that the *kumri* in that jungle had been cut by persons who were inhabitants of Kabbingule (*i. e.*, the hamlet). But it will appear from Martoba's own statements, and otherwise in the inquiry, that this test of what jungles are included in a *varg* is wholly unsatisfactory and uncertain, and that the residents of

other hamlets than those in which particular jungles were and even entire strangers cut *kumri* in those jungles, and that it was in itself quite accidental where a *kumri* cutter in a particular jungle might, in fact, reside. The phrase used of a jungle being "included" in a *varg*, seems to mean only this, that, in respect of *kumri* cut in such jungle, *kumri* assessment is entered in certain *vargs*. Martoba did not, to the shanbhog at least, contend that, in virtue of the fixed *kumri* assessment entered in the *varg* of Kabbingule Anandrao, all the Navalgudde forest belonged to him as owner; what he contended was, that as the *kumri* in Navalgudde had been used to be cut by inhabitants of Kabbingule, the *kumri* produce should be entered in the *varg* of Kabbingule Anandrao: in other words, as I understand him, that whereas he objected to direct collection from the 20 cutters referred to being made by Government, he was asking to have *korlaya* assessment entered in respct of them in this *varg* of Kabbingule Anandrao.

The whole question to which this inquiry was directed was, whether, in respect of certain jungles in which *kumri* had been cut, the direct collection from the cutters was to be by Government or by Martoba; Martoba, if directly collecting in his turn, paying according to the usual rate by entries is his *varg*. No doubt it may be contended that a decision of this question in Martoba's favour would be a recognition of his rights to a certain extent; but that such recognition, as was given, does not involve a right of ownership over any defined ascertainable area of forest, or, in fact, any ownership of land in the proper sense of the term at all, I shall attempt hereafter to show.

In the course of the inquiry held, under direction of the collector by Parameshwaraya, peshkar of Sadashivgad, in consequence of the aforesaid questions arising, it appears that Martoba did claim the whole jungles of Kaignad under a *sanad*, no doubt the *sanad* now in evidence, and was willing to pay the additional amount of *kumri* assessment, which was *kulnasht*, viz., 5-8-9, over and above the amount 29-7-13, the aggregate of the amounts then entered for *kumri* in his different *vargs*. This, I may mention, was in my opinion, the first occasion on which any *sanad* was relied on by the plaintiff's family in respect of Kaignad. The accompaniments

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to exhibit 56 consist, so far as it is necessary to mention them and in order of date, of No. 52, a letter of 25th March 1836 from Narayan, shanbhog of Kadra, to the peskar of Sadashivgad. [His Lordship referred to the documents.]

The admissibility of certain of this group of exhibits was objected to by respondent's counsel when referred to on behalf of appellant on the question of the general title of plaintiff to the *varg* of Bali. The documents particularly objected to were the depositions or statements before the peshkar of Sadashivgad in August and September 1841, of mirasi village officers and raiyats (accompaniments Nos. 37, 33, 39, 40, 34, 10, 5, 8, 9, 35, and 6). The other documents, viz., the report exhibit 56 itself, certain other official documents, and the petitions and examinations of Martoba (viz., accompaniments Nos. 3, 1, 2, 4, 23, 29 and 24) were referred to without objection, and, I believe, by both sides Though, strictly as evidence of all they contain, the statements of the mirasi and village officers cannot be regarded, some reference may, I think, be made to them to see what language these persons in general use in reference to the *kumri* question; and it is observable that one and all speak of Martoba's connexion with the forests of Bali and Kaignad as being one of *collection* from cultivators or cutters, such cultivators, moreover, sometimes belonging to certain *vadis*, within which a particular forest was sometimes being persons resorting to such forest from other *vadis* and places. They profess to give the limits of forests belonging to certain *vadis* or hamlets of Kaignad, as Hartoge, Kortvadi, Virje, Hebkuli, and Baise, Kaiga, Soigunji, and Nalwadi, and of the forest of Bhaire village and of the hamlet of Bali; but they speak of forests in connexion with "hamlets" or "*vadis*" not in connexion with "*vargs*".

Among the accompaniments to exhibit 56 we have documents with which Martoba is directly concerned, *e. g.*, (accompaniment No 3,) Martoba's petition of 23rd April 1840 (which, however, is not material to be mentioned), and his petition (accompaniment No. 1) of 3rd May 1841. In this he mentions that he had heard some report had been made by the shanbhog about his (Martoba) having instructed or authorized one Suable Camut of Goa to cut down a

number of trees. He represents that there had been enmity between him and the shanbhog, and asks for full inquiry. On this petition, under date the 10th May 1841, the collector endorses an order to the peshkar to take evidence and report as to any documents produced by Martoba.

Then we have Martoba's petition, to the collector, of the 15th June 1841 (exhibit 56, accompaniment 2.) He refers to a proposal of this shanbhog (in respect, as I understand, of Bali hamlet) to collect *kumri* assessment direct from 12 persons who had cut in Fasli 1248, from 11 who had cut in Fasli 1249, and from 46 who had cut in Fasli 1250. His objection to this seems to be that these cultivators had been employed by him in jungles "included in his *shist*". He refers to some order having been made for searching inquiry "whether or not the assessment on account of the jungle in which the aforesaid cultivators have cut *kumri* was entered in his (the petitioner's) *varg*." He says that if "it should be found on inquiry that the jungle in which the aforesaid cultivators have cut *kumri* belongs to the Government, and that a separate additional assessment in payable, he (the petitioner) himself will pay whatever money he has collected from the aforesaid cultivators," *i. e.*, that he would simply refund what he had received. Then Martoba was examined by the peshkar on the 24th July 1841 separately as to Bali and Kaignad and further as to Kaignad on the 24th September 1841. He states his case as to the history of the title to Bali hamlet which was, he says, "made over to us" in Fasli 1241 by Balkrishnappa (which is the name still to this day standing in the *chitta* of Bali as vargdar). There is not a word, it may be observed, of the alleged *sanads* of 9th November 1789. He says: "The assessment on account of *kumri* as well as that on account of pepper gardens in the jungles of that hamlet, has been entered in that *varg* from days gone by. The same being imposed as the full assessment on the entire *varg*, and I having continued to pay the full assessment to the Government, I have received the produce of the *kumri* cut in the jungles of that hamlet. Further, I beg to say, that I will not allow (the assessment) to be collected from the cultivators separately." With reference to the question

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on what sort of estimate the assessment was settled on the jungles he states that he had heard his ancestors say as follows:—"An estimate was made as to how much *kumri* could be cut by a particular number of men with a particular number of bill-hooks in the jungles in each village or in each *varg*; the produce estimated for each bill-hook was one rupee (or 0-2f.-8a). It was ascertained, on inspection of the condition of each jungle, whether in the event of *kumri* being (once) cut in the said jungles it would take twelve or fifteen or twenty years to cut *kumri* (there again). The produce was distributed over so many years, and an assessment was settled in proportion thereto." No documents corresponding to such an estimate as here mentioned has been put in evidence, and the statement in itself does not appear to me to be supported by the *chittas* in evidence. If the amount estimated by so much a bill-hook were distributed over different periods varying from twelve to fifteen and twenty years, it is difficult to explain how the sums appearing in the *chittas* as being charged to vargdar and collected from year to year, are in such a vast preponderance of instances exactly divisible by so many bill-hooks.

In his examination as to Kaignad on the same 24th July 1841 he claims the jungles of the entire village "as having been given to his father by the Government under the former rule for a total *beriz* of H. 35-6-4 for *kumri korlaya*, pepper, &c." As to the *kulnasht* in Kaignad he explains it thus: "some *kumri* and pepper lands, &c., carrying an assessment of H. 5-8-9, remained uncultivable and without cultivators." In the remaining lands he states *kumri* cultivation was carried on, making expenditure through the village mirasis for religious ceremonies and fairs, paying to the Government the fixed assessment, and causing the *kumri* in the forest to be cut by means of the raiyats to be employed." He states that on examination of mirasis patels, &c., it would appear "that mirasis had been appointed from the very commencement for each *varg* in the said manja, and that separate boundaries have been fixed for the forests." The mirasis, however, themselves all speak of being mirasis for *hamlets*, not of *vargs*. He then gives a list of hamlets with their mirasis, meaning, I suppose, the mirasis of hamlets

with their forests. He gives the names of 22 jungles or groups of jungles, which names, however, with perhaps one or two exceptions, are names which we meet with elsewhere as names of *vadis* or hamlets. He is asked to state in detail as to which jungle is attached to which *uarg* in the forests. His answer is not very intelligible. He says: "If I were to state the same in detail, it is not the case that the raiyats of any *vadi* cut (the *kumri*) in the jungles (of the *vadi*); wherever there may be found a good jungle in the mauja, the usage is that there they go to cut (the *kumri*); as the *varg* for the entire mauja has been held by us, it includes all the jungles found therein." And, again, the question being repeated he says: "According to the *kadim beriz rekah zhadati*, the assessment, &c., leviable on the entire mauja, and also the jungles having been entered in the Government account" (does he mean the surveys, exhibits 77 and 98, or what?) "out of this four tenantless sites *banjar* being excluded, all the remaining *beriz* is apportioned in the accounts to the different *vargs* of the village; therefore all the jungles of the mauja are included in the *beriz*, and no jungle is left to the Government." It is evident that Martoba was unable to point out what particular jungles belonged to what particular *vargs*; his argument was as follows:—"As it appears from the *rakah zhadati* what jungle assessment is leviable on the entire village, and as a large portion of this is made up by sums entered in the accounts" (I suppose referring to the *jama-bandi chittas*), the "residue being accounted for by four sites or *vadis* being *kulnasht*, the whole jungles of the village belong to me."

There is an instance to be found in these papers of the practical difficulty of identifying any particular lands as being assessed for *kumri* by entries in the *chittas*. It appears that one Shimpi Pandurang had before them, viz., in Fasli 1249, cultivated certain ground in Kaignad. Martoba is asked about this on the 26th September 1841, and says: "The said land is included in the *muli varg* No. 36, standing in my name.' This is the *varg* (of which the *chitta* (exhibit 231) has already been discussed) which was constitated in Fasli 1231, and contains, as we have

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seen; *kumri* assessment alone. It appears, however, by the shanbhog's report of 25th January 1841 (accompaniment 56 to exhibit 56) which was read to Martoba at his examination, that Martoba had in the first instance stated that the land cultivated by Shimpi Pandurang belonged to his *varg*, *muli* 35, Ramshetti Sulal. This was quite a different *varg* from *muli* No. 36, and was one of the 60 or so *vargs* of Kaignad in respect of the assessment of which, in arrear for Fasli 1240, other property of Sadashivrao's was attached and proclaimed for sale by the document exhibit 56, accompaniment 29, of the 29th June 1831, but was not one of the 17 *vargs* containing *kumri* or pepper assessment or both. The four then uncultivated sites, as mentioned by Martoba, were "Holachavadi" in kasba Kadra, "Virja" (which was a hamlet or once a hamlet), "Kankavali" and some land in a place called "Halooge" (*Qy.* Hartooge). Martoba expresses his willingness that the H. 5-7-3 assessment, in respect of *kulnasht* should be added to his *beriz*, and which he was willing to pay. He is asked how he can claim the whole jungles, when "*beriz* for jungles, &c.", is entered only in 14 of his *vargs*, and what jungles with the *vadis* in which situated, he says, belong to these 14 *vargs*? He does not answer the question except as before, but refers to the fact that pepper (surely a very different thing from *kumri*) assessment is entered in three other *vargs* of his, viz., *muli* 13, *muli* 19, and *geni* 10. He is quite aware of the fact that in the *chittas* an enumeration of rice lands themselves is contained, but that as to *kumri* and pepper the amount of assessment only is entered. He adds: "And the enjoyment of the respective *vargs* has been going on according as it had done from a long time before." In this passage I understand that he suggests that the question to what jungle in particular certain *kumri* and pepper assessment is referrible, can only be determined by reference to what has been in actual use, I suppose by the vargdar paying such assessment. He says, further, he will produce "a *beriz zhadati* containing the enumeration of the *vargs* (prepared) from the records we have of former times." If the list, here referred to, be exhibit 364, and there is no other in evidence, we have seen what kind of a document it is. When asked how it has been that he has given away jungle land on contract to

men of other places (referring to selling timber and firewood to Goa merchants) he seems to explain it on the ground that *kumri* cutters are not procurable every year, and that, after all, wood-cutting in its effect is much the same as *kumri* cutting, and that the Government also derives profit by means of duties (*Qy.* export) from the wood being cut. As to teak woods in Kaignad forests, he states that his ancestor, Datta Shenvi, and father got them planted, and adds: "Yet we furnished Government with the requisite wood formerly, and received presents therefore. Now also there would be no objection to supply Government with any tree wished for."

It will be observed that on the 24th July 1841, Martoba only stated generally that the jungles of Kaignad had been "given to his father by the former Government;" he does not refer to any specific document as being in his possession. On the 26th September 1841 he goes further, and says: "I will also produce a *patta*, granted by the former Government, in which it is specified that we may turn it" (I suppose the jungles) "into any kind of '*vritti*'" (translated "profit") "by" (taking) "any useful thing standing thereon and cutting at pleasure trees, jungles, hereafter, From this even we have the exclusive rights in the jungle." The *sanad* itself, however, was not produced till the 4th October 1841, when he sent in, as he had said he would do, a further statement, in writting, of his case as to Kaignad village in the form of a memorial to the peshkar, of the 4th October 1841 (exhibit 56, accompaniment No. 24.) In this he represents the necessity, as also the difficulty, in former times of getting mirasis to come to the forest and perform the worship of the forest deities, and hold feasts and fairs, and that, in the absence of such mirasis, cultivators did not come; that the bringing in of such new mirasis had been effected by his father, and accordingly "29th. 7f. 13a. were entered as the *beriz* of the village; the remaining forest land, carrying a *beriz* of 5h. 8f., 9a., being mirasless had remained fallow from that time up till now." He then states that if cultivators are obtained, one rupee per *payali* is entered (I suppose in the *chittas*) as fixing the assessment from them (*i. e.*, he vargdars), but that in consequence of the functions performed

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by mirasis, nothing is taken from them if they cut *kumri*; that as regards the other raiyats, "if the *kumri* is cultivated by the exertions of men and woman (*i. e.*, jointly), one rupee per *payali*; or if by men only, without woman, half rupee per *payali*; or if by men of tender years or by men who, after cultivating the rice lands, cut a little of the *kumri*, a quarter rupee per *payali* is levied according to usage. If a larger amount than that that is levied, this people would not reside. Therefore, I follow the custom in realizing the duty. But I do not levy, as the shanbhog puts down in the accounts, one rupee rate upon the crops from all the tenants" (indiscriminately). From this passage it would appear that Martoba was also complaining of having assessment levied or attemped to be levied on the basis of Re. 1 (or 0-2f. 8a.) per knife indiscriminately; whereas, he says, all what ought to be levied according to usage, was, as the case might be, Re. 1, ½ rupee, or ¼ rupee. In this passage, however, he seems to admit that the assessment to be levied from him was to have relation to number of cutters. Then he points out that he (the vargdar) is at some expense in providing supplies of articles for holding feasts and festivals in honour of the village deities. As to timber given to men of Bad, Karwar, Sheveshwar &c., he rather apologizes for it than sets up any right to have given it. He rather puts the proceeding on the ground of necessity, as that timber or rafters were required for building purposes, and says that in return these persons furnish "cocoa-nuts, oil, corn, sugar, or even a moderate sum of money in aid of expenses incurred for the deities."

"Though we might," he says, "thus obtain 8 or 10 rupees" (meaning, I suppose, some small sum of money) "this outcome does not cover the expense which is made up from out of our own pocket, thus fulfilling the services due to the deities." Then he speaks as to export of timber by merchants from Goa. This he supports by a reference to some other vargdar, Ramappa, having sold timber, and argues that to give a small portion "of forest for felling was really the same thing as *kumri* cultivation; that *kumri* cultivators were not always procurable; that the moneys paid by such merchants would go "to a certain extent"

to contribute to the expenses of the forest deities, and that, lastly export of timber to Goa benefited Government, as they derived export duties (so the translation). On these grounds and that by virtue of the *sanad* he has a mulgari right in the jungles of Kaignad, and he objects to any separate levying of further sums on the jungles in respect of *kumri* cultivation. I believe I am correct in stating that he nowhere claims a "mulgari" right in respect of the forests of Kaignad, except by virtue of a *sanad;* he nowhere claims it as being merely *muli* vargdar of certain of the separate of *vargs* of Kaignad village.

The report of the peshkar, of the 15th November 1841, after this inquiry is in favour of the position contended for by Martoba, that, as to Bali, he alone was entitled to collect from cultivators in respect of *kumri* cut in that hamlet, and that a separate levy on such cultivators should not be made by Government. As to Kaignad the peshkar seems to accept the *sanad*, so far at least that he makes no observation against it.—in fact, he merely reports it, and this is not unimportant, as he has been asked to report his opinion as to its genuineness. He reports further that, with the exception of the H. 5-7-3 assessment entered as *kulnasht*, the residue of the *kumri* beriz as found in the *zhadati dakhla* was to be found entered in the *varg* of which Martoba was in enjoyment, that Martoba was willing to have the assessment entered as *kulnasht* added (to his liability), and that he (the peshkar) could find that only in one instance, viz., in Fasli 1247, had Government levied a sum (0-1-4) separately for *kumri* cutting in this village. The peshkar concludes by stating: "I don't find that a separate *jamabandi* was ever made and *kumri* tax levied by the Government up to the present time. From all these circumstances, Martoba seems to have reasons of the (above) sort to advance his claim to the forest of this village."

On this report of the peshkar we have the order of the collector, Mr. Blair, of the 14th January 1842. In this he decides that the recommendations of the shanbhog to levy *kumri* assessment separately from the sub-tenants of Bali, were not to have effect given to them, but that Martoba was to continue to collect. As to Kaignad, his opinion was that, for reasons which he mentions, Martoba had no reason whatever to advance a claim to "jungles

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not hitherto brought into cultivation, *i. e.*, falling under the head of "*kulnasht* assessment". From Martoba's offer to pay this assessment, Mr. Blair infers that some tricks of his (Martoba's) had contributed to the land being "included in" *kulnasht*, notwithstanding which he (Martoba) had cleared the jungles of the trees, sold them, and appropriated the proceeds thereof. Mr. Blair's decision as to the Kaignad jungles is, that Martoba should enjoy, for the future, all those jungles which have from the "beginning been cultivated with the *kumri*, and pay the assessment he has paid up to now." He adds: "You are therefore to give due warning, and to take care that no person cut trees in all these jungles without permission and without making payment of proper fees."

I do not gather that Mr. Blair treated the so-called *kulnasht* jungles as spaces of land as being ascertainable by any other means than by the circumstances whether *kumri* cultivation had been, in fact, carried on "from the beginning" in this or that place; his idea was that, though so much assessment appeared to be *kulnasht* (that is, no one paying it), yet that Martoba had been clearing generally trees and appropriating the proceeds, though in spaces not "from the beginning" cultivated in the way of *kumri*.

That Mr. Blair would not have disposed of the matter, as he did, had he considered the *sanad* for Kaignad genuine, or, if genuine, binding, is evident, I think, and that he had the document itself before him appears from exhibit 50. He does not, indeed, express any opinion upon it one way or the other; he ignores it, and deals with the question as if the *sanad* did not exist.

In recognizing in Martoba a certain right to enjoy jungles which had theretofore been used to be *kumried*, I do not find anything to show that he considered Martoba was owner of them or that he had any rights over them, except in connexion with *kumri* cultivation. Though he disapproves of the conduct of Martoba in taking timber in jungles which had never been *kumried*, he does not recognize his right to cut timber as such, even in those jungles which had been *kumried* "from the beginning".

The view which Mr. Blair took of the matter, is further manifested by a previous order of his, of the 15th April 1841 (exhibit 110), and hereinafter mentioned, and by a subsequent order of the 6th June 1842 (exhibit 158). From the latter document it would appear that there had been some further inquiry, referable particularly to the timber question. His opinion clearly was that a right to have *kumri* cutting carried on does not involve a right to cut timber, as such, and sell it. He argues that the very fact that timber trees are found in certain places, shows that the ground had never been *kumried*. Even as to cutting billets for firewood, which *might*, he says, have grown in places which had been *kumried*, he denies the right of Marroba to give chits or passes for such cutting, and says that such passes should be given by the shanbhog. He observes: "The collection of the *kumri* assessment is in respect only of the cultivation of the *kumri*. In the talukas on this side of this district" (meaning, I suppose, North Kanara, where Ankola was) "the persons who pay the *kumri* assessment have right only to cultivate the *kumri*. They have no right whatever over the trees of the adjoining jungles." He evidently uses the word "adjoining" with reference to his previous remark, that in *kumried* places themselves no timber would, in the nature of things, be formed. "Therefore," he continues, "Marroba cannot have any more right than this by the sole reason of his paying the full *kumri* assessment of the village."

Mr. Blair's views are further illustrated by other orders of his falling in A. D. 1841 and 1842, which are in evidence, viz. :—

Exhibit 110 of the 15th April 1841 ;
Exhibit 111 of the 31st July 1841
Exhibit 79 of the 29th January 1842 ;
Exhibit 80 of the 25th April 1842 ; and
Exhibit 81 of the 1st August 1842.

By exhibit 110 Mr. Blair gives order, in general, that "in future no vargdar" (*i. e.*, in Ankola and Sadashivgad, generally,) "is to give permission to cut trees, unless previous permission obtained on production of evidence to satisfy the Sirkar that the forest belongs to his *varg*." In using the phrase "forest

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belonging to a *varg*," Mr. Blair, it is clear from a comparision of the tenor of the orders of his in evidence, did not mean that, because *kumri* assessment was entered in a *varg*, the forest belonged to it. I think he referred to cases of private property in forests under grants or *mulpattas*. As to Martoba's case in particular he says; 'Martoba of Kadra seems to have allowed the trees to be so cut, and to have laid his claim to the forest on the ground that some *kumri* assessment was included in his *varg*. Besides this, no other proof seems to have been brought forward by him. The ground of (the payment of) *kumri* assessment can only be alleged as a reason for the raising of *kumri* produce, but he cannot cut trees at all." He disapproves of the proceedings of Martoba, and says; "It was very improper on the part of Martobaro of Kadra and others to have allowed people to cut Martobarao of Kadra and others to have allowed people to cut trees as it pleased them, and to have received commission from them, on the ground, as stated above, that the forests belonged to their *vargs*." From the mention of the names of Shable Camut of Goa it may be inferred from other sources that the particular cuttings, referred to in this order, were cuttings in forests in Kaignad; while the general direction to prevent vargdars from giving such permission, applied to Sadashivgad and Ankola generally. By exhibit 111 the collector administers official punishment to the shanbhog of Malapur for neglect whereby Martoba "had had facility (given him) entirely to clear the jungle (of trees)." This seems to refer to some jungle at Malapur in Kaignad village, at which place, Malapur, the plaintiff's family have had their principal residence. By exhibit 79 the patel and shanbhog of Kaignad are reprimanded for carelessness in not preventing persons cutting teak in the jungles of Shidgunji, &c. Shidgunji was in Kaignad, and jungle claimed by plaintiff. Exhibit 80 also relates to teak cutting in Shidgunji. Exhibit 81 relates to fining certain persons for cuting teak in Dasnali (a jungle in Kaignad and claimed by plaintiff), and for removing other wood (whether teak or not is not stated) already cut by Government in Sodal (also in Kaignad and claimed by plaintiff).

Mr. Blair's view appears to have been that in the case of such jungles in Kaignad and Bali as appeared to have been, in fact,

*kumried* "from the beginning" (*i. e.* in past times), Martoba was to be considered as having the right to collect assessment in respect of such cultivation from the cultivators, but that he had no right to the timber or wood, as such, of the forests by reason merely of paying *kumri* assessment to Government, except so far, of course, as the cutting and destruction by burning of wood was necessarily involved in the process of *kumri* cultivation. At this time, as I have said, (and this is very important to be borne in mind in considering the effect of Mr. Blair's orders) there was no thought of restricting, still less of abolishing, the system of *kumri* cultivation. It was going on in full force, and really all that Mr. Blair decides is, that as to such jungles as appeared, as a matter of fact, to have been "from the beginning" cultivated in the way of *kumri* by or under Martoba—Martoba was to have the right of collecting direct from the cultivator of *kumri* in such jungles, and that the Government was not to collect *kumri* assessment direct from the the cutters. I think Mr. Blair would have been considerably astonished to find that his orders could be treated as a recognition of Martoba's general right to the forest tracts of the hamlet of Bali and the village of Kaignad, involving not only the right to the produce of *kumri* cultivation within the limits in which it had theretofore been carried on, but also to cut down and sell timber and wood, or put the forest under garden or rice cultivation, and involving, in fact, Martoba's general proprietorship in the forests. Mr. Blair had no occasion to consider the matter from the point of view which afterwards arose, namely, whether the Governmen had not the right to regulate and finally put a stop to *kumri* cultivation, remtitting the *kumri* assessment paid by vargdars.

As to an increase in the *korlaya* paid by Martoba in the *varg* of Bali Balkrishna, or rather in the sub-*varg* of Tilu Jhambad, or respecting the 12 persons reported by the shanbhog to have cut *kumri* in Fasli 1248, the 11 who had cut in Fasli 1249, and the 46 who had cut in Fasli 1250, Mr. Blair's orders are not very clear; all he decides as to Bali is, that *korlaya* was not to be collected by Government direct from the cutters. He does, indeed, in his order, exhibit 159, decide that Martoba "is to pay the

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assessment he has paid up to now." But this does not show that Mr. Blair considered that Martoba was liable only to pay the same absolute amount as theretofrom; it does not necessarily mean more than this, that he was to pay at the same rate, and refers, I think, to the course sought to be adopted by the shanbhog, and complained of by Martoba in his deposition of the 4th October 1841, namely, to levy Re. 1 or 0-2-8 indiscriminately on each bill-hook instead of Re. 1 or As. 8, according as the wielder of the bill-hook was a married couple or a single man. For all that appears (though here I speak with some diffidence, owing to the possibility in the case of such a large mass of documents, that indications afforded by some or one of them may have escaped my attention) additional *korlaya* may have been levied from Martoba in respect of these cutters. By the plaintiff's case, *korlaya* was not entered in respect of the Bali hamlet in the *chitta* of the *varg*, *muli* No. 10, of Baikrishnappa, exhibit 376, but only in the sub-*varg* of Tilu Jhambad. The only document in evidence, however, as to Tilu Jhambad's sub-*varg* is the *azmaish chitta*, exhibit 174, and this relates only to an earlier year Fasli 1242. We might have expected, however, to find in the 17 *vargs* of Kaignad, the *chittas* of which are in evidence, some indications of increases of *korlaya* in the years Fasli 1247-1252; and though we do so, I do not find it can be said that the increase corresponds to the alleged increase of *kumri* cutting in forests of Kaignad.

In *chitta*, exhibit 221. no *kumri* is entered at all.

In *chitta*, exhibit 223, as printed, the years after Fasli 1243 are not given.

In *chitta*, exhibit 223, there is an increase of 0-2f.-8t. in Fasli 1246, none in 1247-1252.

In *chitta*, exhibit 224, in the years Fasli 1247-1251 no increase is entered; in Fasli 1253 there is an increase of 0-5-0.

In *chitta*, exhibit 225, there is an increase of 0-5-0 in Fasli 1250

In *chitta*, exhibit 226, no collections or *jamabandi* at all are shown between Fasli 1226 and Fasli 1265.

In the *chittas*, exhibits 227, 228, 229, and 230, no increases are shown for the years Fasli 1247-1252.

In the *chitta*, exhibit 231, however, increases appear, 0-2-8 in Fasli 1249, 0-3-12 in Fasli 1250 and 0-2-8 in Fasli 1251, bringing up the assessment of 0-1-4 paid in Fasli 1248 to 1-0-0 in Fasli 1251.

In the *chitta*, exhibit 232, no figures on the face of the document referrible to increase of *korlaya* appear, but there are increases in Fasli 1247, 1248 and 1249.

In the *chitta*, exhibit 233. appears an increase of 0-2-8 in Fasli 1249, and 0-2-8 in Fasli 1250.

In the *chittas*, however, exhibits 234, 235, 236 and 237 no figures referrible to increase of *korlaya* appear in the years Fasli 1247 to 1252.

Thus it appears that, in the *chittas* of 5 of the 71 *vargs*, increases referrible to *korlaya* do appear in the years above mentioned, and that in two others of the 17 *vargs* though containing *korlaya*, the years in the question are not shown. In three of the 17 *vargs* it will be remembered no *korlaya* at all is entered anywhere. It appears, therefore, that in the five *vargs* above mentioned, sums referrible to *korlaya* do appear, in the years above mentioned, as increases for this or that year, and these increases aggregate 2r. 6f. 4t., equivalent to 10 pairs of cutters and one single man, or, of course, to 21 single men. It cannot be said, however, to appear that, in respect of the whole increased cutting reported by the shanbhog, *korlaya* was levied from Martoba; but we have the fact that, in respect of the years to which the shanbhog's report refers we do, as a fact, find increased *korlaya* in certain of the 17 *vargs* of Kaig, amounting in the aggregate to a not inconsiderable amount. On the other hand, I do not find that it appears that *korlaya* had not, in fact, already been levied direct from the particular cutters in question, though Mr. Blair disapproves of this being done for the future, and if this had been so, of course, Martoba would not be charged with it over again.

Before leaving Mr. Blair's orders I should, therefore, observe that though in Mr. Blair's views, so far as they are expressed, or in the action he took, I do not find any express support for the opinion have formed as to the original theory and system of *kumri* cul-

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tivation; viz., that, whenever a cutter was allowed to go into a forest to cut *kumri*, so much a knife was levied by Government either from the cutter himself or from some landed proprietor in whose *varg* such charge was entered, and who paid it, he (the vargdar) making what profit he could from the cutter in respec of whom he paid, yet there is, in my opinion, in those order nothing inconsistent with the opinion aforesaid.

In or about A. D. 1847, however, a wider question arose as to *kumri*, namely, the regulation and restriction of the cultivation itself. The views of Mr. Blair (the then Collector of Kanara), as contained in certain reports of his of the 28th May and 31st August 1847 and of the 31st August 1849, are stated generally in the proceedings of the Madras Board of Revenue of 16th April 1859 (exhibit 218, at paras. 7, 9 and following paras.) On the reports of Mr. Blair of August 1847 (which reports themselves, however are not in evidence) the Government of Madras (see *ib.* para 8) on the recommendation of the Board of Revenue and on the 16th December 1847, authorized the Collector of Kanara to restrict the cultivation of *kumri* "to such places and to such an extent as might, in his opinion, be expedient for the preservation of the forest and the general welfare of the province."

Following upon this authorization, we have the orders of Mr. Forbes, head assistant collector, of 26th May 1848 (exhibit 89), and of Mr. Blane, of the 12th December 1848 or 12th January 1849 (exhibit 91). The latter is an order to the tahsildar of Ankola, giving detailed instructions for restricting *kumri* cultivation in that taluka. In the *P. S.* to this letter, certain *kumris* are specially mentioned. The translation of this passage as corrected by my learned colleague, is as follows:—"Besides the *kumris* of descriptions mentioned above (or except the *kumris* last mentioned) there are *kumris* on account of which a separate assessment has been fixed, and which have been held after the manner of *vrags*—*kumris* on account of which some *kumri* assessment is included in *vargs* consisting of land and *kumris* on account of which there is no *kumris beriz*, but which are mentioned as having been enjoyed from of old or by usage." With regard to the *kumri* so mentioned, Mr. Blane directs

statement to be prepared, which is to include certain particulars there mentioned, and is of a differnet character to the *kulvar* lists to be drawn up by the shanbhogs and patels of each village in accordance with a previous para. of the letter. As I read the letter, the *kulvar* lists were to be prepared wherever *kumri* cultivarion was to be carried on; the statement which the P. S directed was to be prepared only in the case of the classes of *kumris* there mentioned. But the order in the earlier portion, excluding *kumri* cultivation from within certain limits, namely, 9 miles east of the seashore, or 3 miles from large rivers and from forests, from which (trees) might be removed easily by carts by land, and in particular from places where teak or any of the five descriptions of trees, there referred to, grew, applies, as I understand the document, to all *kumri* cultivation, whether what has been called Sarkar *kumri* or vargdar *kumri*. I do not, of course, suppose that Mr. Blane intended his order to apply to any cases where *kumri* cultivation was carried on in forest included in estates strictly private property, as under Government grants or *mulpattas* of collectors sanctioned by Government, which had, as we see para. 78 and other paragraphs of Mr. Fisher's report of 30th August 1858, been in former times made. But that the order as to restricting *kumri* cultivation was intended to apply to jungles claimed on the ground of a vargdar paying *kumri* assessment, is clear, I think, from this passage in para. 6: "As regards *kumris* on account of which assessment is paid, if it be deemed necessary to pohibit the cutting and cultivaton of *kumri* in such places, to allow of the forests being grown and taken care of, on the ground of such forests being in the vicinity of a river or containing teak trees, or from any other cause, (then) the *kumri* assessment payable thereon will be remitted."

It is not, however, necessary for me to mention particularly the various measures taken by Mr. Blane and other collectors between 1847 and 1858 to carry out the direction of the Madras Government for the regulation and restriction of *kumri* cultivation, as they will, I believe, be found to be treated in detail by my learned colleague. In 1858 we have the long report, dated 30th August 1858, of Mr. Fisher, then collector, on the past and present history of *kumri* cultivation in the Kanara district,

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and this report was considered by the Madras of Revenue on the 16th April 1849, the proceedings of which have been already referred to. With reference to these proceedings of the Board of Revenue and other papers which were before them, the Madras Government passed their order of the 23rd May 1860 (exhibit 95).

Now, apart from the particular measures taken from time to time with regard to regulating and restricting *kumri* cultivation (into the special character of which other considerations than those of strict right entered, as, for instance, consideration for the classes with whom carrying on *kumri* cultivation had been an hereditary and accustomed industry, and also indulgence for vargdars who had, as a matter of fact, whether of right or not, enjoyed considerable profits from their connexion with this cultivation) it is, I think, clear that both Mr. Blane and Mr. Fisher (and their views were substantially adopted by the Madras Board of Revenue and the Madras Government) were of opinion (as I think also was Mr. Blair) that entry of *kumri* assessment in a *varg* did not establish or show any right of *general ownership* of the vargdar in any tract of jungle over which, or over parts of which, *kumri* cultivation had been used to be carried on, and that Mr. Blane and Mr. Fisher were also of opinion (on this question Mr. Blair had no occasion to express or form any opinion) that, whatever the rights of vargdars paying *kumri* assessment might be in respect of jungles in which *kumri* cultivation might, for the time being, be carried on, the jungles themselves still belonged to Goverment, to the extent that Government might restrict or put a stop to all *kumri* cultivation, remitting, however wholly or *pro tanto* the levy from vargdar of *kumri* assessment; and the question is, was such opinion well founded, and was the course of action, carrying it into effect, an invasion of private right or not?

The circumstances and documents in evidence point, in my opinion, to the conclusion that, originally, *kumri* assessment was inserted in *vargs* only as incidental to rice or garden cultivation. We find in the *chittas* in evidence several instances of larger rice cultivation having been included in former times than appears in

Fasli 1228, the year in which almost all the *chittas* in evidence were commenced. Of the 17 *vargs* of Kaignad, including so-called "forest assessment",4 only are for *kumri* alone; in the other, *kumri* is in conjunction with rice garden ground or pepper groves,and referring or once referring to the fixed regular cultivation of a defined locality.

Looking at the *chittas* of these four purely *kumri vargs* we find, as to *muli* No. 20 (exhibit 229), that though in Fasli 1228 only *korlaya* is entered, that in Fasli 1239 discovery was made of rice cultivation being carried on, and in Fasli 1241 assessment is entered for rice cultivation, and in Fasli 1242 both for rice and garden. In *muli* No. 23 (exhibit 234), in like manner, though in Fasli 1228 *korlaya* only is entered, yet in 1239-1241 there are indications of rice cultivation. However in *muli* No. 36 (exhibit 231) the *vargs* newly constituted in Fasli 1241 and in vrllage tax No. 2 (exhibit 237) there is no trace of rice cultivation being entered in the *chitta*. Mr. Fisher in his letter of the 30th August 1858, para. 37, states that, out of nearly 60,000 *vargs* in Kanara, only 1,750 pay *kumri shist*, and of these only 140 consist of *kumri* alone; while 1,610 of the 1,750 were *vargs* to which *kumri* privileges were attached (meaning, I suppose, that with rice assessment or garden assessment, *kumri* assessment appeared in the *varg*). These circumstances, in my opinion, tend strongly to show that, originally, *kumri* assessment was entered in *vargs* as incidental to more regular cultivation.

We find expressions in some of the official documents in evidence in this case by which *kumri* assessment is sought to be put on the footing of a *farm* of a poll-tax. That *korlaya*, when collected by Government direct from the cutters, had the nature of poll-tax, and that all the right the payment of it conferred, was a temporary one to raise a crop for a particular year or two on a piece of jungle ground belonging to Government, is, I think, clear enough. The fact that it is collected from third persons, viz., vargdars, and not the cutters themselves, does not seem to me to alter its essential nature. It is still a poll-tax in the sense of so much per head being paid for the license, privilege,or *right* ( however it may be styled for present purposes) to let such and such number of persons cultivate *kumri* in the forests, the vargdar in

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turn taking from them payment in money or kind, and, in fact making his own terms with them.

The word naturally occurring in A. D. 1801, and at the time of commencement of the British rule, to the mind of Dr. Buchanan (a most intelligent and, so far at least as this question is concerned, disinterested observer) to describe the levy from the persons pursuing the hill cultivation,(*i. e.*, *kumri*,)was that it was a *poll*-tax and not *land*-tax. It would not, however, appear to be correct to describe the entry of *korlaya* in a *varg* as being a *farm* of a poll-tax. I do not find any instance in which the vargdar pays to Government a fixed lump amount for the right of levying so much per head on the cutters, which is,what I understand, would be a *farm* of a poll-tax. I gather, from the evidence in the case, that the vargdar, though paying so much a head to Government, or having his *kumri* assessment fixed with reference to so much a head, did not merely receive the same sum per head from the cutters. In that there would have been no advantage for the vargdar. What the vargdar seems to have done, so far as I can judge from the scanty materials in evidence showing the relations as between a vargdar and the cultivator, was to receive from the cutters payments in cash and payments in kind, or one of them. The question as to the relation between vargdars and the persons cultivating under them, was little, if at all, brought out or discussed in the argument of this appeal. The only materials I have not ticed, throwing any light upon it, are exhibits 319 and 338 (the private accounts already referred to), exhibit 174 (the *azmaish chitta* for Fasli 1242 for the sub-*varg* of Tilu Jambhad), and exhibit 55 *azmaish chitta* for Fasli 1246 for 4 *vargs* of Kaignad (viz., *muli* No. 14, *muli* No. 27, *muli* No. 31, and *muli* No 32) and the statements of Martoba in his examination in A.D. 1841.

From the *azmaish chitta* (exhibit 174) all that appears after estimate of produce of rice land and garden ground is "0-5-0 *kumri katti* (knife), 2 *payils* (knives or bill-hooks) of his own at 2 ½ (*i. e.*, 0-2f. 8a) per *payil*." Exhibit 55 is only partially translated, and that that *viva voce* at the argument. The passage is as follows:—"The whole of the estimated produce of these" (*i. e.*, the four *vargs* referred to) "the enjoyer, Martoba, does not receive in

full; the land is waste; and no raiyats. If more raiyats come, there will be no deficiency in the estimated produce. The vargdar does not get back pepper or nuts—so Martoba says—and this seems true." These 4 *vargs* had all pepper assessment; the first, viz., No. 14, had rice also, and in the portion of the document translated there is no specific reference to *kumri*. But I gather from the foregoing sources that the plaintiff's family in the present case received, from their cutters, payments in cash and payments in produce, the vargdar making the cultivator's advances, or supplying them with necessaries while the cultivation was going on. The cutters were, in fact, cultivators, enabled by the vargdar to pursue their labour, receiving advances, and, on the crop being gathered, making payments to him in cash, but probably more generally in kind. This was the so-called "produce" to the vargdar of *kumri* cultivation, in respect of which produce he was assessed to Government at so much a knife. He would, of course, take care that his "produce" exceeded the assessment he paid to Government, and in this way he would or might derive very considerable profit (see para. 13 of Dr. Cleghorn's letter; of 17th August 1859, to the Madras Government, part of exhibit 95 and para. 15 of the order of Government, *ib.*), and particularly so if vigilance was not used by the revenue officers, as to how many cutters were allowed to ply their knives in the forests. On the other hand, there must have been great convenience to the revenue officers that the direct collections from the cutters should be made by vargdars, who would be known and generally substantial persons, they answering to Government for so much a knife. The only security for the tax being collected at all, if directly collected from such a class of persons, as chiefly and, in early times at least, almost exclusively were carrying on this cultivation, would be by taking it beforehand, and at any rate, before they could dispose of the crop. But during the interval how were the cutters to live, and how provide the *korlaya* tax beforehand? So, the interposition of a middleman to be answerable to Government, and who could keep an eye on the cutters, advance them necessaries, and take from them so much grain, if not cash, as his produce, would be eminently convenient to the revenue administration.

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Originally, I believe, *kumri* assessment entered in a *varg*, meant nothing more than a charge to a vargdar holding rice or garden ground in consideration of allowing him to send into the forests, near the *vadis*, where he or his raiyats lived, so many cutters, whether persons also engaged in the rice cultivation of his *varg* or strangers. As the extent of cultivation so given would be practically limited by the number of knives, in respect of which a change was made, there was no occasion to limit the cultivation by any reference to locality, though we may suppose that certain forest or tract of forest would, from convenient proximity to rice cultivation, be ordinarily used by the cutters employed by a particular vargdar. The particular tracts of forest by area and boundaries were, I believe, never defined with reference to particular *vargs* as being the subject-matter of the *kumri* assessment entered in such *vargs*, though, as we have seen, the limits of different forests, as understood under certain names derived from the names of *vadis* or hamlets, may have been defined, or at least known by common repute; as in like manner the limits of different *vadis* or hamlets, with the forests they contained, may have been defined or known. The fact of absence of defined or ascertainable locality of any forest tract, in respect of which *kumri* assessment was paid, coupled with the presence of such defined or ascertainable locality when rice and garden assessment were in question, is explained, it appears to me, on the principle (and not otherwise) that in respect of rice and gardens the subject-matter of assessment was so much land estimated according to its produce, whereas in respect of *kumri* cultivation the subject of assessment was so many labourers, *i. e.* *kumri* cutters.

It may, no doubt, be urged that instances, where localities are mentioned in the *chittas* in connexion with entry of *korlaya*, are, in fact, to be found as in the Goer *chitta* (exhibit 48) and the *chittas* of the *vurgs* " village tax No. 2" and *muli* No. 36 (viz., exhibits 237 and 231). But, when examined, I do not consider that these instances are really inconsistent with the principle I have suggested. The entries of sums of money, though mentioned in connexion with localities, are *also* referrible to so many persons. So, for the *chitta* of Goera, the mention of a locality

does not mean (as I have already pointed out in discussing the *chitta*) more than this, that in the forests of the respective *vadis*, respectively named in the *chitta*, the vargdar was charged with *korlaya* in respect of such and such number of knives, or, in other words, that in the forest of this *vadi* he was to be allowed to employ such a number of knives, and in the forest of tha *vadi* such a number : so, for the other two *vargs*, the *chitta* exhibit 237 doe not mean more than this, that, in the case of the first-named *varg*, the vargdar was to be at liberty to employ the knives of 4 pair of labourers in repect of the forest of the *vadi* of Kankavali ; and in case of the other *varg*, the *chitta* (exhibit 23 only means the 4 pairs in respect of Kopp Mazal (if it be the name of a *vadi* or jungle), and which liberty in the last case we find was subsequently extended, and an increased amount of *korlaya* charged.

Though the plaintiff contends that all the forest of Goera is included in its *varg*, I do not find that he anywhere gives evidence to show how the names of *vadis*, mentioned in the *chitta* of that village, correspond to any state of things now existing, or that the forests included in the names of such *vadi* were in fact, all the forests of the village. All that can be said is, that the names of some of the *vadis* or hamlets, mentioned in the *chitta* of Goera, correspond with those of now existing hamlets in the same village.

As to the 17 *vargs* of Kaignad, Martoba was, as we have seen, evidently quite unable in A.D. 1841 to point out what forests belonged to particular *vargs*. That not *all* the forests of Kaignad could have been included in his *vargs*, is shown by there being admittedly *kulnasht* assessment on *kumri* to the extent of Rs. 5-8-9 in the whole amount of *kumri beriz* in respect of this village. His difficulty in showing that his *vargs* had reference to particular localities of the forest of Kaignad, and the fact of some *kumri* assessment in this village having been long *kulnasht*, was, I believe, the occasion and reason for the fabrication and production of the Kaignad *sanad*, whereby he tried to cut the knot of his difficulties by relying on a *sanadi* title to *all* the forest indiscriminately of this village. Apart from the question of the *sanad*, the evidence tends to show that Martoba, or rather Sada-

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shivrao, acquired the *vargs* of Kaignad gradually, not all at once. As against the Government we must take Sadashivrao to have been entitled to or in enjoyment of 15 of the 17 *vargs* in A.D. 1831, as in Fasli 1241 certain other property of his was proclaimed for sale in respect of arrears of assessment for Fasli 1240, due altogether on 61 *vargs* of Kaignad (see exhibit 56, accompaniment 29). Among these are named are 15 of the 17 so-called "forest *vargs*", the ones not named being *muli* 13 in name of Tippa Gowda (exhibit 221), and *muli* No. 36 in name of Martoba Nadkarni (exhibit 231); the latter *varg*, however, being one which had scarcely been formed at the date of the proclamation of sale, and, if formed, no arrear of assessment may have been yet due. As to Tippa Gowda's *varg*, no *beriz pattas* at all are produced, and I have not noticed any evidence on which the plaintiff relies to show how he came into enjoyment of this *varg*. He says in his oral evidence: The holder of *varrg* 13, Tippa Gowda, pays his assessment direct to Government, under an agreement that he should pay the Government assessment on the whole *varg*, and we should enjoy the remaining portion"—a statement the meaning of which is by no means clear to me. In the case of *varg* No. 2, in the name "Santa Mawali," *i.e.*, Santa or Santappa of Mawali (Mawali being the name of a *vadi*), though it was a *varg* in respect of which Sadashivrao was treated as liable for assessment in Fasli 1241; yet it appears from the *chitta* (exhibit 237) that no collections had been made in this *varg* from Fasli 1211 to Easli 1229, and that in the last-named year the *varg* was constituted or perhaps reconstituted in the name of Santappa Varti on waste land being brought into cultivation by him. An early connexion, of some sort or other, of Sadashivrao or his son Martoba with 14 of the 17 *vargs* is shown by the *biriz pattas*. I do not propose to notice them in detail; but from a consideration of them it will, I think, be found that the connexion of the family with different *vargs* appears, so far as the evidence goos, to have commenced for the first time in different *vargs* in different years. For some 13 of them the name of Sadashivrao or Martoba first appears in the Fasli years from 1226 to 1230, but for village tax No. 2 not till Fasli 1238. This, with the instance of the *vargs* in the names of Tippa

Gowda and Martoba, shows that the *vargs* were of gradual acquisition by the plaintiff's family. But how, when *vargs* in the same village having *kumri* assessment were in the hands of different vargdars, was the extent of forest belonging to each ascertained? If it was not ascertained and defined—and some portion, at least, of the forest of Kaignad has always (*i. e.*, at least from the beginning of the British rule) been *kulnasht*, or, in other words,(apart from the question of the *sanad*) the absolute property of Government—I cannot see how these vargdars can be said th have had ownership, in a proper sense of the word, in any part of the forest, either as against one another or as against the Government. If it was ascertained and defined, then how is it that it cannot be shown, and as to Kaignad could not be shown, by Martoba in Fasli 1241? Admitting (which is not the fact, as I do not find that the plaintiff was ever admitted to pay the admittedly *kulnasht* assessment in Kaignad) that the 17 *vargs* of the plaintiff included all *kumri* assessment levied in respect of the village of Kaignad, I cannot see that it therefore follows that he must be held to be entitled, as owner, to all the forests of that village. If would be necessary, first, to show that the jungles, in respect of which *kumri* assessment has been entered in his different *vargs*, do, in fact, include all the jungle of the village; the plaintiff must establish a connexion between *kumri* assessment in particular *vargs* with particular jungle, and then show that these jungles comprise all the jungle of the village. When the *vargs* were in the hands of different owners, either the vargdars must have been able to say "This and the tract of forest belong to me to the exclusion of other vargdars," or else there was no ownership by the individual vargdars in any particular tract at all. But, on the theory of *korlaya* being originally and in its nature a poll-tax, there would be no difficulty of this kind. The general ownership of the forests would be in the Government; but different vargdars of the village would, in consideration of paying *kumri* assessment have the right of culivating so much *kumri* as could be cut by so many knives, and without reference to any particular locality. It would be a case of a vargdar first occupying a particular plot of forest, having the right to use it for a year or so at a time, and

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then the next year resorting to some other place. In such a system there would be no occasion for any definition of boundaries as between different vargdars or as against the Government.

The sole fact of the constitution, in Fasli 1241 in the name of Martoba Nadkarni, of a *varg* in which was entered "*korlaya*" and *korlaya* alone, as the assessment, appears to me to tell at least as much against the admissibility of the argument to which I have referred, as it does against the genuineness of the *sanad* for the Kaignad forests. According to the plaintiff's case, his family was already, in Fasli 1241, in possession and enjoyment, as owners recognized by Government, of 16 (supposing for this purpose that Tippu Gowda's *varg* at that time belonged to them, and treating the *varg* of Martoba as not then formed) of the then 19 *vargs* of Kaignad, which bore or had ever borne assessment in respect of *kumri*, pepper or *farmaish* (the other 3 of the 10 *vargs* being *kulnasht*). This being so, the contention is that they were owners of all the forests of Kaignad. But if the forests already belonged to Martoba, why should he accept a new *varg*? and that, too, a *geni* one, with further assessment in respect of it. The proclamation of Mr. Viveash (not an exhibit here, but referred to by the learned Judge below in his judgment and by both parties in argument here) was not, as I understand, till Fasli 1244; so that in Fasli 1241 we find Martoba accepting a *varg* in respect of what, according to his present case, was already his own, if not under a *sanad* yet by virtue of being owner of all the living *vargs* in the village in respect of which any assessment for *korlaya* pepper or *farmaish* was entered in the *jamabandi chittas*.

The use of the word "*muli*", as applied to a number of these so-called forest *vargs*, was relied on as showing that some permanent estate or instalment must be supposed in the vargdar. Of the 10 of the 17 *vargs*, however, described in the *chittas* as, *muli*, only 2 (beside the new *varg* of Martoba), viz., *muli* No. 20 (exhibit 229) and *muli* No. 23 (exhibit 234), have *kumri* assessment alone entered in 1228. But both these *vargs* show that subsequently (for *muli* No. 20 in Fasli 1239 and for *muli* No. 23 for Fasli 1237) there was rice cultivation; and there may in like manner, in years earlier than any shown in the *chittas*, have

been rice or garden cultivation in respect of which the word *muli* had been originally applied to the *varg*. On the other 7 of the 10 *muli vargs*, 3 (viz., *muli* 13, *muli* 14, and *muli* 19) have rice and pepper, and the other 4 (viz., *muli* No. 21, No 27. No. 31, and No. 32) have pepper groves referred to, which were or may have been at some time a regular cultivation and continuous occupation to which the word "*muli*" might well be applied. In the case of *muli* No. 36, however (exhibit 231) we have not only a *varg* called *muli*, including *korlaya* alone, but one originally constituted as a *geni varg*, being in Fasli 1248 entered as a *muli* one. Had there been a number of instances of the term *muli* being applied in earlier times to *vargs* in which *kumri* assessment alone was entered, the argument from the use of word "*muli*" might have had weight; but there is, I think, only one such instance in evidence, which is clear. This *varg* was, however in the first instance, constituted *geni*, and at a time, viz., Fasli 1241, when there was still a practical distinction recognized between "*muli*" and "*geni*"; whereas the entry of it as *muli* instead of *geni* was in Fasli 1248, four years after the distinction between *muli* and *geni* had been practically done away with by Mr. Viveash's proclamation. But how would the argument of the appellant from the use of the word *muli* have stood before Fasli 1244, and his case is that he had just the same rights over forests of Kaignad then as now? I have adverted to the circumstance that, on the occasion of the inquiry in Fasli 1351, Martoba claimed "mulgari" right in the forest of Kaignad on the ground of a *sanad*, not that he was *muli* vargdar, from of old, of certain *vargs* of Kaignad having *kumri* assessment, and *geni*-holder, equivalent to *muli* or the other *vargs* having such assessment. But how would the argument from the mere use of the word "*muli*" have stood in and before Fasli 1234? It would be this; Being *muli* vargdar of 7 of the 14 *vargs* of Kaignad, having *kumri* assessment (for, of the 17 *vargs*, only 14 have *kumri* assessment, the other 3 have only pepper in conjunction with rice; they might be called the rice and curry *vargs*) and *geni* vargdar of the other seven of the fourteen, I have, therefore, a *muli* right in all the forests of Kaignad. For these reasons I am unable to attribute any weight to the consideration of the word *muli* being applied to some of

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these so-called forest *vargs* as showing that the word implied some "permanent hereditary or transferable right" (see 12 Bombay High Court Reports, Appx., 209, 210) in the soil of the forests in which *kumri* was to be cultivated. There is, indeed, one theory of the rights of a *kumri* vargdar which is not without some grunds for it (though it is not the theory put forward by the appellant) in which the word "*muli*" (even if applied clearly and in a number of instances to *vargs* having *kumri* assessment alone) would have a meaning, though, not in that case involving a *muli* right to the *forests as such*. Martoba's contention in Fasli 1241 was that the forests of Bali and Kaignad were his in the sense that Government could not give them for *kumri* cultivation and collect *korlaya* darcet from the cultivators; in other words, he said, any *kumri* cut in these forests must be by cultivators employed by and under me. Supposing he had such a right, it might well be called "*muli*"; he might have a *muli* right to collect if *kumri* cultivation was carried on at all. But this is a very different thidg from a *muli*, *i. e.*, permanent hereditary transferable ownership with all incidents of such ownership in all soil over which he could show that at any time he had got the forests cut and cultivation carried on for a year or so at a time at intervals of ten to fifteen years.

It has been contended that acquiescence and recognition on the part of the revenue authorities for a long series of years in the enjoyment, by the plaintiff's family, of the forests claimed furnish strong evidence that the plaintitiff's rights are what he alleges, whatever may have been their original foundation. The large extent of forests or jungly ground in Kanara, as compared with the number of revenue offi ers to superintend it, may however, be a sufficient explanation why the revenue officers did not assert what I consider to have been the original rights of Government, viz., to have so much from some one or other (whether vargdar or cutter) for every knife wielded in the forests for *kumri* cultivation; but of acquiescence in or recognition of, by any superior revenue officer, the rights as now put forward on, behalf of the plaintiff, I see no evidence, or, what is the same thing, no sufficient evidence. An expression here and there may be

found on the part of a revenue officer arising *alio intuitu*, on which may be founded a certain amount of fair argument. The alleged recognition and acquiescence, however, really, I think, resolve themselves into this: the course taken by Mr. Blair in 1841, the allowance of double assessment to the vargdar between 1848 and 1860, and the admission contained in paragraph 4 of the order of the Madras Government of the 23rd May 1860. As to the true bearing, in my opinion, of Mr. Blair's orders, I have already expressed myself. The so-called *dugni* arrangement, if regarded as coupled with the contemporaneous regulation and restrictions on *kumri* cultivation, was, it seems to me, a clear interference with, not a recognition of, the plaintiff's claims as now put forward. The allowance of *dugni* to the vargdars ought, I think, to be treated rather as indulgence which it was thought proper to exercise in favour of the vargdars in consideration of their having, in fact, for many years past, derived considerable profits from their connexion with *kumri* cultivation, than as any recognition of their alleged rights.

The paragraph in the order of the Madras Government is as follows:—"It appears that certain proprietors of land in parts of Kanara and some persons not holding land at all, claim to have exclusive and proprietary rights of *kumri* over extensive tracts of forest land, so that no other persons can cut *kumri* within those tracts without their permission; while they allege that their own rights to make or allow *kumri* there at pleasure can no more be interfered with by Government than their rights over their ordinary landed estates. These claims appear to have been acquiesced in for many years by the revenue authorities of the district: but, when subjected to investigation by a late collector (Mr. Blane), they were found to stand on no good foundation." The ground for the expression of the opinion on the part of the Madras Government is referred to in the order itself as being Mr. Fisher's report of 30th August 1858 and the report of the Board of Revenue of the 16th April 1859; the latter report being, as the order of Government states, based on the report of the collector, evdiently meaning Mr. Fisher's said report. In the first place, it is to be observed that the claim, which, it is stated,

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has been acquiesced in, was of exclusive proprietary right in *kumri* cultivation, not of general ownership in the soil and the incidents of such ownership. Then, again, it must be borne in mind that the Government resolution deals with the *general* question of putting an end to *kumri*; the passage has no particular reference to plaintiff's family claims. I feel some difficulty in seeing how the statement as "to acquiescence for many years, &c.," "appears" from Mr. Fisher's report or the proceedings of the Board of Revenue. Both those documents are, so far as I can see, silent as any acquiescence in claims by revenue officers. Besides, it is surely not enough for a plaintiff to rely on some *general* statement in a Government resolution. The plaintiff must show in this particular case that his proprietorship in the forest claimed in this suit have been so recognized by revenue officers as to afford a Court of Justice sufficent ground to infer such proprietorship, however it may have arisen. Now, this, it seems to me, the plaintiff has failed in doing. The recognition of the rights of plaintiff's family, really, I think, consists only in this: that the principle on which Mr. Blair seems to have acted in 1841, involved this, that Martoba was alone entitled to collect from cutters on account of *kumri* cultivation in respect of the the Bali jungles and such jungles of Kaignad as had been *kumried* from the beginning; but that as soon as any acts of Martoba, indicating a claim to general ownership of the forest (such as cutting and selling wood), came to the knowledge of any higher revenue officer, they were promptly checked, and resisted, not only by latter revenue officers, but by Mr. Blair himself in A. D. 1841.

From a consideration of what, in my opinion, was the original nature of *kumri* assessment as an assessment upon or in reference to so many actual labourers; having regard also to the peculiar character and incidents of the *kumri* cultivation itself an disclosed in this case, to the evidence which the Government accounts and particularly the *jamabandi chittas* afford of the relations with the Government of the plaintiff's predecessors as vargdars in respect of the levy from time to time of *kumri* assessment, I have come to the conclusion that the entry of *kumri* assessment in the plaintiff's *vargs*, and its payment for a long series of years,

does not show or manifest any estate or permanent right at all in the forests, as such, as being vested in the plaintiff, even as to such ground as he might have been able to show had been at former times *kumried* by his labourers, and that, whether or not as to such last-mentioned ground, the Government may have had, or, having had, may have ceased to have, any right to collect *korlaya* direct from the cutters so long as any *kumri* cultivation at all is or was carried on; yet that they had the right to stop the cultivation altogether (remitting the *kumri* assessment entered in the *vargs*) in all forests of North Kanara, including those in question in the present case, not shown to be private property, on some other ground than the mere entry of *kumri* assessment in a particular *varg* or number of *vargs*. This being so, I am of opinion the Juge below was right in dismissing the plaintiff's suit, which was to recover possession of particular tracts of forest on the ground of ownership shown or evidenced only (apart, of course, from the question of the *sanads*) by such entry in his *vargs* of *kumri* assessment.

Now, supposing that it may be considered that the plaintiff had established a right, exclusive of others and permanent as against the Government, to have *kumri* cultivation carried on in such places as he could show had theretofore been *kumried* by him or by his permission, or even throughout the limits as claimed by the plaint, I do not, as will have been perceived, consider he has established any such right; but, supposing he had, how does his suit stand? Such a right, having regard to the incidents of the cultivation itself, does not, in my opinion, necessarily involve general ownership in the soil any more than does an exclusive right to cut, carry away, and sell turf taken from a certain place, as in *Wilson* v. *Mackreth*,(1) or a separate and sole right to have the herbage and pasture of certain ground, as in *Burt* v. *Moore*.(2) But in the first of those cases the question was, whether one who had a right exclusive of others, as distinguished from a common right, to use certain land, though in a limited manner as to cut turves, could maintain an action of trespass *quare clausum fregit* against another who had cut and carried away turves from the

(1) 3 Burr. 1824 (2) 5 T. R, 329.

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same land. In the other case the question was whether one who was entitled by demise to the separate and sole right to depasture cattle on certain land, was so far the occupier and possessor of the land as to be entitled, as against the lessor, to exercise the private remedy of distraining cattle damage feasant. It was held that the rights in each case, being exclusive, though limited as to extent, gave such possession as to enable the plaintiff in the one case to maintain trespass *quare clausum fregit* and in the other to justify the defendant in having distrained. The general remedy, however, for one who has been disturbed in a right *in alieno solo*, such as a right of common of pasture or estover, has always been by an action on the case for disturbance, sounding in damages; though, if his right was exclusive and not merely common, albeit that it did not at the same time amount to general ownership, he was entitled to maintain trespass *quare clausum fregit* also, however, ending in judgment for damages. I should, however, be surprised to find (and I have searched in vain for any such case) any authority to show that one having such a right, though exclusive, but not amounting to general ownership has been held entitled to maintain an action of *ejectment*, and that, too, as against the person in whom the general ownership of the land is. *Kumri* right in one may, I think, in itself be considered as quite consistent with general ownership in the soil being in another, just as an exclusive right to cut turves without limit was in *Wilson* v. *Mackreth*; and here, if such general ownership be not in the plaintiff, there can, I think, be no doubt such ownership is with the Government. In the present case, moreover, as to three of the properties claimed, the plaintiff by putting forward and insisting on the *sanads* admits that general ownership, including *kumri* and all other rights over the forests, was at certain dates within the last eighty or ninety years in the Government. If the *sanads* be not accepted, the plaintiff has only *kumri* right as such to rely upon, which right, in my opinion, is quite consistent with the continuance of general ownership of Government. His right being in itself limited by its incidents, and consistent with the general ownership of Government, the fact of its existence and enjoyment does not displace such general ownership. But in that case his right, if disturbed, whether by a stranger or by

Government, would have to be asserted in the form of a suit for damages for the disturbance of a right in *alieno solo*, not by a suit to recover possession. Had I arrived at the conclusion that the plaintiff had a permanent and exclusive right to carry on *kumri* cultivation within the limits specified in his plaint, I should still have felt obliged to dismiss his suit, which is directed to recover possession on the ground of general ownership. That is the case the plaintiff has put forward to the last, and to which his evidence was directed, and it would be quite inadmissible for him to fall back on another case, which, if established, would have, as its result, a relief wholly different to that which, and which alone, he has all along asked for.

The bearing of the Limitation Act on this case will be found, I believe, to be fully treated of by my learned colleague, and I do not, therefore, propose to make more than very few and general observations upon it. Supposing the plaintiff and his predecessors to have had the rights now asserted, the difficulty seems rather to be to find act of the revenue officers, at least after A. D. 1847, and down to A.D. 1858, which was not a denial of, if not an actual interference with, them. It is, I think, quite clear that plaintiff or his predecessors had no enjoyment of the timber, except by permission of Government or in a secret manner, and their general rights in respect of timber cutting as distinct from *kumri* cultivation had been denied by Mr. Blair already in 1841. The wood and timber in forests, part of plaintiff's claim, were in a very large number of cases and to a very large extent between 1840 and 1855 (see abstract exhibit No. 10 in appeal) sold and disposed of by officers of Government and on account of Government. Had only one or two or a few such orders and contracts been produced, it might, no doubt, be necessary that it should be proved that each was, in fact, carried into effect It is, however, so improbable in itself that such a mass of orders, contracts and other documents should, year after year, be made and entered into without their being put into execution; and the evidence of Mr. Muller, Pedro Francis Fernandes and Manoel de Cruz, being sufficient to show, at any rate generally, the large dealings in timber and wood on the part of Government in respect of these forests, that I can feel no doubt that, if not all, at least the greater

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part of these very numerous orders and contracts as to timber were, in fact, carried into effect. And we find that on several occasions these sales of timber are made a subject of complaint by Bhaskarappa, He would not have complained, as he did of mere orders and contracts, unless effect had been given to them. So far as these orders and contracts were carried into effect, they were all infringements of the rights of the plaintiff's family as now claimed. Those large dealings in timber by Government are the more important having regard to the fact that in A.D. 1841 Mr. Blair had already and in general terms denied Martoba's claim to cut timber. As to complaints by the plaintiff as showing that the dealings by Government were actual, not merely orders and contracts without being carried into effect, we have, in Fasli 1262 Bhaskarappa complaining to the collector, Mr. Maltby, (see exhibit 279 of the 7th April 1853,) as follows:—"Consequently I am alone prevented from cutting the trees" referring to forests in Kaignad and other villages in Kadra Magni)," while other people obtain permission to cut and sell (trees) and derive profits therefrom. Owing to the present rules" referring probably to the collector's circular order of the 14th November 1851, exhibit 173), "my raiyats have been left no room for cutting the *kumri*, and I have suffered loss in consequence, which is keenly felt." As to what was being, in fact, done under the orders of the revenue officers, as shown by complaints of the plaintiff's family—see also Ramchandra's petition of the 7th September 1857, exhibit 282. Then we have the class of documents (not to speak of the case of Pandurung Shimpi in A.D. 1841, to which accompaniment 56 to exhibit 56 relates) showing that Government had in the period A.D. 1848 to A.D. 1856 given out for cultivation *rekahnasht* or other uncultivated land (whether strictly *rekahnasht* or not, and I understand "*rekahnasht*", as distinguished from "*kulnasht*", to mean land which had never at any time paid assessment: *kulnasht* being land for the time being destitute of cultivators, though at some previous time it may have been cultivated and assessed) in the villages of Goera, Kaignad and Bnaire to others than the plaintiff's family. Such grants of waste land in these villages are all instances of acts on the part of Government inconsistent with and involving a disavowal of the plaintiff's rights as now claimed

of documents of this class falling between the years A. D. 1848-1865. We have in A. D. 1854 and A. D. 1855, as to land in the village of Goera, exhibit 460, accompaniment 4; exhibit 460, accompaniment 2; exhibit 460; and exhibit 460, accompaniment 9. As to land in Kaignad, we have in the year A. D. 1848 exhibit 122, exhibit 380, accompaniment; exhibit 123, exhibit 121. In the year A. D. 1851, exhibit 404. In the year A. D. 1852, exhibit 380, accompaniment page 664; and exhibit 397. In the year A. D. 1854, exhibit 396 and exhibit 380. In the year A. D. 1855 we have in exhibit 379 a new *varg* constituted as *muli* 37 in the name of "Budgowda" in respect of *rekahnasht* land in Kaignad given for rice cultivation.

In 1856 we have other *rekahnasht* land in Kaignad given for rice cultivation, and constituted a *varg*, as *muli* No. 8, in the name of Anappa Putappa; and in the same year *rakhnasht* land in Dasnali, in Kaignad, given for rice cultivation to Deganya Govind (see exhibit 396, accompaniment 1, and exhibit 391). In respect of Bhaire village, there are similar documents in evidence in respect of the year 1854, exhibit 460, accompaniment 3, and of the year A. D. 1855, exhibit 460, accompaniment 8, and exhibit 460, accompaniment 7 (the last document relating also to same land in Goera).

Then there is the class of documents showing, between A. D 1853 and A. D. 1858, applications by Bhaskarappa or Ramchandra for permission to cut, and security bonds in respect of cutting such and such *kumri* in the forests in the villages of Goera, Kaignad and Bhaire forests and the hamlet of Bali. These applications were in pursuance of the regulations introduced by Mr. Malthy's circular order of the 14th November 1851 (exhibit 173). In March 1853 we have application and recognizance by Bhaskarappa with relation to *kumri* cutting in Kaignad (exhibits 164 and 165); this application of 18th April 1853 as to *kumri* in Goera, Kaignad, Bali and Bhaire (exhibit 168); his application and recognizance, 25th March 1854, as *kumri* in the same villages (exhibits 166, 167); the sub-collector's order of 23rd February 1857 (exhibit 147): on a petition of his relating to *kumri* cutting in his *vargs* generally and his brother Ramchandr's

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applications of 19th December 1856 as to *kumri* in Bhaire, Bali and Kaignad (exhibit 163) and the one referred to in the order of the sub-collector of the 26th January 1858 (exhibit 146) for permission to cut 800 acrss of *kumri* in Kaignad, Goera and Bhaire.

It was contended as divesting these documents of the character of an acquiescence or submission on the part of Bhaskarappa and Ramchandra in or to the interference by Government with their *kumri* rights, that the applications contain words showing that the acquiescence or submission was only provisional and pending order of higher authority. The words relied on, not however to be found in all these documents, are such as these :—"I will pay or produce the remaining amount" (*i. e.*, the excess of produce over double the assessment) "to be held in deposit," or "in order to be deposited till disposed" (of the matter) "hereafter." But admitting that Bhaskarappa and Ramchandra did make these applications, and pay or agree to pay excess of produce over double assessment on the footing that the arangements in force were provisional only, and subject to further orders of Government as to return of proceeds of *kumri* cultivation so paid over by the vargdar, the interference with the *kumri* claims of the plaintiff's family was not with their consent, and was none the less interference, in fact, with their rights, even if the revenue officers stated to them to this effect: "If the Government ultimately decide in your favour, the advantages you would otherwise have enjoyed" (*i. e.*, the excess of vargdar's coollections or profits over double assessment) "shall be restored to you." The alleged cause of action, if any, arose on the interference, in fact, with the rights of the plaintiff's family, and it was not less an interference that he was told "if Government decides in your favour you shall ultimately get some money back." As bearing on the question of limitation, these documents, it seems to me, are very important. I do not find in the oral evidence of Ramchandra or of the plaintiff Shrinivasrao ony trace of this suggested consensual arangement, by which all action of the revenue officers down to A. D. 1861 was to be treated as provisional till final order of Government, so as not to prejudice the right

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of plaintiff's family. On the contrary, their evidence (though in some points mutually contradictory and self-contradictory) seems to me to treat the orders of A.D. 1848, 1849 and 1851 as to limiting the area of *kumri* cultivation, and the levy of double assessment for each acre of forest cut beyond the area for which permission had been obtained, as invasions of their right, and orders, moreover, which they did not obey. It is necessary to be careful, in reading this evidence and some of the documents in the case, to distinguish the two sorts of *dugni* spoken of, viz., the *dugni* or double the amount of the assessment therefore paid by a particular vargdar, and which *dugni* was to be allowed to him, the vargdar, and to which "*dugni*" or double assessment the exhibits Nos. 90 and 92 refer; and the *dugni* or "twofold *jamabandi*" to be levied in respect of each acre of ground cut by or by order of a vargdar over and above the area which he had had permission to cultivate, and which area was fixed with reference to the number of acres estimated as sufficient to produce double the assessment payable by the vargdar. To this latter *dugni* exhibit 173 refers. The sum of Rs. 11,827-14-5 claimed in the plaint, consists of, if I understand the matter aright, in fact of two classes of items: first, the estimated produce of permitted *kumri* cultivation over and above the amount equivalent to double assessment (and which last-mentioned amount was to be paid to or retained by the vargdar), and the "two-fold *jamabandi*" in respect of each acre of *kumri* cut beyond the permitted amount, and which was levied *from* him.

But the levy of this "two-fold *jamabandi*" was surely an invasion of the rights of plaintiff's family, if at least they had a right, to *kumri* without stint in the jungles now claimed. Though the sum was "held in deposit", it was not so by consent, except indeed a consent compelled by fear of an exercise of the powers of revenue officers. Ramchandra when asked, on the 12th October 1871, "what advantage did you obtain by the *dugni* order?" answered: "I consider this order entailed loss to me, as the balance was kept in deposit by the Government. The balance I paid into the Government treasury according to the collector's order," and in the examination of the plaintiff Shrinivas, on the 17th October 1871, he states his point of view as to this matter:

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Having mentioned that a dispute had arisen in Fasli 1265 as to the accuracy of some "*dugni* account" and as to the contention of plaintiff's family that they, according to justice, were entitled to keep the profits, *i.e.*, the excess over the *dugni*, he says: "Government issued an order that the question will be taken into consideration hereafter, and that in the meantime we should pay the excess over the *dugni*, and that, in default of our payment, our property would be attached and sold." He afterwards, speaking of the collections made from the family in excess of *dugni* from Fasli 1258 to Fasli 1270, viz., the amount of Rs. 11,827-14-5, says: "They were collected from us by the issue of *waida chits*. In some instances our property was attached, and when it was ordered to be sold, then we made payments. I remember the first attachment took place in Fasli 1262 or Fasli 1263. I don't exactly remember my property was attached on several occasions."

I must say I feel quite unable to accept the argument that all this was done in pursuance of any arrangement to which the plaintiff's family were consenting parties as provisional only, and which was to be without prejudice to any rights they had. Every levy of the sums so referred to, gave, it appears to me, a cause of action if the plaintiff had the rights he claims.

The Bhaskarappa or the plaintiff may have carried on *kumri* cultivation wthout permission of the Government officers, and beyond the limits allowed them, within the first two or three of the twelve years before the institution of the suit, is in itself not impossible. The plaintiff admits he did not, after the order of 20th March 1861; but such cultivation was concealed, not open, and if the plaintiff wants to rely on such acts as an answer to the bar of limitation, he must surely, having regard to the nature of the suit as one for recovery of possession of definite tracts of land, show distinctly the localities within which such acts were performed, and as to which his alleged rights (interfered with and obstructed as to other localities) have, he contends, been preserved. As to this, however, he has left his case quite bare. I agree with my learned colleague, that this suit is barred by the Limitation Act, and was on that ground alone properly dismissed

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WEST, J.—The plaintiff Bhaskarappa, replaced on his death by his brother Shrinivasrao, sued the Collector of Kanara to recover possession of a tract of forest land estimated by one of the witnesses at about 320 square miles, from which, as he averred he had been wrongfully ejected in execution of an order of the collector made in March 1861.

The allegation of the plaintiff was that his grandfather had received from officers of the Government of Tippu Sultan two *sanads*, or grants, conferring upon him the forest lands of the village of Kaignad, and of the hamlet of Bali, entered in the Government records as *varg*, of estate, No. 10, under the name of Balkrishna Shenvi, in the revenue accounts of the village of Bhaire. The whole forest of the village of Goera, he alleged, had by a similar grant been conferred upon ono Goonot Desai, by whom it had been made over to plaintiff's grandfather Sadashivrao. As to another forest property situated within the limits of Bhaire, and entered in the Government records as *geni varg* No. 23, under the name of Narayanapa, as successor to Ganoji, the plaintiff alleged that the interest of the occupant in this estate having been held by his family for forty years, he was entitled to retain possession of the same.

In the case of each property the plaintiff has not questioned his liability to pay to the Government the sum due thereon according to the ordinary assessment for land rrvenue; or such other sum as may be justly payable under the terms of the *sanad* applicable to that property. But, subject to such payments as may properly be exacted, he maintains that he has a right to the continued and permanent possession and use of the forest lands comprised in his claim. He asks to be restored to possession of them, and demands, further, that certain sums, exacted from him by the revenue authorities from the year 1849 down to 1861 as a tax or rent upon his exercise in those years of his proprietary rights by way of "*kumri*" cultivation, be refunded. These, with mesne profits for the three years immediately before the filing of the suit, are the substantial elements of his claim.

The collector, defendant, denies the genuineness of the *sanads* and the authority of the officers by whom they purport to have

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been issued to make the grants comprised in them. The enjoyment of the forests in question by the plaintiff and his predecessors, even if held under the *sanads* relied on, and much more if these fail, has never, the collector maintains, been of a proprietary or possessory character, but has been of the nature merely of a farm of the fees customarily leviable at rates settled by the revenue authorities on the cultivators each year cutting the jungle for "*kumri*". The possession and the use of the forest has always remained with the Government, which, except in so far as its right to fees *kumri* cultivation had been farmed to the plaintiff's predecessors, has exercised all the rights of proprietorship by means of the revenue officers of the district. Whatever the rights, too, of the plaintiff may originally have been, the claim, it is contended, is wholly barred by limitation.

The District Judge upon the issue of "what rights has the plaintiff in the properties claimed" has dealt with the claim as resting, for all the properties in dispute, upon the footing of an occupancy by the plaintiff recognized by the Government, as well as, in the case of three of them, upon the *sanads* adduced as a special basis of the plaintiff's title. No objection has been taken to the width of this inquiry, and in this Court the case has been argued on the broad ground of whether, in virtue of the *sanads* or by any right whatever, the ptaintiff is entitled to possession of the properties sought in his plaint or any portion of those properties. The District Judge found that he was not. He found also that the suit was barred by limitation. In appeal the bar of limitation has still been relied on by the collector, and, under ordinary circumstances, we should deal with that objection before entering on the merits of the case, but in this instance the two inquiries cannot practically be separated. Whether the suit is or is not barred by limitation, depends on the nature of the rights enjoyed and interfered with, on the revenue history of the district and of the villages in dispute, and on the proper construction of a series of transactions between the plaintiff's family and the revenue officers, which it thus becomes our duty to investigate.

When the fall of Tippu Sultan, in May 1799, imposed on the British authorities the necessity of providing for the government

of his dominions, one of the first measures they adopted was the despatch of Captain Munro, vested with powers as collector, for the administration of the province of Kanara. The difficulties which this task involved, and the means by which they were overcome, are recorded in a series of reports of the year A.D. 1800, which serve as monuments at once to the practical genius of Munro himself and to the political sagacity which chose him for a post that called for the possession of very unusual abilities. As a basis for a re-adjustment of the land revenue, which was the main source of public income, Munro, after subduing open opposition by measures of considerate firmness, entered on an investigation of the relations that had subsisted between the landholders and the successive governments from the earliest times, of which authentic accounts had been preserved down to his own day. The principal results he presented to the Board of Revenue at Madras in his letter of the 31st May 1800 (1) (exhibit 366, p. 5), which affords one of the best extant reviews of the principles and methods of raising the land revenue in an Indian province in the times before the establishment of the British rule.

This report has been examined in such detail in the judgment in the Kanara Land Assessment Case(2) that it will not be necessary at present to repeat that process. It will be enough to glance cursorily at those points in the report and the judgment which bear materially upon the questions now before us; but as these works are concerned almost exclusively with the ordinary assessment of land reclaimed and held for permanent cultivation, we shall have to dwell in rather greater detail on some matters which in them, if noticed, are but touched upon, as being of but subordinate importance. The relations between the Government and its subjects as to forest lands solely resemble in some respects those of which cultivated lands are the object, but in others they differ very widely. The likeness and the unlikeness may equally be traced to the partial and but partial, identity in their nature and history of the two kinds of property.

Munro, writing in 1870, said: "Nothing can be plainer than that private landed property has never existed in India except on the

(1) Ex. 366, p. 5. (2) 12 Bom. H. C. Rep. Appx. I

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Malabar Coast;" but by private property he meant only land assessed so low as to command a ready sale,(1) and immediately after the demonstration of this in the report of the Kanara Land Assessment Case follows the opinion of Mr. Ellis, "a very weighty authority," "that private property in the land was already so well established in India when the lawgivers wrote that no text was necessary to constitute it."(2) Manu says(3) the sages "pronounce tha land to be the property of him who cut away the wood;" and as the same ancient code recognizes the right of the king to a share of the produce (4) and to compel cultivation so as to yield his share, (5) we find the main principles of landed property and of the land revenue clearly defined in the earliest jural work of the Hindu literature. (6) The more recent writers of authority on the same class of subjects are quite in accord with Manu; and the modern Jagannatha, whose Digest was translated by Colebrooke, so far from denying the subjects' property in the soil, as Colonel Wilks thought, insists upon it in the strongest way.(7) When he adds, in language which has no doubt lost some of its force and clearness by translation into English, that the lordship of the king is more powerful than the ownership of the subject, who therefore enjoys but a dependent property,(8) he merely expresses a proposition of the *rajniti* (political philo-

(1) See his report as collector of the ceded districts, Rev. and Jud Sel. Vol. I, P. 94, and the Board of Revenue, *ib.*, p. 588; 12 Bom. H. C. Rep., Appx. 41. See too, Mr. Babington's report, Kanara Land Assessment Case, Printed Documents, III, 66, para. 18, and the Proceedings of the Madras Government, *ib*, p. 109, Fifth Rep., p. 824, quoted below. In their letter to Bengal, of 6th January 1815, the Court of Directors expressly abjure the doctrine of the sovereign's proprietorship of the soil. See Rev. and Jud. Sel., Vol. I, p. 283. In their letter of 17th December 1813 to Madras, they say of Kanara: "we have not property in the land to confer, with the exception of some forfeited estates." *Ib*, p. 511.

(2) 12 Bom. H. C., Rep., Appx. 42. (3) Ch ix, sl. 44. (4) *Ib.* ch. vii, sl 130.

(5) *Ib.* ch. viii, sl. 243. (6) See the Fifth Rep., Appx. 25. p. 828.

(7 Sir W. Jones says (Works, Vol. VIII, p. 208) in the preface to Al-Sirajiyyah. that "the old Hindus most assuredly were absolute proprietors of their land, though they called their sovereigns lords of the earth."—See Wilks's Historical Sketches, Vol. I, page 191.

(8) See Colebrooke's Digest, B. II, ch. ii, s. 1, t. 13, 24; Comm. Bk. V ch i. art i. t. 2, Comm, ad. *fin.*

sophy) which has its counterpart in the writings of European authors on the theory of government and on natural law, who still have not thought the existence of absolute authority vested somewhere in the State and of the sovereign's eminent domain incompatible with private rights and individual property.(1) Lord Lyndhurst in the case of *Freeman* v. *Fairlie*(2) arrived at the conclusion, both from the ancient law of the country and from the Bengal regulations of 1793, that "the proprietors of the soil had a permanent interest in it," which, he says, gives "an entire and absolute dominion and ownership," subject always to the *jama* or assessment.

In the earlier Hindu law the sale of the land belonging to a family is absolutely forbidden.(3) Jagannatha regards forfeiture as impossible without a real of ficitious assent on the part of the owner.(4) It is to his principle of an inseparable connexion that we must probably attribute the right, very widely recognized, of a landholder who had deserted his holding to return and reclaim it even after the lapse of many years. In the Deccan the mirasdar could exercise this right for at least thirty years.(5) In Kanara, Munro reports:(6) "The alienation of land, by sale or otherwise, was unrestrained, but nothing but gift or sale or non-payment of rent could take it from the owner. If he absconded with balances standing against him, it was transferred to another person (indeed a neighbour might be compelled to cultivate it—see page 26);

(1) Hobbe's Commonwealth, Pt. II. c. 24; Compare, ch. vi. s. 15; Grot, D. J. B. P., Lib II., c. xiv, s. 7; Bynkershoek Q. J., P. II. 15; Puffendor L. R., B. VIII, c. v, s. 7; Vattel by Chitty, pp. 111, 112; 12 Bom. H. C. Rep, 43, Appx.

(2) 1 Moore's Ind. Ap at pp. 231, 343. Compare the views of Mr. Grant (Lord Glenelg), Fifth Rep., Appx. 4. (Sel. Rep., Vol. II). pp. 225 637, 977.

(3) I. L. R., 2 Bom., p. 329.—See Kanara Land Assessment Case, 12 Bom. H. C. Reg. Appx. I; Printents. Documents, II, 21; and Buch: Lys., Vol. III, 279. Hence the inextinguishable right of redemption of a mortgage once recognized in Kanara; see Fifth Rep., p. 130; Buch. Mys., Vol. III, 242, 180.

(4) Compare Bracton, *f.* 262, "*Item si per paupertatem possessionem deriquerit animo rtinet civiliter licet corporaliter non fuerit in possessione.*"

(5) 12 Bom. H. C. Rep., 50, Appx.

(6) Ex 366, p. 24.—See Ellis in Madras Mirasi Papers, p. 185, and Madras Rev Sel., p. 817, of Rev. and Jud. Sel., Vol. I.

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but if he or his heir returned at ever so distant a period, it was restored on either of them paying a reasonable compensation for the balance and such extra expenses as might have been incurred on account of improvements."(1) In 1848 we find Mr. Blane (2) complaining of the mischiefs to which this right, still recognized gave rise. He considered the right itself as one of doubtful validity ;(3) but it had undoubtedly been allowed by the British authorities.(4) Thus it was that the name of a former vargdar, or Government tenant, was frequently retained in the revenue accounts for years, or even generations, after he had disappeared. Mr. Harris says: There are many Sarkar lands the rent of which is received from one person, whilst the name of another remains in the *kulvar* statement, and who, from inability to cultivate, had deserted the lands, but will not agree to withdraw his name, hoping that he may some day recover and be again able to cultivate them himself; whilst the person actually paying the Government, fearing that he is liable to be ousted by the former occupant, has no object in improving the land. This admission of a negative *mul* right has probably crept in form, the tahsildars carrying with them from Lower Kanara the knowlege of private rights so clearly established there. But of the Sarkar right to assign such lands to the cultivator in long occupancy I never doubted, and have acted upon it. I have also endeavoured to correct the former glaring abuse as far at it was in my power." As a means of security to tenants taking up deserted lands, *kowlnamas*, such as the one marked H or K at pages 3, 19, were published, and *mulpattas*, or leases of the type of that marked B at Vol. II, page 58, of the painted documents in the Kanara Land Assessment Case, were issued in the earlier years of the century, by which the grantees were to resign it the mulgar came forward within a year, but were not to be disturbed afterwards. (5) As tenants holding from Government without a lease, Munro says, "are exposed to an arbitrary increase, they frequently claim a

(1) Fifth Rep., p. 130; Wilks's Historical Sketches, Vol. I. 155,

(2) Ex. 366, p. 237. (3) See 12 Bom, H. C. Rep. 93. Appx

(4) Kanara Land Assessment Case, printed Documents, Vol. III, 61.

(5) See also Ex. H in the same case and other documents.

reduction of rent when they have suffered losses;" and elsewhere, he thus describes their position, speaking of those who had taken up lands deserted under the preceding Government: (1) "The temporary holder could not obtain the proprietary right without paying a sum of money, which he was unwilling to do, and he could not venture to improve, lest he should be dispossessed in favour of a stranger. As he could gain little, so, on the other hand, he could not loss much, because remissions were granted on account of bad crops, which was never allowed in cases where land was private property. When a man agrees to become the proprietor of Sarkar land, he shows at the same time a confidence both in the forbearance of Government and in his own means of improvement, because by the custom of the country, whatever may happen, he has from this moment no claim to remission;" while, as to the mulgars with a proprietary right in their lands he says: (2) "The accounts contained a register of the number of landholders and the fixed assessment of their respective estates, the total of which formed the *jama*, but they took no notice of waste lands when there was a proprietor in existence. As long a he was present he was responsible for the full rent, whether he cultivated or not.....It was never inquired what portion of his estate a landlord cultivated or left waste. It was expected that, in whatever state they were, he was to pay the whole rent. When he failed, however, as was sometimes the case, it was not usual, even where it could be done, to sell the whole or part of his estate to make good the deficiency. This was looked upon as a harsh measure, and was seldom resorted to. The usual custom was to grant him time, to assist him with a loan of money, or to remit the debt altogether" In his report of 9th November 1800, Munro again insists on the distinction to be observed between proprietary lands and those held only at will (3) "A part of the rent of waste lands upon occupied estate in No. 2 (column 15) ought in the course of a few years to be added to the assessment. They consist both of Sarkar and private lands. In the case of Sarkar lands, where the cultivator of part of the estate does not choose to become proprietor, they cannot be with justice assessed until they

(1) Ex. 366, pp. 4 s, 6 s.
(2) Ex 366, pp. 17, 20. (3) Ex. 366, p. 53.

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are cultivated; and even then, as they have in general been deserted on account of over-assessment, very little more than the *shist* will be obtained from them. In the case of private estates so much indulgence is not necessary. I have directed the *shist* to be levied from a portion of them this year, and in the two ensuing years the whole of them ought to be raised to the Bednore assessment."

It is perfectly clear from these extracts that, in theory, the mulgar was compelled, in consideration of his greater security and permanence of tenure, to pay up the assessment from time to time fixed on his estate without diminution on account of waste or of unfavourable seasons. The same considerations would apply still more strongly to the case of one holding under a *kowl*, a *mulpatta* or ocher description of lease, stipulating for a fixed annual rent. Yet, as if to make every possible indication afforded by the Government accounts uncertain, we find Mr. Blane reporting in 1848 that, in fact, the principle of payment, independent of extent of cultivation, had not in practice been adhered to. The practice", he says, (exhibit 366, p. 182), "does not here exist, as in other districts, of a raiyat only occupying the land he pays for, and throwing the waste land given up or left uncultivated into the general *aycat bunzar*, or waste land of the village; but whatever be the amount of waste it still continues attached to the estate, the *beriz* being, except in special cases, remitted." There was, in fact, "no public record of the extent of any man's land" (exhibit 366, p. 182), and then he complains: "There has never been any application, in Kanara, of the simple rule, that a man has only a right to as much land as he pays for; nor is there any rate or rule of assessment by which the collector can determine whether he has more or less than he ought to have, or by which he can recover or re-assess it. It is of no avail for him to say you have three or four times as much land as is equivalent to the assessment you pay; the simple answer is, that it is within the limits of his *varg*, or the production of some document or the evidence of friendly neighbours to prove that it is his, and if the claim be resisted, there is the ready resource of carrying the case into the Court." The reason for the peculiarity of Kanara on which Mr. Blane here dwells, consists obviously in the general recognition there of private

property. What a man held was presumed to be his own, though subject to assessment for the public revenue; what he held in most other districts was presumed to be only rented to him by the Government.(1) The remedy was to be found, as it has been, in a re-adjustment of the assessment, not in an eviction from the property.

In the earlier report, to which we have referred, Munro says (exhibit 366, p. 9): "From the remotest times, of which there is any record, till near the middle of the fourteenth century, all land was assessed in rice at a quantity of rice" (*i. e.*, cleaned rice) "equal to the quantity sown of paddy" (*i e.*, unhusked rice). This would be a proportion of two to one on the rice sown, and, taking the produce as it was usually reckoned to be twelve-fold, would give to the State one-sixth of the gross produce. The proportion was afterwards repeatedly increased, and, through the exaction of various cases, (2) became but an illusory measure of the raiyat's burden; but in theory a share of the estimated produce was always the proper amount of the State's demand. "The Byjanagar assessment," Munro says, (exhibit 366, p. 11,) "with all additions down to this era (A. D. 1618) incorporated in it has been more than a century considered as the *rekah* or standard rent of all the lands in the country cultivated and waste." The earlier settlement of Harrihar Roy, on which this was based (3) "is not supposed to have been made from any actual measurement, but merely from a rough estimate of the quantity of seed reported to have been usually sown in each field." Thus, as Mr Harris reported, (4) "the foundation stone of the *rekah*" was "the actual fields in

(1) See Mr. Grant's Memoir, Appx. 13 to Fifth Rep.; Munro's report of 15th August 1807, quoted above, paras. 2, 16; Rev. and Jud. Sel., Vol. p. 588.

(2) These were adopted by Haidar and Tippu from the Hindu rulers. See, Rice's Mysore, Vol. I, pp. 485, 489, 493; Rev. and Jud. Sel., I, 487.

The history of the land revenue was similar in Bengal. See Sir J. Shore's minute, Appx. 1 to Fifth Rep., paras. 391, 392 (Sel. Rep. on East India Affairs, Vol II, p. 205.) A review of Akbar's system is given by Mr. Grant, *ib* 637ff.

(3) Ex, 366, p, 11, See also Munro's note on Revenue Board's minute of 1818, Kanara Land Assessment Case, Printed Documents, II, 31. But see, too, ex. 366 p, 217.

(4) Kanara Land Assessment Case, Printed Documents, Vol. III, 34,

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cultivation and the quantity of seed each field was sown with. (1) The collector's shirastedar, at page 92 of the volume from which we are quoting,(2) says this proportional "*geni*" or Government rent was of immemorial antiquity, and successive collectors point to it as the basis of the land revenue. (3) Under the severe rule of Haidar and Tippu(4) the principle of participation still served as is usual under Mahomedan governments, as the basis of the sovereign's demand but the proportion exacted or sought to be exacted was one-half (5) the gross produce or its money equivalent; but, in truth, all was exacted that could be extorted.(6) The raiyats who remained in a village were forced to cultivate the lands of those whom an excessive assessment had caused to abscond.(7) The amil of a district entered into an engagement to produce at stated amount of revenue.(8) This had to be disrributed amongst the villages and within the villages amongst the raiyats in proportion, at least theoretically, to the produce raised by each. The amil was himself made personally responsible that the sum for which he had contracted should be forthcoming, and by way of compensation he could punish the patels who failed to produce the proper contributions of their several villages.(9) These recouped themselves by putting pressure on the individual raiyats.(10)

(1) See Buch. Mys., III. 180. This mode of estimating the revenue leviable prevailed widely ; see Mr Grant's Appx. 13 to Fifth Rep., p, 642.

(2) As to his testimony, see Proceedings of Board of Revenue, dated 16th November 1843, para, 54; Printed Documents, 115.

(3) Mr. Malby, (ex. 366, p. 128) ; Mr. Blair, (ex. 366, p. 217) ; Mr. Blane (ex. 366, p. 204.)

(4) Kanara Land Assessment Case, Printed Documents, III, 21.

(5) Mysore Revenue Regulations, arts. iii, xiv ; Sir J. Shore's minute, Appx. I to Fifth Rep., paras. 29-31, pp. 172, 109, pp. 180, 217, pp. 192, 279, p. 197 Mr. Grant's view, &c., *ib*., p. 359. Kanara Land Assessment Case Printed Documents, *III*, 24, 95.

(6) Ex. 366, pp. 22, 25.

(7) *Ib* 22, 25. Comp. Rev. and Jud. Sel,. Vol. 1, p. 522.

(8) This was general ; see Fifth Rep., p. 634.

(9) Mysore Revenue Regulations, Act IX, Compare the Fifth Rep, A.D., 1811 p. 116, s. 634

(10) Kanara Land Assessment Case, Printed Documents, Vol, 55. III.

In such a state of things gross irregularities were inevitable, and it is not surprising if the evidence of even a theoretical adherence to the former proportional system became in some instances faint and uncertain (1) The extravagant demands of Government were, in fact, evaded by systematic fraud on the part of the village officers and others concerned in the levy of the land revenue. (2) Although the original theory had been that of a uniform aliquot contribution to Government of a share of the produce, this was found incompatible with the cultivation of the poorer lands (3) when the proportion payable had become unreasonably large. Tippu's regulations(4) provide for an inspection of the fields of each village,(5) an estimate of the *bijvari* or grain sown, and of the return as the land was of first, second, third or fourth quality.(6) By lowering the estimated outturn, the share of the Government would be reduced; and Mr. Harris, comparing in 1821 the actual accounts of lands in one of the magnis (sub-divisions) under him with the *rekah* accounts formerly presented to the higher revenue authorities, found (7) that the *bijvari* (sowing) was under-estimated, that "*sthals*" or plots of rice land were omitted, and that the *dar* or rate of contribution to Government, which varied from five times to one-half the seed sown, (8) had been taken too low.

Another method of alleviation was to represent the lands cultivated by an owner or his servants as held by tenants. The gross proceeds assessable for revenue were by this device identified with the rent received by the landlord, about fifty per cent. of the

(1) See Rice's Mysore, Vol. I. p. 486.

In every part of India the numerous *abwabs* and similar extra impositions had a similar effect. See Mr. Grant's view of the revenues of Bengal, Fifth Rep, Appx. 4; Buch, Mys., III., 343.

(2) See Fifth Rep., Appx. 25, p. 534.

(3) See 12 Bom. H. C. Rep., 63, Appx., note e. (4) Act XXXI,

(5) Comp. Kanara Land Assessment Case, Printed Documents, III, 39. para. 25,

(6) This was copied from Akbar's plan, which was itself a development of the Hindu system. See Rice's Mysore. pp, 470, 475, 487 of Vol. I. Similar necessities had suggested a similar system to the Romans; see Dig, Lib, L, tit, 15, fr, 4, and Gibbon's Decline and Fall, Ch. XVII.

(7) Kanara Land Assessment Case, Printed Documents, III, 43. Compare *b*, 92, 93.

(8) Kanara Land Assessment Case, Printed Documents, III, 49.

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gross produce in grain to the cultivator; and by representing the lands as held on *mulgeni* leases at rents below their real value,(1) and variable only on a general revision of the *rekah*,(2) the sum actually leviable by Government was reduced as low as was thought consistent with safety. This device was not indeed laid aside even after the introduction of the British Government, (3) and was not likely to be while it was at once easy and profitable. Against a true assessment of gross produce it would not avail, but it would certainly be employed to diminish an assessment based on the landlord's actual gains. To prevent loss to Government by arrangements of this kind, the Board of Revenue in 1843 say(4): "Care should be taken never to fix" (*i.e.*, estimate for purposes of assessment) "the mulgar's rent at less than 50 per cent." (of the gross produce).

Harrihar Roy's assessment had been founded on the idea that, in taking for executive and religious purposes one-fourth of the gross produce, the State would leave an equal amount to the landlord, the rack-rent recoverable from a tenant being taken as one-half the whole gross produce. It was a converse proposition that, in exacting a moiety of the rack-rent, the Sarkar would take one-fourth of the gross produce. This phase of the theory of proportional contribution seems, for reasons similar to those we have just touched on, to have prevailed over the other, wherever almost, as must often have been the case,(5) they could not be brought into agreement. In the Payen Ghat, where the lands we have to deal with are situated, Mr. Harris says a fixed rate of increase on seed sown was generally received as the theory; but in Bonawasi,(6) and apparently elsewhere, the practice seems to have been to bring out an estimate which should make the Government share equal to that which remained in the hands of the landlord, supposing he let his land to a cultivating tenant. Munro thought that this was a proper and reasonable proportion.(7) The Board of

(1) Kanara Land Assessment Case, Printed Documents, III, 16
(2) 12 Bom. H. C. Rep., 100, Appx, (3) See ex. 366, pp. 83, 85.
(4) Printed Documents, p. 120,
(5) See Kanara Land Assessment Case, Printed Documents, III. 65. 70.
(6) Kanara Land Assessment Case, Printed Documents, III, 35, 36.
(7) Ex. 366, p. 49.

Revenue, in the minute already referred to, (1) say the attainment of this proportion, and no more, has been the object of all subsequent revisions of the assessment; but the first paragraph of the same minute shows that, if it had been the object, it was one that was sought by indirect means. Mr. Reade in 1814 proposed to take 30 per cent of the gross produce reduced to 20 per cent. for Sonda and specially diminished for places on the Maratha frontier.(2) He assumed that the *geni hutwali* (rent produce to the owner as landlord) was from 50 to 60 per cent. of the gross produce, an assumption which in any particular case would probably be incorrect.(3) Mr. Harris's resettlement of Buddangode was made at the rate of one-third of the estimated gross produce of the lands(4). This was approved by the Board of Revenue, who directed an extended application of the system. Something was done towards giving effect to their order; but, in 1825, Mr. Babington reports(5) that the exaction, uniformly, of one-third would operate unequally in many places, and was, in fact, impracticable.(6) Still the principle was not abandoned by the Board of Revenue, and, in 1833, Mr. Viveash says: "The original assessment on the estates generally is supposed not to have exceeded one-third of the gross produce, or one-half of the rent remaining after deducting the expenses of cultivation."(7) He thus identifies one-third the gross produce with one-half the rack-rent. In 1848, Mr. Blane remarks(8) that the investigations of the first seventeen years of British rule, with a view to obtain a satisfactory basis of assessment "were confined to inquiries into the rent produce of the estates without any attempt to ascertain the extent of the estates"; but in 1850 again Mr. Maltby writes:(9) "The principle of assessment in this district and

(1) Printed Documents, p. 113.

(2) Kanara Land Assessment Case, Printed Documents, III, 2, 3.

(3) *Ib.* 70, 93.

(4 Kanara Land Assessment Case, 21 Bom. H. C. Rep., 179, Appx.

(5) Kanara Land Assessment Case, Printed Documents, III, p. 64.

(6) See also Mr. Cotton's Report; Kanara Land Assessment Case, Printed Documents, III, 149.

(7) See Kanara Land Assessment Case, Printed Documents, III, 74; Mr. Cotton's Report; comp. Munro quoted, ex. 366, p. 88.

(8) Ex. 366, p. 179.

(9) See Kanara Land Assessment Case, Printed Documents, III, 118.

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that upon which our accounts are prepared is that the Government is entitled to one-third of the gross produce,"(1) to which he adds that the produce is arbitrarily estimated, and that an exaction of one-third, without under-statement, would produce general misery. In this confusion of theories, the annual *jamabandi* secured the landowner against unreasonable demands in unfavourable seasons, though at the cost, wherever the system of averages was made the basis of a maximum assessment, of considerable loss to the Government in fruitful years.(2)

It is necessary to bear these statements in mind in considering the various accounts and estimates which form a large proportion of the evidence in this case.(3) Their preparation, even where they are prefectly genuine, seems to have been governed by no uniform principle.(4) The results of the survey reported by Mr. Cotton(5) and Mr. Babington (A. D, 1825) seem never to have been embodied in them, and they are every here and there encumbered with summations and averages which are turned to absolutely no practical use. Often, indeed, the work is left half finished, because it had suddenly become evident as the introduction of the *sarasari* (average) assessment into Ankola was abandoned, or indefinitely postponed,(6) that it was, after all, mere waste of labour Munro's practical sagacity had suggested to him that the only safe basis of a taxation of the land was some kind of cadastral survey. He instituted one of a rough kind in Barcur,(7) but nothing seems to have come of it.(8) Mr. Harris's survey of

(1 Compare the Board of Revenue, Rev. and Jud. Sel., I, 561, 563.

(2) Kanara Land Assessment Case, Printed Documents, III, 74, 88.

When the *varg* No. 36 at Kaignad was formed, the *shist* was set forth as 1 hon (= Rs. 4), while the first *jamabandi* was but H. 0-1-4 ( =8 annas) *i. e.*, half the sum reckoned as received from one married *kumri* cutter as tenant. Printed Documents, 455.

(3) *Ib.*, 81.

(4) See the memorandum drawn up by the shirastedar in 1831 ; Kanara Land Assessment Case, Printed Documents, III, 81, 82, 88, 89.

(5) Kanara Land Assessment Case, Printed Documents, III, 64, 149.

(6) See Kanara Land Assessment Case, Printed Documents, III, 15, 27, 31, 36

(7) Ex . 366, p. 69.

(8) See Kanara Land Assessment Case, Printed Documents, III, 79, para. 3, subsection, and paras. 4, 83.

Badangode was combined with a method of assessment, which, as its extension was attempted, discredited it;(1) and the Board of Revenue, though recognizing a survey as desirable,(2) seem to have thought almost to the end that by averaging the casual collections of several years(3) on particular estates, by revisions entered on without accurate data, and by other guesses at the capacity of holdings to bear assessment, they could sufficiently equalize the burden of the land revenue(4) without regard to the fraudulent encroachments by which many properties had been enlarged, the sub-divisions by which others had been unduly relieved of their fair share of the assessment,(5) or the original worthlessness of the local accounts, by which the individual distribution of payment of the land-tax had been regulated.(6) The *kulvar* accounts, prepared for North Kanara in 1800-01, do not seem to have attempted to show either the extent or the produce of the individual land-owner's holdings, nor any more than the constituent elements of the assessment as *shist*, *shamil* and the like.(7) In 1811-12 an estimate was made, on the basis of the earlier one, of which the accounts placed before us show several traces, and in this the *bijvari* was entered (*i.e.*, the quantity of grain required for sowing); but the information, having been obtained from the mere statements of the raiyats, was quite untrustworthy.(8) So also were the

(1) See Mr. Lewin's letter of 5th September 1827; Kanara Land Assessment Case, Printed Documents, Vol. III, 70.

(2) See Kanara Land Assessment Case, Printed Documents, Vol. III, 240, s. 252.

(3) See Kanara Land Assessment Case, Printed Documents, Vol. III, 81, 89; ex. 366, pp. 174, 179, 227.

(4) Kanara Land Assessment Case, Printed Documents, Vol. III, 99, 102, 104, 107, 109, 111.

(5) See ex. 366, p. 260.

(6) See Kanara Land Assessment Case, Printed Documents, Vol. III, 73.

In recent years the assessments have been based directly on area, the estimates of produce being used only as a kind of corrective or ground of maximum. Examples may be found in the cases of *vargs* Nos. 36 and 37 at Kaignad and *varg* No. 2 at Goor, Printed Documents, pp. 455, 604, 605.

(7) Kanara Land Assessment Case, Printed Documents, Vol. III, 79.

(8) Kanara Land Assessment Case, Printed Documents, Vol. III, 80, 99.

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statements of the *geni hutwali* (rent-produce) entered occasionally for some years on the same authority.(1)

The *rekah* accounts sent up to the higher authorities under the native governments seem, in some instances, to have been preserved. Mr. Harris thought them authentic. But they "contained only the *talukvar* totals and fluctuations on each item (or head of revenue) during centuries"; no detail of any individual estate.(2) Under Haidar and Tippu, indeed, only village settlements were generally made,(3) the sub-distribution of the burden amongst the raiyats being left entirely to the patels and shanbhogs.(4) On the introduction of British rule these village officers were called on to furnish accounts of each holding.(5) They professed to comply with this direction, and Munro appears to have attached a value to the documents on which these separate accounts were founded,(6) which was not warranted by their authenticity. Mr. Harris says they were never scrutinized by the superior officers.(7) In 1828 Mr. Babington writes as to these accounts that "no reliance can be placed upon them, as few can be found that have not been falsified in some way or other"; (8) and as the more recent accounts even, prepared under the British rule, he says: "From the lax manner in which the village accounts have been kept in this province for a series of years, and the destruction, alteration and forgery of them by the shanbhogs, no satisfactory adjustment of the revenue can be made from those now existing."(9) They had, in fact, for the most part, perished through neglect,(10) and thus the

(1) Kanara Land Assessment Case, Printed Documents, Vol. III, 89, 90, 92.

(2) *Ib.* 37, 53.

(3) *Ib.* 55. Comp. Mysore Revenue Regulations, s. 9,

(4) *Ib.* 55. Munro's letter to the collectors contemplates a common responsibility of the landholders of a village in the last resort. See ex. 366, p. 69; 12 Bom. H. C. Rep., 165, Appx. Eventually he would have limited this mutual insurance to 10 per cent. of the village assessment. See Rev. and Jud. Sel., I, 482.

(5) In Sonda the individual settlement was first made in 1806. See Kanara Land Assessment Case, Printed Documents, Vol. III, p. 35.

(6) Ex. 366, pp. 9, 17.

(7) Kanara Land Assessment Case, Printed Documents, Vol. III, 55.

(8) *Ib.* 73. (9) *Ib.* Comp. *ib.* 89.

(10) Revenue Board, 16th November 1843, para. 53; Printed Documents, 115

only means whereby the accounts prepared at a later period could be tested, an ineffective means at best, had ceased to exist.(1)

The remarkably well-informed shirastedar, who wrote in 1830 a memorandum, which has already been referred to, says in answer to an inquiry of the Board of Revenue(2) : The Board say that the *beriz* is fixed upon the quantity of seed with which land is capable of being sown. This must arise from their having examined the accounts which the shanbhogs originally delivered in when the country first fell into the hands of the Company in which the '*shist*' and extent of '*bijvari*' (sowing) are entered. This *bijvari* was entered in the same manner as the *shumary bijvari* account was written in the year Visuvasu (1785-86) described in the first paragraph of this answer.(3) It is not stated at what rate per each *mudah* of seed the '*shist*' was calculated. It is, therefore, impossible to say that the *shist* was determined upon any fixed principles, such as that one *mudah* of seed would yield so much produce. In the report of the settlement of the district for Fasli 1236 it was stated that *jamabandi* accounts could not be prepared according to the form received from the Board in Fasli 1235, and it will be perceived by the foregoing detail that there are no authentic accounts of the *bijvari* of the lands of this zilla The Board desire that copies of the *kadim* (ancient) accounts for two or three villages may be prepared and sent to them. There are no such *kadim* accounts in existence. I have sent copies of accounts which were written after the Company took the country, as I have described in the former part of this answer." And then, after a great deal of minute information about the revenue history of Kanara, he says that the answers given to the inquiries made by the first collectors had turned out obviously wrong when tested ;"nor has it ever been discovered on what principles the *shist* was originally formed." Under each succeeding government, he says, the amildars sought to raise the revenue to a higher point.(4) "In many instances they even divided the *beriz* of the

(1) See Kanara Land Assessment Case, *Printed Documents*, Vol. III, 78,79.

(2) *Ib.*, *Printed Documents*, Vol. III, p. 82.

(3) *Ib.*, *Printed Documents*, Vol. III, 77.

(4) *Ib.*, *Printed Documents*, Vol. III, 82.

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waste lands on all the raiyats of a village, and added that also to the *shamil*" (*i. e.*, they thus enhanced the *shamil* or extra assessment payable by each raiyat). The village accountants, he says, in league with their immediate superiors in the days before the Company's rule' habitually manipulated the *beriz* payable on the *vargs*, in which they were interested, to the prejudice of the revenue and of their neighbours.(1) Thus the most corrupt and unprincipled amongst the lower officials became a wealthy class and the most influential in Kanara. Honest men could not but be ruined, and "the readiest resource the people appear to have had to save themselves from extortion, seems to have been the falsification of the accounts for the purpose of deceiving the (superior) officers of Government."(2) "Nothing, therefore," Mr. Blane says, "surprises me more than the manner in which the accounts furnished by the shanbhogs appear to have been received, at the commencement of our administration, as genuine documents which might be relied on."(3)

The original accounts from which those prepared on the establishment of British rule having been so utterly untrustworthy, and those which replaced them having been such as they are described by successive collectors,(4) it would plainly be unsafe to take them in any particular instance as conclusive of any fact that we may find recorded in them, least of all when these are facts affecting the proprietary or pecuniary interests of the hereditary accountants, to which class the plaintiff in this case belongs) Even of the survey of 1825, in which, considering its purpose, unusual care ought to have been exercised, Mr. Blane writes:(5. 'I cannot look upon an imperfect and partial survey as otherwise than directly prejudicial to the interests of Government. There is much reason to believe that it has had this effect in the northern

(1) Kanara Land Assessment Case. Printed Documents, III, p. 96; comp. th Fifth Rep., p. 118.

(2) Ex. 366, p. 174.

(3) Ib. 175, Kanara Land Assessment Case, Printed Documents, Vol. III, 111

(4) The Court of Directors were well aware of the delusive character of the native accounts generally. See despatch to Bengal, Rev. and Jud. Sel., Vol. I, p. 278.

(5) Ex. 366, p. 214.

district of Ankola and the Balaghat, where no investigation of the actual extent of estates formed part of the plan of the survey; but the land, as it was measured, was entered in the accounts as belonging to the different estates according to the dictation of the raiyats themselves, and now often, when a case comes to light in which extensive encroachments may be reasonably suspected, an appeal to the entries in the survey accounts is considered as setting the question beyond dispute." Mr. Viveash had already reported that it was untrustworthy. (1) It was probably a sense of the delusive character of the survey record which prevented its use in the attempted revision of the assessment in Fasli 1243 (A. D. 1833-34), at which in another place (2) Mr. Blane expresses his surprise. This, too, may account for its non-production in the present case, for which, under other circumstances, it must have afforded valuable evidence. In the course of the inquiry in 1833 the plaintiff's father Martoba was examined, (3) and it seems, at first sight, singular that he, too, makes no reference to the survey between 1821 and 1825; but the purpose of that investigation being a revision of assessment, Martoba could have no interest in giving an undue extension, or in calling attention to the extent of his several holdings.

But though the accounts are thus of very slight value where uncorroborated as evidence of particular facts, affecting the interest of individuals and especially of village officers, they serve very well to illustrate the general method of land-revenue managements. Even in entries inaccurate or fraudulent in substance the forms of the regular course of business would naturally be adhered to; and as those forms were determined by the way in which the interest of the landholders and the sources of revenue were regarded by the representatives of the Government, we may gather from the accounts, without attaching unreserved credence to their details, some valuable information on the more general questions arising in the case before us. They have been construed in opposite senses by the counsel in this appeal; but neither of the suggested interpre-

(1) Kanara Land Assessment Case, Printed Documents, Vol. III, p. 202.

(2) *Ib.* 184.

(3) Ex. 100, Printed Documents, 164.

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tations appears to me really so easy and so natural as that which, as it seems, we may draw from the known history of the revenue administration, which in turn by its agreement with the other established facts of this case confirms the view that we take of the relations of the parties with respect to the properties now in dispute.

As the lands in question are forests tracts in the neighbourhood of villages, it may possibly be the fact that they were at some time regarded as the property of the village community as a whole. Where, as we have seen was the case under the preceding government, a village was assessed for a lump sum, the idea that it, as a corporation, was owner of all the lands taken in any way into account (1) in fixing its contribution, would readily spring up even where it had not existed before. In pasturing the cattle, and gathering the wild forest produce, some rude delimitations of contiguous village territories would gradually be arrived at; and there are indications in this case that within the boundaries thus determined the village community in Kanara regarded all forest privileges as its own. (2) The notion has been favoured in some recent works of high authority, that the land, wherever it was inhabited at all in India, was originally held in large masses by village communities, and that the holdings of individual members were held from the community, itself the sole superior and ultimate proprietor. "The indigenous system of the country,' says Sir H. S. Maine, (3) "is one of common enjoyment by village communities and inside those communities by families." Then as to the waste lands he says: (4) "The waste or common land of the village community has still to be considered.....The view, therefore, generally taken (as I am told) of the common land by the community is that it is that part of the village domain which is temporarily uncultivated, but which will some time or other be cultivated and merge in the arable mark. Doubtless it is valued for pasture, but it is more especially valued as potentially capable of tillage. The effect is to produce in the community a much stronger sense of property in common land than at all

(1 This included wastes subjected to *kumri*. See Mysore Revenue Regulation XXXIII.

(2) See ex. 75, Printed Documents, 41. (3) Village Communities. 41

(4) *Ib.*, p. 120.

reflects the vgauer feeling of right which, in England at all events, characterizes the commoners. In the latter days of the East India Company, when all its acts and omissions were very bitterly criticized, and amid the general re-opening of Indian questions after the military insurrection of 1857, much stress was laid on the great amount of waste land which official returns showed to exist in India, and it was more than hinted that better government would bring these wastes under cultivation, possibly under cotton cultivation, and even plant them with English colonists. The answer of experienced Indian functionaries was that there was no waste land at all in India. If you except certain territories which stand to India proper much as the tracts of land at the base of the Rocky Mountains stand to the United States —as, for example, the Indo-Chinese province of Assam— the reply is substantially correct. The so-called waste lands are part of the domain of the various communities which the villagers, theoretically, are only waiting opportunity to bring under cultivation. Yet this controversy elicited an admission which is of some historical interest. It did appear that though the native Indian government had for the most part left the village-communities entirely to themselves on condition of their paying the revenue assessed upon them, they nevertheless sometimes claimed (though in a vague and occasional way) some exceptional authority over the wastes; and, acting on this precedent, the British Government, at the various settlements of land revenue, has not seldom interfered to reduce excessive wastes and to re-apportion uncultivated lands among the various communities of a district."

In the volume of papers relating to mirasi published by the Madras Government,(1) there are many testimonies to the effect that in mirasi villages the whole waste was regarded as the property of the village community, whether the mirasi was *pasunkarei* (held in common by all ) or *arudikarei* (held in severalty by the separate members ). Mr. Ellis says: " Mirasi right..... .....extends certainly to waste, but then the right is limited by the nature of the waste."(2) which means that " mirasi right is

(1) See also Rev. and Jud. Sel., Vol. I, Madras Rivenue, p. 816; Fifth Rep. Appx. 16, p. 714. of Selected Reports on East India Affairs, Vol. II

(2) Madras, M. Papers, 184.

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confined to the use" of the waste as it exists. His late shirastedar says: (1) " All waste lands are included in the *grama turam* (village area), all such lands have been considered to appertain exclusively to the mirasdars"; but this officer, too, reserves a superior right to the Goovernment. " While, however, there is, as has been explained, a right of property to the inhabitants as respects their mirasi ; yet, as this right is founded chiefly on possession, a *paramonnt right* to the territory over which his dominion extend, appears to vest in the prince ; if, therefore, the mirasdar fail to cultivate, and loss thence accrues to the State, the Sarkar enjoys and exercises the right to cause the lands to be cultivated, and to issue *kowls* for that purpose." There are many other statements tot he like effect, and Sir T. Munro was undoubtedly right when he asserted that the Government had always asserted a right of disposal over the waste lands of a village.

Mr. De Laveleye, in his work on primitive property, in contending against those who maintain the singular origin of property by individual occupation, says: (2) " Thus, in oider to defend the quiritary property bequeathed to us by the Romans, writers have asserted that it has existed at all times and in all places, *ubique et semper* ; whereas a closer knowledge of history shows us that the original and universal form of property was the mode of possession practised by the Sclavonic and Germanic tribes, and exercised at Rome itself over the *ager publicus* ; " and throughout his interesting work he shows that communal property, if not universal, has at least at some time been the general form of land-ownership in almost every community of which authentic accounts have reached us. India has been no exception to this rule. (3) It is adduced as a striking example of its prevalence. And yet, if this was a primeval institution of the Indo-European immigrants into India, it is singular that the earlier sources of the Hindu law contain no rules regarding it. In Manu the relation on the individual raiyat to the king is discussed ; provision is made, too, for the administration of villages, towns and districts ; regulations for the

(1) Madras M. Papers, 219. As to this officer's qualifications, see Rev. and Jud. Sel., Vol I, p. 118.

(2) Primitive Property, Preface, xxxix.

(3) See Fifth Rep., Appx. 3., p. 978 ; Wilks' Op. Cit., Vol. I, p 196.

common convenience are prescribed ; (1) but corporate village community is not recognized.(2) "In the three southern provinces of the tract, called by the natives Malayalam, the coast of Malabar, there are no villages, and consequently no rights of any kind in common, Each family of Nayars reside apart on their own estate and hold their *jenmam* right free of all participation or control ..... This was also the condition of the fourth or northern division of Malayalam, Tulanadu, now called Kanara, before the foundation of the Vidyanagara empire.....a general assessment was then introduced.....but does not appear to have operated any considerable alteration in landed tenures, which, divested of all community of right, like those of Malabar, are nearly the same as those which obtain in the *arudikarei* villages to the south of the Colleroon."(3)

It appears, then, that the ownership of the village lands by the village community is not necessarily to be regarded as the only source from which in this country individual ownership has sprung. The existence, indeed, of many joint village communities can be traced to its origin in a voluntary compact in recent times; and the family ownership of the family heritage is what always confronts us in the ancient writings,—an estate dedicated equally to the support of sacrifices to the deceased members, as to the sustenance of those living, and still to come into life. It seems probable that the same tendencies of human nature, and the same exigencies which have led to the formation of village communities with common ownership in widely-severed parts of the world operated in the same way in India,(4) but side by side with the evolution of property on the narrower basis of the family. Mirasi rights, that is, a heritable interest in the soil, do not necessarily imply a mirasi community with joint ownership and joint responsibility to the State for the land revenue of a whole village.(5) In

(1) Manu VII, 115 ; VIII, 237 *ff*, 130 *ff*. (2) See Fifth Rep , p. 157.

(3) Ellis in M. M. P. 179 See also minute of Revenue Board, dated 5th January 1818. Kanara Land Assessment Case, Printed Documents, II, 28.

(4) See 12 Bom. H. C. Rep., 157, Appx.; Fifth Rep., Appx. 25, p. 826; Appx. 16 p. 714 ; Appx. 31, p, 978, para. 42.

(5) See Sir G. Campbell in the Cobden Club Papers cited in 12 Bom. H. C. Rep , 59, Appx.

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a report of the 4th August 1807,(1) Mr. Thackeray says of Kanara and Malabar: "The great difference between the land in these two provinces and those in other provinces is that here it is vested in individuals; there, in communities. The villages above the ghats are like corporations, communities, municipalities, republics, who are the proprietors of the whole lands of the villages; at least, they and the Sarkar share the qualities of property between them. They have cleared and cultivated the village lands, time out of mind; and there is none but the Sarkar who can cliam any share in the property from them. The village community only wants a fixed land-tax, which shall leave them some part of the rent, to become joint proprietors of the village lands: they are at present, however, only common tenants, because, in most places, the Government draws the whole landlord's rent. If the Government exacted the whole rent from Kanara and Malabar, the present proprietors would not be common but individual tenants."*

Where a mass of villages originally independent were united by agreement or conquest into a single political aggregate, as in the formation of the Roman and the English States, the dominion which each community had exercised over its waste lands would necessarily pass to the sovereign; and communal rights would thenceforward be limited just so far as he thought fit to exercise that dominion. This is the history of the folcland in England Originally the property, in great part at least, of the communes(2) themselves constructed on a basis of kinship,(3)it was granted out at first subject to services to be rendered to the State(4) "which reserved its ultimate ownership. But, as the process of political consolidation went on, the folcland was becoming virtually king's land: from the moment that the west Saxon monarch became sole ruler of the English.....the folcland itself becomes scarcely distinguishable from the royal demesne; and every estate cut out of it, whether turned into bocland or not, would seem to

(1) Fifth Rep. 1, p. 824

* As to the recognition of the peculiar proprietary rights existing in Kanara, see Rev. and Jud. Sel., I, 529.

(2) Laveleye, Op. Cit. 246.

(3) Stubbs's Const. Hist. of England, pp. 81, 83, 72. (4) *Ib.* 76.

place the holder in a personal relation to the king, which was fulfilled by military service"(1) As Allen says: "When the king came to be considered as the representative of the State, all charters of bocland ran in his name and appeared to emanate from his bounty,"(2) while from the manifold "appropriations of the public lands to the king as representative of the State, the word folcland fell into disuse, and gave place to the term of *terra regis* or Crown land."(3) Under the feudal law the Norman kings regarding themselves, as by a fiction the law regarded them,(4)as "universal lords and original proprietors of all the lands in the kingdom,"(5) directed this dominion specially towards the forests. The rights of the subject in relation to these domains were cut down or extinguished by a series of special laws of cruel severity,(6) which it became a leading principle of the common law to mitigate as far as posible. but the ownership once appropriated by the Crown has become that of the State without any restoration of the communal or individual ownership of the soil once usurped. Lords holding from the Crown were placed over the rural communities, and the common lands not otherwise absorbed by the Crown became wastes of the manor;(7) but the cultivated lands burdened with their services remained in the same hands as before. The division of the crops between the Crown or the Crown's grantee and the raiyat in India, prevented any strong interest arising which would be served by ousting the actual cultivator. He clung always to his miras; and, except as to waste the inamdar obtained no more and usually sought no more, save as *abwabs* or special cesses, than the land-tax, however settled, which would else have been paid to the Government (8) Thus his right subsisted side by side with a right equally recognized in

(1 Op, Cit., 193, and comp. Spelman on Feuds and Tenures, ch. V.

(2. Allen on the Royal Prerogative, 150. (3) Op. Cit.

(4) So in Scotland; see 1 Ersk. Inst., 259.

(5) II Blackstone 51. Palgrave's Rise and Progress of the English Commonwealth, I, 584.

(6) See Spelman Gloss. *sub voce Foresta.*

(7 Laveleye, 247. Compare the observations of Lord Hatherley in *Warrick* v. *Queen's College, Oxford*, L. R. 6 Ch. at p. 724.

(8) 12 Bom. H. C. Rep., 39, Appx.

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the cultivating raiyat;(1) while, concurrently with both, forestal rights were exercised in many cases exclusively by the Government, which showed that even in *inam* villages its ownership as to some particulars had survived the general grant of its interest.(2) As forests, too, were in many instances constituted in England out of lands in which the ownership for other purposes was untouched, so in India the regulations of the ruling power as to timber were extended over jungle holdings, not claimed in other respects as the property of the State.(3)

Although, therefore, individual property in the cultivated land and a common user of the forests and pastures(4) may be regarded as primary institutions of the Hindus, yet these in the development of organized communities became subject to qualifications in favour of the sovereign, while lands not distinctly appropriated followed only a common analogy in becoming the property of the State. In the Maratha Country, Mr. Elphinstone reports, "all the land which does not belong to the mirasi belongs to Government, or those to whom Government has assigned it."(5) In his History of India he states a similar proposition as resulting necessarily from a regular constitution of society, which may perhaps be doubled; but there are certainly grounds for what Sir T. Munro says,(6) that the "Sarkar from ancient times has every where.....granted waste in *inàm* free of every rent or claim, public or private, and appears in all such grants to have considered the waste as being exclusively its own property."(7) It is true that

(1) See Fifth Rep, Appx. 31, p. 977; Rev. and Jud. Sel., Vol. I, p. 294.

(2) See 6 Bom. H. C. Rep. at pp. 199, 200.

Tippu's Regulations, s. 22—24, reserve to the Government all teak, acacia and sandal trees. They prescribe the maintenance of pine and sal trees, and reserve the produce to the State.

In *Attorney General* v. *Marquis of Devonshire* (5 Price at p. 292), Thomson C. B., doubted whether the Crown could part with its forestal rights by grant.

(3) See 8 Bom. H. C. Rep. 2, A. C. J.; Tippu's Regulations, s. 23—24.

According to the Mahomedan law, the ownership of a tree or a house and that of the land on which it stands, are separable.

(4) Compare Laveleye, Op. Cit., 47, 106. (5) 12 Bom. H. C. Rep., 51, Appx

(6) *Ib.*, 58, 59.

(7) The Board of Revenue insist on this, Kanara Land Assessment, Case Printed Documents, Vol. III, 106.

"in all villages, whether miras or not, the inhabitants reserve to themselves the exclusive use of the waste; but this right is good only against strangers, not against the Sarkar, which possesses, I think by the usage of the country, the right of disposing of the waste as it pleases in villages which are miras as well as in those which are not." Ellis, as a man profoundly acquainted with the native literature and ideas, states the native view of miras; Munro, the great administrator, states firmly and distinctly how far that view had been allowed practical effect. The right of the State, moreover, to some kinds of timber might continue, notwithstanding any appropriation of the land. Its tacit assent to a creation of private ownership over these objects was not to be assumed; its alienation of its right was not to be implied when it was not expressed in a grant.

In his report of 1848 Mr. Blane points out (1) that the extensive wastes of Kanara had been appropriated to a considerable extent by the owners of the neighbouring estates, a process for which the complete want of recorded boundaries gave peculiar faculties. (2) They were, in many instances, "*kumaki*" or auxiliary lands intended to furnish pasturage and manure. "They do not appear", says Mr. Blane, (3) "to have originally differed materially from the waste lands used for similar purposes in other parts of the country, except that, in place of being common to the whole village, that were divided and enjoyed in separate portions by the individual landholders. The original terms upon which they were held then I conceive to have been essentially as an adjunct to, and in connection with, the cultivated lands, and the right to them to have been a modified right, and only to be enjoyed for the purposes for which they were held as above stated." That is, particular forest lands became essentially appendant to certain estates. (4)

We have here a transition from the ordinary common right of the inhabitants to the exclusive right of the individual landowner,

(1) Ex. 366, p. 194.

(2) See Fifth Rep., Appx. 5, paras. 41 ss, p. 482; Mr. Fisher's Report, Printed Documents, 40, para, 48.

(3) *Ib.*

(4) Buch. Mys. Vol. III. 242, says that dry fields were annexed, revenue free, in Sonda to each rice-land property as an encouragement to the farmer.

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or at least to a claim, which seems for long to have been acquiesced in, as not violating any known customary law of the district.(1) The origin of the peculiarity, where it existed, lay probably in the practically unlimited abundance of forest land, along with great differences of convenience of locality. For the Roman-law doctrine of ownership through occupation, Locke(2) substitutes that of the inherent impulse to self-sustenance and the inherent right to free activity in man. He regards the goods of external nature as common property only in the sense of their not being appropriated, and as requiring appropriation to answer their intended purpose; the right of appropriation as controlled, in the absence of positive law, only by the capacity of the individual to labour and to enjoy.(3) Some views, such as these, which have had great influence on the more recent theories of property, seem, at least as to the unappropriated waste, to have obscurely formed a part of the popular legal consciousness in India in both ancient and modern times.(4) It was not formerly the right to occupy and to reclaim which was questioned, but the right of the sovereign to share always in the appropriation, and make certain reserves, which was asserted. The greatness of the share exacted, extinguished private property in most parts of the country;(5) and where population had grown dense, a rigorous bargain placed the Government in the position of landlord, while it defined the holding as regarded those adjacent to it; but in such districts as Northern Kanara the encroachments of the landholders were not looked on as a fraud or injury to the State, rather as the exercise of, at least, a common privilege, except when they were secretly made *(chapawani)* so as to avoid the proper rateable contribution to the revenue.

(1) See the Resol of the Government of Madras, dated 23rd May 1860, Printed Documents, 155

(2) In his treatise of Civil Government, Book I, ch ix, sees. 86, 87, 92; Book II, ch v, s. 25ff.

(3) The different view of the older jurists is set forth by Grotius (Bel. P., Lib II. dc ii., s 4) and Puffendorf (L. N., B. IV, c. vi, s. 4). Voet ad Pand., B. XLI, t. 1, s. 1, supposes a reservation by the *jus gentium* for the purpose of supplying indivi-ual appropriations.

(4) See Fifth Rep., pp. 826, 973.

(5) See Fifth Rep., p. 899.

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In Kanara, consistently with the plan upon which its society and property were originally built up, the dwellings of the landowners, instead of being, as in most parts of India, crowded together within the village site, are much scattered through the forest.(1) The owner of cattle, of rice fields, and a betel garden in the midst of the woods would serve his own purposes and those of the community best by using as "*kumaki*" the forest land in the immediate vicinity of his own cultivation. What was usual and convenient would ere long come to be thought right, and then compulsory; and when the Sarkar's officers came in to demand the sovereign's share of the estimated profits of the jungle tract, the sole possession of it seemed to receive the sanction of the highest authority. As the occupation of the soil extended, and villages in some instances grew crowded and populous, there was no forest left for their inhabitants. They then claimad a right to get their accustomed aids from the forest at large.(2)

The proper or permissible range of vargdars under separate appropriations became, in a measure, defined as neighbours increased in number and extent of possessions by agreements, conveyances, and proceedings in the law Courts, in which no litigant ever thought of cutting down the statement of his right so as to fall within the limits of his use, on account of latent rights of the Government.(3) This was not in any way surprising, seeing that the officers of Government themselves, both before and after the introduction of British rule, looked for long with approval upon the inroads upon the primeval wild, which promised, by making the country more productive, to increase its contribution to the revenue. The Government thought that substantially all

(1) The separate residence of the landholders is referred to by Mr. Thackeray, Appx. 31 to Fifth Rep., p. 988.

(2) See ex. 75, Printed Documents, 41.

(3) Ex. 366, p. 196. In Bengal, Sir J. Shore argued for the futility of attempting to preserve the wastes as Crown lands without a precise demarcation. See Fifth Rep., Appx 5, p 482. An express reserve of waste lands was suggested by Mr. White as a necessary means of preventing their appropriation by zamindars in the Northern Sarkars(*ib.* 706), but this was thought not even desirable.

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land of any value in Kanara was already private property.(1) The despatch of Lord Wellesley in 1800, on which the legislation and administration of the Madras Presidency were thenceforward based, directs the conversion of Government lands, consistently with an order already issued, into private estates wherever that may be possible.(2) In the instructions issued by the Board of Revenue in 1799 no desire is evinced to retain the waste lands of the Northern Sarkars in the hands of Government. They are to be "given up in perpetuity the zamindars free of any additional assessment" (para. 27). The Haveli lands, with their wastes, were to be disposed of on the same principle (para. 64). Actual measurement of the estates to be thus constituted was not in general thought necessary (para. 68).(3) Nor could the Government be moved to a change of views in 1808. To a suggestion of the Board of Revenue that an augmentation of revenue might be derived from waste lands reserved, the answer was: "The Government does not look to any advantage, of that nature beyond the benefit of increasing the amount of the public taxes in proportion to the increased resources of the country."(4) In 1801 the collector, Mr. Reade, remarks on the great quantity of waste land about the hills of Ankola, within which the land now in dispute must have been included, not with any idea of guarding the jungles against encroachment, but with regret that the land "would require more than ordinary labour and expense to bring it into cultivation."(5) The Collec-

(1) See Munro's Report of 11th April 1800. Fifth Rep., 809, ex. 366, pp. 58, 59, 62, 186.

(2) See Appx. 20 to the 2nd Report. A. D. 1810, para. 8, 10, 56—65; Appx. 18 to Fifth Rep., pp. 725, 729; and Appx. 31, p. 932, para. 35, of Mr. Hudson's minute.

(3) The views of Locke (Civil Government, Bk. II, ch. v.), of Adam Smith and of Arthur Young on the advantages of private property, had great practical influence towards the close of the last century. They were adopted by the Constituent Assembly in France. Sinclair in his History of the Public Revenue recommended the sale of the English forests. See Vol. III, Appx. I, ch. ii. References to them occur in the Fifth Rep. as at p. 937.

(4) Fifth Rep., Appx. 30, p. 902; Rev. and Jud. Sel., Vol. I, p. 482. A transition to a different set of views had begun in 1814 (*ib.* 697), but the general policy of parting with the proprietorship of the wastes was still recognized for many years.

(5) Fifth Rep., Appx. No. 24, p. 814.

or of South Kanara writes in 1802 to the same effect of the hill tracts within his division. (1) In 1814 Mr. Reade speaks of the advantage of inducing the people to cultivate the wastes and occupy the inland parts of the province,(2) and again dwells (3) on the impolicy of a tax on felling timber: "Were this tax abolished," he says, "the advantages resulting from an increased demand for timber, clearing the Supa District, and extending its cultivation, would soon compensate the loss. It is surely a very impolitic tax to be permitted to obtain when the nature of the Sonda country is considered." The same considerations would apply to Ankola, of which he had in 1802 written: "Ankola is in the worst condition, contains less inhabitants, is more overrun with jungle, and possesses fewer private estates than any district in Kanara." (4)

Earlier in the same report (5) he regrets that the unhealthiness of Sonda, in the parts where the largeness of the trees proves the fertility of the soil, has prevented the extention of agriculture. Munro thought the presence of wood a disadvantage to the land. (6) The Board of Revenue sanctioned advances for the purpose of clearing the forest. (7)

In 1817, Mr. Harris proposed as to deserted estates, of which there were many in Ankola, that they should be let on the best terms that could be had, a low rent proportional to produce, to be brought to account not as ordinary but as extra revenue, (8) and in 1821 he thought that in remote magins cultivation ought

(1) Fifth Rep., Appx. No. 24, p. 818.

(2) Kanara Land Assessment Case, Printed Documents, III, 1.

(3) Ex. 366, p. 106. The tax was apparently a recent imposition. See Buch. Op. Cit., VIII, 227.

(4) Fifth Rep., Appx. 24, p. 821.

*Note.*—The wastes in Sonda generally extended over 84 per cent. of the whole surface of the province.—1 Buch. Op. Cit., III, 244.

(5) Ex. 366, p. 74.

(6) *Ib.* 101. See also his report as Collector of Ceded Districts. Rev. and Jud. Sel., Vol. I, p. 101.

(7) Kanara Land Assessment Case, Printed Documents III, 32.

(8) *Ib*, Printed Documents, II 49.

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to be encouraged by the allowance of clearing, and that *kowl* (leasehold) raiyats in particular ought to have the timber on their holdings (1) He speaks of *kumri*, a subject of much importance in this case, as recognized mode of preparing the ground for continuous culture.

The series of *kowlnamas* or notifications (2) recorded in the Kanara Land Assessment Case (3) mark very strongly the anxiety of the evenue authorities in 1800 and for many years afterwards to reduce the jungle and extend cultivation. In the earliest of these the raiyats are invited to apply for and cultivate waste lands to any extent at half assessment for the first year of productiveness. They are guaranteed against claims of mulgars after the first year. The *kowlnama* K of 1805 is still more favourable. It relates expressly to the magni of Kadara, where the lands now in dispute are situated, and engages ( Kadra being a border division) that land reclaimed shall in the first year bear no assessment, and shall rise in the course of five years to the ordinary assessment without the "*shamil*", or extra cess, levied elsewhere. The mulgars are to have a preference, but, failing them, any one may take the the waste land, provided only that he must retain his former holding, or at least pay for it. The notification marked S in the same series of papers (4) shows Mr. Harris in 1820 earnestly inviting the raiyats to come forward as applicants for *muli* (pemanent) tenancies of lands abandoned for twelve years (5) by the former mulgars and of Sarkar *geni* lands in which no private right was recognized. The document marked J at page 17 contemplates a clearing away of the immemorial jungles as a ground for a specially reduced assessment. The reason why these offers were but languidly responded to, and why *kowls* or leases were

(1) Kanara Land Assessment Case (12 Bom. H. C. Rep., Appx. 1). Printed Documents, III, 44, 45.

(2) See the Fifth Rep., p. 120. (3) Printed Documents, Vol. II, p. 3ff

(4) Kanara Land Assessment Case, Printed Documents, Vol. II, p. 22. See, too, *ib.*, p. 127.

( 5 ) This term was fixed with reference to the law of limitation, as former holders had come back and ejected persons put into deserted estates by the collector. See Kanara Land Assessment Case, Printed Documents, III. 61. Fifth Rep., Appx., 25, p. 833.

often thrown up, was obviously that, while land was available in superfluous abundance, the ordinary raiyat had more to gain by frequent recourse to fresh soil than by clinging to that which his operations had partly exhausted.(1)

The views of the Government were carried into practical operation in many instances by "*'mulpattas'* (2) granted by collectors with the sanction of Government for estates within the boundaries of which considerable quantities of jungle will be found." (3) Mr. Fisher forwarded a specimen of such *mulpattas* to the Government, and he describes it thus: "A clause in this document shows that the right and title of the former proprietor, and we may conclude nothing more, was made over to the new man; but the boundaries mentioned include forests, and speak of privileges which, according to the instance adduced by Mr. Blane in support of his assertions in the report noted in the margin, were certainly not usual in Government grants made by native princes."(4)

"The terms used in the grantee's privileges are those usual in all deeds of sale between individuals, and the form of entering them is always gone through, though the land sold may have neither *betto chittay* (uplands), brushwood, huckle, &c., &c., attached to it. It will be observed that no mention is made of forest or timber, although stones even are named as made over to the new proprietor, and this seems to show that the list of privileges given is merely formal; or that forest, fruit-trees excepted, was excluded.

"The fact probably is that, at the period when these *mulpattas* were granted, waste estates were plentiful, and cultivators scarce, whilst Government were supposed to be sufficiently protected by the clause which made the *beriz* on the property temporary, and left the matter liable to revision at a future day. The numder of such *mulpattas* cannot be large; but there can be little doub',

(1) Kanara Land Assesment Case, Printed Documents, III, 35; Fifth Rep., Appx. 31, p. 915; Rev. and Jud. Sel. I, 394. note.

(2) See ex. B in Kanara Land Assessment Case, Printed Documents, II, 58, and many others in that compilation.

(3) Mr. Fisher's Report of 1858, Printed Documents, 145

(4) Report on the Land Revenue System of Kanara, dated 20th September 1848, para. 44.

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I think, that if a proprietary right is now held to have been conveyed to all within the boundaries laid down in these documents, much will be given which proprietors in former days never possessed. This, however, is not capable of proof; these documents were drawn up when arable land itself was of little value and forest had overrun much that had at one time yielded large returns to the farmer. Rather, then, than encroach on rights and privileges to which the wording of these grants may seem to entitle their possessors, it would be better to concede them, re-adjusting the *beriz* according to the value of these properties at the present day." Mr. Fisher's inference from the non-specification of timber, that the "list of privileges given is merely formal", is without any solid foundation. The grant, no doubt, as it followed the usual form of a deed of sale, set forth the *ashtabhogam*, or eight usual incidents of ownership described at page 206 of the Madras Mirasi Papers,(1) and as these include *sidha sadhya*, "land and its produce", the mention of *pashanam*", meaning "rocks and minerals", is an indication rather that nothing was meant to be omitted which went to the constitution of complete ownership, than that the privileges granted were purely formal.(2) Why, indeed, should they be, when "estates were plentiful and cultivators scarce" and at the same time "Government were supposed to be sufficiently protected". The object, in truth, was still what it had been when Lord Cornwallis supported the permanent settlement of Bengal by the argument that a temporary lease would not lead a proprietor to clear away the jungle.(3) Mr. Shore thought it would,(4) but was over-ruled. If we look to the specimens of *mulpattas* recorded in the Kanara Land Assessment Case, such as that marked I at Vol. II, p. 61 of the printed documents, or that marked A G at page 95 of the same volume, there can be no doubt that they were intended to convey a complete ownership subject to assessment. The second

(1) For a specimen of a native conveyance in a mirasi village, see the Fifth Rep. p. 827.

(2) See Thackeray's Report of 4th August 1807: Fifth Rep., Appx. 31, p. 1001; *Vaman Janardan Joshi* v. *The Collector of Thana and another*, 6 Bom. H. C. Rep., at pp. 199, 200, A. C. J.; *Ratanji Edulji Shet* v. *The Collector of Thana and another*, 11 M. I. A., 295; and *Ranji Narayan Mandlik* v. *Dadaji Bapuji Desai*, 1 L. R. 1 Bom., 523, 527.

(3) Fifth Rep., Appx. 5, 473. (4) *Ib.* 476.

native grant marked A E at page 73 is equally specific. The particular mention, in some of these documents, of fruit-bearing trees is obviously meant to exempt the grantee from the customary liability to Government for a share in their produce in consideration of the fixed sum which, it is stipulated, he must always pay. The Madras Government, while putting stop to all other *kumri*, felt bound to continue that granted under its own *mulpattas*. (1)

To suppose, therefore, that the Government desired to guard the forests against diminution, except as regards teak and blackwood, and would not deprive itself of its proprietary rights, was to attribute to the beginning of the century the knowledge and the purposes of 1858. (2) Even as to proprietary holdings abandoned by their owners, it had not been thought worth while, as Mr. Blane reports in 1848, (3) to assert the eminent domain of the Government by reducing them to a lower condition. "These," he says, "are what are termed *muli* or proprietary estates which have been given up, but not entered, as Sarkar *geni* estates. The only estates entered under this class are such as were so recorded in the accounts at the commencement of the Company's Government."

Where proprietary estates thus went out of culivation, it appears that in most cases, through mismanagment or frand, they had become burdened with a proportional land-tax so great as to deprive them of market value. (4) In many instances portions of their lands had been transferred to other *vargs* without a due proportion of the tax on the estate; in some cases encroachments had been allowed, or even practised by the owner, in favour of another estate; and the property thus preyed on, when it had

(1) Proceedings of 23rd May 1860, Printed Documents, 157.

(2) In the settlement of Cadapah, discussed in Rev. and Jud. Sel., I. 664 666ff, the waste lands, save in special cases, were all made over to the village renters.

In France the forests which at one time it was thought could not be too soon cleared, are now most rigidly guarded against diminution. See Gandry Traite du Domaine, § 515, § 658ss.

(3) Ex. 366, p. 237.

(4) Kanara Land Assessment Case, Printed Documents III, pp. 16, 17, 80, 9[illegible], 171.

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become unprofitable, had been thrown up.(1) The mere retention of the name of "*muli*" in the accounts could cause no loss to Government until the increased value of produce, or encroachments made by a new holder, had raised the estate to a value for which an incoming tenant would be willing to pay a *nazrana* or premium,(2)the receipt of which, however, even in the case of mere *geni* tenancies, had been discontinued by the British Government as unfair to the cultivator.(3) Whether a mulgar or Sarkar genidar, the raiyat was guaranteed permanency of occupation on payment of the Government dues by Mr. Viveash in 1834, (4) and the Government in 1853 allowed any *geni* occupant to become a mulgar if he desired it.(5) Under the proceding Government the Sarkar genidar had been liable to expulsion whenever he had made it worth while for a rival to offer a premium for his holding.(6)

Mr. Lewin in 1827(7) observed that "there are some estates held under a *shasum* or *sanad* which are considered private property. They were originally waste lands acquired by a *nazrana*, and were made over to the purchaser on the simple *shist* exempt from any extra assessment. Some estates are held on *mulpattas* granted by the functionaries of the Company's Government."

It is perfectly clear from these several indications that, before and for some time after the introduction of the British rule, those unclaimed wastes which Munro considered the only Government property in Kanara(8) were regarded as of little more value than the air or water or other natural agents of which agriculture had

(1) Printed Documents, 109; Kanara Land Assessment Case, Printed Documents III, 66.

(2) Ex. 366, p. 28.

(3) Buch. Op. Cit, Vol. III, 242 ; Mr. Lewin in Kanara Land Assessment Case. Printed Documents, III, 70.

(4) Kanara Land Assessment Case. Printed Documents, II, 23 ; and see *ib.* p. 109 This was conformable to the theory almost universally received. See the Fifth Rep., p. 13c, and Appx. I, p. 205, of Sel. Rep., Vol. II ; Buch. Mys., III, 181.

(5) Kanara Land Assessment Case, Printed Documents, Vol III, 95.

(6) Ex. 366. pp. 27, 28. Comp. Buch. III. 298,

(7) Kanara Land Assessment Case, Printed Documents, III, 70; see ex. 366, p. 28

(8) Ex 366, p. 26.

to avail itself, (1) and by which the revenue thus gained. The troubles of the times continually thinned off the population towards the close of the Mysore rule by death or emigration, (2) and even properties which had absorbed labour and capital in their preparation for rice or garden culture were in many instances restored to the waste. (3) These circumstances must not be lost sight of in weighing the *a priori* likelihood of the *sanads*, on which the plaintiff relies, being genuine, though they do not enable us in any way to dispense with the proof of those documents. It is perhaps rather more surprising that the plaintiff's grandfather should have been willing, as in the case of Kaignad, to pay up about five years' arrears of the forest assessment in order to procure a grant still subject to assessment, than that Tippu's amil should have been ready to make the grant on such terms Such grants would be made on almost any terms when Mr. Blane in 1848 could say of all Government wastes(4) that "for a long series of years they were looked upon as of so little importance that it did not signify by whom they were held. It was considered so much gained if any rent, however small, could be obtained for waste; and offers made for the exclusive privilege of grazing cattle or cutting the grass were readily accepted, the land being in process of time converted into valuable cultivation either by the holders themselves or by tenants who took it from them at considerable rents." Tippu's revenue regulations(5) show, indeed, that a grant of *inam* "*katkodaki*", or, in other words, of *kumri* lands, free of assessment, was an ordinary way of rewarding one who had constructed useful works or peopled a village. By such grants the revenue would benefit to the extent of the assessment on the regular cultivation thus induced, while the grantee would take the profits of the forest lands, worthless, or nearly so, in their wild state to the Government.

In a thinly-populated region of forests like Kanara it was to be expected that a system of temporary culture should spring up, which taking the cream of its fertility from a spot enriched with

(1) See Hume's Essays, "Of Justice." Part I.

(2) Comp. Buch. Mys., Vol. III, 178. 185, 186. 188, 206. 208, 305, 311.

(3) See Buch., Op. Cit., III., 226. 229. (4) Ex. 346, p. 302.

(5) S. 36, 34.

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the ashes of the burnt timber, transferred its operations in the next season or the next but one, to some new and unexhausted field. The accounts we have of this mode of cultivation in former times in India are scanty, considering how widely it must have prevailed; but the reason probably is that it exists for the most part on the outskirts, or beyond the outskirts, of civilization, and necessarily dies out as a dense population makes intensive culture profitable. In Russia, after speaking of the triennial rotation and the long fallow system, Mr. Michell says: (1) "There is another still ruder form of agriculture, that of clearing woods by fire and sowing crops in the ashes without any preliminary ploughing. This primitive system is adopted in the thickly-wooded northern provinces.....where it meets with the three-field system or triennial rotation of crops, so general throughout the central and more thickly-populated provinces of the Empire." Coke, in his 4th Institute,(2) quotes an entry from Domesday Book of 58 acres of "*assartum*" held apparently at a forest assessment or rent "*pro vectigali de silva*" and producing annually 17 shillings 4 pence Even now in the district of the Ardennes a crop of rye is obtained from the common land by "essartage", and the land is then abandoned to pasturage for eighteen or twenty years.(3) In the district of Siegen the common oak coppices are cut down in rotation once in twenty years, and one good harvest of rye obtained from the land,(4) on which Mr, Lavelcye remarks that, "barbarous as it may appear, it is the most rational and economical method of cultivation, for it is the one which yields the largest net profit." This advantage was very early found out by the ruder tribes of India possessed of no capital, indisposed to continuous labour, out of harmony with the more advanced communities, which were completely subjugated to Brahminical influences, and shrinking from the duties and restraints of civilized society. In all the extensive forest tracts such tribes are found living apart from the people of the city and the village, and where they practise agriculture conducting it on the rude system called "*kumri*"(5)

(1) Reports on the Tenure of Land in the several countries of Europe, Part II, p. 70.

(2) P. 307. (3) Lavelye, Op. Cit, 103.

(4) *Ib.* 112; Cotta La Science Forestiere, s. 167, 169.

(5) See Buch, Op. Cit, Vol. II, pp. 177, 246, 273, 384, 519. 543; Vol III, pp. 71' 147, 193.

A clear description of the *kumri* cultivation is given in Mr. Fisher's report of 1858, from which we take the following passages(1):—

"Level ground is not suitable to this kind of cultivation, and a hill side is always selected, on the slopes of which a space is cleared during November, December and January. The fallen timber is then left to dry until March and April, by which time the action of the sun and of the dry easterly winds which prevail at that season have rendered the dead branches and brushwood highly combustible.

"The largest trees, it must be observed, are usually left standing, their arms and branches only being removed, and this mass of comparatively dry wood generates a fierce fire, the effects of which are visible in the soil to a depth varying from three to six inches.

"In most localities the seed is sown in the ashes on the fall of the first rains, the soil having been left untouched by implement of any kind. In Bekul, however, the ground is ploughed before the seed is sown.

"When the young plants begin to appear, the *kumri* is fenced in by a kind of wattle where its place is not supplied by fallen trees, and the chief labour afterwards is weeding. The whole process, it will be observed, is one requiring little skill and less capital, but long-continued and hard labour on the part of the cultivator, who must moreover, watch his clearing day and night until harvest time, in order to protect his crop from the ravages of elk, bison and other wild animals with which the forest abounds.

"In the south (Bekul) the grain raised in *kumris* is chiefly paddy, but in other parts of the district ragi takes its place. The shares of the different cultivators are marked off in the south by cotton and castor-oil plants, whilst in the north the latter only is common. The cotton grown in these clearings is, of course, small in quantity, but is highly esteemed by the people; though its value in the English market, as estimated by the Bombay Chamber of

(1) Rep in ex. 94, paras. 4, 13; Printed Documents, 136.

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Commerce, would be small, and much better prices can be obtained for it here than could be obtained in the Bombay market.

"In the north the crops are reaped in November and December, and in the south in October and November, and the produce is said to be at least double that which could be obtained from the same extent of ground under the ordinary modes of culture.

"A small crop is taken off the ground in the second year, and in Supa I have heard that a scanty produce is sometimes reaped in the third, after which the spot is deserted until the jungle is sufficiently high to tempt the *kumri* cutter to renew the process.

"In the south, where ground suited to regular cultivation is comparatively scarce, and the population is more dense than in other talukas, *kumri* has long been carried on in a systematic way unknown in the north. The forest is regularly worked, and a man goes over his holding once in twelve, ten, or seven years, as the case may be; whereas in North Kanara, virgin forest often falls before the *kumri* knife, and the people select at pleasure (or rather have done so) old *kumris* or jungle which, in the memory of man at least, has never been subjected to the process.

"In some magnis of Bekul, *kumri* cutting is part of the regular business of every raiyat; but north of that taluka it was formerly altogether in the hands of the jungle tribes, who rarely leave their hills, and until lately have been scarcely ever seen in a town ar the camps of the revenue officers. Subsequently many of the more settled inhabitants of the country began to resort every year to the forests to carry on this cultivation. This has now been put a stop to, and none but jungle people are allowed to make *kumris*."

The Board of Revenue, in the course of the proceedings which ultimately led to the present suit, adopt Mr. Fisher's description;(1) but before accepting this as altogether sufficient, it will be desirable to consider what the shriastedar, already quoted, says in 1830, at a time when the necessity or advantage of checking *kumri* cultivation had not yet occured to the Government or its

(1) See Printed Documents, p. 350.

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officers; when, as it would rather appear, the Board of Revenue took it for granted that *kumri* lands held by ordinary landholders (vargdárs) were to be appraised for the purposes of the land revenue according to their *bijvari* (or capacity for seed) on exactly the same principles as lands cultivated after the ordinary manner. He says:(1)—

"It is required by the Board's form to state the extent of the *bijvari* of the *kumri* lands. Previously to Fasli 1232 the revenue derived from *kumri* lands was entered in the accounts under the head of village taxes, or *moturpha*. In that Fasli, however, the Board directed that as it was a revenue derived from the land, it shuld be brought to account as land revenue, which has accordingly since been done; *kumri* lands are not constantly every year brought under cultivation, and their *bijvari* and *kutwalli* are not fixed. The caste of people who cut the jungle and cultivate *kumri* are the kunbis, who live together in the jungles. These people clear a spot in the jungles and cultivate it with paddy, dhal, castor-oil tree, &c., for one or two years, and they are taxed according to the established custom of the village to which the jungle may belong. A spot so prepared will only yield produce for one or two years, but will not again produce for the next ten years. The jungle must be allowed to grow upon it again, and when it may be desired to bring it under cultivation the jungle must be cleared as before. These people, therefore, desert the spots and clear and cultivate others. It is not customary for a person wishing to cultivate *kumri* to make a *darkhast* describing the *chakbandy* (boundary) of the lands he wants, or for him to obtain any order or *patta* for it. These people obtain their livelihood by clearing the jungle and cultivating *kumri*, and this is their constant occupation. They cut and cultivate as they please. After they have cleared a spot and sown it, the tahsildar collects from them the tax payable according to the custom of the village. In some places this tax is fixed at so much for a couple (man and woman), or so much for a man alone. In others it is fixed according to the number of bill-hooks or hatchets they make use of in clearing the jungle, there being a fixed rate of

(1) Kanara Land Assessment Case, Printed Documents, Vol. III, 84.

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payment on each bill-hook and another on each hatchet. Thus these people must be considered as *hangamis* (temporary), and not as fixed cultivators. If these kunbis should clear away jungle and cultivate *kumri* within the limits of a raiyat's *varg*, they pay the vargdar the tax upon it. (1)

"There is no separate *beriz* fixed on a *varg* under the head of *kumri*. The *beriz* is determined with reference to the whole *varg*, and the annual settlement is not made so much for *kumri* and so much for other items. (2) It would be necessary for the future to ascertain how many persons cultivate *kumri* in the Sarkar jungles, and to prepare an account of the *bijvari* of the land so cultivated by them on estimate."

The migratory class of *kumri* cutters thus exercised an immemorial right, or at least an immemorial practice, of culivating the forest lands subject to a tax of money instead of the share of grain which in practice or theory constituted the Government rent on lands thoroughly reclaimed. (3) The reasons for this were that the crops could not be watched so as to prevent a sudden removal, and that in cases of contumacy the carriage of the produce to the head-quarters of a division would cost as much

(1) With this account Mr. Fisher substantially agrees; but he adds, without apparent authority, that the vargdars collected a hatchet rent not only from kunbis cultivating their lands, but from others "under their influence". Similarly in his report on the permanent settlement of Dindigul, dated 25th June 1804 Mr. Hurdis says, paras. 136, 137 :—

"The taxes that are derivable by the proprietor of the land, and belonging to, the brauch of revenue known in these districts under the name of *sounardyem*, literally gold collection, because they are not subject to any charge under an *amini* management, are wholly shown opposite each zemindari to which they respectively belong.

"In the particular statement your Board will observe the different heads under which this revenue is derived. The *ponicando*, literally hill fields, contain a number of spots of land, called *carukums*; these are cultivated by the *mamuli* bill-hook and pick-axe; no settled measurement is given for the rent, but several *carukums* are cultivated at the will of the labourers, and paid for by an usage rent as cultivated."—Fifth Rep., p. 765.

(2) Compare Buch. Op. Cit., Vol. III, 139.

(3) See *supra*, and Kanara Land Assessment Case, Printed Documents, III, 98.

as the sale proceeds would amount to.(1) The allowance of cultivation without the regular *darkhast* or application expected in the case of ordinary lands was practically a yielding to necessity. The wild hill-men, if harassed with formalities, would but plunge deeper into the woods, and thus perhaps escape assessment altogether. On the private estates (*vargs*) of the landholders the same privileges were allowed to the kunbis on the same customary terms by the vargdars, who welcomed their presence on account of the aid they gave as labourers to regular cultivation. But of the fees realized or estimated as realizable in these places, one-half was usually charged to the vargdar as part of his assessment. (2) The abstinence of the Government from levying the fees in such cases was, *prima facie*, an admission that as to the particular lands it had not a right to levy them: the exaction of the fees by the vargdar was, *prima facie*, an assertion that the rights of the Government had passed to him. Its reckoning his gains from this source as a basis to taxation, implied a knowledge of what he was doing; and where the *varg*, including the forest lands, could be defined, of his appropriation and exercise of the *dominium utile* within its boundaries. "It was a mere farming of the fees" is defendant's contention; but, so far as the evidence informs us, it was so in no other sense than the paying of assessment on a rice field was a farming of the rent which the vargdar obtained from its cultivator.

It is conceivable, of course, that the occupation of the exclusive enjoyment of the State's land by the vargdar may have stood on the same footing merely as the possession under the older Roman law of the *ager publicus*, or of the provincial land, reclaimable at any moment by the Government. Such was, in effect, Munro's notion of the position of the ordinary raiyat of the Deccan,(3)and of

(1) See, as to the Roman system of tributes in kind, Coulanges' Histoire des Institutions Politiques de l'ancienne France, p. 179, and Gibbon's Decline and Fall, Ch. XVII.

(2) On this were founded the arrangements referred to by Mr. Fisher, Printed Documents, p. 138, para. 29. See also exs. 91 and 173, Printed Documents, pp. 75, 260.

(3) Fifth Rep., 947. But the view generally taken was more favourable to the raiyat. *Ib.*, 138, 291, 730 and 977: Rev. and Jud. Sel., Vol. i, p. 291; Kanara Land Assessment Case, Printed Documents, III, p. 150.

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the *chalgeni* tenant under Government in Kanara. This would account, too, for the indifference of the Native Government and, so long as the same set of ideas prevailed, of the British Government also, as to unlicensed encroachments. They were treated very much as a matter of course. The shirastedar says: (1) "If any raiyat should bring any of the Sarkar waste under cultivation, or make a *darkhast* for a portion of such land to be made over to him, the Sarkar people examine it and estimate the extent of its *bijvari*, determine whether it be *bijle*, *muzzul* or *bet* and having ascertained the rate per *mudah bijvari*, at which the land in the neighbourhood is assessed, they fixed what they consider to be a fair *beriz* on the land thus newly cultivated. The extent of *bijvari*, at which the land is then estimated, might be entered in the account." The land thus made *chalgeni* with an annual tenancy recognized by the State, would resemble the *ager non vectigalis* of the Roman system let for a short time; while its recognition as "*muli*" (perpetual) would raise it to the rank of the *agri vectigales*, with a right vested in the landholder to deal with his property as freely as one who had acquired proprietorship by prescription against the fisc.(2) But as, too, the possession of provincial lands ripened by the time of Diocletian(3) into full property subject only to a land-tax, so the precarious *chalgeni* tenure of earlier days became an ownership, on a similar condition, from the time when the Government guaranteed its permanence in 1834. Lands truly possessed before, and recognized as possessed, were, from that time forward, owned by their occupants.

We shall find the mode of estimating the productive capacity of lands subject to assessment, described by the shirastedar, illustrated as we proceed, whether their resources were developed by means of regular cultivation or of *kumri*,(4) but we shall also find new views growing up under the teachings of experience

(1) Kanara Land Assessment Case. Printed Documents. III. 85.

(2 See Savigny Droit Public. Romain, Vol. II. pp. 46, 49; and comp. Laveleye, Op. Cit, 23. 48.

(3) Maynz Droit Romain, 178; B. Coulanges' Hist des Institutions. ch. xii.

(4) See instances in ex. 366, pp. 242, 245, 251, 252, Kanara Land Assessment Case, Printed Documents, III, 88.

with regard to the wasteful and pernicious effects of the *kumri* cultivation, as the forests became exhausted, while the demand for timber constantly increased. *Kumri* having become highly profitable, had greatly extended,(1) so that its injurious effects, real or apprehended, were tending to realization at a continually accelerated rate. "The question," say the Board of Revenue,(2) "of whether it is expedient to allow this species of cultivation, first came under discussion in reference to the report of Dr Gibson to the Government of Bombay, which was referred to Mr. Blane, the Collector of Kanara, for his observations. In accounting for a growing scarcity of timber, Mr. Blane noticed among the most influential cause, the increase in the *kumri* cultivation which bid fair, he then considered, to destroy the whole of the large virgin forests within a short time. He expressed his opinion that it should be either placed under considerable check and regulation, or entirely prohibited, as had been done in Mysore.

"On this report being laid before Government they, agreeably to the recommendation of the Board, authorized the Collector of Kanara to restrict the cultivation of *Kumri* to 'such places and to such an extent as might, in his opinion, be expedient for the preservation of the forest and the general welfare of the province.' He was also instructed to assert the right of Government to all forest lands, to which a title cannot be clearly established by private individuals."

What steps Mr. Blane took upon this order of the Governmen we shall have occasion to consider hereafter. That he was not alt together unembarrassed in carrying out his policy, appears from the report of 1849, which the Board next quote. In the case o one Narna Cumpti he was met by an objection that this person was owner of extensive but undefined jungles subject to *Kumri* cultivation, and for which he was assessed to the land revenue. It is probable that under such circumstances the vargdar claimed a great deal more land than he was entitled to. The sub-collecror solved the difficulty by settling directly with the actual *Kumri*

(1) Printed Documents, p. 139. (2 Printed Documents, 351

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cutters, 693 in number, regardless of the vargdar' s rights, if he had rights, as their landlord. Then the Board continue (1) :—

" Mr. Blane submitted for the consideration of the Board, whether the individual settlement should be confirmed, and at the same time entered into the general question of the extent of right in the land conferred by the entry of a *kumri shist* in the *patta* of a vargdar. This question, as already shown by the mode in which Mr. Blane's proclamation was evaded, materially affects the power of the collector to preserve the forests by checking the extent of *kumri*. It also involves the welfare of the jungle tribes, by whom *kumri* is cultivated, and who are stated by Mr. Blane to be held, by the fear of civil suits and other means, in complete subjection to the vargdars and be much oppressed by them.

" Mr. Blane was decidedly of opinion that the entry of a *kumri shist* in his *patta* gave the vargdar no claim to the forests. He expressed himself as follows :—

" ' My own opinion, after an attentive consideration of the case is, that the *kumri* cultivation was, and still continues to be, of the nature of a *rent* similar to other rents, such as the *puleri* or grazing rents in other parts of the country, or privileges of collecting honey or felling timber in the forsets themselves. The origin of the mode of realizing this head of revenue, which is still in force, appears to have been the uncertain and transitory nature of the cultivation, which is never carried on in the same spot for two years running. A small spot in the midst of the forests is cleared and burned and sown with ragi or some other dry crop, and, after this is cut, the place is abandoned and not again cultivated for twelve or fifteen years, till the jungle has grown up. Although it is at the present time pursued to a considarable extent by the more settled cultivators, it was formerly carried on exclusively by a wild and little civilized class of people, who had no fixed habitation, but built temporary huts on the spot, which they occupied for the year, and shifted their place of residence with their cultivation. Owing to this circumstance it was difficult for the Government to collect any revenue directly from the cultivators, and still more to fix upon any given spot as liable to assess-

(1) Printed Documents, 352.

ment; and the easiest mode of collecting the revenue derived from it, was by renting out in the gross to one or more of the principal inhabitants of the village, who made their own terms with the cultivators.

"'On the country coming under the Company's Government, and when the system of giving yearly *pattas* was adopted, the payments made on account of *kumri* appearing as a demand against particular raiyats seem, for convenience sake, to have been entered in their *pattas*, together with the demand, against them, of the fixed land revenue for their permanent cultivation, and thus in process of time to have come to be considered a portion of their *varg*. The same system was adopted with regard to many other items of demand which were not strictly land revenue, such as the *moturpha*, honey farm, fishery and other petty farms, which were all entered as portion of the *varg* of the raiyat; but they have been subsequently struck out of the *patta* and collected separately as extra revenue.'

"He then proceeded to show that the term '*varg*' had not originally the signification, now attached to it, of 'estate', but meant the 'account' of the raiyat with Government, and in proof quoted a report by Mr. H. Stokes, an excellent Kanarese scholar, who mentioned from his own observation that in a tradesman's book in Kanara his account with a customer is headed the '*varg* of that customer'. Hence Mr. Blane concluded that by a raiyat's *varg* was formerly understood his 'account with the Government', and comprised, therefore, not only his landed property, but 'anything for which he had to make a payment to Government; but that the entry did not necessarily imply that he had an absolute indefeasible proprietary right in the thing for which he paid.' In this manner Mr. Blane argued the rent of the collections from the *kumri* cutters came to be entered in the *varg patta*, and being among the few items of miscellaneous revenue retained in it, and its nature, in contradistinction to the assessment on the private lands of the proprietor, not being borne in mind, while the term *varg* was supposed to mean 'estate', the jungles in which the *kumri* was cut came to be claimed and considered a portion of the estate. The assertion of proprietory right has been since countenanced by trans-

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fers, by sale and by suits, as well as by attachments for decrees of Court. Under the operation of our judicial system, it was remarked, 'questions are adjudicated between individuals which have often a very important, but individual, bearing on the public rights of Government which at the time is not foreseen or is overlooked.'

"Where the settlement of *kumri* had been made directly with the raiyats, that is to say, the Board presume, where the forest was the undisputed property of Government,(1) Mr. Blane had prohibited it in particular localities where the facility of transporting timber made it advisable that it should be preserved. This order was in accordance with the authority granted by Government, and mentioned in paragraph 8 of these proceedings. But many of the places in the northern talukas, he remarked, where it would also have been desirable to preserve the forests, are claimed as within the limits for which some of the larger landholders pay *kumri* tax; and without possessing the discretion of assuming the management of the *kumri* and making the settlement with the actual cultivators, it is found impossible to exercise any control either by restricting the general quantity or by assigning the boundaries within which it shall be cut.

"The settlement of the question, whether the large proprietors who pay *kumri* assessment have a proprietary right in the jungles was, therefore, of great importance. If the decision should be in the negative, according to Mr. Blane's view, he proposed to remit the *beriz* they pay on this account from their *pattas* and to make the settlement directly with the *kumri* cutters, as in the case of Narna Cumpti. But if their proprietary right should be affirmed, he considered that he possessed no power to prevent their continuing the destruction of the forest at their discretion and no authority to protect the *kumri* cutters from their exactions and oppressions, for these persons must be recognized as their tenants and be subject to all the legal procees to which tenants are liable.

"To show the disproportionate claims advanced on account of the payment of *kumri shist*, he further instanced the case of

(1) This was, perhaps, Mr. Blane's original intention, but it was soon and far exceeded. See *infra*.

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'Martab Rao', whose family formerly held the office of hak shanbhog in the Ankola Taluka, and who, therefore, not only kept the revenue accounts himself, but exercised an influence almost unbounded in that part of the country. The man holds 17 *vargs* on the borders of the Goa frontier, and claims a jurisdiction over a large portion of the jungles in that neighbourhood. It is impossible to state their extent, but it cannot well be less than 50 square miles of forest. The entire payment on these *vargs* amounts to Pagodas 113, of which only Pagodas 17-4-7 is *kumri beriz*; but the number of raiyats cuttings *kumri* under him has so much increased that he collects from these alone 167 Pagodas, or 1,000 per cent more than the revenue he pays on this account.

"Such claims as these, Mr. Blane truly observed, would as population increased, be of the most serious public importance, as pressure from without would impel large numbers of people to settle gradually on these thinly-peopled tracts, where they would become the tenants-at-will of such men as Martob Rao and Narna Cumpti, who might thus have ten or twenty thousand dependants on their estate.

"The Board fully appreciated the strengh of the arguments of Mr. Blane, and for the present approved of the manner in which he had dealt with the case of Narna Cumpti; but at his views in regard to *kumri* differed in some respects from those set forth in the settlement reports of former collectors, they deemed it necessary that the old accounts of the district should be examined; and, further, that parties who have cultivated *kumri* should be called upon to produce the oldest records upon which they claim the privilege of cutting and clearing forests for the purpose, and that it should be ascertained if the old accounts contained entries to distinguish the assessment on *kumri* from the demand on the regular estate in each individual case."

It was necessary to extract this statement of Mr. Blane's views in such detail, because these are the basis on which the whole subsequent action of the revenue officials and of the Government has proceeded. Yet the precise theory which he had conceived, and the precise scope of the measures he proposed, were not at first correctly apprehended by the Board. They thought that the

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vargdars enjoying without question the advantages of ownership over the forests included within their *vargs*, that is, the lands for which they were assessed to the land revenue, asserted rights of indefinite extent over the forests which remained the property of the Government. It was this unlimited prospective encroachment with which they supposed they had to deal; and they thought they would be helped towards a decision if the old accounts were found to present a charge against the vargdars on account of *kumri*, distinct from that on account of "the regular estate", that is, the estate recognized as a defined aggregate, and subjected to assessment according to the ordinary rules.

Mr. Blane had already(1) called for information as to the rights set up by the vargdars which was supplied to him in the return from which exhibit 62(2) is extracted; but he left the province before making a final report, which was at length submitted by Mr. Fisher only in 1858.(3) That gentleman describes the measures taken by Mr. Blane and Mr. Maltby,(4) which amounted, as they were carried out, to this that, as Mr. Fisher says, "the whole process was brought under the control of the Government." Of the lands which they averred were their property as included within their *vargs*, the vargdars were allowed to let out to *kumri* cutters so much as would bring in to them at the customary rate, twice the assessment in each case entered against them in the accounts; and and for any transgression of this quantity they were fined a double assessment on the excess.(5)

The only claims with which Mr. Fisher expressly deals are those of Narna Cumpti, on which he agrees with Mr. Blane, and the claim of Martoba to the Kaignad forests based on a *mulpatta* which he thought was a fabrication. This we shall have presently to consider, as Kaignad is one of the four estates now in dispute; but for the present it is more important to ascertain Mr Fisher's views about *kumri* and forest in general.

On these points he says :—(6)

(1) See ex. 91, dated 12th January 1849, and ex. 90. dated 10th April 1849.
(2) Printed Documents, 32. (3) Printed Documents, 135.
(4) Ex. 173, Printed Documents. 260. (5) Printed Documents, 139.
(6) Printed Documents, 142.

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"The question at issue, when this case was first brought to the notice of the Board, was not, as the Board seem to have supposed, the right to hold *kumri* cultivation not within the limits of the *varg* or proprietary estate of the landholder, but whether the payment of *kumri shist* creates a proprietary right in the soil of any forest tract brought under *kumri* cultivation;—in fact, whether the entry of *kumri shist* confers any proprietary right at all, such as a similar entry would be held to do in regard to regular cultivation, or whether it is a mere rent paid for certain forest privileges, which can be resumed at pleasure by a remisson of the Government demand.

"As under native governments all cultivation was taxed according to the description and value of its produce, the Government having a recoghized right to a certain share in that produce, whatever it might be, there is good reason to suppose that the *kumri shist* was but a rent for certain forest privileges, and did not confer any proprietary right in the soil on the *kumri* cultivator. Had it been otherwise, most of the garden in the country, and much of the rice land also, would necessarily have been entered as *kumri*. (1)

"Probably almost all the estates in the country have, at one time or other, been under *kumri* cultivation,(2) and in the most wooded portions of the district it is still usual to *kumri* land about to be held as garden or under rice cultivation.

"There can be no doubt as to forest tracts generally being in this district the property of Government, as, with the exception of one taluka, *kumri* holdings are altogether undefined, though this is not the case with the regular cultivated portion of estates, and there has always been Sarkar *kumri* as well as that attached to estates. The collections made by former Governments on this account were entered as poll-tax.(3) and there is little reason to

(1) As, however, it was raised to a higher condition than that of *kumri*, it would, ordinarily be rated under the higher designation. Sections 29-31 of Tippu's Regulations indeed provide expressly for such changes.

(2) It was a recognized stage in the course of agricultural development.

See Mr. Harris's recommendations in 1821. Kanara Land Assessment Case Printed Documents, Vol. III, p. 45.

(3) In some parts of India the land rent was levied as a plough-tax or a house-tax. See Rev. and Jud. Sel., I, 394.

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doubt that the only difference between Sarkar *kumri korlaya* and the *korlaya* paid by vargdars consisted in the one being levied direct from the *kumri* cutters themselves, whereas vargdars were allowed to collect this from those people either cultivating portions of their land or otherwise under their influence, on paying a specified sum as part of the demand on their estates. This *shist*, moreover, was increased when a new tenant or other individual took *kumri* cultivation under a vargdar, but the *shist* on the regular estate was fixed." I may observve that no instance, though it was asked for, has been brought to our notice in the present case in which the vargdar's *kumri shist* has been immediately increased in consequence of a new tenant cultivating *kumri* under him. Where there was an *azmaish* or estimate of what an estate could bear, its productiveness in *kumri* as well as in rice cultivation seems to have been taken account of,(1) and its productiveness in *kumri* was estimated by the number of hatchets employed. The occasional increases and decreases of the *jamabandi* for a particular year seem to be justified by a reckoning of *kumri* gains, as well as other gains, (2) as greater or less than before; but no distinction of treatment is perceptible until Mr. Blane felt authorized not to increase the assessment on account of increased *kumri* cultivation, but to cut down the cultivation to a product on of double the assessment. As to the mode of entering misceilaneous charges in the *pattas* of the vargdars, Mr. Blane's description is not supported by any evidence produced in the present case. A large number of *pattas* have been recorded, but the vargdar is not in that character charged for any thing but the rate at which his land has been assessed. The description given by the shirastedar is thus borne out by actual examples.

(1) See, for instance. ex. 356. pp. 242, 245, and 252.

(2) Lord Longhborough said of the English land-tax: "The tax, though commonly called a tax upon land, is not in its nature a charge upon the land. It is a tax upon the faculties of men estimated.....by the land in their occupation. The land is but the measure by whith the faculties of the person taxed are estimated." See *Grant* v. *Astle*. 2 Douglas at p. 724. The words might have been applied to the *jamabandi* settlements of the earlier half of this century.

See Mr. Maltby's Report, Kanara Land Assessment Case, Printed Documents Vol. III, p. 120, para, 5, and the Proceedings of the Board of Rev., *ib*. 124,

In those districts of the Madras Presidency in which a survey settlement had been introduced, the *pattas* issued to a raiyat contained an enumeration of the several fields in his occupation and of the assessed rate on each ;(1) but in Kanara the precise contents of *vargs* even as to the rice lands had never been ascertained.(2) The vargdar was charged and deductions were allowed on the aggregate holding ; and vagueness as to the precise areas held, if it prevented the growth of a right, through recognition, in the case of *kumri* lands, would very often have equally prevented its arising in the case of rice fields, especially those which paid only for occasional cultivation.(3)

(1) See Appx. 20 to the Fifth Rep., p. 746, and Kanara Land Assessment Case, Printed Documents, Vol. III, p. 171.

(2) See Printed Documents, pp. 105, 119.

(3) In the Revenue and Judicial Selections, Vol. I. p. 203, there is a passage in a minute of Mr. Colebrook's which is instructive as showing how cases analogous to the one before us were regarded in Bengal : "In many of the districts of the Lower Provinces and in some of those of the Western, very extensive tracts of forest land were claimed by, or really appertained to, proprietors who had comparatively small portions of land in tillage. Every district contained some instances of scattered estates, in which the untilled lands much exceeded the arable : many of these forests and wastes are so situated or circumstanced as to be incapable of culture under any mode of management and husbandry which has been tried, or which may be expected to be introduced. Many of them are barren; the rest so nearly so, that they never can render to the proprietor more than a scanty revenue drawn from spontaneous productions. The greater part cannot be reclaimed, but at an expense which would amply purchase the income they may yield in their most improved state, and this consideration led to the relinquishment of the rights, which Government might have reserved, of assessing these lands when brought into cultivation.

"But some wastes there were, I may say there are, which, though capable of tillage, had remained or yet remain uncultivated solely for want of hands, in consequence of a scanty neighbouring population. In these instances and in the case of dispersed estates which contain a disproportionate quantity of untilled land capable of culture, the proprietor whose assessment is fixed on a small portion of cultivated ground, arrives, when the whole is reclaimed, to the condition of an owner paying a quit-rent or nominal due, rather than land-tax.

"The instances being either few or unimportant in most of the districts, and frequent only in frontier districts, and for the most part confined to frontier lands, which are least likely to become valuable, the sacrifice does not appear to have been great, provided the vast tract called Sunderbunds be yet at the disposal of Government, which I trust it will be found to be, notwithstanding the pretensions of the bordering zemindars, who are stated, in a correspondence which passed in

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Mr. Fisher thought that his view of the *kumri* vargdars' position as substantially that of farmers of a poll-tax, derived strong confirmation from the variety of rights set up by the vargdars.(1)

"The rights," he says, "claimed on account of *kumri shist* vary in different parts of the district; and although there may be some reason for this, the difference observable raises doubts as to any proprietary right being claimable on account of this *shist*, and rather goes to show that those who have claimed most and been loudest in defence of rights, real or assumed, have, at any rate, had more conceded to them than their neighbours.

"It has already been observed that, whilst double the amount of the *kumri shist* paid by the Payenghat vargdars has been made over to them, the practical result of the arrangements made in Supa and Yelapur has been simply to remit the *kumri shist*, and resume such privileges as it conveyed. The circumstances which led to such different modes of treatment were, that whereas in Supa the vargdar cut *kumri* in the forest just where he pleased, without reference to village or any other boundaries, and could not, therefore, claim any particular spot as his *kumri* ground, the vargdars

1730. to claim the property of those forests up to the shores of the sea, grounding their pretensions, I presume, on their having been used to make collections from wood-cutters and from persons resorting to those forests to gather the spontaneous productions of them. But as the right of Government to make grants has never been relinquished, nor the practice of making hem by the Board of Revenue been discontinued unless recently, I conceive it to be still in the option of Government to resume the design of claiming the Sunder bunds; and, judging from the avidity with which grants have been sought on the Island of Saugar and adjoining part of the main, a disposition to enterprise now manifests itself, which, if properly directed, may forward the great object of reclaiming from waste and settling and peopling that vast tract.

"It may be inferred, from what has been here said, that it would not have been unadvisable, at the time of making the permanent settlement of Bengal, to have excepted at least the extensive tracts of waste which were so circumstanced as to be capable of being brought into cultivation, if not the scattered estates also in which the proportion of waste land, fit for cultivation, was excessive, and such exceptions may be very fitly made if the Honourable Court of Directors should authorize generally a settlement of land revenue of the ceded and conquered provinces; and if to this be joined the measure of reckoning the revenue at the value in corn, the chief objections of the Honourable Court to a settlement in perpetuity will, I trust, be obviated."

(1) Printed Documents, 141.

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in the Payenghat boldly claimed all the unoccupied forest lands in their respective villages, and sometimes even in whole magnis, because they alone of all the vargdars in these villages or magnis happened to pay *kumri shist*. They argued that as forest was necessary to *kumri* cultivation, and they were the only parties who paid *kumri shist*, the whole of the forest belonged to them."

This state of things he contrasts with that subsisting in the taluka of Bekal : (1)

"Whilst in North Kanara the quantity of *kumri* cut by a vargdar seems to have had far more reference to his opportunities and means than to the *kumri shist* to be found in the Government accounts of his *varg*, and it is, therefore, impossible to say what quantity of cultivation the *kumri shist* of any given *varg* is supposed to represent, the original *kumri* holdings of the Bekal raiyats were defined in *padipads* (an area nearly equivalent to an acre), and the *kumri* assessment on them averaged four annas per *padipad*.

"In consequence of land suitable to garden and rice cultivation being insufficient for the support of the population, *kumri* in Bekal has long assumed the character of regular cultivation. A raiyat having, according to the accounts, 10 *padipads* of *kumri* would have in reality 120, which he may be supposed to go over in the course of twelve years at the rate of 10 *padipads* per annum. As population has increased, however, these *kumris* have been cut once in eight and even once in six years, and it has been customary to sell and mortgage these clearings, and treat them in every way as the *bona fide* property of the raiyats."

The differences to which Mr. Fisher refers are so obviously traceable to the different degrees of social and agricultural development, that it is surprising he should have missed their true causes. The increase of population, and consequent intensifying of agriculture, in Bekal had brought the holdings of the several raiyats into close and sharp contact with each other. It had also given some definite value to every acre of land. Hence the *kumri* holdings were accurately defined, and the assessment on them was

(1) Printed Documents 146.

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attributed in each case to so many *padipads*. How could this system have grown out of a mere farm of a poll-tax? That would have reference to the number of persons, not of acres. It would be a personal contract not descending with the cultivated land to the late proprietor's heirs. But, again, regarding the *kumri* land as a holding in the same sense as rice land, how came the entry in the Government accounts to be but of one acre for every twelve actually possessed? This shows plainly that the accounts were not intended, or, at any rate, cannot be accepted, as sufficiently defining by the mere descriptions in them the *kumri* land held by any vargdar. It is an inversion of the proper process to use them or such a purpose. A raiyat placed or found in possession of such and such lands, and allowed to retain them, was entered in the account as consequently liable for so much, estimated as the proper share of the Government in his gains.(1) On account of the general correspondence between the Government assessment and a proportion of the profits, the entries might very well serve as an indication, in any case, of what was the probable extent and produce of the land; but the raiyat did not, therefore, necessarily acquire his land by a lease from the Government at so much an acre; he was assessed as owner or occupier, deriving so much profit from his actual holding. Thus, the holder of twelve acres of *kumri* land would be entered as responsible for a share of the profits each year yielded by one, because of the twelve years' rotation necessary for that kind of cultivation, just as under Mr. Harris's survey he was charged for one areca tree out of four as the average proportion in bearing(2) on the space which four would occupy. He was not the less owner of the other eleven acres, because charged only for one, or less the owner of all twelve acres, because he each year made active use of but one. As the pressure of population increased, he made use each year of two acres out of the twelve his right and even his assessment, as Mr. Fisher says, remaining what they were before.(3) The *ponam* lands in Malabar were held and cultivated on the same principle.(4) Buchanan de-

(1) Kanara Land Assessment Case, Printed Documents, Vol III. 36, 88, 89.

(2) *Ib.* Printed Documents, Vol. III, 66.

(3) As to a mine. Lord Mansfield said: "The plaintiffs were in possession..... or they had actually wrought it," *Harken* v. *Brikbeck*, 3 Burr., at p. 1563.

(4) Printed Documents, 151.

scribes these in 1801(1) as dealt with in exactly the same way as the *kumri* lands of Kanara. By 1859 they had become recognized private property.

The analogy these cases afford, though in some degree affected, is not destroyed by the circumstance that in more thinly-peopled talukas or magnis the forest tracts belonging to the several *vargs* were less precisely defined. An object may be perfectly recognizable for purposes of ownership, as for other purposes, although its precise line of severance from contiguous objects may not be present to the consciousness of those who think and speak of it, and may never have been exactly defined. The need in Kanara of any such definition would not be felt while land was still abundant. Every clearing in the forest was deemed a public benefit. Every appropriation distinctly made was supported by the common sentiment of the community. In the sub-distribution of the aggregate *beriz*, which under the earlier system was made amongst the several landholders, a portion would naturally be laid upon the vargdar, who had acquired exclusive enjoyment of a tract of forest, and thence obviously derived a profit, enabling him to bear at least an assessment proportionate to the customary rates paid by the less-favoured migratory *kumri* cutters. If this ordinary holding was regarded as perpetual or *muli*, the charge, reckoned according to the number of bill-hooks actually or ordinarily set to work by him, would be attached to his *muli varg*. If he was a mere *chal* genidar, the item would be added to his *geni varg*. And when, on the system of village settlements being superseded by a *kulvar* or individual settlement with each landholder, it became necessary to estimate the proper relative liability of each as a contributor to the aggregate *beriz*, it was natural that the same method of appraisement should be followed by the village officers, in whose discretion, at least in the earliest days of British rule, the regulation of the comparative burdens of the villagers practically rested.(2) In many cases, no doubt, the forest holding

(1) Mysore, &c., Vol. II, pp. 519, 542, 561; Vol. III, pp. 71, 147, 193.

(2) See Munro's Report of 30th November 1806, in Fifth Rep., Appx. 20. p. 745; and compare the letter of the Madras Government, Rev, and Jud. Sel., Vol. I, p. 658.

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charged with assessment, though perfectly recognizable, and recognized as to its central portions, as a true possession enjoyed exclusively by the occupant, blended at its outer margin by under fined gradations into the common waste. The knowledge and the acquiescence of the representatives of the Government could not in such cases be stretched so as to serve as an authority for unlimited encroachments. An undisguised occupation, by open and exclusive user as continuous as the object reasonably admitted, was requisite, since no assent could be implied to what was not apparent. But where such an occupation subisted, the mere employment of the land for rice, dry-crops, pasture, or even for the mere growth of firewood, would not properly form a ground for saying that in one case ownership had been acquired by the lapse of time and the acquiescence of the State, while in another it had not.(1) To levy money from a raiyat on account of any land, implied a knowledge that he was there, and in some way beneficially connected with it.(2) On no other principle could the receipt of the assessment from rice-land holders serve to establish their ownership as against the Government But what the precise nature of the connection was; would in each case depend on the acts done by the tax-payer, the intimation these afforded of the position he held or assumed, and the consequent acts or forbearances of the executive. Thus payment of *kumri* assessment by a vargdar might, according to circumstances, be consistent with a perfecly defined estate in the forest, with an ill-defined estate, though an estate still so far as the conditions of the constitution of property had been satisfied,(3) or with a mere casual and transitory enjoyment which was no estate at all.(4) In the case of rice lands the revenue officers admitted the payment of land-tax as a decisive test of ownership. Yet it was not the payment which created the estate: it was the estate which involved the

(1) See Phillips's Jurisprudence, sec. 122.

(2) *Nec quemquam clam possidere incipere qui sciente aut volente eo ad quem ea res pertinet.....bonæ fidei possessionem nanciscitur.*—Pothier Pand, Lib. 41, tit. ii, 8.

(3) See Dig, Lib. 41, tit. 5, fr. 2, 4.

(4) See Puffendorf and Bynkershoek quoted below.

exaction (1) in virtue of a property, which, Lord Genelg thought, was invested in the Government as "an unalienable, indefeasible necessary right,"(2) and which might at least subsist side by side with a full ownership in the subject.(3) But from the well-defined boundaries of a rice field, the elaborate process of cultivation and the annally repeated operations, the connexion between the payment and the ownership of any spot was usually so certain that the one could be safely inferred from the other. Continuous payment involved continuous acquiescence by the recipient in the occupation for which the payment was made. This it was which made the raiyats safe in their ownership of rice fields, which, as Mr. Fisher said, had generally once been *kumri* lands; and the same tacit acquiescence, wherever definitely invited and in any way plainly manifested, would have the same effect, though the place might be used for building, for *kumri* or as the precinct of a temple.(4)

(1) This is the true explanation of the state of things described by Mr. Blane: "There has never been any application in Kanara of the simple rule that a man has only a right to as much land as he pays for." (Ex. 366, p. 198.)

(2) Fifth Rep., Appx. 4. p. 255; Appx. 31, p. 978.

(3) So under the Roman system, though subjection to the census was primarily but a means of exacting a tribute from the land, the recognition which this gave to private ownership caused it to be highly valued, just as now a raiyat is often eager to get his name entered as occupant of a "number" under the Bombay Revenue Survey, though primarily this is but a record of his obligation as a payer of the land-tax. "*Augusti temporibus orbis Romanus agris divisus censuque descriptus est, ut possessio sua nulli haberetur incerta quam pro tributorum susceperat quantitate solvenda.*"—Frontin, De Coloniis, quoted by Coulanges, Op. Cit., ch. xii.

(4) Mr. Thackeray (adopting in part the language of Locke) says in 1807 that no "original grants or deeds, conferring or establishing the primitive right in private property in the soil, could (probably) be found: for they most likely never existed. A man cultivated a certain field, mixed his labour with the soil, and in process of time obtained a title by prescription which is the best of all titles." Fifth Rep., p. 160, and Appx. 24, p. 823. "In the provinces of Kanara and Malabar.....the lands in general appear to have constituted a clear private property more ancient and probably more perfect than that of England." Report of Committee, *ib.*, p. 130. Lord Romilly says in *Ganga Govind* v. *The Collector of the 24 Parganas*, 11, M. I. A, at page 321: "The interest of the person in possession is not a limited but an absolute interest: the title to the lands is one inheritence; the title to to *khiraj* or rent is another.'

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In the districts above the ghats, disturbed and desolated as they had been,(1) never in all probability more than very sparsely populated, no such evolution of distinct forest estate had taken place. The notion of separate private property in the land was there but imperfectly developed,(2) as in the north of Ankola,(3) until the officials introduced it from Lower Kanara. The village boundaries, where there were distinct boundaries, could be transgressed without molestation, where no one had any interest in preserving the practically boundless forest, or the land which occupied by fellow villager or stranger, could offer no impediment to the occupation for the same annual term of twenty times as much by any one who had the means and the courage to clear it.(4) Thus it was, no doubt, that men of the wider tribes moved about from place to place, tilling each in his rude fashion as much as with his bill-hook he could clear, and quite regardless within what imaginary boundary of village or magni he exercised his untutored industry. The more regular cultivator, anchored to one spot by the possession of a house, a rice field and a betel garden, would still in his *kumri* cultivation choose the precise places that suited him best, with equal disregard to boundaries that no one insisted on. As he cultivated *kumri* and profited by the cultivation, the revenue officers set him down for a contribution on that account; (5) but as this process would not deprive him of an estate, neither would it confer one. The case of Narna Cumpti is one that seems quite in point. This vargdar paying a considerable sum as a resident cultivator of rice lands within a magni, extended his *kumri* operations far away along the untenanted slopes of the ghats. The tract belonged geographically to other magnis, but he was.

....."It is not the case of a lease at all.....it is the case of an absolute ownership of the lands; and the title of the Government rather resembles a seignory than that of a lessor with a reversion." The right of the Government to a share arises, like the claim to a poor's rate in England, from an occupation and a profit derived from the occupation, whatever and however precarious the title. See *Lord Bute* v. *Grindall*, 1 T. R, 338.

(1) Kanara Land Assessment Case, Printed Documents, III, 44.

(2) *Ib.* Printed Documents, III, 39, 51. (3) Fifth Rep, Appx, 42 p. 821

(4) See Locke on Civil Government, B. II, ch. v, s. 32 *ff.*

(5) See Sir T. Munro's letter, ex. 366, p. 69.

charged for the Government's share where he permanently resided, or had his permanently cultivated property. This was most natural, seeing that his *kumri* cultivation would one year be in one village and in the next in a different one. It contradicts the idea of the *kumri* assessment being a mere farm of the "*korlaya*", or tax on the kunbis' bill-hooks. Such a farm would almost necessarily be made by the officials of the sub-division in which the tax was to be levied, or by the collector, and its proceeds would be entered in the sub-divisional accounts of the same magni or taluka; while the cultivator, taxed as a contributor on a fixed holding and an indefinitely varying one, would naturally be charged at the seat of the former. But this kind of temporary occupation, on the other hand, without appropriation of any spot for more than some months or a year, was no more necessarily a property or possession than the occupation by a fishing boat of a particular place on the sea.(1) Property arising from occupation is itself a derivative notion drawn from associations that do not at all attach to the case of a mere vagrant or casual cultivator ;(2) and the case is not altered by the circumstance that convenience or physical necessity has confined his activity within some assignable range. Possession is guarded in the interests of society ; but the mere having made temporary use, or intending to make use, actually or potentially, of a particular area or parts of it, is not possession.

The case of the *kumri* holding in the Panch Mahals, which is the one we have to deal with, seems to be intermediate between the extremes we have considered. The tahsildàr of Ankola reports(3) in 1823 that the villagers assert that all the jungles, great and small, belong, within the boundaries of each village, to the people of that village, who thence take all such materials as

(1) See Paley's Moral and Pol. Phil, Bk. III, ch. iii, iv; Pothier Traite du Domaine de Propriete, ch. ii, s. 21.

(2) Puffendorf, L. N., B. IV, ch vi, s. 3.

"*Ut occupanti est largita, sic allii denuo occupanti largitur, ubi amissa possessio, atque ita redacta res est in causam pristinam. Pristina autem causa communis erat, nec propria nisi jure apprehensionis.*" Byakersh. Qu. Jur., Rom. Lib. II., cap. ii. Comp. Phillips's Jurispr., s. 112 ff.

(3) Ex. 75, Printed Documents, 41.

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they use for aiding their cultivation. As to *kumri*, the report is that in the Kadra magni the people say that the whole *kumri* assessment is entered in the accounts of individual vargdars of the magni. These accounts, they say, (or, it may be, "these estates", as "*varg*" means either) extend to all the hills and jungles, because the vargdars have been wont to cultivate *kumri* at will in all the hills and jungles. The report adds, as supporting these claims of the raiyats, that "the assessment is entered for the *vargs* of the cultivators, but no hill or "jungle is assigned to any individual raiyat with specified boundaries". It is clear that no conception of a *kumri* vargdar's assessment as a mere farm of a poll-tax had arisen in 1823. If it had, the tahsildar's work would have been greatly facilitated. What appears is that, the jungles being found turned to use by the occupiers of rice-land *vargs* or by other stationary residents of the villages, their several supposed profits had been appraised for contributions to Government, and those contributions entered against the occupiers, names. Appropriation had progressed so far that the people of each village asserted a right to exclude those of another, and this idea had been fostered by the system of village assessments. Within the village those raiyats who had, as the community grew up, habitually used particular portions of the forest, either directly or through the kunbis whom they called in to assist them as labourers,(1) came to be associated with those lands in the popular sentiment, not at first probably in a way that constituted a recognition of full ownership, but which gradually approached that conception.(2)

It seems that at this stage, while the payers of *kumri* assessment asserted conjointly a right, which was not disputed, of excluding non-payers from *kumri* cutting in the village jungles, their own reciprocal rights *inter se* had in some cases not yet been precisely defined. If a vargdar assessed for *kumri* found a fellow villager not assessed practising such cultivation, he would actually say: "If you cut *kumri* you must pay *kumri* assessment and thus lighten our contribution to the village *beriz*" (aggregate

(1) Comp. Buch. Mys., Vol. III, 71.

(2) Comp. Lavaleye, Op. Cit., p. 21; Hobbes' Dominion, ch. xiv, f, 7; Locke on Civil Govt., P, II, c.s, 45.

assessment), and from "no cutting without payment" the transition was easy to "no right to cutting without payment". The fellow vargdar, who himself held *kumri* lands, and was assessed for them, was not open to any such remonstrance. His range and that of his neighbour could only by degrees acquire precise definition; but each was equally concerned in exacting from the non-assessed *kumri* cutter, whether of the same village or not, payment at the customary rate for cultivation within the forest belonging or conceived to belong to his *varg*. When, as at Goera, there was but one *varg* embracing the whole village, no question seems to have been raised, in the earlier part of the century, as to the right of the sole vargdar to take all the profits arising in that village from *kumri* cultivation.

Whether concurrently with rights of the *kumri* vargdars, *interse* and with respect to their fellow villagers, an ownership, absolute or usufructuary, had also been constituted in their favour against the Government, is a question which in the case of one of the properties now in dispute necessarily arises for decision. The position apparently taken by the vargdars as early as 1823, is plainly not maintainable. By the strict Hindu law, as well as by the usage explained by Mr. Ellis' s shirastedar, (1) they had not been constituted owners of any definite forest lands where they had not reclaimed them to cultivation. By the Mahomedan law, as explained in the Kanara Land Assessment Case, the forest lands which had not been obtained by an application, on an undertaking for cultivation, remained the property of the State. (2) No person, according to this law, can assume a property in the waste lands of a conquered country without the permission of the conqueror;(3)and that the mere levy of a share of the produce or profits constitutes such a permission in every case, would be a mere begging of the question. Sir W. Jones, indeed, says that it is a false notion which has been entertained by some that, according to " the Mogul constitution, the sovereign is the sole proprietor of all the land which he or his predecessors have not granted to a subject and his heirs;" (4) so that on his weighty authority it may be asserted

(1) See above.

(2) 12 Bom, H. C. Rep., 57, Appx.

(3) See Galloway's Law and Constitution of India, p. 74 (2nd ed.)

(4) Preface to Al Sirajjiyah, Works, Vol VIII. See also Wilks, Op, Cit., Vol I pp. 191, 133.

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either that private property grows within the State, but not as originating from the State, only as receiving its specific stamp from the Statae,(1) or else that the acquiescence of the Government will constitute proprietary right equally with an express grant. Tippu's regulations, too,(2) forbid the occupation of deserted lands only if the occupant fails to pay the assesement. But the acquiescence, to constitute a permanent right, must needs have been an acquiescence in an occupation apparently meant to be permanent The levy of a rate on a casual and desultory use of the soil implied no knowledge of a purpose going beyond the transient enjoyment, and no assent, therefore, to such a purpose. Under British rule, though its introduction would not extinguish private rights already fully acquired, the principle from which we must start is that waste lands belong to the State.(3) The mere fact, then, that a vargdar is charged in the village accounts with an assessment—and he alone perhaps in that village—for *kumri* cannot of itself make him owner of all the forests within its boundaries, Being found to emplty thee labourers on *kumri* cultivation, he would in a revaluation for assessment (*"azmaish"* as it was called) be rated as for *geni hutwali*, or rent produce, on the three rupees, or other sum which those three men as independent cultivators would have paid; and this charge, whether he cut more or less. would remain unchanged until a new appraisement took place. His employing a few men in this way in the village jungles one year in one spot and the next in another, as Martoba says he employed his tenants as Kaginad,(4) could not of itself make him owner of the jungles any more than a vargdar above the ghats, extending his casual operations over a wider range, became owner of a whole taluka. Even in the case of a grant of a definite quantity of land, but of undefined locality, the two eminent lawyers Yorke and Talbot, both afterwards Lord Chancellors, said: "We are of opinion that, in regard to the place where the said lands lie is not described, nor any method provided by which the same may be ascertained, such grant.....is by reason of the uncertainty thereof

(1) Puchta Gewohnheitsrecht, Bk, II, ch. ii, s. i. (2) Mys. Rev. Reg. 21,

(2) See Kanara Land Assessment Case, 12 Bom. H. C. Rep., 59, Appx.

(4) Ex. 56, accompt, 23, MS.

absolutely void in law."(1) He could not become owner in fact without the active or passive assent of the Government passing its proprietary right to him. Such assent is not for a moment to be inferred as to an extensive tract of forest from the payment and receipt of some insignificant sum, a moiety of the rent realized on two or on ten acres which may most naturally be referred to rateability, or the mere participation by the State, according to an immemorial rule, in all profits arising from the land. As there must be certainty in a grant as to the area conferrred, (2) so must there be certainty as to the area, or at least as to the identity of the object occupied, if the occupation is to raise the presumption of a grant or of acquiescence in a definite occupation; *talis enim præsumitur titulus præcessisse qualis apparet usus et possessio.* It is not as inconsistent with this principle, but rather as complementary to it, that the further rule is accepted, that the possession, and the ownerhsip springing from possession, of a farm or a *varg* as a whole, and within the limits as to which certainty is attainable, are not prevented or destroyed by an undoubted encroachment, or by a want of certainty as to some particular plot of ground, or as to the precise delimitation here or there of its proper boundary line; "*quum universitas ejus possideatur non singulæ partes.*" A suit to ascertain boundaries does not imply that either of the owners of contiguous estates has no property at all; (3) and as there may be an effective grant "of lands in possession" though occupied of wrong, (4) so may distinct aquiescence give a like right in the like case; but there can he no grant, no acquiescence in a possession, unless the essential elements of possession, a fixed, a definable, an exclusive occupation exist, and are present to the perception of the parties.

It was strongly pressed on us for the plaintiff that the description of taxes leviable, set forth in a vargdar's account, is not a li-

(1) Chalmers's opinions of Eminent Lawyers, 176. "*Rei plane incertæ possessio nulla est.*"—Voet at Pand, Lib. 41, tit. 2.

(2) See Stockdale's Case, 12 Rep., p. 86.

(3) See *Ganga Govind* v. *The Collector of* 24 *Parganas*, 11 M. I. A., 345, and comp. Rev. and Jud. Sel., I, p. 223.

(4) Viner's Abr., Possession (H.) 2.

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mitation of his proprietorship; that is, if he is a proprietor, the kinds of taxes imposed do not affect his proprietorship. This is true, and the converse is equally true that the levy of a tax does not necessarily make a proprietor. Where there were, as the tahsildar states in the report from which we have quoted, several vargdars in a village charged with *kumri* assessment, and each cultivating as pleasure within its limits, each of them might say, on the principle we are considering, that he was owner of the whole forest; and to each it would be a good answer that the State, having allowed his neighbour a user equal to his own,(1) could not possibly have intended the latter to be exclusive.(2) In the case of a private owner even, the allowance of acts which do not necessarily involve any denial of his ownership, or a grant from him, do not suffice to create an ownership against him;(3) and the mere non-interference of the State, to which neglect is not to be imputed, is not to be accounted for, if it can be otherwise accounted for on a presmuption of a surrender of its ownership. (4) Such a transaction must be evidenced by an undisguised and effective appropriation(5) assented to or submitted to by some one having due authority, or else fortified by an equivalent law of prescription. That under these conditions a true ownership even of the forests might arise, is shown by the case of Malabar, where all the forests became private property.(6)

In the present case the plaintiff's grandfather, finding himself undisturbed as sole vargdar in the use of the forest lands at Goer for *kumri* purposes, or as solely entitled to receive the fees paid by the kunbis who exercised a common right to cut *kumri* there, acquired all the estates in Kaignad, of the assessment for which a charge on account of *kumri* formed an element. On this ground

(1) See Pothier Pand, Lib. 41, tit. iii, paras. 13, 15.

(2) See Mr. Dowdeswell an the Bengal Forests, Rev. and Jud. Sel. Cases, Vol. I, p. 172.

(3) See Lord Ellenborough, C.J., in *Doniel* v. *North*, 11 Ea., at p. 374; *Searby* v. *Tottenham Ry.*, L. R. 5, Eq. 409; *Webb* v. *Bird*, 31 L. J., C. P, 335.

(4) 2 Steph, Com. 473; Parsons, C.J., quoted by Fishery Commissioners in *Leconfield* v. *Lonsdale*, L. R. 5, C. P., at p. 695.

(5) See 2 Bl. Comm, 209

(6) Buch, Op. Cit, Vol. II, p. 435.

he took up the position, apart even from the *sanad* title on which also he relied, that as now being the only payee of *kumri* assessment at Kaignad, he was necessarily owner of all the forest lands there. At Bali the plaintiff's father, Martoba, purchased the holding of a raiyat who, when an appraisement took place in 1831, was alone found of all the villagers to be cutting *kumri*, and was charged for it in his *varg* (account) a petty sum of Rs. 2 a year. He then said: "I alone pay *kumri* assessment; I alone am entered as subject to it; I alone have the right to cut *kumri*. I may exclude the other villagers. All the forest belongs to me." At Bhaire he asserted his ownership of two tracts of forest mentioned in the accounts as those in which his predecessor, as a vargdar there of an estate, had exercised his *kumri* rights. Such rights as those might subsist. They could be created by the acquiescence of the State in such a derogation from its general ownership; and such acquiescence would have been quite in accord with the views prevailing; as already shown, in the beginning of this century, and when the Board of Revenue as well as Sir T. Munro thought that, except in the case of unclaimed waste and escheated estates, the Government had never in Kanara pretended even to any proprietary right;(1) but the mere payment of the *kumri* assessment would not create them in the case of a vargdar, any more than it would make the wandering *kumri* cutter, who paid his rupee to Government one year in one taluka and another year in another,(2) proprietor or co-proprietor of all the forests in the province. The mere form in which the contributions from the one or the other were brought to account in the Government books, as the payers could not control it, served merely as an indication of the particular way in which that portion of the revenue was regarded by the Government in its Financial Department.

(1) See Fifth Rep. as quoted above, and pp. 473, 800 ff. Minute, dated 5th January 1818, of Revenue Board; Kanara Land Assessment, Printed Documents, Vol. II, 28; ex. 366, pp. 26, 27, 59, 186. From Munro's accepting the quotation of his words by the Revenue Board without remark, it may be gathered that Mr. Blane's supposition, ex. 366, p. 187, that by "unclaimed" Munro meant "unreclaimed" was erroneous.

(2) See Mr. Fisher's Rep., para. 12, Printed Documents, p. 137.

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On this latter point there is a certain want of clearness in Mr. Fisher's statement, which evidently led the Board of Revenue into error. He says;(1) "There has, however, always been a certain amount and often a large quantity of Sarkar *kumri*, with reference to which a direct and individual settlement was made with the *kumri* cutter.

"Up to Fasli 1231 the collections made under this head were entered in the *moturpha* accounts as *kumri korlaya*; since that period the money so received has appeared under the head 'land, revenue' in accordance with the orders of the Government dated 11th October 1822; but the original system of bringing these sums to account shows the light in which this tax was viewed and, therefore, that the rights it conveyed were not of a permanent character.

"In the *pattas* distributed to the raiyats (2) no separate entries regarding *kumri* appear ever to have been made, the *shist* and *shamil* shown being given in the aggregate.

"The *sarasari chittas*, showing the average collections from Fasli 1209 to Fasli 1225, a period of seventeen years, distinguish between the *dhanmadi* (paddy) and *kumri shist* in every instance; and as these accounts were originally drawn up by the shanbhogs from the records in their possession, it would appear that such distinctions have always existed. The question now a issue is, whether the entry of *kumri shist* in the accounts of an estate gives the owner a proprietary right in forest land, or merely conveys a right to cultivate *kumri*."

The Board of Revenue understood that this entry of *kumri* assessment under the head of *moturpha*, and not land-tax applied to the sums levied from vargdars as well as to those levied from casual *kumri* cutters,(3) until in 1821-22 they were by order of Government brought under the head of land revenue. This they

(1) Printed Documents, 140.

(2) As to these see Munro's Rep. as Collector of the Ceded Districts, dated 30th November 1806, para. 7, Rev. and Jud. Sel., Vol. I, p. 92; *Freeman* v. *Fairlie*, 1 M. I. A., 346; *Collector of Trichinopoly* v. *Lekhamani*, L. R. 1 Ind. Ap. 312, referring to *Kooldip Narayan Sing* v. *The Government and others*, 14 M. I. A., 256.

(3) Printed Documents, 356.

thought indicated that the collections were looked on merely as the *kumri korlaya* tax levied on the kunbis in a more compressed form, and hence they derived a support for Mr. Blane's theory that the vargdar's position was that merely of a farmer of fees to believed from the kunbis. But all the accounts in the present case make it perfectly plain that the *kumri* assessment payable by vargdars was not thus treated. It was debited to them in the same accounts as the tax on their rice lands. The two wer blended together in a single aggregate settled for the year at the same *jamabandi*. No separate entries, as Mr. Fisher admits, were made for *kumri* assessment in the *pattas* or land-revenue bills, handed to the vargdars. If, then, the entries of the sums levied for "Sarkar *kumri*" are an indication of how this kind of advantage was regarded early in the century, the continuously different treatment of the vargdar's *kumri* assessment is an indication, in their case, at least equally strong the other way. As a matter of historical fact, however, a reference to Mr. Harris's report of 14th June 1821(1) makes it plain that Mr. Fisher himself was under a total misconception as to the practice on which so strong an inference was built, On "the assumption" (of the Government) Mr. Harris says (para. 83) as "this item of revenue,' (*i. e.*, the *moturpha* collections) "were then found incorporated with the land revenue, so have they continued amalgamated in the village taxes in the revenue accounts." Down to Fasli 1229 (1819-20) the village taxes, including *moturpha*, were included in the land revenue (para. 73); but in Fasli 1230 Mr. Harris severed the whole *moturpha* from the "village taxes", and placed it as an item amongst the "extra branches" of revenue (para. 81) He recommended its abolition with one or two exceptions. The order passed on this is not forthcoming, but it probably acceded to Mr. Harris's suggestion(2) with a saving in favour of Sarkar *kumri* collections, which, as arising from the land, were restored in 1822 o their former and proper place in the accounts of the land revenue.(3) The recommendation of the kulkarni which led to

(1) Kanara Land Assessment Case, Printed Documents, III. 56, 58.

(2) This was the policy usually pursued; see Fifth Rep., p. 129 (A. D. 1811). The matter is discussed in detail by the Board of Revenue in 1812, Rev and Jud. Sel. 550.

(3) See Kanara Land Assessment Case, Printed Documents, III. 84, quoted above.

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Martoba's petition, (accompaniment 2 to exhibit 56,) rests on this arrangement. He proposed that the fees due from some *kumri* cutters should be included in the "village taxes extra". Martoba opposed this on the ground that the land was included within his *vargs* (1)

We have not, therefore, to account for any such anomaly as Mr. Fisher's erroneous account would involve. The accounts of the several *vargs* containing charges for *kumri korlaya* present no extraordinary peculiarity : the plain on which they are constructed is readily connected with the ordinary system upon which the land revenue was levied.

In making up the aggregate assessment payable by a vargdar, after his several rice fields had been appraised, the profits he derived from the jungles would necessarily be taken into account, and thus his *azmaish* (estimate) and *jamabandi chitta* (running account of assessment annually settled and paid) would present debits both for "*dhanmadi*" (rice land) and for *kumri korlaya* (*kumri*-cutting tax). These occurring in the annual accounts, would naturally enter also into the *sarasari chittas* (account of averages) which Mr. Fisher says were prepared for the preceding seventeen years in 1225 Fasli (1815-16).(2) But what he fails to notice is that, though the elements of the assessment were different in their local source, the accounts afford no indication of their being differently treated, Many of the accounts recorded in this case present a *sarasari* (average) more or less completely worked out ; but in none is there a separate *sarasari* drawn out on account of the *kumri* element of a compound *varg*. If such a severance, as Mr. Fisher seems to have supposed, really existed in the average account of collections prepared for the province in Fasli 1225 and afterwards, that severance must have rested generally on a separate *jamabandi* for each *varg* every year with reference to its rice land and its forest land, where there was forest land ; and in that case the different method pursued with respect to the *vargs* that we have to deal with, would be still more significant than a general practice of blending the two assessments together.

(1) See also the reports accompanying ex. 200, Printed Documents, 309 ff.

(2) See Kanara Land Assessment Case, Printed Documents. III, 56.

The accounts before us present several instances(1) in which the *sarasari* or average of collection is drawn out equally for a purely forest *varg* as for one consisting partly or wholly of rice land. Such a process, intended to determine what could reasonably be exacted as land revenue, would have no place in the case of a mere farm of a poll-tax. That would be let for a term at such a rate as it would fetch; the bidders competing for it would have no reason to complain whether the rates were high or low; while a land-tax, imposed according to a theory of private ownership subject to a fair rateable contribution, led naturally to various devices, of which the *sarasari* was one, for determining the relative contributory capacity of every estate. Thus a "*kumri shist*" reduced to an average, as a means of determining what should be the standard charge in future, really implies some holding regarded for revenue purposes as definite and invariable, whether unvaryingly employed or not.

Another fact unnoticed by the revenue officers is, that the forest assessment, which as arising out of a merely personal contract would be extinguished by cessation, was in many cases recognized as linked organically to the *varg*. When the *varg* was vacant, the so-called farm ceased; when the *varg* was re-tenanted, the "farm" revived. In not a few instances the *varg*, being solely a forest holding, comprised nothing but *kumri*. When such a *varg*, abandoned during some years, was re-occupied, the *kumri* assessment was re-imposed. What *varg*, thus rated, was or could be re-occupied, except some place to which the land revenue charged was regarded as incident ? (2) There are cases, too, in which the assessment comprises charges on account of "*mirchi aram*" (pepper groves) and *farmaish* (a money commutation for vegetable produce formerly supplied in kind by the Government tenants). The forest lands in Kanara producing pepper were claimed as private property,(3) and had been, as Buchanan says,(4) subjected to land-tax like the rice lands and gardens interspersed amongst them. They exacted some care

(1) As, *e.g.*, in the case of Kaignad *varg muli* No. 32, Govind Hoti.

(2) See Fifth Rep., p. 746. (3) Buch., III, 227. (4) Vol. III, 208.

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and expense to make them productive.(1) No one has suggested that these charges in a vargdar's account represent a farm of fees leviable from any person for the Government. They must represent the vargdar's supposed enjoyment, in fact, whether on a permanent or a temporary right, of a benefit derived from some tract of forest related to his more valuable holding when he had one in some recognizable way, but otherwise itself constituting the *varg*, in the sense of an interest in the land capable of being taken up and laid down, still retaining an individual character, and producing profits on which the assessment was estimated according to the Government's share. If at the same time the vargdar levied on all kunbis, coming to cut *kumri* within certain bounds, the customary fee payable in Sarkar jungles to the Government, and himself practised the same cultivation so far as he thought expedient,—and all this with the knowledge and assent of the local representatives of the Government—it would go far, where these representatives took the assessment from him on the express footing of a *muli* vargdar, to establish his proprietary right to the tract thus ascertained. The entry of landowners' names in the first accounts under the British Government as *muli* or as *geni* holders had, as we have seen, been regulated either by their own desire or the caprice of the local revenue officials.(2) The assessment was not imposed on each field but on each estate as a whole.(3) The estate might consist of holdings scattered all about the village, or even in different villages(4) unrecognizable except by the persons interested, and including a large proportion of waste even within the limits of the ordinary cultivation.(5) It was more likely, when every thing was thus loose and ill-defined, that a forest tract attached to a *varg* should be allowed to stand on precisely the same footing as to ownership than where lands were assessed and held field by field, or in well-marked agglomerations.

(1) Op. Cit., Vol, III, 159, 202.

(2) See also Kanara Land Assessment Case, Printed Documents, III, 66.

(3) See Munro's note, Kanara Land Assessment Case, Printed Document, II 31 ; Mr. Maltby's letter of 22nd July 1839, ex. 366, p, 122, and Munro quoted *ib*, 86.

(4) Ex. 366, p. 69.

(5) Ex. 366, pp. 207, 208.

One way, it is plain, in which the Government could mark its recognition of private proprietorship would be by not itself, for a series of years, levying fees from the kunbis and others who cut *kumri* within the limits of a piece of jungle claimed as belonging to a *varg*. Add to this the constant exaction of such fees by the vargdar, and the assessment of his income thus derived expressly from a *kumri* tax, and the indication becomes conclusive.(1) That the Government, instead of itself levying a rupee a head, or a rupee an acre, from all kunbis resorting for *kumri* to a particular area, should leave their admission to the vargdar who called it his property, and should take from him a moiety or about a moiety of what he received, just as in the case of rice land, implies, as it it seems to me, an allowance of equal rights in the one kind of holding as in the other(2) We shall meet many instances of this as we proceed.

In the cases before us there are no regular accounts, prior to Mr. Blane's measures of 1849, showing the levy, in Goera, of any sum on account of Sarkar *kumri*. In Bhairé there are none. In Kaignad, two or three slight, and perhaps casual, instances only are mentioned. In Bali the sub-vargdars holding their land independently, but paying the assessment through the plaintiff's father Martoba, appear, after the appraisement of the land in 1832, when Tilu Jhambad was the only one cutting *kumri* to have engaged pretty largely in this mode of cultivation until, in 1842, Mr. Blair on a report of the tahsildar directed that the *kumri* assessment was to be levied from Martoba only(3) This seems to have been construed by the subordinate officers as an extinguishment of the rights of the sub-vargdars ; and from that time forth, so far as *kumri* cultivation was allowed, it was practised for the benefit, as landlords, of Martoba and the plaintiff's family. The omission to levy *kumri* fees for Government, while *kumri* assessment, was taken from the plaintiff's family in these villages,

(1) *Jayne* v. *Price*, 5 Taunt., 326 ; *Collector of Trichinopoly* v. *Lekhamani*, L. R. 1 Ind. Ap., 312.

(2) "The receipt of the rents and profits is equivalent to the occupation of the soil." Rep. of Real Property Commissioners, quoted, 2 Smith's L. C., 607.

(3) Ex. 159, Printed Documents, 241.

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would certainly tend to show abandonment of its right in their favour. The origin of the change is, for Bali, traced so as to refute the notion of its being an express farm of fees; but the history of this village serves to show how a practice, allowed originally as uninjurious or even beneficial to the State, first grew, as it became valuable, into an exclusive appropriation against participators in the same common right, which was next asserted against the Government. On the other hand, we have the admitted reservation from the first, by Government, of the more valuable kinds of timber; we have the continued assertion and exercise, in more recent times, of its right to other kinds, as these, too, rose to a marketable worth, and its disposal of lands said by the plaintiff's family to have formed part of their forest holdings. These are indications, it is said, that the Government, whatever privileges it may have allowed, never parted with its ownership and possession of the forests; the vargdars' titles were purely precarious, and could be extinguished whenever the Government chose to forego the payment of the *kumri* assessment on discontinuing its allowance of the *kumri* cultivation. The questions, as to each of the estates in dispute, have to be determined partly by a reference to the series of transactions affecting it either in common with the others or specially, partly also by a reference to the documentary titles on which, as to three of the properties, the plaintiff relies. These titles, their probable genuineness, their construction, the nature of the rights they purport to confer, the possible subsistence of those rights or some of them upon a different basis, the effect on them of the further history of the land administration and of the properties themselves, all required for their comprehension this preliminary review of the subject. We are now in a position to weigh the evidence bearing on each estate; and as it presents the problems with which we have to deal in a rather less complicated form than in the instances of the other estates, we will begin with the case of Bali.

The claim to the Bali forest was made under exhibit No. 5;(1) and though it is now admitted that the subsequent history of the

(1) Printed Documents, 8.

property prevents the rights which that document confers from being effectually asserted, yet its genuineness must be considered, as having an important connection with other facts of the case. It is dated the 9th November 1789. Whether there ever was such a person as its grantor, the Amil Amad Ali Saheb, is not known. The only witness on the subject, with any pretensions to the character of an expert, Mahamad Mahadi, says (1) that the document is unsigned, the mark in the place of the signature being merely the Persian letter ص "*swad*," the initial letter of a word commonly attached to documents to signify "receipt". It does not seem, throughout the disputes relating to the property to have been ever alluded to before 1845, or produced before the year 1850: it is, indeed, admitted for the plaintiff(2) that it was not produced. Why, when land was so abundant and tenures so insecure as under the Mysore Government of Kanara in 1789, the plaintiff's grandfather should have been willing to pay up about one-and-a-half year's arrears of the full assessment in order to be created mulgar, with a saving of all existing rights, does not appear. Munro's report(3) tells us that all the extra assessments added in recent times to the *kadim beriz*, or ancient land-tax were looked on as an unjust and almost intolerable burden, yet on this estate the ancient assessment is increased to the extent of more than 40 per cent. by recent additions. All this, it is stipulated, Sadashiv is to pay for the privilege of being mulgar of a property resigned on account of the inability of its previous holder to cultivate it. That predecessor had obviously become insolvent; and Sadashiv would not, on the ordinary principles of human nature, be willing to pay a considerable sum for the privilge of succeeding him on the same terms. The advantage gained by Sadashiv was, it is said, the use of the waste lands; but these were at the time practically valueless, and even so late as 1832 the estimates made in that year show that only two billhooks were employed in the forest; so small was the demand still at that time for *kumri* land in proportion to the supply.

In 1811 the collector, Mr. Reade, published a notification(4) that *sanads* and writings relating to lands and *vargs* not brought

(1) Printed Documents, 803.
(2) Argument, 26th February 1878.
(3) Ex. 366, p. 17.
(4) Printed Documents, 36.

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forward and recorded in the accounts of the next *jamabandi*, would never afterwards be recognized. No steps were taken by Sadashiv, in consequence of this intimation, to have his *sanad* recorded. On the 23rd January 1827 the vargdar of the property, Balkrishna, makes a grant to Martoba(1) of a piece of land for a temple. Martoba is to pay the assessment and enjoy the land for ever, as a means of providing for the expenses of worship.

There is no mention or indication of Martoba himself being the superior holder under a *sanad*. The document is not a surrender of part of his land by a lessee: it is a grant by an owner, consistent with Bakrishna's then ostensible position, but hardly consistent with the always subsisting and acknowledged ownership of Martoba himself.

In 1828 Anandrav, a member with Martoba, plaintiff's father, of an undivided family, being required, as a Government servant, to send in a list of the lands held by him and the titles under which they were held,(2) mentions only three sub-*vargs* at Bali as the property of his family. He says there is no *sanadi* title by his entries in columns 7 and 9 of the return.(3)

In Fasli 1241 (1831-32) a general re-valuation for assessment of the hamlet of Bali was ordered by the head assistant collector. Martoba, as a party interested, was invited to assist at this process. He protested against it, not on the ground of his holding the hamlet by *sanad*, but that it had been "enjoyed for many years by our ancestors."(4) He says: "I will pay without objection whatever amount of *jamabandi* the Government may fix", not the amount stipulated in the *sanad*. He tells the peshkar that he produces documents relating to the property executed by persons who had been his tenants, and whose names appeared in the Government books as the vargdars; but he makes no allusion to the *sanad*. He was very anxious at this time to get the *varg* entered in his own name; yet, when examined on

(1) Ex. 374, accompt. 20, Printed Documents, 564.

(2) Printed Documents, exs. 476, 710,

(3) Printed Documents, exs. 332, 529.

Accompt. 7 to ex. 374, Printed Documents, 547.

the 6th December 1831 by the tahsildar,(1) he again makes no reference to the *sanad*, by which, if it was in existence and valid, he might at once have established his right.

After this, *kumri* began to acquire considerable value; several raiyats at Bali began to cultivate, according to this method, in the forests of the hamlet. The local officers proposed that the fees should be separately collected for Government.(2) Martoba strongly opposed this on the ground that he had an exclusive right; and being, in a formal examination, asked "what rights have you to the hamlet of Bali, and what of your statement that the *kumri korlaya* (*kumri*-cutting tax or fees) is yours?"(3) he again places his right solely on the ground of ancient possession. His ancestors, he says, being registered as vargdars, his uncle got Ramaji Naik's and afterwards Balkrishna's name entered as vargdar. He goes at some length into the history of the property, and mentions several occasions on which the production of the *sanad* might have been expected, but still makes no mention of it. This was on the 24th July 1841. Martoba on the same occasion put in a list of the *sanads*, documents, &c., produced with reference to the Kaignad and Bali jungles.(4) This makes no mention of the *sanad* in question; so that it is quite clear it was not relied on.

In 1845, Martoba, his previous applications having failed, tried again to get the Bali *varg* entered in his name as vargdar.(5) In his application he makes no mention of the *sanad*, though he goes once more through the history of the *varg*. It was enjoyed by his ancestors, he says, on *muli* (proprietary) right. The matter having been referred to the tahsildar for report, Martoba addressed an application to him,(6) and in this for the first time he says "we have got a *mulpatta*," still, however, without actually producing the document. At length in 1850, when Mr. Blane, adopting decisive measures for checking *kumri* cultivation, had desired

(1) Accompt. 27 to Ex. 374, Printed Documents, 573.
(2) Ex. 200, accompts. 1 and 3, Printed Documents, 506, 508.
(3) Accompt. 4 to Ex. 56, manuscript.
(4) Accompt. 33 to Ex. 56, manuscript.
(5) Ex. 375, accompt. 1, Printed Documents, 580.
(6) Ex. 375, accompt. 2, Printed Documents, 582.

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that a return should be sent in of those who as vargdars enjoyed *kumri*, and of the titles they set up,(1) Martoba appears to have produeed a copy of the *sanad*. Such is the effect of the entry in the last column of exhibit 62,(2) a document which, however, is itself unauthenticated, though brought from the office of the taluka. Whether the original *sanad* was produced, does not appear certain, though it may perhaps be taken as probable.

Apart from the question of whether the plaintiff could make a legal title upon this document so long held in reserve, and after half a century of transactions carried on without reference to it, it is quite obvious that its character as a genuine document cannot but be seriously impaired by the way in which it has been dealt with. Proceeding from an unknown official, and withheld, as we have seen, from scrutiny, it would require for its establishment a course of enjoyment not only consistent with, but necessarily or most properly referrible to it as a title. We shall see how far this need is satisfied in the progress of the inquiry which we must, at any rate make into the history of the connection of the plaintiff's family with this property, in order to determine whether in their character of vargdars they have acquired a proprietary title to the forests at Bali.

In the history given by Martoba, and still adhered to by his son, it was said that the *varg* was successively let by the family to tenants, who not only undertook to meet the Government claims, but became vargdars, the real owners having got their names entered in that character. But if Vithoba, accepting the *kabulayat*, (exhibit 320),(3) from Ramji Naik on the 11th March 1799, induced the Government to expunge his own name or his brother Sadashiv's, and substitute Ramji's as vargdar, it is hard to conceive how, without something more, the former relation between the Government and Sadashiv can have continued. Sadashiv was a kowldar or lessee from the Government. When he had made over possession of the land to Ramji, and procured his admission and registry as tenant to the Government, how could his own right still subsist? He had become party to a transaction which contradicted it, or

(1) Ex 91, Printed Documents, 75. (2) Printed Documents, 32.
(3) Printed Documents, 522.

implied its extinction. (1) Clearly when he had neither possession, ner even a place as vargdar, he could not be made responsible for the Government rent assessment under his lease ; and when hir liability ceased, so also did his right. (2) As between himself and Ramji he might have been entitled, under the *kabulayat*, to call for a resignation in his own favour, or the execution of some other document which would transfer, if it could be transferred at will, Ramji's tenancy to himself ; but, until this was done, Ramji was the tenant of Government, whose original title could not be disputed by Sadashiv, and thus Sadashiv's lease was by his own act superseded.

This view of the legal effect of Sadashiv' s or Vithoba' s transaction with Ramji and the Government is not, indeed, directly important for the disposal of any material question in the present case; but it is important when the probability of the genuineness of the alleged transaction has to be weighed against the probability of a document, such as exhibit 320, having been fabricated so as to vest Sadashiv's family with an apparent title in spite of the unquestionable facts which were opposed to it. Ramji Naik was undoubtedly the vargdar of Bali. The *jamabandi chitta* for *durmatti* (1801-2) registered his name in that capacity, and was a fact that could not be got out of the way, though it might be circumvented by the device of a *kabulayat* and a subsequent resignation, such as exhibit 321,(3) by which Ramji professes to give back the land to Sadashiv. Yet in this resignation Ramji says he has received back his *kabulayat*, exhibit 320, which has to this day remained with the plaintiff's family ; and he says he will procure a substitution of Sadashiv's name for his own in the Government accounts, which never took place. These might possibly be taken as formal statements, not literally fulfilled, or meant to be fulfilled, and in a fabricated document there was no need to introduce them ; but the discrepancy exists, and impairs the credit claimed for the exhibit.

(1) Indian Evidence Act (I of 1872), s. 115 ; *Pickard* v. *Sears*, 6 Ad. & E., 475; *Davidson* v. *Gent*, 1 H. & N., 744.

(2) *Thomas* v. *Cook*, 2 B. & A., 119, not subject in this country to considerations arising from the satute of frauds (see per Sugden, C., in *Creagh* v. *Blood*' 3 J. & Lat., at p. 160).

(3) Printed Documents, 523, dated 16th February 1804.

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What on a closer scrutiny is more against the genuineness of these papers, is the nature of the transaction they indicate. In exhibit 320 Ramji engages to pay 5 Hons (=Rs. 20) a year to Vithoba besides paying the Government assessment. He also engages to repay an advance of seed rice. Why should Sadashiv have paid a large premium for land which would yield so small a return, and at such risk, Rsmji being evidently almost a pauper?

Again, from exhibit 321 it appears that though the assessment, reduced to Haidari Hons, was H. 52, yet the *jamabandi* was settled at H. 29-1-9. It seems very unlikely that, when Ramji had been willing to pay a profit rent on an assessment greatly higher, he should have been forced to resign the land after so considerable a reduction. Ramji, too, having been substituted for Sadashiv as Government's tenant, and not as a tenant holding pemanently under a *kowl*; on his resignation in favour of Sadashiv, the latter would come in the same and no other character. It does not seem at all likely that Tippu's officers, having the engagement of Sadashiv, a man of substance, to pay Rahati Hons 67 a year, would agree to the substitution for him, in the Government books, of a man of straw like Ramji, from whom they certainly could not expect to collect anything like the full amount of the greatly enhanced assessment for which Sadashiv was liable. If we now turn to the *jamabandi chitta* for *durmatti* (A.D. 1801-02)(1) we find, after a long and complicated estimate of the assessment in Rahati and Haidari currency, that in Raodri (*i.e.*, 1800-01) the *jamabandi* had been fixed at H. 20-3-14, which sum had been collected. At the same time, however, Ramji had entered into an *istawa* contract, that is, one for a gradually rising payment by which he engaged to take up the waste land of the estate, and bear an increased proportion of the full estimated assessment for each of a series of years. For 1801-02 the portion is H. H. 5-7-11. Now in 1800 and 1801 Sadashiv's connection with the *varg*, accepting his own account must have been perfectly well known. He was himself, indeed, a nadkarni (revenue accountant), though whether at that particular

(1) Printed Documents, 597 ff.

time in office does not appear. If he was really proprietor under his *sanad*, and responsible for the full assessment, why should less than half the amount be accepted from Ramji? And why should the contract for a gradual rise of the assessment on the waste lands have been made with him, when the whole might have at once been realized from Sadashiv?

These considerations make it probable, even without reference to the rival resignation, in 1799, to a Bikrishnappa(1) that the *kabulayat* and the *razinama* alike are fabrications ingeniously put together, when Martoba, desiring to become vargdar, had to meet the fact of Ramji's former entry in that character contradicting his own alleged ancient title.

It does not seem possible to reconcile the *durmatti* account (2) with the *jamabandi chitta* relating to the same property (3) drawn up in 1228 Fasli (A. D. 1818-19), and then continued as a running account for several years. The circumstances under which this document was prepared, are set forth at page 176 of the Kanara Land Assessment Case (12 Bom. H. C. Rep., Appx.); and some further light on the subject may be gathered from the printed documents in that case, Vol. III, pages 26, 81, 89. In computing the average payments for seventeen years, the sums collected from Ramji from Fasli 1209 to 1213 are entered (page 592); and it appears that the sum collected in 1209 (*i. e.*, 1799-1800) was H. H. 13-3-14. This falls vey far short of the assessment according to Sadashiv's *kowl* or *sanad*; and it is hardly conceivable, that if he still remained liable, the amount should be thus suddenly reduced to about one-fifth of its proper amount. The constitution of the *varg* in Fasli 1214, as shown or Printed Documents, page 591, appears to be drawn from the *izarpatta*, or lease, mentioned at page 601; but the gradual increase of assessment must have been put out of sight, as, after an aggregate of H. H. 26-1-9 in *durmatti* and the next year, the increase goes only to H. H. 29-1-9 in Fasli 1213; and in Fasli 1214 the total assessment actually recedes to H. H. 25-0-0. (4) It does not until Fasli 1240 (A. D. 1830-31) rise to H. H. 52, the equivalent of the R. H. 67 of the *sanad*. If during

(1) Printed Documents, 561.

(2) Printed Documents, 597. (3) Printed Documents, Exs, 376, 588

(4) Printed Documents, 591.

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this time Sadashiv had been regarded as a mulgar, having a permanent interest in the land, he would not, on the principles laid down by Munro, have been entitled to any remission.(1) If, having an interest in the land, he chose to forego that interest for thirty years in order to avoid payment of the stipulated rent, he could not at the end of that time come forward and get the interest resuscitated after benefiting so long, by its suppression. Thus, even if he could be regarded as not having put Ramji into his place as lessee of the Government, he would still have to be treated as having surrendered his lease. More especially is this the case after the notification issued by Mr. Reade in 1811. Had Sadashiv then asserted his right, as he was invited to do, he would have been made responsible for the full assessment. By holding back he escaped it; and having gained that advantage by suppressing his lease, a surrender would, on the principle of *Balfour* v. *Weston*,(2) be presumed to prevent his afterwards benefiting again by asserting it. His holding back was, under the circumstances, an inducement to the Government to make disadvantageous arrangements; at the least, an acquiescence by which he would be bound, according to the doctrines recognized in such cases as *Archbold* v. *Scully* (3) and *Thomson* v. *Eastwood*, (4) if not also according to those which bind a man to make his representation or misrepresentation good, such as *Burrows* v. *Lock*,(5) *Freeman* v. *Cook*,(6) and *Slim* v. *Croucher*. (7) The plaintiff must, therefore, establish his claim on some different foundation than the *sanad* if it is to stand at all. His pleader admits this, though not for the reason we have given, and to understand his position we must trace the history somewhat further.

Ramji's resignation occurred in Fasli 1213. In Fasli 1214 the account (Printed Documents 501) does not show any change of the vargdar's name, but in Fasli 1215 Vithalrao is named as vargdar, and his name remains till Fasli 1237. Corresponding to this is the exhibit 322, (8) dated 12th May 1804, by which Vithalrao and Balkrishna agree to take the lands on the same

(1) Ex. 366, pp. 17, 18, 20, 23, 53, 68, 86.
(2) 1 T. R., 310.
(3) 6 H. L C. at p. 383.
(4) L. R. 2 Ap. Cas,, 215.
(5) 10 Ves., 470.
(6) 2 Ex. 663.
(7) 1 D. G. F. & J ; 518.
(8) Printed Documents, 524.

terms from Sadashiv on which he had let them to Ramji Naik. In 1807. Vithal having died, his brother addresses (exhibit 323) (1) to Sadashiv, relinquishing all interest in the property; and on the 23rd August 1809 Balkrishna also resigned. On this, however, it is said, nothing was done, (2) as a reduction of the assessment by 5 Hons enabled Balkrishna to go on with the cultivation; and Sadashiv took a piece of the land in lieu of his profit rent—a piece, Martoba says, assessed at 1 Hon, which was paid by the vargdar Balkrishna. It seems very unlikely that Sadashiv, who had paid a considerable premium to obtain the land at a rental of H. H. 52, should, when the assessment was in 1809 reduced to H. H. 23, have been content with a profit of 1 Hon a year. The profit arising from cultivation, as land was then so abundant, he could make almost anywhere; and if the piece of land in question was so specially productive in comparison with the assessment, that indicates how much the Government probably lost by the substitution of almost pauper tenants for the wealthy Sadashiv.

In 1822 Balkrishna failed to pay up the whole of the assessment. The crops of the cultivators were seized, and were about to be sold, when several of them asserted their *muli* or proprietary right to their holdings, notwithstanding the *varg* as a whole was entered in Balkrishna's name. He, they said, was but a farmer of the hamlet, as Ramji and Vithal had been before him; and they proposed themselves to undertake the farm of the village and bring its assessment up to the standard of H. H. 50 in three years. (3) The tahsildar on inquiry found that some of the raiyats were mulgars; and as Balkrishna had failed and his heir Sakhaji would not come forward, he recommended that at the next *jamabandi* the settlement should be made with the raiyats individually. (4)

(1) Printed Documents, 526.

(2) Martoba's examination of 6th December 1831, Printed Documents, 573

(3) Ex. 372, Printed Documents, 536. This method was common in mirasi villages. See Rev. and Jud. Sel., Vol. I, p. 945 ff. See also Fifth Rep., pp. 18, 121

(4) Ex. 99, Printed Documents, 163.

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In the inquiry tending to a forfeiture of the estate held by Balkrishna to Government on account of the non-payment of the land revenue, Sadashiv, if owner of the property, was deeply interested. There can be no doubt that, if he had asserted his right and accepted the corresponding obligation, he would have been readily admitted as vargdar. The tahsildar, finding no superior holder, calls Balkrishna, rather loosely the ancient mulgar. (1) On this account possibly, or perhaps because of his official connections, he being a patel, (2) Balkrishna's name was retained still at the head of the *(varg)* account ; but the tahsildar's suggestion was adopted. A settlement for land revenue was made direct with the several "*kuls*" ; (3) and in the account for Fasli 1233 is an entry (4) that "*jamabandi* has been settled on an inquiry with the *kuls.*" Still Sadashiv did not come forward.

In 1829, Balkrishna's son, Shantappa, sought to be restored to the position of head vargdar, (6) settling with Government for the whole village. Some of the "*kuls*" naturally opposed this, but the tahsildar (7) supports the application conditionally on Shantappa's furnishing security. The head assistant collector at first declined to entertain this proposal, (8) but eventually it was acceded to, as is shown by the entry in the *jamabandi chitta* for Fasli 1239.(9) Next year, Shantappa failed ; and as he had given no security, the revenue had to be collected from the raiyats. (10) The assistant collector giving directions to this effect,(11 orders further that a general *azmaish* or appraisement of the

(1) Printed Documents, 163.

(2) Ex. 324, Printed Documents, 527. Ex. 374, accompt. 1, Printed Documents, 544.

(2) See Ex. 206, Printed Documents, 333. (4) Printed Documents, 593

(5) With this may be compared the account of the former practice given by the shirastedar, Kanara Land Assessment Case, Printed Documents, III. 97.

(6) Ex. 374. Accompt, 22, Printed Documents, 566 Accompt. 23, Printed Documents, 567.

(7) Ex. 206, Printed Documents, 333.

(8) Ex. 207, manuscript, untranslated. (9 Printed Documents, 594

(10) Ex. 208, Printed Documents, 334.

(11) Ex. 209, Printed Documents, 335.

village holdings be made with a view to a *kulvar* or individual settlement according to the produce for the next Fasli year.

This order was dated the 10th June 1881; and on the 16th July, 1831, Balkrishna resigns his *varg*, if it was to be regarded as still his, to the Government, with a request that it be transferred to Martoba.(1) He sets forth the agreement with Sadashiv, but he says nothing of the transaction of 1809; and he says he continued paying the *munafa* or rent to Sadashiv down to 1821, which disagrees with Martoba's account already mentioned. To this he adds falsely that "he made the *kuls* individually answerable to Government through the said Martoba." If there had been any such transaction as that, Martoba would, as he certainly could, have got his own name substituted as vargdar, or, at any rate, paid the Government, so as to save his own interest, in 1822 and the following years. It is certain he would not have submitted to the arrangement of 1829. But in this interval Martoba takes the grant, (exhibit 374, accompaniment 20,) from Balkrishna whose own title at the time, as a vargdar, was at least in abeyance, and in 1828 Anandrao, as we have seen,(2) returns his family as owning but three sub-*vargs* at Bali

Martoba was invited as a sub-vargdar to attend at the re-valuation of Bali. He must, as a sub-vargdar, have paid assessment direct to Government from 1822 to 1828 and again in 1830. He now sent to the peshkar the application of the 24th October 1831. (3) In this he asserts the ancient holding of the *varg* by his family, and mentions Rama Naik as their tenant. Vithalrao and Balkrishna, he says, were his relatives; and, to get over the awkward fact of the direct collection for several years from the *kuls*, he says his father handed a list of their names and assessments to the shanbhog (village accountant), conformably to which that functionary had tired to collect the revenue. To the proposed appraisement he objected, expressing his willingness to pay any assessment that might be settled for the hamlet. To this application he appended the documents, exhibits 321-324 In

(1) Ex 374, accompt. 1, Printed Documents, 544.

(2) Ex. 332, Printed Documents, 529, 530.

(3) Ex. 374, accompt. 7. Printed Documents, 547.

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the inquiry that followed he produced also some old *beriz pattas* or revenue bills; but these being in Balkrishna's possession on the hypothesis, *prima facie* correct, of his being former owner as well as vargdar, would naturally be handed by him to Martoba along with *razinama* (resignation, surrender).

Martoba's application was supported by ten raiyats who expressed their willingness to pay their assessment to him as being his sub-tenants.(1) At their head stands Martu Sakhaji, who in 1822 had petitioned as a sub-vargdar holding as a mulgar for separate assessments. The kulkarni recommended(2) that the proposed transfer should be made. On the 30th November 1831 Martoba engages(3) to abide by any terms made by Balkrishna with the raiyats. Balkrishna's son, Shantappa, being examined by the tahsildar,(4) admitted that the *razinama* had been executed by his father, but denied his capacity on the grounds of his being sixty years of age and of his having been insane for the last ten years. The second disparagement was intended to cover the period during which his father's insolvency had led to a direct settlement with the *kuls* at Bali. Shantappa admitted his own insolvency, but urged that, as the Government had distrained the raiyats' produce, and so realized the revenue, this made no difference. Balkrishna had in the meantime died; and in an application, dated 5th December 1831,(5) Shantappa denounces the documents, produced by Martoba in support of his claim, as forgeries. On the next day Martoba was examined,(6) and gave his account of the documents. In explaining what land his father had retained in lieu of rent, he mentioned the holdings of Fakir and Palpat Naik, and said he had collected the rent in grain. But a comparison of the document exhibit 325,(7) with accompaniment 20 to exhibit 374,(8) shows that these holdings were given by Balkrishna rent-free to the two *kuls*, and that the ownership of Martoba as trustee for a temple was not created until 1827. Taking

(1) Ex. 374, accompt. 8, Printed Documents, 548.
(2) Ex. 374, accompt. 9, Printed Documents, 549. (3) *Ib.* 553.
(4) Ex. 374, accompt. 13, Printed Documents, 554.
(5) Ex. 374, accompt. 14, Printed Documents, 556.
(6) Ex. 374, accompt. 27, Printed Documents, 573.
(7) Printed Documents, 528. (8) Printed Documents, 564.

these facts along with Balkrishna's statement that he had paid the *munafa* or profit-rent down to 1821 it is not unreasonable to infer that Martoba tried to bolster up a false story by connecting it with the circumstance, true in itself, that he held the land called Karle, though not in his own right.

Meanwhile another claimant appeared in the person of Martoba's cousin, one Ramappa. On the 7th December 1831(1) this applicant says that he had taken the *varg* in mortgage from Balkrishna and Shantappa; that the *razinama* in favour of Martoba was fraudulent; and he prays that an appraisement may be made, and the *varg* entered in his own name. The inquiry went on; Shantappa's uncle,(2) representing him, produced documents which, if genuine, showed(3) that Ramji Naik and Vithalrao, whose names appeared as vargdars in the accounts, had been the lessees, not of Sadashiv but of Balkrishna. The grant of 1827(4) was adduced; and against Balkrishna's admissions in favour of Martoba was pitted his petition in support of his son Shantappa's application for the vargdarship in 1829.(5)

Martoba answered on the 21st December 1831.(6) Shantappa's documents, he says, are forgeries. Ramappa, a co-parcener of Martoba himself, is, he says, merely a *chalgeni* (annual or precarious) tenant of a single sub-*varg*, who hopes, as he has neglected his holding, to profit by a re-assessment. As to the awkward facts of 1820-23, Martoba says that Balkrishna, no doubt, agreed that the *varg* should be broken up, and in his statement made no mention of Martoba's superior right: but though the revenue was collected separately from the several *kuls*, the *varg* had been allowed to stand as before,(7) and this, Martoba says, was due to a representation made by himself. He evidently thought that the mere retention of the ledger account in the old form was

(1) Ex. 374, accompt. 24, Printed Documents, 568.

(2) See Ex. 374, accompt. 15, Printed Documents, 557.

(3) Ex. 374, accompts. 17-19, Printed Documents, 561 ff.

(4) Ex. 374, accompt. 20, Printed Documents, 564.

(5) Ex. 374, accompt. 23, Printed Documents, 567.

(6) Ex. 374, accompt. 28, Printed Documents, 575.

(7) See *jamabandi chitta*, Printed Documents, 593.

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enough to keep alive the old right, though the actual transactions after 1822 were between the *kuls* and the Government. Why, as he produced some of his documents (by his own account) before the tahsildar in 1831, he did not then get the *varg* entered in his own name, he does not explain. Of the *sanad* he makes no mention, The assessment had now (Fasli 1241) come up to the full amount due under it, but apparently it had not yet been thought of.

The report of the tahsildar, dated 28th December 1831,(1) was in favour of Martoba. He seems to have accepted without inquiry Martoba's statement that he himself had obtained recognition in the *jamabandi patta* of Fasli 1230, and that in his interest "the plan of setting the assessment with each person individually was stopped." Why, amongst the objectors to a sale for arrears of revenue in 1822,(2) Martoba had not come forward, if at all, in the character of superior holder, is a matter that had apparently escaped notice altogether. Even if the *varg* should not be registered in Martoba's name, the tahsildar still recommended that he should be allowed to collect the several assessments, and settle annually in block for the whole hamlet. The sub-collector, however, was not satisfied;(3) and after some further consideration he determined to reserve the question between Martoba and Shantappa, and directed that in the coming year, Fasli 1242, the assessment should be levied from the *kuls* individually as in Fasli 1241.(4) On the 20th October 1832 the estimate or valuation *(azmaish)* had been sent in and received.(5) The several "*azmaish chittas*" or appraisements of the holdings included within the larger *varg* are exhibits(6) 174-195 in the record.

If we examine the first of these documents, we find it was drawn up in September 1832, and relates to the holding of one Tilu Jhambad. The "*rivaz hutwali,*" or full rack-rent, is estimated on the produce by multiples of the *bijvari* or seed sown,

(1) Ex. 374, Printed Documents, 540.
(2) See Ex. 99, Printed Documents, 163.
(3) Ex. 210, Printed Documents, 337.
(4) Ex. 211, Printed Documents, 338.
(5) Ex. 375, accompt. 7, Printed Documents, 587.
(6) Printed Documents, 261-300,

varying according to the estimated fertility of the soil in each field; (1) and this being equally divided, one moiety is set down for the rice-land assessment, *i. e.*, H. H. 5-4-8. The garden lands, &c., are next assessed, on a doubtless rather arbitrary estimate of their produce, at a rent valuation of $\frac{2}{3}$rds of the cocoanuts thought to be gathered annually.(2) The areca trees are reckoned at one anna a tree; the wild mangosteens at four annas the jack trees at two annas each; the wild pepper plants, on an estimate of their produce, at 4 pice an "*atva*". The total under this head being H. H. 1-2-2, there follows an item of H. H. 0-5-0 (*i. e.*, Rs. 2) for "*kumri katti, 2 payils*" (hatchets) "of his own at Fanams $2\frac{1}{2}$ per *payil.*"

The other *azmaish chittas* are all drawn up on the same principle. Where the lands are sub-let there is an attempt to discover at what rent, in order that this may be equally divided. Where the produce cannot be readily valued, the assessment is imposed at so much per tree, &c. The charge for "*kumri katti*" occurs in the case of no other sub-*varg* except that of Tilu Jhambad, doubtless because no other raiyat was found at the time practising *kumri* cultivation.(3) The annual valuation he is charged upon, in the estimate of produce or rack-rent, is just the same as vagrant *kumri* cutters would have been charged by Government for the same two bill-hooks employed in the same way. The entry shows that he was not at all regarded as a farmer of a poll-tax; but, on the other hand, it is in itself far from indicating the permanent exclusive occupation of any particular area. Practising *kumri* cultivation to the extent specified, he is assessed accordingly. The object of the *azmaish* was not to settle titles but contributions, and, for aught that appears, Tilu Jhambad, being master of two bill-hooks, might use them anywhere he pleased in the forest. The entries as to mangosteens, jack-fruit trees and pepper vines do point to some definite area held in view in fixing the assessment; and for this very reason probably these are classed with the cocoanut and areca trees as admitting, and requiring, an estimate approaching accuracy of their proper pro-

(1) See Kanara Land Assessment Case, Printed Documents, III, 02. (2)

(3) See Printed Documents, 306, 304.

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portional contribution. The *kumri* tax stands by itself, being referred to a different standard. The charge for jack trees occurs in the *azmaish* of several other sub-*vargs*, but not that for mangosteens or pepper vines.

To the principal collector, Mr. Cameron, the estimates appeared over-exacting. He did not think it necessary to levy a produce tax on the trees;(1) and on the 30th April 1833 he confirmed the individual assessments, amounting in all to H. H. 54-4-4, which had been levied since 1822. Martoba's claim to the position of vargdar he rejected on two grounds: (1) that many of the raiyats were ancient mulgars or proprietors; and (2) that the late vargdar, Balkrishna, had become so through being patel and an inamdar, which, however, gave him no right to a settlement with him for the assessment of the whole hamlet. Martoba's superior title he does not seem to have thought worth discussion; the *sanad* was not yet forthcoming.

The order as to the method of assessment was revised, however, and on the 23rd September 1833 the head assistant collector directs that the settlement is to be according to produce as shown in the *azmaish chittas* previously sent in.(2) Martoba protested, but this led only to a confirmation of the order(3) by the collector. Yet the name of Balkrishna was still retained as vargdar in the accounts; and though separate receipts were given to the *kuls*, no separate accounts were opened in their names in the collector's books. In correspondence, too, to the form of the account, though this was no longer true to its substance, the annual *beriz patta* or revenue bill was still drawn up in the name of the deceased Balkrishna.

In this state of things Martoba seems to have induced Tilu Jhambad to resign his land (sub-*varg* No. 1) to him. In exhibit 373 Tilu complains (4) that the resignation was extorted by force. The head assistant collector, on the 5th June 1835, directs that Tilu's name be retained, and his possession confirmed ;(5) but Tilu

(1) Ex. 214, Printed Documents, 341.
(2) Ex. 212, Printed Documents, 339, 201, Printed Documents, 313
(3) Ex. 213, Printed Documents, 340. (4) Printed Documents, 539.
(5) Ex. 101, Printed Documents, 169.

having by some means been won over, Martoba was eventually(1) put into his place as the mulgar of the sub-*varg*.

From this time forth Martoba went on purchasing one sub-*varg* after another. The correspondence filed in this suit shows his acquisition of six sub-*vargs* numbered (besides Tilu Jhambad's No. 1 ) 4., 5, 7, 8, 14 and 18 in the list of holdings prepared in Fasli 1232. (2) By 1841 it appears that, by himself or his sub-tenants, Martoba had got possession of 13 out of the 22 sub-*vargs* of the hamlet. (3) The forests had now begun to acquire value. Traders from Goa and elsewhere came to Kanara to purchase timber, and Martoba appears to have had no hesitation in selling it within the bounds of the jungles attached to his *vargs*. (4) *Kumri* cultivation, too, was becoming profitable. In Fasli 1248 Tilu Jhambad (who, no doubt, had remained as Martoba's sub-tenant ) employed six bill-hooks instead of the two for which he had been assessed in Fasli 1232 On an inquiry it turned out that (5) in Fasli 1248, 12 ; in Fasli 1249, 9 ; and 1250, 20 *huls* had cut *kumri* in the forest. The tahsildar forwards the list furnished by the kulkarni, and recommends that the fees properly payable, at Re. 1 for a married man and his wife and Re. 0-8-0 for a bachelor, be levied (direct) and brought to account, because the jungles were entered in the return of 1823 (9) as Government property. The sums properly due had been entered by the kulkarni under the head of village cesses, a branch, as we have seen, of the land revenue ; but the peshkar had put off dealing with the matter. The question, as stated by the kulkarni, (7) was whether the fees for the *kumri* cut by " others than Tilu Jhambad belong to the Government or to the said *varg*, " not the sub-*varg* of Tilu Jhambad. What he meant was an inquiry whether the sums should be credited direct to Government as extra revenue, under the head of village taxes, or whether the produce should be deemed part of the profits of the *varg*, assessable only like other

(1) Ex. 107, Pinted Documents,, 176.
(2) Accompt. to Ex. 372, Printed ,Documents, 538.
(3) Ex. 56, Printed Documents, 23.
(4) See Ex. 110. Printed Documents, 179.
(5) Ex. 200, Printed Documents 304. Accompt., Printed Documents, 306 ff.
(6 Exs. 77, 98. (7) Printed Documents, 306.

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profits for land revenue. In the latter case the Government would take from the vargdar, as assessed land-tax, only a moiety of the sum which in the former case it would levy as *kumri* fees. Martoba had objected to additional foreign *kuls* being admitted in Fasli 1250 to cut *kumri* on a payment to be included in the village cesses, though whether this particular objection extended beyond Kaignad, is not clear.(1) To the exercise of *kumri*-cutting by other *kuls* of the village he appears so far not to have objected. The kulkarni had set down the fees payable by the *kuls* newly cultivating *kumri*, provisionally, as items of the village cesses, pending the determination of whether a regular *jamabandi* should be imposed on them or not; and the peshkar in Fasli 1248 and 1249 had noted that an inquiry should be made on the subject, but had not obtained instructions from the collector. In Fasli 1250, the number having increased to twenty, he again sought instructions; and the tahsildar, seeing that no order had been made, says he has directed the kulkarni to collect the fees for the current year from these *kuls*, including the sum due from Tilu Jhambad for the four bill-hooks in excess of the two included in his *jamabandi*; and he recommends that the similar collections for Fasli 1248 and 1249 may be brought to account as revenue.

Now, however, Martoba having large interests at stake in Kaignad, as well as important ends to achieve at Bali, lost no time in petitioning the collector. An inquiry was directed to be made by the peshkar (an officer subordinate to the tahsildar), and the result is reported in exhibit 56, dated 15th November 1841.(2) On looking at the Government accounts the peshkar found the whole of Bali still entered as one *varg* "*muli* No. 10—Balkrishnappa," assessed at H. H. 54-4-4. Then follows an extraordinary mis-statement: "It appears from the Government accounts and documents, &c., that the above *beriz* (assessment) includes H. 3-5-14, which forms the assessment on account of jungle, and constitutes a tax on *kumri* and pepper jungle. The depositions of the old village accountants, mirasis, and others of the place show that the tax on the *kumri* cut on the aforesaid hamlet has been collected from the beginning by the same person who enjoyed the said *varg*. Moreover, I don't find that the *jamabandi*

(1) Ex. 200, Printed Documents 304. (2) Printed Documents, 23.

was separately made and the amount collected by Government." Then, referring to the report, exhibit 200, he says that in the re-assessment of Fasli 1242 the *kumri* that then happened to be cultivated was appraised for assessment, and that the corresponding amount had since been levied, even though the cultivation had fallen short of that forming the basis of the estimate.

It is hard to suppose that this report was a perfectly honest one. The Government accounts did not, and could not, show, as the peshkar says, H. 3-5-14 as the jungle assessment on account of *kumri* and pepper. The only sub-*varg* charged for pepper was Tilu Jhambad's, an amount of annas 8 *hutwali*, producing an assessment of annas 4. The only one charged for *kumri*, as indeed appears from the report, was the same one; whence on H. 0-5-0 would arise an assessment of H. 0-2-8. If from the beginning the *kumri* fees had been collected by the vargdar, that was nothing to the point, seeing that Martoba was not vargdar.(1) His position was that of Tilu Jhambad. It had only recently occurred to him that he could effectually object to any *kul's* cutting *kumri* in the forest of Bali; and his objection had at first apparently been limited to the intrusion or the allowance of others than the *kuls* of the village, who exercised a right equal to his own, and were entered as chargeable with *kumri korlaya* in the account of village cesses,(2) rendering their subjection to a regular *jamabandi* for this new cultivation.

The assessment of H. H. 3-5-14 appears to have been really the whole assessment of Tilu Jhambad's sub-*varg*, arrived at by halving the *rivaz hutwali*(3)as estimated according to principles that we have already discussed.(4) The amount is but 1 taha, or less than a penny, over the exact moiety, and variations to a greater extent occur in stating the same sums in the papers placed before us

(1) See Printed Document, 750, 754.

(2) See plaintiff's examination, Printed Documents, 742; Ex. 200, and accompt. 1, Printed Documents, 304, 306.

(3) See Ex. 94, Printed Documents, 113-116; Ex 200, Printed Documents, 304; Ex. 174, Printed Documents, 261.

(4) See Kanara Land Assessment Case, 12 Bom. H. C. Rep., Appx., pp. 60, 62, 66, 98; Ex. 366, pp. 10, 49. &c. Precise equality of division was not sought.

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The report of the kulkarni to the peshkar of the 25th February 1841 (1) shows that the assessment had eventually been fixed at H. 3-0-9 for Fasli 1243, and subsequently levied. The same thing appears from the report in Fasli 1251 forming accompaniment 15 to exhibit 56, MS., so that the assessment H. 2-4-14 reported did not quite correspond to the fact even as to the whole sub-*varg*. There had been a reduction from an exact moiety of the estimated gains, so as to bring the assessment down to H. 3-0-9, in accordance with Mr. Cameron's objection to the levy on vild trees. Martoba was examined by the peshkar and made the statement to which we have already referred.(2) He boldly asserts that the *kumri* and pepper assessments "having been" imposed on "the said *varg*, and I having continued to pay the full assessment to Government, I have received the produce of the *kumri* cut in the jungles of that hamlet." His true position, as we have seen, was that of a recent transferee (except as to three) of several sub-*vargs*, including one in which *kumri* cultivation had been comprised in the estimate of profits for assessment. In answer to the next question, instead of the recent *azmaish* of 1832, he goes back to that of 1822; and taking the amount of H. H. 5-3-10 entered, against Tilu Jhambad, (3) he divides this in a way quite unsupported by any testimony but his own, and opposed to the older entries in the *jamabandi chitta*(4) so as to bring out a charge of H. H. 3-5-14 for *kumri* and pepper tax. As to the more recent *azmaish* of Fasli 1242, he has to admit that that resulted in Tilu Jhamhad's being assessed at only H. H. 0-2-8 = Re. 1; but the balance (of the H. H. 3-5-14), he says, was debited separately to the *varg*. This is, so far as can be seen, a bold falsehood, which he follows up with another: "The *varg* is in my enjoyment, and I pay the Government the full assessment on the whole *varg*, amounting to H. H. 3-5-14, even when no *kumri* produce is raised every year because I have a *muli* right." *Varg* here, again, means the whole *varg*, not Tilu's sub-*varg*; and Martoba having invented a *kumri*

(1) Ex. 200, accompt. 1, Printed Documents, 30f.

(2) Ex. 56 accompt. 4.

(3) See accompt. to Ex. 372, Printed Documents. 538; accompt. to Ex. 56, MS.

(4) Printed Documents, 588, 590.

assessment of H. H. 3-5-14 which did not exist, now sets forth his payment of the ordinary assessment, as sub-vargdar in place of Tilu, as made on account of the total *kumri* assessment of the hamlet in his character of general vargdar, or else a portion of that payment, together with some other which no one had any authority to receive from him in a capacity above that of a simple raiyat like others of the village. There was no superior vargdar. As a *sanad*-holder he had not yet come forward.

This was a very impudent fraud; but it was quite successful. Mr. Blane, in his order(1) of the 14th January 1842, says: "It appears that the *kumri* assessment and the assessment on account of the pepper grown therein, on *muli varg* No. 10, called Balkrishnapa, in the Bali hamlet of the village of Bhaire, is H. 3-5-4; that the sum is collected from a long time before by the person who has enjoyment of the *varg*; that Marroba has at present enjoyment of that *varg*, that he collects the *kumri* (assessment) from the sub-tenants of the said *varg*, and that he himself pays the (Government dues). There is, therefore, no room (left) to uphold the recommendations of the shanbhog for levying the assessment separately from the said sub-tenants. Therefore you should so arrange that Martoba should collect the assessment from the raiyats, as he used to do before, and pay the Government revenue." Still it will be observed that Mr. Blair limits his order to directing that "Martoba as vargdar—he thought of the whole hamlet—should collect the assessment from the raiyats as he used to do before, and pay the Government revenue." He does not confer on Martoba any other privilege, or any new right of ownership, except that of collecting the *kumri* assessment from the sub-vargdars, and himself paying merely the H. 3-5-14. Even a *sanad* would in such a case be strictly construed.(2)

Martoba, however, having got himself thus recognized as the *kumri* vargdar of the Bali forest, and with no apparent precise delimitation of its boundaries, would, no doubt, have turned his position very soon to profitable account, but for the unfortunate

(1) Ex. 159. Printed Documents, 241.

(2) *Vaman Janardan Joshi* v. *The Collector of Thana and the Conservator of Forests*, 6 Bom. H. C. Rep. at p. 199.

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quarrels which led to the petition of Shable Camut, to the order No. 110,(1) and then to the strict limitation imposed by the orders of the 14th January 1842, (2) the 16th May 1842 (3)and the 6th June 1842 (4) Martoba was thus prevented from cutting timber at Bali in the jungles that were cultivated, and limited rigourously to the exercise of *kumri* cultivation. The further consideration of these orders, as they apply equally to all the estates in dispute, will be resumed when the peculiarities of the case as to each of them have been dealt with.

The direction for levying the assessment direct from the *kuls* at Bali in 1834 (5)having been expressed "until further orders", Martoba tried once more in 1845 to get the whole *varg* entered to his own name.(6) An inquiry having been ordered, Martoba addressed a further petition on the 22nd August 1845 to the tahsildar.(7) Having now to face the former decision that Balkrishna's vargdarship had been a consequence of his being patel, and that the *kuls* had individual rights of occupation, Martoba now plays a stronger card. He for the first time says: "We have got a *mulpatta* forthcoming respecting the same." Ramapa alarmed about his own sub-*varg*, sent in a strongly-worded remonstrance,(8) and after an investigation the tahsildar reported on the 26th August 1847 against Martoba's claim.(9) On the 31st January 1850 Mr. Blane finally refused to depart from the orders of 1833 and 1834.(10)

The *sanad*, though mentioned, as we have seen, in 1845 to the tahsildar, had not even then been filed, conclusive as it would have been in favour of the claim of Martoba as against the objections of Ramapa. But Mr. Blane, having in January 1849,(11)

(1) Printed Documents, 179. (2) Ex 159, Printed Documents, 241.

(3) Ex. 160, Printed Documents, 243. (4) Ex. 158, Printed Documents, 239.

(5) Ex. 213, Printed Documents, 340.

(6) Ex. 375, accompt. 1, Printed Documents, 580.

(7) Ex. 375, accompt 2, Printed Documents, 582.

(8) Ex. 375, accompt. 4, Printed Documents, 585.

(9) Ex. 375, Printed Documents, 579. (10) Ex 124, Printed Documents, 196.

(11) Ex. 91, Printed Documents, 75.

directed a return to be prepared, showing the tracts of forest to which vargdars laid claim as belonging to their *vargs* and the proofs on which they relied to establish their ownership, the document, exhibit 62,(1) was drawn up in Fasli 1260, and in this it is stated that Martoba produced a copy of a *mulpatta* such as the one now before us. This *mulpatta* or *sanad* was well adapted to its immediate purpose. Differing from the other *sanads* in this case, it defines the hamlet by exact boundaries, and grants everything within them on *muli* tenure, *i.e.*, in full proprietorship. *Inams* and *shasan* grants of prior date are to be respected. Saving these, "you shall enjoy the rest of the lands, cutting the trees and jungle, and making use of them as you please." There is to be a remission of assessment if the land should fall waste, a provision peculiar to this *sanad*, and exactly meeting an objection upon which Mr. Blair had, in 1842, excluded Martoba from some parts of the Kaignad forest.(2)

Considering the long course of shuffling and trickery, and the audacious final fraud by which Martoba had got himself installed as the *kumri* vargdar of Bali, it is not to be supposed that he would be prevented by a too sensitive conscience from backing up his claim at need with a forged *sanad*. If the one in question had been genuine, it is morally certain that it would have been produced on such occasions as had arisen in 1822, 1832 and 1841. Taking it, as the plaintiff would have it taken, as a valid document, the assumption of ownership by the Government in 1822 and in 1833, by dealing directly with the sub-vargdars, contradicted the right conferred by it; and Martoba, himself a sub-vargdar and the purchaser of many sub-*vargs*, would be barred by limitation against any remedy on the document, and also by his open acquiescence in the assumption and exercise of rights inconsistent with it. Martoba was quite shrewd enough to forecast these consequences; and he was not the man to lose a valuable property through mere carelessness. Seeing, then, what the document is, and how and when it was produced, it must be set down as a rather clumsy forgery, dating possibly from 1845, when one fraud had been successfully carried through, and the need of another was at the same time becoming evident, but probably from 1850.

(1) Printed Documents 32, (2) See below.

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The oral statements of the plaintiff and his brother in the Court below show that they took their stand there most distinctly on the *sanad*.(1) Ramchandra says(2) he remembers that the sub-*vargs* were formed in Fasli 1242 or 1243 by Balkrishna. The seven raiyats who pay direct to Government, obtained that privilege, he says, by irregular means.(3) Shrinivas himself, asserting that Tilu's sub-*varg* alone conttains forest, that is, in effect. that this stb-*varg* comprises *all* the forest, has to admit that, even after the surrender to Martoba. people, not only raiyats of the village but from other parts of the country, used to come and cut *kumri* there.(4) There are nine sub-vargdars, according to the plaintiff, who pay direct to the Government, having been directed to do so by Balkrishna. He denies that his grandfather or his father ever held a sub-*varg* at Bali,(5) though the list of holdings prepared in 1822 shows Sadashiv's name(9) as holder of sub-*varg* No. 15, and Anandrao's return in 1828(7) shows a holding by the family under the *varg* of Balkrishna, as to which, too, the existence of a *sanad* is denied. It is plain that we cannot rely on the statements of such persons for the determination of any fact that the documentary evidence leaves in doubt.

Goono,(8) who says he cut *kumri* at Bali under Martoba and Bhaskarappa, may have been sent in by them as sub-vargdar. He says that till 1861 there was no limit as to place or quantity in Bali, which is opposed to any individual appropriation of particular areas—a fact of some importance in its bearing on the plaintiff's claim as successor to Tilu Jhambad. Tanu's testimony(9) relates to a time (1841) when an exclusive possession was certainly not held by plaintiff's family.

Setting the *sanad* title aside, the next question that naturally presents itself in connexion with this property, is that of what right, if any, became vested in Martoba through the order of Mr. Blair, dated 14th January 1842.(10) That order, based on an erroneous

(1) See Printed Documents, 740, 750.
(2) Printed Documents, 726. (3) *Ib.* 727. (4) Printed Documents, 742.
(5) Printed Documents, 759.
(6 Accompt. to Ex. 372. Printed Documents, 538.
(7) Ex. 332, Printed Documents, 530. (8) Printed Documents, 767.
(9) Printed Documents, 767, (10) Ex. 159 Printed Documents, 241.

statement of facts, directs thae Martoba is to "collect the assessment from the raiyats as he used to do before, and pay the Government revenue," Martoba had not authorizedly, or except as a purely voluntary arrangement, collected from the raiyats before, and no higher or other right being conferred upon him than this function of a middleman, it would have to be seen whether mere length of time, supposing there had been time enough, would convert the permission into a right, so that it could not be withdrawn as the will of the collector who had given it. That mere lapse of time will sanctify every wrong, and convert every habitual activity into a right, in virtue of some general principle and apart from the provisions of the positive law bearing on any particular case, is a notion very widely spread, but wholly erroneous; (1) and in the instance a reference to the Regulations and Acts of Limitation would be necessary to ascertain whether they prevented the recall of a permission granted through error, and error induced by fraud and misrepresentation, because of the lapse of a term which would bar a suit for actual possession. Further consideration of this matter, however, is made unnecessary by the admission and even insistence of the able pleaders of the plaintiff that his position and his rights are now those of Tilu Jhambad, neither more nor less.

That Tilu Jhambad, as a sub-vargdar of Bali, had any exclusive rights over the forest at all, there is nothing whatever to indicate. Martoba himself did not, in 1841, rely on any such rights. He relied on his own rights as vargdar; though by a piece of verbal jugglery he contrived to identify the H. 3-5-14, for which he was liable as successor to Tilu Jhambad in his whole sub-*varg*, with a *kumri* assessment applicable to that and twenty-one others, as conjoint elements of the single *uarg* No. 10, entered under the name of Balkrishna. This *kumri* assessment on the whole *uarg* attributed in recent years to the sub-*varg* of Tilu had, in fact, Martoba said, always from of old been paid bo himself and his ancestors, in virtue of their being vargdars of the whole, entitled to settle with the Government for all *kumri* cultivation that might take place, and by implication to levy from the actual *kumri*

(1) See *Thomson* v. *Eastwood*, L. R. 2 AP. Cas., 215; Byles, J.; in *Attorney General* v. *Mathias*, 27 L. J. Ch, at p 766; Savigny Syst., s. 177.

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cutters the customary fees for their own benefit. According to this view, Tilu Jhambad, exercising either an unrestricted or a restricted common right of cutting *kumri*, stood in no different position from that of the other villagers. He was not possessed of any particular piece of land, though he might resort to any part of the forest to make a particular temporary use of it; and he could not maintain a suit for the recovery of any piece from which he was excluded, though he might or might not be able to maintain one for damages, and the establishment of his right if it was interfered with.(1) But, putting Martoba's pretensions as vargdar altogether aside, it is not at all to be inferred from the mere circumstance that Tilu Jhambad. cutting *kumri* in 1822 or 1832, was charged accordingly on an estimate of his profits thus acquired that he and he alone was in possession, as proprietor, of the jungle within the village boundaries. After 1832 many other *kuls* of the village went into the forests for the same purpose. In 1840 there seem to have been twenty. Shrinivas, the plaintiff, indeed says (2) "that persons who came from other parts of the country to Jhambad, used to cut *kumri* in these forests," and it was, as we have seen, of the intrusion only of strangers that Martoba had at first complained. What objection could Tilu raise to their cultivating on the mere ground that he had happened to be cultivating, and the others not, in the year in which the new *asmaish* was made? If Tilu could not object, neither could Martoba; and what is the exclusive right which was shared by all the *kuls* of the village at least, if not also by the people of the district at large? But it is an exclusive right—a possession—which is sought in this suit. The facts, as they appear when analyzed, afford no ground for such a claim. The mere assumption of rights for a few years, if the plaintiff's account (exhibit 328) can be taken as proof of the transactions to which it relates between Fasli 1249 and 1257, would not create them; but that documents, in fact, points to no exercise of ownership, and to no benefit derived from the forest, but what might well fall within the limits of Tilu Jhambad's right as we have construed it. Had there been

1) *Willingale* v. *Maitland*, L. R. 3 Eq. 203; *Warrick* v. *Q. Coll*, *Oxford*, L R. 3 Eq. 683, 723; but see also *Lord Rivers* v. *Adams*, L. R. 3 Ch. Div., 359.

2) Printed Documents, 742.

an occupation of the forests on a considerable scale, the account would have shown receipts extending much beyond the fees for three or four bill-hooks in one year. The account is by no means confined to *kumri*, and its principal items cannot apparently relate to debts or payments under that head.

The *sanad* (exhibit 3 (1).), which grants the village of Goera to Goonot Desai, has the advantage over the one relating to Bali, that it purports to proceed from a grantor, Amil Shekh Budan, who is known to have existed. It does not, however purport to be a grant by the amil himself, but merely an announcement that the Mir Asaf has assented to Goonot's application for the village at a reduced assessment. An amil, it was admitted, could not, according to the Mysore Revenue Regulations, grant lands at a reduced assessment for more than three years; and the objection occurs that an officer who could not himself directly make a grant at less than half the assessment, could not indirectly effect the same object by asserting that a superior authority had done so.(2) There ought to be some independent testimony that the superior officer did, in fact, make the grant, or confirm it. In an inquiry held in 1818 five persons being questioned say(3) that they were present in the office of Amil Shekh Budan when he handed the grant to Goonot Desai, but this statement was not signed by the tahsildar by whom it purports to have been taken. The report for which it ought to have served as evidence was not made, and the paper was found seven and a half years afterwards by a subsequent tahsildar lying in the office. This cannot be considered satisfactory evidence, if evidence at all. The signature of Shekh Budan is not proved. The witness Mahamad Mahadi deposes (4) that the name and the title "Subehdar" are incorrectly spelled.

At the head of the *sanad* is the name "Tippu Sultan Badshah". The obvious purpose of placing this apparent sign manual where it is, was to give the document credit as one countersigned by

(1) Printed Documents, 4.

(2) The Mahomedan law bears strongly against any alienation of lands involving detriment to the revenue. See Galloway's Laws and Constitution of India, pp. 74, 79, 97 (2nd ed.) As to the high sanction required by the general practice Fifth Rep., p. 632.

(3) Ex. 47, Accompt. E., MS. (4) Printed Documents, 803.

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Tippu himself; but the evidence of Sayad Husen (1) and a comparison of the signature to exhibit 493, an undoubtedly genuine one, make it plain that the name cannot be Tippu's signature. It is now said that the name may have been written as a mere freak by some clerk, and it is not relied on as a signature; but its primary effect would be to deceive any one, not provided with the means of investigation, into a notion that the grant was confirmed by the then royal authority; and it may well be that on strict principles the holder of a grant, who allowed it to be thus seriously tampered with, could not make any title under it.(2) Mahalkoomi, the widow of Goonot, when she first produced the document in 1817, and Sadashivrao, on subsequent occasions, never gave any hint that the seeming signature was not a substantial part of the Document, but a mere exercise in penmanshipi. The *sanad* has been relied on as it stands down to the institution of this suit. Its date is 12th April 1798, about a year before the fall of Tippu.

The assessment of the village is by the *sanad* fixed at Rahat. Hons 30 a year, equal in Haidari Hons (adopted as the British money of account) to H. 23-0-12. In return for this the grantee in authorized to occupy the village, "to cut the trees and jungle and enjoy his estate from generation to generation" free from any increase of assessment, and any charges under the name of dues on fruit, &c.

The *jamabandi chitta* of Goers as a single *varg*, made out, like the others with which we have to deal, in order to afford a basis for the introduction of the Revenue Board's *sarasari* or average settlement in Fasli 1228,(3) was drawn up from prior accounts framed on the principles and subject also to the exceptions that we have already considered, is exhibit 48, beginning at page 14 of the Printed Documents. A total assessment of H. H. 51-7-14

(1) Printed Document, 799.

(2) *Pigot's Case*, 11, *Co*, 27; *Master* v. *Miller*, 1 Smith's L. C., 796 (6 ed); *Aldous* v. *Cornwell*, *L. R.* 3 *Q. B.* 573.

(3) Kanara Land Assessment Case, Printed Documents, III, 26, 81, 89; and Judgment, p. 176 of 12 Bom. H. C. Rep., Appx.

being thus arrived at, the collections do not, for any year, down to 1225 Fasli, amount to so much as H. H. 23-0-12. In Fasli 1226 the *jamabandi* was settled at H. H. 24-7-8, and towards the close of that year the petition (exhibit 96(1)), dated 27th June 1817, was presented to the collector, Mr. Harris. In this, Mahalkoomi, saying she is widow of Goonot and that her husband had obtained the *sanad* from the amil, points out that the *jamabandi* exceeds the assessment thus engaged for, and prays for a reduction to the amount of the preceding year, H. 21. She naturally makes no allusion to Mr. Reade's notification of 1881, by which all grantees under *sanads* desiring to benefit by them had been desired to bring them in at the next *jamabandi*. Her *jamabandi* at that time was but H. 20, and she may, though holding the *sanad*, have thought it expedient rather to rely on her position as a mere vargdar with a precarious title, seeing that in that capacity she might expect a leniency which she could not claim as a proprietress at a rent fixed for ever.(2) According to the rigorous constructions applied to Crown grants in England, Mahalkoomi's rights under the *sanad*, even had its authority been recognized by the new Government, had already become forfeited through non-payment of the stipulated rent;(3) and if she had excused herself on the plea of a smaller *jamabandi* having been imposed, that settlement, on terms inconsistent with the grant and having no reference to it, might be considered a bargain on a new footing, implying a surrender or extinction of her *sanad* title. She could not, nor could her husband, gain an advantage for several years by the suppression of the *sanad*, and then again an advantage by its production and assertion; and the non-revelation of the title to a Government which had not created it, whose adoption of it was requisite to its validity, and which had given notice that *sanads* not produced would be refused recognition, exclude the supposition that the reduction of assessment was a mere act of bounty not touching the right to levy, or the right to hold, under the *sanad*

(1) Printed Documents, 160. (2) See Ex. 366, pp 53, 68, 86.

(3) See 10 Reports 42a, Co. Lit. 203; Com. Dig., Tit. Prerogative; Printed Documents, 70

(4) See *Pickard* v. *Sears*, 6 A. & E., 469., and Indian Evid. Act, s. 115; *Freeman* v. *Cooke*, 12, Ex. 663, quoted and approved by Blackburn, J., in *Maxted Paine*, L. R. 6, Ex at p. 171.

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Sadashivrao's name appears beside that of Goonot Desai in 1801-02; and in exhibit 66, the huzur *chitta* brought from the collector's office, there appears, opposite to the entry of H. H. 22(1) as the *jamabandi* amount for Fasli 1215, the following explanation :—"The aforesaid persons (Goonot and Sadashiv) having said that the same (*varg*) may be given to any body who will tender more than this (H. 22) and no one having tendered more, H. H. 22 are settled as *jamabandi*." An invitation and a contract of this kind were incompatible with the continued subsistence of the rights and obligations created by the *sanad*. Even in the *chitta* of 1799 Goonot is named(2) as *izardar*" or contractor (3)This suggests that if he had the *sanad*, he, from the very first, suppressed it. A contract or farm, by a sole owner for the collection from himself of the rent for which he is already answerable, has no practical meaning; and if Goonot was not, in 1799, in possession under his *sanad*, that *sanad*, viewed as a derogation from the rights of Government, would, according to the Madras law, have no effect.

The collector seems not to have been inclined to press these legal objections, if, indeed, they had occurred to him. He directed the tahsildar(4) to inquire into the petition and report on it. This was on the 1st July 1817. No report was made. It is possible that, until a new collector came on the scene in 1824;(5) Mahalkoomi or Sadashiv did not care to get the inquiry hastened. On the 23rd March 1820, Mr. Harris issued an order (6)that the titles, under which *kumri* cultivation was carried on, should be looked into and reported on. A further order to the same end was issued on the 4th January 1823. The rough survey of the forests took place in 1822 and 1823, the results of which are embodied, as to the properties now in dispute, in exhibits Nos. 77(7) and 98. A general survey of the lands of Ankola was going on from 1821 to 1825,—one that seems to have served no very useful purpose, but which might be taken as a sign that the

(1) The sum H. 22 appears also in the *berij patta*. The entry of H. 21 in the *jamabandi chitta*, Printed Documents, 16, seems to be a mistake.

(2) Ex. 66.

(3) As to the practice of farming village revenues, see the Fifth Rep., 118.

(4) Ex. 97, Printed Documents, 762. (5) 12 Bom. H. C. Rep., 180, Appx.

(6) Ex. 71, Printed Documents, 38.

(7) Printed Documents, 45.

Government was awaking to its interests, and that more searching inquiries might follow. These measures may have suggested to people who were interested that the less they stirred in matters touching the forests the better for themselves. Sadashiv, too, had fallen into disgrace. Mr. Harris, on the 14th June 1821, complains(1) of the kulkarnis for suppressing accounts; and from Mr. Fisher's Report(2) it appears that Sadashiv was on this account dismissed. That Venkatramanaya was appointed in Fasli 1231, is stated by Martoba himself.(3) Martoba makes this a ground for impugning the forest survey, as made by a person unacquainted with the locality; but the return (exhibit 98) prepared by Venkataramanaya(4) was made on information supplied in part by Martoba himself. The statement in it, that there are no *sanads*, may not be at all conclusive; but Sadashiv, with his official connexions, must have known well of the return, and should, if he had really acquired any interest under a *sanad*, have brought it forward at this time. In 1825, however, Sadashiv was patel of Goera, and in that capacity he addressed to the sub-collector, Mr. Cotton, the application, exhibit 47.(5) In this he represents that the grantee of the village under a *sanad* from the late Government, who had abandoned it, had been induced by him to return on a promise of reduced assessments. The tahsildar, however, had for the current year fixed the assessment at H. H. 27-5-0, a sum in excess of the H. H. 23-0-12 of the *sanad*. The patel, therefore, suggests that the *sanad* assessment may not be exceeded. The tahsildar being directed to inquire, then found the petition of Mahalkoomi and the papers connected with it. On the 9th January 1826 he recommended that Sadashivrao's rquest should be complied with; but the disposal of the matter was postponed until the *tharav beriz*, then still in contemplation,(6) should be introduced.

Amongst the accompaniments to the tahsildar's(7) report is a deposition (marked H) made by Sadashiv when questioned as patel

(1) Kanara Land Assessment Case, Printed Documents, III, 53.
(2) Printed Documents, 143 See Revenue Board, Printed Documents. 357.
(3) Ex. 56, accompt. 23. (4) Ex. 157, Printed Documents, 237.
(5) Printed Documents, 12.
(6) Printed Documents, 13. See 12 Bom. H. C Rep., Appx., p. 176.
(7) Printed Documents, 12.

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on the subject of his recommendations. He says that Mahalkoomi died (between 1818 and 1821) while the inquiry on her petition was pending. "The mirasi," he says, "abandoned the village in Fasli 1231, because of the assessment being fixed at H. 30." Sadahiv had assured him that he would get the assessment regulated by the *mulpatta*, and thus induced him to return. But now finding it still excessive, he intends to withdraw, the consequence of which will be that the village will be left uncultivated. On these grounds Sadashiv recommended a reduction of the assessment, without hinting that he was himself in any way interested in the matter. If there was, in truth, a mirasi owner of the village, then there is no deduction of title to Sadashiv and the plaintiff. No one knows what became of him. If, as seems more probable, the mirasi was a mere figment, and Sadashiv abused his official position to obtain a reduction of assessment, or even a recognition of the *sanad*, it would be opposed to all principle that he should be allowed to build up rights against the Government on such a foundation.(1) If Mahalkoomi's petition was true, there were no male relations to succeed her. The estate, whatever it was, which she held, had escheated to Government on her death;(2) and Sadashiv, having become interested in the property, now sought by fraudulent misrepresentations to get the efficacy of the *sanad* admitted in favour of an imaginary person, that he might take the benefit of it himself.

The intended "*tharav*" was even now not extended to Ankola;(3) but a reduction of the assessment on Goera from H. 30 to H. 27½ was obtained in Fasli 1235, and to H. 23-1-4 in Fasli 1236 and 1237. In Fasli 1238 the *jamabandi* is first confirmed at H. 27½, but then follows as entry the effect that an ancient *mulpatta* having been presented at Honore, a reduction was allowed to H. 25. On this the plaintiff relies as a recognition of the *sanad*, and of a transfer of the interest under it to his grandfather. If by recognition is meant taking notice of its existence and contents, possibly, too, being influenced by them,

(1) See *Murphy* v. *O'Shea*, 2 J. & Lat, 422, 429; Story on Agency, s. 210; *White and Presthall's Case*, 1 Leon, at p. 331.

(2) *Collector of Masulipatam* v. *Kavali Venkat Narainappa*, 8 M. I. Ap, 500.

(3) See 12 Bom. H. C. Rep., Appx. 177.

then no doubt there was a recognition of a document which was probably the *sanad* with which we are now concerned. But if by "recognition" is meant an admission of the document as genuine, valid, and legally obligatory, nothing of that kind seems to have occurred. The "ancient *mulpatta*" might well have been accepted as a basis for a rough estimate of what would be a reasonable assessment, because of the difficulty there was in estimating the productiveness of the village on account of its remote situation in the forest,(1) without its being taken as obligatory; and that it was not so taken, is perfectly clear from the assessment being fixed, not at H. 23-0-12, the sum mentioned in the *sanad*, but at H. 25. The strongest point in favour of the admission of the *sanad* as binding, is what Mr. Blane says in 1848: "Pagodas 26-7-14 were struck off the *beriz*, and entered in the accounts as *mulpatta kumri*." The meaning of this is that in accounting for the difference between the full estimated revenue and that actually realized, the sum named appeared amongst the deductions from a complete levy, with the assigned reason against it.(2) This, however, was not in an account between the collector and the plaintiff's father; and a mere description of the cause of a deficiency, which would not be in any way binding on the plaintiff, is not binding on the defendant. The term "*mulpatta kumri*," too, may mean *kumri* allowed by reference to a *mulpatta*, whatever kind of reference it was. A mere description, like this, of some entry, which is not itself forthcoming, cannot be weighed against the evidence that the *sanad*, in the required sense, was not accepted by the collector. If it had been accepted as binding, the question would still remain of whether Sadashivrao could be allowed to benefit by it, it having been produced and dealt with on his false report and deposition, which, it may be presumed, he backed up in the personal interview noted in exhibit 48A, under the date of 10th December 1828. A scheme of deception is not sanctified by being extended over several years; and that in 1828 the family did not rely on a *sanad* title for the vargdarship of Goer, appears from the return, made in that year by Sadashiv's undivided cousin, the shanbhog Anandrao, of properties in which

(1) Printed Documents, 18.

(2) See Kanara Land Assessment Case, Printed Documents, III, 91.

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he was interested.(1) In this the value of Goer is set down in the column of lands for which there is no *sanad*; and as it had already been sent in before December 1828, it is hardly possible that Sadashiv could have relied on the *sanad* in that month as a ground of title for himself.

Martoba many times afterwards spoke about his *mulpatta* and his *muli* rights; but he could not thus create for himself a title which did not exist. In the year Fasli 1252 it appears that Martoba was called on to pay a village cess of five annas as "*dhobi khand*". The village cessess, as we have seen, were included under the larger head of land revenue, and Martoba, paying the assessment of the *varg*, which comprised the whole village, claimed exemption. This was allowed by the sub-collector, Mr. Parkar to whom it appeared that the "irregular imposts, such as *dhobi khand*, &c., were included in the *beriz* of the whole *varg*". The superfluous recital by the peshkar, in announcing this decision(3)to Martoba, of his having stated that he collected under his *mulpatta*, is no evidence at all that he did collect under it, much less that his right under the *sanad* was admitted. Why the letter should have been written at all, is not apparent; and though referred to, it is, of course, in no way assisted by the letter, exhibit 53, MS. from the deputy tahsildar in 1861, which directs adherence to the former order. It does not appear that it had been departed from: the application seems to have been made for the sake of getting something more said about the *mulpatta* or *sanad*.

In 1845 the tahsildar appears to have given permission to Martoba to cut down 1,509 trees in Goer, thinking he held the village "on *muli* right;"(4) but Martoba, though he may have spoken of his *mulpatta* in his application, relies, when examined,(5) on the permission he had obtained, not on an ownership conferred by a *sanad* and independent of any permission at all. The *sanad* is itself insufficiently proved; it is discredited by the fraudulent tricks of the plaintiff's family in connexion with it, they having been the persons really interested when it was first produced in

(1) Ex. 332, Printed Documents, 529. (2) See Ex. 100, Printed Documents, 164.

(3) Ex. Printed Documents, 510

(4) Ex. 51, MS. (5)Ex, 51, accompt. 6, MS.

1817 or 1818 ; it is abandoned or suppressed to the benefit of the grantee in his dealings with the Government for several years ; it has never been acted on as binding the Government to its terms; there is no evidence of the interest under it having been conveyed to the plaintiff's predecessors. For all these reasons it is impossible that he should make a title under it. He must stand or fall by a differently constituted right.

Sadashiv, as we have seen, got his name entered side by side with Goonot Desai's in the *jamabandi chitta* or revenue account as early as 1801. A series of *beriz pattas*, subsequent to that date though not unbroken, shows that he generally paid the assessment. The earliest in the year 1800 are in the name of Goonot Desai alone; Sadashiv's name is joined with Goonot's in the year Rakataksh (1804-5). This recurs in several succeeeding years, untill, in 1825-26, the *beriz patta* is addressed to Sadashiv alone by the sub-collector, Mr. Cotton.

In 1834 Sadashiv's name appears for the first time alone in the *jamabandi chitta* ; (1) but the mere retention, down to that year, of Goonot's name was so in accordance with the ordinary usage that it is not of any great significance. It might be retained even though Martoba had asserted and established a transfer to himself, and would thus not disprove his right any mere than the mere conjoint entry of his own name, and then its sole entry, woule prove it. What does appear is that, on the 29th June 1831, a notification was issued by the collecter(2) to the effect that a *varg* at Kaignad would be sold on account of arrears due by Sadashivrao on several other *vargs*. Amongst these, appears " Village of Goer, *muli* No. 1. *Jamabandi* of *varg*, Sadashivrao, H. 20. Recovered 14. Balance, H. 6." from this coupled with the entry of Sadashivrao's name in the accounts, it seems clear that he was made responsible as *vargdar*. The mere circumstance, indeed, of his being held answerable for the revenue, would not in itself necessarily imply that he was vargdar.

(1) Printed Documents, 19. The entry was probably consequent on the investigation of assessments then going on, and in the course of which Martoba was examined in December 1833. See below.

(2) Ex 56. accompt. 29, MS.

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Mr. Harris in 1821 points out(1) that in many instances of Sarkar land even, while the Government rent is received from one person, the name of another is retained in the *kulvar* statement, agreeing with the *kulvar jamabandi chittas* for reasons already discussed. As under the Bombay system,(2) though the registered holder is responsible, the land and its produce and he who takes the produce are answerable too, so, under the Madras Regulations XXVII of 1802 and II of 1806, the collector could recover from the proprietor, or the actual occupier of the soil, arrears due on account of land revenue; and Regulation I of 1826 extended the remedies of distraint and sale as against any one owing arrears to the Government. If Sadashivrao, therefore, or Martoba had accepted the annual *beriz patta*, or had actually cultivated the land, he would be answerable for the revenue assessed on it. But here there seems no reasonable room for doubt that Sadashiv really was vargdar. No other claimant has set up a prior right, and he who has been forced to pay as *muli* vargdar, has thereby obtained a distinct recognition of the right corresponding to that liability.(3)

The position of the plaintiff's family as vargdars of Goera has never, in truth, been contested by the revenue authorities. The question has been, what does this right include as regards the forests of the Goer village, or what right is there vested in the plaintiff, apart from any entries in the revenue accounts, which he can assert against the Government. The plaintiff's theory of his position is: "I am proprietor alike of the forests and the rice lands of the village, subjected, as such, to payment of revenue to the Government, but not deriving my title from such payment. Long and exclusive occupation made me owner; the Government recognizing me as mulgar, exacted land revenue from me in that character, in which, too, I paid it. It could not afterwards withdraw that recognition, and dispossess me as having had a mere tenancy-at-will of one part of my estate, undistinguished as to its tenure, in earlier days frome the other part, to which my full ownership is still admitted. Taxing me on one principle

(1) Kanara Land Assessment Case, Printed Documents, III, 51.

(2) Reg. XVII of 1827, s. 5; Printed Judgments for 1875, p. 314.

(3) 12 Bom. H. C. Rep., Appx., 210.

for one portion, and on another for the other, does not affect my antecedent right to either."

The counter theory of the defendant is in substance this : "There has been no occupation of the forests. While they were deemed almost worthless, no obstacle was placed in the way of a free resort to them, except for timber of special value. Such timber was always preserved, and other timber also, as it, too became valuable. The plaintiff's alleged ownership is contradicted by the constant exercise of timber-cutting by the Government, and by the prevention of it on his part as also by the collector's disposal of lands included within the boundaries of the village. The plaintiff is a *muli* vargdar, but *varg* is primarily an account, while *muli* describes an estate, Being a vargdar he was allowed to farm the fees payable at customary rates by those whom the Government allowed to cut *kumri* in the forest of the village ; but this was not any estate in the land, which was but occasionally made use of even by those who thus cultivated it. The privilege having been withdrawn, the farm necessarily ceased. While it lasted, the sums payable by the plaintiff were debited to him in the same account in which, for the lands really in his occupancy, he was charged as mulgar ; but the mere combination of the charges in a single account did not assimilate the sources from which they were to be derived. The plaintiff was a *muli* vargdar as being a mulgar of a certain estate, without being mulgar of everything to which any charge in his account related."

The theory of the *kumri* assessment as payment for a farm of a poll-tax, which originated with Mr. Blane, has already been partly considered. There seems to have been a practice, in the earlier part of the century, of farming the proceeds of the "*kumri korlaya*" tax leviable in the jungles of the ghats. In its order of the 23rd May 1860(1) the Madras Government quotes from a report of Mr. Harris :

"The following is the meaning of this term, as explained by the collector, Mr. Harris, in 1822 :—'*kumri korlaya* is the jungle of the ghats cut down with the *korlaya*, or bill-hook, by a race of

(1) Printed Documents, 156

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men (Mallei Kudigul) who inhabit the ghats and never descend into the lower country. They depute a head man to the renter on the part of the Sarkar annually to arrange their barter of hill produce, such as cassia, pepper, cardamoms, ragi and wax. The renter gives them cloths, rice, tobacco and arms in return. For this permission he enters into *darkhast* with the Sarkar.' "

Mr. Blane, too, in 1849(1) says that the *kumri* of a village was rented out in gross to one or more who made their own terms. The payments, he says, began with the Company's Government to be entered in the raiyats' (*benz*) *pattas* along with *moturpha* and other items subsequently struck out. The Sarkar *kumri*—the fees payable for *kumri* cultivation of Government lands—may very well have been farmed out. But, when it was farmed out, it was let upon a *darkhast*, or application, like other farms of which the timber dealings furnish many instances. There is no instance adduced of a vargdar, much less of the plaintiff having presented any *darkhast* for the farm of *kumri korlaya* tax on the lands at Goer or Kaignad. If the tax for a particular village was ever rented on the plan described by Mr. Blane, the proceeds of the farm could not be entered against each contractor separately as a sum due on his *varg* in the sense of estate. The sum would rank amongst the village taxes, which, as we have seen, were items of the land revenue, though no longer *moturpha*, and not attributable to landholders as such. No instance has been adduced, in this case, of an item included in a man's *varg* (in the sense of assessment account) clearly not referrible to his occupation of the land ; and it is not easy to see either how a farm of revenue could be thus debited, or how, if it was ever included, it should have been repeated year after year, unless the farm was perpetual. Where, too, as at Kaignad, the same vargdar held many estates, why should the farm rent be distributed amongst them ? A personal contract for the proceeds of the fees would be a single one, standing apart from all sums due for the occupation of the soil for ordinary cultivation. If it is answered that the farm, having originally been granted to the owners of particular *vargs*, passed with the *vargs* to the transferees, that adherence to the estate of

(1) Printed Documents, 353,

itself shows something quite different from an ordinary farm of revenue. A farm thus dealt with, must have had reference, too, to some particular area as to be *kumried*; for how else could the terms be settled? And when we come to a definite area of forest land, the profits of which under *kumri* cultivation were attached by way of perpetual farm to a particular estate, what reason was there in the earlier times for making this distinction? *Kumri* cultivation was regarded as the only of making the forests profitable; it was a necessary preparation for higher cultivation. Under the native governments at any rate, and for a long time under the British Government, land was a drug;(1) the difficulty was to get it taken up. If occupied as private property it was none the less profitable to the State, since it was still subject to proportional assessment. The probabilities of the case, therefore, agree rather with the primary suggestions of the accounts than with Mr. Blane's theory, which looks too much like one invented to support a foregone conclusion, and differs, too, from the reasons assigned by him, in exhibit 90, (2) for imposing a limit on *kumri* cultivation by vargdars, as well as from the earlier theory of Mr. Blair. In the beginning of the century every extension of proprietorship being regarded as an advantage, the entry of a *shist* or assessment for a piece of land was looked on as a sufficient title or indication of ownership. At a later time this became embarrassing when payers of assessment on forest tracts rested on the same admission or presumption; and then the payment of *kumri korlaya*, which, under circumstances, might or might not indicate ownership, was pronounced in all cases to indicate something quite different.(3)

The revenue clerk Shivarao(4)agrees with the old shirastedar(5)that the *kumri* assessment was never shown in the *kulvar jamabandi* statement in a separate column, but always included in the ordinary *shist* and *shamil*. No great significance is to be attached, perhaps, to the circumstance that in some of the accounts *shamil* is charged expressly upon the *kumri korlaya*. This, it has been urged, shows that it was an ancient tax on an ancient tenure; and

(1) See above, Ex. 366, pp. 20, 22 and 23. (3) Printed Documents, 142, 357.
(2) Printed Documents, 73. (4) Printed Documents, 730.
(5) Kanara Land Assessment Case, Printed Documents, III, 84.

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certainly it would not be easy to understand how *shamil* could be attached to a mere farm of revenue; but the extremely loose manner in which the early accounts were drawn up, deprives them of any claim to unreserved confidence. The *shamil* was shifted about a good deal at the discretion of interested officials, and Mr. Blane adduces an instance in which it was attached in the accounts to a *varg* of entirely new formation. (1) The same thing indeed, occurs in the case of some of the *vargs* at Kaignad. (2) Mr. Fisher says that sometimes the amount of the *shist* was not realized by a *kumri* vargdar, and an instance occurs in the account at Printed Documents, p. 401, of H. 0-7-8 paid, though there was no cultivation. The true explanation of this is probably the one given of similar cases by the shirastedar, (3) that when vargdars were well off they would inform the shanbhogs of some slight diminution of their produce, but at the same time avoid a re-assessment by paying the full amount entered against their names; but the way in which the matter is treated in the accounts shows plainly that the *varg*, rice land and forest together, was regarded and dealt with as a whole, not as landed estate, *plus* a farm. In the latter case, whether the farmer realized any thing or not, would be a matter of indifference; on the theory of an equal division of the *geni hutwali*, or rack-rent, the omission of an allowance for land left "*banjar*" or uncultivated, called for particular explanation.

The report of Mr. Fisher states that there were in the district 1,750 *vargs* including *kumri shist*.(4) Of these 140 were purely *kumri vargs*. Such a *varg*, No. 36, was newly formed at Kaignad within the period of our inquiry. It was, a few years after its formation, changed from a *geni* to a *muli varg*. Now, although the addition to a vargdar's account of an item of charge on account of a farm is conceivable, yet that hypothesis will not account for the existence of *varg* consisting wholly of *kumri*, and standing in the accounts apparently on precisely the same footing

(1) Ex 366, p. 244. See also Kanara Land Assessment Case, Printed Documents, III, 95.

(2) See below.

(3) Kanara Land Assessment Case, Printed Documents, III, 89, para. 7.

(4) Printed Documents, 139.

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as any other *vargs* producing land revenue. In the case of the newly-created *vargs*, including forest lands granted by British officers, the entries would be made in just the same way. The occasional diminution or augmentation of the assessment, on account of a fluctuation in *kumri* cultivation, would be naturally referred to the same principle as in the case of rice lands. In the case of 307 *kumri* vargdars Mr. Fisher reports that they have now no *kumri* rights. This he accounts for by the supposition that they have brought their *kumri* lands under regular cultivation. It may be that some of the vargdars had been shut out from *kumri* cultivation on account of the indefiniteness of their local range, as described in para. 54 of the report; but if the 307 vargdars had brought their *kumri* lands under regular cultivation, one must inquire what lands? A mere farm of a poll-tax would not by itself enable them to make such an encroachment. The holding must have had reference to some particular topographical limits; and, again, the thought suggests itself that, at the time when this institution arose, the Government that parted with the *kumri* rights to an individual proprietor, would not think the distinction, between a farm of the only then conceivale profits of a particular space and a proprietary occupation of the space, worth preserving. If, too, the *kumri korlaya* had been a mere farm, each of the 307 vargdars, after securing his appropriation, would probably have come forward, resting on the complete absence of record of boundaries, and said: "I renounce my *kumri* farm. Remit the charge for it." That they were allowed to convert their lands into rice fields, and that they continued to pay assessment under the denomination of *kumri korlaya*. shows that the *vargs*, rice lands, and forest alike, where they were really occupied by an individual, were looked on by all parties as integral holding subject to an integral assessment.

From such a state of things as this the one which existed at Bekal would arise by natural development. As the vargdars pressed on each other's boundaries, the limits of each estate being distinctly adjusted, the *kumri korlaya* would be levied at a sum proportional to the bill-hooks for which each afforded employment, and afterwards according to the acreage annually fit for *kumri*

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cultivation. But on the rent or farm theory why should there be any particular extent of forest recognized as belonging to a *varg* and proportional to a constant "*kumri korlaya*" payment? One contractor or group of contractors would one year take the whole *kumri* of a village, and the next year another; and where less was taken, the quantities would be perpetually varying, so as to prevent the growth of any definite association between a particular tract of cultivated land.

The account which Martoba himself gives, on the 6th September 1841, (1) of the *kumri* assessment seems to be more consistent with the general theory of the subject and with the history of the district than that of the collectors. He says the *kumri* assessment was fixed on an estimate of how much *kumri* could be cut at the rate (for *geni hutwali*) of one rupee for each bill-hook thus employed; and in the same inquiry he says that he has "employed raiyats in the jungle included in his *shist*, and received from them the appropriate fee."(2) If he was in possession of a forest tract, this is what would take place; if he were cutting *kumri* casually about the whole forest of the village, he would still be charged in the same way. The mere entry of an item of assessment for *kumri korlaya* would not be conclusive of a definite occupation: but a charge for particular places within the village as included in his *varg* would tend to show, especially when coupled with the absence of an levy by the Government directly from the actual *kumri* cutters, that these were regarded as occupied by the vargdar. This indication would be stronger if the charge was made, though the lands lay by waste. If combined, they make up the area of a village which, as a whole, gives its name to a single *varg*; it is hard to resist the conviction that the vargdar was regarded as occupying the whole area. Why otherwise divide the *kumri* assessment into many local items? Treating it as a rateable estimate, based on profits usually realized, the division is exactly conformable to the similar one made in appraising the rice lands. Tippu's regulations direct that "all *hatakodaki*" (*i. e.*, *kumri*)" lands appertaining to the villages shall be brought into the measurement (or survey) and

(1) Ex. 56, accompt. 4, MS. (2) Ex 56, accompt. 2, MS.

shall be included in the *jama*."(1) The village of Goera had probably been thus constituted as a revenue unit. We ought to have some evidence to counteract that which strongly tends this way, something to show that the unit had been broken up.

Now, on examining the *jamabandi chitta* of the *varg* in question we find it headed(2) "*Kulvar Jamabandi Chitta.* Village of Goera, Goonot Desai and Sadashivaro Nadkarni, Mulgars." The account was prepared in 1818-19 from the annual *chittas* drawn up from 1799; and, however loosely these may have been prepared, and with whatever carelessness as to the nature of tenure on which *vargs* were held, this title of the account is a *prima facie* indication that the estate had been treated as a *muli* or proprietary holding, occupied and paid for as such by its tenants, and allowed to be so held by the Government. The *jamabandi* or assessment actually imposed in the annual settlement is, indeed, very far from coming up to the *shist* and $\frac{3}{4}$ *shamil* estimated, according to Munro's plan, as the sum properly leviable,(3) and the permanent proprietary estate appears all along to have obtained advantages reserved in theory for precarious holdings;(4) but the reports of the collectors, and especially of Mr. Blane, show that this happened in many cases where there was no doubt as to the existence of ownership in the tenant.(5) In the enumeration of the different lands within the village as contributory to the revenue, the forest hamlets included within its boundaries(6) are set forth each as chargeable with a specified cash payment, for "*nanebab kumri korlaya*" (=cash revenue tax on *kumri* cultivation), and it has been urged that this entry indicates the farm of a levy of fees payable in cash; but its true significance is obviously this, that, as the Government charged a customary fee for each bill-hook, its owner would pay the vargdar no more, and the vargdar would

(1) Mysore Revenue Regulations 33; 3 Buch. Mys., 71.

(2) Ex. 48, Printed Documents, 14.

(3) Printed Documents. 104; Ex. 366, p. 143; Kanara Land Assessment Case, Printed Documents, III, 79, 80.

(4) See Ex. 366, pp. 17, 53, 68, 86, 143.

(5) Remissions were granted under the native governments, also without forfeiture in some cases. See Ex. 666, para. 24.

(5) See Printed Documents, 716, 796.

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expect no more for its employment within his holding.(1) The amount realizable by the vargdar was, therefore, immediately got at by reckoning the number of bill-hooks actually or potentially used in his jungle; and the *geni hutwali* thus determined, divided by two, gave the proper assessment in money (*nanebab*) without any calculation of the quantity and price of produce. In former times the general assessment had, to a great extent, been actually levied in grain; the cash levy was only a commutation.(2) As distinguished from such an assessment, one leviable in cash only had naturally acquired the designation of *nanebab* (=cash division of the revenue, or coin cess), which was continued at a later period as having an obvious, though not quite the same, relation to the details of the revenue system as they then existed.

Of the 22 Rahati Hons forming the total of the *kumri korlaya* assessment, H. 6 are charged on account of "*vadis*" (hamlets or divisions of the forest) "lying waste, there being no issue of the mirasi." This entry certainly points, and strongly, to the vargdar being regarded as proprietor, and, therefore, liable for the assessment, whether the land was actually cultivated or not. The use of the term "mirasi" for the deceased cultivator may suggest that the vargdar was, as to these minor holding, only allowed to settle for the whole village, within which others independent proprietors might subsist, as at Bali; but the mirasi here was probably of the class mentioned by Munro,(3) holding under the vargdar, though on a permanent tenure, respected even on the reversion of the superior estate to the Government. The mulgar of the whole village was, so far as the account indicates, dealing with the Government on the ground of his taking the profits of all the forests, and paying assessment thereon, just as of all the rice lands included in his *varg*, although the basis of the estimate in each case was somewhat different.

(1) See Kanara Land Assessment Case, Printed Documents, III, 85.

(2) 12 Com. H. C. Rep., Appx. 63. It was a common course in many districts to levy the revenue on dry-crop lands in money, while that on wet crops on account of their great fluctuations was taken by an actual division of produce. See Fifth Rep., 476, 482, 671.

(3) Ex. 366, pp. 21, 86, 131.

In the whole account, after the estimate has once been made, there is no distinction between charges for *kumri* and charges for rice land. The assessment is treated as a whole, subject as a whole to increase or diminution without any reference to a portion as a farm at an invariable rate, while the rest waried according to produce.

The production of the *mulpatta* in 1817, 1825 and 1828, as well as in 1850,(1) must have brought distinctly to the notice of the collector, whatever opinion he had as to the particular title set up, that the whole village, including the forest lands, was claimed, and was, in fact, held by the mulgars. The assessment in 1828 and afterwards was fixed on a consideraton of the *mulpatta*, a re-valuation being, as the *chitta* says,(2) waived on account of the remote situation of the village amongst the jungles.

In 1833 there was a general inquiry into the productive capacity of estates with a view to a re-adjustment of the land revenue after the visit and report of Mr. Stokes recorded in the Kanara Land Assessment Case.(3) Martoba was then examined; and he speaks as of his holding extending to the whole village without distinction. His reason for not paying the full assessment (besides the *mulpatta*) is that the whole of the land is overgrown with jungle. He agrees to an estimate being made; but this does not seem to have been done. In 1850, again, he apparently sets up (4) both a right and a possession extending to the whole area of the village.

The private account (exhibit 298) does not seem to afford any certain indication in favour of the plaintiff's claim. But, apart from this, the accounts of the Government, so far as they can be relied on, go to sustain the plaintiff's assertion of an actual inclusion in his holding, not merely of the rice lands, but also of the forests of the village of Goera. The revenue officers had notice of the holding, and apparently recognized it, down at least to 1841, when Martoba's dealings in the timber came to

(1) Ex. 62, MS. translation of entry referring to Goera. The document, however, as already noticed, is not authenticated.

(2) Printed Documents, 18.

(3) Printed Documents, III, 156 ff, 180; 12 Bom. H. C. Rep., 187, Appx.

(4) Ex. 62, MS., 481.

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the collector's notice, The Government had perhaps even before this cut timber in the forests claimed and, for some purposes at least, apparently held by the plaintiff's family; and subsequently to that year these transactions become frequent and exclusive. The defendant relies on them as contradictory of the plaintiff's ownership and an assertion of the ownership of Government, such as to afford material support to the theory of *kumri* assessment and *kumri* cultivation put forward by him and as, at any rate, having constituted an assumption of ownership on the part of Government, a taking of possession on its behalf, which, from the moment it occurred, constituted an ouster of the plaintiff's family, supposing them to have been in possession before, and imposed on them the necessity of suing to recover possession within the ordinary term of limitation—a term long exceeded before the present suit was brought.

If the cutting of timber in the forests in dispute was essentially an assertion of complete ownership over them, then acts of that kind, clearly proved, would necessarily be inconsistent with any continued recognition of ownership to any extent, however qualified, vested in the plaintiff's family. And as the executive Government has certainly the power to give effect to an intention it may express to take and keep possession as against a subject,(1) its exercise of what it deems its right here and there in an unenclosed tract, at its own will, as parts of a whole, to which the same right and appropriation are declared to extend, constitutes an ouster of the subject from the whole, notwithstanding any casual or furtive incursions on his part within the places thus appropriated. But, under the English law, though the right cannot, by mere custom, be acquired to take profits *alieno solo*,(2) yet there may be a grant of woods and timber in a particular place, saving the soil, as a fee *in alieno solo*,(3) as particular profits arising in one place may by grant or prescription belong to an estate in another.(4) In a recent case it was held even that a grant might be presumed to the poor of a parish of the

(1) See per Lord Tenterden in *Butcher* v. *Butcher*, 7 B. & Cr., p. 402.

(2) *Gateward's Case*, 6 Rep., 59 *b*.

(3) Rep., 137 *b*.

(4) *Grimstead* v. *Marlowe*, 4, T. R., 717.

right to lop trees, and sell the wood for consumption in the parish.(1) Thus the right to cut timber is separable, as a legal notion from the residual ownership with which it is usually joined in England; (2) and in this country the reserve of the forests or of timber trees of special value by the State in a grant of land is a general and well-understood incident of the estate thus created(3) In Gujarat it is not unusual for the owner of trees and the owner of the soil in which they grow to be different persons. This custom may have sprung from the Mahomedan law. It does not necessarily follow, therefore, from the cutting of trees by the Government that the Government, asserting an unqualified ownership of the soil, extruded every private claimant. As it could cut down a teak tree on soil admittedly private property, so could it conceivably cut a matti tree; and allowing that the plaintiff's family were in actual occupation of all the forests of Goera as *kumri* vargdars, the question has still to be considered of whether that occupation necessarily included an ownership and exclusive disposal of all the timber as an integral element of the right and its exercise, so that each cutting of a tree by the collector was a contradiction of any ownership in the plaintiff. We have for the determination of this point practically nothing to go upon except the analogy of the dealings of the Government with teak and blackwood in the earlier times. In falsely asserting that the teak taken from the forests in dispute by the Government was sold or given by their family, the plaintiff and his brother were unconsciously strengthening the case of the defendant upon the ground of limitation; because if the proved, and now admitted, taking at will of this timber was a violation of the plaintiff's right, that right has been contradicted in an essential part ever since the beginning of the century; but the truth appears to be that the list

(1) *Willingale* v. *Maitland*, L. R., 3 Eq., 103.

(2) That there may be an actual possession of the soil by a subject, while the Crown retains the sole exercise of ownership over the trees, see *Harper* v. *Chasemore*, 4 B. & C., 574; and as a grant may be made of timber trees passing only these and the soil on which each stands (Com. Dig., Tit. Grant E. 5) so they may be reserved, cases of which occur in Chalmer's Opinions, pp. 133, 139.

(3) *Waman Janardhan Joshi* v. *The collector of Thana and another*, 6 Bom. H. C. Rep., 191, 200; *Govind Purshotam* v. *The Sub-collector of Kolaba and another*, *ib.* 188.

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of reserved timber trees was extended step by step, as the value increased, in the exercise of a right to the timber of the forests regarded as the property of Government; and that, for some years after the *kumri vargs* were embraced within the reservation, there was still no question as to the *kumri* vargdar's right to an exclusive user of the soil for *kumri* cultivation. The exercise, on the part of Government, of this right in this sense, the submission to it, while the acts did not necessarily imply anything more, would amount only to an assertion and an acceptance, as between the parties, of a narrower definition of the vargdar's right as conceived and exercised at an earlier day. The plaintiff could not say that the right exercised was no right, without admitting that his own alleged ownership had been contradicted; but he might say that its existence and its ever-extending exercise, once admitted as a definite derogation from his own complete proprietary right, were still consistent with his general ownership and possession and the recognition of these by the Government. The plaintiff's family appear, in fact, to have submitted without dispute—though, as they say, on terms, for many years—to the cutting of timber by Government and to the prohibition of cutting by themselves, before they were finally excluded from the forests. This may not unreasonably be referred to their acceptance of the position of owners subject to special rights in the Government, which, under the circumstances, is the view more favourable to them, and it is one supported by the acts and the language of the revenue authorities. When a right is divisible, it may be partially lost by partial invasion or non-user.(1) It does not appear that until recent years the Government's dealings extended beyond the timber and its preservation. The collectors did not let kunbis loose on the forests in dispute as Sarkar *kumri* nor in Goer, except *post litem motam* did they form a new *varg* (*varg* No. 2) out of the forest lands. The formation even of such a *varg*, supposing the plaintiff was not deprived of possession, though entirely opposed to the *sanad*, would not itself amount to more than an alteration or re-distribution of the assessment, which would follow naturally on its conversion into highly-cultivated rice land, and which, as ruled

(1) Dig, Lib. 7, tit. iv, f. 14.

in the Kanara Land Assessment Case, is quite consistent with a *muli* vargdar's full and continued ownership. The case differs from that of the constitution of the new *varg* No. 36 at Kaignad, not only in that the latter was long *ante litem motam*, but that it was voluntarily taken up by Martoba at a new rent altogether distinct from what he was paying for his other *vargs*, and on a lower tenure than that on which, as it is contended, he held the estate out of which it was formed. Here the existing possession was not disturbed. There was, in effect, merely a demand for an increased rent which the plaintiff, to save his property, acquiesced in. The tenure continued unbroken notwithstanding such a variation as this.(1) In 1839 Mr. Maltby writes ; (2) "The extent of the Government rights in the jungles and wastes has never been clearly defined, and some extensive tracts have been gradually included by persons whose right is extremely doubtful." If he had thought that the cutting of timber by Government had up to that aime prevented or extinguished private ownership, he would have been freed from a considerable difficulty. So, too, would Mr. Blane in 1848. (3) Writing of the Goer property he says : (4) "The particulars of the present cultivation of this estate are not known ; but there is *kumri* attached to it, which in Fasli 1257 has paid" (*i. e.* to the vargdar) "Pag. 29-2-8, being Pag. 4-2-8 in excess of the *beriz* on the whole of the regular cultivation, which is, therefore, held entirely free." He was aware, then, of the occupation of some parts, at least, of the Goer forests by the plaintiff's father, and felt unable to do what he would have been glad to do,(5) turn him out of possession on behalf of the Government, until there had been a decision on "the question of a fixed *beriz* of ancient assessment upon undefined tracts of cultivated and waste lands."(6) In 1855 the sub-collector, Mr. Robinson, while he rejects Bhaskarappa's objection to a grant of land to one Bahudin, resting on the ground of its being included in Goer.

(1) *Doe dem.* 13 *Monck v. Geikie*, 13 L. J. Q. B., 239 ; *Clarke* v. *Moore*, 1 J. & Lat., 723.

(2) Ex. 366, p. 129.

(3) See Ex. 366, p. 194 ff.

(4) *Ib.* p. 257.

(5) Printed Documents, p. 353.

(6) Ex. 366, p. 204.

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bases his determination on the fact of the lands not being included in the specification of Fasli 1228 of the contents of the Goer *varg* which we have already considered. He cannot, therefore, have regarded the plaintiff's family as wholly dispossessed by the timber cutting then already for many years monopolized by the Government. But the consciousness of the revenue officials in such a case as to places beyond the limits up to which their intentions were clearly expressed, shows best what particular kind of mastery was exercised in acts to which they could assign a wider or a narrower legal scope by the intention with which they were accompanied. The fair conclusion appears to be that arrived at by the Madras Government, that while the plaintiff's family set up a "claim to have exclusive and proprietary rights of *kumri* over extensive tracts of forest land, so that no person can cut *kumri* within those tracts without their permission.....these claims appear to have been acquiesced in for many years by the revenue authorities of the district."(2)

That Goonot Desai was *muli* vargdar, and that his rights in that capacity passed to the plaintiff's ancestors, seems not to have been questioned—whatever question there might be as to the extent of the rights which that position implied. Transfers of land were not registered until about the year 1836 ; (3) and before that time Martoba's property had been distrained for his assessment as *muli* vargdar of this Goer estate. The possession, whatever it was, was his, and, if duly recognized, would give him the same right against the Government to his forest lands as to his rice lands. Property, where there is a supreme political authority, has its origin or its necessary sanction in the acts or the permission of that authority;(4) and the general recognition of an occupant's right as owner by the representatives of Government is, in the last resort, the only basis, except prescription implying the same thing, on which a possessor of lands can rest his title as against the State.(5) Here there was an enjoyment on a proclaimed proprietary

(1) Ex. 460, Printed Documents, 694 ; accompt. 9 to Ex. 460, Printed Documents 704.

(2) Res. of 23rd June 1860, Printed Documents, 155.

(3 Printed Documents, 771.

(4) Maynz D. R., s. 177 ; Savigny's System. Vol. I, Appx. 2.

(5) See Grotius, D. J. B. ac P., L. II, c. 2, s. iv. ; *Collector of Madura* v. *Veeracamoo Ummal*, 9 M. I. A., 446.

right. To some extent at least thee was a long acquiescence in it. What, then, was the extent of that enjoyment? Was it as a matter of fact interfered with, as alleged by the defendant? When did the acquiescence of the Government cease? Was it wholly withdrawn and the plaintiff's family wholly ousted at a time more than twelve years before the present suit was brought? When an act on the part of Government took place, constituting an ouster of the plaintiff's family, but in its immediate physical operation limited as to the extent of enjoyment interfered with or extent of locality, was the plaintiff's whole possession as owner destroyed, or did it continue as to the portions of land not actually occupied by the Government, so as to leave a right surviving as to these portions, which could be asserted after the bar of limitation had begun to operate as to the others? The answers to these questions, depending on the general dealings of the Government with the forests in dispute, must be deferred until the circumstances more particularly affecting the Kaignad and Bhaire estates have been considered; but the questions themselves must be borne in mind in order to assign their due importance to the several portions of the evidence bearing on each of those properties. The plaintiff denies as a fact that the dealings of the Government with the timber in the forest were such as to deprive him of possession even of that, inasmuch as his family levied fees on the Government's licensees down to the year 1861. His father's and brother's payments under the arrangements imposed by Mr. Blane and his successors for the regulation of *kumri* cultivation and their submission to restrictions *prima facie* derogatory to their ownership, were, he contends, the result of an agreement or understanding which kept all rights in suspense, but at the same time preserved them against limitation down to 1861, when effect was given to the final resolution for excluding him from the forests, and appropriating to the public use the moneys hitherto kept in deposit. If there was an enjoyment of timber by the Government, that may be referred to payment, or to his own acquiescence on grounds of policy,(1) and is not incompatible with the continuance of his right even to the timber. Much less is it incompatible with the existence and the continuance of his

(1) Printed Documents, 755. See accompt. 23 to Ex. 56, MS.

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right to the soil. Particular aggressions on the land, especially in recent years, and particular exclusions of his own family, may rank as encroachments become irremediable through limitation, but still without disturbing his possession or his right in the remainder, until the final act of expulsion which forms his cause of action in the present suit. Reserving the discussion of these several contentions we proceed to examine the case as to the Kaignad estate.

The *sanad* on which the claim to the forest at Kaignad rests(1) purports to be a grant from Asaf Shekh Makhdum, dated 18th March 1779. The witness Mahamad Mahadi Husen(2) thinks the ostensible signature is not one at all. It is admitted, on the one hand, that there was an asaf of the name of Shekh Makhdum, and on the other that his execution of this document is not directly proved. The plaintiff relies on circumstantial evidence and an enjoyment conformable to the grant for proof of its genuineness and effect. An asaf had not power, under Tippu's Government, to make grants to the detriment of the revenue; but here it is said that the *sanad* does no more than assure to the grantee, Sadashivrao, the enjoyment of the forest of the village at the ordinary assessment.

The payment of 155 Rahati Hons, set forth as the consideration paid for this grant, is equal to nearly five years' assessment. This might be a good inducement to the Mahomedan officer to make the grant, especially at a time when his master's fall was imminent; and recognition of the worship of the forest deities, as an object to be achieved by Sadashivrao's intervention, might very will be but an echo of his own application. Without any feeling of his own part as to the local divinities except one of animosity or contempt, Shekh Makhdum might be willing to insert some reason which would serve Sadashivrao against the probable reclamations of mirasis who might come back in a quieter time to demand a restitution of their holdings.(3) The

(1) Ex. 4, Printed Documents, p. 6. (2) Printed Documents, p. 803.

(3) See the remarks of Mr. Grant (Lord Glenelg) in the Fifth Rep. at p. 318, which show that allowances for Hindu worship were frequently made or winked at by Mahomedan officials.

objection taken to the grant as one made on improbable grounds, therefore, though it deserves consideration, does not seem to be one of any great weight.

Why Sadashivrao at such a time should have been willing to pay five years' arrears of the assessment to obtain a grant of the forest on terms of annually paying the whole land revenue arising from it, is however not easily explained. The condition of affairs in that part of the country where Kaignad is situated, as described by Munro, was not such in 1799 as to invite any outlay of capital in the purchase of land. The state of the adjacent village of Goera is, indeed, set forth in some detail in the *sanad* we have already discussed, which in this respect is in all probability historically true, whether genuine or not. Through an insurrection of Yemaji Naik, it says, the "taluka became destitute of inhabitants and waste," and the people could not be induced to return to Goera, so that it became worth while to induce Goonot Desai to take it up at less than half its ordinary assessment. This was in April 1798; and why in March 1799, when public tranquillity had certainly not been restored, Sadashivrao should pay handsomely for a similar grant on so much more onerous terms, is not at at all obvious. Forest land then commanded no premium. The Kaignad *sanad* itself says that the mirasis have fled, and cannot without special management be induced to return. Sadashivrao showed, even after the establishment of British rule, that he set no value on a *muli* right to the forest, and we have had to deal with many indication that the difficulty at that time was to get such lands occupied.

The date of the *sanad* is suspiciously near the date of the subversion of Tippu's dominion. In fabricating a fasle *sanad*, one date, no doubt, might as well be chosen as another; but the regulations for registering all grants which existed under native as under British rule, the course of communication by which sub-officers of various kinds were informed of all such transactions, imposed great difficulties on the fabrication of spurious grants so long as the old accounts were preserved, or might come to light, except with the adoption of some date which would account for the omission of ordinary formalities.

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The severance made, by the grant, of all the forest lands of the village from all the rice lands, was an unlikely arrangement. It was to be expected that Sadashivrao, seeing his gain in a transaction so unusual, would have the forest lands at once formed into a single *varg* in his own name under orders issued to the local officers of the magni and the village. A large portion of the forest belonged to eight *vargs* in the village, including rice lands. The owners of these lands would almost certainly return and demand possession, not only of their rice fields, but also of the forest attached to them, which to them would be of value as furnishing fodder and manure. The breaking up of these *vargs*, which might prevent the rice lands from being re-tenanted, was not a probable transaction; while, if we confine the operation of the *sanad* to the purely forest *vargs*, of which there seem to have been twelve, besides some other waste, the *beriz* entered in the *sanad* will no longer at all agree with the sum of the assessments of the several forest tracts as taken from the old accounts for those drawn up under Munro's administration. Neither, indeed, would it agree with the claim now made under the *sanad*. If arrears were paid up as a consideration for the grant, what was to be expected was a payment of the whole arrears and a grant of the whole *vargs* at the regular assessment, as an arrangement obviously desirable to both parties.

After the settlement of Kanara the *sanad* was not brought forward for many years. On the 27th March 1800 a proclamation(1) was published, announcing that while a preference would be given to mulgars, and their rights would be recognized if they came forward within twelve months, yet, subject to that, lands would be granted to applicants on advantageous terms, Sadashivrao's grant was, on his own showing, a valuable one. It is part of his case that the tenants of the deserted rice lands returning became his sub-tenants, he paying the assessment on their whole *vargs*. Why, then, did he not secure his position by getting it recognized, and having his name entered as *muli* vargdar? The notification announces that lands held on "*kowl*", or lease, may be held still on the same terms; if his were advanta-

(1) Kanara Land Assessment Case, Printed Documents, II, p. 3.

geous he would naturally have availed himself of the opportunity to make them sure.

When Mr. Reade's notification of 1811 called for all *sanads* to be produced at the next *jamabandi* on pain of their not being afterwards recognized, Sadashivrao did not produce the one for Kaignad any more than that for Goera or for Bali.

To show that the *sanad* was produced in A.D. 1815, the paper exhibit 273 (MS.) is brought forward. This is an unauthenticated copy of an unsigned order, supposed to have been addressed by some one unknown to the patel of Kaignad. Such a paper is plainly inadmissible, and, if admitted, it could not further the cause of the plaintiff, who wishes to use it, as it would show that down to 1815 he was still not in occupation of the forests, and had omitted the obvious means of having effect given to his *sanad*, supposing it to be a genuine document. In an order passed by Mr. Fisher, as collector, on the 2nd April 1857 there occurs this passage(1): "In one order issued by the tahsildar to the patel of Kadra in Fasli 1224 it is stated that Sadashivrao had produced a *sanad* given during the time of the late Government;" and from this Mr. Shantaram would have us infer that the *sanad*, with which we have now to deal, was, in fact produced before the tahsildar in Fasli 1224 (1814-15). But the papers sent up with the report (exhibit 56 (2)) were in the collector's office, and amongst these was a copy of the document, exhibit 273. It is to this evidently that he collector refer, as it would, *prima facie*, appear to be a copy of an order from the tahsildar. It is not necessary or allowable to go further, and assume that the collector had before him satisfactory evidence that, in fact, such an order had been issued. He only mentions the matter to refuse any significance to it. Much less could this passing mention of an order, to which the collector himself attached no importance, prove that a *sanad*, and this particular *sanad*, had been produced before the tahsildar.

Knowing, as he must have known, of the forest survey in 1822-23, with a view to mark off private estates from the Government jungles, it was to be expected that Sadashivrao

(1) Ex. 148, Printed Documents, (2) Printed Documents, p. 23.

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would bring forward his *sanad*. In his examination in 1841 (1). Mortoba complains of the inaccuracy of the survey record; and he was so deeply interested in the matter that, holding a *sanad* which, as he thought, made him proprietor of all the Kaignad jungles, he could hardly have failed to produce it when these had been set down as Government property.

When examined in the inquiry of 1833 with a view to a re-assessmet, (2) Martoba, as we have seen, mentioned and insisted on the *sanad* for Goera. But, though questioned *seriatim* as to the numerous *vargs* held by him at Kaignad, he makes no allusion to having a *sanad*. Some of his answers can be reconciled with his having a *sanad* only by his intention to suppress it. Thus he says of the *varg muli* No. 23: "This *varg* belongs to the mirasi.....I only received from him the amount of revenue settled, and paid it to Government."..."Now I am willing to pay the amount of revenue that may be settled by the Government." As to *muli* No. 27 he says: "This land was lying waste, and I have been cultivating it since the time of my ancestors.....I have paid the assessment leniently fixed thereon year by year.....I agree to an estimate." Of *muli* No. 31 he says; "Patu, the mulgar, incurred debts, in payment of which he gave this land to me . . . I agree to an estimate of produce." As to *muli* No. 32: "The mulgar, Govind Hoti, made over the lands to our possession when he was alive . . . The produce being insufficient, I am unwilling to pay the assessment in full . . . I agree to an estimate being made." These answers, all of which relate to purest forest *vargs*, are inconsistent with his being at the time proprietor of the whole forests under a *sanad* which excluded the rights of all other private persons. Two years afterwards the *vargs* 27, 31 and 32 were along with *varg* No. 14 revalued for assessment. The accounts show Martoba as the actual enjoyer of the lands, though the *jamabandi chitta* were and continued in other names. A consequent slight reduction in the assessment of *varg* No. 31 is recorded in the *chitta*.(3) This mode of dealing, while on the

(1) Ex 56 accompt. 23.

(2) Ex. 100, Printed Documents, p. 164. (3) Printed Documents, p. 394.

one hand, it shows that the revenue officers did not in the least regard the forest holdings as mere farms of fees, shows, on the other hand, that Martoba either had no *sanad*, or else chose to suppress it, and to enter into arrangement inconsistent with it.

His cousin Anandrao, in the meantime in drawing up the return of properties in which he was interested, dated 13th June 1828, had mentioned but three of the seventeen *vargs* now in question,(1) and these as held under any *sanad*. The explanation of this offered for the plaintiff is, that Anandrao, who could not, as united in interest with Sadashiv and Martoba, and as nadkarni or accountant of the group of villages including those in dispute, be ignorant of the family's possessions, made a false return, acknowledging an interest only in properties in which that interest could not be concealed. This account of the matter may be in some measure correct, but it does not agree with the insertion of many other *vargs* at Kaignad (those marked Nos. 4, 7, and 11 of the list at p. 529, Printed Documents), besides the three registered as belonging to members of the family; and the omission at the same time of the other *vargs* now in dispute. The more reasonable conclusion would seem to be that Sadashivrao, who was already an extensive landed proprietor at Kaignad, was now engaged, as a few years later he was engaged at Bali, in getting every *varg* possible into his own hands or under his control, but that this process had as yet gone no further than the return indicates. The *beriz patta*, as has been pointed out for the plaintiff, were still issued in the name of the nominal vargdar, dead perhaps years before, to the person really interested, and by means of these, and the record kept of them, Martoba's responsibility was enforced in 1831 for sixty *vargs* entered in other persons' names. It is most likely, therefore, that though Sadashivrao, or some other member of the family, had taken out the *beriz pattas* not only for the three *vargs* but for several others, Anandrao did not feel constrained to include all those *vargs* in his list. The three *vargs* were indisputably property, but the family stood in the relation only of annual tenants to the other fourteen *vargs*; that is, they were in form only annual tenants, though to all practical intents

(1) See Ex. 332, Printed Documents, p. 529.

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proprietors. The plaintiff says(1) that except the three which were registered in the names of his father and his uncles, and one in the name of Shantappa, the family book-keeper, all the others have been held continuously in the names of the original mirasis, but still only in reality as tenants of his own family.

The suggested explanation of Anandrao's conduct assumes a complete want of principle on the part of the plaintiff's family and class. Sadashiv, the head of the family, could not have been ignorant of what was going on (indeed his frequent petitions show that he kept the closest watch on everything that could touch his own interests); and his acquiescence may properly be taken as a sign either that the *sanad* did not then exist, or else that he chose to suppress it, in the hope of gaining more by that course than by taking its benefits along with its burdens. It must have been a similar motive which in 1831 led Martoba to take up a new *varg* (orginally *geni* No. 76, afterwards *muli* No. 36) formed out of the waste. If, as he afterwards insisted, the whole of the forests already belonged to him under his *sanad*, why should he accept this forest *varg*? Supposing he had no *sanad* at that time, the transaction is an ordinary and reasonable one. Supposing he had the *sanad*, his acceptance of the new estate on an inferior tenure implies an admission of the power to grant it, a power incompatible with his own concurrent ownership and thus involving an extinction or surrender of it.(2) For the present, however, it is enough to say that his acceptance of the estate points to the non-existence of a *sanad* at all. There was no occasion at that time to fabricate one; for, as Martoba says in his examination two years afterwards, he, as the patidar, enjoyed all the advantages of ownership over the greater part of the forests, heightened by the possibility of putting forward, when it suited him, poor raiyats as the vargdars, in order to get favourable terms at the *jamabandi* on the recommendation of his own official connexions. But, as a *muli* proprietor of the whole forest, why take at an additional assessment a mere *geni* holding formed out of his own property? As the distraint of *varg* No. 9 in 1831 was removed by Martoba's paying the money due on sixty-four *vargs*

(1) Printed Documents, p. 758.

(2) *Lyon* v. *Reed*, 13, M. & W., 285

(only four of them standing in his own name) before matters had proceeded to an actual sale, there is room to suspect, seeing the wealth and the influence of the family and the movement that was going on for a new assessment, that the whole transaction was but a trick designed to show that a large property belonging to Martoba was over-taxed, and probably, too, in case of need, to establish at any future time his interest in that property which might be compromised by Anandrao's return in 1828. If the family were really insolvent, losing money by the numerous *vargs* they already held, their acceptance, at that very time, of a new *varg* and its new responsibilities is, apart from any consideration of the *sanads*, rather surprising.

In 1841 new exigencies arose. The forests had begun to grow valuable, and Sadashivrao's foresight to bring in its reward. Then came Mr. Blair's order, No. 110, dated 15th April 1841. (1) Martoba had thought that as a mere vargdar, or one exercising the rights of a vargdar paying *kumri* assessment, he might cut down timber and dispose of it. "Besides this," says Mr. Blair, "no other proof seems to have been brought forward by him, and the payment of *kumri* assessment gives a right only to the cultivation of *kumri*, not at all to the cutting of timber." "No vargdar must," in future, "cut trees in the forest, without permission obtained on the production of evidence to satisfy the Government that the forest belongs to his *varg*." An inquiry was then started, which led to the report, exhibit 56,(2) and to the orders, exhibits 158 and 159.(3) We have seen reason to think that the report was a not altogether honest one as regards the hamlet of Bali; either that, or else the peshkar must have been hoodwinked by Martoba's superior astuteness. The order No. 110 had been passed upon a report made by the tahsildar Yeshwantapa; and from Martoba's petition of the 15th June 1841(4) it appears that the same officer had recommended that fees collected from some *kumri* cutters at Kaignad should be credited to Government. Martoba ingeniously suggests, whether truly or falsely, that there is a personal enmity between him and

(1) Printed Documents, p. 179.

(2) Printed Documents, p 23.

(3) Printed Documents, pp. 239, 241,

(4) Accompt. 2 to Ex. 56. MS.

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the tahsildar and thus succeeds in getting the inquiry in the matter transferred to the peshkar. It is remarkable that even in this petition there is not one word as to the *sanad*. Martoba relies on the jungles, where the cultivation had taken place, being included in his "*shist*," *i. e.*, within the limits for which he was charged with assessment. He even acticipates that on inquiry the jungle may turn out to belong to the Government, in which case he begs that he, who has collected from the raiyats, may be allowed to pay the money to the Government. Why should he rely on his mere payment of assessment, or why make such an offer as this, if all the while he held a grant of the whole forest? It is true that in another petition,(1) dated very shortly after the order, exhibit 110 (*i. e.*, 3rd May 1841), and asking for a further inquiry, he had requested that he might be allowed to produce his "documents" and evidence of enjoyment; but this might refer to any papers, such as accounts, which he thought would support this claim; it is far, indeed, from the specific and emphatic reference which the *sanad*, if then in existence, would have led to on the part of a man certainly never inclined to under-estimate his rights.

Martoba being examined by the peshkar on the 24th July 1841,(2) was allowed to limit his answers for the present to Bali. On the same day, however he appears to have given a pretty full account of his Kaignad property, and the claims he set up to it.(3) The whole jungle of the village, he says, was given by the late Government to his father at a *beriz* of H. H. 24-8-2, *kadim beriz* and a *shamil* of ... ... 10-9-2

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making a total of H. H. ... 35-6-5

Out of this, lands assessed at 5-8-9 he said were waste owing to

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want of cultivation. H. 29-7-13 (which should be 29-7-11) therefore, was the remaining assessment, which, he said, the family had paid to Government from his father's time, taking in return the rents and produce of the forests. "The *kumri*

(1) Accompt. 1 to Ex. 56, MS. (2) Accompt. 4 to Ex. 56, MS.

(3) Accompt. 23 to Ex. 56, MS.

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*beriz*," he adds, "of my several *vargs* has been entered in the "*chittas* of those *vargs* respectively." An examination of the mirasis, &c., will show "that mirasis have from the beginning been appointed for each *varg*, and that separate boundaries have been fixed for the forest." Next he gives the names of the several mirasis, with the forest held by each, the enumeration comprising thirty-one different tracts of jungle. Kankavali and Virje he mentions as occupied, Hotehwadi in kasba Kadra only as waste. When asked to assign the different forest *vadis* to the different *vargs* to which they belong, he evades the question by saying "as the *vargs* of the entire village are held by us, the raiyats of any particuar *vadi* do not confine themselves to that *vadi*, but cut *kumri* wherever in the jungle they find a good place for it." It is then pointed out that from this indefinite answer it cannot be ascertained that any particular jungle belongs to any *varg*: and thereon he replies "according to the *kadim beriz rekah zhadati*" (*i. e.*, the scrutiny of the ancient assessment of lands once inventoried in the *rekah* as assessable) "the assessment has been entered as due to Government, which arises from the whole village, including the forest. From this a deduction is made of four *banjar*" (*i. e.*, fallow or waste) "spaces, and all the remaining *beriz* apportioned to the several *vargs* of the village. All the jungles of the village are, therefore, included in the *beriz*, and no jungle is left for Government." The notion on which this answer rests is that as an occupation of all the forests would lead to a jungle assessment distributed amongst the *vargs*, so the presence in the accounts of a jungle assessment implies a charge for, and therefore an occupation of, all the forests. The fallacy, obvious as it is, has found wide and ready acceptance owing to its favouring the claims of individuals or communities against the Government, and has not been altogether contemned even in the argument before us.

Martoba proceeds to charge the return of Government forests prepared in Fasli 1232 (1) with gross inaccuracy, on account of its having been prepared by a new comer, Venkatramana, when his own family were turned out of office, and without inquiry

(1) Ex. 77, 98, Printed Documents, p. 45 ff, and MS.

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from them. The exclusion he speaks of lasted but for a year, (1) when the plaintiff's family recovered the shanbogship in the person of Anandrao. He remaining in office till Fasli 1230, prepared the document, exhibit 332, already referred to. In Fasli 1240 he was replaced by Narayan. (2)

Thus far, even in his examination, Martoba has made no allusion to any *sanad*; though there could be no more proper occasion for mentioning it than when for his right to the forests at Kaignad he relied on his family's having held them all from the former, Government, or when he was asked to show by enumeration which forests belonged to each of his several *vargs*.

On the 25th September 1841 he is questioned again on recommendations of the shanbhog, similar to those in accompaniment 1 to exhibit 200,(3) that *kumri* assessment should be levied direct from the cultivators in several places within the Kaignad jungles. The shanbhog's obvervations as to one of the cases deserve particular attention. In Fasli 1247 three *kumri* cutters having been employed by a raiyat named Buda Gavda, he was charged in the *jamabandi* 1¼ *falam* for it.(4) Now, in Fasli 1250 he had again employed three persons, and the shanbhog proposed to charge him again; but Martoba stepping forward said that an assessment of 5 *falams* in the *varg* of Bhiku Gavda of Kadra for pepper-grove tax covered the land in question. The shanbhog says: "The jungle is more than 2 *kos*" (4 miles) "wide and long. There is no defined place in respect of which the assessment is entered on account of pepper groves. The reason assigned, therefore, is no good one for saying that the place, where the *kumri* is cut, is included in the *varg* . . . . an assessment of 8 falams 2 tahas is entered as *kumri korlaya*," (*kumri* assessment) "unrealizable owing to want of a tenant (*kulnasht*,) in kasba Kadra;" whereon he suggests that the assessment should be levied on account of the three *kumri* cultivators

(1) Printed Documents, p. 238. (2) Accompt. 24 to Ex. 56, M.S.

(3) Printed Documents, p. 306.

(4) The account was probably made out thus: one adult produced or paid annas 8 two women or children 8 annas, total Re. 1=2½ falams, a moiety of which reckoning it as "*geni hutwali*", was 1¼ falam charged against the vargdar. See Printed Documents, p. 309 ff.

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From this we see that there might be a charge for forest assessment in a particular *varg* (account) referrible or not to a defined space in the forest; that Martoba, on the ground of Rs. 2 being entered in the assessment of a particular *varg*, claimed a right to exclude other raiyats from cultivating land which could not be said, as no particular land could be said to belong to it; and that, even if this had been otherwise, no assessment was paid on the *varg*: it was entered as *kulnasht*.

Martoba in his answer admits that Hotevadi in Kadra is waste; and he adds that Virje and Kankavali also are waste, as well as land called that of Krishna Bhat of Hartage. He thus accounts for a deficiency, in the village forest revenue, of H. 5-7-3, though he had previously named Virje and Kankavali as amongst his *vadis* occupied by tenant mirasis, and had also mentioned Hotevadi as held by Shidda mirasis, and Hartage as held by Anand mirasis. He had got the assessment reduced, he says, on account of these lands being untenanted, but would pay it if ordered to do so. The Kadra jungle, he maintains, is not distinct from those included in his *vargs*. He had before said that each *varg* had its defined piece of forest; but such a definition would now have excluded him from the extensive Kadra jungle. Being then asked for any documentary evidence of his right to the forest, he says he will produce it with a separate petition, still hesitating apparently to bring forward the *sanad* which would have been an end of controversy.

In the next question Martoba is asked, with reference to the shanbhog's return showing that he pays *kumri* assessment on but fourteen *vargs* at Kaignad, how on this he asserts a right to all the jungles, and to point out which jungle belongs to each *varg*. He answers that the deduction of H. 5-8-9 for four uncultivated forest spaces being made, H. 29-7-13 is the *beriz* on the 14 *vargs*. But, besides these, he says there are three, *geni* No. 10 and *muli* Nos. 13 and 19, bearing a jungle *beriz*. What he seems to mean is, that, albeit the full jungle assessment, *minus* that of four places named charged in the fourteen *vargs*, yet he pays, over and above that, an assessment on three other *vargs*, including forest. Then, as to the asked for specification, he says that the accounts

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originally obtained by the Government contained an enumeration only of the rice lands. In the case of *muli* lands the assessment only has been set down, while the enjoyment has been governed by previous practice. The accounts of the former Government did, however, assign particular "*vadis*" in the forest particular *vargs*, and he undertakes to produce an old *beriz zhadati patta* showing the proper distribution. Then at last he mentions a "*patta*" obtained from the former Government. Being asked as to the teak trees, he attributes their presence to planting partly carried on by his ancestor Dhatta Shenvi, though the grant was in 1799 to his father Sadashiv. In his petition of the 4th October 1841 he names only his father as having planted teak, which he says he supplied to the Government agents in return for presents for the silvan deities. He tries to justify his sale of timber to traders as really beneficial, and at last produces the *sanad* so long withheld.

Along with the *sanad* Martoba produced,(1) not a *beriz zhadati patta* of the late Government, but a paper drawn up by himself, showing the distribution of the jungle assessment of Kaignad over the different *vadis* of its forest, and ascribing these to the several *vargs* in which he was interested. In this he makes the whole jungle *beriz* amount to H. H. 35-6-6 (he had formerly said 35-4-4, probably by mistake, see above), of which he accounts for the following:—

| | | | |
|---|---|---|---|
| Sum of assessment on *muli vargs* | H. H. | 17 | 6 7 |
| Do. do. do. *geni* ... ... | | 12 | 1 6 |
| including *shamil*, total ... | | 29 | 7 13 |
| Assessment on land not cultivated (*banjar*) at Hote, Virje, Hartage and Kankavali. ... | | 5 | 8 9 |
| | | 35 | 6 6 |

Great stress has been laid on the agreement of this account prepared by Martoba with the actual *zhadati chitta*(2) of the year Krodhan (A.D. 1805) obtained at the time from the taluka *kacheri*

(1) Ex. 364, accompt. 30 to Ex. 56.

(2) Ex. 56, accompt. 55.

by the peshkar. But Martoba, belonging to the shanbhog family, would readily have access to all the village accounts for many years,(1) and probably had copies of every paper that could be of any service to him. What he undertook to produce was an ancient *zhadati patta*; what he produced was an account drawn up by himself in detail agreeing in a way with a comparatively modern *zhadati chitta*, which dealing only with totals according to differnt classification, gave no details as to particular *vargs* or sources of assessment. In this *zhadati chitta* the miscellaneous cesses come to R H. 32-5-1
Deduct for an item of assessment on dry-crop land (Hakal) 0-2-8

and there remains... ... ... ... ... R. H. 32-2-9, the amount in the *sanad*, equivalent in H. H. to H. 24-8-2. The assessment H. H. 29-7-13, however, was arrived at by taking *shist* and *shamil* together on all the forest lands of the village, and subtracting therefrom the *shist* and *shamil* of four waste spaces. The correctness of Martoba's statement could not, therefore, be really tested by the *beriz zhadati chitta*, which neither shows how much of the total *shamil* of the village is attributable to the forest lands, nor out of this how much, if any, is assignable to the "*pada bhumi*" or waste land, the assessment of which appears in exhibit 364 as a deduction. Whatever it was, it must have been included in the H. H. 5-8-8, since the whole *shamil* is charged against the village in one item, and there is no deduction at all on account of waste land. Mr. Fisher in 1857 (2) speaks of an early *beriz zhadati*, which showed all the wenty forest *vargs* as *kulnasht*; but of this there is no evidence before us, and the statement was probably erroneous.

On looking at the *zhadati chitta* itself, one is struck by the circumstance that the miscellaneous cesses composed of several fractional items amount in the aggregate to exactly H. H. 25-0-0. That all the petty sums leviable from a number of *vargs* in Rahati currency should, when converted, chance to come to a precise integral number of Haidari Pagodas, is so very unlikely, that it

(1) See Kanara Land Assessment Case, Printed Documents, Vol. III 52, 53.

(2) Ex. 148, Printed Documents, p. 221.

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may be deemed virtually impossible. The figures seem to indicate a choice of H. H. 25 as a sum very near the right mark, and then an adjustment of the constituent items so as to make up that total. If such a process took place, the agreement of the forest assessment in the *sanad* with that in the *zhadati chitta* would not tend to confirm the former document of six years' earlier date.

That there should, however, be a general agreement between Martoba's statement (exhibit 364) and the *beriz zhadati chitta* was in any case to be expected. They were drawn up from the same data; and the *kulvar jamabandi chittas*, or individual raiyats' accounts, would, as to the assessment leviable, whether remissions were granted or not, necessarily agree with the collective revenue accounts kept by the village, magni and taluka officers. As the account showed what the total possible assessment was, and what the total actual assessment, Martoba had to assign H, 5-8-6 to "*kulnasht banjar*" in order to account for H. H. 29-7-13 as the sum of the assessments entered as in present operation. Even as to these, however, there is a discrepancy that is not explained. The shanbhog's report showed that the whole H. H. 29-7-13 arose from only fourteen *vargs*; and Martoba, in his examination,(1) admitting this to be correct, sets up a claim to the forest of three other *vargs* on the ground of his paying pepper assessment for those also. Add the assessment that he gives for these, and the total active forest assessment of the village rises to H. H. 32-5-10. He thus makes out his claim to the seventeen *vargs*, embracing, as he says, all the forests except four "*banjar*" spaces, at the cost of a contradiction of both the *zhadati chitta* and his own written statement.

The strangest points remain to be noticed. In a scrutiny of the assessable capacity of Kaignad in 1805 its forest lands are set down for a *shist* of H. H. 24-8-2, or R. H. 32-1-9, *plus* such share of the *shamil* as might belong to them, This amount is arrived at, according to Martoba's own account (exhibit 364), by excluding the *vadi* of Virje, and fragments of three others which happened to be out of (*kumri* or pepper) cultivation. Why should this coincide with the state of things in 1841? He had said in

(1) Accompt. 23 to Ex. 56, MS.

fact(1) that all were occupied by his mirasis except one: and the paper 364 appears to have been drawn up, so as, by an arbitrary construction of items, to agree with his first incautious statement, about four *banjar* spaces having been deducted in the original settling of his assessment, and at the same time so as to account for the difference between the active and the full *rekah*, or estimated assessment in the Government books.

But even if the untenanted spaces in 1841 should be such as exactly to fit the estimate of 1805, that would not account for the correspondence to it of the *sanad*. The *shist* payable according to the *sanad* is R. H. 32-2-9 (=H. H. 24-8-2), and this is the precise amount of the sums actually leviable in 1805. But besides the fourteen forest lands producing this *shist*, or *kadim beriz*, there are, as Martoba insists, other three forest lands bearing an assessment, as he says, of H. 2-7-13. When the grant was made by Tippu's amil in 1799, how came he to fix the assessment annually payable at R. H. 32-2-9. so as erroneously to agree, by anticipation, with the active or realizable *shist* of 1805? Martoba says the absence of some of the mulgars (so he calls them) left some forest lands unoccupied, and hence arose a reduction in the *shist*, chargeable against the village, of H. H. 5-8-9; but at the time of his grant all the mirasis had abandoned the forest. This is the very reason assigned in the *sanad* itself for the grant it makes. As then all the forest was deserted, why make a deduction in the *sanad* "*shist*" on account of three places in particular? They were not places naturally unculturable, but, according to Martoba's own account, culturable, and occupied in 1841. That they should have been included in the *rekah*, implies that they were considered as capable of yielding assessment as any other of the forest lands. "You are annually to pay the *beriz*, *plus* the miscellaneous cesses" Sadashivrao is informed; and then his *sanad* sets forth a *kadim beriz* for the whole, not agreeing with the real aggregate *kadim beriz*, but exactly agreeing with that *beriz* as erroneously estimated six and alse forty-two years afterwards

If, then, Martoba told the truth about the fourteen and the seventeen *vargs* in his examination, the *zhadati chitta* was wrong

(1) Ex. 56, accompt. 23.

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and the *sanad* in all probabibilty spurious. Perhaps his ora statement is erroneous, and his written one correct, but no value can be attached to either apart from the credit due to Martoba himself, and that unfortunately is none at all. The probable genesis of the *sanad* is this, that Martoba, finding himself pressed as to his right to dispose of the timber, and in danger of losing possession of all the forest land; through his failure to produce the ancient *beriz zhadati chitta*, assigning each tract to its own *vargs*, framed the document 364 and the *sanad* so as exactly to supply the deficiency. "The records we have of former times" were not produced, and it is incredible that they should not have been produced, had they been consistent with Martoba's story.

The only way of accounting for the non-production and non-mention of a *sanad* which really existed, is by supposing that Sadashiv and Martoba chose purposely to keep it in the back ground, and to conceal their own true relation to the property, in order to secure more favourable terms in the annual *jamabandi* settled by the collector. We have seen that a more rigid exaction of the proper assessment was made in the case of permanent proprietors than in that of mere tenants-at-will. A collector, who knew that he had a wealthy landowner to deal with, would naturally refuse remissions which in the case of an apparently pauper raiyat he would as naturally concede. An official's recommendation in favour of a poor raiyat would be listened to as disinterested. Sadashivrao, then, by concealing his *sanad* and putting forward the petty mirasis to bear the assessment as vargdars, probably secured a considerable advantage. Here was an object in allowing their names to remain in the Government books. If the *beriz patta* annually made out in each raiyat's name as vargdar was actually issued, as it might be,(1)to Sadashiv or Martoba, that would further be taken as a ground for a remission on account of the apparent insolvency of the mirasdar and of the transitory interest of the persong settling for the revenue; and thus while gaining all the advantages accorded to precarious and poor tenants, the *sanad*-holders may have been well content to suppress a title-deed, which, as they thought, would still at need

(1) Kanara Land Assessment Case, Printed Documents, Vol. III, p. 51. *supra*.

serve its intended purpose as well as ever. It would be consistent with a scheme of this kind that Sadashiv should in 1800 have allowed the village assessment to be farmed by a group of four persons(1) of whom he was not one. The advantage that the farmers could gain in such a case, was the profit they could derive from the waste lands; but, if all the forest lands in which Sadashiv was interested were occupied by tenants dependent on himself, their presence would prevent trespass on the part of the contractors. The difficulty is in supposing that every one of the mirasis, as he returned, should acquiesce in Sadashiv's appropriation of his miras and sink into the condition of his tenant. In one case at least, that of *varg* No. 13, this position never was accepted. In the case of the *varg* No. 19 it would seem to have been accepted, and afterward successfully repudiated, as the mirasi was eventually successful in resisting Bhaskarappa's claim as landlord. In several others his acquisition of the raiyats' interest seems to have been a very gradual process, the *beriz pattas* showing no payment by him for many years.

Sadashiv, however, could not, according to the law, take or transmit the benefits of entirely inconsistent positions. Supposing he had the *sanad* in 1799, and that it was a valid document, he might have claimed what it gave to him, accepting at the same time the obligations that it imposed. But he could not put forward the vargdar raiyats for year after year as proprietors, even as mere genidars, to obtain a favourable settlement, and yet retain his own right as proprietor against the Government Taking a *beriz patta* in the name of a raiyat, was an acknowledgment in every instance on his part that the proprietorship or the tenancy from Government belonged to that raiyat, or that his own right, supposing the raiyat had absconded, was a defeasible one, subject to be displaced by the raiyat's return. He was distrained on in 1831, not for the amount due under his *sanad*, but for sums due by him as casual tenant-at-will of fifteen out of the seventeen *vargs* in dispute.(2) When Martoba voluntarily accepted, in 1831, a *varg*

(1) Ex. 461, Printed Documents, p. 707.

(2) On one, No. 13, there was no arrear, or it was not his but Tippa Gavada's and one (No. 36) had not yet been formed.

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No. 36, formed out of the forest, to which he had asserted as yet no title under the *sanad*, he admitted in the Government a power to make the grant contradictory to the *sanad*, and implying its surrender or abandonment.(1) In 1833 he strove for a lenient re-adjustment of the assessment on the footing of an ordinary vargdar, and in 1836 an *azmaish* or new estimate of some of his *vargs* was made on the same understanding. So far as this extended to the rice lands, he was admittedly no more than an ordinary vargs dar. But in 1833 and 1836 alike he drew no distinction, and asked for none, between the rice lands and the forest holdings. He took the position, as to several, of a *geni* vargdar or mere tenant-at-will. He had by his own admission escaped payment, for forty years, of H. 5-8-9 annually out of the assessment due according to the *sanad*, by means of remissions for land left waste by supposed absentee tenants of Government. Payment of the sum stipulated was essential to the continuance of the right conferred.(2) It was admitted in argument that by non-payment the three *vargs*, not paid for, had become forfeited; but the right being single, the stipulation was indivisible also, and if there was a forfeiture at all, the forfeiture extended to the whole estate. Martoba too, avows(3) that his tenants cut *kumri* wherever they could find a fit place throughout the jungles; there was no resignation of part, accepted in return for a remission of part of the assessment. He had no right, after thus dealing with the Government to his advantage for forty years in one capacity, to turn round then and claim advantages in another. Having never produced his *sanad*, or been in any way bound by it, he could not exact or expect a recognition of it on the part of Government.(4)

Some stress was in argument laid on the supposed operation of Madras Regulation 31 of 1802 in establishing the title of the plaintiff through his having been in actual possession of the estates conferred by the three *sanads* prior to the 4th May 1799. But, in the first place, that regulation was meant to apply only to lands "exempted from the payment of revenue to Government," not to lands which were still burdened with the land-tax. For

(1) *Davison dem. Bromley* v. *Stanley*, 4 Burr., 2210.

(2) Kanara Land Assessment Case. 12 Bom. H. C. Rep., Appx. 47.

(3) Ex. 56, accompt. 23.

(4) *McDonnel* v. *Pope*, 9 Hare, 705.

such a case as that of Goer, provision was made by other regulations, which gave a formal legislative shape to the rules which had been in operation before.(1) By Regulation 1 of 1803, sec. 43, a collector was prevented from granting a *kowl* or lease without the authority of the Board of Revenue. He could not by mere quiescence create a title as lessee, which he was powerless to grant directly, since this quiescence, construed as acquiescence, would, at most, raise a presumption of a grant. Much less could such an effect arise when he was for years kept in ignorance of the existence of a *kowl* or *mulpatta* at a fixed rent,(2) and did not recognize it as obligatory when it was brought to his notice. Even the Board of Revenue, to which the collector was strictly subordinate,(3) could not "grant, or confirm grants of . . . *muctahs*, fixed rents . . . without the authority of the Governor in Council,"(4) and it is not pretended that there was any confirmation in this case at all. Supposing, however, that Regulation 31 of 1802 could be applied either to the case of Goer, or to that of Kaignod or of Bali two conditions would still have to be satisfied. The grantees must have obtained and held actual possession before the 4th May 1799, and the land must not have been resumed and assessed to the public revenue subsequently to that date. In the case of Kaignad it does not appear that Sadashiv obtained actual possession, even granting that his *sanad* were genuine, before the 4th May 1799. He is not the person whom the accounts of the several *vargs* show as in possession at the first settlement, nor is this proved by other testimony. The statement of Martoba himself in 1833 is quite against it, and the continued entry of three *vargs*, as unoccupied waste, shows that, if he had "actual possession" under the *sanad*, he held it only by actual fraud. But it is certain that all the lands were assessed to the public revenue. The revenue levied, the annual *jamabandi*, may not have amounted to so much as the stipulations of the *sanad*, but the assessments did; and if they did not, that would be an argument only against the applicability of the

(1) See Kanara Land Assessment Case. 12 Bom. H. C. Rep., Appx, 106, 107.

(2) See per Jessel, M. R., in *Lacey* v. *Hill*, L. R., 4 Ch. Div at p. 546; *Turner* v. *Tipper*, L. R, W. N. for 1877, p. 139.

(3) Mad. Reg. 2 of 1803, Sec. 5.

(4) Mad. Reg. 1 of 1803, sec. 42.

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Regulation, not for its application only when it tells against the Government. The title being thus invalid, no length of time could bar the Government's rights to resume the lands,(1) that is to resume the exercise of its rights such as they would be apart, from the grants relied on.

That the collector, Mr. Blair, was not much impressed by the *sanad*, and the correspondence of the *shist* mentioned in it to that in the *zhadati chitta*, and to the present total forest assessment, is manifest from his order of 14th January 1842.(2) The peshkar, as in the case of Bali, had reported altogether in favour of Martoba's claim, but the collector does not even mention the *sanad*. He regarded it evidently as a mere make-weight, thrown in at the last moment to give additional force to the claim based on Martoba's being the only payer of *kumri* assessment in the village of Kaignad. This claim he declines to admit; but, adopting the criterion put forward in his examination by Martoba himself, he determines that Martoba may retain the jungles actually subjected to *kumri* cultivation. There had been time in the course of forty years for three or four turns of cropping; the nature of the vegetation showed plainly where it had taken place; and thus the means existed of determining precisely how far *kumri* cutting had gone in the practice which, Martoba said determined the local extent of the right. The peshkar sought to get this order modified in the sense that, some defined jungles being excepted to answer to the "*kulnasht* deduction of H. 5-8-9 from the revenue, Martoba might be allowed to cut the timber in all the rest." A few worthless spaces would then, no doubt, have been set aside for a few years, while all that was valuable was appropriated; but the collector refused to depart from the principle he had laid down. "Jungles which have been cultivated from the beginning (and those) only," he says, "are included in the assessment paid by Martoba." The occupation of such lands gave no general right to the forest, and he peremptorily forbade the proposed indulgence. The strict limitations thus imposed on Martoba's user of the forest his complete expulsion from three *vargs*, were entirely inconsistent with the grant construed as he

(1) Mad. Reg. 31 of 1802, sec. 8. (2) Ex. 159, Printed Documents. p. 241

insists it ought to be construed; yet he brought no action in the Civil Court to assert his right against the great injury which, if the *sanad* was genuine and effectual, was thus done to him. It may be that for various reasons, besides the mere consciousness of a weak cause, he was prevented from engaging in litigation with the collector, but his conduct was certainly not, *primâ facie*, that of a man assured of his right and of his means of proving it. It suggests a diffidence like that which in his petition(1) made him anticipate that, on inquiry, some of the jungles might be found not to belong to him. If he trusted to the resources of passive resistance, evasion and intrigue, this was not the policy of a thoroughly honest man; and in adopting such an explanation of his quiescence we should have at the same time to admit as less unlikely the supposition that he fabricated the *sanad* to serve a necessary and obvious purpose.

From whatever direction, therefore, we approach the consideration of the *sanad*, it is impossible to give effect to it as a basis of any right vested in the plaintiff. This view we shall find confirmed by a consideration of the evidence bearing more immediately upon the claim of the plaintiff as founded on a recognition of his propietary rights in the dealings between him and Government and on the entries in the public accounts.

The *vargs* or estates at Kaignad, which include forest and are assessed accordingly, are in all 20 in number. On three of these, as they were entered as *kulnasht* (unoccupied), no revenue was levied down to 1841, though Martoba had, in fact, been making use of them. These were Virje, kasba Kadra and Kankavali. The collecter withdrew them in 1842, and his order was acquiesced in. Of the remaining 17 *vargs*, 9 are purely jungle *vargs*, viz., *2 geni vargs* and 7 *muli*. Of the 8 compound *vargs*, including both rice land and forest, 5 are *geni* and 3 *muli*. The forest *varg*, *muli* No. 36, was formed, as we have seen, as *geni* No. 76 in 1831; and this comparatively petty holding is the only one of the 17 that stands in the name of Martoba. *Prima facie*, then, this is the only *varg* as to which a relation of contract or tenure, as between the plaintiff's family and the Government, has

(1) Accompt 2 to Ex 56.

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been recognized by the latter. But, it is said, though Marioba's or Bhaskarappa's name has not been substituted in any case for that which formerly stood in the Government books, yet his position as the person really interested in the property, as the real vargdar in fact, though not the nominal one, has been so recognized and acted on, that he thus acquired and transmitted an ownership which the Government cannot dispute to the present plaintiff. The *muli vargs* which have thus descended are in their nature proprietary; as to the *geni vargs*, the proclamation of Mr. Viveash in 1834 guaranteed the *geni* vargdar who should pay the amount of his *jamabandi* in every instance against eviction equally with the mulgar.

We have had occasion already to observe that the retention of an absent cultivator's name, especially of a mulgar's name, in the Government books originated in the recognized right of such a person to return and recover his holding, with or without compensation to the intermediate holder put into possession by the Government.(1) The right continued to be recognized under the British Government; and the entries in the accounts indicated always who was regarded as the vargdar, who or whose representative, if forthcoming, might demand possession of the holding on engaging, by acceptance of the annual *beriz patta*, to pay the revenue fixed at the *jamabandi*. Should he in any year or series of years not be present, the land was disposed of, for the time being, on such terms as could be imposed, which being inscribed in the *beriz patta* issued to the temporary occupant, though still in the name of the vargdar, marked the extent of his right and his responsibility. In the case of *varg* entered as that of Shanta Mavali or Shanta Varthi, and bearing the official designation Gram Terige No. 2, we find(2) that there was no collection at all from Fasli 1211 to 1229. In 1230 Fasli, Shantappa quietly resumes possession or is found out to have resumed it, and then goes on holding and paying as before. No one evidently had taken up the land in the meantime, either temporarily or on one of the proffered *mulpattas* by which even a mulgar returning

(1) See also Mr. Chaplin's Report on the Deccan, Rev. and Jud. Sel., IV, p. 475; *ib.* 694,

(2) Ex 237, Printed Documents, p. 494.

after more than a year would find himself excluded. With this may be contrasted the case of the *varg geni* No. 1,(1) the account of which is headed "Balsevadi *geni kul*". For several years the payer of the land revenue is apparently one Naras Naik of Balsevadi, but in Fasli 1226 the land having been deserted by him was valued for a new holder from the Government. The *beriz pattas* show that the person really interested from this time forward was Sadashivrao. There was here no *muli* right in the absent tenant to interfere with the free disposal of the property; and though the vargdar's name was retained in fact, it was liable to displacement according as the collector in his discretion might dispose of the holding. It was not for some years so disposed of, probably because no one made an eligible offer. In Fasli 1231 the *varg* is applied for at the full assessment imposed on it by Bhikappa Nadkarni, a cousin of Sadashiv's, and thenceforward his name appears from time to time as payer of the land revenue.

That the transfer of a *muli varg* to a new name was less readily made, appears from the case of *muli* No. 14, the account of which(2) is headed which the name of Narayan Honehalli. The examination of Martoba in 1833(3) shows that he was in possession, which he had acquired on Narayan's death leaving only a minor son;(4) but Narayan's name is still kept in the accounts throughout, though with a note, in Fasli 1242, of settlement "through Martoba". In the case of the *varg muli* No. 21, headed as that of Bhogan Konse,(5) there is an entry in Fasli 1242: "The *varg* is nominal. Cultivation by means of Martoba."(6) A similar note is found under the same year in the account of the *muli varg* No. 20 entered to Bira Varnagule.(7) It runs thus; "The *varg* is nominal. The Sarkar *jamabandi* is paid through Martoba, who enjoys the *varg*." These and similar memoranda show that Martoba, though settled with as being in actual possession, was not yet regarded as the mulgar. In order to acquire that posi-

(1) Ex. 222, Printed Documents, p. 379.
(2) Ex. 223, Printed Documents, p. 463.
(3) Ex. 100, Printed Documents, p. 164.
(4) Ans. 10, Printed Documents, p. 166.
(5) Ex. 230, Printed Documents, p. 450. (6) Printed Documents, p. 453.
(7) Ex. 229, Printed Documents, p. 444.

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tion he would have to obtain a resignation in his favour by a preceding mulgar, or else a *mulpatta* from the collector, on which the land would be transferred to his name in the accounts.(1)

Why Martoba did not take this step at an early time, has already been explained. He would have been charged higher in the annual *jamabandi* than the poorer nominal vargdars,(2) and he would have been less to change about, should it be expedient, from one waste holding to another, as might suit his convenience. That, until he thus took it up, he could not be regarded as having any proprietary interest in the soil, is probably the reason why in his return No.322(3) made in 1828, Sadashiv's cousin Anandrao, included none of the *vargs* on which, as the *beriz pattas* show, Sadashiv had, in fact, been paying the land revenue for several years without becoming vargdar. Such *vargs* were not "immoveable property belonging to" the family; they were held but from year to year, and could be resumed either by the Government or by the vargdar or his representative.

Viewed in this light the circumstance that Martoba's property was attached in 1831 for revenue due on fifteen out of the seventeen *vargs* in dispute, affords no conclusive admission by the Government that he had any permanent right in those *vargs*. As the recipient of the *beriz patta* in any case he would be responsible for the revenue of the year without thereby necessarily acquiring any right that extended beyond ehe year.(4) Arrangements had, no doubt, been made between him and the real vargdars, or usurpations submitted to by the latter, which as against them made him a landlord; but these arrangements, to which the Government were not a party, could not give Martoba the right of a tenant of Government or of a landholder recognized as having possession by a right of continuous operation, unless he accepted the responsibilities of that position. Still formal transfers may in some instances possibly have been made to him or his father, as such transactions were not recorded in the collector's office, nor the

(1) See Kanara Land Assessment Case. Printed Documents, III, p. 61.

(2) See Kanara Land Assessment Case, Printed Documents, p. 162.

(3) Printed Documents, p. 529.

(4) See Kanara Land Assessment Case, Printed Documents, III, 112, 117.

documents even filed in the taluka offices down to 1836 ;(1) and, as time went on, his actual enjoyment, though existing only, as formerly viewed by the Government, through a derivative possession, seems to have been regarded as a kind of right that might be directly recognized. In the *azmaish* or valuation,(2) in Fasli 1246, of the *vargs* Nos. 14, 27, 31 and 32, all standing in other names, Martoba is set forth as the actual enjoyer of the *vargs*, as in 1833(3) he had been questioned as the person interested about the assessment of them all. The report (exhibit 56(4)) makes no suggestion of any one else being interested in the 17 forest *vargs* ; and in his order of the 14th January 1842(5) Mr. Blair, misled perhaps to some slight extent by the silence of the peshkar, speaks of the *vargs* not *kulnasht* as "held by him" (Martoba), though, in fact, only one of the seventeen stood in his name. From that time forward Martoba and his sons have always been dealt with as enjoying the rights of the actual vargdars or their representatives. Their names appear as enjoyers of the land in the *dugni* accounts frrom A. D. 1848 to 1861. (6) In the return No. 62 (7) prepared in 1851, only five (*muli*) *vargs* assessed for *kumri* are set down as enjoyed by Martoba; but this is unauthenticated; and when in 1857 the collector called for a return of the lands held by Bhaskarappa, all the seventeen *vargs* were entered by the tahsildar as in his possession. (8) In a note it is said that Tippa Gavda's son Badaku (Tippa being nominal vargdar) is in possession of *varg* No. 13, and disputes Bhaskarappa's right, but that this is contrary to an admission formally made in Fasli 1252 by the then mirasi Tamma Gavda. (9) The assessment on this *varg* No. 13. it is admitted by Ramchandrs, (10) has always been paid by Tippa Gavda and his representative, in virtue, it is said, of a lease, which has not been produced, though the doocuments in evidence certainly point to such a relation as alleged between the

(1) Printed Documents, p. 771. (2) Ex. 55, MS.
(3) Ex. 100, Printed Documents, p. 165. (4) Printed Documents, P· 33.
(5) Ex. 159, Printed Documents, p. 241.
(6) Ex. 27.
(7 Printed Documents, p. 33. See Ex. 91, Printed Documents, p. 75.
(8) Ex. 57.
(9) App. No. I., MS. See alo Ex. 56, accompt. 39.
(10) Printed Documents, pp. 722, 723.

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plaintiff and Badaku. In the *dugni* account of Fasli 1261 Martoba's name is entered as the enjoyer of Tippa Gavda's *varg muli* No. 13. As to *varg* No. 19, that, it is said, is claimed by Guda Gavda; but as the *beriz pattas* and other evidences show that Martoba has long paid the assessment, it is entered as his property. There was litigation going on between the plaintiff and one Bhika Govda, tenant of *varg* No. 19,(1) in which Bhika proved successful; but the payment of the assessment by plaintiff's family since Fasli 1230 is shown by the *bariz pattas* and Martoba was treated with as the person responsible in 1833.(2) The antagonists of Bhaskarappa in 1857, if they could have come forward have not come forward to dispute the rights of the plaintiff in the present contest with Government; and the defence of the collector not having been put on the ground of a defect in the plaintiff's acquisition of the rights of the nominal vargdars, we may, for the purposes of any further discussion, regard the plaintiff as representing each of those vargdars as to such rights as were vested in him.

In determining what those rights were, it is to be observed that of the nine (purely jungle *vargs*) seven are *muli* holdings. These estates may have been formed originally as appurtenances or accretions to ordinary rice-land *vargs*, the rice lands of which were subsequently detached and added to other *uargs*; but there is no evidence of this, and in the case of the forest *varg* No. 36. formed in 1831, it is certain that it existed as a separate *varg* from the first. It is hard to conceive of a *muli* estate in a mere farm of the fees leviable from the *kumri* cutting kunbis. The lands about Kaignad were regarded as in a special way dedicated to the forest deities,(3) so that casual cultivators would meet with a less ready reception than those who, as permanent residents provided a permanent source of offerings at the shrines. Mere strangers, too, would be a good deal kept off by superstitious dread It is probable, therefore, that the rude cultivation of the forest was carried on by the original mirasis as permanent holders or users of particular places, however obscurely defined, and was made answerable for an assessment on account of its visibly

(1) Printed Documents, pp. 722, 749. (2) Printed Documents, p. 167.
(3) Printed Documents, p. 144.

affording a profit to the fixed *kumri* cultivators. When, at a later time, Sadashiv and Martoba had succeeded in getting every forest *varg* into their own hands, or under their own power, the boundaries would naturally be lost sight of, and all the more so, as, though paying but part of the assessment, these landowners sought, and for many years successfully, to appropriate the whole of the forest.

The *vargs* which embrace forest and rice land are treated in the accounts as integral holdings. The reductions made at the annual *jamabandi* from the full estimated assessment are made with reference to the circumstances of both kinds of land, but without any several appropriation to the one and the other. The *shamil* or extra assessment is added to the forest tax as to that on rice lands. This of itself would not prove that forest land was held in precisely the same way as rice land—the *shamil*, as we have seen, having been distributed in a very capricious manner; but it runs counter to the notion of the *kumri* vargdar having been nothing more than the farmer of a poll-tax. If that notion, indeed, were correct, there could hardly have been *kumri* attached to "estates";(1) and the natural mode of dealing with the money thus realized, would have been to enter it, like *kumri* fees levied from the kunbis, amongst the "village taxes", as we find was done in the case of such moneys levied in several instances before proper payment had been determined and the sum debited to particular *kuls* at the *jamabandi*.(2) [His Lordship commented upon the *jamabandi chittas* relating to the seventeen forest *vargs* claimed by the plaintiff, and continued:—]

The investigation, thus closed, of the *jamabandi chittas* of the seventeen forest *vargs* of Kaignad, in which the plaintiff claims an interest, has been increased in difficulty by the great confusion of the accounts both in the original and still more as printed in English. Haidari Hons are in many cases erroneously set down instead of Rahati Hons, in some instances instead of Rupees. Figures that are to be added together are separated by others not to be included in the addition, and stand sometimes at opposite sides of the page. The brief memoranda of the account-

(1) Mr. Fisher, Printed Documents, p. 145.

(2) Printed Documents, p. 309. Ex. 56. accompt. 23.

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ants have not in some instances been correctly apprehended, through want of familiarity with the principles on which the land, revenue was assessed and levied, and the accounts of it recorded. Should this case go to a higher tribunal it is to be desired that the figured documents may be carefully revised, and the collection of the items re-adjusted. Without this, indeed, they will be almost unintelligible to any one not already acquainted with the subject, and will apparently justify all that Munro said of the ability of the Kanarese accountants in concealing facts within a cloud of figures.

The *beriz pattas* which have been frequently referred to as tracing back Sadashiv's or Martoba's connexion with the *vargs* to an early period form a bulky mass of documents which it will not be necessary to discuss in detail. For the *varg* of Tippa Gavda no *beriz patta* has been produced, a fact explained, as we have already seen, by the plaintiffs as arising from a term in Tippa's agreement that he was to pay the assessment himself. For the *varg geni* No. 9 also there is no *beriz patta* produced; but it was one of those for which Martoba was held responsible in 1831, (1) and in Fasli 1242 he is entered as paying the assessment. In Fasli 1243 he was questioned as to its valuation. (2) Possibly, Yeso, mirasi, may have come back, as he was expected to do and reclaimed his holding; but in 1857 Bhaskarappa was returned (3) as its undisputed owner. There may have been an arrangement such as is said to have been made with Tippa Gavda; but the plaintiff's title here against the Government must rest upon his recognition otherwise than directly in the revenue accounts.

The *beriz pattas* of the other *vargs* go back in some instances as *muli* No. 14, to the beginning of the century. Down to 1815, they are mere statements of the *jamabandi* fixed for the year on each *varg*, and the instalments by which the amount is to be paid. In 1815 and afterwards they are endorsed with receipts for the payments made. Faom 1816 (Fasli 1226) onwards these receipts, so far as they have been preserved and given in evidence

(1) Ex. 56, accompt. 29.

(2) Ex. 100, Printed Documents, p. 166. (3) Ex. 57.

by the plaintiff, constantly present such expressions as "Marifatine Sadashiv", "Sadshiv Mandawali", "Martoba Marifat", and the like. Over these phrases there was a great deal of contention, the plaintiff insisting that they meant "paid on account of Sadashiv", while the defendant maintained that they meant "by the agency of Sadashiv" on account of some one else. The primitive sense of the words supports the latter rather than the former argument; and when we consider what the vargdar (or the *varg*) was always treated as a person, real or ideal, with whom the account of the particular *varg*, should he claim it, was to be settled, the use of these phrases of agency in the receipts is readily understood. However completely Sadashiv or Martoba had actually taken the place of the nominal vargdar, the accounts still assumed the vargdar's existence and retention of that character, until he was superseded by a formal transfer with a mutation of names; and thus Martoba paying money would obtain a receipt "Marifat Martoba" on a *beriz patta* still issued in the nominal vargdar's name. (1) The series of *beriz pattas* are not quite complete; but they approach continuity near enough to show that the plaintiff's family were substantially the payers of the assessment from the various dates already mentioned down to the beginning of the litigation. This was compatible with their not having acquired any parmanent rights, and is far from proving, or even supporting, the case made on the *sanad*; but it explains how it was that, without assuming the position of actual vargdars, Sadashiv and Martoba came by degrees to be regarded as the persons, and the only persons, really interested. This is, indeed, occasionally indicated in recent times by their being called "lagwandars". The nominal vargdars could, for *jama*.

(1) The *pattas* in the case of *Freeman* v. *Fairlie*, 1 M. I. A., 205, were *beriz pattas* for town lots at an invariable rent or *jama*, not at a *jama* annually re-adjusted. Thy constituted a sufficient acknowledgment of a right of permanent occupation as eagainst the E. I. Company, who issued them for waste land; but Lord Lyndhurst says, p. 346; "The *patta*" therefore "forms no part of the title. It is the conveyance that gives parties a right to claim the *patta* (*i. e*, a renewed *patta* in the purchaser's name) and by having the latter the amount of the sum payable to the Government is ascertained and future doubt prevented." As to the defeasible interest of the mere pattadar, compare Rev. and Jud. Sel., Vol. IV pp. 474, 475.

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*bandi* purposes, be treated as real or unreal persons as might be most expedient, their names in the latter case standing in the same predicament as those of hundreds of other raiyats who have disappeared, but whose accounts were retained in their name, because they, or their heirs might possibly return and reclaim their ancient holdings.

Admitting that the plaintiff's family had acquired actual possession of the forest lands belonging to the *vargs* whose revenue history we have thus analyzed, and that the officers of Government by their dealings with Martoba and Bhaskarappa had recognized them as holding such possession, we are still confronted with the question of what those lands were. The "*beriz zhadati dakhla*", or memorial of the scrutiny of 1805(1) affords us no help in this matter. It deals with the revenues of the village as a whole according to different classifications, but says nothing of boundaries. It is not at all unlikely that in the old *rekah*, on which this document was founded, only a small proportion of the forest should have been taken into calculation as capable of affording revenue at all. Martoba's paper, (exhibit 364,) by which, in 1841, he affected to distribute the whole forest amongst twenty *vargs*, could not supply this defect: it would itself require the support of external evidence in order to obtain any particular credit. Martoba failed to produce such evidence. His policy in 1841 was what his father's had been in 1823. In that year the kulkarni reported(2) that the accounts of the *vargs* included all the *kumri* assessment of the villages in the Kadra Magni, where the properties in dispute are situated, and that as the raiyats cut *kumri* "in all the hilly forests on the borders of the magni, all the hills and jungles are entered under the *vargs* of the raiyats: that there are no *sanads* in respect of them, but that, in virtue of enjoyment from year to year, the jungles do not belong to Government, but all to the raiyats. This statement of the raiyats is supported by the fact that an assessment is charged for the *vargs* of the *kuls*; but no hill or jungle is assigned to to any individual raiyat with specified boundaries." Such being the report of the kulkarni, and the villagers claiming an unlimited user of the forest,

(1) Ex. 56, accompt. 55. (2) See Ex 75, Printed Documents, p. 14

the tahsildar says. "There is no record in the *kulvar beriz*" (detailed account of revenue due from each raiyat) "of jungle such as to enable an entry to be made of the forest either as Government property or as raiyati." "All," he adds, "are Government jungles." It is plain from this that even in 1823 the plaintiff's family could not, or would not, hold or claim any particular space in the forest as appendant to any *varg*. They relied on the fallacy that as the whole forest would be represented in the Government accounts by charges for *kumri korlaya* and pepper, so such charges represented the whole forest, while, in fact, they might represent but a small part, or no definite part of it.

The forest surveys, (exhibits 77 and 98,) whichever of them is best entitled to credit(1) do not remove the difficulty. They do not profess to assign the forest tracts to this or that *varg*, but, subject to such individual rights as could be asserted, set them all down as the property of Government. The averages of collections during the first seventeen years of British rule, made with a view to the imposition of the *tharaw* or settled impost, include, in the property we are dealing with, forest land equally with rice land, and thus confirm the view that no distinction in the treatment of either was contemplated ; but no inquiry was made, as Mr. Blane says,(2) during the seventeen years, as to the extent of any man's holding. There was no record, even down to 1848, "of the extent of any man's land ;"(3) and so recently as in 1858 Mr. Fisher says the extent of land under regular cultivation is unknown.(4) It is hardly surprising, therefore, that official materials for determining the precise extent of the forest *vargs* should not be forthcoming. In the survey of 1821-25 "the land as it was measured was entered in the accounts as belonging to the different estates according to the dictation of the raiyats themselves,"(5) a process which again points to the indifference, in those days, of the revenue officers as to the preservation of land so long as it did not escape assessment, but which would naturally deprive the survey record of nearly all value for the purpose of determining the proper boundaries of particular *vargs*. It was so little trusted

(1) See Ex. 157, Printed Documents, p. 237.
(2) Ex. 366, p. 179. (3) *Ib.* 197.
(4) Printed Documents, p. 147. (5) Ex. 366, p. 214.

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that it was not even made use of in the inquiry of 1833 as to the productive capacity of the several estates.(1)

In argument it was contended for the plaintiff that the *zhadati dakhla* of Fasli 1215(2) sets down the forest *shist* as H. 25, and the *shamil* as H. 10-5-2, total H. 35-5-2, agreeing nearly with Martoba's paper, exhibit 364, which, by extracts from the *jamabandi chittas*, brings the *shist* and *shamil* to H. 35-6-6, whence it was argued his list must have included every acre of the forest. This was hastily said, for a reference to the *zhadati dakhla* shows that the H. 10-5-2 is but the first element out of many going to make up a total *shamil* of H. 262-7-15 ; and how much of this is properly attributable to the forest properties, is not indicated. It has to be gathered from the *jamabandi chittas* which Martoba used, and, therefore, necessarily agrees with them. It was admitted that there was no further evidence, than what has been thus touched on, of the topographical limits to which the possession or enjoyment of the plaintiff's family extended. In this way the vagueness and confusion of boundaries by which Sadashiv and Martoba sought to profit, has become a stumbling block to their decendants. It is plain from several of the *jamabandi Chittas* that the *kumri* tax on forest *vargs*, ceasing to be collected at all while the *varg* was untenanted, was nevertheless a definite item in the estimates of land revenue, and became leviable, as before, immediately on the re-occupation of the *vargs*. If this is to be called the rent of a farm of fees, it is obviously of a farm not at all in the ordinary sense—a farm inseparably connected with the tenancy, and coupled with a capacity in its holder to covert the land to any agricultural use he pleased. Such an interest is, according to ordinary notions, an estate in the land, and it is quite possible that evidence of what might rightfully be enjoyed, as properly included in the several *vargs*, could have been produced in 1841. Martoba, however assessed, might have been able to show an actual possession of the forest, subject or not to special rights vested in the Government, under such circumstances, and for such a time, as would constitute him owner. Such evidence could hardly be obtained now, and, if produced, it could not have any material effect.

(1) Ex. 366, p. 184 ; see Printed Documents, p. 164, Ex. 100.

(2) Ex. 56, accompt. 55.

The mass of old accounts(1) produced by the plaintiff, if faith is to be given to them, show profits received from some of the *vaids* of Kaignad, as, *ex. gr.*, for Somagule Varnagule, Hoti, Virge, Konse and Kodal, as far back even as Fasli 1213; but they do not prove, and could not prove, that these jungles in their whole extent were held by Sadashivrao, or in what capacity he received the petty sums recorded as accruing from them. The latter series from 1836 to 1843(2) indicate, what the earlier ones do not, occasional trafficking in timber cut in the jungles; but the discussion of them belongs to the general investigation of the dealings of the revenue officers with the timber of the forest. Mr. Blair's order in 1842 undoubtedly displaced Martoba from some of the jungles; and it would be desirable to know what precise portions were left to him either as an independent aggregate, or, as the *jamabandi chittas* and the re-valuations indicate, as wholly or in part constituting the several *vargs*. The jungle, so far as it was subjected to *kumri*, would seem to have been left to Martoba, from the absence of any further disputes such as those referred to at Printed Documents, p. 306. His rights were cut down in local extent and also in their comprehensiveness; yet, so far as they were recognized, they seem to have been guarded against encroachment. But as to the precise range even of this restricted enjoyment we are without evidence. There are various indications—as in the sub-collector's order, exhibit 313, of 9th August 1858—that the means existed, or were supposed to exist, of determining, at least roughly and approximately, the forest belonging to each *varg*; but it did not accord with the theory of either party to this suit to bring these means to bear on the case. The collector asserting that payment of *kumri korlaya* conferred and implied no right to the land, was not interested in showing an invariable allocation of the same forest land to the same *varg*. The plaintiff claiming the whole forest under his *sanad*, naturally refrained from adducing testimony of the precise extent of his partial enjoyment after 1841, as that would also be evidence of his partial dispossession and of his having submitted to it. His position as a mere landholder or vargdar is none the less much embarrassed by the absence of any means by which we could ascertain that such or such an area was

(1) Ex. 312, MS. (2) Ex. 315.

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actually occupied by him after 1841 and down to 1861, when he was, as he says, finally and wholly excluded.

To meet this difficulty it has been urged for the plaintiff that Mr. Blair's order of June 1842(1) was one made without authority, and that, at any rate, it was not so carried out as to deprive Martoba of his possession. His enjoyment remained, it is said, what it had been before. As to the former point, the collector generally represented the Government, to which any one injured by his acts might appeal. Martoba either appealed to Government or the Revenue Board, or he refrained. In the former case the higher authority must have adopted the collector's acts as they were not condemned or modified: in the latter case, there was a submission to the ouster so far as it extended. Martoba, if dispossessed, was dispossessed effectually for purposes of limitation, since the collector unquestionably had power at the time to give effect to his own orders: and on the matter coming to the notice of Government it has never annulled the collector's proceedings and their legal effect by a retroactive restoration of the plaintiff to his former alleged position. Whether, in fact, he being in possession was dispossessed by Mr. Blair's orders and the execution given to them, and whether wholly or in part; what was left to him in 1849 when Mr. Blane's *dugni* scheme was introduced; what remained to him, if anything, in the nature of possession to be recovered in a suit like the present,—are questions the answers to which, depending on the general policy pursued with regard to the forests as a whole, had better be deferred until the special grounds on which the claim to the forest of Bhaire is founded have been investigated.

The plaintiff's claim to the forest at Bhaire is not as in the cases that we have considered, founded upon a *sanad*. It rests simply on the inclusion of the forest described by its boundaries in the plaint within the *geni varg* No. 23 of the village of Bhaire. The plaintiff avers that his family have enjoyed this property for forty years. The District Judge was of opinion that the alleged transfer from the former vargdar, Subrav, was not proved, and this objection has been pressed on the part of the defendant in appeal also. The plaintiff Srinivas deposes, however, that the *varg*

(1) Ex. 158, Printed Documents, p. 239.

was leased to his father in Fasli 1248 by his maternal uncle Subrav, or assigned to him in perpetuity on terms of his paying the Government assessment and Rs. 2 annually by yay of *munáfa* or profit rent to the vargdar. The *jamabandi chitta* (1) is headed "by name Ganoji now Narnappa," and the introduction of Narnappa's name into the account occurs in Fasli 1237, from which time, as it was a merely *geni varg* and one on which the full assessment had never been paid, Narnappa became the real vargdar, the name of Ganoji being retained probably for the purpose only of identifying the *varg*. When an estate was scattered about an extensive village, its several parts, though the number of the *varg* was not remembered, were known to the neighbouring landholders as parts of the *varg* of such and such a person or name; and the retention of the old name on this account in some instances gave rise to a practice which was, no doubt, then retained in many others in which there was not the same reason for it. Subrav's connection with the *varg* is shown first in Fasli 1238, (2) when it is said that the land "is cultivated by raiyats (settling for the revenue) through Subrav."

The witness Visvanath (3) is Subrav's son, and he deposes that Narnappa, now dead, was his brother. The father and sons were a united family, and they demised the *varg* in question, in Fasli 1248, to Martoba on a perpetual lease at a profit rent of Rs. 2 over the Government assessment, which, he says, has always been paid by the plaintiff's family. The lease has not been produced, the palintiff said he could not find it; but there does not seem to be any sufficient reason for doubting its existence, or, at least, the existence of some agreement of equivalent effect. The execution of counterparts is not a common practice; and the parties being in accord with one another, a false lease or counterpart could readily have been fabricated had they been conscious that the alleged transaction was a mere figment. There have been some variances of statement as to the profit rent; but if the vargdar desired to transfer his interest and his relation to Government, and Martoba or Bhaskarappa to assume them, the transaction was within their competence, and sufficiently authenticated by their public declarations.

Exhibit 63 is a report of the deputy tahsildar, dated 16th May

(1) Ex. 238, Printed Documents, p. 497.

(2) Printed Documents, p. 500. (3) Printed Documents, p. 727.

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1,859, recommending the allowance of certain mutations of names in the land registers. Amongst these is the charge of *geni varg* No. 23 at Bhairé from the name of Narnappa to that of Bhaskarappa. Amongst the accompaniments was a letter from Visvanath,(1) desiring that the *kumri* assessment should be levied from Bhaskarappa, agreeably to the practice of many years based on a lease at a profit rent of Rs. 4 a year, under which Bhaskarappa had always paid the assessment and taken the produce. Another accompaniment (No. 2) was a statement made by Bhaskarappa in answer to questions put to him by the manager. From the questions it appears that Visvanath had been asked to pay the assessment, and had requested that it might be recovered from Bhaskarappa. Bhaskarappa says he is not able to find the lease, but the land is his; and as Visvanath raises no objection, he desires that the assessment may be received from him. Being pressed to produce the lease, he answers not unreasonably: "As Visvanath agrees, and I am willing to pay the assessment, I think there cannot be any need to produce the lease. The *munâfa*" (profit rent) "is a matter for our own consideration; and as the land is in my possession, I request that the assessment may be received from me." Seven inhabitants of Bhairé, including the patel, were examined on the same occasion, and their statement supports Bhaskarappa's.(2)

Under such circumstances no difficulty, it is certain, would in any ordinary case have been raised to the proposed transfer. It is said for the plaintiff that Bhaskarappa's name was entered as *lávandar*, or actual cultivator, though the title of the *varg* remained unchanged; but there is no proof of this beyond the statements of Ramchandra(3) and Srinivas.(4) Bhaskarappa was at this time in conflict with the revenue officials, and Mr. Fisher had already sent in his report on the restriction of *kumri*(5) following up the order disallowing the claim under the *sanad* passed in 1857.(6) Hence there may have been a reluctance to recognize

(1) Accompt. 6, MS. (2) Ex. 63, accompt. 4, Printed Document, p. 34.

(3) Printed Documents, p. 727. (4) Printed Documents, p. 35.

(5) Ex. 94, Printed Documents, p. 135.

(6) Ex. 148; Printed Documents, p. 221.

his *status* as a vargdar, except under a kind of compulsion; but the transfer of interests in the land, and of the right and responsibility of settlement for the revenue, being an established practice, as the list of recommendations (1) shows Bhaskarappa's right arising from Visvanath's resignation or admission, could not be defeated by any mere surliness or delay on the part of the officials. He succeeded to Visvanath's right, such as they were, in 1859, if at no earlier time.

It must be taken as established that Martoba and Bhaskarappa had, in fact, been paying the assessment on the *varg* No. 23 ever since Fasli 1248. Some accounts, called for to prove this, (2) were filed and subsequently withdrawn by the collector on his admission, as the *rozkam* (or daily register of proceedings) states of the plaintiff's contention on this point. When Mr. Blane's "*dugni*" system was introduced, and sums gained by the *kumri* vargdars, in excess of double the assessment they paid, were taken from them and placed in deposit, accounts were kept of the moneys thus exacted, or later on directly levied from the kunbis. In the first of these for Fasli 1258 (3) there occurs "Bhaire *varg* No. 23, Ganoji *hal* (now) Narnappa Visvanath of Ankola. The above-named Martoba has the enjoyment." The same kind of entry recurs whenever there is a levy of an excess over the *dugni* in succeeding years. (4) In his application and recognizance (5 of Fasli 1263 Bhaskarappa engages for *kumri* cutting in the jungles of Bargadde and Kalani as belonging to his *varg* No. 19 (corrected No. 23) at Bhaire. In Fasli 1262 he had applied for a license in the Kalani and Handalmakki jungles as belonging to the same *varg*. In his unsuccessful application for a license in Fasli 1266, (6) he merely mentions forest as included in the *varg*. There cannot, then, be any reasonable doubt that Bhaskarappa was the person really in occupation of the *varg* No. 23, and in that character was dealt with by the Government officers in transactions connected with the *kumri* cultivation of some portion of the forest. His son is now in possession of the rice lands portion of belonging to the *varg*,

(1) See Ex. 63. (2) Ex. 18, item 16. [3] Ex. 24. [4] Ex. 25 to 35.
(5) Exs. 166, 167, Printed Documents, pp. 251, 252.
(6) Ex. 163, Printed Documents, p. 248.

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and the Government officials do not seek to dislodge him ; (1) and there is nothing whatever to show that his title to one part of the work differs from his title to the other part. There is a puzzling confusion of names through which it would appear that "Bargadde" sometimes means merely a tract of rice land in the *varg* No. 23, and sometime includes the neighbouring forest. Bhaskarappa, as we have seen, got a license in Fasli 1263 to cut *kumri* in the "Bargadde" forest ; but the plaintiff in his deposition (2) (as corrected according to the original) says: "I have not claimed Bargadde. Bargadde so called is rice land, and what I claim is only forest." Earlier in his examination he had spoken of "the Bargadde forest," and said "Bargadde is property No. 4 which I claim;"(3) and, again, "this *varg* is in Bargadde;" (4) and Mahamad Isuf having deposed to his own acquisition of forest land in Bragadde(5) from Government, which was afterwards purchased from him by Bhaskarappa, there was an apparent contradiction of the plaintiff's ownership to this extent, acquiesced in by the head of the family. Bhaskarappa had, in fact, opposed the grant, but on the ground that the land was situated in Goera. (6) It was not there, but neither in strictness apparently could it have been in Bargadde. The positions of the two pieces of land are set forth in the *jamabandi chitta*, (7) and from this it seems that one plot was "about a mile from Bargadde" and the second "about two miles south-east of the above land." The witness De Cruz, who knows the forests well, speaks of Gotegalli and Bargadde as separate jungles, Bargadde being near Handalmakki.(8) Yet Pante, the name of one of Mahamad Isuf's grant, was described as in Gotegalli and Bargadde. (9) The witness Fakiri assigns Bargadde and Kále (Kálani) to Goer or Kaignad.(10) Such extreme looseness of expression, as this comparison brings out, makes it immpossible to draw any precise inference as to boundaries from the mere use of particular

(1) Printed Documents, p. 744. (2) Printed Documents, p. 754.
(3) Printed Documents, p. 745.
(4) Printed Documents, p. 751. (5) Printed Documents, p. 757.
[6] See Ex, 460, Printed Documents, p. 694 and accompaniments.
[7] Ex, 390, Printed Documents, p. 673. [8] Printed Documents, p. 796.
[9] Printed Documents, p. 703.
[10] Printed Documents, p. 766.

names of parts of the forests never accurately defined, or even conceived, by those speaking of them. Something more specific is requisite to establish the possession and enjoyment of any particular area.

In the document, exhibit 62,(1) prepared apparently under Mr. Blane's order in Fasli 1260, there is an entry to the effect that the *varg* No. 23 at Bhairé is enjoyed by Visvanath of Ankola, and that, according to the vargdar's assertion, it is an aggregate *varg*, comprising both rice lands and the *kumri* of Kalani and Handalmakki. We have had occasion to remark that this paper is one that deserves but a very qualified credit, if any at all; but taking it as a mere imperfect memorandum, it may confirm to some extent the notion that the jungles of Kalani and Handalmakki (probably called also sometimes the Bargadde jungle) were in 1850 claimed as part of the *varg geni* No. 23 at Bhairé. It thus agrees with Bhaskarappa's applications and with the plaintiff's claims explained to us on appeal. In the document, exhibit 57, prepared in Fasli 1266 to show the *vargs* held by Bhaskarappa and the sums due for *kumri* on each, the *varg* 23 at Bhairé does not occur. According to the *jamabandi chitta* of the *varg*.(2) Kolani and Handalmakki are either solely rice lands, or else spaces including rice lands. The name Bargadde is not applied to any part of the *varg*. For what particular tract of forest, if any, the *kumri korlaya*, which forms an element of the *beriz*, is imposed, does not appear; the mere mention of the two names in connexion with the rice produce is plainly insufficient to define it. The *chitta* presents several of the features on which we have observed in the case of those of the Kaignad *vargs*. In one place (3) measures of grain are added up along with figures denoting money to determine the net produce. The frequent memoranda that the land is entirely waste, raise a suspicion that the official position of Subrav, the person really interested (who was shiraste-dar at Honavar and afterwards tahsildar) may have led to a lax scrutiny of the assessable value of the property; but it does establish his possession of the *varg*, and his capacity to transfer it to Bhaskarappa.

(1) Ex. 238, Printed Documents, p. 497.

(2) Printed Documents, p. 33. (3) Printed Documents, p. 500.

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What, however, was the *varg* as to the forest land included in it? The plaintiff says it comprised the whole of the forest tracts called Kalani and Handalmakki. These names are given in the unauthenticated paper, exhibit 62, as those of parts of the *varg*, and this suggests that a portion of the forest bore the same names, but it does not prove the fact. In the forest survey, exhibit 77, however, the Handalmakki jungle is mentioned (1) as the north boundary of the Jhambad jungle, and apparently along with Kalani (written Kale) of the Hedarge. It is mentioned as the southern boundary of the Bor Shetka jungle in Goera. It must, therefore, have extended along the the northern border of the village, with Jhambad and Hedarge, each set down as 1 *kos* or two miles long, bounding it on the south. Now, as to the northern limit, the land claimed in the plaint may agree with this topography, but for the southern boundary the plaint sets down, not Jhambad and Hedarge, but Kanadgi, Average and Hop, in the village of Goera. Indeed, as it makes the forest claimed extend on every side to Goera, of which Sonake (printed Sankev), Kote and Bicholi are but portions, the description given is of a place completely enclosed within the bounds of Goera, and, as no boundaries within Bhaire are mentioned, comprising the whole of that village. This cannot be correct, as it is admitted for the plaintiff that there are other jungles at Bhaire to which he sets up no title. Under such circumstances good evidence of actual enjoyment would be indispensable to enable to us to determine that any particular area belonged to the plaintiff. Such vague testimony as that of Gopoo, who says that he bought timber at Bhaire twenty or twenty-five years ago from the plaintiff's cousin, (2) does not bring us in the least degree nearer to the point. On the other hand, it would appear from exhibit 136 (3) that in 1852 Bhaskarappa, while strongly opposing the cutting of timber in the Goera jungle, raised no objection to the cutting of 100 trees at Bargadde. Here we have a clear indication that Bargadde, if primarily denoting a piece of rice land, gave its name also to some of the forest. Was this identical or not with the place of Bhaskarappa's *kumri* operations in Fasli 1263? Was it or not identical with Kalani or

(1) Printed Documents, p. 46. (2) Printed Documents, p. 770.

(3) Printed Documents, p. 208.

Handalmakki? On such important points we are left quite in the dark.

Whatever may have been the local extent of Subrau's or of Martoba's supposed enjoyment of the Bhaire jungles before 1842, it is clear that in that year the user was cut down to the employment, for *kumri*, of lands that had been customarily thus cultivated. What those lands were, seems not to have been particularly inquired. It may be that in some instances Mr. Blane's order of the 10th April 1849 (1) would extend the limits prescribed by Mr. Blair, though its general effect must have been the reverse of this. Of what, if anything, was retained in actual possession after these orders, and in oppsition to them, we have virtually no evidence of the least importance, except the statements and applications of the plaintiff's family and the various orders of the Government officers. What rights, if any, these orders recognized as vested in the family; what they denied or infringed; and the application to the state of circumstances which thus arose of the Law of limitation, are the remaining objects of present investigation.

The plaintiff, relying as to three of the four properties claimed by him upon grants which expressly authorize him to cut down and make use of the forest, has naturally sought to prove an exercise of the ownership thus conferred upon him. It may be that, in the earlier years of the British rule, timber of the ordinary kinds had hardly any selling value in Kanara.(2) In the account of the Government forests drawn up in 1823 by order of the collector, Mr. Harris,(3) it was not thought worth while to umerate any trees except those of the four more voluable species. Teak, poon, blackwood and jackwood had been preserved in the Government forests from early in this century as before the introduction af the British rule; but as to other kinds of timber there seems to have been no check upon any one who chose to resort to the forests and help himself to what the wanted,(4) subject, when it was imposed, to a signorage fee. As population increased, while the forests conveniently situated diminished, wood of every kind acquired a market value, so that, as Mr. Maltby points out

(1) Ex. 90, Printed Documents, p. 73. (2) See Buch. Mys., Vol. II, 541.
(3) Ex. 77, Printed Documents, p. 45. (4) Comp. Buch., Op. Cit., III, 227.

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in 1839, (1) fees were paid to private proprietors even for firewood, on the cutting of which no restriction was placed by Government for several years afterwards. It is, therefore, not surprising perhaps that the plaintiff, though he filed (2) the long series of accounts consisting of exhibits 290 to 310, should not have been able to point out in them any instance of his disposing by way of sale or license for felling of any trees in the forest, and that he should at first have produced no evidence of dealings with timber on his part as proprietor earlier in date than 1839. Teak, poon and blackwood, it has been admitted, he was not allowed to middle with: other timber had no price. How far the proclamation of 1823, (3) by which landholders were allowed to cut down even teak and poon "within their proprietary estates"(4) was really acted on, does not appear by any evidence for several years after it was issued. Some information on the subject might probably be gained from Mr. Blane's report on *kumri*, hereafter referred to, (5) but this has not been placed before us. The plaintiff's family may, so far as it was worth while, have made use of the timber within the lands for which they were assessed at *kumri* rates, and it seems certain that at Kaignod they had destroyed almost all the valuable timber in its forests by the year 1841; but from the time that the process then came to the collector's notice it is certain that he put a stop to it, except within the bounds of lands that had actually been subject to *kumri*, and on which no valuable trees remained. If the cutting of timber is a right separable from other rights over the forest lands, the exercise of it was barred by limitation long ere the present suit was filed. If it was an essential element of the ownership of the lands, or a right necessarily growing out of that ownership, then the ownership itself was practically contradicted in its whole extent by an ouster as to the timber involving an entire negation of it just as long before the proper remedy was sought. In that case the subsequent complete expulsion of the plaintiff would be but a further application of a principle already fully asserted.

(1) Ex. 366, p. 130. (2) Printed Documents, p. 734.

(3) Ex. 73, Printed Documents, p. 40.

(4) Their *muli* apparently is distinguished from their *geni* holdings.

(5) See p. 786.

It seems that whenever ownership of the lands was recognized, the same ownership of the timber growing on them, or at least a right to use the timber at discretion, was recognized, too, down to the year 1847. (1) Mr. Blane then insisted on the production of evidence of title before timber was cut. What evidence he required is not clear; but it is plain that in preserving the timber he did not intend to extinguish the owner's power over really private proprietary estates. This will become clearer at a later stage of this investigation.

To show what took place in 1837 the plaintiff (2) has produced the correspondence (filed as exhibit 314) which passed in Fasli 1248 (=A.D. 1838-39). Here we find a letter, dated 8th March 1839, from Joachim Jose Santalis Jamsalker to Marta Shevi Malapur.

[His Lordship commented upon documents produced by plaintiff, and continued:—]

Such is the sum of the evidence derived from the plaintiff's accounts to prove the exercise, by his family, of ownership over the timber of the forests, whether under their express grants or in virtue of their rights as *kumri* vargdars. It is plainly of the most feeble character; and it will appear, as we trace out the orders and transactions relating to these forests, that in Fasli 1254-55 Mortoba was cutting timber under orders obtained from the Government officers which might be used to cover more extensive transactions than those which they were intended to authorize. The accounts, exhibits 290 to 310, though they show an enjoyment of many portions of the forests in other ways, do not show any cutting of timber. As to the oral testimoney, the only important evidence of timber purchased from the plaintiff's family is that of Pandurang bin Khushal, (3) who says he brought 60 trees. But this witness is discredited by his manifest falsehood in denying that he made a contract with Government (4) for the purchase of firewood on an area that included four *vadis* in Kaignad. It was at one stage of the plaintiff's argument indeed admitted that the exercise of a right to cut timber for exportation could not be established.

(1) Ex. 218, paras. 7, 8; Printed Documents, p. 351.
(2) See Printed Documents, pp. 738, 739.
(3) Printed Documents, p. 761.
(4) Ex. 341. See Printed Documents, p. 791.

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On the other hand, the constant exercise of a right to dispose of the timber in the disputed jungles by the revenue officers on behalf of the Government is proved by a long series of documents. By exhibit 239, dated 28th September 1834, the head assistant collector authorizes the tahsildar to accept Rs. 375 from a contractor for teak trees fallen or cut down in several "*vadis*," including Deokar, part of Kaignad. It is said, indeed, that there is no proof that this order was acted upon, and that the Rs. 375 were paid as well as tendered, and a similar objection has been raised in several other instances; but it is reasonable to presume after the lapse of so long a time that orders issued by a public officer to his subordinate were acted on; and the plaintiff, who asks us to place reliance on his own most loosely kept accounts and correspondence not merely as orroborative, but as the sole evidence of transactions in the exercise of his ownership, cannot reasonably-expect us to disregard the evidence of public records to which he himself constantly appeals as sufficient whenever they tell in his favour. As to the point now nder consideration, that evidence is supported by independent proof afforded by the plaintiff's own father and brother, and for its general effect may most properly be relied on. Yet so much as this may properly be allowed to the plaintiff in relation to the transaction of 1834, that it is not shown that any of the trees contracted for were actually cut down in Deokar, much less that Martoba knew they were cut, and submitted to it. The document shows or suggests the view taken by the revenue officers, but nothing more.

By the proclamation, exhibit 73, (1) dated 18th April 1823, the proprietors of land had, in modification of the severe restrictions of an earlier time, (2) been allowed to cut teak and poon trees within "their proprietary estates or private gardens." It does not appear that this order had been cancelled; but as to the timber growing there, the permission given to the plaintiff's father Martoba, (3) to cut ten teak trees at Malapur for his temple at Goa, and the application on which it was granted, point, *prima facie*, either to the exclusion of that forest from the "*mula swasthagalu*",

(1) Printed Documents, p. 40.

(2) Exs. 68 and 70, Printed Documents, pp. 35 and 37.

(3) Ex. 49, Printed Documents, p. 21.

or proprietary estates of the applicants, or else to an admitted exception, in the forests, of the teak timber from the comprehension of proprietorship. Still it is not impossible that while the ownership or the right of the Martoba was fully recognized, he should still be subjet to a duty on the exportation of timber, and constrained, therefore, though owner, to obtain a permit for that reason. It might be required, too, when properties were intermingled, in order to prevent fraud on the Government or for other adminstrative purposes, as a condition of removing teak from the forest, to obtain a permit (1) from the revenue authorities. He was at a later period required to obtain a permit from the village officers for the removal of firewood, his ownership of which was not at the time contested. The witness Krishnaya(2) deposes that permission must be obtained now to cut teak or blackwood on admittedly private lands. A grant of land for cultivation does not convey such timber.(3)

Exhibits 254 and 240, dated in 1841, are an application and a permission to cut twelve blackwood trees in the forest of Kaignad. Black wood being one of the valuable kinds of timber specially reserved, the same considerations apply to it as to teak trees. But here the license is given to a stranger ; and if the notification of 1823 was properly construable as giving a proprietorship, not merely a permission or license, and was still operative, amounts to a contradiction that the forests of Kaignad formed part of the plaintiff 's *"mula swastha"*, or proprietary estate, unless the right to the forest timber, or to the places whereon it grew, was separable from the jungles constituting that estate. The plantiff in his deposition before the District Court(4) mentions Shable Camut of Goa as a person who had dealings with his father in timber, the produce of the forests in dispute. That there were some transactions of this kind, appears

(1) A distinction between a permit and a permission is taken by the plaintiff, Printed Documents, p. 745. An owner could not cut his own timber within a royal forest without the presence of a forester, except by a special right. See Coke's 4th Inst., ch. 73 ; Co. Lit. 115 a ; comp. Vin. Abr. Forest (k) 4.

(2) Printed Documents, p. 802.

(3) Printed Documents, p. 776, 788. See Nairne's Rev. Hand-book, 109, 173.

(4) Printed Documents p. 739.

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from exhibit 331, MS., and exhibit 110.(1) Shable Camut and others who had felled trees under a contract with Martoba and other vargdars, complained to the collector that the trees which they had cut down had been fraudulently carried away by other persons. On a reference to the tahsildar that officer expressed a doubt as to the right apparently then asserted by Martoba—"a claim to the forest on the ground that some *kumri* assessment was included in his *varg*." On this the collector, on the 15 April 1841, observes: "The payment of *kumri* assessment can only be shown as a ground for the raising of *kumri* produce; he cannot cut trees at all," *i. e.*, of course cannot cut them except for the purpose of *kumri* cultivation. "The vargdars, it appears, allow people to cut a large number of trees, alleging that the Sarkar forests belong to their *vargs*." This is to be prevented in future, unless the vargdar has in each case "obtained permission on the production of evidence to satisfy the Sarkar that the forest belongs to his *varg*;" and no trader is to cut trees on vargdars' licenses until orders are given determining, by inquiries to be instituted hereafter, the question of "whether the forest belongs to them or to the Sarkar." As a means towards this decision he calls for papers mentioned by the tahsildar, and "also the account which appears to have been prepared separating the forest of the Government and of the raiyats." This last is the return, No. 77 or 98, (2) prepared in 1833,(3) and more fully discussed in another part of this judgment.

Mr. Blair did not, in this order, adopt the easy mode of solving the difficulties in relations between the Government and the *kumri* vargdars which rested on the assumption that the vargdar was no more or less than the farmer of what was called a "rent" or a poll-tax. He thought that some of the forests, and the trees in them, did, or at any rate might, (4) belong to the vargdars, and seeking information upon which he might determine what these were; he directed that pending the inquiry no waste was to be allowed,

(1) Printed Documents, p. 179.

(2) Printed Documents, pp. 39, 41, 43, 45. (3) See below.

(4) See *Doe Dem. Ibbey* v. *Wilson*, 11, Ex. 56.

except on clear proof of the vargdar's right in each instance. That his recognition of the right of the vargdars to cut timber on what they called their estates, however limited this recognition may have been as to locality, was made a cover for extensive devastation in the purely Government forests, appears from the description given by Mr. Blane a few years latter.(1)

On the 3rd May 1841 Martoba presented the petition (accompaniment No. 1 to exhibit 56.) In this he sets forth his sale of trees to Shable Camut, and justifies it on the ground of his having long enjoyed the right of cutting down the jungle and raising produce, in consideration of a *beriz* (or assessment) settled with him on account of *kumri* and pepper. He adds that the tahsildar's report on this subject was sent in without an investigation of his documents, and of the enjoyment he has had under them of the jungle. The petition was referred for report; and the peshkar in exhibit 56(2) deals with this and with two other petitions(3) in which Mortoba protested against the recommendations that had been made for the levy of *kumri* fees from the actual cultivators of lands in Kaignad which he averred were included within his *varg*. As to the hamlet of Bali, the peshkar thought that Martoba, as the vargdar of the whole *varg* thus constituted, was entitled to have the settlement for *kumri* made with him. As to Kaignad, he found a correspondence between the sums entered in the Document(4) put in by Martoba as a statement of the *kumri* assessment paid by him on his several *vargs* subject to that impost and the "*beriz zhadati dakhla*" of 1805,(5) which he had obtained from the records. The local witness examined by the peshkar having deposed inconsistently with the old return of 1823(6) as to the boundaries of the forests, declared that these jungles were dedicated to the local deities, and that Martoba had always had possession and enjoyment of the jungles as a means of providing for the worship of these divinities, the peshkar reported that he

(1) See below.

(2) Printed Documents, p. 23. (3) Accompts. 2 and 3 to Ex. 56.

(4) Ex. 364, accompt. 30 to Ex 56. (5) Accompt. 55 to Ex. 56.

(6) Ex. 77, Printed Documents, p. 40.

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seemed to be entitled to all the forest lands claimed as belonging to his *varg*, except only those entered as *kulnasht* as a ground for remission of assessment, which remission, however, Martoba was willing to forego. The collector, Mr. Blair, looked less favourably on Martoba's claims. He admitted him, indeed, as the person with whom the *kumri* settlement for Bali was to be made;(1) but as to Martoba's asserted right in virtue of his paying the *kumri* assessment, and not the whole assessment, over all the jungles of the village of Kaignad, he entirely rejected it. He prohibited his cutting trees in the *kulnasht* jungles, which he defines as all the jungles "with the exception of the places cultivated by his tenants." Even though a jungle might, in a general sense, be a *kumri* jungle, trees were forbidden(2) to be cut in it if it had remained without actual cultivation.

The peshkar, unwilling to abandon his own view, appears to have backed up Martoba in a further application, by suggesting that the lands to which the remission of assessment as *kulnasht* was distinctly applicable being excepted, he was entitled to cut timber in all the remaining forest. Mr. Blair, however, refused to recede from his previous determination.(3) As *kumri* prevents the growth of large trees, "it is impossible," he says, "that timber should exist in those spaces which have been *kumried*." Its existence marks a place as Government property not included in the land assessed on account of *kumri*. Such, pending a further investigation which Mr. Blair intended to make, was the final order to the peshkar. Even for firewood cut on his recognized property Martoba was to obtain a pass from the shanbhog. The line of thought taken by Mr. Blair in these orders appears to have been this:—"I cannot, upon conflicting statement submitted to me, determine to what local limits, beyond his actual enjoyment of *kumri*, Martoba's rights extend. The assessment has been settled with reference to such actual enjoyment; and I will not allow it to be extended beyond the spaces in which it has in some degree been recognized. Thus limited, it cannot include a right to fell timber, which, accordingly, I forbid." Any right set up by

(1) Ex. 159, dated 14th January 1842, Printed Documents, p. 241.

(2) Ex. 160, Printed Documents, p. 243, dated 15th May 1842.

(3) Ex. 158, dated 6th June 1842, Printed Documents, p. 239.

Martoba to cut timber, except as strictly incidental to his cultivation of *kumri*, was thus contradicted, as the cultivation itself was strictly limited to places already previously cultivated in the same way. The order as to firewood seems to have been merely intended to prevent confusion and fraud. All persons desiring to cut firewood in the Government forests had been required, on the 8th May 1841, to present an application for permission,(1) yet without any intention to deny the right, as appears from another order, dated 27th June 1842,(2) which prescribing seignorage fees on timber, expects firewood, and allows it to be cut "without objection as before."

It is to be observed that Martoba himself, when examined on the 25th September 1841,(3) in the course of the inquiry that we have been considering though he says, in answer to question 12, that he will produce the *mulpatta* (lease, *sanad*) which he afterwards actually produced on the 4th October, does not seem content to rest on it for his right to deal with the forest at pleasure. He says that, as *kumri*-cutters sometimes do not come forward, he lets as much jungle as one *kumri*-cutter would clear to a wood trader at the same customary rate. He urges, too, that Government is thus enriched by customs' dues. In his written statement of the 4th October 1841(4) he admits that he has made some sales of wood to neighbours; but these, he says, have been limited to Rs. 8 or 10 a year, and the proceeds have been expended on offerings to the forest deities. The cutting of timber by traders really tends, he urges, to facilitate *kumri* operations, without doing injury. This is rather the language of a man deprecating censure for having, as he knows, done wrong, than of one conscious that he has not exceeded his right, and interested in maintaining it; but allowance must be made here, as elsewhere, for a characteristic timidity and suppleness of manner. All that can be inferred, perhaps, is that, whether by submission or assertion, Martoba desired much less to preserve his consistency and self-respet than to make the best of his circumstances. But this much is evident, that the documents do not

(1) Ex. 78, Printed Documents, p. 60.
(2) Ex. 82, Printed Documents, p. 64.
(3) Accompt 13 to Ex. 56, MS.
(4) Accompt 24 to Ex. 56.

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show such an extensive and undisguised dealing with the timber of the forest as would support an inference of a known and acknowledged ownership. The creeping tone of Martoba's statements and the hesitation with which he put forward his *sanad*, had their influence, no doubt, on Mr. Blair, who in his orders does not even allude to this *primâ facie* important document. In the earlier order of 15th April 1841 on Shable Camut's case it is said that Martoba having rested his claim on the entry to his debit of some *kumri* assessment; "besides this no other proof seems to have been brought forward by him." Martoba complained, as we have seen, that the inquiry was imperfect; but it is quite unlikely that if his *sanad* had ever been recognized as empowering him to dispose of the forest timber, he should not have brought it forward, or have insisted in his petition to the collector distinctly and emphatically on the rights that it gave to him.

On the 27th December 1841 the sub-collector, Mr. Anderson, directs(1) that prmission be granted to one Shabaji Vithal to cut 200,000 billets of firewood in the Kaignad jungle. The license is not to injure teak trees or "to cut trees in places in which the raiyats have right." If the conduct of the revenue authorities at this time is to be referred to a discrimination made by them between lands actually *kumried* and those left in a state of nature, this order may be applied to the portions of the forest reserved by Mr. Blair as Government property. If the whole forest was, as the plaintiff contends, his property and in his possession, this order could not be carried into effect at all without infringing that right so as to contradict it in its whole extent. It is only by accepting a limitation of the area over which his right subsisted, that the plaintiff can avoid the conclusion that it was, even as early as 1841, wholly set aside by the officials even as to an exclusive ownership of the firewood in any portion of the Kaignad forest.

On the 8th January 1842,(2) the sub-collector instructs the peshkar that he may direct the patel of Kinnar to cut 300 bamboos for the repairs of the *kacheri*, and 1,200 for the repairs

(1) Ex. 112, Printed Documents, p. 182. (2) Ex. 438, untranslated.

of raiyats' houses from the forests of Kaignad and Kodsali. Bhaskarappa (original plaintiff now deceased) took a part in the correspondence, he being at the time kulkarni of Kinnar; but no admission can, without straining, be extracted from his letter subversive of the rights before and afterwards advanced by his family. The cutting of bamboos was probably at this time looked on as a matter of common right; their purchase as equivalent only to a payment for labour. Even so late as 1857 no fee was levied, though the cutting of bamboos was subjected to regulation.(1)

On the 29th January 1842 the village officers were suspended for carelessness in not having prevented the cutting of two teak trees at Shidagunji in Kaignad,(2) and on the 25th April 1842 four persons were fined for cutting teak in the same forest.(3) Teak trees, as we have seen, were from the first strictly preserved; yet if, as has been contended, the recognition of the *sanad* for Kaignad made all the forests there private property, and the proclamation of 18th April 1823(4) gave to the vargdar full and sole ownership of the teak, these orders must have been passed in matters with which the revenue officers really had no concern.

On the 27th June 1842 the collector, Mr. Blair, issued an order for the levy of seignorage on the cutting of timber trees within the Government jungles.(5) Fourteen species are meantioned in the list, including blackwood, but excluding teak and poon. An order of the 10th October 1842 gives more detailed directions on the same subject;(6) but eventually the levy of seignorage fees was put a stop to under the orders of Government.(7) These orders, being expressly limited to the Government jungles, have not in themselves a direct bearing on the rights recognized as vested in Martoba; but from the exhibit 409, a report from the peshkar to the collector, dated 20th October 1842, it appears that the new rule was probably brought into operation on contractors with Government for cutting timber in Mardi, Dasnali Sulali and Balemani jungles of Kaignad, comprised within the

(1) Ex. 217, Printed Documents, p. 347. (2) Ex. 79, Printed Documents, p. 61.
(3) Ex. 80, Printed Documents, 62. (4) Ex. 73, Printed Documents, p. 40.
(5) Ex. 82, Printed Documents, p. 64. (6) Ex. 83, Printed Documents, p. 66.
(7) Ex. 85, dated 26th December 1843; Printed Documents, p. 68.

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plaintiff's claim. What was done upon the report does not appear, but it incidentally shows that the revenue officers had taken on themselves to give a contract to Goa traders by which the latter were authorized to cut down 20,000 trees, and that this contract had been, in parts at least, actually carried out. If the plaintiff's rights over all parts of the jungle were one and indivisible, that single right was by such a transaction wholly set at nought; but by distinguishing the lands *kumried* from those which were still virgin forest, an application can be found for the license which would still leave in Martoba's enjoyment a right that was not necessarily invaded.

In July 1842 the witness J. F. D'Souza applied for and obtained permission to cut twenty-five blackwood and four other trees in Kaignad and Goera. The same witness at a later time, *i. e.*, about 1853, cut sixty trees on a permit in Handalmakki, a forest of Bhaire.(1) In the year 1842 other applicants were permitted to cut trees at Hebkuli and Dasnali in Kaignad.(2)

The order of Mr. Fawcett, sub-collector, dated 16th December 1842, on the subject of eight teak trees surreptitiously cut at Navalgadde, in Kaignad,(3) implies that he considered applicable to this place a proclamation issued three years before against the cutting of teak in *kumri* operations. A similar proclamation, as appears from Mr. Blane's report of the 31st August 1847, referred to by Revenue Board(4) was issued by Mr. Blair in 1843 against the cutting of teak, blackwood, poon, jackwood and sandal-wood, but proved ineffectual on account of rights which the merchants found in possession of timber asserted they had derived from owners of private jungles. If any instances of this kind occurred in relation to the lands now in disptue, they would be of some importance, but none have been adduced.

Exhibit No. 406 is a recommendation, dated 13th January 1843 (untranslated) on the part of the peshkar that a contractor DaCunha for 2,000 logs in the forest of Dasnali (Kaignad) and Handalmakki (Bhaire) be now allowed, as he requests, leave to cut 1,800 of them; that permission be given for 300 trees in

[1] Printed Documents, p. 794, and Ex. 256 [untranslated].

[2] Exs. 424, 425, Printed Documents, pp. 684, 685.

[3] Ex 84 Printed Documents, p. 67. [4] Printed Documents, p. 351.

Handalmakki to the exclusion of Dasnali, on account of the teak in the latter which might be injured.

Exhibits 59, 60, accompaniment Nos. 1 to 60 and 61(1) are a group of orders of A. D. 1844, which show that the native officers of the locality understood Mr. Blair's order of 1842 as having allowed to Martoba a right, and an exclusive right, to cut the firewood produced in the jungles assigned to him by those orders and elsewhere where his right, as they conceived, had not yet been disputed. The subordinate officials had no authority to transgress the collector's orders, and interpreting them they do not seem to have gone beyond a reasonable construction, though one more favourable certainly to Martoba than that which eventually prevailed.

Exhibits 86, 87, 88,(2) are orders of the same year directed to the preservation of teak. Exhibit 87 is simply a *brutum fulmen* of the usual generality. The other orders are to the effect that applicants for permission to cut *kumri* are to "specify the jungle and place wherein they would cut it;" and that steps should then be taken to assign to them only such spaces as might be *kumried* without injury to the teak. Martoba did not at this time make any applications of the kind intended. He dealt at pleasure with the jungles allowed to be his, so that the orders could not bear upon him. There was always, as Mr. Fisher(3) points out, "Sarkari" as well as "vargdari" *kumri*.

On the 7th November 1844 there is an order(4) from the sub-collector Mr. Parker, allowing permission to be given to Martoba to cut 800 trees in the Kaignad forest to rebuild his tenants' houses. This shows that Mr. Blair's order was still adhered to; and Martoba by the application he made virtually admitted that he was not, at any rate, owner in all respects of all the Kaignad jungles. If his proprietorship was essentially integral, extending to all the Kaignad forests, and all that they produced or contained, he thus, by his own act, gave the lie to that alleged proprietorship.

(1) Printed Documents, p. 28 ff.

(2) Printed Documents, 69, ff.

(3) Report dated 30th August 1858, paras. 63, 83; Printed Documents, pp. 142, 145.

(4) Ex. 114, Printed Documents, p. 184.

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The accounts filed as exhibit 315 present under the years Fasli 1254, 1255 (1844-45, 1845-46) some transactions in timber. But these do not on a close scrutiny appear to be dealings in the open exercise of a right of ownership by Martoba. He had, as we have seen, obtained permission from the sub-collector to cut 800 trees in Kaignad. From exhibit 51 and its accompaniments (MS.) it appears that at about the same time Martoba got leave from the tahsildar to cut 1,500 trees in Goera, as his *muli* holding, for a temple at Goa. Not finding trees to his liking in Kaignad, he cut the 800 also, or some of them, in one of the Goera jungles. Information was given to the collector by Martoba's cousin Rangapa, and an inquiry being directed, Martoba relied on the permission he had obtained. The peshkar in Exhibit 51, dated 7th January 1846, seems to think that Martoba's right to the forests of Goer has been confirmed by some other person having the year before been forbidden to cut timber there ; yet he refers also to an order of the collector, Mr. Thompson, dated 28th January 1845,(1) in which that gentleman reprimands the tahsildar for supporting Martoba in his opposition to some traders who, under a contract, as appears, with Government, were cutting timber in Goera. Martoba seems to have used a false pretext as a means of smuggling out timber for trading purposes ; (2) but there is nothing in the transaction, when sifted, which supports a dealing by him on an independent right, or which militates against the exclusive control of the timber reserved to themselves by the revenue authorities.

Martoba was examined as to this business on the 28th July 1846, and he says that when he had cut 1,063 logs he desisted according to the collector's order. The Khushal Naik and Pedro, whom he mentions as having removed some of the timber cut down under the permission he had obtained, are easily identified as the persons of the same names in the account (exhibit 315), the transactions in which, already discussed, are thus brought into immediate

(1) Ex. 113, Printed Documents, p. 183.

(2) The duty which (Ex. 51) Martoba offered to pay in his application to the tahsildar, was perhaps customs' duty under Act VI. of 1844.

(3) Ex. 117, Printed Documents, p. 187.

relation with orders made, and submitted to, in total violation or contradiction of Martoba's alleged proprietary right over the timber of the forests in question. In 1850 Martoba renewed his application for leave to cut 800 logs of timber.(1) An inquiry was made, (2) and the head assisstant collector, Mr. Chamier, granted leave, for the present, to cut only 200 trees in the forests of Kaignad, Goera and Bhaire(3) At the same time Narayan, the cousin of Bhaskarappa, and united in interest with him,(4) was permitted, on his application, to cut 600 trees in Kaignad.(5) On the 13th October 1852 Bhaskarappa applied for leave to cut 300 trees more in Kaignad, Goera and Bhaire, (6) and this was allowed by two orders. The latter of these is recorded,( 7) and it directs the precautions are to be taken, so that Bhaskarappa's trees may not become mixed with those of the contractors.

The precise circumstances do not appear under which Mr. Forbes, head assistant collector, issued the order, (exhibit 116,( 8) dated 14th November 1845. Martoba appears to have been levying, or trying to levy, fees on the cutting of firewood in the Kaignad jungles ; but whether throughout the jungles, or only on the lands assigned to him by Mr. Blair, is not apparent. The assistant collector says: "In the matter of dispute of Nadkarni Martobrav of Kadra, setting up his title under a *mulpatta* to the forests of Kaignad, &c., there is an order passed by the collector in the Fasli year 1252( A. D. 1842), not upholding his right thereto. Accordingly, he is competent to collect money in respect of the *kumri* cultivation only, but not, on the plea of his having right in other respects to the forests, to collect wrongfully any money &c., from persons, natives or foreigners, that may cut billest in these, which are Government forests. I have personally directed the said Martobraya not to prevent such persons from cutting fire billets). You should see that the same is acted up to."

(1) Ex. 126 Printed Documents, p. 199.( 2) Ex.129, Printed Documents, p. 201.
(3) Ex. 130, Printed Documents, p. 202.
(4) Deposition of Ramchandra, Printed Documents, p. 721.
(5) Ex. 127, Printed Documents, p. 200.
(6) Ex. 137, 138, Printed Documents, pp. 209, 210, see Printed Documents, p. 719.
(7) Ex. 141, Printed Documents, p. 213. (8) Printed Documents, p. 186.

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If Martoba at that time set up an exclusive claim to all the Kaignad jungles without distinction, this order is a contradiction of the whole right without distinction, whether on the ground of a common right to cut fuel at pleasure(1) or on that of the ownership of the Government, subject only to the exercise of a right, as the assistant collector says, to "collect money in respect of the *kumri* cultivation," a way of putting the case by which Mr. Forbes merely anticipated the final resolution of the Madras Government.

In the deposition of the plaintiff(2) and in that of his brother Ramchandra(3) stress is laid on a sale of timber by Martoba, in 1846, to the agent of Government. When the whole correspondence, however, is examined,(4) it turns out that, though Martoba had persuaded the sub-conservator of forests and the assistant agent for the Government of Bombay that he being, under his *sanad*, proprietor of Goera, was entitled to payment for fourteen poon trees cut in the Bijoli jungle of that village; yet, when a request was sent to the revenue authorities, payment was refused; and the sub-conservator was sharply reminded that he had nothing to do with the questions of proprietorship of the soil. The contract for the removal of trees was then taken by Narayan,(5) whom plaintiff Bhaskarappa calls his younger brother(6) on behalf of Martoba, who, it may be thought, would be disinclined to take part in removing the property if he considered that he was being wrongfully deprived of it.

The plaintiff Shrinivas(7) says he is aware that strangers cut timber and firewood in the forests in question, on permits from

(1) DeCruz, Printed Documents, p. 795.

(2) Printed Documents, p. 756. (3) Printed Documents, p. 717.

(4) Ex. 275. and accompt, Printed Documents, p. 509; Ex. 443, Printed Documents, p. 686; Ex. 444, Printed Documents, p. 687.

(5) Ex. 446, Printed Documents pp. 690, 447; Printed Documents, pp. 691, 448; Printed Documents, pp. 692, 449; Printed Documents, p. 893.

(6) He appears to have been his cousin and a connexion by marriage. He was employed in the Revenue Department, and in 1852 suspended on account of the suspicious disappearance of some documents that had been in his charge relating to Bhaskarappa's *kumri* claims. See Exs. 161, 162, 131, Printed Documents, pp. 244, 247, 203.

(7) Printed Documents pp. 746, 755.

the Government officers, but he asserts that '*manafa* or profit" was paid to his family down to 1861. This, he said, applied to all the forests; but, when further pressed, he was unable to name any one who had paid such fees. He was able apparently to point out in his accounts some items, for Fasli 1246 and 1247, of sales of firewood; but these are consistent with his being a mere *kumri* cutter on a license, or even a mere cutter of fuel in the exercise of a common right. No entry of real significance could be found showing that his family had dealt as owners with the forest timber. There is no proof whatever of the statement "whenever Government wanted trees in this forest (Kaignad) they paid me for them and took them away." He admits that Martoba had been forbidden to cut trees in the forest prior to A. D. 1861, and admits that his family obtained permission when they wanted to cut down timber; but this he explains partly by the fact that vargdars were not allowed to export without a pass, partly by the fact of the dispute that was going on as to the right. Yet intelligent people, like the plaintiff's family, must have been well aware that to seek permission was to admit the right to grant it and the incapacity to act without it. The plaintiff's brother and virtual co-plaintiff Ramchandra says boldly: (1) "The Government have never up to A. D. 1861 cut timber or exercised any right in these forests whatever." This is a palpable falsehood; and there is an entire failure of evidence to support the further statement, "We have ourselves cut and allowed other persons to cut timber in these forests for the last twenty years, *i. e.*, from as long as I can remember."(2) The transactions already considered are the latest of which any proof has been attempted; and it is obvious that, so far as these afford any indication at all, it is not of an ownership of the forest timber exercised by the plaintiff's family, but of the absence of such ownership.

The revenue officers in the meantime went on treating the forest trees as the property of Government. A report, dated 7th December 1847, (3) from the peshkar shows that an application had been entertained from a catechu maker to cut down 2,000

[1] Printed Documents, p. 717. [2] Printed Documents, p. 717.

[3] Ex. 120, Printed Documents, p. 190, Ex. 120, accompt. 1, printed Documents, p. 191.

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khair trees in Kadra and Bore (Kaignad). He recommends that the license be limited to 800 trees.

On the 12th January 1849 and the 10th April 1849, Mr. Blane issued his orders (1) for limiting *kumri* cultivation to particular localities, and for restricting vargdars to areas proportional to the assessment they paid. The object of these orders was to preserve the forests from injury, with which view *kumri* is forbidden in places producing timber and affording facilities for its removal. It is to be allowed only where it has been practised before. But these orders not bearing, except indirectly, upon the actual exercise, by Government, of the rights of an owner over the forests timber, a full discussion of them is reserved for that part of this judgment in which their relation to the occupation or possession of the forest lands is to be considered.

On the 25th April 1848, Pandurang, whose evidence has already been referred to, applies for permission to cut 150 trees in the jungles of Kaignad and Kinnar. The application being referred for report to the shangbhog of Kinnar, Pandurang was examined by that officer, who was no other than Bhaskarappa, the original plaintiff in this case.(2) The same Pandurang is found on the 30th June 1853 entering into an agreement(3) as to the mode in which he is to cut, chiefly at Kaignad, 205,000 billets of firewood, for which he had contracted with the sub-collector.

This transaction took place under an order and a notification of Mr. Maltby, the collector, dated 17th March 1852,(4) which introduces a system of selling, by auction, the right to cut wood in the jungles, subject to an excise of 8 annas a log on export, and customs duty when sent to foreign territory. In the notification it is intimated that for the coming year (Fasli 1262) 500 trees may be cut in Mardy, a forest of Kaignad. There is evidence that this was at that time virgin forest,(5) and if it had never been *kumried*, it had been excluded form the plaintiff's possession by

(1) Ex. 91, Printed Documents, p. 75; Ex. 90, Printed Documents, p. 73.

(2) Ex. 264 A, Printed Document, p. 506; Ex. 264 B, Printed Documents, p. 50.

[3] Ex. 341, Printed Documents, p. 533.

[4] Ex. 170, Printed Documents, p. 256; Ex. 171, Printed documents, p. 256.

[5] See Ex. 123, Printed Documents, p. 195; Ex. 404, Printed Documents, p. 682; deposition of Ramkrishna Shahuji, Printed Documents, p. 793.

Mr. Blair's orders of 1842 and those of subsequent years. An auction was then held, and instructions for giving effect to it were sent by the sub-collector, Mr. Robinson, to the peshkar on the 21st May 1852.(1)

In the same year the right to fell 900 trees in Sanke Khote and Bijoli forests of Goer, having been sold to one Marian Pereira, he was opposed by Bhaskarappa. This is reported by Bhaskarappa's brother, the witness Ramchandra, as pated, and the sub-collector insists that the transaction shall be carried out. If Bhaskarappa offers further obstruction, he is to be prosecuted.(2) As to 100 trees similarly disposed of at Bargadde in Bhaire, no opposition was offered; and it appears that the only forests in that village (except Bali), now claimed by the plaintiff, are those called Kalani and Handalmkki.(3)

In January 1853, Bhaskarappa obtains leave to cut ten trees at Malapur (Kaignad) to present to a temple at Gokarn, to make a chariot for the idol there.(4) It is obvious from this that he was rigorously excluded from exercising an owner's rights over the timber in the forest.

On the 30th April of the same year, directions are given for announcing a sale, by auction, of the right to cut timber and firewood in the jungles.(5) The accompaniments to exhibit 411, the first of which has been translated at length (MS.), show that the contracts extended to Hartage, Sankargiri, Mardi, Majal, Balemani Devkar, Handegadde and Konipet, Halge, Malapur and Bolve, in the village of Kaignad, to Purat and Bargadde and to Goera. Exhibit 341, the contract of the witness Pandurang,(6) is one of those entered into on this occasion.

In Fasli 1264 (A. D. 1854-55) the notification, exhibit 384,(7)

[1] Ex. 132, Printed Documents, p. 204.

[2] Ex. 136, dated 16th August 1852, Printed; Documents, p. 208.

[3] See plaintiff's deposition, Printed Documents, p. 754, *ad fin.*, as corrected.

[4] Exs. 133, 134, 135, Printed Documents, pp. 205, 206, 207.

[5] Ex. 93, Printed Documents, p. 81.

[6] Printed Documents, p. 791; Printed Documents, p. 533, where the word January is given by mistake for June.

[7] Printed Documents, p. 669.

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indicates an extensive felling of teak trees by Government in the jungles of Balemani, Dasnali and Sulali, in Kaignad. On the 24th May 1855 one Texeira contracts(1) for fifty blackwood trees at Balemani and other places. A report of claims made on the 23rd July 1855(2) shows that timber had been felled in Balemani, Devkar (Kaignad) and in Yeda Kalani Bail, which seems to be the Kalani forests in Bhaire. A statement, dated 27th September 1855,(3) shows about 1,000 trees confiscated in the Kaignad and Goera jungles, and on the 28th Bhaskarappa applies for leave to cut 200 trees for building his house.(4) Leave was granted for only 100, and not in the Kaignad forest, but apparently at Goera and Bhaire.(5)

On the 11th March 1856, Ramchandara, brother of the plaintiff, obtains permission(6) to cut four trees in the Goer or Kaignad forest for boat building. Ramchandar could not remember this, (7) and his whole testimony relating to the forests is very unsatisfactory.

Exhibit 159, dated 21st February 1859, (8) is a notification of a sale by auction, of timber in the forests of Shidagunje, Virgé and Malapur (Kaignad). Exhibit 151,(9) and several following documents, relate to a sale of trees notified by the assistant conservator of forests, and the results. From these it appears that timber was sold at Bolve and Malapur in Kaignad.

This selection from a much larger mass of documentary evidence (10) is sufficient to show a continued and consistent exercise, on behalf of Government, of its proprietary right over the timber, and even over the firewood in the forests in dispute, from the time that the assertion of the right became a matter of appreciable consequence.

(1) Ex. 140., Printed Documents, p. 212.

(2) Ex. 287, Printed Documents, p. 672. (3) Ex. 386, Printed Documents, p. 671.

(4) Ex. 142, Printed Documents, p. 214. (5) Ex. 144, Printed Documents, p. 217.

(6) Ex. 145, Printed Documents, p. 218. (7) Printed Documents, p. 721.

(8) Printed Documents, p. 226. (9) Printed Documents, 228.

(10) See the judgment of the District Judge, p. 68, and the abstract showing transactions as in an index put in to the hearing of the appeal, App. No. 10.

In teak and the other specially valuable kinds of timber it is admitted that the ownership of the plaintiff's family was never recognized, (1) though such a right was more than once asserted ; (2) and as other kinds acquired a market value, they seem to have been invariably treated as objects of a similar right to that vested in the Government with respect to teak.(3) The witness Ramchandar says, indeed, (4) that he and his family have cut timber as long as he can remeber, and that a Government officer purchased from them ; but the case turns out, as already shown, to be one in which the alleged ownership was entirely denied. The plaintiff Shrinivas (5) said he had accounts of such timber cut by his family in the forests. In those that he had filed (exhibit 315) the only distinct transaction rests, as already seen, upon a permission from the sub-collector. The further accounts produced in the course of his examination (6) come down only to Fasily 1248, as we have already seen. Some letters produced at the same time point, like the accounts, to occasional transactions in the forest timber on Martoba's part between 1242 and 1250 Fasli (A. D. 1832-41). The first is from Shable Camut in Fasli 1249, and speaks of a contract in the Dasnali and Sulali jungles, out of which arose the occasion probably for Mr. Blairs's order, exhibit 110.(7) The second is a letter from one Francis, agent for Thomas Costa, dated 18th May 1840, engaging to pay Rs. 65 for the farm, during three years, of the jungles of Sulali and Balemani. The fourth is from the same, engaging to give 11 lbs. of paper for one month's cutting in Malapur. This is dated in Fasli 1249 (A. D. 1839-40). The third has no year inscribed on it. It requests Martoba to foward sixty-eight yokes of timber detained already for two years.

In the second letter there is a reserve of the five superior kinds of timber preserved by Government. Why this reserve should be made on a private estate, does not appear. But it is, of course,

(1) See plaintiff's deposition, Printed Documents, p. 736.

(2) Accompts. 23, 24 to Ex. 56.

(3) Printed Documents, p. 746. (4) Printed Documents, p. 717.

(5) Printed Documents, p. 735. (6) Ex. 331.

(7) Printed Documents, p. 179.

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conceivable that Martoba as owner might be actuated by the same motives as the Government itself. In the fifth letter, however, dated 12th January 1841, Fernandez, on behalf of Costa, engages to give three reams of paper for a license to cut forty teak and ten blackwood trees in addition, it would seem, to the contract in the fourth letter. If the private ownership set up by the plaintiff did not include the select trees, this contract was a fraud on the Government: If it did include them, then every permission sought and granted for the cutting of teak and blackwood, as well as in the case of other trees, was necessarily a contradiction of the general ownership of the plaintiff's family over the timber.

In the sixth letter one Jaki Fernandez explains that an apparent excess beyond his contract was really not committed by him. This is in Fasli 1248. The seventh letter refers, by implication, to a right asserted over the Kandse jungle (Fasli 1242). The eighth engages for compensation for a wrongful cutting in Konipet (Kaignad) in Fasli 1848. The ninth is a promise to pay at a fixed rate for wood to be cut in Ghatke adjoining Marde and Majal. Majal of Kopp Majal was *varg* No. 36, created in Fasli 1241.

It is not shown that there was an actual felling and carrying away of timber corresponding to these indications; yet the letters do, no doubt, suggest, like the memoranda in the same compilation, that Martoba was doing what is obvious from exhibit 110, also selling timber, until the collector's interference put a stop to it. There is no authenticated instance afterwards: and Martoba's submission, as well as his attempts to evade the order, prove convincingly that he could not have been satisfied he had a right to the timber. The plaintiff not being able to deny that strangers had, on licenses from Government, cut timber before 1861, (1) says they paid his family "'*munafa*,' *i. e.*, a fee or profit,"(2) but of this there is no evidence, any more than of his having cut trees in spite of the collector's prohibition.(3) He admits that Government cut teak trees and took them away. His assertion, that they paid for them, is quite

(1) Printed Documents, p. 748. (2) Printed Documents p. 746.

(3) Ex. 117.

unsupported. (1)

The testimony of Pandurang,(2) that he purchased trees from the plaintiff's father, has already been considered. His account of a transaction in cinnamon bark is open to the same objections. The witness Narayan(3) says he purchased khair or catechu trees from Bhaskarappa about the year 1846 in Bali, Kaignad and Goera. In 1847, as we have seen, there is an indication of a considerable transaction in khair trees on behalf of Government. (4) Goorrai(5) deposes to his having paid Rs. 12 for gallnuts and Rs. 6 for twelve trees to Bhaskarappa about 1356, but his statement is not calculated to win confidence. Mir Karim(6) bought Rs. 2 worth of wood out of Konipet from Bhaskarappa about 1853, at a time when Bhaskarappa was manager of Malapur. Gopoo(7) bought firewood from a member of the plaintiff's family for a couple of years between thirty and twenty years ago. When a prohibition against cutting without a license from Government was then imposed, he took out such a license, and an attempted obstruction by Bhaskarappa was removed by the village officers. This witness's testimony shows clearly both that the plaintiff's family for a time made money by the forest wood, and that this was then prevented in the interest of Government against the efforts of Bhaskarappa.

Balkrishna (8) says his brother bought some wood from Martoba twenty or twenty-five years ago. It came from Bargadde, to which, as far as forest is concerned, the plaintiff set up no right.(9) It may be inferred either that there may have been some timber on land not reckoned as forest, or else that, right or no right, Martoba was glad to get a consideration for his permission to cut wood anywhere.

Soobh Naik purchased about seventeen trees from Bhaskarappa fifteen or sixteen years ago out of Marde and Bore. The witness says he went first to the peshkar and asked permission to cut in

(1) Printed Documents, p. 755, 750.

(2) Printed Documents, p. 761.
(3) Printed Documents, p. 765.
(4) Ex. 120, Printed Documents, 190.
(5) Printed Documents, 768.
(6) Printed Documents, 769.
(7) Printed Documents, 770.
(8) Printed Documents, 770.
(9) Printed Documents, 754.

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the Kaignad forest, which was refused, on the ground that it was vargdar's property. That the peshkar should have given such an answer in 1856 or 1857, when the Government had long been selling the timber in the Kaignad forest, is incredible, and it turns out that the plaintiff's father applied for permission(1) to cut in the Bore jungle to Mr. Poulton, the assistant conservator of forests.

Ganna Shetti bought some wood and bamboos twenty years ago out of Bhaire from Bhaskarappa.(2) There was no restriction at that time, apparently, on the cutting of bamboos. What the wood was, the witness does not say.

This is the sum of the testimony by which the plaintiff endeavours to make out his exercise of ownership over the timber in the forests in dispute. It is easy to understand, without impeaching the veracity of the witnesses, that people holding, like the plaintiff's family, a large extent of land, and frequently filling local offices, may have had some transactions in timber in the extensive forests bordering on their property, or for some purposes even included in their estate, without the superior officers of Government having any suspicion of the fact. They may very well have sold timber, in some instances, from lands, as at Bargadde, not reckoned as forest at all. The evidence, both in quantity and character, falls very far short of what one would expect in the case of an undisguised exercise of ownership of the timber during a long term of years, and over a tract of country measured by hundreds of square miles.(3) All the witnesses go back many years for the transactions to which they depose, and it may safely be presumed that none could be got who would venture to describe similar dealings in more recent years.

The defendant's witnesses, on the other hand, depose clearly to the absolute control exercised over the timber by the Government. Mr. Muller, assistant conservator of forests, says (4) that "no one could enter the forests and take wood as he liked," or otherwise than on permission granted. He says that Bhaskarappa

(1) Ex. 360. (2) Printed Documents, p. 773.
(3) See Printed Documents, p. 796. (4) Printed Documents, p. 775.

and his family "made applications, like any other raiyats, for timber." No contractors were interfered with by them. When land was given at Marde to Annapa for cultivation, it was cleared by burning the timber, except blackwood.

The witness Fernandez (1) deposes to the cutting and selling of timber by Government in several of the forest tracts in dispute, and to the prevention of cutting without a license. He is confirmed by the forest inspector, M. DeCruz, (2) who evidently has a minute acquaintance with the locality. This witness deposes to frequent sales of timber by Government ever since 1845, and says that no one was allowed to cut timber without a license, though at first the cutting of firewood was free. The emphasis of this deponent's statements, however, may possibly have been affected by his having been sued by the plaintiff's brother.

Ramkrishna (3) says Government cut wood for its timber stores in Goera, Kaignad and Bhaire, and also sold it to contractors. Krishnaji (4) confirms this on an acquaintance with the forests from 1850 to 1860.

Ramchandra Nilkantappa (5) cut timber under contracts with Government for four years (1853-56) in the disputed jungles. Questioned as to obstruction on the part of the plaintiff's brother Ramchandar the witness denied it, and denied, too, that he had ever paid him any money. Balappa (6) took a contract, which he carried out for cutting trees at Virje. This witness also sold a quantity of gallnuts on account of Bhaskarappa: but where these were collected, does not appear.

Haidarkhan's evidence relates to 1859, when the dispute between the parties was clearly defined; but Shesha Maistree's contracts (7) are of Fasli 1256 (A.D. 1846-47) and 1261 (A.D. 1851-52). Souza applied for wood, and obtained it in 1842 (8) from Kaignad and Goera, and in 1852 from Handalmakki in Bhaire.

There cannot be any reasonable doubt, on a consideration of the whole of this evidence, that from the time when it be-

(1) Printed Documents, pp. 780, 782. (2) Printed Documents, p. 794.
(3) Printed Documents, p. 797. (4) Printed Documents, p. 801.
(5) Printed Documents, p. 790. (6) Printed Documents, p. 791.
(7) Exs. 260, 266; see Printed Documents, 793. (8) Ex. 256.

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came worth while to do so, the Government officers asserted and exercised constantly and openly the proprietary right over the timber of the forests which they alleged was vested in Government. The plaintiff's family knew this, submitted to it, themselves applied repeatedly for timber to the revenue officers. A few trifling and probably furtive transactions, which, witnesses after a lapse of several years say, related to this or that one of the disputed jungles, cannot be set for a moment against such a body of testimony.(1) From 1842 downwards there is no instance which goes effectively to disprove the acquiescence of the plaintiff's family in ownership of the Government. It is clear that this ownership had not been parted with at all in the opinion of the parties most interested. If it had been parted with, and had become vested in Sadashivrao or Martoba as an integral portion of the estate in the land which the plaintiff says was theirs, then the assumption and the exercise of ownership by the Government over the trees from 1841 down to the filing of the suit, was itself a perpetual ouster of the family from a portion of their estate, and, coupled with other proceedings which we have still to examine, would constitute a complete eviction of the owners as such, notwithstanding partial indulgences allowed to them in another character. If there was such an ouster, proved as to the whole by a multiplicity of acts bearing on the several parts of the estate, but all referrible to the same principle or purpose, then the plaintiff had a cause of action of the nature of ejectment so soon as he was disturbed in his possession by any of these acts, in their legal nature such as to contradict and annihilate his right throughout the estate, even though their immediate physical incidence was on but particular portions of it,(2)—a cause of action extending as to its physical object to the whole property, because his power over the whole was invaded and overthrown. Regarding the plaintiff's right, therefore, to land, to timber, to *kumri* cultivation

[1] "*Possessionum.....alia vera, alia imaginaria.....Imaginaria vero ubi quis se gesserit ac si possideret cum alius possideat*;" Bracton, fol. 39. See also fol. 41 p.

[2] *Nonutique ita accipiendum est ut qui fundum possidere velit omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire, dummodoet cogitatione hac sit, ut totum fundum usque ad terminum velit possidere.*" Dig. Lib. 41, tit. 2, fr. 3, 25. See Voet's Commentary ad loc. p. 9, and *Gladstone* v. *Padwick*, L. R. Ex., 203.

and to reclamation and disposal at his own mere will, as parts, so far as the right is concerned, of a single legal unit (and this is the point of view we have been invited to adopt), it cannot be doubted that the cause of action arose far more than twelve years before 1870, when the present suit was filed. The trees were cut down and sold by Government; the plaintiff was prevented from disposing of them; his use of the land was confined to comparatively small spots in the forest; grants were repeatedly made of land within the circuit of his alleged estate. This using and disposal of any portion whatever, at its discretion, by the Government necessarily implied possession of the whole, a possession against which however unrighteously assumed, the plaintiff could not possibly struggle except in the law Courts, and to these he did not resort until his recourse to them had, on his own hypothesis, long been barred by limitation.

We have been referred on the part of the plaintiff to the case of *Musst Manserun* v. *Musst Luteefun*,(1) where the familiar rule is applied that a regular deduction of title accompanied by a corresponding enjoyment, supports an allegation of right. Here, in so far as the right rests on the *sanads* it is not supported but contradicted by the active enjoyment assumed on behalf of the Government, thirty years almost before the institution of the suit, of an important part of the advantages conferred by the grants, and upon an assertion of right which, if the grants are to be construed as the plaintiff desires, called for immediate action in the Court on his part. His claim, therefore, on the *sanads* is as untenable in view of the transactions we have been considering as of the other circumstances which, as a whole, make it, in our opinion, quite unsustainable. It is no less contradicted by a series of transactions by which the Government officers disposed, from time to time, of portions of land included within the confines of the estate which the plaintiff says was his. Supposing the plaintiff's family were in possession of the 300 square miles of forest conferred by their grants, every acre disposed of by the Government without their assent was an invasion of their whole property. It has been contended by Mr. Shantaram that although

(1) 3 Calc. W. R., 46.

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such of those new grants as were acted on, constituted trespasses on which suits might have been brought as to the individual encroachments, yet the general possession, the possession of the remainder, was not disturbed by them; and that, although the suits at one time available, on the ground of the several trespasses, have become barred by limitation, that does not touch the case of the bulk of the property from which he contends that the plaintiff was not ousted till 1861. Now, as affording a ground of inference either that the plaintiff's family never trusted to their *sanads*, or had abandoned what claims they could have made under them, these repeated invasions, of what the plaintiff's family must have known to be a well-defined and proveable title, are of the utmost significance. To have abstained from legal proceedings while not only their enjoyment of the timber but their possession of the soil of the forests was every now and then invaded, without apology and without regard to their remonstrances, and that, too, not in the assertion of a particular right confined to the land disposed of, but of a general right, under which they would eventually be stripped of their whole estate, was a practical acquiescence in that right as vested in the Government against which there is nothing to be set but the respect which the family entertained for the revenue officers and their reluctance to engage in litigation. These are not sufficient reasons. When an infirmity of title is suggested by other considerations, the quiescence of the plaintiff's family is most naturally referred to that as its true source, and thus again a strong presumption arises against the *sanad* titles; although, should those titles be otherwise proved, the occupation, by the Government or its grantee, of a definite portion of land embraced within the larger estate of the plaintiff would not necessarily dispossess him of the whole.(1) The estate at large in such cases, however viewed by its owner, is an essentially arbitrary aggregate. So is the portion appropriated: it may be separately possessed, and its possession separately lost and acquired without affecting the legal relation of the owner to the residue; while the cutting of timber, though on a small

(1) "*Locus certus ex fundo et possideri et per longam possessionem capipotest.*" Dig. Lib. 41, tit. 2, fr. 26 Voet's Comm.

scale here and there, in places selected at the pleasure of an invader and the simultaneous prevention of the like acts on the part of the owner, necessarily constitute dispossession as to the whole forest so far as regards the timber and all rights with which the ownership of the timber is integrally connected.(1)

But if, setting the *sanad* titles for a moment aside, we deal with the question between the plaintiff and the collector, as resting on the position of the former as vargdar, some further inquiries become necessary and the acts of the parties may possibly be regarded from a different point of view. We have not only to consider what is to be regarded as the tract of forest for which a *kumri* vargdar pays assessment, but to answer the questions—What is the nature of the right that he has in or over such land? Is it a mere profit *a prendre*, or a servitude, or is it a true possession which developes itself into ownership? In what sense and to what extent is the vargdar owner? Are there acts of enjoyment of the nature of a profit *a prendre*, or of the exercise of a fee in *alieno solo*, to which, albeit his title is good, he is bound to submit? Is he subject to a right in the Government, or its grantee, to reduce the land held by him as forest, at forest assessment, to cultivated land with or without compensation? As to the first of these questions we have some reason to conclude that the mere payment of a *kumri* tax, however it may have indicated that some land was beneficially occupied by the vargdar, afforded by itself no certain evidence either of the place of that occupation, on of its nature as temporary or permanant, as held on proprietary right, or as merely casual and precarious. It is the possibility of referring the exaction levied to some particular area, shown to have been actually and exclusively held by the tax-payer, either by extrinsic evidence or by that of the Government accounts themselves, that makes the payment and receipt of the tax a practical assertion and admission of private ownership of the space thus rendered distinguishable.

But private ownership being established, it still remains true that "a property in the soil must not be understood to convey

(1) Savigny on Possession, s. 22; *Rich. dem. Lord Cullen* v. *Johnson* 2 Str., 1142; *McDonnell* v. *McKinty*, 10, Ir. L. R. 514.

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the same rights in India as in England."(1) It may be subject to restrictions and qualifications, varying according to the peculiar laws of each country; and those acts under one system would be necessarily regarded as contradictions of any ownership over the object on which they were exercised, except that from which they spring, might, under another system, be quite compatible with an ownership(2) subsisting unimpaired side by side with the limited right to which they would be attributed. The exaction of a share of the crops is itself an instance of this divided dominion. The reserve of timber generally, as of particular kinds of timber, may be referred to it. The owner by grant or by acquiescence would in such a case, notwithstanding the exercise of the reserved rights, be owner still of the soil of which for all other purposes he had been allowed an exclusive occupation. It is even conceivable that his ownership, or rather part ownership, emanating as a legal right from the State(3) should be subject, though otherwise fully recognized, to a retraction or diminution, in the intrests of the community, for the purposes of high cultivation, as in the case of the wastes of mirasi villages(4) and as under the Mahomedan law, grants of land may ordinarily be resumed if not cultivated in three years. The plaintiff himself seems to point to the allotment, at the discretion of the offiicials, for high cultivation of plots of land out of his estate; (5) but it has not been contended, on either side, in such case that such a residual right, still vested in the Government, is compatible with a private ownership of forest lands as against the State. The spaces of which the Government has disposed for improved cultivation within the area for which a *kumri* tax has been levied from the plaintiff, are pointed to, on the one side, as indications that the levy implied no admission of proprietary right over any part of what was subjected to the impost; on the other, as mere encroachments by wrongful appropriation, not touching the right to the remainder of the property

(1) Sir J. Shore in Fifth Rep. p. 205.

(2) See Pothier Traite du Droit de Domaine de Propriete, ch. I, ss. 14, 8.

(3) Von Savigny's System, sec. 57. "*At jus privatum sub tutela juris publici latet.*"—Bacon de Just. Univ. Aph. III.

(4) See above, p. 91. And Place's Rep. on the Jaghir, Fifth Rep., p. 717.

(5) Printed Documents, 747.

The more comprehensive the alleged title of the plaintiff, the more significant, from this point of view, would be the successive invasions of it, as a series of practical denials of that title in its whole extent, quite incompatible with its exercise; but if these acts can be referred to parts of the physical object of the right, that is, to spaces in the forest legally separable from those allowed to remain, uninvaded and unclaimed, in the plaintiff's possession, his right to the latter might still subsist, though within limits narrower than his claim. What the Government intended, and practically intimated through its officers, constituted the bounds which it set to the plaintiff's acquisition though its acquiescence, both as to the extent of rights to be exercised and the local limits within which they were to be exercised. As to the former point, we have seen that whether Sadashiv and Martoba gained a general ownership of the soil or not, they either did not gain an ownership of the timber, or were wholly ousted from the exercise of that ownership from 1842 downwards; as to the latter, we have to see, first, how far, if at all, the officers of Government allowed an undisturbed possession of the forest lands to the plaintiff's family; how far they actually disposed of those lands and on what avowed title; and, lastly, how the enjoyment, whether it is to be called possession, or by some other name, held by the plaintiff, was affected by the general administration of the forests, and the special orders in the course of that administration down to the time of his final and complete expulsion in 1861. The rights of a grantee are defined by the grant under which he holds: so much as it confers he owns, and no more. The vargdar's interest grows up under the influence of custom and practice, and may assume various characters admitting of no single definition. Although the continued operation of a *sanad* held by the plaintiff is irreconcileable with a series of acts necessarily referrible to a right inconsistent with it, yet it is quite conceivable that a vargdar, may, as such, have rights subject to considerably greater derogations than can be reasonably engrafted on the documentary titles in this case, and capable, therefore, of continued existence and recognition, notwithstanding large deductions from their completness according to the widest description. The position of the plaintiff's family,

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whatever its origin, is admitted, moreover by both parties in this case to have been more or less affected by the particular transactions between them and the revenue authorities. The plaintiff asserts that his titles have thus been confirmed or even created; the defendant that these titles have thus been annulled or prevented from ever coming into existence. It is necessary, therefore, to consider the facts connected with several appropriations of land by the revenue officials within the limits of the plaintiff's claim.

The first of the titles created by the British Government officers is one in favour of the plaintiff's own family. In Fasli 1241 (=A.D. 1831-32) the forest *varg* No. 36 was formed out of *kulanasht* and at Kaignad in favour of Martoba. The inconsistency of his accepting this as a *geni varg* bearing a new assessment with his being already proprietor under a *sanad* of all the forest within the village boundaries is obvious. Its subsequent change to a *muli varg* was made in Fasli 1248 (A. D. 1838-39) under Mr. Viveash's notification, allowing changes of that kind. The notification does not say anything expressly of forest *vargs* bearing only an assessment for *kumri* or forest produce; and that Martoba should have been allowed in 1838 to become *muli* vargdar of this forest holding, is opposed to the notion that *kumri* assessment then implied no more than a casual precarious interest of the nature of a farm of the tax on actual cultivators, and was, indeed, a sign that no higher interests subsisted. But why, on the other hand did Martoba take up this *varg* out of his own property? His doing so was an admission that it might be granted, and thus a denial of his own title, whether as *sanad*-holder or as mere vargdar over the lands comprised in it. It seems to have been formed out of a part of the forest called Kopp Mazal, which does not appear under any other *varg*. Martoba afterwards sought to have lands in Sulali and Balsewadi also recognized as included in this *varg* No. 36; but the village accountant reported in 1841 that they were not mentioned as belonging to it in the accounts.(1) It is clear that there were some forest lands at Kaignad to which Martoba was not entitled either

(1) Ex. 200, Printed Documents, p. 304.

as *sanad*-holder or as vargdar in 1831-32, and the question then becomes what these were ?

The grant of a piece of waste land, called Jamkhand, on the 6th March 1848 (1) appears to have been more probably of land once already cultivated and then deserted, than of forest land. Jamkhand does not appear as the name of any tract of forest at Kaignad, and no importance, therefore, is to be attached to this document.

In 1848, Narayan or Anappa, son of Ramappa, applied for about 200 acres of forest land at Marde in Kaignad.(2) The place seems to have included also a tract of land, properly call Bedhowarkodi or Bhowarkondi. The assistant collector assented to the application, and directed that the land should be surveyed. Martoba objected ; (3) but Mr. Maltby, the collector, having personally inspected the place, set aside the objection, and prescribed the terms on which Anappa might have the land. When Anappa, after some delay, agreed to the terms, the sub-collector issued the requisite instructions, (4) dated 15th September 1852. The report of the deputy tahsildar(5) shows what progress had been made in carrying these out on the 8th August 1854. Anappa was then in full possession, and of this Bhskar complains on the 20th November 1855.(6) Yet the land was never restored. The transaction, as a trespass now irremediable, is admitted. That Bhaskarappa should have submitted to it, is strange, relying, as he did, according to the case now made for him, on his proprietorship of the land in question under his *sanad*. In his list, exhibit 364, prepared in 1841, Martoba includes Marde in the forest claimed by him, by not mentioning it among the *kulnasht* land. That he should have submitted even as vargdar, implies, *primâ facie*, either that his *varg* did not extend to the land in question, as the collector seems to

(1) Ex. 122, Printed Documents, p. 194.

(2) Ex. 123, Printed Documents, p. 196; see Ex. 281, Printed Documents, pp. 517, 380; Printed Documents, p. 660; accompt. 2 to Ex. 379, Printed Documents, 608.

(3) Ex. 281, Printed Documents, p. 517. Ex. 404, Printed Documents, p. 682 ; Ex. 380, Printed Documents, 660.

(4) Ex. 397, Printed Documents, p. 681.

(5) Ex. 380, Printed Documents, p. 660.

(6) Ex. 281, Printed Documents, p. 517.

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to have thought, or else that his right was subject to a special derogation when the land was required by Government to supply an applicant with a place for the higher cultivation. The local examination by Mr. Maltby, however, could not have been necessary, although possibly for various reasons desirable, if Martoba's right was at that time deemed a merely precarious revocable farm of *kumri* fees and wild jungle produce. What the whole transaction suggests is, that Martoba was recognized as having, in his character of *kumri* vargdar, possessory rights, but rights which did not, in fact, extend to the place in question. In his examination the plaintiff Shrinivas endeavours to get out of the difficulty by saying that the land was not part of Marde ; (1) but this is obviously false, as Bhaskarappa's petition shows.(2)

The next grant (3) is one of some land, called "Pallasmal," at Bhaire to the patel Tumma Naik. But as this is not shown to be Kalani or Handalmakki, the forests in that village to which plaintiff's claim is now confined, it would require no further discussion, but for the looseness with which the plaintiff sets forth the local boundaries of the land claimed at Bhaire. The grant of Kumbiyagal to Puda Gavda is of a piece of rice land, bounded all round by forest it is true, but not, therefore, itself forest.(4)

In 1853 one Dhevganna applied for land in Dasnali, one of the Kaignad jungles. It was granted, subject to assessment, according to estimate, by the assistant collector on the 25th February 1854. (5) Bhaskarappa set up a claim to the land, and relied on its having, in 1832, been entered by the shanbhog, in his account of the inspection of lands and crops, as included under a *varg* called Ramshetti Sulale. On investigation, the sub-collector found (6) that that *varg* comprehended only the two plots called Sulale and Balemani ; and concluding that Bhaskarappa's claim was entirely groundless, he confirmed the assignment to Dhevganna. Bhaskarappa could not, on this occasion, have relied on his *sanad* ; he took his stand simply on his vargdarship: this is

(1) Printed Documents, p. 752. (2) Ex. 281, Printed Documents, p. 518.
(3) Ex. 121, Printed Documents, p. 193.
(4) Ex. 379, Printed Documents, p. 605.
(5) Ex. 396, Printed Doduments, p. 678.
(6) 396, accompaniment, Printed Documents, p. 679.

strange, and it is strange that, when his proprietorship was thus invaded, he did not at once institute legal proceedings. But taking his position as that merely of vargdar, his conduct is easily explained. Dasnali, though Martoba had sold timber in that jungle in 1838 or 1839 to Shable Camut, (1) was not really included in the *varg* in which by fraud or carelessness, it had been entered twenty years before; and not finding it attributed to any other *varg* he had to submit.

Ganna Shetti (2) has obtained a new *varg* from Government at Marde. The grant to Mahomed Isuf, which he describes as in Bargadde, (3) appears (4) only to be near Bargadde in Bhaire.

About Bargadde itself the plaintiff gives contradictory accounts, (5) as Bhaskarappa formerly made unfounded claims; (6) but, on the whole, it appears unlikely that the land is included in Kalani or Handalmakki, which only are set forth in exhibit 62 as included in Vishvanath's *varg* in Fasli 1260 (A. D. 1850-51).

Shrinivas says now that Bargadde is rice land, and that no part of it is included in this suit; nor has this been disproved by any counter testimoney, except his own earlier and apparently ill-considered statement.

In 1859 the parties were already at arm's length, so that the less weight is to be given to be document exhibit 156.(7) From this it appears that several persons having been found cutting *kumri* at a place called Hoskeri in Shidagunji, a forest of Kaignad, an inquiry was directed. Bhaskarappa claimed the land for *kumri* purposes as included in his *geni varg* No. 3; but the sub-collector disbelieved his account, and directed that the land should be dealt with as Government property free from private claims. It appears from this, that even after the complete resumption of the *kumri* lands by the revenue officers, so far as possession and dominion were concerned, the vargdars charged with *kumri* assessment were still recognized

(1) Printed Documents, p. 739. (2) Printed Documents p. 773.
(3) Printed Documents, p. 781. (4) Ex. 390, Printed Documents, p. 673.
(5) Printed Documents, pp. 755, 750, 754.
(6) Ex. 460, accompaniments, Printed Documents, pp. 694-704.
(7) Printed Documents, p. 235.

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as having a right of a personal nature to earn the amount preferably to others in the particular *varg* (=estates) for which they were charged. In the particular case, however, the land in question was found not to belong to a *varg* for which Bhaskarappa paid.

Ramchandar in 1857,(1) as well as Bhaskarappa in 1855(2) complaints of the grants of jungle lands that were really his property; and that these grants, or some of them, were of lands included within the present claim, is admitted by the plaintiff Shrinivas.(3) He adds: "This has been going on from the commencement of the British Government; and there is separate assessment for these lands." If that is so, it is impossible that he can have held a recognized unqualified ownership under his *sanads*. If, as vargdar, he was a forest proprietor, he must have been a proprietor within narrower bounds than he now asserts, or with rights very materially qualified. That would necessarily be so, if, in spite of his ownership, the Government exercised a right of converting his forest at will into rice fields. It has been a not a unusual experience in other parts of India that forest rights or privileges should be extinguished by grants of the land for regular cultivation.(4) Instances occur in the work of M. Laveleye of a communal ownership of the wastes, as in Russia and Java, coupled with a right in individuals to reclaim and retain in high cultivation particular portion of the soil;(5) and suc ha right might possibly be retained by the Government

(1) Printed Documents, Ex. 282; Printed Documents, p. 519.

[2] Ex. 281, Printed Documents, p. 517; Ex. 280, Printed Documents, p. 516.

[3] Printed Documents, p. 747.

[4] Compare the remarks of Sir H. Maine, quoted above.

[5] See above. Such a case appears, too, to be contemplated in Bracton, f. 226, where in an "*Assisa Nova Disseisinæ*" it is said: "*Item (tenens) decere potest quod nulla communia pertinet ad tale tenementum (scil querentis); quia illud fuit aliquando foresta, boscus, et locus vastæ solitudinis, et communia, et jam inde officitur assartum, vel redactum est in culturam et non debet communia pertinere ad communiam et ubi omnes de patria solebant communicare.*" The appropriation of a private estate out of the common waste is recognized, but without (according to the plea) drawing to itself the rights of common properly appendant to the ancient tenements.

representing the community at large while transferring its general ownership over a forest tract to a single proprietor, or allowing an individual proprietorship to grow up. This, however, is not a theory that has been relied on by either party in the present case; the plaintiff says the appropriations by the Government have been simple trespasses; the defendant says they have been particular exercises of a complete ownership, unimpaired by the licensed presence of the plaintiff's family and their permanency of a particular kind of profits as contractors with Government. If the grants were made out of an aggregate estate, not in the exercise of any such right as I have supposed conceivable as existing side by side with the plaintiff's general proprietorship, they contradicted that ownership from the first; and the plaintiff's family could never have acquired a title by prescription under a possession which was interfered with at the discretion of the revenue authorities in such a way as to show, both by act and intention, that they did not allow it to be that of an owner. There are strong grounds for supposing, however, that while the revenue officers supposed plaintiff's family to be entitled to, and allowed them to hold as owners, some lands of much smaller extent than they claimed, they dealt with the rest as Government property free from private rights. Grants made out of this property so conceived, would not at all contradict the plaintiff's right to the lands recognized as his property. How far this was so, and what were the results, are points that involve some difficulty, and require special consideration.

It is unfortunate that in endeavouring to determine to what extent the possession or enjoyment of the plaintiff's family actually went, we are prevented from availing ourselves with any confidence of the depositions of the plaintiff himself and of his brother Ramchander, by the gross and palpable falsehoods with which they abound. Whatever answer would, in his own opinion, tell most in his own favour, appears to have been given to each question put to either of those witnesses without a thought of whether it was true or not. Ramchander could not recall that the Government had, ever down to 1861, cut timber in the forests, or attempted to do so. Shrinivas con-

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tradicts himself hopelessly as to the grant to Anappa at Marde.(1) He says he has excluded the land to which that grant applies from his claim, and that it does not form part of the Kaignad jungle included in his *sanad* in direct contradiction to Bhaskarappa's statement, and inconsistently with his having traced his boundary so as to include this land, and made no express exclusion of it.(2) Ramchandra, too, in the early part of the case, says(3) that Martoba and the rest always asserted that "they paid assessment on the whole forest." Shrinivas(4) had plainly become aware that the exercise of proprietary rights,or what looked like proprietray rights, within the boundaries of the estates claimed by him told strongly against his claim, and he wished them to make out that the acts relied on, had taken place outside the limits of his claim. This is the obvious motive of his statements with regard to the Government tea plantation at Kaignad. Having been questioned about the grant to Anappa at Marde, and seen that it could not be contested, he places the older Government plantation there also. Yet the land, he says at first, was given to Government by his brother Bhahskarappa,(5) though he never heard of the plantation from Bhaskarappa. It is only since his dispossession, he says, that Government have made a plantation at Kadra. Mr. Miller(6) proves that in 1856 or 1857 the trees in the plantation at Kadra were about forty years old. The same witness himself began the Government plantation at Marde as recently as 1864. Kadra was undoubtedly included within the boundaries of Kaignad. The plaintiff admit(7) that no reduction was made in his assessment on account of the land taken up for teak plantations. There is no evidence of any grant by his predecessors to the Government, and the effect of these acts, involving an assertion of the ownership of Government, cannot be got rid of by merely, at the eleventh hour, excluding the particular places to which they directly extended from the claim. Unless they can be referred to some right reasonably conceivable

(1) Printed Documents, p. 752. (2) Printed Documents, p. 750.
(3) Printed Documents, p. 721, (4) Ex. 281, Printed Documents, p. 517.
(5) Printed Documents, p. 752. (6) Printed Documents, 777.
(7) Printed Documents, p. 756.

as one co-existent with a kind of proprietary right in the plaintiff, or else as extending and intended to extend to an area separable from another recognized as his, they can be taken in no other sense than as a practical denial and over-riding of his alleged right and exclusive occupation, whenever and so far as seemed expedient to the revenue officers. The State's original possession could not be lost without the consciousness of its representatives, or conduct from which such consciousness would properly be inferred by the plaintiff; and there could be no consciousness of possessions having been lost so long as the revenue officers, as occasion arose, disposed of any portion of the property at their discretion, without regard to its actual or ideal occupation by the plaintiff's family.(1)

From the examination of the evidence, so far as we have yet pursued it, it results that the plaintiff's family, though the proof of their *sanad* titles entirely fails, yet, as vargdars, exercised rights over forest tracts in all the estates to which the present claim extends. In Bali these rights could not be referred to any particular space. In Goera they extended throughout the village lands. At Kaignad and Bhaire they were exercised over areas which might have admitted of recognition, had the requisite evidence been adduced, but which cannot be recognized from the evidence placed before us with a view, on the one side, to grasp the whole forests of those villages, and on the other, to justify a total exclusion of the plaintiff from the forests. Taking the plaintiff's right, as he would have it accepted, to be equally good to one part of the forests of these villages as to another, and that his ownership of the soil involved, as incident to it, the ownership of all timber growing thereon, it is plain that his exercise of dominion has been prevented, except within such limits as the executive officers prescribed, at any rate from the year 1842 down to the present time. The ownership of the Government over the forest trees has, during the same time at least, been uniformly asserted. So also has its proprietary right in the soil, if the several portions which it has from time to time disposed of, as occasion arose, and without apology or compensation, formed essential

(1) See *Curzon* v. *Lomax* 5, Esp. 60; and Lord Hardwicke in *Townsend* v. *Ash*, 3 Atk. at p. 339.

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parts of the alleged estate of the plaintiff, undistinguishable as to the right by which they were held from the other parts of his property. But while the plaintiff's family set up claims to the whole forests, it is clear that from 1842 downwards these claims were never admitted. It is clear, also, that for many years after 1842 some forest lands were recognized in the Government accounts, in the transactions recorded in those accounts and in the orders of the collectors, as belonging in some way to the plaintiff's family. They were assessed for those lands, held such enjoyment of them as was allowed to any one, and were repeatedly admitted to have, at least, a usufructuary interest for the purposes of *kumri* cultivation(1) In the absence of the evidence, which on the one side or the other could probably have been supplied, as to the exact local limits, in each case, of the admission of the authorities, or the possession of the plaintiff's family, it is possible that the dealings of Government with the forest timber, and its disposal of plots of land, may be referred generally to places lying without the boundary, not, indeed, of what was claimed, but of what was conceded to the vargdar. If that was so, the right to the lands within the recognized limits remained unaffected. In the case of Goera it is harder to draw such a distinction than in the case of Kaignad or Bhairo, since the vargdar's right, so far as it was recognized at all, was not only asserted but admitted equally to all parts of the village without discrimination ; but even then the orders of the collectors and their acts between 1842 and 1857 may have established a local severance between lands unresumed and unclaimed by the Government and those over which it chose to assert complete ownership. How far this was so ; what was the position of plaintiff's family with reference to the estates down to the time when the entire control of *kumri* cultivation was assumed by the Government ;

(1) In *Harper* v. *Charlesworth* (4 B. & Cr., 583, 594) Bayley, J., says : "It appears to me that there was strong evidence to show that there was actual possession in the plaintiff. The property belonged, and the timber was reserved, to the king, but every description of enjoyment was not exercised ; " and Holroyed, J.: "The payment of the (nominal) rent, the exercise of the privilege of shooting over the land, and the actual cutting of the grass by the plaintiff's permission, was sufficient evidence.....that plaintiff was in the actual possession of all but the trees."

how the steps of that process affected the legal relations between the parties down to the entire exclusion of the plaintiff from the forests ; and whether any remedy for rights that may have been infringed now remains to him, are the remaining subjects of inquiry.

By its proclamation(1) of the 25th April 1807 the Government of Madras announced that the Hon'ble Court of Directors had resolved to assume the sovereignty of the forests in Kanara, that an officer had been appointed to see that no injury was done to them, and that all persons were "prohibited from cutting or destroying trees in the teak forests.....or from taking away the young plants." The resolution of the Court of Directors could not, of course, give it a sovereignty which it did not possess already ; it was in virtue of a sovereignty already existing that the proclamation was made. What it obviously meant was that the Court being sovereign by deligation,(2) and thus vested with the eminent domain,(3) intended in future to exercise it for the preservation of forests over which public rights subsisted. It has been urged for the plaintiff that the prohibition extends only to the cutting of teak ; but though this was held chiefly in view, the prohibition must be taken as general, since "injury" might be done by destroying timber of other kinds. At the same time a proclamation, thus couched in general terms and announcing merely the intention of the Government in future to strictly preserve the forests, cannot be reasonably construed as having been intended to extinguish private rights where they subsisted. It could not really have any such effect, nor could it prevent the growth and acquisition of private rights where the facts were present which according to law would engender them, the domain of the State not being in India inalienable.(4)

The collector's order of the 7th August 1811 prohibits the cutting of teak trees as against orders already issued. His order(5) of the 12th December 1811 repeats this pro-

[1] Ex. 368 Printed Documents, p. 535.

[2] See per Lord Kenyon *Moodley* v. *E. I. Co.*, 1 B. R. 469.

[3] Grot. D. J. B. P., Lib. II, cap. 14, s. 7 ; Chitty's Vattel, p. 111 ; Kent's Comm. I, 270, II. 407.

[4] See Pothier's Tr. de La Prescription, s. 1, 16 ; Ex. 18, Printed Documents, 35,

[5] Ex. 70, Printed Documents, p. 37.

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hibition as to teak, poon, blackwood and sandal wood at the same time that it allows the cutting of the fourteen other kinds of timber commonly employed for building. These notifications are general in expression, and are probably to be referred to forests in which the Government rights still subsisted, not to those, if any, in which these rights had been transferred to private persons. (1)

In 1820 the extension of *kumri* cultivation had apparently become a cause of some anxiety to the revenue authorities, as on the 1st March the collector, Mr. Harris, issued an order (2) directing the tahsildar of Ankola to make careful inquiries as to the existence of any *sanads* or charters defining the rights of the raiyats over the forests, as to any former decisions on the subject, and as to the places where, under the former government, timber had been cut for public purposes. But while the public might, on the one hand, be suffering from unlicensed encroachment, the raiyats, Mr. Harris thought, where in another direction suffering from an undue harshness of the officials. In his report of the 14th June 1821, (3) Mr. Harris speaks of the forest conservancy regulations as having been construed so as to prevent the cutting of trees planted "in the small gardens attached to many a farm house." The Government of Madras, recognizing the grievance, informed that of Bombay in 1822 that it would "instruct the district officers that the authority of the conservator of forests extended only to the timber and trees produced in the forests belonging to Government, and that with respect to all other trees and timber his control over them must, like that of any person, arise from private contracts with the proprietor." (4) This direction, having been concurred in by the Court of Directors, should have been an effective safeguard of any private rights over the forests which those in whom they were invested could establish.

It was obviously in pursuance of the same policy that the collector issued, on the 18th April 1823, the following proclama-

(1) See *The Collector of Ratnagiri* v. *Vyankatrao Narayan*, 8 Bom. H. C. Rep. 1, A. C. J.

(2) Ex. 71, p. 38.

(3) Kanara Land Assessment Case, Printed Books. Vol. III, p. 43.

(4) Proceedings of Madras Government of 23rd October 1874 para. 3.

tion(1):—

"PROCLAMATION.

"All the raiyats are (hereby) given to understand (as follows)

"In conformity to the orders now received from Government, the proprietors of land are, from the date of this proclamation, at liberty to cut teak, poon and all (other) trees growing on their propreitary estates or private gardens, and make use of them according to their pleasure. The mulgars are (hereby) further informed that, in future, the Dock Department, for the sake (on account) of Government, or any other department, is not in any way prevented from cutting trees from private gardens of (their) *vargs*. Yet the cutting of teak and poon trees growing in Government jungles is strictly prohibited, as it has been heretofore.

All the raiyats should, therefore, fully know that if any one cut or destroy such trees, he will be subject to criminal prosecution and punishment, and should behave themselves accordingly."

The passage relating to the operations of the Dock Department might possibly be taken as reducing that which precedes it to a mere permission to the landholders to cut timber concurrently with the Government; but it ought, perhaps to be construed by a reference to the context and to the proceedings of the Government, as meaning that the department was not prohibited from acquiring trees from private gardens, either on payment of compensation or by agreement with the proprietors.(2) It could not have been intended to recognize the landholders' rights, and to extinguish them in the same breath. A statute for the preservation of timber would be required for the limitation or the extinction of rights acquired as against the crown or public; (3) and the rights of the landholders appear to have been taken as already subsisting. The proclamation was, in fact, intended to carry out the same policy as that Mr. Dunlop in Ratnagiri, (4) issued about the same time, and by which, it has been held, the Government was bound. These are the considerations that most naturally present themselves to a Court seeking to construe the document according to received legal principles; yet in practice

(1) Ex. 73, Printed Documents, p. 40. (2) In France the timber in lands subject to the forest law is liable to a "servitude de Martelage" by which it can be taken for the navy. See Gaudry Traite de Domaine, f. 841.

(3) See Chalmers's Opinions, 155. (4) 8 Bom H. C. Rep at p. 2., A. C. J.

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it would seem to have been interpreted as a mere indulgence to the landowners to cut timber within their own estates only (1) whatever the recognized area of those estates; while the officers of Government still cut down as before, within those estates or without them, such teak and poon trees as they thought suitable for the public departments. No single instance has been adduced of purchase-money or compensation actually paid to a landowner for such timber; and the obvious improvidence of the order, thus construed, would go far to account for the havoc made some years later in the forests.(2)

What the precise rights of the landholders were however, to what lands they extended, and in whom they resided, were questions which the inquiry of 1820 had not furnished the collector with means of answering. Accordingly, on the 2nd January 1822, Mr. Harris issued an order (3) in the following terms:—

"Whereas it is necessary to know the details of all the Government jungles (situated) in the said taluka, together with the boundaries thereof, &c., you are to make an inquiry, not limiting yourself merely to jungles formerly assigned to people connected with the Shipping Department; but if there was a former inquiry giving the results of that inquiry, and examining whether the jungles have from a long time been known and continued as Government jungles, and from the ancient practice, and from *sanads* and documents, if forthcoming, and from old accounts, and the evidence of witnesses, which should be fully inquired into by you; you should prepare and forward to the collector a statement of such jungles as are (those of) Government, with particulars of the names of the magnis and mauzas they are situate in, and of each jungle (with) its limits or boundaries and marks. You should, without making any delay in this work, make a full and regular inquiry, and forward a statement containing details of all the Government jungles in your taluka. You should consider this work to be very urgent.

You should also ascertain, as stated above, as to which of the four kinds of trees, viz., the teak, blackwood, jack and poon trees, in the jungles included in those considered to be Government jungles is abundant, and which is less so, and which is not found at all, and insert in the statement which

(1) See below. (2) See below. (3) Printed Documents, p. 39.

kind of the trees is abundant, which is less (abundant), and which is not found at all, by way of remark. Date the 2nd January, in the Fasli year 1232 (A. D. 1823), Camp, Mangalore."

This was followed by a proclamation which has not been given in evidence, but which is referred to by the tahsildar, Khanderav, in his application of the 22nd August 1823(1) to the sub-collector for further instructions. According to the account given by the Madras Government in its proceedings of the 23rd October 1874, (which as an historical statement we have by consent received in evidence,) Mr. Harris's order had down to that date been generally misunderstood, in consequence of a faulty translation from the vernacular, as ignoring "all private proprietary right in forest, and claiming for Government all the forests in the district, with the exception of 100 yards round cultivated estates." The vernacular order itself must have plainly conveyed to the tahsildar's mind,(1) that he was by careful inquiries to ascertain the boundary lines deviding jungles, the property of Government, from those belonging to private persons; and (2) that from the former he was to exclude jungles from which the raiyats had customarily taken leaves, &c., as aids to their agriculture. These are the *kumaki* (auxiliary) lands spoken of by Mr. Blane in para, 41 of his report of the 20th September 1848. He regards them as having been acquired in portions by separate landholders "as an adjunct to the cultivated lands;" but the tahsildar seems to point to the use of them as generally "common to the whole village", which, as Mr. Blane says, was the case with "waste lands used for similar purposes in other parts of the country."(3)

(1) Printed Documents, p. 41. (2) Ex. 366. p. 194.

(3) These rights of vicinage were in many instances an important element of the value of estates. The forest rules in Oude and other provinces have in various degrees recognised them. In Ratnagiri the "*rab*" or "*warkas*" lands appear to have come into the enjoyment of individual holders of arable land in regular cultivation by a similar evolution from a common right or a common indulgence conceded originally as an inducement to the costly reclamation and culture of rice lands. On a similar principle, probably, common appendant in the forest was favoured by the English Common Law (see Coke's 4th Inst, 297-298); though the theory of the Courts, explained by Blackstone, B. II. ch. iii, looked at the matter from the wrong side as judged by its history, Compare Rev. and Jud. Sel., Vol. IV, pp. 415, 416, 453.

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Mr. Cameron, the sub-collector, not intending evidently to determine anything off-hand as to the rights set up, directed the tahsildar to make inquiries as to whether the cutting of *kumri* and the payment of assessment went together in every case or not, and whether the assessment on this account formed the subject of a separate agreement or charge. But he directed that, with the exception of cultivated plots and 100 yards around them, the whole of the forests should be entered in the returns as "*Sarkari*" or belonging to Government. The object, he said, was not to deprive the raiyats of their common of pasture and collection of manure and firewood, but to prevent the cutting of teak trees in the Government jungles, as distinguished from lands for which the raiyats were indivdually charged with a *shist*. It was from this order probably that the long-continued misconception of Mr. Harris's order, referred to by the Madras Government, took its rise. Yet, so far as can be gathered from Mr. Cameron's directions and his statement of the purpose in view, the payment of *shist* or assessment for lands recognized as charged with it was at that time deemed enough to mark them off from Government jungles, and to exclude them from the scope of the intended arrangements for the preservation of the forests. What he wanted was a list of the forests which might be Government property, intending afterwards, and on fuller information, to allow for the private interests that had been carved out of it, or imposed on it as burdens of the nature of common or easements. If, however, we are to assume that Mr. Cameron intended and was understood as saying that no forest lands, except, the small steadings already mentioned and ordinary lands regulary assessed, were to be excluded from the lists of Government jungles, it is plain that the returns, (exhibits Nos. 77 and 98,) prepared in obedience to such an order as this, even if not open to the objections on the grounds of carelessness and misinformation taken by Martoba when examined in 1841 (1) would not even ostensibly discriminate between Government and private forest property. In either case the forest within 100 yards of a clearing was to be excluded, in either case if beyond that distance it was to be

(1) Accompt. 23 to Ex. 56; Ans. to Q 5, M. S.

included in the statement.(1) The determination of where private rights over the forests existed, was intended to be based on the information called for as to the payment of assessment; but whether this information was ever really supplied, does not appear. It is clear that no arrangement was founded on it, and it does not seem to have been relied on, when the landholders, after being allowed for many years to treat the forest lands connected with their *vargs* as their property in the fullest sense, and no doubt making this user a means of unauthorized encroachment, were suddenly told that they were shut out from all but the precarious exercise of a privilege which might be withdrawn at the discretion of the executive.(2)

For several years after 1823 the subject of the demarcation of the private and Government forests seems to have been allowed to drop. Reliance may, perhaps, have been placed on the arrangements of the Conservancy Department under the Government of Bombay, which, however, was in no position to determine questions of disputed ownership. Mr. Harris, in his report of 14th June 1821,(3) thought that in remote magnis (sub-divisions) cultivation ought to be encouraged by the allowance of clearing, He speaks of *kumri* as a means of preparing the ground for a more advanced agriculture, and thinks that raiyats taking forest lands under a *kowl* or lease should have the timber. These views were not expressed with direct reference to Ankola, but they may have been adopted with regard to it by collectors, who could see in the circumstances of the Panch Mahals forming the northern part of that táluka, much that resembled those of the other parts of Sonda. The collectors may have been not unwilling to defer grappling with a difficult and ungracious task, pending the

(1) According to the Mahomedan law a dwelling and its enclosure to the extent of about two acres would be free from the title (*ushar* or tribute *kharaj*) leviable on the rest of the estate, Belin Etude sur Propriete en Pays Musalman, p. 142. But a special ownership of the house and close was the first form of separate property in land amongst many nations. See Laveley, Op. Cit, 11. 104, 45, 139; Quarterly Review, July 1871.

(2) See Ex. 94 Mr. Fisher's Report, para, 61; Printed Documents, p. 142, Proceedings of Board of Revenue, p. 38; Printed Documents, p. 357. Proceedings of Government, paras. 4, 8, 16; Printed Documents pp. 155, 156, 158.

(3) Kanara Land Assessment Case, Printed Books, Vol. III, 44, 45.

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decision of the general question of assessment in Ankola. Surveys of a rough kind were, as we have seen, made between 1821 and 1825, (1) with a view to a settlement ; but, except a great deal of barren discussion, no progress appears to have been made towards a final arrangement down to the time when Kánara came under the Bombay Government. These surveys, if the records of them have been preserved, though no doubt directed chiefly to ascertaining the extent and production of the rice lands, ought, it may seem, to throw some light on what other lands, if any, were at these dates regarded as forming part of the *vargs*, but they have not been produced in evidence.(2) It was felt, no doubt, that their credit would be seriously impaired by the circumstances already adverted to. The change of policy, moreover, on the part of the Government, which was notified in 1832, as it must have caused very great difficulty to attend any attempt to distinguish the timber cut on private properties from that felled in the Government jungles with which they were mingled, would naturally lead to a lax and defective administration of the forests in this respect. Extended cultivation was desired in order to furnish matter for *jamabandi* reports of growing prosperity, the preservation of timber was hardly regarded, as timber was as yet hardly an article of commerce. It is only after many years that even the accounts of Martoba, keenly alive as he was to his own interests, afford any indication of his having realized material gains from the forests, which rightly or wrongly he had appropriated. Yet all this time the proclamation of 1823 must have been considered as legally operative on what were really private estates, since the existence there of private property in all kinds of timber, at least as a common appendant to the *vargs* within which the trees were standing, was, as we shall see, made a means of defeating a general notification of Mr. Blair in 1843 for the preservation of valuable trees in the Government forests.

(1) *Vyakunta* v. *Government of Bombay* 12 Bom. H. C. Rep., 188, Appx. 188; Printed Documents in that case, Vol. III, pp. 141, 149.

(2) in a letter, dated 16th August 1827, Mr. Lewin, the sub-collector, in answer to the Assisstant Judge, says : "That the *paymaish* (survey) accounts of Ankola cannot be considered authentic." Kanara Land Assessment Case, Printed Documents, Vol. III, 202.

How for them, if at all, were the forest lands now in dispute private estates?

In 1841 an application for his aid was made to the collector by Shable Camut(1) and others who had purchased trees in the forest from Martoba, plaintiff's father, and complained that these had been fraudulently removed by other persons. The tahsildar was doubtful whether the forest could be regarded as the property of the vargdar, and sought instructions. The collector says :(2) "Martobrav of Kadra seems to have allowed the trees to be so cut, and to have laid claim to the forest on the ground that some *kumri* assessment was included in his *varg*. Besides this no other proof seems to have been brought forward by him. The payment of *kumri* assessment can only be shown (adduced) as a ground for the raising of *kumri* produce. He cannot cut trees at all. From the facts (reported) it appears that in your taluka (some) people receive a consideration, and (then) allow their neighbours and strangers to cut a large number of trees, alleging that the Sarkar forests belong to their *vargs*. In future no vargdar should allow others to cut trees unless he has previously obtained permission on the production of evidence to satisfy the Sarkar that the forest belongs to his *varg* ;" and, again, after censuring the conduct of Martoba and others, the collector says : "No merchant or other person should cut trees from that forest until orders are given, determining, on inquiries to be instituted hereafter, the question of whether the forest belongs to them or to the Sarkar." It is plain from this that the intended demarcation had never been carried out. Mr. Blair calls for "the account which appears to have been prepared, separating the forests of the Government and of the raiyats ;" but if, as is probable, the document, exhibit 77, was forwarded to him, he cannot have been misled by it into supposing that the mere entry in it of forest as Sarkari was sufficient to give the forest that character as against the claims of private individuals. On the 14th

(1) Mentioned by plaintiff (Printed Documents, p. 739,) as having had dealings with his family.

(2) Ex. 110, Printed Documents, p. 179.

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January 1842(1) he deals with a proposal by the shanbhog (village accountant) to collect the *kumri* assessment at Kaignad and Bali direct from the actual cultivators; and on that occasion he makes no mention of the return No. 77 as decisive against Martoba's right. Martoba, it appears, had maintained(2) that as he, and he alone, paid *kumri* assessment in Kaignad, he had a "right over all the jungles of the village." Mt. Blair does not scout this claim as being necessarily absurd, and contradicted by the result of the previous inquiry. What he says is, that Martoba's offer to supply teak to Government, and to pay in future the assessment on some jungles entered in the village accounts as tenantless (*kulnasht*), shows that he cannot be really entitled to any jungles except those (opposed to *kulnasht*) which he has had under cultivation by his tenants. The *kulnasht* lands, Mr. Blair says, Martoba, as a penalty for his frandulent devices, shall not have even on payment of the assessment, but, subject to such payment, Martoba is to "continue to enjoy for the future all those jungles which have from the beginning been cultivated with *kumri*." On his use of these no restriction, it appears, is meant to be placed; a prohibition against cutting timber is limited to the *kulnasht* jungles, as is made more plain by the subsequent explanatory order of the 16th May 1842.(3)

It may posibly be a question why Mr. Blair, satisfied as he was of Martoba's fraudulent conduct did not resume the "*geni*" *vergs*, of which there were seven in Kaignad, by turning out Martoba at the end of the year, and handing over the *vargs* to other tenants. The answer is to be found probably in the notification issued by the then collector, Mr. Viveash, on the 24th October 1834, and printed at page 24 of Vol. II of the Printed Documents, in the case of *Vyankuta* v. *The Government of Bombay*, (12 Bom. H. C. Rep., Appx. I). By this the "Sarkar genidar" a tenant theretofor removeable, though not in practice removed, at the end of each year, was promised, if he paid the assessment, an equal permanency of holding as the mulgar or recognized proprietary tenant. By the same notification Mr.

(1) Ex. 159, Printed Documents, p. 241.

(2) See Accompt. 23 to Ex. 56, MS. (3) Ex. 156, Printed Documents, p. 243.

Viveash had invited genidars to become mulgars if they desired, his aim being, as explained by his successor, Mr. Maltby, in 1852, (1) "to render the occupants of those lands full proprietors of a saleable and improvable property," a policy approved by the Government on the 11th April 1853 (2) Permanent holdings subject to assessment were probably regarded by Mr. Blair as property which he could not touch any more in the case of their consisting partly or wholly of forest lands than in the case of rice lands; (3) though had he considered the *kumri* lands even in *geni vargs* as held on mere tenancies-at-will, he would probably have resumed them. Had he looked on the *kumri* vargdar as standing in the relation to Government of a mere farmer of a tax, without any interest in the land at all, he would simply have put an end to the farm as a merely personal contract, and made new arrangements with all the safeguards that he had thought expedient.

Mr. Blair had probably discovered by this time, notwithstanding Martoba's assertion to the contrary, (4) that there were no ascertained local boundaries by which the portions of forest to which Martoba was and those to which he was not entitled, could be precisely defined. He defines his right as extending to those jungles which have "from the beginning" or customarily been cultivated with *kumri*. Some new objections having been raised by Martoba, the collector, on the 6th June 1842, says (5): "It is to be understood that jungles which have been cultivated from the beginning only are included in the assessment paid by Martoba. The places where timber trees exist, being included in the *kulnasht* assessment, and they being Government property, no one should be allowed to cut (such trees) without

(1) Kanara Land Assessment Case, Printed Documents, VII, p. 92.

(2) *Ib.* p. 95.

(3) See Mr. Fisher's Report, Printed Documents, p. 142, para. 60.

(4) Accompt. 23 to Ex. 56, MS.; Ans. to Q, 1, Q. 3, Q. 12. The list in exhibit 364 or accompaniment 55 to exhibit 56 does not supply the promised information as to the forest attached to each separate *varg*. The latter affords no particulars; in the former, "*vadis*" or forest tracts of the same name are assigned to several different *varg*), as *muli* to *vargs* Nos. 20 and 31, Kabingule to *vargs* Nos. 10 and 26, Sulali to *varg* 31, and *geni* No. 3. Virje and Kankavali, described as *kulnasht*, are also entered, the former under *vargs* Nos, 13 and 20; the latter under *vargs* No. 23 and *geni* No. 60.

(5) Ex, 158, Printed Documents, 239.

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permission from Government." Again, the tahsildar having recommended that with the exception of the jungles as *kulnasht*, Martoba should be allowed to cut timber from the whole forest of Bali and Kaignad, Mr. Blair answers: "The collection of *kumri* assessment is made only in respect of the cultivation of *kumri*.

No one has a right to enjoy the trees standing in the jungles near lands under cultivation. Therefore, although Martoba pays the full *kumri* assessment for the Bali village, he cannot have the trees standing in the jungles which are never cultivated.

The same applies to the jungles of the village of Kaignad.

In the talukas on this side of the district the persons who pay the *kumri* assessment have a right only to cultivate the *kumri*; they have no right over the trees of the adjoining jungles.

Therefore Martoba cannot have any more right than this by the sole reason of his paying the full *kumri* assessment of the village."

Mr. Blair lastly calls for the old survey accounts, (1) in order to see how these *kumri* lands were entered in them, with what result we are not informed.

Taking these several orders together, it appears that while Mr. Blair thought it quite possible that a particular and larger tract of forest might, by a special title, be attached to a *varg*, yet, in the absence of such special title, all that the payment of *kumri* assessment in a particular *varg* created or indicated, was a right to cultivate *kumri* and use the forest at will for that purpose wherever under that *varg*, *kumri* had been customarily cultivated. These limits, though not precisely ascertained, (2) seem, wherever there had been an appropriation, to have been in a general way know to the local officers. The jungles of the *vargs* are spoken of in the correspondence as if readily recognizable. From the tahsildar's report, dated 25th April 1841(3) and its accompaniments, it appears that the shanbhogs reported that several "*kuls*" were cutting *kumri* in the jungle of Bali, with respect to which no regular assessment had been entered except in the sub-*varg* of Tilu Jhambad. In Kaignad, *kumri* cutters had cultivated in Sulali and Balemani, which Mortoba claimed as included in *varg*

(1) See Ex. 366, p. 157.

(2) Compare Ex. 123 and Ex. 404 with Ex. 380, p. 560 of Printed Documents.

(3) Ex. 200, Printed Documents, p. 304.

No. 36. This the shanbhog reports (1) really includes only *kop mazal*. Twenty others had cut *kumri* in Navalgadde claimed by Martoba as belonging to the *varg* Kabbingule Anandrav (*geni* No. 25.) Three had cut in kasba Kadra claimed by Martoba as included in the *varg* called Bhika Gavda *muli* No. 19,) because of his paying pepper accessment on account of it, though as to *kumri* it is entered as *kulnasht*. One person has cut *kumri* at Bolve. It seems clear from this enumeration that the jungles were distinguishable by their names, though without limits precisely ascertained, and that they could be assigned to the several *vargs*, if any, to which they belonged. The same appears at a later time from the sub-collector's order, exhibit 313, dated 9th August 1858.

It has been urged for the plaintiff that Mr. Blair's orders were a violation of the rights conferred by the proclamation (2) of 18th April 1823 ; but that proclamation, while it gives to landholders the trees, or at least permission to cut down the trees on their "proprietary estates," does not in any way define what lands fall within that designation. It was argued also that there is no evidence of any restriction on the vargdars' forest rights before Mr. Blair's time, such as that which he now sought to impose on them. The answer to this is, that even though there had been no interference on the part of the revenue officers with the free use of the forest, yet that free use, without an exclusive appropriation' would not in itself constitute an exclusive right as against the public. The right arising from the State's emenent domain is not extinguished by its mere non-exercise ; and its exercise was not called for until some public injury are inconvenience arose.(3)

On the other hand it was admitted that there was not evidence of vargdars having, in virtue of *kumri* assessment paid by them, been allowed to cut down timber in order to expert it.

Mortoba, in his examination and his written statement of A. D.

(1) Printed Documents, p. 306. See accompt. 23 to Ex. 56 ; Ans. to Q. 7—12, dated 25th September 1841.

(2) Ex. 73, Printed Documents, p. 40.

(3) See the American cases cited by the Fishery Commissioners in *Leconfield* v. *Lansdale*, L. R., 5 C. P., 696 ; *Vooght* v. *Winch*, 2 B. & A., 632 ; *Scarby* v. *Tottenham Railway Company*, L. R., 5 Eq., 409 ; *Cooper* v. *Barber* Taunt. 99

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1841, (1) admitting that he has recently allowed Goa traders to cut down trees in the jungles, endeavours to excuse this by saying that the same thing had previously been done by other vargdars as his relative Ramappa; that *kumri* cutters sometimes did not come forward; and that the clearing of the woods really facilitated the *kumri* operations. As to teak timber, he said that the trees had been planted by his family; that the Government were supplied, and would still be supplied, with what they required; as to cutting allowed on a small scale to neighbours, that this was in return for articles furnished for offerings to the forest deities. Although in the course of these proceedings Martoba produced his *sanad*, it was plain that he did not venture to rely on it as giving him absolutely any rights except as incidental to his *kumri* occupation or enjoyment of the forest claimed by him.

It was said that the landholders did cut timber for their own use; but even this seems, in the case of the plaintiff's family, to have been done under permits from the revenue officers, (2) inconsistent with the complete ownership over the forests now set up by the plaintiff. The truth is that Martoba's rights were now in course of definition by actual contact with those of the State. The cultivation of *kumri* was, as contended for the plaintiff, admitted as a right, but not as a right of indefinite local extent. The assessment had been levied on the exercise of the *kumri* cutting seen or admitted to be carried on to a certain extent in certain places. To this extent and in these places it was now recognized as an exclusive right but no further.(3)

But being thus recognized as an exclusive right, what was the nature of that right? Had the plaintiff's family possession of the lands customarily *kumried* by them, subject or not to rights as

(1) Accompts. 23 and 24 to Ex. 56. MS.

(2) See Ex. 114, dated 7th November 1844, Printed Documents, p. 184.

(3) The order of Mr. Blair, had effect been given to it, (as was much to be desired,) by an actual demarcation, would have settled the respective rights of the vargdar and of the Government by mutual exclusion, on the principle followed sometimes in similar cases in Germany and France (where it is called "Cantonment") See Cotta La Science Forestiere, sec. 166; Du Droit Crocq. Le Administratif, sec. 842. The same plan has been followed under the Inclosure Act in England as between lords of manors and tenants.—See L. R., 9 Q. B., 162.

in *alieno solo* exercised by the Government? Or was possession in the Government subject only to the exercise of *kumri* cultivation by the vargdars ? The order of the 28th March 1844 (1) against the cutti ng of young teak trees, and those of the 16th and 23rd March 1844, (2) directing that *kumri* is to be carried on only in those places that may be marked out for the purpose, with a view to prevent injury to the young teak trees are of tittle or no use towards the determination of these question. They are properly referrible to jungles the property of Government, to the jungles claimed by the plaintiff only if those jungles were Government property, which is the very point to be decided. It is certain that *kumri* was cut by the plaintiff's family down to the year 1858, a nd no evidence, it was contended, has been adduced of a marking out, under, these orders on their application in any instance of particular spaces whithin which their operations were to be confined ; but on the 23rd February 1857 we find the sub-collector, Mr. Robinson (exhibit 147, Printed Documents 220,) saying on an application made by Bhaskarappa: "It has been decided that during this year, the Fasli year 1267, Bhaskarappa may be allowed to cultivate so many acres as will yield to him an income equal to double the *kumri* assessment paid by him. You should make inquiries, according to law, what places are fit for the *kumri* cultivation, and point out to the persons in Bhaskrappa's service the places to the exetent in acres which, as shown above, ought to be allowed (to him) for the purpose of cutting *kumri*. Take measures to carry out the above (instructions). Bhaskarappa represents that there being a great number of *kumri* cutters, the *kumri* now permitted will not provide a sufficient labour for their livelihood. The above order is issued in respect of the *kumri*, which appertains to the assessment included in Bhaskarappa's, *varg*. If there are, besides these, more *kumri* cutters there, you should, under the orders already passed, containing rule regarding the *kumri* cultivation by the other *kumri* (cutting) raiyats, allow to such persons so many acres as you may on inquiry find to be sufficient for their subsistence, and also impose assessment on this according to law." This indicates that at that time the sub-

(1) Ex. 87, Printed Documents, p. 70.

(2) Ex. 88, Printed Documents, p. 71 ; Ex. 86, Printed Documents, p. 69.

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collector did not intend to allow Bhaskarappa any choice even as to the places where his *kumri* rights were to be exercised, and should thus deprive him of the possession, if any, that he had till then retained; but the question of Bhaskarappa's rights was at that very time under consideration by the collector, to whose order, should it differ from his subordinates, we must look for their determination. Nor are the orders of the 27th June 1842 (1) and that of August 1842 (2) conclusive on the point we are now considering. By the former of these the collector, fulfiling a purpose expressed in his order of the 6th June, forwards to the tahsildar a list of seignorage fees to be exacted on the cutting of other kinds of timber than teak in "the Government jungles". To this he adds that there is no objection to the cutting of trees for fuel without payment of fees. Exhibit 83, dated 10th October 1842, (3) is an order, apparently issued by the sub-collector, giving some further instructions as to the levying of seignorage fees, which under the orders of Government were discontinued in 1843. (4) The order of the 1st August 1842 relates to teak trees cut in the Dasnali and Sulali jungles of Kaignad, treating them as the property of Government, and confirming the impression produced by the order of the 29th January 1842 (5) and 25th April 1842,(6) that the revenue officers treated the timber in some, at any rate, of the jungles at Kaignad as Goverment property. The peshkar's report exhibit 409, dated 20th October 1842, tends the same way. It shows that the cutting of timber generally in the Kaignad forests, called Mardi, Dasnali, Sulali and Balemani, was regarded as subjet to the control of the revenue officers and to the levy of seignorage fees. But whether anything was done upon the recommendations made in this document for the protection of growing teak, does not appear; and for the plaintiff it has not unreasonably been urged that a mere report of a subordinate officer, without evidence of any practical step taken in consequence of it, could not dispossess Martoba, or deprive him of any right to which at the time he was really entitled.

(1) Ex. 82, Printed Documents, p. 64. (2) Ex. 81, Printed Documents, p. 63.
(3) Printed Documents, p. 66.
(4) Ex. 85, dated 26th December 1843. Printed Documents, p. 68.
(5) Ex. 79, Printed Documents, p. 61. (6) Ex. 80, Printed Documents, p. 62.

The prohibition referred to in exhibit 84, dated 16th December 1842(1) has not been put in evidence; but the order is meterial, as showing that the cutting of *kumri* had been expressly proclaimed not to include a right of cutting down teak trees. As to trees of the less valuable kinds, the carrying on of *kumri* cultivation would imply their removal. The order of the 14th January 1842 recognizes Martoba's claim to the jungles so far as he, by his tenants, had actually brought it under *kumri* cultivation. The clause of the order of the 6th June 1842, requiring that a pass should be obtained from the village officers, seems to have been designed only to prevent frauds. It could not have been intended to prevent Martoba from cutting firewood, as this was at that time permitted to all,(2) but was similar to the regulations found necessary in all forest countries when it becomes worth while to make them.(3) In January 1844(4) an order was issued that, in furtherance of the previous order, the patel might, in the absence of the shanbhog, issue a permit covering firewood exported by Martoba from the jungles in respect of which he had been paying assessment. On the 5th August in the same year(5) the tahsildar, on Martoba's complaint that permissions are given to strangers to cut firewood in Bali, Kaignad and Bhaire, writes to the peshkar that the question of Martoba's rights in the Kaignad forest is under inquiry; that there is no objection to Martoba's cutting firewood in the jungle, to the enjoyment of which he has by the collector been held entitled, and any undisputed jungles for which he has *mulpattas* or leases, but that no other person is to be allowed to cut firewood in the jungles referred to. An additional ground for the order is stated, in the fact that even in the Government jungles the licenses to cut firewood are to be limited so as to prevent interruption to the *kumri* cultivation; but this appears to be given only as a reason *a fortiori* for the order in favour of

(1) Printed Documents, p. 67.

(2) Ex. 82, Printed Documents, p. 64.

(3) See, for instance, the English Statute I Edw. III, St. 2, cap. 2; and Co. Lit., 115*a*.

(4) Ex. 59, Printed Documents, p. 28.

(5) Ex. 60, Printed Documents, p. 29.

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Martoba within the local limits of enjoyment allowed to him.

On the 27th September 1854(1) the tahsildar reports that Bhaskarappa has down to that period been in exclusive enjoyment of the honey produced in his vargdar jungles, and this enjoyment seems to have been continued down to 1857, when on the 22nd April the sub-collector,(2) acting on the collector's order of the 2nd of that month,(3) directed that Bhaskarappa's alleged right to the forest should no longer be recognized, that the right to gather the honey should be put up to auction, and that no one on Martoba's behalf should be allowed to cut *kumri* except under an order from the revenue authorities.

The gathering of honey and the like,(4) being advantages not necessarily connected with *kumri* cultivation viewed merely as a profit *a prendre* or a right exercised, without possession, in *alieno solo*, it and the exclusive ownership of firewood allowed to Martoba, for a time at least, point to a recognition, by the revenue officers, of his having an estate in the land, and a possession in virtue of that estate. Mr. Maltby,(5) writing in 1839, says: "The extent of the Government right in the jungles and waste has never been very clearly defined, and some extensive tracts have been gradually included by persons whose right is extremely doubtful. In many cases the just claim to the right of pasturage or of gathering leaves for manure preferred by the holders of the neighbouring estates, to the exclusion of other villagers, has been changed to a claim of proprietary right in the soil; and many secret encroachments have been made upon waste to which the parties have no title whatever. Much jungle is cut, especially in the north of the district, as firewood for the Bombay and other markets; and there is reason to believe that title is cut without payment of a fee to some alleged proprietor whose claim is gradually becoming prescriptive." The process, therefore, that was going

(1) Ex. 58, Printed Documents, p. 26.

(2) Ex. 139, Printed Documents, 211.

(3) Ex. 148, Printed Documents, p. 221.

(4) See plaintiff's deposition, Printed Documents, p. 739. Gopal Ball Mahalaya, Printed Documents, p. 760.

(5) Ex. 366, p. 129.

on in Martoba's case, was familiar to the revenue authorities; and so far as Mr. Blair disapproved of it, or thought he could contend against fit, it is to be presumed that he defined his own position and Martoba's in 1842. The revenue Board, on the 5th December 1844,(1) go so far as to say "there is not a foot of ground unappropriated" in Kanara—an opinion based, as Mr. Blane shows, on a mistake, but a mistake agreeing with that general carelessness or looseness of grasp under which an asserted ownership of the soil was likely to acquire consistency, though of questionable origin, through not being disputed, and possession to be allowed where only a license to enter and use for particular purposes could at first and in strictness have been claimed.

The Government, too, being in intimate communication with the Board of Revenue,(2) cannot be supposed to have been ignorant that there was any possession held by a subject in Kanara adverse to itself. Till knowledge of the intrusion (supposing the act had that character) reached it, its own possession would not for legal purposes be disturbed according to the principle *quamvis saltus proposito possidendi fuerit alius ingressus tamdiu priorem possidere dictum est quamdiu possession ab alio occupatiam ignoraret*;(3) but from the moment that such knowledge was acquired, and no step forthwith taken to expel the intruder, the consciousness of a full power of disposition over the lands occupied, and with it the possession of them, was lost to the Government, and passed to the private occupire holding as proprietor.

That in very many cases a servitude or right of user had been allowed in Kanara to become an actual appropiration of ownership of the soil and of possession in a strict sense, is evident from the important and able report of Mr. Blane, dated 20th September 1848. After dealing with waste included within the recognized limits of assessed estates, Mr. Blane continues:(4) "With respect to the other class of waste lands claimed as being attached to estates to which I referred, viz., the immamorial waste, they may be considered

(1) See Ex. 366, p. 186.

(2) See Madras Reg. 1 of 1803, s. 9. (3) Poth. Pand., Lib. 41, tit. ii, fr. 39.

(4) Ex. 366, p. 196.

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to form a distinct question from that of the waste lands just referred to. It is to the claim to these lands which has been in cautiously admitted, or, at least, not opposed, that I attribute the absorption of nearly the whole *rekhnasht* or Government waste land. The claim appears to have recently attracted the notice of Government, for it is apparently for information respecting these that it called for some information in its minutes of consultation dated 5th August 1845. There are considerable tracts of such kinds of waste land attached to a great part of the estates, some of which is cultuable and some consisting of hilly or stony ground incapable of improvement. They are often termed '*kumeki*' lands or land allowed to assist in the cultivation and they were intended to afford to the raiyats the means of procuring leaves from the brushwood or jungles growing on them as manure for their fields, and to furnish grass as fodder for their cattle; but they do not appear originally to have differed materially from the waste lands used for similar purposes in other parts of the country, except that, in place of being common to the whole village, they were divided and enjoyed in separate portions by the individual landholders. The original terms upon which they were held, then, I conceive to have been essentially as an adjunct to, and in connection with, the cultivated lands; and the right to them to have been modified right and only to be enjoyed for the purposes for which they were held as above stated. The usufruct of them for such purposes was a necessary concession; but I do not conceive them to have been on that account the less Government lands, but only lands which they were permitted to occupy for particular purposes.

"If such were, in general terms the nature of the tenure under which they were held, it has become entirely altered under our administration. The raiyats now claim the absolute proprietary right in them the same as to their cultivated lands, and, as a necessary consequence of such a right, the liberty to bring them under cultivation without the payment of additional assessment, and even of selling or letting them, and thus separating them, if they choose, from the cultivation, and alienating them from the original purposes for which they were intended. Another effect of such a tenure is, that even where they are greatly in excess

of the quantity necessary for the purposes for which they were intended, they can prevent others from taking them up on a *patta* and upon a fixed assessment payable to Government, and the person occupying them pays the rent to the landlord, not to the Government, and is in every respect his tenant. It is necessary to observe, however, that the right to cultivate such lands is not admitted in theory, but it is, as a rule, actually enjoyed in practice from the simple cause to which I have so often alluded, that we do not know the extent of the original estates, and cannot tell, therefore, what is new cultivation and what is old, and the ready answer to all questions on the subject is, that is part of the original cultivation. I have, since I have held the office of collector, endeavoured to set my face steadily against the admission of such claims; but lands which have been formerly brought under cultivation in this manner are beyond recovery, and it may be said generally that nearly every case in which it is attempted to restrain these encroachments, involves a protracted contest, and nearly the certainty of having to defend a law suit if there be the most slender grounds for disputing the award.

"The forest and woodland occupied for *kumri*, to which I referred in a former letter upon the subject of the conservancy of the forests in Kanara, is also of the same nature as the above, and claimed much on the same grounds. It is sufficient to repeat here that the landholders claim, on these as well as other waste lands said to be included in their estates, the exclusive right of cultivating, or renting them out, and selling them and their produce in every respect in the same manner as their old cultivated lands upon which, according to my view, an assessment was alone fixed." Then, after dwelling on the gradual extension, in private conveyances and in proceeding in the civil Courts, of the rights asserted as against the public, the collector adds: (1) "When it is considered that this system has been going on for the last forty-eight years, it may be readily imagined to what an extent lands have thus been appropriated. This has arisen from there being no public record of the extent of any man's land to which the public officers could refer. In suits between individuals the right of Government do not come under discussion; and the pro-

(1) Para. 46.

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duction of an admitted sale, or mortgage deed, or other evidence of a like nature has always led to the land being decreed to one party. There has never been any application in Kanara of the simple rule, that a man has only a right to as much land as he pays for; nor is there any rate or rule of assessment by which the collector can determine whether he has more or less than he ought to have, or by which he can recover or reassess it. It is of no avail for him to say, you have three or four times as much land as is equivalent to the assessment you pay; the simple answer is that it is within the limits of his *varg*, or the production of some document or the evidence of friendly neighbours to prove that it is his, and if the claim be resisted, there is the ready source of carrying the case into the Court."

It is to be regretted that the letter of the 31st August 1847, referred to by Mr. Blane and also his letter of the 31st August 1849 referred to by the Board of Revenue in their proceedings of 16th April 1859, (1) in both of which he dealt specially with the subject of *kumri*, have not been placed before us. It appears, however, from the extracts given in the proceedigns, (2) that Mr. Blair, a former collector, had in 1843 issued a proclamation directing "that five valuable kind of timber, viz., teak, poon, blackwood, jack and sandal, should be preserved *in the Government forests*; but this, Mr. Blane states, had practically no effect, inasmuch as the timber merchants continued to fell the timber wherever they found it, on the plea that they cut it from private jungles, and had obtained the permission of the owners to do so. To defeat this subterfuge Mr. Blane had directed that when jungle is claimed as private property, the right must be established before timber is cut. The clearance of the jungle, so injurious in many respects, had been attended with one great advantage. According to all reports, it had diminished the prevalence of fever. On this account principally he confined his recommendation to the confirmation of his prohibition of the felling of the five superior kinds of timber, and to the preservation of the jungle in spots near rivers on the sea coasts, where from its position the timber would be easily made

(1) Ex. 218, para. 9, Printed Documents.

(2) Paras. 7, 8.

available, and the inferior kinds of wood might be allowed under proper regulation to be cut as firewood for export.

"On this report being laid before Government, they, agreeably to the recommendation of the Board, authorized the Collector of Kanara to restrict the cultivation of *kumri* to 'such places and to such an extent as might, in his opinion, be expedient for the preservation of the forest and the general welfare of the province.' He was also instructed to assert the right of Government to all forest lands to which a title cannot be clearly established by private individuals."

It appears also from the collector Mr. Fisher's report of 30th August 1858,(1) that "Mr. Blane, when addressing the Board on forest matters on the 31st August 1847, observed that one of his greatest difficulties arose from the absence of all definition of the rights of private individuals, and the facility which this has afforded the people for putting forward claims to the jungle as private property. He pointed out that the jungles of Lower Coorg had, in the course of a very few years, been ruined by Mangalore speculators, who, on the strength of an order that raiyats might cut teak on their own lands, brought whole tracts of forest as portions of *vargs*, and worked them until no timber of any value remained."

It cannot reasonably be said that this was the mere precarious occupation from which no property could arise,(2) or that rights thus asserted and thus exercised by a vargdar did not, where they were submitted to, constitute possession as owner.(3) The power of resumption was no doubt, in virtue of its superior strength, vested always in the Government, which thus, in one sense, had not lost possession of what it could re-take at any moment ;(4) but in allowing the growth of private property

(1) Ex. 94, para. 48. Printed Documents, 140.

(2) See per Lord Eldon in *Cholmondely* v. *Clinton*, 2 Meriv., p. 259.

(3) See 2 Ersk. Inst., 272, and compare the description "in by right adversely to the rest of the world and asserting the dominion to be his own" * * * "Having entered upon it and claiming it or exercising the right to it as his own, Tindal, C. J. in *Davies* v. *Lownds* cited, 2 Sm. L.C., 585 (5 ed., with Bracton, f. 52, on a "*possessio precaria*," or "*de gratia*," and see *Catteris* v. *Cowper*, 4, T. R., 547.

(4) Savigny Possession, s. 31 ; 3 Bl., Comm. 257, Ersk. Inst., Loc. Cit.

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apart from express grant, the Government steps down from its position of absolute superiority, except where a cause has arisen for the assertion of its inalienable eminent domain, and necessarily submits to the exclusion from legal problems arising between it and a subject of the element on its own side of irresistible force,(1) so that what would be possession as against a fellow-subject is possession as against the Government itself.(2) Whether the acts and forbearances of the revenue officers were binding on the Government, is a separate, though a cognate, question. The collector was instructed by the Government, in a passage already quoted, to " assert the right of Government to all forest lands to which a title cannot be clearly established by private individuals." Such being his function, and as a Government in matters of this kind must act by means of a representative, the collector may properly be regarded as its representative in acquiring the knowledge which gave significance to its abstaining from the assertion of its own right as against a subject. The collector was bound to report to the Board of Revenue every instance of lands held under invalid titles, (3) and all unathorized alienations

(1) Bracton, f. 52, after saying "*Acquiritur possessio et liberum tenementum extempore sine titulo et traditione per patientiam et negligentiam veri domini*," adds "*Inter regem et privatas personas non tenet istud, quia rex parem non habet nec vicinum nec superiorem.*" ... ... But then the king could not, according to the English law, "enter upon or seize any man's possessions upon bare surmises without the intervention of a jury," as by an inquest of office.* A simple "resumption," in the Anglo-Indian sense, by a mere order of the executive was not recognized ; and in the judicial or quasi-judicial inquest of office, acquiescence would necessarily be admitted as a ground of title against the Crown, as otherwise private property could subsist only by express grant, an effect would be denied to the provisions of Magna Charta "*Nullus libor homo... ... aliquo modo distruatur.*" In the colonies, where the right of the Crown to waste lands is recognized, the proceeding against an intruder is by information in Chancery or by writ of intrusion. See the *Qeen* v. *Hughes*, L. R. 1 P. C. 81.

* Bl. Com. 260, Reeves's History of English Law, ch. xxxi.

(2)"Although the king can never be put out of possession, in point of law, by the wrongful entry of a subject, yet there may be an adverse possession in fact against the Crown," so as to give the possessor protection under the statute of limitation against the Crown. Shelford's Real Property, Statutes 134. *Id.* 233 (6th ed.). "The king may be wrongfully dispossessed, but the intruder's injuriors possession.....is called intrusion." Per Lord Mansfield in *Taylor dem. Atkins* v. *Horde*, 2 Smith's L. C. at p. 555 (5th ed.).

(3) Mad. Reg. II of 1803, s. 27.

of land. (1) He was to investigate with care the rules that had immemorially guided the assessment of the public revenue,(2) to state the result to the Board of revenue, and to regulate the demands on the raiyat "with a just regard to the rights of the Government," as well as "to the rights of the people." (3) Although these rules do not, in express terms, authorize the collector to act for the Government in allowing or disallowing possession by subjects in derogation of its general right to lands not held in private ownership, yet they point to his being (subject to the control of the Board of Revenue and to some enacted restrictions) the agent of Government for all purposes connected with the administration of the public revenue, and especially of the land revenue. That, in practice, he held this position, is evident from the whole history of these proceedings. Althoug, therefore, the Government may not be bound by the collector's acts or abstinencies going beyond his delegated authority as equivalent to expressions of will on its own part; (4) yet for the purpose of affecting the Government with knowledge of what was doing on the part of the plaintiff's family and on what asserted ground of right, it was fully represented. In the case of *Vyakunta* v. *The Government of Bombay*(5) it was held that the continued recognition, by the collector, in the revenue accounts of a *varg* as *muli—i. e.*, held on a permanent proprietary right, subject to assessment—constituted an admission of such a right binding on the Government.(6) This was because the collector was the agent of the Government; and he was equally its agent for the purpose of taking cognizance of other proprietary or possessory rights continually brought under his notice in the accounts and in the administration of the district. (7)

What the rights set up were, is stated by the Madras Government itself in its order of the 23rd May 1860 (8) at para. 4: "It appears that certain proprietors of land in parts of Kanara, and

(2) *Id.* p. 41. (3) S. 39.

(4) *Collector of Musulipatam* v. *Kavaly Venkat Nurrayanappa* 8 M. I. A., 500.

(5) 12 Bom. H. C. Rep. 210, Appx. (6) *Ib.*

(7) *Nos enim dejicit qui rem nostro nomine tenenti dejicit.*—Poth. Pand., L. 41, t. ii, fr. 40, note (*d*).

(8) Ex. 94, Printed Documents, 155.

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some persons not holding land at all, claim to have exclusive and porprietary rights of *kumri* over extensive tracts of forest land, so that no other person can cut *kumri* within those tracts without their permission; while their own rights, they allego, to make or allow *kumri* there at pleasure, can no more be interferred with by Government than their rights over their ordinary landed estates. These claims appear to have been acquiesced in for many years by the revenue authorities of the district; but when subjected to investigation by a late collector, Mr. Blane, they were found to stand on no good foundation." That the right claimed was one only to use the soil for the purposes of *kumri* cultivation, would not make the plaintiff's right the less an interest in the land, or his occupation the less a true possession. In *R.* v. *Tolpuddle* (1) Lord Kenyon says: "This was not the less a takeing of a tenement, because the pauper could only enjoy the land in a particular mode, for in many farms the tenant stipulates that he will not depasture sheep or horses on particular grounds." Buller, J., in the same case says: "It seems to me that if the pauper had the sole possession, or, which is the same thing, the sole profits, he might have maintained trespass," an opinion which was affirmed in the subsequent case of *Burt* v. *Moore*. (2) In that case Lord Kenyon says: "Although the defendant was restrained by the agreement to a particular mode of occupation, he is to be considered as the occupier of the land, and being entitled to the sole use of the land, is also entitled to maintain trespass." Albeit, therefore that the plaintiff's use of the forest never went beyond turning it to profit by *kumri* cultivation, that user, if a sole and exclusive user, would be a possession, ripening by the acquiescence of the Government into a right to possess. Nor would this possession, and the right growing out of it, be made impossible by a concurrent right on the part of Government, if such right in any case existed and was exercised, to enter the lands thus occupied for the particular purpose of cutting timber. Such a right might be reserved in a perpetual demise giving to the tenant an interest in and possession of the land. Having a detention or occupation of forest lands in the assertion of proprietorship under such circumstances as have been described, the plaintiff's family had actual

(1) 4 T. R., at p. 575. (2) 5 T. R., 329.

possessions so far locally as Mr. Blair's other had allowed it. That officer was equally the agent of Government in taking cognizance of all Martoba's acquisitions, in recognsing his *geni* and *muli* rights in the accounts and other administrative proceeding, and in refusing recognition to his ownership or possession of the jungles, except in lands actually *kumried* by his tenants. (1)

We have seen that by their orders passed in 1844 the local officers guarded Martoba in the enjoyment of the jungles which Mr. Blair had allowed to him. How far this portection actually extended, appears from the deputy tahsildar's order (2) to the village officers, dated 11th August 1844. They are to prevent the cutting of firewood by strangers in the jungles assigned to Martoba by the collector's order and in those enjoyed by him without dispute. He was at this time contending against Mr. Blair's order unfairly restricting his rights at Kaignad ; but at Goer and Bali his possession was now apparently undisputed, nothing having been done, on the information supplied to the collector with respect to the forests claimed by the vargdars, towards determining "the question as to whether the forest belongs to them or to the Sarkar."(3) At Kaignad he seems to have striven not only to preserve what had been assigned to him against intrusion on the part of wood-cutters, but also to levy fees throughout the forest. On this Mr. Forbes, the head assisstant collector, in an order dated 14th November 1845, (4) says: "He is competent to collect money in respect of the *kumri* cultivation only, but not, on the ground of his having right in other respects to the forests, to collect money from persons that may cut billets in those which are Government forests," that is, apparently, in those Government forests to which the right set up by him was rejected by the order of Mr. Blair, which is referred to. But the order may also be construed in this sense, that wherever *kumri* cultivation is carried on at Kaignad, Martoba moy receive the fees ; but

(1) On the effect of acquiescence, see *Collector Madura* v. *Veeracamoo Unmal*, 9 M. I. A., 446.

(2) Accompt. to Ex. 60, Ptinted Documents, p. 30.

(3) Ex. 110, Printed Documents, p. 179.

(4) Ex. 116, Printed Documents, p. 186.

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wherever billets are cut in the same forests, he is not entitled to receive anything on that account, his right being strictly limited to *kumri* cultivation and its proceeds. The latter construction may seem the one more in accordance with the view taken by the collector, Mr. Thompson, on the 28th January 1845, (1) who says, in relation to an attempt on Mortoba's part to check the cutting, by some Government contractors, of common trees at Goera (see MS. exhibit 51 ), that an order had already been given "that Martoba could not set up any claim to the timber trees in connexion with his dispute relating to the *kumri*." The trees in question may have stood outside the limits of the lands at Goera which had been customarily *kumried*, and the principle of the orders as to Kaignad may have been applied to them; but the idea most naturally conveyed by the collector's language is that Martoba's asserted right to *kumri* cannot, at any rate, embrace timber trees, wherever these may stand. Yet in the order of Mr. Blair, dated 6th June 1842, it is assumed as self-evident that, in the jungles subjected to *kumri*, trees fit for firewood only can be found. There is no reason why there should be trees fit for timber therein," as such trees take thirty or forty years to grow, and cannot, therefore, be available in places subjected to a clearance for *kumri* once every eight or ten years. This implies at once that *kumri* operations would leave no timber trees standing, and, as a necessary consequence, that the presence of such trees contradicted the prior exercise of *kumri* cultivation, and thus excluded the land from the scop of the order of January 1842, defining what Matoba might and might not retain. Mr. Thompson's order may have been based on the same view, and could not, at any rate, have dispossessed Martoba of the lands ordinarily *kumried* by him, or under his orders. In 1842, when Mr. Blair's order was made, the cutting of firewood had not yet been subjected to any restriction.(2) The orders of the local officers in 1844, already referred to, imply, however, that though any one might resort to the forest for fuel, he was obliged to obtain a permit from the revenue officers, and to cut in convenient places, so

(1) Ex. 118, Printed Documents, p. 183.

(2) Ex. 82, Printed Documents, p. 64.

as not for instance, to interfere with *kumri* cultivation. The lower officials seem to have construed Mr. Blair's order, that Martoba was not to grant permits for cutting firewood, but was himself, if he desired to remove it, to obtain passes from the village officers, as not implying anything in derogation of his complete ownership of the forests allowed to him; but the order may very well have been founded on the notion that the cutting of fuel was an exercise of a common right, vested, no doubt, in Martoba as in other members of the community, but subject in his case, as in theirs, to administrative regulations made for the common benefit. If, indeed, the common right subsisted, it could not be extinguished except by an act of the soverei gn authority directed to that end, and would survive in spite of a possession, forpurposes of *kumri* cultivation, of particular spaces acquired by Martoba as against the Government. If Mr. Forbes considered that Martoba was confined to portions of the forest formerly submitted to *kumri* cultivation, his direction operating against Martoba's levy of fees on the cutting of firewood even in those places, must have construed Mr. Blair's order as conceding possession or enjoyment only subject to the common right. That the cutting of firewood in the Kaignad forest had been allowed on orders of the revenue officers, even before Mr. Blair's orders of 1842, appears from the order of Mr. Anderson, the sub-collector, dated 27th December 1841, (1) allowing 200,000 billets to be cut in Kaignad. The applicant is not "to cut trees in places in which the raiyats have right," but that may refer to spaces arround their dwellings, or amid their actual *kumri* cultivation, interference with which was not permitted. According to the plaintiff's contention, there could be no spot in Kaignad in which the right to cut down trees remained to Government, or the community; and Mr. Anderson's order, allowing such cutting, was an infraction of Martoba's right, which, if essentially integral, was thus contradicted in its whole extent; but the permission as quite reconcileable with a possession of particular spaces by Martoba either subject to the common right of cutting fuel, or on a title which enabled him to exclude all other persons, and which where it subsisted would be protected

(1) Ex. 112, Printed Documents, p. 182.

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by the terms of the order.

When Mr. Blane made the report of the 31st August 1847, to which we have already eferred, he was, as we have seen, instructed to take such measures as he should deem expedient to assert the rights of Government, and to preserve the forests by the limitation of *kumri* cultivation. This was at the end of 1847, and at the end 1848 he issued a circular order, (1) in which, after stating some of the evils supposed to arise from a diminution of the forest, he directs (2) that in granting permission to cut *kumri* it is not to be allowed at any spot within nine miles of the sea, three miles of a large river, or where teak, poon and other valuable timber trees grow. Where it is allowed it is to be confined to places that have been subjected to the like process before. (3) As to the persons, he says that some persons, merely on the ground of a charge for *kumri* being entered in their *pattas* or tax-bills, assert a right, through *kumri* being, as they say, thus included in their "*vargs*", though they cannot point out any particular boundaries within which their right subsists to cut *kumri* anywhere they please in the Government forests. Such persons, Mr. Blane says, must, as a condition of obtaining permission to cut *kumri*, come to the revenue officers, and prove what their rights are. If raiyats, paying assessment for *kumri*, are prevented from cultivating through the operation of the order as to locality, their assessment, it is said, will be remitted; where cultivation of *kumri* is allowed, it is to be restricted to an amount reasonably proportional to the assessment actually paid. Strangers to the district are to be excluded from the Government jungles, and the *kumri* cutters of the district are to be allowed to exercise their calling (in the Government forests) subject to the rules previously laid down.

The tahsildar is then directed to prepare lists of the *kumri* cultivators, and to supply other information, with a view to a re-adjustment of the tax; and then follows a *postscript*: "Besides the *kumris* of the descriptions mentioned above, there are *kumris* on account of which a separate assessment has been fixed, and

(1) Ex. 91, dated 12th December 1848, apparently by mistake for 12th January 1849; Printed Documents, 75. See Ex. 90, Printed Documents, 73.

(2) Printed Documents, pp. 32, 33. (3) Ex. 89, Printed Documents, 72.

which are held after the manner of *vargs*; [also] *kumris*, on account of which some *kumri* assessment is included in (the accounts of) the *vargs*, consisting of land, and *kumris* on account of which there is no *kumri beriz* [fixed], but which are mentioned (in the accounts) as having been enjoyed according to ancient custom *(mumul)*. With reference to these, a separate statement should be prepared, showing the name of the *kumri* vargdar or owner; the (amount of) assessment fixed thereon; the names of the forests attached therto; how many persons cultivate *kumri* under such vargdar or owner; what amount is paid by them to the vargdars; and in what shape (either in kind or in cash). You should ask them what proof they have to show tha the forests they enjoy appertain to the said *beriz*, and should describe in detail the (nature of such) proof as well be brought forward by them, at the end of the statement in (the column of) remarks. Thus prepare (a statement), and forward (the same to this office)." It was in obedience to this order that the return was prepared for the Fasli year 1860 (A. D. 1250-51) which is exhibit 62(1) in these proceedings, and hich sets forth distinctly both the lands claimed and the titles set up to them by Martoba. In the meantime, however, the head assisstant collector had, on the 26th May 1248, issued an order which deprived the vargdars of their *kumri* cultivation altogether under some misapprehension of the collector's wishes. The local subordinates seem to have give notice (1) to the *kumri* cutters that they could have to pay direct to the Government; and of this Martoba complains on the 31st March 1249 as, in effect, a double charge on them and on him, he having paid the fixed assessment. Mr. Blane, having received from his deputy shirastedar an account of the *kumri* cultivation carried on by the several vargdars; it became possible and necessary to deal with the subject immediately.

This was done by the order of the 10th April. 1849.(2)

We have seen that the basis of the assessment of the land in Kanara was the title of Government to an aliquot share of it produce. This, under the Hindu rulers, was generaly fixed on a supposed equal partition of net profits between the landlord and the Government at one-fourth of the gross produce,(3)

(1) Ex. 277, Printed Documents, p. 511. (2) Ex. Printed Documents, 73.
(3) See Munro's Report, Ex. 366, pp. 10, 11, 19.

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out of which the religious establishment was provided for. The proportion was increased by subsequent additions, even before the time of Haidar and Tippu to the extent of at least 70 per cent., so that Mr. Harris's survey rate, introduced into the magni of Buddengode,(1) of one third of the gross produce was a comparitively light one. This seems to have been by some officers regarded as the standard rate of the district(2) in spite of its unequal bearing on the different kinds of cultivation.(3) The various ways in which determination of the Government's share was sought to be arrived at, have already been considered. Munro's principle(4) was that where the land revenue did not exceed a moiety of what the landlord could in a settled state of affairs realize as a net rental, no reduction should be made, "because," he says, "I am satisfied that it is fully adequate to every end not only of present realization but of future improvement, and that a country moderately improved, the basis of whose assessment should be one-half of the net produce, would, if protected from all other demands, soon pay with one-third what it had before paid with one-half." In the proceedings of the Board of Revenue of the 16th November 1843, para. 44, it is said :(5) "This, it wil be observed, has been the object of all subsequent revisions of the assessment as well as of the measures now in operation ;" and it was as an aid to its attainment that the estimates of produce were made, which occur in the *azmaish chittas* relating to Bali and in several places in the *jamabandi chittas* recorded in this case.

It is very probable that the *shist*, or assessment, due on account of the jungle elements of every *varg* had originally been reckoned with more or less care and honesty according to this principle. Mr. Blane, deeming the actual recovery of the forest lands long encroached on impracticable, now gave to the same principle an inverted application. "Martoba of Kaignad and others," he says, "I find cut *kumri* 1,000 per

(1) Kánara Land Assessment Case, Printed Documents, Vol. III, 149.

(2) *Ib*, p. 118. (3) Ex. 366, p. 49.

(4) *Vyakunta* v. *The Government of Bombay* 12 Bom. H. C. Rep., Appx., p. 179.

(5) See Kánra Land Assessment Case, Printed Documents, III, 233 ; Printed Documents 98, 113 in this case.

cent. in excess of the *kumri* assessment they pay in these *vargs*" ..... "Therefore, it appears to me to be proper (as to particular instances) that after deducting double the amount (of the *kumri* assessment in each case) the excess should be Collected and kept in deposit by Government." He then applies this to the cases of the several *vargs* in which the profits derived from the kunbis at the customary rate, calculated according to the number of knives employed, comes to more than double the assessment paid by the vargdar, and directs that such excess be placed in deposit. In such cases the double assessment is to be handed to the vargdars already answerable for a single assessment in their *vargs*. Where the amount collected comes to less than twice the assessment, the whole is to be handed to the vargdars. Where the vargdars are not debited with any *kumri* assessment, the whole amount collected from their tenants is to be appropriated by the revenue officers.

It is obvious that such a mode of dealing with the *kumri* vargdars as that which has been described, was equally inconsistent with the theory of a farm of the "*kumri korlaya*," as with that of a proprietary right in the soil vested in the vargdar. If the Government had really leased to a vargdar, either temporarily or in prepetuity, the collection of the fees payable by the *kumri* cutters resorting to a particular place, not at a proportion of the sum levied but at an invariable rate, which was not lowered, though nothing should be received by the lessee, it would be an act of official dishonesty to the farmer "we cannot in any case allow you to make more than 100 per cent. profit, and, to prevent your doing so, we will take the farm out of your hands and hand to you 100 per cent. if, and when under our management, it produces so much." If the rate was re-adjustable from time to time as in the case of rice lands, while the vargdar was at liberty to cultivate by means either of his own people or of casual immigrants; and if, as in the case of a farm, and especially after Mr. Maltby's change of the levy to a rate per acre, we must needs suppose the payment had reference to some definite tract of land more or less clearly perceived, it is hard to distinguish such a farm from an interest in the land, such

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as the vargdar held in a rice field. To such a holding the *kumri* right was usually attached; and it was inherited and passed with it as a part of the estate, never being treated, so far as we have been shown, as a merely personal contract.

Mr. Blane says that this scheme of limiting a vargdar's profits to a sum equal to the *kumri* assessment paid by him as "*deshada mariade prakara*," *i. e.*, according to the custom of the country; but no trace appears of any such custom. In settling an assessment it was, no doubt, customary to estimate it roughly at one-half of the net rent, and the rent due by each *kumri* cutter being fixed by custom at Re. 1 or Re 0-8-0 payable in money, the Government share was readily ascertained, and was calculated in the same way when the vargdar employed servants or tenants on his own account, instead of collecting rent from the vagrant *kumri* cutters. But there was nothing, so far as appears, to justify the converse rule, by which certain land being included in a property and taxed for *kumri* cultivation, the owner was to be limited to the employment on it of so many hands as would ordinarily produce twice the assessment. If, too, the principle was to be applied so far as to prevent the vargdars realizing more than the Government, fairness required that the Government should not ever take more than it left to the vargdar; yet, if the "*geni kutwali*," or rent produce, fell short of double the *kumri* assessment, the latter was still charged at its full amount not at one-half of the rent collected, or proper for the land actually cultivated. The truth seems to be, that collector adopted the first plea that presented itself apparently referrible to some received principle for a course really determined by considerations of expediency, and that he would have acted less harshly had he not expected instructions from the Board of Revenue in answer to his letter of the 20th September 1848. He says: (1) "The final orders of the Board on this subject are expected. On receipt of these orders my final orders will be communicated. I request that proper measures may be adopted that persons may not cut the *kumri* excessively at their pleasure hereafter, *i. e.*, for Fasli year 1259. The vargdars severally should, under the provisions of the circular order, cut so much *kumri* only as may be appro-

(1) Printed Documents, p. 74.

priate to yield double the *kumri* assessment they have been paying. With respect to the Sarkar *kumri*, those residing in this district and habitually cutting the *kumri* should cut the *kumri* sufficient for their subsistence. The *kumri* to be cut shall be cut only in jungles situate beyond the prescribed limits. I request that the circular order may be acted upon and adhered to, and that no orders be issued to the vargdars to cut the *kumri* in the jungles at their pleasure."

Whether the expected orders were issued or not, we have not been informed. If they were, not final orders, for we find that Mr. Blane addressed another report to the Board on the 31st August 1849, (1) relating to the *kumri* cultivation ; and in Fasli 1262 (=A. D. 1852-23) Mr. Maltby, the then collector, promised a report on the subject in all its bearings, which was eventually furnished only in 1858 by his successor, Mr. Fisher.(2) Some extracts from Mr. Blane's report of 31st August 1849 are given in the proceedings of the Board, dated 16th April 1859, para. 13ff. (3) Mr. Blane gives his notion of the *kumri* holding as what he calls "a rent," or farm of the fees leviable for *kumri* cutting, which having been entered in the vargdar's "*varg*" in the sense of account, came to be looked on as a part of his *varg* in the sense of estate. "In this manner, Mr. Blane argued, the rent of collections from the *kumri* cutters came to be entered in the *varg patta*, and being among the few items of miscellaneous revenue retained in it, and its nature in contradistinction to the assessment on the private lands of the proprietor not being borne in mind while the term *varg* was supposed to mean 'estate,' the jungles in which the *kumri* was cut, came to be claimed and considered a portion of the estate. The assertion of proprietary right has been since countenanced by transfers, by sale and by suits as well as by attachments for decrees of Court. Under the operation of our judicial system it was remarked, 'questions are adjudicated between individuals which have often, a very important but individual bearing on the public rights of Government which at the time is not foreseen or is overlooked.'

(1) Printed Documents, p. 74.

(2) See below. (3) Ex. 49, Printed Documents, p. 135.

(4) Printed Documents, pp. 352-353,

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"Where the settlement for *kumri* had been made directly with the raiyats, that is to say, the Board presume, while the forest was the undisputed property of Government, Mr. Blane had prohibited it in particular localities where the facility of transporting timber made it advisable that it should be preserved. This order was in accordance with the authority granted by Government, and mentioned in paragraph 8 of there proceedings. But many of the places in the northern talukas, he remarked, 'where it would also have been desirable to preserve the forests, are claimed as within the limits for which some of the larger landholders pay *kumri* tax; and without possessing the discretion of assuming the managment of the *kumri* and making the settlement with the actual cultivators, it is found impossible to exercise any control either by restricting the general quantity, or by assigning the boundaris within which it shall be cut.'

"The settlement of the question, whether the larger proprietors who pay *kumri* assessment have a proprietary right in the jungles, was, therefore, of great importance. If the decision should be in the negative, according to Mr. Blane's view, he proposed to remit the *beriz* they pay on this account from their *pattas*, and to make the settlement directly with the *kumri* cutters, as in the case of Narna Cumpti. But if their proprietary right should be affirmed, he considered that he possessed no power to prevent their continuing the destruction of the forest at their discretion, and no authority to protect the *kumri* cutters from their exactions and oppressions; for these persons must be recognized as their tenants, and be subject to all the legal process to which tenants are liable.

"To show the disproportionate claims advanced on account of the payment of *kumri shists*, he further instanced the case of 'Martab Rao, whose family formerly held the office of naib shanbhong in the Ankola Taluka, and who, therefore, not only kept the revenue accounts himself, but exercised an influence almost unbounded in that part of the country. This man holds seventeen *vargs* on the borders of the Goa frontier, and claims a jurisdiction over a large portion of the jungles in that neighbourhood. It is impossible to state their extent, but it cannot well be less than fifty square miles of forest. The entire payment

on these *vargs* amounts to Pagodas 113, of which only Pagodas 17-4-7 is *kumri beriz*; but the number of raiyats cutting *kumri* under him has so much increased that he collects from these alone 167 Pagodas, or 1,000 per cent. more than the revenue he pays on this account."

"Such claims as these, Mr. Blane truly observed, would, as population increased, be of the most serious public importance, as pressure from without impel large numbers of people to settle gradually on these thinly-peopled tracts, where they would become the tenants-at-will of such men as Martab Rao and Narna Cumpti, who might thus have ten or twenty thousand dependants on their estate."

From this extract, and especially the latter part of para. 17, it is plain that, whatever restrictions Mr. Blane may have imposed or sought to impose on Martoba's enjoyment of the jungle lands held by him in the assertion of ownership, he felt himself unable to assume, with respect to those lands, the management of the kumri and settlement with the actual cultivators, or to restrict the quantity of *kumri* cutting, or the boundaries within which it was to be carried on. In his report of 30th August 1858, Mr. Fisher says: (1) "Those vargdars of the Payenghat, who paid *kumri shits*, received double the amount of this assessment from the sums collected at the above rates direct from the *kumri* cutters when the extent of this cultivation within their respective boundaries admitted of this arrangement; otherwise the tax levied, whatever it might be, was given to them against the *shist* paid;" but this, it is plain, occurred only once down to 1858. Mr. Fisher's own order of 11th August 1849, (2) which directs the collection for the current year from the actual cultivators, says, for the future, "you are also to issue injunctions to the shanbhogs of the villages, directing them to see that the vargdars, as stated above, cut *kumri* not exceeding double the (*kumri*) assessment which is fixed as the *jamabandi*, and this (you are) to arrange for the due enforcement (of the circular order above referred to.)" It appears, in fact, that, after the action taken on the

(1) Ex. 94, Printed Documents, 138, p. 29.

(2) Ex. 92 Printed Documents, p. 78.

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hasty order of Mr. Forbes in 1848,(1) no attempt was made for several years either to collect the *kumri* fees direct from cultivators within alleged forest limits of Martoba's *varg*, or to introduce cultivators independently of him. Martoba and Bhaskarappa were repeatedly told not to cut *kumri* beyond an extent corresponding in the rent it would produce to double the *kumri* assessment. They appear to have submitted, at least nominally, to these directions, and when they transgressed them to have paid the excess realized beyond double the assessment into the Government treasury,(2) or even double assessment on the lands in excess; but these very proceedings show them to have been in possession of the lands however hampered in their use of them. They still for sometime chose their own places for *kumri* cultivation within their *vargs*. The "*dugni*" (double) arrangement as it was called, the applications made under it, and the payments of excess, coupled with the abstinence of the revenue officers from using the jungles as "Sarkar" forest available for assignment, according to their needs at the discretion of the officers to the *kumri* cutters seeking allotments,—all imply that possession was still held by the plaintiff's family pending the long-deferred decision as to whether they were to be regarded as proprietors or not.

In a revenue circular, dated 14th November 1851,(3) the then collector, Mr. Maltby, "resolved that the *jamabandi* (annual assessment) should be settled upon ascertaining the extent of cultivation by measurement" (instead of by the number of knives employed.) The villages officers were to "inspect and measure the *kumri* cultivated as coming under the assessment of *vargs*, also the *kumri* cultivation in purely Government jungles." As to the latter, they were to ascertain and set forth the names of the cultivators, and charge each with a *jamabandi* of R. 1, of R. $\frac{3}{4}$ or R. $\frac{1}{2}$ an acre according to circumstances. As to vargdars jungles, the direction was "with regard to the cultivation of *kumri* said to be included in the assessment of

(1) Ex. 98, Printed Documents, 72.

(2) Printed Documents, pp. 748, 756, 778, another recognizances, Exs. 165, 167; also Bhaskarappa's petition, Ex. 128, Printed Documents, 517.

(3) Ex. 173 Printed Documents, 260.

*vargs*, you must state the number and name of the *varg*, the total assessment and what portion thereof forms the *kumri* assessment, and prepare an account, that the number of acres cultivated in each *varg* and the number of cultivators may be known. If you give this at the time of the huzur *jamabandi*, it will be adjusted in the huzur." From this it is manifest that while the collector assumed, or exercised, the right of regulating the assessment on *kumri* according to a new principle, he distinguished broadly between the Sarkari and the vargdari jungles, and as to the latter advisedly refrained from obtaining the means of effecting a settlement with the individual cultivators. The vargdars alone were to manage the jungles for which they were assessed; the assessment only was to be adjusted each year according to the actual area cultivated as reported by the local officers at the "huzur *jamabandi*" or final revision of the sums to be exacted by the collector. That the vargdars while subjected to so arbitrary a change in the mode of assessment, should have been left undisturbed in the actual enjoyment of the forests attached to their *vargs*, is a somewhat emphatic testimoney to the collector's sense of their irremoveability.

Mr. Fisher at length in a report, dated 30th August 1858,(1) expressed his views on the whole subject. He considered the question to be(2) "whether the entry of *kumri shists* confers any proprietary right all, such as a similar entry would be held to do in regard to regular cultivation, or whether it is a mere rent paid for certain forest privileges which can be resumed at pleasure by a remission of the Government demand," and he thinks it has the latter character. Then, pronouncing against the genuineness of the *sanad* granting the forest lands of Kaignad,(3) proposes that "Bhaskarappa be placed in the same category with all other raiyats paying *kumri beriz*." As to all vargdars paying *kumri* assessment, his recommendation(4) is: "In the Payenghat Taluka of the North Kanara I would propose to allow each vargdar one acre per annum of

(1) Ex. 94, Printed Documents 135, para. 60.

(2) Printed Documents, 142. (3) Paras. 66-76.

(4) Para. 99, Printed Documents, 148.

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*kumri* for every rupee of *shist* paid, subject to the arrangements alluded to in paragraph 96 as occasionally necessary. For instance, a man, who pays 10 rupees *shist*, should be allowed 100 acres of *kumri*, which should be marked off and made over to him as affording him the means of cultivating ten acres per annum."

If the plaintiff's fammily had indeed been excluded, as Mr. Fisher (paras. 29, 30(1) ) says, the vargdars were excluded from all personal management of the forest lands "within their respective boundaries," and made mere renters or recipients, at the hands of the Government officers, of twice the assessment when so much was levied from the *kumri* cutters, and when less was levied of less, it would be hard to conceive of them as still holding possession. It is, however, almost equally inconceivable that having thus deprived the vargdar, the revenue officers should have still charged him the full *shist* when so much was not realized by them from the cultivators; but, it is added, "the vargdar was allowed to cut an extent of *kumri* which would produce double the amount of *shist* paid if he liked to do so"; and as regards the lands with which we are now concerned, Mr. Eisher's account as regards the years prior to 1857 is erroneous. The amounts in excess of the "*dugni*" were received from Bhaskarappa.(2) He was, even so late as 23rd September 1858, served with notices to pay up the excess over the *dugni* on account of both Goera and Kaignad for the Fasli years 1265 and 1266. These are included under exhibit 312, and imply Bháskaráppá's occupation or use of the land beyond the prescribed area.

Bhaskrappa then retained possession of the *kumri* lands; and though he was checked and stanted in his use of them, they were not, so far as appears, made use of for "Sarkar *kumri*," so as to deprive him of his hold of the soil until 1857. In that year, as we shall presently see, an order of the sub-collector deprived him of all *kumri* lands in excess of those which at the calculated rates would produce twice the *kumri* assessment; and in 1858, as we shall also see, the lands were wholly taken over by the revenue official. The *shist* or assessment still charged for them

(1) Printed Documents, 138.

(2) See Ex. 24 MS. and Ex. 462, Printed Documents, p. 708.

then no longer corresponded to any recognized estate in the land; and though there is a recognition of "*kumri* within the limits of the said Bhaskarappa's *varg*," yet Bhaskarappa's interest is reduced to that described by Mr. Fisher, without even any saving provision in the way of liberty to cultivate on his own account. The area allowed for each actual cultivator is at the same time cut down from three acres to one and a half acres.(1)

In the order of Mr. Maltby, lately referred to, that officer says: (2) "In the circular order No. 12, of the Fasli year 1258, it is stated that if people were to cultivate *kumri*, they should present a petition to the tahsildar, and in the peshkar's division to the peshkar; and that the tahsildar and peshkar were to examine the place where the people desired to cut *kumri*, and that permission should be granted to cut *kumri* and carry on cultivation if the place was one where there was no objection to cut *kumri* under restrictions laid down in the circular order mentioned above, &c., &c. In accordence therewith, you or the peshkar must henceforth keep an account of each cultivator to whom permission to cut *kumri* has been granted, send it to the huzur soon after the time of the cutting *kumri* is over, and fix the *jamabandi* as stated above. On the cultivators, who may have carried on the cultivation not after obtaining permission, a twofold *jamabandi* will be levied from such persons; and it is also determined that a separate punishment should be inflicted by the police for the offence of having violated the orders. You must, therefore, levy a two-fold *jamabandi* from the persons who cut *kumri* without permission; make an inquiry with regard to the offence of having acted contrary to orders; report to the ilaka saheb" (*i. e.*, the assisstant collector of a division of a district,) "recommending what punishment you, at your discretion, think proper, and act according to the order that you may receive."

If we compare this discretion with Mr. Blane's circular, (3) we find that the earlier document contains no order that every one desiring to cut *kumri* "must present a petition" to the local

(1) Ex. 146, Printed Documents, 219; Mr. Fisher's Report, para. 32; Printed Documents, 139.

(2) Printed Documents, 260. (3) Ex. 91, Printed Documents, 75.

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officer. The customary right of the *kumri* cutters of the district seems, in 1849, to have been still recognized, subject only to such arrangements as might be necessary to prevent permanent injury to the forests. The only persons who were required to obtain a formal licence where those vargdars who, in virtue of an entry of a charge on account of *kumri* in their *pattas*, claimed an indefinite right of cutting *kumri* in all parts of the forests. (1) The village officers were to prepare a *kulvar* list (*i.e.*, one giving the name of each *kul* or cultivator) of the persons who (usually) cultivated *kumri*, and of how much land each cultivated as a basis on which the tahsildar was to found his general directions as to the places and the extent of *kumri* to be allowed in each village. Till this was settled, no *kumri* cultivation was to be allowed; and afterwards the village officers were no inspection "to prepare a *kulvar* list of the persons (atually) cultivating (*kumri*) and the extent of cultivation by each, and to produce the list at the time of the *jamabandi*." Even to these rules the vargdar *kumris*, as we have seen, were made an exception; and as to them a list was to be made showing the vargdar's name, the *kumri* assessment, the name of the forest, the number of the cultivators, and the amount and mode of payment by them to the vargdar. Mr. Maltby did not probably intend, as to the vargdars to interfere any further with their freedom of action and enjoyment; but his order being misconstrued so as to give the directions intended to apply to the casual *kumri* cutters in a general operation, Bhaskarappa was from that time forth subjected to much the same conditions by the tahsildar and the peshkar as if his special rights had already been finally pronounced against.

Then, to save the local officers the trouble of making out the list from inquiries on the spot, they exacted from Bhaskarappa, as no doubt from other vargdars, applications such as that of the 31st March 1853.(2) In this Bhaskarappa asks permission, for the Fasli year 1253, cultivate *kumri* in ten *vargs* in Kaignad. These he describes by their revenue numbers, and specifying

(1) See Ex. 94; Mr. Fisher's Report of 30th August 1858, para. 54 Printed Documents, 141.

(2) Ex. 164, Printed Documets, 249.

the persons he is about to employ in each *varg* he concludes: "Thus the persons named above have been appointed for the purpose of cutting *kumri* in the jungles of the aforesaid *vargs*. Therefore, in the event of permission being granted to cut accordingly, I will make arrangements to allow [the same] to be cut without infringing the rules, and well pay to Government whatever balance may remain after deducting the *dugni* from the *jamabandi* [or revenue] py the Government. Thus I have given this petition in writing."

On the same day, his application having been acceded to, he executed the *muchalka* (recognizance or engagement), exhibit 165. (1) This specifies the names of the jungles, the *vargs* in which they are severally included, and the names of the proposed cultivators. The document concludes as follows:—"Thus I have obtained permission for the cutting of *kumri* in the above-mentioned acres (by means of) the individuals aforesaid. I will employ the said persons without transgressing the rules, and without allowing the six kinds of trees prohibited by the Government to be cut, viz., the teak, the blackwood trees, &c. I shall allow the *kumri* to be cut only in the places where it has been cultivated from aforetime; deducting the '*dugni*' (double) amount of the amount settled in the *jamabandi*, as mentioned in the *darkhast*, I shall produce the remaining amount in order to be deposited. In case of any more *kumri* being cut, I shall pay (as penalty) double the assessment which may be fixed by Government, &c., (for that portion) together with the assessment. Thus I execute the *muchalka*." Exhibit 168, dated 8th April 1853, (2) is an application similar to the one already quoted for permission to cut *kumri* in Goera in the jungles called Kalani and Hendalmaki, under *varg geni* No. 23 at Bhaire and at Jhambad Bali, besides Hirur (under *geni* No. 2) and Kankavali (under *geni* No. 7) at Kaignad. The "*dugni* assessment" mentioned as appertaining to four of those places does not agree either with the double of the total sum leviable according to the number of acres to be cultivated, with double the assessment entered in the accounts of the *vargs* named as *kumri* assessment. It may perhaps be the excess, as estimated, of the sum properly attributable to so many

(1) Printed Documents, 250. (2) Printed Documents, p. 254.

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acres in each case over double the assessment charged in the accounts, and would thus represent the sum, as at first calculated, that the vargdar would have to pay subject to revision at the *jambandi*. For the Kankavali jungle no "*dugni* assessment" is specified. It is set forth as belonging to the *varg geni* No. 7, called Santappa ;" but *geni* No. 7 was not called "Santappa," and did not contain Kankavali.(1) That jungle belonged to the *varg* called Gram Treige, or village tax, *geni* No. 2 ; (2) and the name Santappa is a further identification. Now the *jamabandi chitta*, to which reference has just been made, indicates a payment, each year down to Fasli 1251, of less on account of this *varg* than the *kadim beriz* or ancient assessment on the rice land alone. It was reported by the tahsildar in 1841(3) as one of the three forest *vargs* allowed to become *kulnashit*, and which Mr. Blair, therefore, refused to allow Martoba to have on any terms. It does not appear that it had since then been conceded to Martoba or Bhaskarappa ; and the application for permission to cut *kumri* in it, though only to the extent of 3 acres, could not be based on any such ownership, or continued possession, as might be alleged with respect to the other *vargs*. The introduction of this jungle, therefore, makes it rather harder, than it would otherwise be, to take the application as an evidence that Bhaskarappa was seeking only permission under pressure from the revenue officials, and in a way unautherizedly prescribed by them, to make use for *kumri* of land of which he was in actual occupation ; but the explanation probably is that it was merely an instance of Bhaskarappa's struggling to get all he could, where straghtforward means failed, by any shifty device that suggested itself.

Exhibit 166, dated 25th March 1854,(4) is a similar application for permission to cut *kumri* in Kaignad, Goer and Bhaire for the Fasli year 1264. Bhaskarappa proposes to employ 242 men and to cultivata 756 acres. He executed a *muchalka*(5)

(1) See Ex. 235, Printed Documents, p. 478.

(2) See Ex. 237, Printed Documents, 494.

(3) Accompt. 54 (untranslated) to Ex. 56, Printed Documents, 23.

(4) Printed Documents, 251.

(5) Ex. 167, Printed Documents, 252.

for this area ; but it seems to have been cut down to 560 acres, and as to these a new engagement is prescribed. "I will cause *kumri* to be cut and cultivated to the extent of 560 acres as now fixed dy you for the said two hundred and forty-two individuals, in the three villages [aforesaid] in such of jungles attached to the respectiv *vargs* as may be determined upon by the Government. Under the (existing) restrictions I will deduct the amount of double *kumri* assessment for the *jamabandi* that may be fixed, and collect and produce the remainder before the Sarkar to be placed in deposit. I will take measures [to see] that the jungle may not be cut in excess of the acres fixed, and that teak, blackwood and other trees of the prohibited kind may not be cut and injured."

The lates application that has been put in evidence is exhibit 163, dated 19th December 1856.(1) In this, Bhaskarappa asks leave to cut *kumri* in the forests of the several estates to the extent of 740 acres ; but the tahsildar, on the ground that the names of the proposed cultivators had not been specified, refuses permission. Hereupon Bhaskarappa seems to have resorted to the sub-collector. There is an order, dated 23rd February 1857, from Mr. Robinson(2) to the following effect :— " It has been decided that during this year, the Fasli year 1267, Bhaskarappa may be allowed to cultivate so many acres as will yield to him an income equal to double the *kumri* assessment paid by him. You should make inquiries according to law what places are fit for the *kumri* cultivation, and *point out to the persons in Bhaskarrppa's service the places to the extent in acres which, as shown above, ouget to be allowed* [to him] *for the purpose of cutting the kumri.* Take measures to carry out the above [instructions]. Bhaskarappa represents that there being a great number of *kumri* cutters, the *kumri* now permitted will not provide sufficient labour for their livelihood. The above order is issued in respect of the *kumri* which appertains to the assessment included in Bhaskarappa's *varg*. If there are, besides these, more *kumri* cutters, then you should, under the orders already passed, containing rules regarding the *kumri* cultivation by other *kumri* [cutting] raiyats, allow to such persons so many acres as you may on inquiry find to be

(1) Printed Documents, p. 248. (2) Ex. 147, Printed Documents, p. 220.

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sufficient for their subsistence, and also impose assessmnt on this according to law." This order apparently waives what the tahsildar had insisted on, a list of the proposed cultivators by name ; but it leaves to the discretion of the tahsildar the selection of the places where cultivation was to be carried on by Bhaskarappa's people to the allowed extent. It also directs that the excess of *kumri* cutters seeking allotments are to be provided for under the ordinary rules. The context suggests that this provision was to be made out of the lands to which Bhaskarappa's application referred, and that so far, at any rate the lands were to be taken altogether out of his hands by a separate settelement with each cultivator ; and though the passage might possibly be construed as intending that, as Mr. Blane's circular prescribed, allotments should be found for those persons in the "Sarkari" jungles, yet this was not its real sense, as becomes plain from a consideration of Mr. Fisher's order of the 2nd April 1857, to be presently discussed, and from the course taken by Mr. Robinson himself in the same month. From an examination of Bhaskarappa, taken on the 7th June 1858,(1) it appears that Mr. Robinson had on the 20th April 1857 passed an order " that the *jamabandi* should proceed by entering the '*dugni*' portion of the *kumri* assessment for (*i. e.*, to the credit of) the vargdars, and the remainder under the head of Government *kumri*." This Bhaskarappa complains of as depriving him of his jungles,(2) as the introduction of kunbis against his will must needs have done ; and he says that Mr. Pechin's orders No. 212 (not recorded) and No. 366 (which seems a mistake for No. 365)(3) have been issued inconformity with it. From these, and order No. 446,(4) which also is referred to by Bhaskarappa, it appears that as to all in excess of the quantity corresponding to the "*dugni*" of his *kumri* assessment, he was not only ousted in 1857, but deprived of all profits derived from it ; while the locality of what was still allowed to him, was regulated wholly by the discretion of the revenue officials. In

(1) Ex. 462, Printed Documents, p. 708.

(2) See to the same effect Ramchandra's petition, Ex. 282, dated 7th September 1857, Printed Documents, 519.

(3) Ex. 146, Printed Documents, p. 219.

(4) Ex. 125, Printed Documents, p. 197.

perfect consistency with this we find Mr. Robinson on the 22nd April 1857 passing an order(1) on the question of wild honey in the forests, respecting which the tahsildar had reported on 27th September 1854.(2) No contention on Bhaskarappa's part is to be listened to. The honey is to be sold by auction; and, moreover, except by order, no one employed by Bhaskarappa is to be allowed to take any step to wards cutting *kumri* in the forest. It is said that it does not appear whether the honey was actually sold for Government: but that is of much less importance than the intention which the order shows, in dispossessing Bhaskarappa, to deprive him of all semblance of dominion over the lands in dispute. How the plaintiff's family regarded the orders, is apparent from Ramchandra's petition of the 7th September 1857, complaining "that they purport to interfere with (or prevent) the enjoyment by use of the forests."(3)

It is contended for the plaintiff, that even if Mr. Robinson's intention was to set the *kumri* cutters to work on the disputed lands, yet this intention was not actualy carried out, and there is no evidence before us of what was actually done beyond Mr. Robinson's order itself; but this objection does not seem to have been raised in the Court below; and the *dugni* account for Fasli 1267, to be presently referred to, shows that, in fact, these *kumri* cutters did cultivate a large area in Goera. The depty tahsildar was not at to liberty act otherwise than according to the order given to him; and Bhaskarappa being, as his applications show, out of possession, so far as he obtained possession at all, merely as tenant for a single season, under the sub-collector's order, of a place and on terms prescribed by that order, and by acceptance having acquieseced in those terms, could not hold on a right contradictory to the order he had solicited, or by any secret arrangement convert the actual possession concurrently given to the *kumri* cutters against his right, into a legal possession on his own part. No remitter of Bhaskarappa to his former title was effected; it was, in fact, prevented by his partial and temporary occupation under

(1) Ex. 139, printed Documents, p. 211.
(2) Ex. 58, Printed Documents, p. 26.
(3) Ex. 282, Printed Documents, p. 519.

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an order at variance with that right. (1) His derivative possession, if he was now more than a license, could not be placed higher than its source in an asserted absolute right of ownership in the Government. His dispossession as proprietor, therefore, was in no way anulled or remedied; it was confirmed and completed by his admission to the forests in another character; and if it could be held that his former right was not surrendered by his accepting the now and inconsistent one, yet limitation, which had begun to run against his claim to restoration as owner, could not be barred by an occupation contractually referrible to the usurped ownership inconsistent with his own. The possession of a tenant is for such purposes counted as the possession of his landlord, and that the tenant was once himself accounted owner makes no difference.(2)

In the following year Bhaskarappa made an application similar to exhibit 163, but extending to 800 acres. It was rejected by the tahsildar for not specifying, the names of the cultivators. Bhaskarappa again resorted to the European officer, but this time entirely without success. Mr. Pochin, acting additional sub-collector, on a petition presented by Bhaskarappa's brother Ramchandra, gives the following instructions:—(3) "According to orders passed heretofore, each person should have the *kumri* (in land) not exceeding 1½ acres. Bhaskarappa must, therefore, produce before you a list, specifying the names of the *kumri* cutters, with the number of acres (to be cut by them). Unless a list is produced as above stated, specifying the names of persons with the number of acres (to be cut by them), neither Bhaskarappa, nor any one on his behalf, should be allowed to cut even a single tree in the forest. Bhaskarappa, who is the responsible party, will be held guilty for any violation thereof. I have personally informed Ramchandara of this fact. You should, therefore, take measures that no *kumri* is cut, unless a list, specifing the number of persons with the number of acres (to be cut by them), is furnished by him. In

(1) Litteton's Tenures by Tomlins, p. 617.

(2) *Williams* v. *Pott*, L. R. 12 Eq. 149. See also *Nawab Malka Jahan Sahiba* v. *The Deputy Commissioner of Lucknow*, L. R. 6 M. Ap. 63.

(3) Ex. 146, dated 26th January 1858; Printed Documents, p. 219.

the event of such list contaning the names of persons and the number of acres (to be cut by them) being furnished, you should proceed in a manner not inconsistent with the orders passed on the subject of the *kumri*, and submit a report."

We will examine the circumstances under which this occurred. The collector, Mr. Fisher, was in the meantime(1) investigating Bhaskarappa's claims under his *sanads*. In an order, dated 2nd April 1857,(2) he deals, in detail, whith the *sanad* relating to Kaignad, and rejects it as spurious, adding, however, "as (Bhaskarappa), however, has been paying from the beginning a large portion of the *kumri* assessment of that village, he will be treated in the same way as other vargdars who pay *kumri* assessment. He should not consider that he is at liberty under this (order) to cut *kumri* without permission, or to cut trees, or to cultivate waste lands. All this authority rests in the hands of Government."

With the *sanad* titles relating to Goer and to Bali Mr. Fisher deals more summarily. The Bali *sanad* he does not even name that relating to Goer he mentions without discussing it. Bhaskarappa himself had dwelt chiefly on his Kaignad *mulpatta* in his petitions, exhibits 280 and 281. The collector's decision is: "He will, however, have no right to the whole forest on the ground of his paying *kumri* assessment for the said two *vargs*. As stated above, he will be treated in the same way as other vargdars who pay *kumri* assessment, but he will not have any further authority whatever."

Bhaskarappa, having thus been reduced to the position of other vargdars, was not, without permission to cut *kumri*, to cut trees, or cultivate waste lands. On this the deptuy tahsildar seems to have demanded from Bhaskarappa what, as we have seen, he had been excused earlier in the year from giving, a list of the cultivators employed by him. To his was to be added a specification of the quantity of *kumri*, if any, cut by each in excess of that corresponding in its aggregate to the *dugni* or double assessment paid by Bhaskarappa. Bhaskarappa having refused, the deputy tahsildar(3) makes the following

(1) See Bhaskaroppa's petitions, Exs. 280, 281; Printed Documents, pp. 516, 517.

(2) Ex. 148, Printed Documents, p. 221.

(3) Ex. 152, Printed Documents, p. 220.

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recommendation :

"All the *kumri* cutters should be registered in the Government accounts, and out of the [proceeds of] regular assessment payable on that account, the amount of the *'dugni'* due to the vargdar should be paid to him by Government. The Government should adopt measures for the collection of the whole assessment from each individual, and make the collection themselves.

The deputy tahsildar here proposes to do what Mr. Fisher in his report to the Board of Revenue(1) in 1858 says has been the practice since Fasli 1259 (A.D. 1849-50), but what down to 1857, it is clear from this correspondence, had not been done. Mr. Pochin was apparently not even yet prepared to cut the vargdars off from all connexion, except as holders of rent charges for which they were assessed. He was willing to permit them as cultivators, or contractors under a license, to earn twice the assessment. He says(2) the tahsildar is himself to ascertain who have cut up to the limits of the "*dugni*," and "how many persons.....have cut in excess thereof, and proceed cacording to the order of the huzur" (*i.e.*, collector "on the subject." But then he adds: "In order that collection of the assessment may not be obstructed, you should take security from the said *kumri* cutters, or have the produce secured beforehand. In future, if Bhaskarappa would have the *kumri* cut, he should first give a list or application, specifying the number of acres, [which would yield an income] under double the *kumri* assesment he pays, and names of the *kumri* cutters, which should be subjected to a regular inquiry, and a report submitted by you, and on receipt of an order, Bhaskarappa should, upon permission taken, cut as many acres only as may be assigned to him. The said Bhaskarappa should be properly informed that he should not at all cut the [*kumri*] according to his pleasure without having taken permission therefore ; and you should regulate yourselves by the order of the huzur, and also the order No. 319 of the last year."

It is clear from this that Mr. Pochin, in November, treated the *kumri* cutters as holding, according to Mr. Robinson's order of

(1) Ex. para. 29, Printed Documents, p. 139.

(2) 152, dated 26th November 1857 ; Printed Documents, p. 229.

February, directly from Government; all the cultivators, that is, who were cutting *kumri* on an area beyond what had been expressly allowed to Bhaskarappa at so much per head for each man thus employed by him. Excess by the latter were to be ascertained, and in fact were ascertained. Bhaskarappa, as we shall see, made himself personally answerable for the double assessment charged in such cases, and paid the money. Now, also, Bhaskarappa was first required by a person vested with superior authority to present a list of names as a condition of obtaining permission, in any future year, to cut *kumri* to the allowed extent. The deputy tahsildar without authority insisted on it for the current year, Fasli 1267.

Bhaskarappa refuse to comply with the condition thus sought to be imposed on him. He declined, moreover, to pay arrears of *kumri* assessment demanded from him.(1) The sub-tenants, becoming alarmed about their livelihood, petitioned for leave to cultivate *kumri* directly under the Government; and the matter having been referred by Mr. Pochin to the collector, the result was communicated to the deputy tahsildar as follows:(2) "You made a report soliciting orders on this subject which was submitted to the huzur, and a memorandum, No. 261, received therefrom runs as follows:—

"It appears that Bhaskarappa, instead of furnishing a list showing the number of individuals and the acres (of land) required (for cutting the *kumri*), agreeably to the order passed on the subject of the cutting of the *kumri*, makes frequent applications and carries on futile proceedings. It is not just that persons, who subsist upon the *kumri* cultivation, should suffer hardship on account of him. As uniformity of practice everywhere is desirable, it was not necessary to accede to Bhaskarappa's representations. In other places, inquiries are made of (each) person as regards the cutting of the *kumri* and orders given for *kumri* cultivation. The assessment is levied by Government

(1) See Printed Documents, p. 708, Ex. 312, in which is a notice calling for payment of R. 477-10-1 arrears, less *dugni*, for Fasli 1265 and 1266. This is dated 22nd September 1858.

(2) Ex. 125, dated 14th March 1858, Printed Documents, p. 197.

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direct from the respective individuals, and double the *kumri* assessment is paid to the vargdar. (Following) the above procedure in respect of Bhaskarappa's *kumri*, receive applications direct from persons who subsist by the *kumri* cultivation, permit them to cut as much *kumri* as would suffice for their maintenance, and levy the *kumri* assessment from them for the Government.

"As regards persons wishing to carry on cultivation in the *kumri* within the limits of the said Bhaskarappa's *varg*, you may allow them, at your discretion, to cut the *kumri* (on land) not exceeding 1½ acres (in extent) for each individual, which would suffice for their maintenance, subject to the rules and circular orders relating to the *kumri* cultivation. Assessment should be imposed on these persons separately, and collected for Government from them respectively."

Bhaskarappa's proprietary connexion with the land was now completely severed, as far as the revenue officers could sever it; but still, as a payer of *kumri shist*, he was allowed, instead of receiving money compensation, to earn twice the *shist* as estimated by the profits of land allocated to him year by year on his application for *kumri* within the former limits of his *varg*. How effect was given to the collector's orders, appears from an order of the sub-collector, Mr. Pochin, dated 23rd March 1856,(1) by which, on an application from Bhaskarappa to be allowed to cut 800 acres of *kumri* to provide employment for 536 persons, he is allowed to have 157 acres yielding an income, as estimated, equal to double the assessment with which he is charged in Bhairé, Goera and Kaignad. The choice of places is to rest with the deputy tahsildar; and the assessment of the *kumri* cutters in the 493 acres allowed to be *kumried* over and above the 157 acres, is to be separately credited to Government. Bhaskarappa, except as to the area allowed to him, is placed on the same footing as any casual applicant for permission to cut "Sarkar *kumri*." As to that area itself, he is allowed to use it for one year, on terms prescribed by the revenue officers. His position remained, in fact, substantially what Mr. Robinson's order had made it.

(3) Ex. 149, Printed Documents, p. 224.

Considerable stress was laid for the plaintiff on the document, exhibit 313, dated 9th August 1858 (untranslated). In this the sub-collector, Mr. Pochin, begins by reciting two reports made by the tahsildar. In one the tahsildar had reported that in Fasli 1267 Bhaskarappa had cultivated his vargdari *kumri* without giving a list of cultivators; that, continuing to cultivate, he gave in no list at the time of the *jamabandi*; and that as to *kumri* cut by labourers in his service, he assumes in his answer the whole responsiblity. In the other there was a complaint that Bhaskarappa had *kumried* places along the road side, the cultivation of which had been forbidden, and which it appears were not connected or not deemed to be connected with Bhaskarappa's *varg*.

The sub-collector, having referred to the collector, had been instructed as follows:—

| | | | | A. g. a. |
|---|---|---|---|---|
| The area *kumried* without a list and a permission was ... | | | | 706 39 5 |
| „ „ „ on the road side ... ... | | | | 56 37 13 |
| | | A. g. a. | | |
| Whereof surveyed (1) and cultivators ascertained. | | 506 35 6 | | |
| Area ascertained by inspection, but cultivators' names not ascertained ... ... ... | | 143 6 2 | | |
| | | | | 650 1 8 |

On the acres 706-39-5, a levy of Re. 1 an acre was to be made so far as necessary to provide Bhaskarappa with a double assessment, and Rs. 2 an acre on the rest.(2) It was to be so "entered in the *jamabandi*, and orders according to law are to be given for the corresponding collections."

On acres 21-28-5, on which a *sarve* or second crop had been raised, a levy of annas 8 an acre as usual was to be made.

These directions the sub-collector tells the tahsildar to carry out; and he adds an instruction as to the road-side cultivation and unlicensed cultivation in Fasli 1265.

This order, it is said, shows the Bhaskarappa persistently

(1) *I. e.* under the order Ex. 152.

(2) Compare Bhaskarappa's petition of 20th November 1855, Ex. 281, Printed Documents, p. 518.

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asserted his right to cut *kumri* at will, which is, in one sense, doubtless quite true ; but it is no less true that he was deprived of the exercise of this right. The order, it is to be borne in mind, is subsequent in date to exhibit 152, which in the middle of Fasli 1267 directs that the *kumri* cutters are to be ascertained by regular inquiry, and that security for the collections is to be taken from them. It is subsequent in date to exhibit 125 also, by which, on the 14th March 1858, the tahsildar had been expressly directed to have nothing more to do with Bhaskarappa, but to take the whole management and distribution of the *kumri* lands into his own hands and to levy direct from the actual cultivators. The natural construction of the order we are considering, therefore, would be that the levy should be made from the actual cultivators.

The *dugni* account for Fasli 1267 shows(1) for Goera acres 311-1-5 cut beyond the area producing the double assessment. On this, the *jamabandi* imposed is Rs. 622-1-1. On *kumri* cut in accordance with orders, Rs. 126-14-9 is the assessment, and the total levied is Rs. 748-15-10. Of this, there is payable to the vargdar Rs. 65-2-4 as double assessment, leaving an excess of Rs. 683-13-6 to be credited to Government under the head of deposits. This order has been quoted as showing that, in spite of all orders to the contrary, Bhaskarappa still retained possession and management of the forests ; but it does not prove this. It is framed consistently with exhibit 313, and it gives the number of persons, ascertained according to exhibit 152, cutting *kumri* within the extent authorized and the number beyond it. It provides as a deduction or disbursement for payment to the vargdar of his small proportion out of the sum levied. This is no recognition of Bhaskarappa as still in possession ; it points rather to his exclusion, or his recognition merely as representative of the actual *kumri* cutters. Suppose, however, that the Rs. 622-1-1 was paid by him and accepted as on his own account, in what respect would that mere transaction place him in a better position than any casual *kumri* cutter cultivating without leave, and made to pay double assessment by way of penalty? Having been one deprived, and then come in

under colour of an agreement for cultivation according to prescribed limits, he could not, by transgressing those limits, extend his right. His encroachments enured to the benefit of his landlord. Having accepted an area defined by the revenue officers, by submitting to pay a penalty as distinguished from the regular *kumri* rates, he admitted that he had extended his occupation wrongfully ; and if he was in wrongfully, the Government, with right and fact united, was in full possession as soon as his casual tenants vacated their temporary holdings, and his intrusion thus ceased about the end of A.D. 1857, or early in 1858, at the close of the harvest of Fasli 1267. But the fact is, and it is impossible to set it aside, that being out of possession in his own right in 1856 ; shut out by the order of the tahsildar from using the land in the only way in which he could turn it to account, or which had previously constituted his possession, he recovered his possession, under the sub-collector's order, exhibit 147, but partially, and subject to terms inconsistent with his continued holding as proprietor. There is no doubt, unless he had attorned to the Government, that on the 23rd February 1857 he had, as owner, a cause of action for the recovery of the property of which, as such owner, he was then, if not sooner, wrongly dispossessed, and none the less dispossessed because he was indulged with a derivative possession of part on terms contradictory of his independent possession and ownership.(1) Being examined on the 7th June 1858, (2) Bhaskarappa claims the position accorded to *kumri* vargdars in Bekal, where they were allowed actual possession and enjoyment of lands corresponding to their assessment,(3) and says he has appealed against the collector's decision to the Board of Revenue.(4) In his report of the 30th August 1858, para. 65,(5) Mr. Fisher speaks of "Bhaskarappa who has of late presented so many petitions to the Board and the Govevnment regarding the manner in which his claims hav been treated by the successive authorities in this

(1) See *Williams* v. *Pott.*, L. R. 12 Eq. 149.

(2) Ex. 462, Printed Documents, p. 708.

(3) Ex. 94, para. 88, Printed Documents, p. 146.

(4) See Ramchandra's petition, Ex. 282, Printed Documents, p. 519.

(5) Ex. 94, Printed Documents, p. 143.

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district." That these applications were unsuccessful, appears from the proceedings of the Revenue Board of the 16th April 1859.(1) That body held the *sanad* for Kaignad to be a fabrication; they considered that as to "vargdari *kumri*," as it was called, "the entry of the *kumri shist* in the accounts of any *varg* does not confer a proprietary right in the forest, but only the rent of the privilege of cutting *kumri* therein, which rent may be discontinued on surrender of the yearly sum paid for it;" and they recommended that the sums taken and deposited in excess of the *dugni* or double assessment on *kumri* lands should be "carried to the public account,"—that is, made available for expenditure. On the 23rd May 1860, the Madras Government, (2) adopting the views of the Revenue Board as to question of legal right, but declining to adopt the alleviations in favour of the *kumri* vargdars recommended by the collector and the Board as a politic indulgence,(3) resolved that "the proper course will be to remit the *shist*," which was a euphemism for extinguishing the right, or abolishing the practice for which it was paid. They proibited "Sarkar *kumri*" without previous permission. The sums in deposit they directed to be brought to account.

It is on the collector's order, dated 20th March 1861, issued in consonance with this decision of the Madras Government, and the consequent exclusion of the plaintiff from the forests, that the present suit is passed. The cause of action in a suit of the nature of ejectment, it is contended, arose then and not sooner. But having allowed that Martoba and Báskarápá had, through the knowledge and quiescence of the local authorities, acquired an actual possession of lands subjected to *kumri* cultivation down to the year 1842, we must not refuse efficacy to the acts of the same authoritieis if they afterwards, depriving Bháskarápá, assumed or resumed possession on behalf of the Government. On the 23rd Febreuary 1857, Mr. Robinson, as we have seen, issued an order which not only prevented Bhaskarappa from cutting *kumri* where he wished within the limits of his *varg*, but also allowed the tahsildar at his discretion to introduce strangers to

(1) Ex. 218, paras. 36, 38, 49 Printed Documents, p. 350.
(2) Ex. 95, paras. 16, 17, 20 Printed Documents, pp. 158, 159.
(3) Ex. 218, paras. 43, 45, 46, Printed Documents, pp. 358, 359.

cut *kumri* there. A couple of months later he directs that the rents taken from these *kumri* cutters shall be credited to "Sarkar *kumri*". This was depriving him of possession as completely as he had ever had possession. The whole management of the *kumri* lands was taken into the lands of the revenue officers; and Bhaskarappa was recognized as entitled only, under certain circumstances, to a certain portion of the proceeds. There were protests and remonstrances from time to time throughout the series of transactions by which Bhaskarappa and his predecessors were gradually ousted. It would be unreasonable to suppose what there is nothing to indicate, that they *ex animo* assented to the proceedings by which they were so seriously injured. But mere complaint to the revenue officers themselves, or to the executive Government, could not interrupt the sole possession they were acuqiring and eventually acquired; nor would furtive incursions on Bhaskarappa's part into the forest from which he had been extruded,(1) trespasses in the eyes of the Government officers for which he was subjected to penalties like any other intruder, reacquire for him the possession that he had once lost. In later days, certainly, there was no more lack of will than of power to repel his unsanctioned aggressions. Limitation could be barred only by a suit,(2) and no suit was brought for several years after Bhaskaraypa's total expulsion. His protests and his endeavours to defeat the purposes of the officials, serve only to repel the suggestion which also was pressed on us that by keeping the sums levied from him, or from the *kumri* cutters, in deposit, the collector, acting with the assent of Bhaskarappa, held money belonging to the latter in trust for him pending the final disposal of the matter by Government. There was no trust, no assent, though there was enforced submission; and Bhaskarappa, constrained *nolens volans* to part with his money,(3) had equally a right of action whether

(1) Potheir Pand, Lib. 41, tit. ii, 7, 8, 39, 41; and see Reeves's Hist. of the E. Law, Vol. I, p. 319.

(2) *Plane per solam extra judicialem interpellationem nulla usucapionis interruptio fit, uti nec per domini denunciationem ne hoc aut illud in suo fundo per alium possesso fiat, cum aliud sit prohibere ne quid novi fiat.....aliud de possessione litem movere.* Voet. Comm. ad Pand., Lib. 41, tit. 3, s. 20. The Madras Reg. II of 1802, secs. 15 and 1 of 1823, s. 2, provide for suits against Government officers on the part of persons aggrieved by their acts.

(3) See Ex. 312, MS. dated 13th September 1858.

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it was expended or placed in a treasure chest.

Mr. Robinson's action may seem to have involved a confiscation of rights which Mr. Blane, a superior officer, had some years before recognized as existing, and to have thus been without due authority; but Regulation VII of 1828, section III (Madras), gives to a sub-collector in charge of a division "all the powers granted to the collectors by the regulations," subject only to the "superintendence, revision and control of the collector." Mr. Robinson's proceedings do not appear to have been any particular annulled by the collector. The rank, therefore, as acts done by the collector himself, if done in the exercise of powers conferred by the regulations. But, morever, they were adopted and confirmed by the collector. Mr. Pochin, on the 28th November 1857, like Mr. Robinson, recognizes a right in Bhaskarappa to a certain quantity of *kumri* cutting, but on terms inconsistent with his possession as owner or usufructuary of any particular place. Lastly, the collector himself, in the order communicated by Mr. Pochin on the 14th March 1858,(1) directs the complete eviction of Bhaskarappa from any connexion at all with the forest lands. That this order had actually been put in force before the 7th June 1858, is evident from what Bhaskarappa says in his examination(2) of that date. The "orders issued by the officer in charge of the division" had thus been more than adopted, and Bhaskarappa had been reduced to the position of a mere recipient of the *dugni*. It appears(3) that, on a notice from the plaintiff calling for the production of the ordinary assessment accounts and of the "*dugni*" accounts from Fasli 1258 to 1270, these documents were produced in the District Court and filled as exhibit 64, but were afterwards returned to the collector on the ground that he admitted the plaintiff's contention on the point to which they refer. If these accounts did, indeed, present Bhaskarappa, subsequently to 1856, as the payer of the whole *kumri* assessment on the land cultivated in what had once been his *varg*, they would be in direct contradiction to the orders issued on that subject; but even if Bhaskarappa,

(1) Ex. 125, Printed Documents, p. 197.
(2) Ex. 462, Printed Documents, 708.
(3) See Ex. 18.

by arrangement with the *kumri* cutters, did pay for all of them, and was named in the accounts as actual payer, that could make no material difference. Nor would it, if he was allowed, year by year, himself to contract for any extent of *kumri* and to pay the stipulated price or rent.(1) He did not pay, in his own right as proprietor, or in admitted discharge of an obligation implying his correlative right. It gave him no control, as owner, over the lands cultivated by the *kumri* cutters or even by himself. His possession had ceased in 1857 ; his suit was not brought till July 1870. It was then, as more than twelve years had elapsed since his dispossession, barred by the Limitation Act XIV of 1859, sec. 1, art. 12. The decree of the District Court must, therefore, be confirmed.

*Decree confirmed.*

(1) *Adeo verum est possessionem in possidentis persona semper talem perseverare qualis ea inceptie.*—Poth. Pand., Lib. 41, tit. ii, fr, 52.