APPELLATE CIVIL.

Before Mr. Justice Ranade, on reference from Sir L. H. Jenkins, Chief Justice, and Mr. Justice Whitworth.

HANMANTRAV AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA (ORIGINAL DEFENDANT), RESPONDENT.* 1900. *November* 15.

Possession—Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Evidence—Effect of plaintiffs' possession—Presumption of title—Evidence Act (I of 1872), sec. 110.

The plaintiffs brought this suit in 1898 for a declaration that certain land in the village of S. belonged to them, and that they might be confirmed in possession. They alleged that they purchased the land in July, 1888, from the pátel of the village, and had been in possession ever since, and that their vendor had previously been in possession. They now sued because their possession had been threatened by the orders of Government officials. It was admitted that the plaintiffs had been in actual possession since 1888.

The District Judge held that the burden of proof of title to the land lay upon the plaintiffs. He was of opinion that they had failed to prove it, and he dismissed the suit.

Held, per JENKINS, C.J., and RANADE, J. (WHITWORTH, J., dissenting), that the plaintiffs being in possession (not shown to have wrongfully originated) such possession was good against the whole world except a person who could show better title; that the burden of proving such title lay therefore upon the defendant; that he had failed to prove it, and that therefore the plaintiffs were entitled to the declaration sued for.

Per WHITWORTH, J.:—That the evidence did not show such possession in the plaintiffs as under section 110 of the Evidence Act (I of 1872) shifted the burden of proof upon the defendant; that prior to the alleged sale to the plaintiffs in 1888, the defendant had been in the position of an absentee owner of the land in question represented partly by the village officers and partly also by the village community, and that he might be said to be in possession; that the sale to the plaintiffs in 1888 by the pátel of the village, who should have protected the defendant's interests, was a wrongful act; that the plaintiffs were therefore not relieved from the burden of proving their title, and that they had not proved it.

Per RANADE, J.:—When a person in possession of land has been dispossessed and sues to recover it, the fact of his previous possession will not entitle him to a decree unless he sues under section 9 of the Specific Relief Act (I of 1877) within six months of the date of dispossession. If he sues after the six months

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have expired, he must prove a *primâ facie* title. In such a case he is entitled to a decree unless a superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and that the plaintiff, who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *primâ facie* title is made out. When no such *primâ facie* title is made out by the plaintiff who asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof.

APPEAL from the decision of C. H. Jopp, District Judge of Ahmednagar.

Suit for declaration of title. The plaintiffs brought this suit in 1898 in the District Court of Ahmednagar against the Secretary of State for India in Council for a declaration that a certain piece of land in the village of Savargaum belonged to them and praying that they might be confirmed in possession

They alleged that on the 25th July, 1888, they purchased the land from one Patilbowa Dhondji (who, it appeared, was then officiating pátel of the village); that they had ever since that time been in actual possession; that before the purchase their vendor had been in possession; that during their possession they had with the assent of the Government's agent built on the land and spent Rs. 1,600 on it, and that their possession had now been threatened by the orders of Government officials.

The defendant pleaded that the land belonged to him and never belonged to the plaintiffs or their vendor.

It appeared that in 1888-89 there had been an inquiry in the Mámlatdár's Court as to the ownership of this land, and the Mámlatdár had decided that it did not belong to Government, and directed the village officers not to interfere with the plaintiffs if they built on it.

The District Judge, however, dismissed the suit. He was of opinion that the Mámlatdár had no jurisdiction to decide the question of title, and in this suit he held that the burden of proving their title to the land lay upon the plaintiffs and that they had failed to do so.

The plaintiffs appealed.

The appeal was at first argued before the Division Bench composed of Jenkins, C.J., and Whitworth, J.

Ráo Bahádur *Ghanasham N. Nadkarni* for the appellants (plaintiffs).

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the respondent (defendant).

JENKINS, C.J.:—The plaintiffs have brought this suit against the Secretary of State for India in Council for a declaration that a site in the village of Savargaum belongs to them, and that they may be confirmed in possession. Their case, shortly, is, that on the 25th of July, 1888, they purchased the site from Patilbowa Dhondji, the consideration being Rs. 20 in cash and Rs. 20 previously lent by the plaintiffs' father to Patilbowa's father on mortgage of the land, and that they thereby became its owners; that possession of the site has since the purchase been with them, and before that with their vendor and his father; that during their possession the plaintiffs have with the assent of the Government's authorized agent built on the land and spent on that object a sum of Rs. 1,600; and that their possession has now been threatened by the orders of Government officials.

The suit came on for hearing before the District Judge of Ahmednagar, by whom the following issues were framed:—

1. Have plaintiffs proved their title to the site in dispute?

2. Is the defendant estopped from denying that plaintiffs are the owners of the site in dispute?

3. Are plaintiffs entitled to the relief claimed in the plaint?

In my opinion the District Judge erred in his omission to frame an issue as to the plaintiffs' possession. The result is that we have no finding on this point, and the District Judge has as a consequence wrongly misconceived the proper incidence of the onus of proof. Section 110 of the Evidence Act provides: "When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." This section merely formulates the commonplace in the law of evidence, that possession affords *primâ facie* presumption of ownership, and I am aware of nothing that excludes the Secretary of State from the operation of that rule. The first point therefore which I propose to consider is whether the plaintiffs

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are in possession. Admittedly they have been in possession since July, 1888: but can it be said that their possession is of such a character as to attract the presumption described in section 110? in other words, was their possession such as would be recognised by a Court of law? The plaintiffs did not obtain possession by ousting any one, nor can it be said that their possession was not peaceable; for when a question was raised as to the propriety of their possession, the Mámlatdár after inquiry came to the conclusion (whether rightly or wrongly is immaterial for this purpose) that the plaintiffs were entitled to remain in and build. I am not at present considering the possibility of an estoppel resulting from the Mámlatdár's action; I allude to what he did as a circumstance throwing light on the character and quality of the plaintiffs' possession, and I pause here to state that I find nothing to justify the suggestion, which did not even find a place in the argument, that the Mámlatdár acted otherwise than honestly. It seems to me contrary to well-established doctrine to say that this is not such a possession as the law would recognise, and one that would be good against the whole world except the person who can show a good title. To say that a possession is not within the meaning of section 110, unless it is a possession according to title, would be to render that section meaningless, and to introduce a doctrine subversive of the established principles of property law. The matter is thus summed up in Pollock on Torts (4th Ed.) p. 330:—

"Sometimes mere detention may be sufficient; but on principle it seems more correct to say that physical control or occupation is *primâ facie* evidence that the holder is in exercise (on his own behalf or on that of another) of an actual legal possession, and then, if the contrary does not appear, the incidents of legal possession follow. The practical result is that an outstanding claim of a third party (*jus tertii* as it is called) cannot be set up to excuse either trespass or conversion. "Against a wrongdoer possession is a title'; or as the Roman maxim runs '*Adversus extraneos vitiosa possessio prodesse solet.*' As regards real property, a possession commencing by trespass can be defended against a stranger not only by the first wrongful occupier, but by those claiming through him; in fact, it is a good root of

title as against every one except the person really entitled."

As authority for this last proposition Mr. Pollock vouches *Asher* v. *Whitlock*,(1) to which as well as to the cases on which it proceeds reference may usefully be made. In another passage Mr. Pollock says: "The authorities do not clearly decide, but would seem to imply that it would make no difference if the *de facto* possession violated by the defendant were not only without title, but obviously wrongful."

The propositions thus laid down are of course not binding authorities, but I cite them as they state most clearly what appears to me to be the law. That *Asher* v. *Whitlock* lays down principles to be observed in this Presidency is finally established by the authoritative judgment of Sir Michael Westropp in the case of *Pemraj* v. *Narayan*,(2) heard and decided by a Full Bench of this Court as far back as 1882. In the course of his judgment the learned Chief Justice remarks: "The plaintiff's possession was a good title against everybody except the true owner. This being so, we fail to perceive any good reason for requiring the plaintiff to wait until he is evicted, or preventing him from obtaining a declaration of that which is beyond all doubt his right, *viz.*, that his title as possessor is good against a person who is seeking to disturb that possession, and who has not a colour of title to the land in dispute, and never had possession of it." Then later, in reference to his right to vindicate possession under section 230 of Act VIII of 1859, he says, although the plaintiff "may, if he please, give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession and cast upon the decree-holder the burden of proof of title,—*i.e.* his right to dispossess the applicant. This appears to have been so held in the Calcutta Full Bench Case—*Radha Pyari* v. *Nabin Chandra*,(3) and is quite in accord with the value and import of possession as laid down in the English authorities, to which we have referred, as well as in the Indian Evidence Act I of 1872, section 110." Another and still more authoritative pronouncement is to be found in the recent Privy Council judgment is *Ismail Ariff* v. *Mahomed Ghouse*.(4) There

(1) (1865) L. R. 1 Q. B. 1.
(2) (1882) 6 Bom. 215.
(3) (1870) 5 Ben. L. R. 703.
(4) (1893) L. R. 20 I. A. 99; 20 Cal. 834.

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the plaintiff sought a declaration that he was the sole and absolute owner of the land, and that the same was not dedicated for religious or charitable purposes and that the defendant had no right, title or interest therein or in any part thereof. The defendant denied the plaintiff's possession and relied on a dedication. Both the lower Courts found that the plaintiff was in possession and that the defendant was not the Mutwali. The Court of appeal, however, in Calcutta, differing in this respect from Mr. Justice Trevelyan, held there was a dedication, and declined to "declare that this person, the plaintiff, has a title, when as a matter of fact it is shown he has none." On this ground they dismissed the plaintiff's suit. Their Lordships of the Privy Council in disposing of the case say at page 106 of the Report:—

"It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By section 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrongdoer from interfering with his possession. The Appellate Court, in accordance with the judgment above quoted, has dismissed the suit. Consequently, the defendant may continue to wilfully, improperly and illegally interfere with the plaintiff's possession, as the learned Judges say he has done, and the plaintiff has no remedy. Their Lordships are of opinion that the suit should not have been dismissed; that the plaintiff was entitled in it to a declaration of his title to the land. It was not necessary for him to negative that the land was dedicated to religious or charitable purposes —a question upon which the Original and Appellate Courts have differed, and which, as the only defendant was not entitled to maintain the wakfnamah, and other persons would not be bound

by an adverse decision, their Lordships do not decide. That declaration should be omitted from the decree. Their Lordships will humbly advise Her Majesty to reverse the decree of the Appellate Court, and order the defendant to pay the costs of the appeal to that Court, and to affirm the decree of Mr. Justice Trevelyan, substituting for the words 'the sole and absolute owner' — 'lawfully entitled to possession,' and after the words 'in this suit mentioned,' omitting 'and that the same have not been dedicated for religious or charitable purposes.' The respondent will pay the costs of this appeal."

These principles have received an instructive application in the recent case of *Gangaram* v. *Secretary of State for India*[1] decided by Jardine and Ranade, JJ. There the plaintiff advanced the same claim as here to a site in a village, relying on the fact that ten or fifteen years before he had built a cattle-shed on the land and that prior to that he had erected sheds on it each year and kept fodder, grain and earth on the site. The District Judge, disbelieving the evidence as to keeping fodder and grain there and as to the yearly building of the shed, dismissed the suit, and from this the plaintiff appealed. The High Court held that the plaintiff had failed to prove title and refused to grant him the declaration of title he sought. They, however, granted him relief in protection of his possession, and in so doing they said: "The plaint, however, contained a prayer that the plaintiff might be awarded any other relief to which he might be entitled. If he had made reference to section 42, illustration (*g*), of the Specific Relief Act, or if the Court had noticed that illustration which refers to suits brought for confirmation of possession, it is probable that an issue would have been raised as to whether the plaintiff was entitled as against the defendant to be retained in possession. There is no evidence on the record of the defendant's title; and it is found by the Judge that the plaintiff has held possession for at least ten years and has built a shed on the land. These facts appear to us to bring the case within the ruling of their Lordships of the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse*." [2]

This case is singularly apposite, because it distinctly shows that even in the case of a village site, Government cannot rely on

(1) (1895) 20 Bom. 798. (2) (1893) L. R. 20 I. A. 99.

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any general presumption: and that as against the party in possession it must show title. It seems to me that this case is a direct authority founded on the soundest principles, and that it is strictly applicable to the present case. Moreover, this case does not stand alone; for as far back as 1869 I find in the case of *Shama Soonduree Debia* v. *The Collector of Maldah*(1) the following principles were enunciated by Mr. Justice Mitter, the defendant-Collector in that case being the representative of the Government:—

"If the plaintiff can prove that she was in possession of the property in dispute until she was ousted by the defendant against her consent, and without the intervention of a Court of law, the defendant ought to be called upon to prove his title. If the defendant succeeds in proving his title, the plaintiff ought then to be required to prove a better one. That evidence of possession, however short, is evidence of title, is an undisputed proposition of law, and it therefore follows that such evidence is at least sufficient to make out a *primâ facie* case in favour of the party by whom it is given."

Probably it would not be difficult to multiply instances, but I am content to abide by the principles thus stated over thirty years ago and reaffirmed in this Court by a decision which is binding on us.

This, then, is how the law stands. I am conscious of having laboured what may seem to be an elementary point, but I have done so, as the true value of possession without proof of title does not seem to me to have been accurately appreciated. The plaintiffs, therefore, being in possession, how has the defendant shown that he is the true owner? The evidence in the case is in part documentary and in part oral: I will first deal with the former. It consists of statements in documents relating, not to the site in suit, but to adjoining premises. These documents have not been translated, but they consist of a sale proclamation, a rent-note and a map, and the statement in them which the defendant calls in aid of his case is one which gives the land in suit as one of the boundaries, describing it as "Government open ground,"

(1) (1869) 12 Cal. W. R. 164.

"open ground," and "vacant land." But how is such a statement relevant? An attempt was made to bring it in either under section 13 (*a*) or section 32 (4). Obviously neither of them is apt for that purpose: for, so far as section 13 (*a*) goes, it is impossible to say that any one of these documents was a transaction by which any right in the site in suit was created, &c.; there was merely an incidental reference to it, the subject-matter of the transaction being another piece of land. Nor, on the other hand, have those conditions been established on which alone a statement would be admissible under section 32 (4). So it now only remains to consider the oral evidence, and in so doing it is important to bear in mind what the true object of proof is: it is whether the Government has shown a title to the property, and in this connection it is important not to be influenced by preconceived ideas as to the general ownership of Government: for each case must be decided by what is proved in it. *Quod non apparet non est*; or, as it has been recently expressed by Lord Halsbury, "of things that do not appear and things that do not exist, the reckoning in a Court of law is same." Now there are three witnesses on whom the defendant has relied. The first is Balvant, who is about thirty-three or thirty-four. He is a kulkarni and states in his evidence, which was given on November 18th, 1899, that he had known the site for the last eleven or twelve years. He says:—

"There was no building on this ground when I first saw it eleven or twelve years ago. The site was an open one. When I began to serve as kulkarni, Hanmant Ram Hukumchand began to occupy it. This was ten years ago. He began to build on the site. * * * When he began to build, I do not know if any one had occupation of the land. I do not know whether Government or any private person owns it."

The evidence in no way establishes the Government's title: the witness's knowledge does not extend back, at the outside, more than a year beyond the period of plaintiffs' admitted possession: he is not even able to express an opinion (for what it may be worth) as to the existence of any general right over the land. The next witness is Rama, who is twenty-five or thirty years old and lives in a hamlet one mile from Savargaum. He says the site

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was an open one, but he does not know to whom it belongs. This witness admits he saw stones on the ground nine or ten years before the building was put up, but he says cattle were not tied, nor did he ever see a chupper for cattle on the site. He does not know whose people in the village say the site is. His evidence therefore also fails to show a title in the Government, at most it negatives certain acts of ownership asserted by the plaintiffs prior to 1888; but with this aspect of his evidence I will deal later. The next witness is Ganesh, who is merely called to prove a map, but he makes one statement in the course of his evidence which is deserving of notice. He states that he inquired among the villagers and ascertained that the open space belonged to Government. This statement, I need hardly point out, has no evidentiary value, but it is curious that no effort was made to call those villagers from whom the witness gleaned this information, for it cannot have been from the two witnesses whose evidence I have examined that he obtained it. I now come to the last witness, Bapu, who no doubt states that the site is "Government waste open space" and that "the villagers believing the land was Government land gave it to the Kumbárs for making pots." The Government Pleader refrained, and I think properly, from pressing the evidence of this witness; for it is obvious that the relations between him and the plaintiffs were of a character calculated to influence his evidence adversely to them.

This, then, is the evidence, and after giving it the best consideration I can, it has failed to establish to my satisfaction Government's title to the land, or any possession by Government within sixty years before the commencement of this suit.

It would suffice to stop at this point, but as this is a first appeal I think it better shortly to examine the evidence adduced on the plaintiffs' behalf for the purpose of proving possession and acts of ownership by their vendor and his father. They first endeavoured to show that the property had been mortgaged by the vendor's father to theirs, and they went further and sought to make out that there had been a written document. This the District Judge declined to believe, because it is stated in the sale-deed—the genuineness of which is undisputed—that there was a mortgage, but without a document. I think the Judge was right in

discrediting the existence of a written mortgage, but I am by no means satisfied that he should for that reason have held that there was no mortgage at all, seeing that the fact of a mortgage was corroborated by the statement in the sale-deed. I see no reason for supposing that the statement in the deed as to a mortgage was manufactured for future contingencies, for had that been the design, the conspirators would hardly have stopped short at an oral mortgage. Indeed, the District Judge himself does not suggest such a theory. The position therefore would appear to be this, that so far as the plaintiffs swear to a written mortgage they are contradicted by the statement in the sale-deed, but so far as they assert that there was a mortgage, they are corroborated by the same statement, which is properly admissible for that purpose (Evidence Act, section 157). The doctrine *falsus in uno falsus in omnibus* in this country affords a test of little or no value; for it is to be feared that "there is almost always a fringe of embroidery to a story however true in the main," and I should myself hold, on the evidence, that there had been an oral mortgage, if a finding on the point were necessary. I do not, however, place much stress on this alleged mortgage, but there is other evidence of acts of ownership which has been too summarily dismissed by the District Judge owing, no doubt, to his failure, in the first instance, to determine the question of possession, and observe the legal consequences resulting therefrom. The rest of the documentary evidence produced by the plaintiffs consists of documents relating to other land and referring to the site in suit in the description of boundaries in a manner suggestive of its having belonged to Dhondi Ganji. Two of these documents are Exhibits 41 and 32, as to which the District Judge says they "have, in my opinion, probably been forged for the purposes of this suit." For this reason he not only declines to place reliance on these documents, but he also uses them to nullify the evidence of witnesses 31, 40 and 39 on the ground of their connection with these documents, and for this reason he thinks their testimony is not of any value. I am not disposed to agree with this: but however that may be, it does not enable him to get rid of the testimony given by Gulabchand (Exhibit 43). This witness is seventy years of age and swears that he has known the site for fifty years. It is true he does not live

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in Savargaum, but in Ane, three miles off; still he asserts that he is always going there. He swears to the existence of the chupper on the site and the tying of cattle there. "I saw Dhondji's possession," he says, "for about twenty years; Dhondji mortgaged the site to Hukumchand. I learnt this, as I used to tie my horse there." Then he gives some details as to the chupper and deposes that a dinner was given on the site on Hukumchand's anniversary. In cross-examination he re-asserts that he tied his horse in the shed, and swears that there were signs of cattle having been there. To judge by the cross-examination, the fact of this witness being a moneylender is suggested as a discrediting circumstance. I am led by this to cite what has been said in this connection by their Lordships of the Privy Council:

"Their Lordships are led by the judgment under review and by some portion of the argument which has been addressed to them to state, as has often been stated before by this committee, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be; that is, due weight must be given to evidence there as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection if sanctioned would virtually submit the rights of others to the suspicions and not to the deliberate judgment of their appointed Judges. Nor must an entire history be thrown aside because the evidence or some of the evidence of some of the witnesses is incredible or untrustworthy."—*Ramamani* v. *Kulanthai*.[1]

As a matter of fact I do not find that the District Judge disbelieved this man; all he says with regard to him is, "I do not think that his testimony is sufficient to establish that Dhondi, father of Patilbowa, owned the site, more especially as the mortgage to the plaintiffs has not been produced, and as in the proclamation and other papers relating to the sale of a neighbouring site to one Jethiram on October 13th, 1878, this piece of ground is entered

(1) (1869) 14 Moore's I. A. 354.

as belonging to Government." I take this criticism to mean this, that Gulabchand's evidence does not, as against the matters to which the District Judge refers, establish ownership, and had that been a correct exposition of the position there would be much in its favour. He does not, however, say that his evidence is not to be believed, or that so far as he deposes to particular facts, he is to be discarded. Why should we not give credit to this man? Surely the fact of his being a moneylender cannot, *per se*, be sufficient, and I must confess I cannot accept the evidence of Rama, who is now only twenty-five or thirty, as outbalancing Gulabchand's evidence relative to matters that occurred when Rama was a mere lad. It may be that Gulabchand's evidence would not alone go far towards establishing possession, but at any rate it shows that the plaintiff obtained possession from one who did exercise, rightly or wrongly, certain acts of apparent ownership, and so is confirmatory of the view that the plaintiffs' possession is one which the law will protect.

I have alluded to this evidence not so much because it is necessary for the plaintiffs' case, but because it helps to dispel the view (which I think, even apart from it, unsound,) that the plaintiffs had not such possession as section 110 of the Evidence Act contemplates. It further makes it clear that there is *no* evidence which shows a possession by Government at any time within sixty years. It is true that the site with which we are concerned is *gavthan* land, and some stress is laid on this fact, but I think without good reason. According to Wilson, *gavthan*, apparently a corruption of *gaonthan*, means "site of a village, whether in ruins or still standing." Even in the absence of judicial decision I should not have regarded land of this character as inviting any inference that it was the unfettered property of Government. As a matter of fact the view I entertain has the sanction of the decision in *Gangaram's* case. Reference has been made to section 37 of the Land Revenue Code, but that appears to me in no way to advance the defendant's case, for it only relates to that which is not the property of individuals &c., and even then subject to such rights as may be established over the same. It in no way disturbs the presumption arising from possession or the legal results that flow therefrom.

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I would therefore reverse the decree of the lower Court and declare that the plaintiffs are lawfully entitled to possession of the land in suit and the shed thereon. As there is a difference of opinion the case will be referred to Mr. Justice Ranade.

WHITWORTH, J.:—The plaintiffs brought this suit for a declaration that they were the owners of a site within the village of Savargaum, and for recovery of its possession, alleging that they had bought it in 1888 from one Patilbowa, and that they and their father had previously held it in mortgage from Patilbowa's father Dhondi. There is no evidence of Dhondi's title, and the plaintiff's case rests upon (1) their possession since their purchase in 1888, and (2) the previous possession of their vendor or of his father or of themselves or their father as mortgagees.

The first question that arises is: Was this possession at any stage of such a character as, under section 110, Evidence Act, to put on the defendant the burden of proving that the plaintiffs are not the owners of the site? I cannot find that it was. The conclusions that I would draw from the evidence are (1) that the possession alleged to have been exercised before the sale consisted merely of such acts as are permitted to any villagers in respect to an open space in a village, so long as no one is prejudiced by them, and which would be permitted to an influential person such as the pátil of the village (as both Dhondi and Patilbowa in turn were) even if they were somewhat prejudicial to public convenience; and (2) that the actual possession taken after the execution of the deed of sale in 1888 was a merely wrongful act.

Without asserting that section 110 of the Evidence Act does not apply to the Secretary of State (who is defendant in this case) as well as to any private person, it is still necessary to consider the character of his possession of any land in India. He is an absentee owner represented in a village partly by the village officers and partly also (I think) by the village community. An open site in a village—and especially one with several roads about it as, from the map, the one in question appears to be—is useful as affording space to move in, to meet, to furnish air and so on; and so long as a community are deriving such advantages from an open space in a village, the Secretary of State may, i

seems to me, be said to be in possession of it: and the conversion of such a space to building purposes by a private person amounts to ousting the Secretary of State from his possession.

In estimating the character of the plaintiffs' act in taking the deed of sale and proceeding to build, it is to be observed that the person from whom he purported to buy was the person—or at any rate was a member of the family of the person—on whom primarily devolved the duty of protecting the defendant's interests. As Patilbowa says in his evidence that he was officiating pátil for five years fifteen years ago (speaking in 1899), it would appear that he was actually pátil at the time of the deed of sale in 1888. And even if he was not, he was still regarded as sufficiently representing the family as to make his sole signature satisfactory. And the fact that the pátil's immediate superior, the Mámlatdár, went beyond his duty and authority in order to confirm the plaintiffs in the possession they had taken, so far from strengthening the plaintiffs' case, to my mind only throws additional suspicion on the whole transaction. And the complaisance of the Mámlatdár having been secured, it is by no means surprising that the plaintiffs should have confidently proceeded to expend large sums in building. So that that incident also, I think, loses all significance.

The plaintiffs' documentary evidence consists only of deeds between third persons in which the site in dispute in being referred to as a boundary is called by the pátil's surname of Garji. If such a statement is relevant at all, it can be of but very small value, and in no way better than the similar opposing evidence on the part of the defendant that in other documents the same site was referred to as Government open land. But it is noticeable in this connection that according to the evidence of the plaintiffs' witnesses their father Hukumchand got possession of the site (according to their statements of period) about the year 1861, while their documents are dated 1869 and 1879. If there were mortgage and possession as alleged, the site would by 1869 or 1879 have been more naturally referred to as the Márwádis' site than as Garji's.

Holding, as I do, that the plaintiffs are not relieved of the burden of proving their title, I have no hesitation in accepting

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the District Judge's conclusion that they have not proved it. If the pátil's family had had any real title to the site, I cannot but think that better evidence would have been available; and if there had been any written mortgage, I cannot but think that the Márwádi, a man of business, would have been careful to preserve it. And the oral evidence, even if accepted, would not establish ownership or right of possession. The case of *Gangaram* v. *Secretary of State* (1) seems to me to differ in an important particular from the present one (though perhaps some of the views advanced in this judgment may not be wholly reconcilable with that decision). For in that case it is said that there were "old walls" on the site in dispute, a fact that would indicate that the site had been in the past private property, and not an open space beneficial to the community at large. I would dismiss the appeal with costs.

Owing to the difference of opinion between the Judges the appeal was referred to Ranade, J., for final decision under section 575 of the Civil Procedure Code, 1882.

Ráo Bahádur *Ghanasham N. Nadkarni* for the appellants (plaintiffs).

Ráo Bahádur *Vasudev J. Kirtikar* (Government Pleader) for the respondent (defendant).

RANADE, J.:—The difference of opinion which has led to this reference relates to the question whether the possession of the appellant-plaintiffs in this case was or was not of such a character as to place on the respondent-defendant, under section 110 of the Evidence Act, the burden of proving that plaintiffs were not owners of the land. The Chief Justice was of opinion that the burden of proving that plaintiffs were not owners lay on the defendant, who affirmed that the plaintiffs in possession were not such owners. Mr. Justice Whitworth was of opinion that the possession of the plaintiffs was not of that exclusive character claimed for it, and that it was only of the sort which is permitted to any villagers in respect of an open space in a village, and that the actual possession of the plaintiffs under the deed of sale was a wrongful act. The difference of view is thus chiefly

(1) (1895) 20 Bom. 798.

about the character of the possession enjoyed by the appellant-plaintiffs.

It was admitted by the Government Pleader that under section 110, possession, when long and continued up to a recent date, leads to a presumption of title. Where the conflict is between mere previous possession and recent actual possession, the fact of previous possession will not entitle plaintiff to a decree except in suits under section 9, Act I of 1877, brought within six months from dispossession. Where this period is exceeded before a suit is brought, and is less than the limitation law requires, he must make out a *primâ facie* title—*Purmeshur Chowdhry* v. *Brijo Lall Chowdhry*(1); *Debi Churn Boido* v. *Issur Chunder Manjee*(2); *Ismail Ariff* v. *Mahomed Ghouse*(3); *Ramchandra Narayan* v. *Narayan Mahadev*.(4) And section 110 refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such *primâ facie* title to claim a decree where no superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and the plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *primâ facie* title is made out—*Pemraj Bhavaniram* v. *Narayan Shivaram*(5); *Krishnarav Yashvant* v. *Vasudev Apaji*.(6) Where no such title is made out, and plaintiff comes to the Court and asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof. This seems to me to be the true construction to be placed on section 110. Any other construction would, as the Chief Justice has observed in his judgment, make the section virtually without any purpose.

As regards plaintiff's possession there is no dispute. He has been actually in possession since 1888. The Mámlatdár, who made the first inquiry, found him in possession, and ordered the village authorities not to disturb him. Though the Assistant

(1) (1889) 17 Cal. 256.
(2) (1882) 9 Cal. 39.
(3) (1893) 20 Cal. 834.
(4) (1886) 11 Bom. 216.
(5) (1882) 6 Bom. 215.
(6) (1884) 8 Bom. 371.

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Collector decided against him, the order of removing the building has not been carried out, but both the Collector and the Commissioner have only required the plaintiff to pay rent and the price of the land to Government, on failure of which alone he was to be evicted. The possession being thus in the plaintiff, the next question is whether it was a wrongful possession or whether it was a possession with a *primâ facie* title. Mr. Justice Whitworth holds that it was a wrongful possession, while the Chief Justice is of opinion that it was a possession founded on a *primâ facie* right, which under section 110 shifted the burden of proof on to the defendant. On a careful consideration of the evidence I am inclined to agree with the Chief Justice on this point. In the first place there is the deed of sale to which no objection can be taken. It was produced before the Mámlatdár, and this shows that it was not a hole-and-corner affair. The Mámlatdár took evidence and gave orders confirming plaintiffs' right (Exhibits 20 and 21). The Mámlatdár's order was passed on 26th November, 1888, *i. e.* four months after the deed of sale. He may have exceeded his powers, but his *bona fides* cannot be questioned. The Assistant Collector's order was passed three years after in December, 1891, and in the interval plaintiffs had built the house on the strength of the Mámlatdár's decision. It is to be noted that the deed of sale recites a previous mortgage which took place ten or twenty years before the deed of sale. This mortgage has been disbelieved, because the plaintiff and the vendor have given contradictory accounts as to what was done with the mortgage bond, which, according to their previous statements, was in writing, while the deed of sale says that there was no writing. The situation of the land and its description as "*bakhal*" have also to be borne in mind. The house built by the plaintiff has no doubt small roads on four sides, but beyond these roads there are plaintiffs' and other peoples' houses on all sides. It may be that the pátils have encroached upon this Government land by reason of having their houses and lands in the neighbourhood, but the encroachment must have taken place long ago, and under any circumstances plaintiffs are not shown to have been in any way concerned with the wrongful encroachment. The oral evidence on both sides has been noticed by the Chief Justice in his judgment

and it is not necessary to go over that ground again. The witnesses for the defendant have either no real knowledge, or are on bad terms with the plaintiffs. The Kulkarni Bapu (Exhibit 63) admitted this enmity in the most explicit manner. Plaintiffs' witnesses are comparatively disinterested men, who had longer opportunities to be acquainted with the facts. They are therefore more reliable.

On the whole, therefore, plaintiffs had not only possession, but possession accompanied with proof of title sufficiently strong to shift the burden of proof. The burden so shifted has not been discharged by the oral and written evidence adduced on behalf of the defendant. The two documents adduced on his behalf are inconclusive, and the witnesses have no positive knowledge that the land belongs to Government. The facts of the case appear to me to be entirely governed by the ruling in *Gangaram* v. *The Secretary of State for India*,[1] where the plaintiff held possession for ten years and had built a shed on the site of old walls. The plaintiffs in the present case have been in possession for ten years, and plaintiffs' vendor had previously mortgaged the land for ten or twenty years before during which time chuppers are said to have been built. The land is admittedly "*gaothan*" and "*bakhal*" land attached to houses in village sites. The plaintiffs' possession therefore was not wrongful, and it was founded on a *primâ facie* title which must be protected under section 110 till defendant showed better title. This the defendant has failed to do in the present case, and I therefore agree with the Chief Justice in reversing the decree of the lower Court.

Decree reversed.

(1) (1895) 20 Bom. 798.